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CASES  
ON  
CONSTITUTIONAL LAW

SELECTED FROM DECISIONS OF  
STATE AND FEDERAL COURTS

BY  
JAMES PARKER HALL  
PROFESSOR OF LAW AND DEAN OF THE LAW SCHOOL IN  
THE UNIVERSITY OF CHICAGO

AMERICAN CASEBOOK SERIES

JAMES BROWN SCOTT  
GENERAL EDITOR

ST. PAUL  
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1913

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TO THE MEMORY  
OF  
JAMES BRADLEY THAYER

(iii)•



# THE AMERICAN CASEBOOK SERIES

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FOR years past the science of law has been taught by lectures, the use of text-books and more recently by the detailed study, in the class-room, of selected cases.

Each method has its advocates, but it is generally agreed that the lecture system should be discarded because in it the lecturer does the work and the student is either a willing receptacle or offers a passive resistance. It is not too much to say that the lecture system is doomed.

Instruction by the means of text-books as a supplement or substitute for the formal lecture has made its formal entry into the educational world and obtains widely; but the system is faulty and must pass away as the exclusive means of studying and teaching law. It is an improvement on the formal lecture in that the student works, but if it cannot be said that he works to no purpose, it is a fact that he works from the wrong end. The rule is learned without the reason, or both rule and reason are stated in the abstract as the resultant rather than as the process. If we forget the rule we cannot solve the problem; if we have learned to solve the problem it is a simple matter to formulate a rule of our own. The text-book method may strengthen the memory; it may not train the mind, nor does it necessarily strengthen it. A text, if it be short, is at best a summary, and a summary presupposes previous knowledge.

If, however, law be considered as a science rather than a collection of arbitrary rules and regulations, it follows that it should be studied as a science. Thus to state the problem is to solve it; the laboratory method has displaced the lecture, and the text yields to the actual experiment. The law reports are in more senses than one books of experiments, and, by studying the actual case, the student co-operates with the judge and works out the conclusion however complicated the facts or the principles involved. A study of cases arranged historically develops the knowledge of the law, and each case is seen to be not an isolated fact but a necessary link in the chain of development. The study of the case is clearly the most practical method, for the student already does in his undergraduate days what he must do all his life; it is curiously the most theoretical and the most practical. For a discussion of the case in all its parts develops analysis, the comparison of many cases establishes a general principle, and

the arrangement and classification of principles dealing with a subject make the law on that subject.

In this way TRAINING AND KNOWLEDGE, the means and the end of legal study, go hand and hand.

The obvious advantages of the study of law by means of selected cases make its universal adoption a mere question of time.

The only serious objections made to the case method are that it takes too much time to give a student the requisite knowledge of the subject in this way and that the system loses sight of the difference between the preparation of the student and the lifelong training of the lawyer. Many collections of cases seem open to these objections, for they are so bulky that it is impossible to cover a particular subject with them in the time ordinarily allotted to it in the class. In this way the student discusses only a part of a subject. His knowledge is thorough as far as it goes, but it is incomplete and fragmentary. The knowledge of the subject as a whole is deliberately sacrificed to training in a part of the subject.

It would seem axiomatic that the size of the casebook should correspond in general to the amount of time at the disposal of instructor and student. As the time element is, in most cases, a nonexpansive quantity, it necessarily follows that, if only a half to two-thirds of the cases in the present collections can be discussed in class, the present casebooks are a third to a half too long. From a purely practical and economic standpoint it is a mistake to ask students to pay for 1,200 pages when they can only use 600, and it must be remembered that in many schools, and with many students in all schools, the matter of the cost of casebooks is important. Therefore, for purely practical reasons, it is believed that there is a demand for casebooks physically adapted and intended for use as a whole in the class-room.

But aside from this, as has been said, the existing plan sacrifices knowledge to training. It is not denied that training is important, nor that for a law student, considering the small amount of actual knowledge the school can hope to give him in comparison with the vast and daily growing body of the law, it is more important than mere knowledge. It is, however, confidently asserted that knowledge is, after all, not unimportant, and that, in the inevitable compromise between training and knowledge, the present casebooks not only devote too little attention relatively to the inculcation of knowledge, but that they sacrifice unnecessarily knowledge to training. It is believed that a greater effort should be made to cover the general principles of a given subject in the time allotted, even at the expense of a considerable sacrifice of detail. But in this proposed readjustment of the means to the end, the fundamental fact cannot be overlooked that law is a developing science and that its present can only be understood through the medium of its past. It is recognized as imperative that a sufficient number of cases be given under each topic

treated to afford a basis for comparison and discrimination; to show the development of the law of the particular topic under discussion; and to afford the mental training for which the case system necessarily stands. To take a familiar illustration: If it is proposed to include in a casebook on Criminal Law one case on abortion, one on libel, two on perjury, one on larceny from an office, and if in order to do this it is necessary to limit the number of cases on specific intent to such a degree as to leave too few on this topic to develop it fully and to furnish the student with training, then the subjects of abortion, libel, perjury, and larceny from an office should be wholly omitted. The student must needs acquire an adequate knowledge of these subjects, but the training already had in the underlying principles of criminal law will render the acquisition of this knowledge comparatively easy. The exercise of a wise discretion would treat fundamentals thoroughly; principle should not yield to detail.

Impressed by the excellence of the case system as a means of legal education, but convinced that no satisfactory adjustment of the conflict between training and knowledge under existing time restrictions has yet been found, the General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limitations of the class-room, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case. Cumulative references will be avoided, for the footnote may not hope to rival the digest.

The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject.

It is equally obvious that some subjects are treated at too great length, and that a less important subject demands briefer treatment. A small book for a small subject.

In this way it will be alike possible for teacher and class to complete each book instead of skimming it or neglecting whole sections; and more subjects may be elected by the student if presented in shorter form based upon the relative importance of the subject and the time allotted to its mastery.

Training and knowledge go hand in hand, and Training and Knowledge are the keynotes of the series.

If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief.

For the basis of calculation the hour has been taken as the unit. The General Editor's personal experience, supplemented by the experience of others in the class-room, leads to the belief that approximately a book of 400 pages may be covered by the average student in half a year of two hours a week; that a book of 600 pages may be discussed in class in three hours for half a year; that a book of 800 pages may be completed by the student in two hours a week throughout the year; and a class may reasonably hope to master a volume of 1,000 pages in a year of three hours a week. The general rule will be subject to some modifications in connection with particular topics on due consideration of their relative importance and difficulty, and the time ordinarily allotted to them in the law school curriculum.

The following subjects are deemed essential in that a knowledge of them (with the exception of International Law and General Jurisprudence) is universally required for admission to the bar:

Administrative Law.	Insurance.
Agency.	International Law.
Bills and Notes.	Jurisprudence.
Carriers.	Mortgages.
Contracts.	Partnership.
Corporations.	Personal Property, including the Law of Bailment.
Constitutional Law.	Real Property. $\left\{ \begin{array}{l} 1^{st} \text{ Year.} \\ 2d \quad \quad \quad \text{"} \\ 3d \quad \quad \quad \text{"} \end{array} \right.$
Criminal Law.	Public Corporations.
Criminal Procedure.	Quasi Contracts.
Common-Law Pleading.	Sales.
Conflict of Laws.	Suretyship.
Code Pleading.	Torts.
Damages.	Trusts.
Domestic Relations.	Wills and Administration.
Equity.	
Equity Pleading.	
Evidence.	

International Law is included in the list of essentials from its intrinsic importance in our system of law. As its principles are simple in comparison with municipal law, as their application is less technical,



and as the cases are generally interesting, it is thought that the book may be larger than otherwise would be the case.

As an introduction to the series a book of Selections on General Jurisprudence of about 500 pages is deemed essential to completeness.

The preparation of the casebooks has been intrusted to experienced and well-known teachers of the various subjects included, so that the experience of the class-room and the needs of the students will furnish a sound basis of selection.

While a further list is contemplated of usual but relatively less important subjects as tested by the requirements for admission to the bar, no announcement of them is made at present.

The following gentlemen of standing and repute in the profession have written or are at present actively engaged in the preparation of the various casebooks on the indicated subjects:

George W. Kirchwey, Dean of the Columbia University, School of Law. *Subject, Real Property.*

Nathan Abbott, Professor of Law, Columbia University. (Formerly Dean of the Stanford University Law School.) *Subject, Personal Property.*

Frank Irvine, Dean of the Cornell University School of Law. *Subject, Evidence.*

Harry S. Richards, Dean of the University of Wisconsin School of Law. *Subject, Corporations.*

James Parker Hall, Dean of the University of Chicago School of Law. *Subject, Constitutional Law.*

William R. Vance, Dean of the George Washington University Law School. *Subject, Insurance.*

Charles M. Hepburn, Professor of Law, University of Indiana. *Subject, Torts.*

William E. Mikell, Professor of Law, University of Pennsylvania. *Subjects, Criminal Law and Criminal Procedure.*

George P. Costigan, Jr., Professor of Law, Northwestern University Law School. *Subject, Wills and Administration.*

Floyd R. Mechem, Professor of Law, Chicago University. *Subject, Damages.* (Co-author with Barry Gilbert.)

Barry Gilbert, Professor of Law, University of Illinois. *Subject, Damages.* (Co-author with Floyd R. Mechem.)

Thaddeus D. Kenneson, Professor of Law, University of New York. *Subject, Trusts.*

Charles Thaddeus Terry, Professor of Law, Columbia University. *Subject, Contracts.*

- Albert M. Kales, Professor of Law, Northwestern University. *Subject, Persons.*
- Edwin C. Goddard, Professor of Law, University of Michigan. *Subject, Agency.*
- Howard L. Smith, Professor of Law, University of Wisconsin. *Subject, Bills and Notes.* (Co-author with Wm. Underhill Moore.)
- Wm. Underhill Moore, Professor of Law, University of Wisconsin. *Subject, Bills and Notes.* (Co-author with Howard L. Smith.)
- Edward S. Thurston, Professor of Law, George Washington University. *Subject, Quasi Contracts.*
- Crawford D. Hening, Professor of Law, University of Pennsylvania. *Subject, Suretyship.*
- Clarke B. Whittier, Professor of Law, University of Chicago. *Subject, Pleading.*
- Eugene A. Gilmore, Professor of Law, University of Wisconsin. *Subject, Partnership.*
- Ernst Freund, Professor of Law, University of Chicago. *Subject, Administrative Law.*
- Frederick Green, Professor of Law, University of Illinois. *Subject, Carriers.*
- Ernest G. Lorenzen, Professor of Law, George Washington University. *Subject, Conflict of Laws.*
- Frederic C. Woodward, Dean of the Stanford University Law School. *Subject, Sales.*
- James Brown Scott, Professor of Law, George Washington University; formerly Professor of Law, Columbia University, New York City. *Subjects, International Law; General Jurisprudence; Equity.*

WASHINGTON, D. C., September, 1913.

JAMES BROWN SCOTT,  
General Editor.

Following are the books of the Series now published, or in press :

Administrative Law	Damages
Agency	Partnership
Bills and Notes	Persons
Carriers	Pleading
Conflict of Laws	Sales
Constitutional Law	Suretyship
Corporations	Trusts
Criminal Law	Wills and Administration
Criminal Procedure	

## PREFACE

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It is peculiarly difficult adequately to cover the subject of Constitutional Law by selected cases within the compass of a single manageable volume. The principles of many legal topics may be stated or exemplified with a definiteness denied to those of Constitutional Law. The reasons for this are two-fold: Certain brief general provisions in our constitutions purport to limit the powers of government over a wide and indefinite field, and our dual federal system compels a delimitation of the spheres of state and nation throughout an ever-shifting "twilight zone." While it is by no means true, as is sometimes stated, that our country alone imposes judicially administered restraints upon legislative action, yet it is true that our restraints are more sweeping and more vague than those in other countries (e. g., Canada and Australia) whose courts also ignore unconstitutional legislation. It is impossible effectively to state in tabloid form the meanings of due process and equal protection of law, of the separation of the powers of government, or of the division of governmental powers between the states and the United States, as they are recognized in our constitutions and enforced by our courts. Government is not a simple matter, and the doctrines that would limit it form a fascinating complex of history, law, and politics. Every word of the most carefully phrased abstraction must be made flesh in a hundred concrete examples before the living principle is revealed. Here, as in other fields of practical judgment, there is "an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions." To secure a sound basis for such an intuition in the student's mind nothing can take the place of the consideration of a multitude of instances and much and varied reasoning and discussion.

To present the requisite amount of material within the desired space, the names and arguments of counsel have been uniformly omitted, most statements of facts have been rewritten, and all irrelevant or merely repetitious matter has been excluded. Important judicial reasoning and discussions of authorities have been reproduced at length, and the leading cases have been rather fully annotated with references to significant decisions developing or limiting their scope. Where similar constitutional problems have arisen in the self-governing British colonies, references to their decisions are also made, especially to those of Canada and Australia. Some present tendencies in government, such as the delegation of large powers to commissions, the newer forms of social legislation, and the rapid extension of federal activities, have been accorded a relatively fuller treatment than

some of the older topics. The division of the book into short chapters or sections facilitates its re-arrangement to meet the wishes of teachers or the demands of courses of varying lengths, and the material in Chapter XX may be used, if desired, as the basis for a short separate study of the Federal Courts.

Matter in the text, rewritten or inserted by the editor, is placed in brackets. Omissions are indicated by asterisks. All judicial quotations are from the opinion of the court unless otherwise indicated, and all notes are by the editor unless credited to other sources. Cases in the United States Supreme Court are included through October Term, 1912-13 (vols. 230 U. S., 33 Sup. Ct., and 57 L. Ed.).

UNIVERSITY OF CHICAGO LAW SCHOOL,  
October 22 1913.

JAMES PARKER HALL.

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# CASES

ON

# CONSTITUTIONAL LAW

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## PART I

### PRELIMINARY TOPICS

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#### CHAPTER I

#### MAKING AND CHANGING CONSTITUTIONS

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#### WOODS' APPEAL.

(Supreme Court of Pennsylvania, 1874. 75 Pa. 59.)

[Appeal from the Allegheny County Court of Common Pleas. An act of the legislature, June 2, 1871, submitted to the people the question of "calling a convention to amend the Constitution of Pennsylvania." The popular vote being in the affirmative, an act of April 11, 1872, provided for the election of delegates to such a convention, which was to meet in November, 1872, and was empowered to propose to the citizens "a new Constitution or amendments to the present one, or specific amendments to be voted for separately," subject to certain limitations indicated in the opinion below. The act required the election for passing on the work of the convention to be held according to the general election law of the state. The convention prepared a new Constitution that violated certain of the limitations imposed upon its powers by the legislature, mentioned in the opinion below, and also passed an ordinance providing for the submission of the Constitution to the voters according to the general election law of the state, except in Philadelphia, where different provisions were made. Plaintiffs, citizens and local taxpayers, sought an injunction in the above-mentioned court to prevent various state officers from holding an election under the convention ordinance, alleging the illegality of the convention and its acts. The bill was dismissed on demurrer, in the following opinion:]

STOWE, J. \* \* \* I have no difficulty in concluding that if the Acts of Assembly in question are unconstitutional and void, the convention was an illegal body, and its acts revolutionary, and that in such case it would be the duty of courts to exercise all their authority to prevent its mandates being carried into effect to the injury of any individual; that the legislature would be bound to enact such laws as might be necessary to punish any attempt to force upon the people its revolutionary work, and the executive officers of the state to use all their power, civil and military, to suppress it.

If, however, in the face of all this, such force, moral or physical, was brought to bear as to overawe or compel the submission of the legal authorities of the state, then, indeed, the arm of the law would be paralyzed, and the proposed Constitution would become effective, not by the law, but by that higher right of revolution which is above all law, but is nowhere recognized by it. Courts can know nothing by anticipation. They are bound to determine the law as it is previous to the successful accomplishment of revolution, as though such a fact were impossible; but when accomplished and duly recognized by the political powers of the government, the courts have no alternative but to accept the fact without question and act accordingly.

While, then, courts must recognize the powers that be, though the product of revolution, they are bound to use all their legitimate authority to suppress acts actually or ostensibly revolutionary, as though they were simply rebellious and could never become legitimate.

Coming, then, to the question of the constitutionality of the act to authorize a popular vote upon the question of calling a convention to amend the Constitution, approved June 2d, 1871, and also the act passed subsequent to the election, held in pursuance of the same, entitled "An Act to provide for calling a convention to amend the Constitution," approved April 11th, 1872, raised by the 2d, 3d, 4th, 5th, 6th, and 7th sections of complainants' bill, it is claimed that they are both unconstitutional and invalid, because:

1. There is no power given by the present Constitution to the legislature authorizing such a proceeding.

2. There is a different method provided by the Constitution, by which it may be amended, and, therefore, upon well-recognized principles of law, the legal conclusion arises that no other exists.

It cannot be claimed that the authority for the legislation and proceedings taken in reference to calling this convention are expressly set out in the Constitution, but it is argued that the power arises under the second section of the Declaration of Rights, which declares that "all power is inherent in the people and all free governments are founded on their authority, and instituted for their peace, safety, and happiness. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform, or abolish their government in such a manner as they may think proper," all



of which is, *inter alia*, excepted out of the general powers of government, and is "forever to remain inviolate."

It is difficult to see how the withholding of power from the government can, strictly speaking, create a right in the legislature from which it is thus withheld, to exercise that power; but if it should appear that such power exists above and before the Constitution as a great natural and indefeasible right, and has been so recognized and acted upon frequently as a fundamental principle underlying all free government, this provision will sufficiently appear to be a solemn declaration of the existence of such a right, and may in ordinary parlance fairly be said, without any great breach of legal accuracy, to confer a power under the Constitution.

Before, however, entering into a consideration of this question, it will be necessary to examine whether there is anything in the Constitution, as urged in the second proposition, which directly or by necessary legal implication takes away such a fundamental right as we have suggested, in case it existed, where there is no constitutional restriction.

It is urged, and with much apparent force, that because the Constitution in the tenth article "of amendments" provides a certain and carefully defined way for amending the fundamental law, the well-recognized legal maxim ordinarily applied to the construction of deeds and written instruments, as well as acts of legislation, "*Expressio unius est exclusio alterius*," leads to the fixed legal presumption that no amendment can, under the Constitution, be made to it, except in the way thus especially provided.

This rule enunciates one of the first principles to the construction of any ordinary instruments between parties. \* \* \*

Mr. Jameson, in his work on Constitutional Conventions, p. 573, says, with great force, upon this question: "Viewed upon principle, were there no authority upon the point, it would be doubtful whether, dealing in great questions of politics and government, the same maxim ought to prevail which regulates the construction of contracts between man and man. As a matter of speculation it may be admitted that the rule expresses the weight of probability equally in cases of great and small magnitude. But there is always a doubt; and between the cases indicated there is the wide difference, that in ordinary contracts it is possible to enforce the construction which the courts shall pronounce the true one, whilst in the case of constitutional provisions regulating great organic movements, to hold such a maxim applicable would be, by presenting barriers to the attainment of what the people generally desire, to make that revolutionary which perhaps was not so. Where the intention of the framers of a Constitution is doubtful, the people assuming power under the broader construction should have the benefit of the doubt; and that all the more because in opposition to them our courts are comparatively powerless. It is infinitely better where no principle is violated, that

a Constitution should be so construed as to make their action legal rather than illegal."

So far as judicial opinion is concerned, it has been said by the Supreme Court of New York that the maxim is to be applied to ordinary contracts rather than constitutional provisions: *Barto v. Himrod*, 4 N. Y. 483, 59 Am. Dec. 506; while the judges of the Supreme Court of Massachusetts have expressed a different opinion (6 Cush. 573), holding that under the Constitution of Massachusetts, containing a provision substantially like our own, no power existed to amend, except as provided in the article of Amendments.<sup>1</sup> As a matter of history, however, a convention was called by the legislature in 1853, twenty years after this opinion was given, to propose a Constitution; and while the question was raised as to the legality of such convention, it was ably vindicated by the best lawyers in the state, among them Choate, Parker, and Morton, the latter one of the judges of the court at the time the opinion was given; and a Constitution prepared and submitted to the people.

Turning now to the history of the government of the various states, for the purpose of discovering what the usage in such cases has been, we find the practice has been so frequent and uniform as clearly to indicate what the common understanding of the people, lawyers and laymen, has been in regard to this question.

So far as I am able to learn, there had been, in 1865 (throwing out of consideration the rebel states during 1861, and afterwards while undergoing reconstruction), twenty-five constitutional conventions called by the legislatures of the various states, without any special authorization in their Constitutions. In Georgia, January 4th, 1789, May 4th, 1789, and 1838; in South Carolina, 1790; in New Hampshire, 1791; in New York, 1801, 1821, and 1846; in Connecticut, 1818; in Massachusetts, 1829, 1853; in Rhode Island, 1824, 1834, 1841, and 1842; in Virginia, 1829, 1854, and 1864; in North Carolina, 1835; in Pennsylvania, 1837; in New Jersey, 1844; in Missouri, 1845, 1861, and 1865; in Indiana, 1850.

Mr. Webster stated in 1848, in his argument before the Supreme Court of the United States, in the case of *Luther v. Borden*, "that of the old thirteen states, their Constitution with but one exception contained no provision for their own amendment, yet there is hardly one that has not altered its Constitution, and it has been done by conventions called by the legislature, as an ordinary exercise of power." If this is true, and my own examination, so far as, with the limited time and opportunity since the argument of this case, I have been able to make it, has verified it, as well as shown the continuation of the same practice to the present day,—it would seem as though the question as to whether the calling of a constitutional convention was a legal exercise of power by the legislature, should now be consid-

<sup>1</sup> Accord: *In re the Const. Convention*, 14 R. I. 649 (1883).



ered by all judicial tribunals as settled so firmly as a part of the common law of our governments, that any attempt to disturb it at this day would savor more of revolution than legitimacy. He would be bold, indeed, who would now assert that all these conventions were usurpations, and that all the Constitutions proposed by them and adopted by the people were revolutionary.

The conclusion that I have drawn from all this is, that 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,<sup>2</sup> 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 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.

The somewhat similar expression contained in the Declaration of Independence was clearly revolutionary and so intended to be; but that was a paper published to the world to justify our refusal to submit longer to governmental authority, and spoke of the rights of the people, as against the oppression of constituted authorities; but in all instruments established by the people themselves for their own government, the only rational view is to consider it as above stated,—the introduction of a constitutional and legal revolution, by the consent of the constituted authorities of the state. This last is absolutely indispensable, as is now admitted by all. To give the force and effect of the law to the proceeding, it must emanate from the legislative authority, and be the result of its permission or direction. The only way the people can legally act under a Constitution such as ours, is through their representatives, and therefore, no matter how many may favor a convention to change the Constitution, if one should be called, and convene without proper authority from the existing government, its action would be clearly illegal, and the result

<sup>2</sup> Compare the institution of government under the present federal Constitution with the consent of 11 states, despite Arts. of Confed. art. XIII, providing for the perpetuity of the latter and their non-alteration save by unanimous consent of the state legislatures. The first Constitutions of Delaware and Maryland restricted the power of making constitutional changes to the legislatures only, but in both states the legislatures called conventions, resulting in the adoption of new Constitutions (Delaware, 1792; Maryland, 1851). All three of these proceedings are regarded as revolutionary in Jameson, *Const. Conventions*, §§ 563-569 (4th Ed.), as is also, for similar reasons, the convention resulting in the Pennsylvania Constitution of 1790. *Id.* §§ 221, 222, 225.

of illegitimate power.<sup>3</sup> It follows, then, that the action of the legislature in authorizing a vote of the people on the question of the amendment of their Constitution, and subsequently by another act authorizing the election of delegates, was a legal exercise of legislative power, and constitutional, unless something in the acts themselves is in conflict with some constitutional provision. \* \* \*

The 8th, 9th, and 10th paragraphs of the bill complain of illegal acts done by the convention: First, in refusing a separate submission to a popular vote of the fifth article, relating to the judiciary, the contingency having arisen, under which, by an act of the legislature, they were bound to do so;<sup>4</sup> and second, in altering several of the provisions of the Bill of Rights contrary to the limitations imposed in the fourth section of the Act of April 11th, 1872; and third, in disregarding the Act of Assembly, under which the convention was called, in regard to submitting the amended Constitution to a vote of the people, and ordaining a different method.<sup>5</sup>

These objections are all consistent with the conclusions already arrived at, and if valid would raise further questions under the bill, notwithstanding what has already been said, and should therefore be considered.

In examining these questions, the first and second may be taken together.

Looking upon general principles at the real question involved, which is how far, if at all, a constitutional convention regularly called may legally disregard limitations imposed upon its actions by the legislature, I have no difficulty in arriving at what seems to me to be the correct rule. A convention to amend the Constitution, without there is an express limitation as to the extent of their power, passed upon by the people in determining the question of amendment, has inherently, by the very nature of the case under the great principle peculiarly American, and quasi revolutionary in its character heretofore mentioned, absolute power, so far as may be necessary to carry out the purpose for which they were called into existence, by the popular will. Unless prohibited or restricted in the manner specified by the people, the convention has a right, untrammelled by mere legislative limitations, to propose to the people for their consideration and adoption any plan they may see fit. In saying this, we are not to be understood as saying that the convention is in any respect the su-

<sup>3</sup> Accord: *Luther v. Borden*, 7 How. 1, 34-40, 12 L. Ed. 581 (1849); Jameson, *Const. Conventions*, §§ 226-246 (full commentary upon the revolutionary Rhode Island convention of 1841-42). The Constitutions for new states proposed by several unauthorized territorial conventions have acquired validity by congressional confirmation. Jameson, *supra*, §§ 188-216. See especially the case of Michigan, §§ 198-209, where there was a series of irregularities.

<sup>4</sup> See the negation of this objection in *Wells v. Bain*, 75 Pa. 39, 55, 56, 15 Am. Rep. 563 (1873).

<sup>5</sup> See note 6, this case. This different method, being for Philadelphia only, was held not to affect the present case.

preme power of the state. We take it to be simply the attorney for the people, with plenary power to do what is required of it, but nothing beyond.

Subject to the limitation just mentioned, a constitutional convention, in the language of Mr. Wilson, in the federal convention of 1787, has the power to conclude nothing, but to propose anything.

Such, too, is the inevitable result of the views already expressed as to the purpose and effect of the second section of the Declaration of Rights. If it be taken as a constitutional recognition of the principle of legal revolution (so to speak), and of a popular power as we believe, the obvious result follows, that when once called into operation by proper authority, it cannot be subverted nor restrained by the legislature.

If this is correct, the convention was right in disregarding the limitations sought to be imposed upon its power, both as to what it should propose to change in the present Constitution, and how the proposal should be submitted to the people for their adoption or rejection. \* \* \*

Demurrer sustained.

[The plaintiffs appealed, and the state Supreme Court gave the following opinion:]

AGNEW, C. J. The change made by the people in their political institutions, by the adoption of the proposed Constitution since this decree, forbids an inquiry into the merits of this case. The question is no longer judicial, but in affirming the decree we must not seem to sanction any doctrine in the opinion, dangerous to the liberties of the people. The claim for absolute sovereignty in the convention, apparently sustained in the opinion, is of such magnitude and overwhelming importance to the people themselves, it cannot be passed unnoticed. In defence of their just rights, we are bound to show that it is unsound and dangerous. Their liberties would be suspended by a thread more slender than the hair which held the tyrant's sword over the head of Damocles, if they could not, while yet their existing government remained unchanged, obtain from the courts protection against the usurpation of power by their servants in the convention. When they become complainants, the convention must defend and show their authority.

It was contended in the case of Francis Wells et al. v. James Bain et al.,<sup>6</sup> involving the legality of an ordinance of the convention, ar-

<sup>6</sup> 75 Pa. 39, 15 Am. Rep. 563 (1873), holding invalid an ordinance of the convention providing special election commissioners in Philadelphia to take charge of the balloting at the submission of the Constitution; the act of the legislature calling the convention having provided for a submission under the general election laws of the state. The court argued that the prior popular vote for calling a convention in effect delegated to the legislature power to decide upon the terms of the call. See the criticism of this view in Dodd, Revision and Amendment of State Constitutions, 74-77. As to how far constitutional conventions may exercise incidental legislative powers, with or with

gued at Philadelphia in December last, that the convention had the power to ordain ordinances having the present force of law; and the instant power to proclaim a Constitution, binding without ratification, irrespective of the matter adopted by the people to exercise their right to alter or amend their frame of government. This imputed sovereignty in a convention called and organized under a law, as the very means adopted by the people to exercise their reserved right of amendment, owing to the briefness of the time, was not discussed in that case with the fulness the importance of the question to the people demanded.

There is no subject more momentous or deeply interesting to the people of this state than an assumption of absolute power by their servants. The claim of a body of mere deputies to exercise all their sovereignty, absolutely, instantly, and without ratification, is so full of peril to a free people, living under their own instituted government, and a well-matured Bill of Rights, the bulwark and security of their liberties, that they will pause before they allow the claim and inquire how they delegated this fearful power, and how they are thus absolutely bound and can be controlled by persons appointed to a special service. Struck by the danger, and prompted by self-interest, they will at once distinguish between their own rights and the powers they commit to others. These rights it is, the judiciary is called in to maintain. The very rights of the people and freedom itself demand, therefore, that no such absolute power shall be imputed to the mere delegates of the people to perform the special service of amendment, unless it is clearly expressed, or as clearly implied, in the manner chosen by the people to communicate their authority.

A convention has no inherent rights; it exercises powers only. Delegated power defines itself. To be delegated it must come in some adopted manner to convey it by some defined means. This adopted manner, therefore, becomes the measure of the power conferred. The right of the people is absolute, in the language of the Bill of Rights, "to alter, reform, or abolish their government in such manner as they may think proper." This right being theirs, they may impart so much or so little of it as they shall deem expedient. It is only when they exercise this right, and not before, they determine, by the mode they choose to adopt, the extent of the powers they intend to delegate. Hence the argument which imputes sovereignty to a convention, because of the reservation in the Bill of Rights, is utterly illogical and unsound. The Bill of Rights is a reservation of rights out of the general powers of government to themselves, but is no delegation of power to a convention. It defines no manner or mode in which the people shall proceed to exercise their right, but leaves that to their after choice. Until then it is unknown

out submission to popular vote, see *Id.* 108-117; *Ex parte Birmingham & A. Ry. Co.*, 145 Ala. 514, 42 South. 118 (1905) (cases); *Frantz v. Autry*, 18 Okl. 561, 612-626, 91 Pac. 193 (1907) (territorial convention).

how they will proceed, or what powers they will confer on their delegates. Hence we must look beyond the Bill of Rights to the mode adopted by the people, to find the extent of the power they intend to delegate. These modes were stated and discussed in the opinion in *Wells et al. v. Bain et al.*, supra.<sup>7</sup> If, by a mere determination of the people to call a convention, whether it be by a vote or otherwise, the entire sovereignty of the people passes ipso facto into a body of deputies or attorneys, so that these deputies can, without ratification, alter a government and abolish its Bill of Rights at pleasure, and impose at will a new government upon the people without restraints upon the governing power, no true liberty remains. Then the servants sit above their masters by the merest imputation, and a people's welfare must always rest upon the transient circumstances of the hour, which produce the convention and the accidental character of the majority which controls it. Such a doctrine, however suited to revolutionary times, when new governments must be formed, as best the people can, is wholly unfitted when applied to a state of peace and to an existing government, instituted by the people themselves and guarded by a well-matured Bill of Rights.

\* \* \*

The people have the same right to limit the powers of their delegates that they have to bound the power of their representatives. Each are representatives, but only in a different sphere. It is simply evasive to affirm that the legislature cannot limit the right of the people to alter or reform their government. Certainly it cannot. The question is, not upon the power of the legislature to restrain the people, but upon the right of the people, by the instrumentality of the law, to limit their delegates. Law is the highest form of a people's will in a state of peaceful government. When a people act through a law the act is theirs, and the fact that they used the legislature as their instrument to confer their powers makes them the superiors and not the legislature. The idea which lies at the root of the fallacy, that a convention cannot be controlled by law is, that the convention and the people are identical. But when the question to be determined is between the people and the convention, the fallacy is obvious. Such a metonymy may do for a flourish of rhetoric, but not for grave argument. The parties to the question are the people on the one hand and the convention on the other. The people allege an usurpation of power in this, that the convention seeks to bind them without their ratification. The question then is, what power was conferred? The judiciary sits to decide between them. The people having challenged their power to set a government over them at will, the agents

<sup>7</sup> They are stated to be (75 Pa. at page 47, 15 Am. Rep. 563):

"1. The mode provided in the existing Constitution.

"2. A law, as the instrumental process of raising the body for revision and conveying to it the powers of the people.

"3. A revolution."



must show their authority to do this. The latter put in evidence the Act of 1871 as their authority. Then the issue is, does the Act of 1871, simply ordering a convention to be called, confer this absolute, extraordinary, and dangerous power upon a body of men not yet called into being, and which can have neither being nor power except by the further act of the people through the instrumentality of a law? To make the law odious, it is assumed that the legislature is or may be corrupt. But this is aside from the true question of power. In a governmental and proper sense, law is the highest act of a people's sovereignty, while their government and Constitution remain unchanged. It is the supreme will of the people expressed in the forms and by the authority of their Constitution. It is their own appointed mode through which they govern themselves, and by which they bind themselves. So long as their frame of government is unchanged in its grant of all legislative power, these laws are supreme over all subjects unforbidden by the instrument itself. The calling of a convention, and regulating its action by law, is not forbidden in the Constitution. It is a conceded manner, through which the people may exercise the right reserved in the Bill of Rights. It falls, therefore, within the protection of the Bill of Rights as a very manner in which the people may proceed to amend their Constitution, and delegate the only powers they intend to confer, and as the means whereby they may, by limitation, defend themselves against those who are called in to exercise their powers. The legislature may not confer powers by law inconsistent with the rights, safety, and liberties of the people, because no consent to do this can be implied, but they may pass limitations in favor of the essential rights of the people. The right of the people to restrain their delegates by law cannot be denied, unless the power to call a convention by law, and the right of self-protection be also denied. It is, therefore, the right of the people and not of the legislature to be put by law above the convention, and to require the delegates to submit their work for ratification or disapproval. \* \* \*

Decree affirmed.<sup>8</sup>

<sup>8</sup> The prevailing American practice of submitting Constitutions and amendments to the people for ratification is indicated by the discussion in Jameson, *Const. Conv.* §§ 479-495 (4th Ed.). Nearly 50 conventions, however, have followed a contrary procedure, and have given effect to their work without such a submission. Most of these were before 1800, or in the South during the period of secession and reconstruction. Recent instances, however, have occurred in Mississippi (1890), South Carolina (1895), Delaware (1897), Louisiana (1898), Virginia (1902), and, in effect, in Kentucky (1891). The Louisiana convention was expressly authorized to do this by a previous popular vote, *State v. Favre*, 51 La. Ann. 434, 25 South. 93 (1899); and the Mississippi convention had legislative authority to "enact" a new Constitution, *Sproule v. Fredericks*, 69 Miss. 898, 11 South. 472 (1892). The South Carolina convention was uninstructed by either legislature or people, and in Delaware the legislature recommended to the convention the popular submission of its work. The Kentucky and Virginia conventions were expressly instructed by their legislatures to submit their proposed Constitutions to popular vote. The Kentucky con-

## ELLINGHAM v. DYE.

(Supreme Court of Indiana, 1912. 99 N. E. 1.)

[Appeal from Marion County Circuit Court. In 1911 the Indiana Legislature passed, with the formalities of ordinary legislation, and the Governor approved, an act (Laws 1911, c. 118) termed a "proposed new Constitution," which was a copy of the existing Constitution with 23 amendments, with a provision that it should be submitted to the voters at the general election of November, 1912, and, if adopted, should take effect January 1, 1913. Dye, a citizen, voter, and taxpayer of Marion county, on behalf of himself and all other citizens, voters, and taxpayers of the state, sued to enjoin Ellingham, as Secretary of State, and the state board of election commissioners (of whom the governor was one), from performing certain ministerial duties devolving upon them under said act in preparing ballots and conducting the election for the submission of the proposed Constitu-

vention did so, and, after its adoption, the convention reassembled, amended the Constitution in various substantial particulars, and promulgated it without further submission. The political departments of the state government recognized the validity of these changes, and the courts accepted them. *Miller v. Johnson*, 92 Ky. 589, 18 S. W. 522, 15 L. R. A. 524 (1892). The Virginia convention promulgated a Constitution in defiance of instructions, but the governor and members of the legislature swore allegiance to it, and the courts upheld it as the existing frame of government. *Taylor v. Commonwealth*, 101 Va. 829, 44 S. E. 754 (1903). See an account of most of the above proceedings in *Lobingler, The People's Law*, 301-325 (1909).

"The better view would seem to be that the convention is a regular organ of the state (although as a rule called only at long intervals)—neither sovereign nor subordinate to the legislature, but independent within its proper sphere. Under this view the legislature cannot bind the convention as to what shall be placed in the Constitution, or as to the exercise of its proper duties. If, then, we say that the convention is independent of the regular legislature in the exercise of its proper duties, it will be necessary to discuss for a moment what are its proper functions. These are simply to propose a new Constitution or to propose constitutional amendments to the people for approval; or, in states where the submission of Constitutions is not required, to frame and adopt a Constitution if they think proper. In this sphere, and in the exercise of powers incidental to its proper functions, it would seem that constitutional conventions should not be subject to control by legislative acts. \* \* \* As a rule, then, constitutional conventions are subject only to the following restrictions: (1) Those contained in or implied from provisions in the existing state and federal Constitutions; and (2) in the absence of constitutional provisions, those derived or implied from the limited functions of conventions. To these restrictions Jameson and others would add those imposed by legislative acts under which conventions are called, but such restrictions are certainly not yet recognized as of absolute binding force, except in Pennsylvania, and should not be so recognized if the convention is to be an instrument of great usefulness." *Dodd, Revision and Amendment of State Constitutions*, 80, 92 (1910).

The principal judicial utterances in favor of these views are quoted in *Frantz v. Austry*, 18 Okl. 561, 585-603, 91 Pac. 193 (1907). As to how far conventions may be limited by an express or implied popular assent to the terms of the legislative call, see *Dodd, supra*, 74-77 (cases). Some state Constitutions make the constitutional convention, within its sphere, independent of both legislative authorization and control. *Carton v. Sec'y of State*, 151 Mich. 337, 115 N. W. 429 (1908); *N. Y. Const. art. 14, § 2* (1894).

tion, on the ground, among others, of the Legislature's lack of power to submit such a proposal. The extra expense involved in such submission was under \$2,000, of which plaintiff's share would be less than three cents. The Circuit Court granted the injunction and defendants appealed.]

COX, C. J. \* \* \* The underlying question involved, out of which all the others presented grow, is simply whether the act printed as chapter 118 is a valid exercise of legislative power by the General Assembly. On this question the appellants contend that the act involves the submission of a new Constitution to the people for adoption or rejection, and that the General Assembly is clothed with power to initiate, draft, and submit a new Constitution to the people in such form and manner as to enable them to adopt it as the organic law of the state. This power, it is asserted, is included in the general grant of the legislative power of the government instituted by the existing Constitution which is made to the General Assembly by section 1 of article 4 of that instrument, which provides that "the legislative authority of the state shall be vested in the General Assembly." The appellee, on the contrary, in support of the conclusion of the trial court that the act in question is unconstitutional and void, contends that the power to initiate, frame, and submit to the people fundamental law is not legislative power in the sense in which the General Assembly is vested with legislative power by that provision. But the making of fundamental law being essentially different from ordinary legislation, the power of the General Assembly in relation to it is measured by the special and limited grant of power to it, made by article 16 of the present Constitution, to initiate, frame, and submit amendments in the mode and manner therein provided; and that this by necessary implication withholds the right of the broader and more comprehensive exercise of the power to so participate in fundamental legislation involved in initiating, preparing, and submitting a new Constitution. Appellee also contends that the draft embodied in chapter 118 is not that of a new Constitution, but that it is in substance, truth, and fact merely proposed amendments of the existing Constitution, and that therefore it cannot be lawfully submitted to the people for their action because of noncompliance with the requirements of article 16. \* \* \*

The General Assembly of our state is clothed with legislative authority in the words of section 1 of article 4 quoted above. That the General Assembly is supreme and sovereign in the exercise of the lawmaking power thus conferred upon it, subject only to such limitations as are imposed, expressly or by clear implication, by the state Constitution and the restraints of the federal Constitution and the laws and treaties passed and made pursuant to it, has been uniformly declared by an unbroken line of decisions of this court from the beginning of the judicial history of the state to the present. But this general grant of authority to exercise the legislative element of



sovereign power has never been considered to include authority over fundamental legislation. It has always been declared to vest in the legislative department authority to make, alter, and repeal laws, as rules of civil conduct pursuant to the Constitution made and ordained by the people themselves and to carry out the details of the government so instituted. \* \* \*

To erect the state, to institute the form of its government, is a function inherent in the sovereign people; to carry out its purpose of protecting and enforcing the rights and liberties of which the ordained Constitution is a guaranty by enacting rules of civil conduct relating to the details and particulars of the government instituted, is the function of the Legislature under the general grant of authority. It needed no reservation in the organic law to preserve to the people their inherent power to change their government against such a general grant of legislative authority; and yet we find in the first section of the first article of the Constitution this statement of the purpose of the government which they had builded, and the declaration of their power over it: "We declare 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; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the people have, at all times, an inalienable right to alter and reform their government."

With knowledge of the tendency of vested power to broaden and exalt itself, the people have declared their abiding power over the framework of the government, while in section 1 of article 4 they gave into the hands of an agency the authority to exercise all their power to make laws to carry out the declared purpose of the government, save such as they had withheld by express or implied limitations, or had surrendered to the federal government. \* \* \*

[Continuing a quotation from Jameson, *Const. Conventions* (4th Ed.) 359, concerning the general powers of a state legislature:]

"To this general statement of the extent of the power of our Legislatures, the proviso must be appended that the measures passed by those bodies must not be of the character denominated fundamental. \* \* \* Saving the single case, to be noted in a subsequent chapter, in which by express constitutional provision they act in conventional capacity, in the way of recommending specific amendments to their Constitutions, they have no power whatever to amend, alter, or abolish those instruments. \* \* \* The formation and establishment of the fundamental law is, in all the American Constitutions, regularly the work of conventions acting in conjunction with the electors. On the other hand, no fact is better settled than that, beyond the province thus specially set apart for them, neither conventions nor the bodies of electors have any legislative power. They

can neither of them pass any law comprised within the sphere of ordinary legislation." \* \* \*

[After quoting from cases in Arkansas, Illinois, California, Idaho, and Missouri statements that the proposing of constitutional amendments is not an exercise of ordinary legislative power:]

In the case of *Commonwealth v. Griest*, 196 Pa. 396, 46 Atl. 505, 50 L. R. A. 568, the Supreme Court of Pennsylvania directed a writ of mandamus to issue to compel the Secretary of State to perform his statutory duties in submitting an amendment which he had refused to discharge because the Governor had vetoed the amendment, and the court held that neither veto nor signing by the Governor could affect such proposed amendment,<sup>1</sup> as amending the Constitution was not lawmaking. It was said that the article of their Constitution, similar to ours, which vested generally the legislative authority in the General Assembly, did not cover fundamental legislation. \* \* \* And it was said of the provision which empowered the Legislature to frame and submit amendments of the Constitution: "It is Constitution-making; it is a concentration of all the power of the people in establishing organic law for the commonwealth. \* \* \* It is not lawmaking, which is a distinct and separate function, but it is a specific exercise of the power of a people to make its Constitution." \* \* \*

[Here follow quotations to the same effect from Jameson, and a reference to article 16 of the Indiana Constitution, which empowers the legislature, by a majority vote of each house chosen at two successive general elections, to submit constitutional amendments to the voters of the state, and requires the submission of two or more amendments, if made at the same time, to be in such a manner that they can be voted upon separately.]

The presence of this article in the Constitution fights against the contention that the general grant of legislative authority bears in its broad arms by implication any power to formulate and submit proposed organic law whether in the form of an entire and complete instrument of government to supersede the existing one or single amendment. For if the General Assembly have the greater power, unfettered power, under the general grant, what necessity could there have existed for giving the lesser, special power, which the checks and

<sup>1</sup> Accord (assent of Governor unnecessary to legislatively proposed constitutional amendment): *State ex rel. Morris v. Secretary of State*, 43 La. Ann. 590, 9 South. 776 (1891); *Warfield v. Vandiver*, 101 Md. 78, 116-121, 60 Atl. 538, 4 Ann. Cas. 692 (1905) (cases). Likewise, the President's assent is unnecessary to congressionally proposed amendments to the federal Constitution. *Hollingsworth v. Virginia*, 3 Dall. 378, 1 L. Ed. 644 (1798). Nor do other constitutional requirements for the processes of ordinary legislation govern the proposal of amendments, unless expressly made applicable thereto. *Julius v. Callahan*, 63 Minn. 154, 65 N. W. 267 (1895). As to how far our legislature may bind its successors in such matters, see *Murphy Chair Co. v. Attorney General*, 148 Mich. 563, 112 N. W. 127 (1907); *State ex rel. Galusha v. Davis*, 20 Nev. 220, 19 Pac. 894 (1888).

limitations accompanying it? That both the general grant of legislative authority and the special authorization to act in relation to amendments were deemed necessary by the framers of the Constitution arises from the obvious fact that each involved a different subject-matter; the one, of ordinary lawmaking, and, the other, the change of organic law. The one involved, necessarily, a broad discretion while the other merely gave a narrow, limited power, under guard, to aid the people in the exercise of their sovereign power over the structure of their government. \* \* \*

[After an exhaustive review of the history of Constitution making and amending in Indiana:]

If the power to draft and submit to the people organic law is embraced in the broad bestowal of "the legislative authority of the state" made in section 1 of article 4, where is the limitation on it, save that of the Constitution of the United States? What check is laid upon the use of the power? There is none, for all the checks and limitations which the people in their Constitution have placed upon the Legislature are upon the exercise of the power over ordinary legislation, and have no relation to fundamental legislation. The Legislature being supreme, and sovereign in the exercise of the legislative authority, save only as it is limited by the Constitution of the United States, the laws and treaties made under it, and the limitations stated in our state Constitution, if its general authority includes the subject-matter of organic legislation, why submit the "new Constitution" to the people at all? For the federal Constitution or laws do not prohibit doing so, and no limitation is found in article 4 of our own Constitution which places a ban upon the action. \* \* \*

Sound legal and political principles, the history of our political life as a state, and the authority of judicial and commentatorial opinion, all unite in forcing the conclusion that the act of 1911 is invalid for want of power in that body to draft an entire Constitution and forthwith submit it to the people under its general legislative authority, if the instrument be conceded to be a new Constitution and not merely amendments; and that, if it be considered as merely a series of amendments, it is a palpable evasion and disregard of the requirements and checks of article 16, and is for that reason void. This conclusion renders unnecessary any consideration of the other objections raised against the validity of the act. \* \* \*

The further contention of counsel, that the court is without jurisdiction for the reason that courts may not interfere with legislative action, has for its basis the claim that, using the words of counsel, the writ of injunction in this case, if it does anything, restrains the enactment of a law which is upon its passage and which may not, of course, be done. Much of the argument of counsel is based upon the assumption that in doing the thing sought to be done through chapter 118 the General Assembly was acting within its power, and it falls to the ground with the determination to the contrary. Since

the act incorporating the proposed organic law was passed in the form of and in accordance with the prescribed rules of ordinary enactments, and since it provided rules of conduct for the action of certain officials, it must be subject to interpretation and construction of the courts. The work of the Legislature in relation to it is at an end; it has passed beyond any further action of that body—so far as the Legislature is concerned it is a complete enactment. If the Legislature was without power to formulate and present the proposed organic law to the people, as we have seen it was, chapter 118 is void, and the mandate of that body that the ballot shall be incumbered with the question of its adoption is of no more force than that of any citizen without authority under the Constitution. The question involved is no more than whether ministerial acts threatened to be done in carrying out the provisions of an unconstitutional act may be enjoined. This, as we have seen, may be done. And there is also authority for the intervention of the courts before proposed constitutional changes have been passed upon by the votes of the electors and the result declared.<sup>2</sup> \* \* \*

[Here follows the citation of various cases, only two of which are in point—*Livermore v. Waite*, 102 Cal. 113, 36 Pac. 424, 25 L. R. A. 313; *Holmberg v. Jones*, 7 Idaho, 752, 65 Pac. 563 (semble).]

Judgment affirmed.

[*MORRIS, J.*, gave a dissenting opinion (*SPENCER, J.*, concurring) upon the grounds that no injunction could issue against the governor, nor against a political act like the submission of a constitutional amendment, quoting largely from *State v. Thorson* (see note below).]

<sup>2</sup> In the following cases the submission to the voters of proposed constitutional changes was enjoined by the courts on the ground of their invalidity: *Livermore v. Waite*, 102 Cal. 113, 36 Pac. 424, 25 L. R. A. 312 (1894) (defective substance); *Holmberg v. Jones*, 7 Idaho, 752, 65 Pac. 563 (1901) (defective method of proposal—semble). In *Wells v. Bain*, 75 Pa. 39, 15 Am. Rep. 563 (1873) a particular mode of submission, invalid in form, was enjoined. See, also, the arguments in *Mayor, etc., of City of Macon v. Hughes*, 110 Ga. 795, 804-806, 36 S. E. 247 (1900); *De Kalb County v. City of Atlanta*, 132 Ga. 727, 740, 65 S. E. 72 (1909); *Tolbert v. Long*, 134 Ga. 292, 294, 295, 67 S. E. 826, 137 Am. St. Rep. 222 (1910)—all cases of ordinary "local option" legislation.

In the following cases courts refused to enjoin the submission to the voters of proposed constitutional changes, on the ground of their alleged invalidity: *State ex rel. Cranmer v. Thorson*, 9 S. D. 149, 68 N. W. 202, 33 L. R. A. 582 (1896) (defective substance); *Frantz v. Autry*, 18 Okl. 561, 603-611, 91 Pac. 193 (1907) (same)—see *Threadgill v. Cross*, 26 Okl. 403, 109 Pac. 558, 138 Am. St. Rep. 964 (1910) (mandamus granted to compel submission); *People ex rel. O'Reilly v. Mills*, 30 Colo. 262, 70 Pac. 322 (1902) (defective method of proposal)—see *People ex rel. Elder v. Sours*, 31 Colo. 369, 74 Pac. 167, 102 Am. St. Rep. 34 (1903).

In *Wells v. Bain*, above, and *Frantz v. Autry*, above, the changes were proposed by constitutional conventions. In all of the other cases they were proposed by legislatures.

In *State ex rel. Cranmer v. Thorson*, 9 S. D. 149, 154, 155, 68 N. W. 202, 33 L. R. A. 582 (1896) the court refused, at the suit of a taxpayer, to enjoin the Secretary of State from certifying to the proper election officials a constitutional amendment proposed in the proper legislative method, but alleged to

## 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

be ineffectual in substance. Haney, J., said (after holding relator's pecuniary interest as a taxpayer to be too trifling):

"There is another view, which involves the structure of the state government and the relation of its several departments. Should it be conceded that the relator has such an interest in the matter as entitles him to be heard, or that the action involves a question of such public concern as would warrant an attempt by the Attorney General to obtain an injunction, could this court issue it? *No precedent for such action has been presented by counsel or discovered by the court.* In discussing this phase of the case it will be assumed an amendment of the Constitution was intended requiring the concurrent action of the Legislature and electors. The former has acted. Its action will be communicated to the latter by means of defendant's certificate. Until the latter shall have expressed their approval, the proceeding is incomplete, and the Constitution will remain unchanged: The proposed amendment is on its way to the electors. Can this court, at this time, impede its progress? Can it be called upon to anticipate conditions which may never exist? Can it interpose its process between the Legislature and electors, who are alone with power to modify the fundamental law, before both have acted, and while the matter is pending and incomplete? The powers of the state government are divided into three distinct departments—the legislative, executive, and judicial. The powers and duties of each are prescribed by the Constitution. Const. art. 2. Power to amend the Constitution belongs exclusively to the Legislature and electors. It is legislation of the most important character. This court has power to determine what such legislation is, what the Constitution contains, but not what it should contain. It has power to determine what statutory laws exist, and whether or not they conflict with the Constitution; but it cannot say what laws shall or shall not be enacted. It has the power and it is its duty, whenever the question arises in the usual course of litigation, wherein the substantial rights of any actual litigants are involved, to decide whether any statute has been legally enacted, or whether any change in the Constitution has been legally effected; but it will hardly be contended that it can interpose in any case to restrain the enactment of an unconstitutional law. *Mississippi v. Johnson*, 4 Wall. 500 [18 L. Ed. 437]. If the Legislature cannot be enjoined when engaged in the enactment of unconstitutional statutes, it and the electors cannot be enjoined when engaged in an unwarranted attempt to amend the Constitution. *To issue an injunction in this action would be to enjoin the Legislature and electors in the exercise of their legislative duty.* Suppose a bill, having passed the Legislature, is in possession of the Governor, or, to make the analogy more nearly complete, suppose it is being conveyed to the executive by an officer of the Legislature; would any one imagine the progress of the messenger could be arrested by an injunction? The inquiry answers itself. *Is there any distinction in principle or reason between such a case and the case under discussion? Clearly none.* An injunction cannot be granted to prevent a legislative act by a municipal corporation. Comp. Laws 1887, § 4650. The Code expresses the settled doctrine in this respect. Spell. Extr. Relief, § 688. If courts cannot interfere with the legislative proceedings of a city council, they certainly cannot with like proceedings in the Legislature



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,<sup>1</sup> 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 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.

itself. If they cannot prevent the Legislature from enacting unconstitutional laws, they cannot prevent it and the electors from making ineffectual efforts to amend the Constitution."

The legislative proposal of a constitutional amendment, though not ordinary legislation, is yet the exercise of a legislative function. *People ex rel. Attorney General v. Curry*, 130 Cal. 82, 62 Pac. 516 (1900).

<sup>1</sup> Upon this question the authorities in all the states are collected in *Marshall Field & Co. v. Clark*, 143 U. S. 649, 661 ff., 12 Sup. Ct. 495, 36 L. Ed. 294 (1892); 23 L. R. A. 340, note; and 40 L. R. A. (N. S.) 1, note. Where not governed by special statutory or constitutional provisions, the better authority gives preference to the enrolled act over the evidence of legislative journals.

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 ignominious 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 Chepachet, 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 govern-

ment 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 apparent 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." \* \* \*

[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.<sup>2</sup>

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

<sup>2</sup> Accord: *State ex rel. McClurg v. Powell*, 77 Miss. 543, 27 South. 927, 49 L. R. A. 652 (1900); *Ellingham v. Dye* (Ind.) 99 N. E. 1, 21 (1912)—both collecting the later cases. Neither the declaration of the legislature that an amendment is part of the Constitution, *State ex rel. McClurg v. Powell*, above; nor that of the governor, *Bott v. Wurts*, 63 N. J. Law, 289, 43 Atl. 744, 881, 45 L. R. A. 251 (1899); *McConaughy v. Secretary of State*, 106 Minn. 392, 119 N. W. 408 (1900), binds the courts.

In a number of states unimportant deviations from the prescribed method of submitting constitutional amendments are held not to invalidate them. *State ex rel. Thompson v. Winnett*, 78 Neb. 379, 110 N. W. 1113, 15 Ann. Cas. 781 (1907), annotated in 10 L. R. A. (N. S.) 149. In a few states the local Constitution expressly confers upon certain officials or tribunals the duty of deciding whether a proposed amendment has been adopted by the requisite vote or not, and this decision will bind the courts; but otherwise this question is a judicial one also. *State ex rel. McClurg v. Powell*, above (cases).

As to what constitutes the "majority" commonly required for the popular adoption of constitutional amendments, see the annotation in 22 L. R. A. (N. S.) 478, to *State ex rel. Blair v. Brooks*, 17 Wyo. 344, 99 Pac. 874 (1909).

Where a constitutional amendment, even though irregularly adopted, affects an important part of the framework of government and has been acted upon so long that to annul it would create great public embarrassment, it will be judicially upheld. *Nesbit v. People*, 19 Colo. 441, 452-456, 36 Pac. 221 (1894) (power of legislature for past 10 years). See, also, *Weston v. Ryan*, 70 Neb. 211, 97 N. W. 347, 6 Ann. Cas. 922 (1903), and *Pease v. Peck*, 18 How. 595, 15 L. Ed. 518 (1856) [but compare *Hulbert v. Merriam*, 3 Mich. 144 (1854)].

AMENDMENT OF FEDERAL CONSTITUTION.—See U. S. Const. art. 5. Can the Constitution be amended in any other way than as here prescribed? May a state revoke its ratification of a proposed amendment, before three-fourths of the states have ratified? May Congress recall an amendment once submitted to the states? How long are submitted amendments open to ratification? For a discussion of these questions, see Jameson, *Const. Conv.* §§ 575-86 (4th Ed.).

## CHAPTER II

## FUNCTION OF JUDICIARY IN ENFORCING CONSTITUTIONS

## SECTION 1.—POWER TO DECLARE STATUTES UNCONSTITUTIONAL

THE FEDERALIST.<sup>1</sup>

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American Constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be

<sup>1</sup> The passages here reprinted are taken from *The Federalist* (Ford's Ed.), a collection of papers published in 1787-88, chiefly by Hamilton and Madison, urging the adoption by the states of the then proposed federal Constitution.



answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A Constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

This exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is, that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an *equal* authority, that which was the last indication of its will should have the preference.

But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be fol-

lowed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

It can be of no weight to say that the courts, on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise *will* instead of *judgment*, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove anything, would prove that there ought to be no judges distinct from that body.—Federalist, No. 78 (Hamilton) (Ford's Ed.) 520-523.<sup>2</sup>

There ought always to be a constitutional method of giving efficacy to constitutional provisions. What, for instance, would avail restrictions on the authority of the state legislatures, without some constitutional mode of enforcing the observance of them? The states, by the plan of the convention, are prohibited from doing a variety of things, some of which are incompatible with the interests of the Union, and others with the principles of good government. The imposition of duties on imported articles, and the emission of paper money, are specimens of each kind. No man of sense will believe, that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them. This power must either be a direct negative on the state laws, or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of Union. There is no third course that I can imagine. The latter appears to have been thought by the convention preferable to the former, and, I presume, will be most agreeable to the states.—Federalist, No. 80 (Hamilton) (Ford's Ed.) 531.

<sup>2</sup> Before the framing and adoption of the United States Constitution in 1787-88 there had been a number of decisions or dicta in state courts upon the point, chiefly to the effect that an unconstitutional act of the legislature might be disregarded by the courts. See *Holmes v. Walton*, 4 Amer. Hist. Review 456 (N. J. 1780); *Comm. v. Caton*, 4 Call, 5 (Va. 1782); *Rutgers v. Waddington*, Pamphlet, 1784 and 1866 (N. Y. 1784); *Trevett v. Weeden*, 2 Chand. Crim. Trials, 269 (R. I., 1786); perhaps a Massachusetts case, 7 Harv. L. Rev. 415 (1786-87); *Bayard v. Singleton*, 1 Mart. 42 (1 N. C. 5) (1787). These cases and others arising before *Marbury v. Madison*, below, are collected and discussed by Wm. M. Meigs, in 19 Amer. Law Rev. 175-190, and 40 Amer. L. Rev. 649-654, and in Coxe, *Judic. Pow. and Unconst. Legislat.*, 219-269. All but the first and fifth of them are printed in 1 Thayer, *Cas. on Const. Law*, 55-80.



## 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 frequently 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 de-

clare 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 demon-

strative 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.<sup>1</sup>

<sup>1</sup> The federal Circuit Court for Pennsylvania declared an act of Congress unconstitutional in *Hayburn's Case* (1792), not reported. See 13 Am. Hist. Rev. 281 (1908), by M. Farrand.

"So far as the grounds for this remarkable power are found in the mere fact of a constitution being in writing, or in judges being sworn to support it, they are quite inadequate. Neither the written form nor the oath of the judges necessarily involves the right of reversing, displacing, or disregarding any action of the legislature or the executive which those departments are constitutionally authorized to take, or the determination of those departments that they are so authorized. It is enough, in confirmation of this, to refer to the fact that other countries, as France, Germany, and Switzerland, have written Constitutions, and that such a power is not recognized there. 'The restrictions,' says Dicey, in his admirable *Law of the Constitution* [page 127, 3d Ed.], 'placed on the action of the legislature under the French Constitution are not in reality laws, since they are not rules which in the last resort will be enforced by the courts. Their true character is that of maxims of political morality, which derive whatever strength they possess from being formally inscribed in the Constitution, and from the resulting support of public opinion.'" J. B. Thayer, *Legal Essays*, 2 (also in 7 *Harr. L. Rev.* 130).

"It is almost necessary to the working of a federal system that the general government, and each of its departments, should be free to disregard acts of any department of the local states which may be inconsistent with the federal Constitution. And so in Switzerland and Germany the federal courts thus treat local enactments. But there is not under any written Constitution in Europe a country where a court deals in this way with the act of its co-ordinate legislature. In Germany, at one time, this was done, under the influence of a study of our law, but it was soon abandoned. Coxe, *Jud. Power*, 95-102; Thayer's *Cases on Constitutional Law*, I, 146-149."—Thayer, *John Marshall*, 61-62.

But see 6 *Am. Pol. Sci. Rev.* 456 (1912), mentioning a recent case in Roumania declaring unconstitutional an act of the Roumanian Parliament.

In *Eakin v. Raub*, 12 *Serg. & R.* 330, 345-358 (Pa., 1825) is a strongly reasoned dissent by Gibson, J., from the doctrine of the principal case, a view

## 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 transcendent 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

which this distinguished judge abandoned twenty years later. See *Menges v. Wertman*, 1 Pa. 218, 222 (1845); *Norris v. Clymer*, 2 Pa. 277, 281 (1845).

If an unconstitutional act of Congress may be disregarded by the courts, a fortiori an act of a state legislature in violation of the federal Constitution will fail. This results, not only from the reasoning of the principal case, but from the express language of article VI, par. 2. *Eakin v. Raub*, above, 12 Serg. & R. 330, at 356-357. A state law was first held void as in conflict with the Constitution in *Fletcher v. Peck*, 6 Cranch, 87, 3 L. Ed. 162 (1810). Of course the federal courts, in any case properly before them, may pass upon the validity of state legislation under state Constitutions to the same extent that a state court might. *Van Horne's Lessee v. Dorrance*, 2 Dall. 304, 1 L. Ed. 391 (1795); *Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L. Ed. 455 (1875); *Concord v. Portsmouth Sav. Bk.*, 92 U. S. 625, 23 L. Ed. 628 (1876); *Knight v. Shelton (C. C.)* 134 Fed. 423, 440, 441 (1905) (validity of amendment of state Constitution).

For valuable discussions of the historical basis of the doctrine of the principal case, see Thayer, *Legal Essays*, 1 (also in 7 *Harv. L. Rev.* 129) (1893); A. I. Clark, in 17 *Harv. L. Rev.* 1 (1903); McLaughlin, *The Courts, Constitutions and Parties*, 3-107, 267-275 (1912). In Beard, *The Supreme Court and the Constitution* (1912) (also in 27 *Pol. Sci. Quar.* 1), is an elaborate study of the personal views of the framers of the Constitution upon this subject. The researches of these writers seem clearly to establish the historical correctness of *Marbury v. Madison*. For references to some contrary views, see 27 *Pol. Sci. Quar.* 1, note. For a criticism of Marshall's argument, see Thayer, *John Marshall*, 95-101, quoted in Thayer, *Legal Essays*, 15-16, note.

The power and duty of courts in the ordinary discharge of the judicial function to disregard enactments of legislatures, of whatever rank, which violate limitations imposed by some paramount authority, is recognized in every English-speaking jurisdiction where the question has arisen. In addition to cases in the courts of the United States and of every American state, see: *Canada*—*Woodruff v. Atty. Gen. for Ontario*, (1908) A. C. 508 (provincial legislation); *Atty. Gen. for Ont. v. Atty. Gen. for Canada*, (1896) A. C. 348 (Dominion legislation); *Re Provincial Fisheries*, 26 *Can. S. C.* 444 (1896) (same), affirmed (1898) A. C. 700. See, also, for general



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

discussions, *Queen v. Chandler*, 12 N. Br. 556 (1869); *L'Union St. Jacques v. Belisle*, 20 L. C. Jur. 29 (1872, Quebec Q. B.); *Brophy v. Atty. Gen. for Manitoba*, (1880) A. C. 202, 217. *Australia*—*Cooper v. Commissioner*, 4 Comm. L. R. 1304 (1907) (state act violating state Constitution) [although the state Constitution itself was subject to alteration by the legislature]; *Baxter v. Comms.*, 4 C. L. R. 1087 (1907) (state act violating Commonwealth Constitution); *Federated, etc., Ass'n v. New S. W. Ass'n*, 4 C. L. R. 488 (1906) (federal act violating Commonwealth Constitution). *New Zealand*—*In re Award*, etc., 26 N. Z. S. C. 394, 404 ff. (1906).

In *Baxter v. Comms.* above, Griffith, C. J., said (4 C. L. R. 1125): "The observation that the American Union has erected a tribunal which possesses jurisdiction to annul a statute on the ground that it is unconstitutional seems to be founded on the supposition that the Supreme Court of the United States was endowed with special powers in this respect different from those possessed by other courts. \* \* \* The power of the Supreme Court of the United States to decide whether an act of Congress or of a state is in conformity with the Constitution depends upon and follows from the Constitution itself, which is, by section 2 of article VI, declared to be the supreme law of the land, as the Australian Constitution is declared to be by section 5 of the Constitution Act. Such questions must certainly arise under a federal Constitution, and must be determined by the courts before which they are raised \* \* \* English jurisprudence has always recognized that the acts of a legislature of limited jurisdiction (whether the limits be as to territory or subject-matter) may be examined by any tribunal before whom the point is properly raised. The term 'unconstitutional,' used in this connection, means no more than 'ultra vires.' The analogy between the two systems of jurisprudence is therefore perfect."

For the meaning of "unconstitutional" as applied to a statute of the British Parliament, see *Webb v. Outrim* (1907) A. C. 81, 89 (P. C.); and for a striking illustration of the British doctrine of the supremacy of the ordinary law of private rights over acts of the Crown, see *Walker v. Baird* (1902) A. C. 491. See, also, *Smith, J.*, in *Eaton v. Boston, etc.*, Ry., post, p. 717: "Parliament \* \* \* is at once a legislature and a constitutional convention."

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 Representatives." 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.<sup>1</sup>

<sup>1</sup> See, also, *People v. Draper*, 15 N. Y. 532, 543, 514 (1857); *R. R. Co. v. Otoe County*, 16 Wall. 667, 672-673, 21 L. Ed. 375 (1873); *Cooley*, Const. Llm. 241 (7th Ed.).

"The governments of the states possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions."—Waite, C. J., in *Munn v. Illinois*, 94 U. S. 113, 124, 24 L. Ed. 77 (1876).

Compare *Bridgeport Public Library & Reading Room v. Burroughs Home*, 65 Conn. 309, 82 Atl. 582, 585 (1912).



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 unwise 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.<sup>2</sup> 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

<sup>2</sup> Accord (legislation not invalid for improper motives of legislators): *New Orleans v. Warner*, 175 U. S. 120, 145, 146, 20 Sup. Ct. 44, 44 L. Ed. 96 (1899) (municipal ordinance); *McCray v. U. S.*, 195 U. S. 27, 53-59, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561 (1904) (act of Congress), post, p. 960 ff.; *Boston v. Talbot*, 206 Mass. 82, 91, 91 N. E. 1014 (1910) (acts of rapid transit commission).

<sup>3</sup> "The theory that laws may be declared void when deemed to be opposed to natural justice and equity, although they do not violate any constitutional provision, has some support in the dicta of learned judges, but has not been approved, so far as we know, by any authoritative adjudication, and is repudiated by numerous authorities. \* \* \* No law can be pronounced invalid, for the reason simply that it violates our notions of justice, is oppressive and unfair in its operation, or because, in the opinion of some or all of the citizens of the state, it is not justified by public necessity, or designed to promote the public welfare. We repeat, if it violates no constitutional provision, it is valid and must be obeyed."—Andrews, J., in *Bertholf v. O'Reilly*, 74 N. Y. 509, 514, 516, 30 Am. Rep. 323 (1878). Compare *Loan Ass'n v. Topeka*, 20 Wall. 653, 663, 22 L. Ed. 455 (1875), and *Giozza v. Tiernan*, 148 U. S. 657, 661, 13 Sup. Ct. 721, 37 L. Ed. 599 (1893).

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.<sup>4</sup>

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.<sup>5</sup>

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

<sup>4</sup> The earlier authorities to this effect in the older states are collected in Thayer, *Legal Essays*, 16-33 (7 Harv. L. Rev. 140-152), with some observations upon the rule itself. See, also, the comment of an Australian writer in 6 *Comm. L. Rev.* 204, 205 (1909); and *Varner v. Martin*, 21 W. Va. 534, 542-543 (1883) (unconstitutionality need not be as free from doubt as evidence of guilt necessary to convict a criminal).

"In determining whether the legislature, in a particular enactment, has passed the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such enactment. It must be regarded as valid, unless it can be clearly shown to be in conflict with the constitution. It is a well-settled rule of constitutional exposition that, if a statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed."—*Sweet v. Rechel*, 159 U. S. 380, 392, 393, 16 Sup. Ct. 43, 40 L. Ed. 188 (1895), by Harlan, J.

Compare *Gulf, C. & S. F. R. Co. v. Ellis*, post, p. 334. As to the burden of proof in rebutting such presumptions, see *Lindsley v. Nat. Carbonic Gas Co.*, post, p. 377.

<sup>5</sup> In *State v. Fairmont Creamery Co. of Nebraska*, 153 Iowa, 702, 706, 707, 133 N. W. 895, 42 L. R. A. (N. S.) 821 (1912), in discussing a statute applicable only to persons buying dairy products for purposes of manufacture, sale, or storage, which forbade the payment of prices higher in one locality than in another in order to destroy competition, Evans, J., said: "The argument directed against the statute is not without its cogency. If it were presented to a legislative committee, it might properly cause hesitation as to the particular form of the proposed legislation; but the courts have neither advisory nor veto powers over legislation as such. And even though the court may entertain great doubt as to the constitutionality of a particular legislative act, it may not interpose such mere doubt against the legislative prerogative. It is only when the violation of the Constitution is 'clear and palpable' that the court is justified in rendering nugatory a legislative act. To speak accurately, the constitutionality of an act is not dependent upon an affirmative holding to that effect by the court. It is the province of the court only to determine whether a legislative act in question is or is not

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<sup>1</sup>):

"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 adaptability 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

'clearly, plainly, and palpably' unconstitutional. The legislative and executive departments of government are under the same responsibility to observe and protect the Constitution as is the judicial department. This responsibility is always present in the enactment by the Legislature, and approval by the executive, of all legislation. The constitutionality of all proposed legislation must be determined in the first instance by such co-ordinate branches of the government. Within the zone of doubt and fair debate such determination is necessarily conclusive. For the court to enter that zone would of itself be an offense against the Constitution. But when a legislative act is clearly and unmistakably unconstitutional, then the court must so declare. By common consent such a declaration is not deemed as usurpation by the court, but as a protest against usurpation already done. In such a case the court furnishes the only means of authoritative protest possible to the body politic."

And so Holmes, J., in *Gray v. Taylor*, 227 U. S. 51, 56, 33 Sup. Ct. 199, 57 L. Ed. — (1913): "It is not lightly to be supposed that a legislature is less faithful to its obligations than a court."

For a discussion of the differing considerations applicable when a court is enforcing a mere prohibition upon legislative action and when it is dealing with the division of legislative powers between the states and the United States, see Thayer, *Legal Essays*, 33-38 (7 Harv. L. Rev. 153-155).

<sup>1</sup> See *State ex rel. Yapple v. Creamer*, post, p. 512, and notes.

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."

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### MUSKRAT v. UNITED STATES

(Supreme Court of United States, 1911. 219 U. S. 346, 31 Sup. Ct. 250, 55 L. Ed. 246.)

[Appeals from the Court of Claims. An act of Congress authorized Muskrat and others to bring suits in the Court of Claims, with an appeal to the federal Supreme Court, to determine the validity of certain acts of Congress altering the terms of certain prior allotments of Cherokee Indian lands. From a determination of two such suits by the Court of Claims these appeals were taken.]

Mr. Justice DAY. \* \* \* Section 1 of article 3 of the Constitution provides: "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."

Section 2 of the same article provides: "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; 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; 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."

It will serve to elucidate the nature and extent of the judicial power thus conferred by the Constitution to note certain instances in which this court has had occasion to examine and define the same. \* \* \* [Here follow references to *Hayburn's Case*, 2 Dall. 409, 1 L. Ed. 436, and to *U. S. v. Ferreira*, 13 How. 40, 14 L. Ed. 42, in both of which it was denied that the federal courts could be required to make decisions which were subject to review by non-judicial tribunals or officers; and to the refusal of the Supreme Court to answer legal questions asked it by President Washington.<sup>1</sup>]

The subject underwent a complete examination in the case of *Gordon v. United States*, reported in an appendix to 117 U. S. 697, in which the opinion of Mr. Chief Justice Taney, prepared by him and placed in the hands of the clerk, is published in full. \* \* \* In that case an act of Congress was held invalid which undertook to confer jurisdiction upon the court of claims, and thence by appeal to this court, the judgment, however, not to be paid until an appropriation had been estimated therefor by the Secretary of the Treasury; and, as was said by the chief justice, the result was that neither court could enforce its judgment by any process, and whether it was to be paid or not depended on the future action of the Secretary of the Treasury and of Congress.<sup>2</sup> "The Supreme Court," says the Chief Justice, "does not owe its existence or its powers to the legislative department of the government. It is created by the Constitution, and represents one of the three great divisions of power in the government of the United States, to each of which the Constitution has assigned its appropriate duties and powers, and made each independent of the other in performing its appropriate functions. The power conferred on this court is exclusively judicial, and it cannot be required or authorized to exercise any other." \* \* \*

[After referring to *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 215 U. S. 216, 30 Sup. Ct. 86, 54 L. Ed. 164]: It therefore becomes necessary to inquire what is meant by the judicial power thus conferred by the Constitution upon this court, and, with the aid of appropriate legislation, upon the inferior courts of the United States. "Judicial power," says Mr. Justice Miller, in his work on the Constitu-

<sup>1</sup> See note on Advisory Opinions at the end of this case.

<sup>2</sup> The right to enforce a judgment by process is not indispensable to its judicial character. It is enough, in an appropriate case, that a judgment be made "the final and indisputable basis of action either by the department or by Congress." In *re Sanborn*, 148 U. S. 222, 226, 13 Sup. Ct. 577, 37 L. Ed. 429 (1893).

tion, "is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." Miller, Const. 314.

As we have already seen, by the express terms of the Constitution, the exercise of the judicial power is limited to "cases" and "controversies." Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.

What, then, does the Constitution mean in conferring this judicial power with the right to determine "cases" and "controversies." A "case" was defined by Mr. Chief Justice Marshall as early as the leading case of *Marbury v. Madison*, 1 Cranch, 137, 2 L. Ed. 60, to be a suit instituted according to the regular course of judicial procedure. And what more, if anything, is meant in the use of the term "controversy?" That question was dealt with by Mr. Justice Field, at the circuit, in the case of *In re Pacific R. Commission* (C. C.) 32 Fed. 241, 255. Of these terms that learned justice said: "The judicial article of the Constitution mentions cases and controversies. The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. *Chisholm v. Georgia*, 2 Dall. 431, 432, 1 L. Ed. 445, 446, 1 Tucker's Bl. Com. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication."

The power being thus limited to require an application of the judicial power to cases and controversies, Is the act which undertook to authorize the present suits to determine the constitutional validity of certain legislation within the constitutional authority of the court? This inquiry in the case before us includes the broader question. When may this court, in the exercise of the judicial power, pass upon the constitutional validity of an act of Congress? That question has been settled from the early history of the court, the leading case on the subject being *Marbury v. Madison*, *supra*.

In that case Chief Justice Marshall, who spoke for the court, was careful to point out that the right to declare an act of Congress unconstitutional could only be exercised when a proper case between opposing parties was submitted for judicial determination; that there was no general veto power in the court upon the legislation of Congress; and that the authority to declare an act unconstitutional sprang from



the requirement that the court, in administering the law and pronouncing judgment between the parties to a case, and choosing between the requirements of the fundamental law established by the people and embodied in the Constitution and an act of the agents of the people, acting under authority of the Constitution, should enforce the Constitution as the supreme law of the land. The Chief Justice demonstrated, in a manner which has been regarded as settling the question, that with the choice thus given between a constitutional requirement and a conflicting statutory enactment, the plain duty of the court was to follow and enforce the Constitution as the supreme law established by the people. And the court recognized, in *Marbury v. Madison* and subsequent cases, that the exercise of this great power could only be invoked in cases which came regularly before the courts for determination. \* \* \*

[Here follow quotations to this effect from *Osborn v. Bank of U. S.*, 9 Wheat. 819, 6 L. Ed. 204, and *Cohen v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257, and the following from *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339 at 345, 12 Sup. Ct. 400, 36 L. Ed. 176:<sup>3</sup>] "Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, state or federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act." \* \* \*

It is therefore evident that there is neither more nor less in this procedure than an attempt to provide for a judicial determination. final in this court, of the constitutional validity of an act of Congress. Is such a determination within the judicial power conferred by the Constitution, as the same has been interpreted and defined in the authoritative decisions to which we have referred? We think it is not. That judicial power, as we have seen, is the right to deter-

<sup>3</sup> In this case the court refused to hold invalid a Michigan railway rate regulation statute, in a friendly or collusive suit brought to test it upon an agreed statement of facts, in the preparation of which the people of the state had not been represented. The circumstance, however, that both parties to a case may desire the same decision, does not disable a court from deciding a constitutional question, provided only that it is a legitimately controverted issue in a real case, and that all adversary interests are properly represented. See *Pollock v. Farmers' Loan & T. Co.*, 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759 (1895), based upon reasoning of *Hawes v. Contra Costa Co.*, 104 U. S. 450, 26 L. Ed. 827 (1882). By leave of court the government, though not a party, may be heard in litigation involving questions of public importance. See the *Pollock Case*, above, 157 U. S. at p. 499, 15 Sup. Ct. 673, 39 L. Ed. 759, and *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 13, 25 Sup. Ct. 158, 49 L. Ed. 363 (1904).

mine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the government. This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a "case" or "controversy," to which, under the Constitution of the United States, the judicial power alone extends. It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question. Such judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation. In a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question. Confining the jurisdiction of this court within the limitations conferred by the Constitution, which the court has hitherto been careful to observe, and whose boundaries it has refused to transcend, we think the Congress, in the act of March 1, 1907, exceeded the limitations of legislative authority, so far as it required of this court action not judicial in its nature within the meaning of the Constitution. \* \* \*

As Congress, in passing this act, as a part of the plan involved, evidently intended to provide a review of the judgment of the court of claims in this court, as the constitutionality of important legislation is concerned, we think the act cannot be held to intend to confer jurisdiction on that court separately considered.<sup>4</sup> \* \* \*

Judgment reversed and cases ordered dismissed for want of jurisdiction.<sup>5</sup>

<sup>4</sup> The Court of Claims, not being a constitutional court, may of course be empowered to exercise non-judicial and advisory powers. *Gordon v. U. S.*, 117 U. S. 697, 698, 699 (1864), appendix.

<sup>5</sup> Accord: *U. S. v. Evans*, 213 U. S. 297, 29 Sup. Ct. 507, 53 L. Ed. 803 (1909) (no power to decide question of criminal law as a precedent, after de-

## SECTION 2.—EFFECT OF UNCONSTITUTIONALITY

## NORTON v. SHELBY COUNTY.

(Supreme Court of United States, 1886. 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178.)

[Error to the Circuit Court of the United States for the Western District of Tennessee. A state statute purported to create a board of county commissioners for the government of Shelby county, in place of the existing county court. Within a month thereafter an action was brought against this board to test the validity of its creation, and the lower state court upheld it. Pending an appeal to the state Supreme Court, said board issued certain bonds authorized by the statute creating it. On the appeal the state Supreme Court held this statute unconstitutional and the board created thereby to be without lawful authority. Suit being brought by Norton thereafter upon some of said bonds in the federal Circuit Court, judgment was given for defendant county.]

defendant's acquittal); *Jones v. Montague*, 194 U. S. 147, 24 Sup. Ct. 611, 48 L. Ed. 913 (1904) (no appeal after possibility of relief sought has ceased); *Buck's Stove & Range Co. v. American Federation of Labor*, 219 U. S. 581, 31 Sup. Ct. 472, 55 L. Ed. 345 (1911) (same, after controversy settled out of court).

See *Interstate Commerce Commission v. Brimson*, post, p. 70, and the quotation from *Huddart v. Moorehead*, post, p. 76, note.

ADVISORY OPINIONS.\*—Save where made an express constitutional requirement, courts generally refuse to give opinions to other departments of government for their guidance in advance of actual litigation, on the ground that such opinions have not a judicial character, thus following the precedent set by the Supreme Court in Washington's administration, referred to in *Muskat v. U. S.*, supra. Application of Senate of State, 10 Minn. 78 (Gil. 56) (1865); Reply of Judges, 33 Conn. 586 (1867); *State v. Baughman*, 38 Ohio St. 455 (1882). In several instances such opinions have been given without discussion of the practice. *People v. Green*, 1 Denio (N. Y.) 614 (1845); Opinion of Judges, 37 Vt. 665 (1864); Opinion of Judges of Court of Appeals, 79 Ky. 621 (1881); In re Board of Public Lands and Buildings, 37 Neb. 425, 55 N. W. 1092 (1893) (see also In re Railroad Commissioners, 15 Neb. 679, 50 N. W. 276 [1884]; In re School Fund, 15 Neb. 684, 50 N. W. 272 [1884]; In re Brown, 15 Neb. 688, 50 N. W. 273 [1884]; In re Babcock, 21 Neb. 500, 32 N. W. 641 [1887]; In re State Warrants, 25 Neb. 659, 41 N. W. 636 [1889]; In re Senate File 31, 25 Neb. 864, 41 N. W. 981 [1889]; In re Quere of Procedure of Two Houses of Legislature in Contests of Election of Executive Officers, 31 Neb. 262, 47 N. W. 923 [1891]; In re House Roll 284, 31 Neb. 505, 48 N. W. 275 [1891]). The Nebraska practice was apparently discontinued in 1898 by rule of court (52 Neb. xviii, rule 32). The Constitutions of Colorado, Maine, Massachusetts, New Hampshire, and Rhode Island expressly require the rendition of such opinions at the request of the governor or legislature, and Florida and South Dakota at the request of the governor alone. See a classification of these opinions in 6 Am. & Eng. Ency 1070-1078 (2d Ed.). Except in Colorado, however, such opinions have no judicial effect. Green

\* See, in general, Thayer, *Legal Essays*, 42-59.

Mr. Justice FIELD. \* \* \* But it is contended that if the act creating the board was void, and the commissioners were not officers de jure, they were nevertheless officers de facto, and that the acts of the board as a de facto court are binding upon the county. This contention is met by the fact that there can be no officer, either de jure or de facto, if there be no office to fill. As the act attempting to create the office of commissioner never became a law, the office never came into existence. Some persons pretended that they held the office, but the law never recognized their pretensions, nor did the supreme court of the state. Whenever such pretensions were considered in that court, they were declared to be without any legal foundation, and the commissioners were held to be usurpers. The doctrine which gives validity to acts of officers de facto, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices, and in apparent possession of their powers and functions. For the good order and peace of society their

v. Comm., 12 Allen (Mass.) 155 (1866); Answers of the Justices, 95 Me. 564, 566, 573, 51 Atl. 224 (1901); In re Constitutionality of Senate Bill, 12 Colo. 466, 21 Pac. 478 (1889).

For various qualifications upon the right to require such opinions in these states, see Answers of the Justices, 95 Me. 564, 51 Atl. 224 (1901) (cases) [but compare Questions and Answers, 103 Me. 506, 514 ff., 69 Atl. 627, 19 L. R. A. (N. S.) 422, 13 Ann. Cas. 745 (1907)]; Answer of the Justices, 150 Mass. 598, 24 N. E. 1086 (1890); Opinion of the Justices, 208 Mass. 614, 95 N. E. 927 (1911) (cases).

For a discussion of the meaning of a provision in the Constitutions of Illinois, Idaho, and Washington, requiring the judges of the Supreme Court annually to report to the governor "such defects and omissions in the Constitution and laws" as they find to exist, see the correspondence printed in 243 Ill. 9-41 (1909).

From very early times the English courts have given "consultative" opinions to the Crown and the House of Lords, and Parliament has extended the practice for the benefit of local government bodies. That such opinions are without binding force in regard to legal rights is, however, carefully recognized. See (Certificate of Judges, 2 Eden, 371 (1760) (opinion to Crown); Head v. Head, T. & R. 138, 140 (1823) (same to House of Lords); Ex parte Kent Co. Council, (1891) 1 Q. B. 725 (to county council under statute). The early English and Massachusetts precedents are briefly reviewed in Opinion of the Justices, 126 Mass. 557, 561-566 (1879).

The history of Canadian practice in regard to advisory opinions appears in In re Sunday Legislation, 35 Can. S. C. 581 (1905); In re Criminal Code, 43 Can. S. C. 434 (1910); In re References by Gov. General, Id. 536 (1910). Such opinions are appealable to the Privy Council. Atty. Gen. for Ontario v. Hamilton St. Ry. (1903) A. C. 524.

ADMINISTRATIVE RULES REGULATING EXERCISE OF JUDICIAL CONTROL OVER UNCONSTITUTIONAL STATUTES.—In addition to the limitations upon judicial power in this regard exemplified by the cases in this chapter and in Chapter III, following, courts ordinarily will not declare legislation unconstitutional, save in the clearest cases, except by the judgment of appellate courts, by a majority of a full bench, and when a decision of the constitutional question is absolutely necessary to dispose of the case. See Cooley, Const. Lim. 230, 231 (7th Ed.). Where an act can be upheld, however, courts more freely pass

authority is to be respected and obeyed until, in some regular mode prescribed by law, their title is investigated and determined. It is manifest that endless confusion would result if in every proceeding before such officers their title could be called in question. But the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an officer who holds no office, and a public office can exist only by force of law. This seems to us so obvious that we should hardly feel called upon to consider any adverse opinion on the subject but for the earnest contention of plaintiff's counsel that such existence is not essential, and that it is sufficient if the office be provided for by any legislative enactment, however invalid. Their position is that a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. That position, although not stated in this broad form, amounts to nothing else. It is difficult to meet it by any argument beyond this statement: An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.<sup>1</sup>

upon its constitutionality, even when not strictly necessary, *Twining v. N. J.*, 211 U. S. 78, 114-117, 29 Sup. Ct. 14, 53 L. Ed. 97 (1908); *Borgnis v. Falk Co.*, 147 Wis. 327, 337, 338, 133 N. W. 209, 37 L. R. A. (N. S.) 489 (1911); and it is sometimes said that this will also be done where the immediate decision of the question is a matter of great public importance, *Borgnis v. Falk*, above; *Sabre v. Rutland Ry.*, 85 Atl. 693, 704 (Vt. 1913). Compare the disposition made of various questions in *Income Tax Cases*, 148 Wis. 456, 134 N. W. 673, 135 N. W. 164 (1912).

If the meaning of a statute is ambiguous, it will, if possible, be so construed as to avoid the necessity of passing upon doubtful constitutional questions. *U. S. v. Del. & H. Ry.*, 213 U. S. 306, 407, 408, 29 Sup. Ct. 527, 53 L. Ed. 836 (1909). Generally, too, a statute will not be held invalid merely upon the objection of public officers charged with ministerial duties in its execution, but without personal interests that may be prejudiced by their action thereunder. *Braxton County Court v. West Virginia*, 208 U. S. 192, 28 Sup. Ct. 275, 52 L. Ed. 450 (1908); *Threadgill v. Cross*, 26 Okl. 403, 407-412, 109 Pac. 558, 138 Am. St. Rep. 964 (1910) (cases); 47 L. R. A. 512, note. [Contra, where an officer is personally responsible for his acts, *State ex rel. University of Utah v. Candland*, 36 Utah, 406, 410-420, 104 Pac. 285, 24 L. R. A. (N. S.) 1260, 140 Am. St. Rep. 834 (1909).] As to the practice of taxpayer's actions to test the validity of laws by asking an injunction against the expenditure of public money in enforcing them, see *Ellingham v. Dye*, 99 N. E. 1 (Ind. 1912); *Income Tax Cases*, 148 Wis. 456, 134 N. W. 673, 135 N. W. 164 (1912). Compare *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466 (1911) (duty of state auditor to refuse to sanction expenditures under invalid law).

Upon writ of error from state courts the federal Supreme Court will not hold state statutes invalid save at the suit of those whose own constitutional rights are invaded. It is not enough that the law may be invalid as to others, and, being inseparable, may therefore fail as a whole. *Tyler v. Judges of Court of Registration*, 179 U. S. 405, 21 Sup. Ct. 206, 45 L. Ed. 252 (1900); *New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 160, 161, 27 Sup. Ct. 188, 51 L. Ed. 415, 9 Ann. Cas. 736 (1907); *The Winnebago*, 205 U. S. 354, 360, 27 Sup. Ct. 509, 51 L. Ed. 836 (1907). See *Shephard v. Wheeling*, post, p. 50.

<sup>1</sup> An unconstitutional statute is generally held to confer no protection upon a ministerial officer who is sued for infringing private rights in reliance



In *Hildreth v. McIntire*, 1 J. J. Marsh. (Ky.) 206, 19 Am. Dec. 61, we have a decision from the court of appeals of Kentucky which well illustrates this doctrine. The legislature of that state attempted to abolish the court of appeals established by her Constitution, and create in its stead a new court. Members of the new court were appointed, and undertook to exercise judicial functions. They dismissed an appeal because the record was not filed with the person acting as their clerk. A certificate of the dismissal signed by him was received by the lower court, and entered of record, and execution to carry into effect the original decree was ordered to issue. To reverse this order an appeal was taken to the constitutional court of appeals. The question was whether the court below erred in obeying the mandate of the members of the new court, and its solution depended upon another, whether they were judges of the court of appeals, and the person acting as their clerk was its clerk. The court said: "Although they assumed the functions of judges and clerk, and attempted to act as such, their acts in that character are totally null and void, unless they had been regularly appointed under and according to the Constitution. A de facto court of appeals cannot exist under a written Constitution which ordains one supreme court, and defines the qualification and duties of its judges, and prescribes the mode of appointing them. There cannot be more than one court of appeals in Kentucky as long as the Constitution shall exist, and that must necessarily be a court de jure. When the government is entirely revolutionized, and all its departments usurped by force or the voice of a majority, then prudence recommends and necessity enforces obedience to the authority of those who may act as the public functionaries, and in such a case the acts of a de facto executive, a de facto judiciary, and a de facto legislature must be recognized as valid. But this is required by political necessity. There is no government in action except the government de facto, because all the attributes of sovereignty have, by usurpation, been transferred from those who had been legally invested with them to others who, sus-

thereon. *Campbell v. Sherman*, 35 Wis. 103 (1874); *Sumner v. Beeler*, 50 Ind. 341, 19 Am. Rep. 718 (1875); *Warren v. Kelley*, 80 Me. 512, 15 Atl. 49 (1888). [See *Clark v. Miller*, 54 N. Y. 528 (1874).] But its existence may be an element in affording to persons who act thereunder the protection of other rules of law. *Henke v. McCord*, 55 Iowa, 378, 7 N. W. 623 (1880) (immunity of inferior judicial officer acting within his jurisdiction—semble); *Brooks v. Mangan*, 86 Mich. 576, 49 N. W. 633, 24 Am. St. Rep. 137 (1891) (same); *Annheuser Busch Brewing Ass'n v. Hammond*, 93 Iowa, 520, 61 N. W. 1062 (1895) (officer acting under writ fair on its face); *Id.* (defense to civil action for making complaint under invalid law); *Tillman v. Beard*, 121 Mich. 473, 80 N. W. 248, 46 L. R. A. 215 (1899) (same—cases); *State v. Godwin*, 123 N. C. 697, 31 S. E. 221 (1898) (officer not indictable for obeying invalid law) [but see *Flaucher v. Camden*, 56 N. J. Law, 244, 28 Atl. 82 (1893) (private individual thus punishable)]. The situation created by action under an unconstitutional statute may of course afford a basis for various collateral rights. *Norton v. Shelby County*, 118 U. S. 425, 454, 6 Sup. Ct. 1121, 30 L. Ed. 178 (1886) (restitution); *United States v. Realty Co.*, 163 U. S. 427, 16 Sup. Ct. 1120, 41 L. Ed. 215 (1896) (discharge of moral obligation), *post*, p. 604, note.



tained by a power above the forms of law, claim to act, and do act, in their stead. But when the Constitution or form of government remains unaltered and supreme, there can be no *de facto* department or *de facto* office. The acts of the incumbents of such departments or office cannot be enforced conformably to the Constitution, and can be regarded as valid only when the government is overturned. When there is a constitutional executive and legislature, there cannot be any other than a constitutional judiciary. Without a total revolution, there can be no such political solecism in Kentucky as a *de facto* court of appeals. There can be no such court while the Constitution has life and power. There has been none such. There might be under our Constitution, as there have been, *de facto* officers; but there never was, and never can be, under the present Constitution, a *de facto* office." And the court held that the gentlemen who acted as judges of the legislative tribunal were not incumbents of *de jure* or *de facto* offices, nor were they *de facto* officers of *de jure* offices, and the order below was reversed. \* \* \*

The case of *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409, decided by the supreme court of Connecticut, upon which special reliance is placed by counsel, and which is mentioned with strong commendation as a land-mark of the law, in no way militates against the doctrine we have declared, but is in harmony with it. That case was this: The Constitution of Connecticut provided that all judges should be elected by its general assembly. An act of the legislature authorized the clerk of a city court, in case of the sickness or absence of its judge, to appoint a justice of the peace to hold the court during his temporary sickness or absence. A justice of the peace having thus been called in, and having acted, a question arose whether the judgments rendered by him were valid. The court held that whether the law was constitutional or not, he was an officer *de facto*, and, as such, his acts were valid. The opinion of Chief Justice Butler is an elaborate and admirable statement of the law, with a review of the English and American cases, on the validity of the acts of *de facto* officers, however illegal the mode of their appointment. It criticises the language of some cases, that the officer must act under color of authority conferred by a person having power, or *prima facie* power, to appoint or elect in the particular case; and it thus defines an officer *de facto*: "An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office are exercised—First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent, requirement, or

condition, as to take an oath, give a bond, or the like; third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public; fourth, under color of an election or an appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such."

Of the great number of cases cited by the chief justice, none recognizes such a thing as a de facto office, or speaks of a person as a de facto officer, except when he is the incumbent of a de jure office. The fourth head refers, not to the unconstitutionality of the act creating the office, but to the unconstitutionality of the act by which the officer is appointed to an office legally existing. That such was the meaning of the chief justice is apparent from the cases cited by him in support of the last position, to some of which reference will be made.<sup>2</sup> \* \* \* [Here follows an analysis of certain of these cases in support of this argument, and a discussion of other points in the case.]

Judgment affirmed.<sup>3</sup>

<sup>2</sup> This interpretation of *State v. Carroll* is criticised in *Lang v. Bayonne*, 74 N. J. Law, 455, 461, 462, 68 Atl. 90, 15 L. R. A. (N. S.) 93, 122 Am. St. Rep. 391, 12 Ann. Cas. 961 (1907).

<sup>3</sup> The cases accord and contra to the principal case are collected in 15 L. R. A. (N. S.) 94-107. The weight of authority is with it, save as concerns de facto municipal corporations and acts of their officers. As to these, see 15 L. R. A. (N. S.) 105-107; 28 Cyc. 172 (cases); 29 Cyc. 1391 (cases). The argument against the doctrine of the principal case appears in the following quotations:

"No necessary to the successful carrying on of a republican form of government is the principle which I understand the Chief Justice to have laid down, namely, that a statute which creates an office, and provides an officer to perform its duties, must have the force of law until condemned as unconstitutional by the courts, and that in the meantime the officer so provided is an officer de facto, that it is impliedly recognized and acted on almost universally (so far as my examination has disclosed) in the case of municipal corporations which have been created by unconstitutional laws. Such corporations are declared to be de facto corporations. *Dillon on Mun. Corp.* § 43a; *Burt v. Winona, etc.*, R. R. Co., 31 Minn. 472, 18 N. W. 285, 289, and cases cited. And not only so, but courts refuse to permit the legality of their existence to be called into question, except by the state itself, through its Attorney General, and hold that so long as the state does not see fit to interfere, and terminate the existence thereof by direct proceeding brought by the Attorney General, a municipal corporation which has been created by an unconstitutional statute may exercise upon the citizen, through its officers, the powers conferred upon it by the statute, as fully and completely as if it was created by a law valid in every particular.

And yet, if it be true that there cannot be such a thing as a de facto officer, unless there be a de jure office, on what theory can the acts of such officers be recognized as valid? How can it be true that a law of this character, the validity of which no one but the Attorney General can challenge, and which is permitted to be enforced to the fullest extent against the public, 'confers no rights, imposes no duties, affords no protection, creates no office,' and 'is, in legal contemplation, as inoperative as if it had never been

SHEPHARD v. WHEELING (1887) 30 W. Va. 479, 482-484, 4 S. E. 635, SNYDER, J. (holding invalid a West Virginia statute authorizing state circuit courts, upon the petition of aggrieved taxpayers, to revoke and annul any ordinance of a city, town, or village made contrary to law):

"The enactment of an ordinance by a city council, or the enactment of a statute by a legislature, being in each case the exercise of legislative power, the repeal of such ordinance or statute must likewise be the exercise of legislative power. It does not require any precise definition of judicial power, or any nice discrimination as to its extent and limitations to determine that the act of repealing a statute is not the exercise of judicial power. \* \* \*

"When, in the course of determining the rights of the parties to a particular suit or controversy, the court finds it necessary to ascertain whether or not a statute is unconstitutional, the court must necessarily pass upon that question; but in doing so it does not annul or repeal the statute if it finds it in conflict with the Constitution. It simply refuses to recognize it, and determines the rights of the parties just as if such statute had no existence. The court may give its reasons for ignoring or disregarding the statute, but the decision affects the parties only, and there is no judgment against the statute. The opinion or reasons of the court may operate as a precedent for the determination of other similar cases, but it does not strike the statute from the statute-book; it does not repeal, 'supersede, revoke, or annul' the statute. The parties to that suit are concluded by the judgment, but no one else is

passed'? \* \* \* In my judgment the same public policy which requires obedience from the citizen to the provisions of a public statute which creates a municipality, and provides for its government, even though unconstitutional, so long as it has not received judicial condemnation, equally justifies his obedience to every other law which the Legislature has seen fit to enact, until such has been judicially declared to be invalid. I conclude that an officer appointed under authority of a statute to fill an office created by the statute is a de facto officer, and that acts done by him antecedent to a judicial declaration that the statute is unconstitutional are valid, so far as they involve the interests of the public and third persons."—Lang v. Bayonne, 74 N. J. Law, 455, 462, 463, 68 Atl. 90, 15 L. R. A. (N. S.) 93, 122 Am. St. Rep. 391, 12 Ann. Cas. 961 (1907), by Gummere, C. J.

"The de facto doctrine is exotic, and was grafted upon the law as a matter of policy and necessity to protect the interests of the public and individuals where those interests were involved in the official acts of persons exercising the duty of an office without being lawful officers. \* \* \* We are unable to discover any difference in reason for declaring an officer to be de facto, whether he holds a de facto or de jure office, if he has occupied it with the usual insignia of a de facto officer. The authorities are in harmony that the de facto doctrine was invented to deal with effects, not with causes. The effects only can be reached. The causes cannot. The official acts are accomplished. If the effects are alike, it is immaterial that the causes differ. The effects, whether from a de jure or de facto office, are alike. Hence the acts of the officer occupying either position should be declared de facto."—State v. Poulin, 105 Me. 224, 229, 231, 74 Atl. 119, 24 L. R. A. (N. S.) 408, 134 Am. St. Rep. 543 (1909), by Spear, J.

bound. A new litigant may bring a new suit, based upon the very same statute, and the former decision cannot be pleaded as an estoppel, but can be relied on only as a precedent. This constitutes the reason and basis of the fundamental rule that a court will never pass upon the constitutionality of a statute unless it is absolutely necessary to do so in order to decide the cause before it. *Cooley*, *Const. Lim.* 163. \* \* \*

"In a very able opinion by Shaw, C. J., which is approved and in part quoted in the text of *Cooley*, that eminent judge says: 'It may be well doubted whether a formal act of legislation can ever, with strict, legal propriety, be said to be void; it seems more consistent with the nature of the subject, and the principles applicable to analogous cases, to treat it as voidable. But whether or not a case can be imagined in which an act of the legislature can be deemed absolutely void, we think it quite clear that when such act is alleged to be void, on the ground that it exceeds the just limits of legislative power, and thus injuriously affects the rights of others, it is deemed to be void only in respect to those particulars, and as against those persons whose rights are thus affected. Prima facie, and upon the face of the act itself, nothing will generally appear to show that the act is not valid; and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void as to him, his property, or his rights, that the objection of unconstitutionality can be presented and sustained. Respect for the legislature, therefore, concurs with well-established principles of law in the conclusion that such act is not void, but voidable only; and it follows, as a necessary legal inference from this position, that this ground of avoidance can be taken advantage of by those only who have a right to question the validity of the act, and not by strangers. To this extent only is it necessary to go in order to secure and protect the rights of all persons against the unwarranted exercise of legislative power; and to this extent only, therefore, are courts of justice called on to interpose.' In *re Wellington* 16 *Pick.* (Mass.) 96, 26 *Am. Dec.* 631. \* \* \*"<sup>1</sup>

<sup>1</sup> For various purposes, other than that of enforcement in its invalid form, regard will be paid to an unconstitutional statute by the courts. Defective portions, even when inseparable, may be subsequently amended so as to make the whole operative without re-enactment as an entirety. *Allison v. Corker*, 67 *N. J. Law*, 596, 52 *Atl.* 362 (1902) [annotated in 60 *L. R. A.* 564-566], *Collins, J.*, saying (67 *N. J. Law*, pp. 600, 601, 52 *Atl.* 363 [60 *L. R. A.* 564]): "An unconstitutional statute is nevertheless a statute; that is, a legislative act. Such a statute is commonly spoken of as void. I should prefer to call it unenforceable, because in conflict with a paramount law. If properly to be called void, it is only so with reference to claims based upon it. Neither of the three great departments to which the Constitution has committed government by the people can encroach upon the domain of another. The function of the judicial department with respect to legislation deemed unconstitutional is not exercised in rem, but always in personam. The supreme court cannot set aside a statute as it can a municipal ordinance. It simply ignores statutes deemed unconstitutional. For many purposes an unconstitutional statute may influence judicial judgment, where, for example, under color of it private or public action has been taken. An unconstitutional stat-

**POLLOCK v. FARMERS' LOAN AND TRUST CO.** (1895) 158 U. S. 601, 635-637, 15 Sup. Ct. 912, 39 L. Ed. 1108, Mr. Chief Justice FULLER (after holding invalid certain parts of the federal income tax law of 1894, taxing all incomes over \$4,000—see p. 1026, post, for this part of the case):

"Being of opinion that so much of the sections of this law as lays a tax on income from real and personal property is invalid, we are brought to the question of the effect of that conclusion upon these sections as a whole.

"It is elementary that the same statute may be in part constitutional and in part unconstitutional, and, if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected. And in the case before us there is no question as to the validity of this act, except sections 27 to 37, inclusive, which relate to the subject which has been under discussion; and, as to them, we think the rule laid down by Chief Justice Shaw in *Warren v. Charlestown*, 2 Gray, 84, is applicable,—that if the different parts 'are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them.' Or, as the point is put by Mr. Justice Matthews in *Poin-dexter v. Greenhow*, 114 U. S. 270, 304, 5 Sup. Ct. 903, 962: 'It is undoubtedly true that there may be cases where one part of a statute may be enforced, as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the legislature was

ute is not merely blank paper. The solemn act of the legislature is a fact to be reckoned with. Nowhere has power been vested to expunge it or remove it from its proper place among statutes."

So, also, persons who have obtained benefits or have consented to action under invalid statutes may be estopped from attacking them. *Bellevue Borough v. Manufacturers' Light & Heat Co.*, 238 Pa. 388, 86 Atl. 187 (1913); *Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325 (1850).

It is generally held, however, that an invalid statute is not made operative, without re-enactment, by a subsequent constitutional amendment not expressly made retroactive, 38 L. R. A. (N. S.) 78, 79 note; though of course an expressly retroactive amendment (not violating the federal Constitution) may have this effect, *Hammond v. Clark*, 136 Ga. 313, 71 S. E. 479, 38 L. R. A. (N. S.) 77 (1911); as well as a corrective act of the legislature itself, *Ross v. Board of Supervisors of Wright County*, 128 Iowa, 427, 104 N. W. 506, 1 L. R. A. (N. S.) 431 (1905).

In *Echison Drilling Co. v. Flournoy*, 131 La. 442, 59 South. 867 (1912), it was held that the legislature had no power to make an act, then incompetent to it, become operative upon the contingent adoption of a future constitutional amendment not in terms retroactive. Compare *Tua v. Carriere*, 117 U. S. 201, 209, 210, 6 Sup. Ct. 565, 29 L. Ed. 855 (1886); In *re Rahrer*, 140 U. S.



that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the legislature one they may never have been willing, by itself, to enact.' And again, as stated by the same eminent judge in *Sprague v. Thompson*, 118 U. S. 90, 95, 6 Sup. Ct. 938, where it was urged that certain illegal exceptions in a section of a statute might be disregarded, but that the rest could stand: "The insuperable difficulty with the application of that principle of construction to the present instance is that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact what, confessedly, the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted, in view of the illegality of the exceptions.'

"According to the census, the true valuation of real and personal property in the United States in 1890 was \$65,037,091,197, of which real estate with improvements thereon made up \$39,544,544,333. Of course, from the latter must be deducted, in applying these sections, all unproductive property and all property whose net yield does not exceed \$4,000; but, even with such deductions, it is evident that the income from realty formed a vital part of the scheme for taxation embodied therein. If that be stricken out, and also the income from all invested personal property, bonds, stocks, investments of all kinds, it is obvious that by far the largest part of the anticipated revenue would be eliminated, and this would leave the burden of the tax to be borne by professions, trades, employments, or vocations; and in that way what was intended as a tax on capital would remain, in substance, a tax on occupations and labor. We cannot believe that such was the intention of congress. 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. But this is not such an act, and the scheme must be considered as a whole. Being invalid as to the greater part, and falling, as the tax would, if any part were held valid, in a direction which could not have been contemplated, except in connection with the taxation considered as an entirety, we are constrained to conclude that sections 27 to 37, inclusive, of the act, which became a law, without the signature of the president, on August 28, 1894, are wholly inoperative and void."<sup>1</sup>

545, 564, 565, 11 Sup. Ct. 865, 35 L. Ed. 572 (1891); *Pratt v. Allen*, 13 Conn. 119 (1839).

Legislation originally valid may be suspended by the operation of a superior law and will be revived by the removal of this bar. In *re Nelson* (D. C.) 69 Fed. 712 (1895) (cases). Compare the common-law doctrine of the effect of the repeal of a repealing law. *Com. v. Churchill*, 2 Mete. (Mass.) 118 (1840).

<sup>1</sup>For various applications of this rule to *civil* statutes, see *International Text-Book Co. v. Pigg*, 217 U. S. 91, 112-114, 30 Sup. Ct. 481, 54 L. Ed. 678 24 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103 (1910); *Employers' Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297 (1908); *El Paso & N. E. R. Co.*



CHAPTER III  
SEPARATION AND DELEGATION OF POWERS OF  
GOVERNMENT

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SECTION 1.—SEPARATION OF POWERS

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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

v. Gutierrez, 215 U. S. 87, 30 Sup. Ct. 21, 54 L. Ed. 106 (1909). In the two latter a federal statute was held separable territorially, but not as to subject-matter. As to *criminal* statutes, see James v. Bowman, 190 U. S. 127, 23 Sup. Ct. 678, 47 L. Ed. 979 (1903); Ill. Cent. Ry. v. McKendree, 203 U. S. 514, 27 Sup. Ct. 153, 51 L. Ed. 298 (1906); N. Y. Cent. & H. R. R. Co. v. U. S., 212 U. S. 481, 496, 497, 29 Sup. Ct. 304, 53 L. Ed. 613 (1909).

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.<sup>1</sup> To 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

<sup>1</sup> "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 obligations 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).

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 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, Rôck.*, 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.<sup>2</sup>

<sup>2</sup> "It may safely be said, that to hear and decide adversary suits at law and in equity, with the power of rendering judgments and entering up decrees according to the decision, to be executed by the process and power of the tribunal deciding, or of another tribunal acting under its orders and according to its direction, is the exercise of judicial power, in the constitutional sense; and that it is so, whether the decision be final, or subject to reversal on error or appeal."—Ames, C. J., in *Taylor v. Place*, 4 R. I. 324, 336 (1856).

Almost everywhere the legislature may not in pending litigation grant new trials, reopen judgments, or allow appeals where the right has expired. *Sanders v. Cabaniss*, 43 Ala. 173 (1869) (cases); *Taylor v. Place*, above. Early cases to the contrary have been overruled in Connecticut and Pennsylvania. *Norwalk St. Ry. Co.'s Appeal*, 69 Conn. 576, 37 Atl. 1080, 38 Atl. 708, 39 L. R. A. 794 (1897); *De Chastellux v. Fairchild*, 15 Pa. 18, 53 Am. Dec. 570 (1850). Maryland perhaps still permits special appeals to be authorized. *State v. Northern Cent. Ry. Co.*, 18 Md. 193 (1862). Compare *Wallace v. Adams*, 204 U. S. 415, 27 Sup. Ct. 363, 51 L. Ed. 547 (1907) [following *Stephens v. Cherokee Nation*, 174 U. S. 443, 19 Sup. Ct. 722, 43 L. Ed. 1041 (1899)] (act providing for review in other courts of prior final judgments of federal territorial courts as to Indian tribal citizenship).

The legislature may repeal a court's appellate jurisdiction, however, so as

MAYNARD v. HILL, (1888) 125 U. S. 190, 204, 205, 8 Sup. Ct. 723, 31 L. Ed. 654, Mr. Justice FIELD (upholding a divorce granted by the territorial legislature of Oregon in 1852 under a grant of legislative power by Congress extending "to all rightful subjects of legislation." The divorce was granted upon petition of the husband, without cause and without notice to the wife, then in Ohio):

"What were 'rightful subjects of legislation,' when these acts organizing the territories were passed, is not to be settled by reference to the distinctions usually made between legislative acts and such as are judicial or administrative in their character, but by an examination of the subjects upon which legislatures had been in the practice of acting with the consent and approval of the people they represented. A long acquiescence in repeated acts of legislation on particular matters is evidence that those matters have been generally considered by the people as properly within legislative control. Such acts are not to be set aside or treated as invalid, because, upon a careful consideration of their character, doubts may arise as to the competency of the legislature to pass them. Rights acquired, or obligations incurred under such legislation, are not to be impaired because of subsequent differences of opinion as to the department of government to which the acts are properly assignable. With special force does this observation apply, when the validity of acts dissolving the bonds of matrimony is assailed; the legitimacy of many children, the peace of many families, and the settlement of many estates depending upon its being sustained. It will be found from the history of legislation that, while a general separation has been observed between the different departments, so that no clear encroachment by one upon the province of the other has been sustained, the legislative department, when not restrained by constitutional provisions and a regard for certain fundamental rights of the citizen which are recognized in this country as the basis of all government, has acted upon everything within the range of civil government. *Loan Ass'n v. Topeka*, 20 Wall. 663, 22 L. Ed. 455. Every subject of interest to the community has come under its direction. It has not merely prescribed rules for future conduct, but has legalized past acts, corrected defects in proceedings, and determined the status, conditions, and relations of parties in the future."<sup>1</sup>

to strike down cases that have been appealed and argued, but not yet decided. *Ex parte McCardle*, 7 Wall. 506, 19 L. Ed. 264 (1868); *Baltimore & P. R. Co. v. Grant*, 98 U. S. 398, 25 L. Ed. 231 (1879).

See Chapter XIII, section 2, *Retroactive Laws*, post, pp. 897-898.

<sup>1</sup> Further extracts from this case are printed at p. 434, post. See *Ex parte Tillman*, 84 S. C. 552, 66 S. E. 1049, 26 L. R. A. (N. S.) 781 (1910), as to power of legislature to regulate custody of children without a judicial hearing.



## FOX v. McDONALD,

(Supreme Court of Alabama, 1892. 101 Ala. 51, 13 South. 416, 21 L. R. A. 529, 46 Am. St. Rep. 98.)

[Appeal from the city court of Birmingham. A statute authorized the probate judge of Jefferson county, Alabama, to appoint a board of five police commissioners for the city of Birmingham. The board thus appointed designated McDonald as chief of police for that city. Fox, mayor of the city, refused to administer the oath of office, and McDonald obtained a writ of mandamus from the city court ordering Fox to do this. Fox appealed, inter alia claiming the statute was unconstitutional as conferring non-judicial powers upon the probate judge.]

HEAD, J. \* \* \* It is a well-settled principle that Constitutions, like statutes, are properly to be expounded in the light of conditions existing at the time of their adoption; and we look at the antecedent government, consider its system as a whole and in its several parts, and the experiences and practices of its administration, and we consider and weigh the evils of the old system, which the people intended to cure by the new. Thus aided, we interpret those provisions which require construction, and determine what the intention of the framers of the instrument was, and give effect to that intention; and it not infrequently occurs, in the exposition of written laws, both constitutional and statutory, that the letter of a provision will be justly made to yield to a manifest intention in opposition to it derived by construction alone. When we take our Constitution, therefore, and read it in the light of this history, we see plainly that it was not intended to declare that every act pertaining to government, and the regulation of the social and property rights of the citizen, should be exercised exclusively by the legislative, executive, or judicial department of the state government, or some member of it, according as the act possessed a legislative, executive, or judicial character, for we find there are many such acts especially peculiar to the very nature of our system, and necessarily inherent in it, which, time out of mind, have not been exclusively exercised by these departments, and which, for the ease and efficiency of our system, could not be so exercised. \* \* \*

Again, if all functions of government of a legislative, executive, or judicial character properly belong to, and are therefore to be exercised exclusively by, the several departments created by the Constitution, what shall become of the multiform powers and duties which, by legislative enactment, without express constitutional authority, have so long been conferred upon, and exercised by, the various officers appointed to perform functions of government in the several counties, and who are not made members of either of those departments? Has it ever been thought that the executive and min-



isterial, and indeed, in some instances, the judicial or quasi judicial, functions of the tax assessor, tax collector, county treasurer, coroner, county surveyor, and clerks of courts, to which may be added the officers and boards of control of our state institutions for the care of the insane and deaf, dumb, and blind, and our state and county medical boards for the preservation of the public health, properly belong to the several state bodies of magistracy created by the Constitution, within the spirit and intent of that instrument, and must therefore be confided to the exclusive exercise of those bodies? None will so declare. Indeed, we have in our system, in opposition to the letter of the constitutional provisions under review, striking illustrations of the blending of legislative, executive, and judicial power in the same persons or bodies, which it has not been, and will not be, supposed our several Constitutions intended to inhibit. In Clay's Digest, and in each compilation of our laws since, we find the creation of a court of county commissioners. This body is an inferior court created by law, and belongs, under express provision of each of our Constitutions, to the judicial department of government, yet we find, in its very creation, it was, and has ever since been, endowed with legislative and executive powers. In fact, its chief duties are of those characters. It is given the power to levy and assess taxes for the support of the county government, which is a legislative function.<sup>1</sup> Cooley, Const. Lim. marg. pp. 479, 488.

<sup>1</sup> In many states an early practice of making the inferior courts the organs for levying local taxes and assessing property therefor has been continued and judicially upheld.

*Levying taxes:* Pennington v. Woolfolk, 79 Ky. 13 (1880); State v. Gazlay, 5 Ohio, 14 (1831), approved in State v. Cincinnati, 52 Ohio St. 419, 451, 140 N. E. 508, 27 L. R. A. 737 (1895) [see 2 Chase's Ohio Statutes, 1469-1471, 1478]; Ballard v. Thomas, 19 Grat. (60 Va.) 14 (1868). Contra: Hardenburgh v. Kidd, 10 Cal. 402 (1858); Munday v. Assessors of City of Rahway, 43 N. J. Law, 338 (1881).

*Assessing or appraising property, or revising assessment de novo:* Pierre Water Works Co. v. Hughes County, 5 Dak. 145, 37 N. W. 733 (1888); Pennington v. Woolfolk, above; State ex rel. Spencer v. Ensign, 55 Minn. 278, 56 N. W. 1006 (1893); Edes v. Boardman, 58 N. H. 580 (1879); Nalle v. City of Austin, 23 Tex. Civ. App. 595, 56 S. W. 954 (1900); Wheeling Bridge & T. Ry. Co. v. Paull, 39 W. Va. 142, 19 S. E. 551 (1901). Contra: Auditor of State v. Atchisou, T. & S. F. R. Co., 6 Kan. 500, 7 Am. Rep. 575 (1870); Baltimore City v. Bonaparte, 93 Md. 156, 48 Atl. 735 (1901). Regarding the latter practice it has been said:

"The ascertainment of the values of property is strictly judicial, and, in a government perfectly separated into the three distinct departments, of legislative, executive, and judicial, would, of necessity, belong to the judicial, and not to either of the other departments, because it has not in it a single element relating to the enactment or execution of law. It has, however, heretofore been considered the necessary adjunct of the strictly legislative power—made so by the constitution—of levying taxes."—Wheeling Bridge & T. Ry. Co. v. Paull, above, 39 W. Va. at page 147, 19 S. E. at page 552, by Dent, J.

"In so far as the question of jurisdiction is concerned, we see no distinction between proceedings to determine the value of property for the purpose of exercising the power of eminent domain and to determine the value of such property for the purpose of taxation."—Nalle v. City of Austin, above, 23 Tex. Civ. App. at page 599, 56 S. W. at page 956, by Key, J.

It is given power to direct and control the property of the county, to examine and audit the accounts of the receiving and disbursing officers of the county, to make rules and regulations for the support of the poor; and it is given plenary and executive powers over the erection and maintenance of public roads, bridges, and ferries, and the appointment of the necessary officers in that behalf.

These are functions which do not inherently pertain to the judiciary, yet none will say, in view of their long-continued and useful exercise by the court of county commissioners, without let or hindrance, that the Constitution, in distributing the powers of government, intended to inhibit such exercise. So, also, the sheriff, who is expressly made a member of the executive department, has ever been empowered, by legislation, to perform the judicial function of approving bonds necessary to be taken by him in the administration of the laws. Clerks, registers in chancery, commercial notaries, and commissioners of deeds, under constitutions in terms confining judicial power to the courts, have long exercised, under legislative sanction only, the power of taking acknowledgments of conveyances, which this court has declared to be of a judicial nature. The coroner is so far an executive officer that he may execute process upon, and arrest, the sheriff himself, who is, by the terms of the Constitution, a member of the state executive department; and yet it has never been supposed that he may not, with constitutional favor, perform the judicial function of holding inquests. Other illustrations might be given, but these suffice to make clear the principle that the Constitution must receive an enlarged and liberal interpretation, and the intention of its framers ascertained upon a broad view of the history and experience, the needs and usages, of the time, and the great general purpose they had in view, of framing a comprehensive and beneficent government. Thus viewed, we irresistibly conclude that it was not the intention of the Constitution to declare that all these powers and duties, so indispensable to efficient government, and so long exercised, under legislative sanction only, by these officers and agencies of legislative creation, properly belong to the legislative, executive, or judicial body of magistracy created by the Constitution, because alone they may partake of a legislative, executive, or judicial nature.<sup>2</sup>

We come then to the concrete question, does the power to fill vacancies in office by appointment "properly belong" to the executive department of the state government, to be exercised exclusively by

<sup>2</sup> For an enumeration of a great variety of administrative functions imposed upon judges in some states, see *In re Johnson*, 12 Kan. 102, 104 (1873) (probate judges) [see, also, *In re Sims*, 54 Kan. 1, 12, 37 Pac. 135, 25 L. R. A. 110, 45 Am. St. Rep. 261 (1894)]; *Matter of Davies*, 168 N. Y. 89, 102, 61 N. E. 118, 56 L. R. A. 855 (1901) (supreme court judges); *State v. City of Cincinnati*, 52 Ohio St. 419, 451, 452, 40 N. E. 508, 27 L. R. A. 737 (1895) (court of common pleas). "A distinction seems to obtain in practice between powers conferred upon a court and those conferred upon the judges thereof."—*Matter of Davies*, 168 N. Y. at page 102, 61 N. E. at page 121, 56 L. R. A. 855, by

that department, within the meaning of the Constitution? It may be regarded as a fundamental policy of our system of state governments, in this country, that the selection of persons to perform the offices and functions of government shall be left to the people themselves, to be exercised at the ballot box. \* \* \* The inherent nature and essence of the act of selecting officers of government, therefore, in view of this established policy, describe it as one properly belonging to the people, through the ballot, and not to any particular department of government, to be exercised by representatives of the people. The filling of vacancies in office pending the action of the people, by appointment of their representatives, clothed by law with that authority, is, as a rule, an expedient, merely, evoked by the convenience and necessities of government growing out of the nature of our system. In the nature of things, the people cannot be always called upon to act immediately when the selection of a person is necessary to the exercise of a function of government. Hence, it has been customary and essential to provide other means of appointment in cases to which this necessity gives rise. Furthermore, in our experience, wisdom has dictated that particular offices be filled exclusively by appointment of some governmental agency other than the vote of the people themselves; and this, and the agencies for such appointments, and the methods of filling vacancies in offices elective by the people, have been expressly manifested and prescribed in our Constitutions or laws. It was necessary that they be so prescribed, for otherwise the right of such appointment resided nowhere. It belonged to no department of the government. With us, the governor has no prerogatives. He must find warrant in the written law for his every official act. He has no more power to appoint officers, when not expressly conferred, than has the president of the senate, who is of the legislative, or the chief justice of this court, who is of the judicial, department; and when we go back to our Constitutions and laws, in this state, from the beginning of the state government to the present, we find it has been the policy to distribute this appointing power among the several departments of the state. We need not specify. The instances will readily occur to the minds of those familiar with the Constitutions and laws. It may be true, that the governor has been invested with the greatest share of this power, but no principle or policy has been declared that the power inherently belongs to him. And we may remark that the fact that all our Constitutions, in assigning appointive power to the governor, have specifically designated the particular officers to whom it applied, fur-

Vann, J. "All such powers, when the court is directed to execute them, are necessarily to be performed by the judge, for they can be in no other way; and hence it can make no substantial difference whether the statute confers them in terms on the court or on the judge of the court."—*State v. City of Cincinnati*, 52 Ohio St. at page 451, 40 N. E. at page 512, 27 L. R. A. 737, by Williams, J.

nishes cogent argument that the people did not regard the power as necessarily or inherently belonging to him.

In what we have said, we have pretermitted inquiry whether or not the act of appointing an officer is inherently of an executive character; and we have endeavored to show that, whether so or not, it is not such an act as, upon a proper construction of the Constitution, properly belongs to the executive department. The weight of authority joins issue upon the proposition that it is inherently of that character. The supreme court of California declares it possesses judicial characteristics. Says that court: "The person to be appointed is required to have certain qualifications. He must be a citizen of the United States, and of the state, and a resident and qualified voter of the city and county, and he must be of good repute for honesty and sobriety, and he is required to produce evidence to this effect. \* \* \* The examination of these questions, passing upon the sufficiency of the evidence, and determining whether the candidates possess the requisite qualifications, are certainly functions partaking essentially of a judicial character." *People v. Provines*, 34 Cal. 520. In *People v. Morgan*, 90 Ill., on page 562, it is said: "The executive power in a state is understood to be that power, wherever lodged, which compels the laws to be enforced and obeyed. And the instrumentalities employed for that purpose are officers elected or appointed, who are charged with the enforcement of the laws. But the power to appoint is by no means an executive function, unless made so by the organic law or legislative enactment." In *Mayor, etc., of Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572, it is said: "We are not prepared to admit that the power of appointment to office is a function intrinsically executive, in the sense in which we understand the position to have been taken, namely, that it is inherent in, and necessarily belongs to, the executive department. Under some forms of government, it may be so regarded, but the reason does not apply to our system of checks and balances in the distribution of powers, where the people are the source and fountain of government, exerting their will after the manner, and by instrumentalities, specially provided in the Constitution."

In *People v. Freeman*, 80 Cal. 233, 22 Pac. 173, 13 Am. St. Rep. 122, that court again held that the power of appointment to office is not essentially an executive function, and may be regulated by law. Judge Christiancy, in *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, had under consideration whether the legislature could appoint persons to fill offices created by it, and his purpose was to determine whether such appointment could be treated as a legislative act which it was competent for the legislature to perform; and in discussing the question he says: "Besides the power to make general rules for the government of officers and persons, and regulating the rights and classes of persons, or of the whole community, there is a large class of powers recognized as legislative, occupying an intermediate space between

those of a judicial character, on the one side, and the executive, on the other, and which are not, and cannot be, marked off from these by any clear line." And further on he says: "As to this mode of appointment being the exercise of a power essentially executive in its nature, it is sufficient to say that executive power cannot always be defined by any fixed standard, in the abstract. What would come within the executive power, in our form of government, would fall within the legislative, in another, and vice versa. The question here is whether, under our Constitution, it is executive or legislative; and as the Constitution has not confided the appointment of those or of the like officers to the executive authorities, and has left it to the legislative discretion, whether to create such offices, and how they shall be filled, it cannot be truly said that such an appointment is any more in the nature of the exercise of an executive than a legislative power." In harmony with these decisions, see *State v. Constantine*, 42 Ohio St. 441, 51 Am. Rep. 833; *People v. Woodruff*, 32 N. Y. 364.

There are decisions to the contrary: *Taylor v. Conn.*, 3 J. J. Marsh. (Ky.) 401; *State v. Kennon*, 7 Ohio St. 561; *Achley's Case*, 4 Abb. Prac. (N. Y.) 35; *State v. Noble*, 118 Ind. 350, 21 N. E. 244, 4 L. R. A. 101, 10 Am. St. Rep. 143, and other cases from that state. These Indiana cases give the question full discussion, and they appear to be the only well-considered cases in support of their doctrine. Mr. Freeman, in an exhaustive note in 13 Am. St. Rep., on page 125, (*People v. Freeman*, 80 Cal. 233, 22 Pac. 173, 13 Am. St. Rep. 122) reviews all the authorities upon this subject, and states his conclusion from them in the following language: "The truth is that the power of appointing or electing to office does not necessarily and ordinarily belong to either the legislative, the executive, or the judicial department. It is commonly exercised by the people, but the legislature may, as the lawmaking power, when not restrained by the Constitution, provide for its exercise by either department of the government, or by any person or association of persons whom it may choose to designate for that purpose. It is an executive function when the law has committed it to the executive, a legislative function when the law has committed it to the legislative, and a judicial function, or at least a function of a judge, when the law has committed it to any member or members of the judiciary." What he has said meets with our approval. \* \* \*

Judgment affirmed.<sup>3</sup>

<sup>3</sup>The cases upon the subject of the constitutional power of courts to appoint nonjudicial officers are collected in 16 L. R. A. 737, note to *State v. George*, 22 Or. 142, 29 Pac. 356, 16 L. R. A. 737, 29 Am. St. Rep. 586 (1892), and in 19 L. R. A. (N. S.) 579, note to *State v. Neble*, 52 Neb. 267, 117 N. W. 723 (1908). Most of them uphold the power. The federal Constitution expressly permits it. Article II, § 2, par. 2. In Massachusetts it is not allowed, unless the appointees must report to the court. *Case of Supervisors of Elec-*



PEOPLE *ex rel.* McDONALD *v.* KEELER.

(Court of Appeals of New York, 1885. 99 N. Y. 463, 2 N. E. 615, 52 Am. Rep. 49.)

[Appeal from an order of the General Term of the Supreme Court. Certain charges of misconduct in office having been made against one Thompson, the commissioner of public works in New York City, the state senate by resolution directed a committee of its members to make an investigation of the matter, with power to send for persons and papers, and to report the result, with recommendations, to the senate. McDonald, having been summoned before such committee, attended as a witness, declined upon advice of counsel to answer certain questions, and finally withdrew without the consent of the committee because the latter refused to permit the further presence of McDonald's counsel. Under a warrant from the senate, its sergeant at arms arrested McDonald for contempt, and, after a hearing in which McDonald adhered to his position, the senate directed his commitment to jail until he should consent to testify or the legislature should adjourn. McDonald petitioned the local County Court for a writ of habeas corpus, which was dismissed. On appeal to the General Term this order was reversed and McDonald discharged. This appeal was from that order.]

RAPALLO, J. \* \* \* [After stating the cases of *Anderson v. Dunn*, 6 Wheat. 204, 5 L. Ed. 242, and *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. Ed. 377, both involving the power of Congress to punish non-members for contempt, and after citing *Stockdale v. Hansard*, 9 Ad. & El. 1, *Kielly v. Carson*, 4 Moore, P. C. 63. and *Burnham v. Morrissey*, 14 Gray (Mass.) 226, 74 Am. Dec. 676:]

In *Kilbourn v. Thompson* \* \* \* it was \* \* \* held, following a course of reasoning which need not be repeated here, that the right of the house of representatives to punish a citizen for a contempt of its authority derived no support from the precedents and practice of the two houses of the English parliament, nor from the adjudged cases in which the English courts have upheld those practices; that the powers of congress were derived solely from the federal Constitution, and that such as were not conferred by that instrument, either expressly or by fair implication, were reserved to the states respectively, or to the people; and that while the house had power to punish contempts by fine and imprisonment in certain cases, it had no general jurisdiction on the subject, but was confined to those cases where the power was expressly conferred by the Constitution, or was necessary to enable the house to exercise its lawful functions. Express

tion, 114 Mass. 247, 19 Am. Rep. 341 (1873). In 13 Am. St. Rep. 125 ff., many cases are collected discussing the power of appointment as between the legislature and the executive. See, also, F. R. Mechem in 1 Mich. L. Rev. 531.



power is given by the Constitution to each house to punish its members for disorderly behavior, and to compel the attendance of absent members, under such penalties as the house may prescribe, and the opinion concedes that among the incidental and implied powers of congress may be that of compelling the attendance of witnesses and punishing contumacious witnesses in the same manner as could be done by a court of justice in dealing with cases which congress is empowered to decide; such as the election and qualification of its members, the trial of a contested election, and proceedings in the house to impeach officers of the government. Whether their power over recusant witnesses extends beyond those cases, the court, in reviewing the case of *Anderson v. Dunn*, expressly declines to decide; but the court does emphatically declare that whether the power of punishment in either house by fine or imprisonment goes beyond the specified cases or not, no person can be punished for contumacy as a witness before either house unless his testimony is required in a matter into which the house has jurisdiction to inquire, and that neither of those bodies possesses the general power of making inquiry into the private affairs of the citizen. To the like effect is the opinion of the supreme court of Massachusetts in the case of *Burnham v. Morrissey*, 14 Gray, 226, 74 Am. Dec. 676: "The house of representatives has the power, under the Constitution, to imprison for contempt; but the power is limited to cases expressly provided for by the Constitution, or to cases where the power is necessarily implied from those constitutional functions and duties to the proper performance of which it is essential."

It must be borne in mind that the cases cited did not arise under any act of congress authorizing either house to punish contumacious witnesses, for there is no such act. The question was whether a general power to punish contempts was inherent in congress as necessary to the exercise of its functions independent of any statute. That such a power could be exercised to compel the attendance of witnesses in certain cases was conceded. Whether it existed in cases of investigations properly instituted for purposes of legislation was left an open question. So far as the statutes of the United States were concerned, a different course of proceeding was prescribed. The act of January 24, 1857, c. 19, 11 Stat. 155 (U. S. Comp. St. 1901, p. 55) provided that any person summoned as a witness before either house, or a committee thereof, and refusing to appear or to answer any question pertinent to the matter in consideration, should, in addition to the pains and penalties then existing, be liable to indictment and punishment as for a misdemeanor; and it was made the duty of the president of the senate to certify the fact to the district attorney for the District of Columbia, who was required to lay the matter before the grand jury. This act was incorporated with modifications in the Revised Statutes of the United States, §§ 102-104 (U. S. Comp. St.

1901, p. 55). The other pains and penalties alluded to must have had reference to the supposed power to punish for contempt. But if, as contended, no such power can be exercised by congress under the limited authority delegated to it by the Constitution, the power could not be created and conferred by any act of congress.<sup>1</sup>

The case now before us is entirely different. It arises under a statute enacted by the legislature of the state of New York. The inquiry is, not whether the power to enact such a law is to be found in the state Constitution, but whether such legislation is prohibited or restrained by that instrument, or by the Constitution of the United States. Except as thus limited the state legislature possessed the whole legislative power of the state. *Bank of Chenango v. Brown*, 26 N. Y. 469; *People v. Dayton*, 55 N. Y. 380.

The only express provision of the Constitution which is claimed to be violated is that which declares that no person shall be deprived of life, liberty, or property without due process of law. If the statute in question was within the power of the legislature to enact, the proceedings against the relator were due process of law. He was imprisoned by virtue of a pre-existing law, informed of the charge made against him, and was heard in person and by counsel in his defense. The proceedings need not be according to the course of the common law. *Happy v. Mosher*, 48 N. Y. 313; *People v. Supervisors*, 70 N. Y. 228. And we necessarily come back to the question whether the legislature had the power to enact the law. But the main ground upon which the statute is assailed is that it confers upon each of the two houses a power, which is in its nature judicial, to hear, adjudge, and condemn; that no such power can be conferred by statute upon the legislature itself, or either branch thereof; that the Constitution gives the senate and assembly only legislative power, and that judicial power is vested in the courts named in the Constitution, and in such inferior courts as may be created, and that the grant of judicial power to the courts is an implied prohibition of its assumption by the legislature, except as authorized by the Constitution.

The Constitution of the United States declares in terms 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 order and establish. Although no similar declaration is contained in the Constitution of this state, still it is a recognized principle that in the division of power among the great departments of government the judicial power has been committed to the judiciary, as the executive power has been committed to the executive department, and the legislative to the legislature, and that body has no power to assume the functions of the judiciary to determine controversies among citizens, or even to expound its own laws so as to control the decisions of the

<sup>1</sup> Held constitutional in *In re Chapman*, 166 U. S. 661, 17 Sup. Ct. 677, 41 L. Ed. 1154 (1897).

courts in respect to past transactions. *People v. Supervisors*, 16 N. Y. 432. To declare what the law shall be, is a legislative power; to declare what it is or has been, is judicial. *Thompson, J., in Dash v. Van Kleeck*, 7 Johns. 498, 5 Am. Dec. 291. But, notwithstanding this general division of powers, certain powers in their nature judicial are, by the express terms of the Constitution, vested in the legislature. The power of impeachment is vested in the assembly. Each house is made the judge of the qualification and election of its own members. The power of removal of certain judicial officers for cause is given by the Constitution to the senate and assembly, and may involve inquiries judicial in their nature, and by statute certain other officers may be removed by the senate on the recommendation of the governor. 1 Rev. St. 123, § 41. I think it would be going too far to say that every statute is necessarily void which involves action on the part of either house partaking in any degree of a judicial character, if not expressly authorized by the Constitution. Where the statute relates to the proceedings of the legislative body itself, and is necessary or appropriate to enable it to perform its constitutional functions, I cannot regard it as such an invasion of the province of the judiciary as should bring it within any implied prohibition of the state Constitution. That instrument contains no express provision declaring any of the privileges of the members of either house, except that for any speech or debate in either house the members shall not be questioned in any other place. Even the privilege of exemption from arrest during the sessions is not declared. No power to keep order, or to punish members or others for disorderly conduct, or to expel a member, is contained in the state Constitution, as it is in the Constitution of the United States. All these matters are in this state left under the regulations of the statutes, and there is not even express authority to enact such statutes. 1 Rev. St. c. 7, tit. 2. The necessity of the powers mentioned is apparent, and is conceded in all the authorities, (see *Cooley, Const. Lim.* 133;) yet it is equally apparent that statutes upon the subject must authorize some action partaking of a judicial character. If that feature is a fatal objection, it annuls all the statutory provisions in which it appears.

The power of obtaining information for the purpose of framing laws to meet supposed or apprehended evils is one which has, from time immemorial, been deemed necessary, and has been exercised by legislative bodies. In this state it does not rest upon precedent merely, but is expressly conferred by statute, (1 Rev. St. 158, §§ 1, 2,) which provides that every chairman of a committee, either of the senate or assembly, or of any joint committee, is authorized to administer oaths to witnesses; and when the committee is, by the terms of the resolution appointing it, authorized to send for persons and papers, the chairman has power, under the direction of the committee, to issue compulsory process for the attendance of any witness within the state whom the

committee may wish to examine, and to issue commissions for the examination of witnesses out of the state. To subject a witness to punishment as for a contempt, the testimony sought must, as has already been shown, relate to a legislative proceeding. 1 Rev. St. 154, § 13, subd. 4.

It is difficult to conceive any constitutional objection which can be raised to the provision authorizing legislative committees to take testimony and to summon witnesses. In many cases it may be indispensable to intelligent and effectual legislation to ascertain the facts which are claimed to give rise to the necessity for such legislation, and the remedy required; and irrespective of the question whether, in the absence of a statute to that effect, either house would have the power to imprison a recusant witness, I cannot yield to the claim that a statute authorizing it to enforce its process in that manner is in excess of the legislative power. To await the slow process of indictment and prosecution for a misdemeanor might prove quite ineffectual, and necessary legislation might be obstructed and perhaps defeated if the legislative body had no other and more summary means of enforcing its right to obtain the required information. That the power may be abused is no ground for denying its existence. It is a limited power, and should be kept within its proper bounds; and when these are exceeded a jurisdictional question is presented which is cognizable in the courts. My conclusion is that subdivision 4, § 13, 1 Rev. St., is constitutional and valid. These views are supported by the decision of this court in *Wilckens v. Willet*, 40\* N. Y. 521-525, where it was held that the house of representatives of the United States had the power to compel the attendance of witnesses. In that case this court said, per Johnson, J.: "That the power exists there admits of no doubt whatever. It is a necessary incident to the sovereign power of making laws, and its exercise is often indispensable to the great end of enlightened, judicious, and wholesome legislation. The power is rather judicial in its nature, but in a legislative body it exists as an auxiliary to the legislative power only." And further, at page 526: "The power to punish for disobedience and contempt in refusing to attend is a necessary incident to the power to require and compel attendance." S. C. 4 Abb. Dec. 596; *Wickelhausen v. Willett*, 10 Abb. Prac. 164; *Id.*, 12 Abb. Prac. 319. \* \* \*

Throughout this Union the practice of legislative bodies, and in this state the statutes existing at the time the present Constitution was adopted, and whose validity has never before been questioned by our courts, afford strong arguments in favor of the recognition of the right of either house to compel the attendance of witnesses for legislative purposes as one which has been generally conceded to be an appropriate adjunct to the power of legislation, and one which, to say the least, the state legislature has constitutional authority to regulate and enforce by statute. \* \* \*

[It was held that McDonald, as a mere witness, was not entitled to be attended by counsel.]

We are finally brought to the consideration of the important and more doubtful question whether the investigation which the committee was conducting was a legislative proceeding which the house was authorized to institute. This is a jurisdictional question; for the statute applies only to such proceedings; and if the house had any authority independently of the statute, that must depend upon the question whether the testimony was sought for the purpose of aiding it in the performance of any of its constitutional functions. An investigation instituted for the mere sake of investigation, or for political purposes not connected with intended legislation, or with any of the other matters upon which the house could act, but merely intended to subject a party or body investigated to public animadversion, or to vindicate him or it from unjust aspersions, where the legislature had no power to put him or it on trial for the supposed offenses, and no legislation was contemplated, but the proceeding must necessarily end with the investigation, would not, in our judgment, be a legislative proceeding, or give to either house jurisdiction to compel the attendance of witnesses, or punish them for refusing to attend. Where public institutions under the control of the state are ordered to be investigated, it is generally with the view of some legislative action respecting them; and the same may be said in respect to public officers.<sup>2</sup> \* \* \*

[It was held that this investigation appeared to be made with a view to possible legislative action to prevent the recurrence of any misconduct that might be found to exist.]

Order of General Term reversed and original order restored.

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#### INTERSTATE COMMERCE COMMISSION v. BRIMSON.

(Supreme Court of United States, 1894. 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. Ed. 1047.)

[Appeal from the federal Circuit Court for the Northern District of Illinois. Section 12 of the federal Interstate Commerce Act, conferring upon a Commission certain powers to regulate interstate commerce, authorized the Commission to inquire into the management of the business of interstate carriers, and to require by subpoena the testimony of witnesses and the production of books and papers relating to any matter under investigation. In case of disobedience to a subpoena the Commission might invoke the aid of any federal court, which might then issue an order requiring such subpoena to be obeyed, and might punish failure to obey this order as a contempt. Defend-

<sup>2</sup> See the opinions in *Colonial Sugar Co. v. Atty. Gen.*, 15 Com. L. Rep. 182 (Australia, 1912), by a divided court, as to the power of the federal government to compel persons to give information to the government in respect to matters not within the scope of governmental action except by amendment of the Constitution.



ant Brimson and others disobeyed subpoenas of the Commission, which then petitioned the proper federal court for an order requiring defendants to appear, testify, and produce documents. The Circuit Court held section 12 unconstitutional and denied the petition.]

HARLAN, J. \* \* \* Is the twelfth section of the act unconstitutional and void, so far as it authorizes or requires the Circuit Courts of the United States to use their process in aid of inquiries before the Commission? The court recognizes the importance of this question, and has bestowed upon it the most careful consideration.

As the Constitution extends the judicial power of the United States to all cases in law and equity arising under that instrument or under the laws of the United States, as well as to all controversies to which the United States shall be a party (article 3, § 2), and as the Circuit Courts of the United States are capable, under the statutes defining and regulating their jurisdiction, of exerting such power in cases or controversies of that character, within the limits prescribed by congress (Act Aug. 13, 1888, 25 Stat. 434, c. 866), the fundamental inquiry on this appeal is whether the present proceeding is a "case" or "controversy," within the meaning of the Constitution. The Circuit Court, as we have seen, regarded the petition of the Interstate Commerce Commission as nothing more than an application by an administrative body to a judicial tribunal for the exercise of its functions in aid of the execution of duties not of a judicial nature, and accordingly adjudged that this proceeding did not constitute a case or controversy to which the judicial power of the United States could be extended.

At the same time the learned court said: "Undoubtedly, congress may confer upon a nonjudicial body authority to obtain information necessary for legitimate governmental purposes, and make refusal to appear and testify before it touching matters pertinent to any authorized inquiry an offense punishable by the courts, subject, however, to the privilege of witnesses to make no disclosures which might tend to criminate them or subject them to penalties or forfeitures. A prosecution or an action for violation of such a statute would clearly be an original suit or controversy between parties, within the meaning of the Constitution, and not a mere application, like the present one, for the exercise of the judicial power in aid of a nonjudicial body." In re Interstate Commerce Commission (C.C.) 53 Fed. 476, 480.

In other words, if the Interstate Commerce Act made the refusal of a witness duly summoned to appear and testify before the Commission, in respect to a matter rightfully committed by congress to that body for examination, an offense against the United States, punishable by fine or imprisonment, or both, a criminal prosecution or an information for the violation of such a statute would be a case or controversy to which the judicial power of the United States extended; while a direct civil proceeding, expressly authorized by an act of congress, in the name of the Commission, and under the direc-



tion of the attorney general of the United States, against the witness so refusing to testify, to compel him to give evidence before the Commission touching the same matter, would not be a case or controversy of which cognizance could be taken by any court established by congress to receive the judicial power of the United States.

This interpretation of the Constitution would restrict the employment of means to carry into effect powers granted to congress within much narrower limits than, in our judgment, is warranted by that instrument. \* \* \*

What is a case or controversy to which, under the Constitution, the judicial power of the United States extends?<sup>1</sup> Referring to the clause of that instrument which extends the judicial power of the United States to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or that shall be made under their authority, this court, speaking by Chief Justice Marshall, has said: "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." *Osborn v. Bank*, 9 Wheat. 738, 819, 6 L. Ed. 204. And in *Den ex dem. Murray v. Improvement Co.*, 18 How. 272, 284, 15 L. Ed. 372, Mr. Justice Curtis, after observing that congress cannot withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity or admiralty, nor, on the other hand, bring under judicial power a matter which, from its nature, is not a subject for judicial determination, said: "At the same time there are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."<sup>2</sup> So, in *Smith v. Adams*, 130 U. S. 173, 9 Sup. Ct. 566, 32 L. Ed. 895, Mr. Justice Field, speaking for the court, said that the terms "cases" and "con-

<sup>1</sup> See, also, the discussion in *Muskrat v. United States*, ante, p. 39.

<sup>2</sup> In *State ex rel. Ellis v. Thorne*, 112 Wis. 81, 87, 87 N. W. 797, 799, 55 L. R. A. 956 (1901), it was held that a board of review, exercising judicial powers in the equalization of tax assessments, was not unconstitutional because not a court. Marshall, J., said: "The constitution by no means provides that all authority to act judicially is or shall be vested in some one of the courts therein indicated. The language of the Constitution is: 'The judicial power of this state, both as to matters of law and equity, shall be vested in' the courts mentioned. The term 'matters of law and equity' refers to the administration of the law in actions and proceedings in courts of law and equity,—the exercise of such power in such matters as was exercised

troveries," in the Constitution, embraced "the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs."

Testing the present proceeding by these principles, we are of opinion that it is one that can properly be brought under judicial cognizance.

We have before us an act of congress authorizing the Interstate Commerce Commission to summon witnesses, and to require the production of books, papers, tariffs, contracts, agreements, and documents relating to the matter under investigation. The constitutionality of this provision—assuming it to be applicable to a matter that may be legally intrusted to an administrative body for investigation—is, we repeat, not disputed, and is beyond dispute. \* \* \* Whether the Commission is entitled to the evidence it seeks, and whether the refusal of the witness to testify or to produce books, papers, etc., in his possession, is or is not in violation of his duty or in derogation of the rights of the United States, seeking to execute a power expressly granted to congress, are the distinct issues between that body and the witness. They are issues between the United States and those who dispute the validity of an act of congress and seek to obstruct its enforcement; and those issues, made in the form prescribed by the act of congress, are so presented that the judicial power is capable of acting on them. \* \* \*

[Here follows a discussion of *Hayburn's Case*, 2 Dall. 409, 1 L. Ed. 436; *United States v. Ferreira*, 13 How. 40, 14 L. Ed. 42; *Gordon v. United States*, 117 U. S. 697; and *In re Sanborn*, 148 U. S. 222, 13 Sup. Ct. 577, 37 L. Ed. 429—cases involving questions similar to those considered in *Muskrat v. United States*, ante, p. 39.]

by such courts at the time of the adoption of the Constitution. As said in *Callanan v. Judd*, 23 Wis. 343, 349, the proper construction of the term "judicial power in matters of law and equity" is such power as the court, under the English and American systems of jurisprudence, had always exercised in actions at law and in equity. To act judicially, and to act judicially in a matter at law or in equity,—or, in other words, in actions at law or suits in equity,—are not necessarily the same. Every officer or board that is required, in the administration of the law, to determine whether a duty exists, or determine from facts, by the exercise of judgment, a course of action, within legislative restraints or guides, must necessarily act judicially in a sense. The power often partakes so much of the judicial function that it is spoken of as quasi judicial. Manifestly, an officer or board, or other tribunal other than a court, may act judicially in the sense above mentioned and not do anything falling within the meaning of the term 'judicial power as to matters of law and equity': and so a judicial officer may perform acts officially outside of such matters,—mere ministerial acts."

For the powers of a judicial nature commonly exercised in this country by administrative and executive officers, acting under the usual constitutional provisions creating separate legislative, executive, and judicial departments, see *United States v. Ju Toy*, post, p. 285, and notes (cases); *State v. Hawkins*, 44 Ohio St. 98, 5 N. E. 228 (1886); *State ex rel. Yaple v. Creamer*, 85 Ohio St. 349, 400-403, 97 N. E. 602, 39 L. R. A. (N. S.) 694 (1912) (administration of workmen's compensation act).

The views we have expressed in the present case are not inconsistent with anything said or decided in those cases. They do not in any manner infringe upon the salutary doctrine that congress, excluding the special cases provided for in the Constitution,—as, for instance, in section 2 of article 2 of that instrument,—may not impose upon the courts of the United States any duties not strictly judicial. The duties assigned to the Circuit Courts of the United States by the twelfth section of the Interstate Commerce Act are judicial in their nature. The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession, and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. Except in the particular instances enumerated in the Constitution, and considered in *Anderson v. Dunn*, 6 Wheat. 204, 5 L. Ed. 242, and in *Kilbourn v. Thompson*, 103 U. S. 168, 190, 26 L. Ed. 377, of the exercise by either house of congress of its right to punish disorderly behavior upon the part of its members, and to compel the attendance of witnesses and the production of papers in election and impeachment cases and in cases that may involve the existence of those bodies, the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises. See *Whitcomb's Case*, 120 Mass. 118, 21 Am. Rep. 502, and authorities there cited.

Without the aid of judicial process of some kind, the regulations that congress may establish in respect to interstate commerce cannot be adequately or efficiently enforced. One mode, as already suggested (the validity of which is not questioned), of compelling a witness to testify before the Interstate Commerce Commission to answer questions propounded to him relating to the matter under investigation, and which the law makes it his duty to answer, and to produce books, papers, etc., is to make his refusal to appear and answer, or to produce the documentary evidence called for, an offense against the United States, punishable by fine or imprisonment. A criminal prosecution of the witness under such a statute, it is conceded, would be a case or controversy, within the meaning of the Constitution, of which a court of the United States could take jurisdiction. Another mode would be to proceed by information to recover any penalty imposed by the statute. A proceeding of that character, it is also conceded, would be a case or controversy of which a court of the United States could take cognizance. If, however, congress, in its wisdom, authorizes the Commission to bring before a court of the United States for determination the issues between it and a witness, that mode of enforcing the act of congress, and of compelling the witness to perform his

duty, is said not to be judicial, and is beyond the power of congress to prescribe.

We cannot assent to any view of the constitution that concedes the power of congress to accomplish a named result indirectly, by particular forms of judicial procedure, but denies its power to accomplish the same result directly, and by a different proceeding judicial in form. \* \* \*

The present proceeding is not merely ancillary and advisory. It is not, as in *Gordon's Case*, one in which the United States seeks from the Circuit Court of the United States an opinion that "would remain a dead letter, and without any operation upon the rights of the parties." The proceeding is one for determining rights arising out of specified matters in dispute that concern both the general public and the individual defendants. It is one in which a judgment may be rendered that will be conclusive upon the parties until reversed by this court; and that judgment may be enforced by the process of the Circuit Court. Is it not clear that there are here parties on each side of a dispute involving grave questions of legal rights, that their respective positions are defined by pleadings, and that the customary forms of judicial procedure have been pursued? The performance of the duty which, according to the contention of the government, rests upon the defendants, cannot be directly enforced except by judicial process. One of the functions of a court is to compel a party to perform a duty which the law requires at his hands. If it be adjudged that the defendants are, in law, obliged to do what they have refused to do, that determination will not be merely ancillary and advisory, but, in the words of *Sanborn's Case*, will be a "final and indisputable basis of action," as between the commission and the defendants, and will furnish a precedent in all similar cases. It will be as much a judgment that may be carried into effect by judicial process as one for money, or for the recovery of property, or a judgment in *mandamus* commanding the performance of an act or duty which the law requires to be performed, or a judgment prohibiting the doing of something which the law will not sanction. It is none the less the judgment of a judicial tribunal dealing with questions judicial in their nature, and presented in the customary forms of judicial proceedings, because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by congress in execution of a power granted by the constitution. \* \* \*

Judgment reversed.<sup>3</sup>

[FULLER, C. J., and BREWER and JACKSON, JJ., dissented. FIELD, J., was absent.]

<sup>3</sup> Accord: *Matter of Davies*, 168 N. Y. 89, 61 N. E. 118, 56 L. R. A. 855 (1901) (proceeding by attorney general to obtain evidence to enable him to proceed against combinations violating anti-monopoly laws of New York).

See the discussion of the meaning of "judicial power" under the Australian Constitution, in *Huddart & Co. v. Moorehead*, 8 Com. L. Rep. 330, 355 ff., 381 ff.

## 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:<sup>1</sup>]

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

(1909). Isaacs, J., said (pp. 383, 384): "It is I believe correctly stated by Palles, C. B., in *The Queen v. Local Government Board* (1902) 2 I. R. 349, 373, that 'to erect a tribunal into a "court" or "jurisdiction," so as to make its determinations judicial, the essential element is that it should have power, by its determination within jurisdiction, to impose liability or affect rights.' 'By this,' said the learned Chief Baron, 'I mean that the liability is imposed, or the right affected by the determination only, and not by the fact determined, and so that the liability will exist, or the right will be affected, although the determination be wrong in law or in fact. It is otherwise of a ministerial power. If the existence of such a power depends upon a contingency, although it may be necessary for the officer to determine whether the contingency has happened, in order to know whether he shall exercise the power, his determination does not bind. The happening of the contingency may be questioned in an action brought to try the legality of the act done under the alleged exercise of the power. But where the determination binds, although it is based on an erroneous view of facts or law, then the power authorizing it is judicial.' There we get a modern use of the term 'judicial power.'"

<sup>1</sup> Sec. 3768. The courts and judges may issue attachments for contempt, and punish them summarily, only in the following cases, which are hereby 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.]



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.

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 establish." 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 se-

cure 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 quotation 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 instantaneously 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.<sup>2</sup>

<sup>2</sup> See cases collected in 36 L. R. A. 254 ff., note to *Hale v. State*, 55 Ohio St. 210, 45 N. E. 199, 60 Am. St. Rep. 691 (1896), most of which sustain the principal case. In several cases the legislature is conceded larger powers over contempts in courts created by it than in courts created by a Constitution. As to the legislative power over "constructive" contempt, see *State ex inf.*

## APPEAL OF NORWALK ST. RY. CO.

(Supreme Court of Errors of Connecticut, 1897. 69 Conn. 576, 37 Atl. 1080, 38 Atl. 708, 39 L. R. A. 794.)

[Appeal from the decision of Judge Hall of the Superior Court. The railway company, acting under the statute mentioned in the opinion below, asked the city of Norwalk to approve a certain plan for double-tracking part of its line. The city council did not notify the company of its decision within 60 days, and thereupon the company made application to the Superior Court. From a judgment there for the company the city appealed. Other facts appear in the opinion.]

HAMERSLEY, J. The act of 1893 confers upon city councils certain powers in establishing regulations for the location, construction, and operation of street railways, and requires a council, if requested by a railway company, to take some action within 60 days, and to notify the company in writing of its action. Whenever a council fails to give such written notice, the act of 1895 confers the same powers upon the "superior court or any judge thereof," to be exercised on application of a railway company, and calls this application an "ap-

Crow v. Shepherd, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624 (1903), criticised in Thomas, *Constructive Contempt* (1904); 50 Am. St. Rep. 572 ff., note; and 99 Am. St. Rep. 675 (cases).

"The power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders, it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."—Brewer, J., in *In re Debs*, 158 U. S. 564, 594, 595, 15 Sup. Ct. 900, 910, 39 L. Ed. 1092 (1895).

In Wisconsin and Michigan it has been held that the legislature cannot transfer from a court to a jury the right to determine the facts in equity cases. *Callanan v. Judd*, 23 Wis. 343 (1868); *Brown v. Kalamazoo Circuit Judge*, 75 Mich. 274, 42 N. W. 827, 5 L. R. A. 226, 13 Am. St. Rep. 438 (1889) (though Constitution directed such abolition as practicable of procedural distinctions between law and equity).

CONTROL OF INCIDENTS OF JUDICIAL FUNCTION.—There are many decisions holding that the courts cannot be deprived of the power to control their proceedings, methods of work, officers and attendants, surroundings, and other incidents necessary to the unfettered discharge of their judicial duties. *State ex rel. Hovey v. Noble*, 118 Ind. 350, 21 N. E. 244, 4 L. R. A. 101, 10 Am. St. Rep. 143 (1889) (choice of judicial assistants); *Witter v. Cook County Com'rs*, 256 Ill. 616, 100 N. E. 148 (1912) (juvenile court probation officers); *Ex parte Griffiths*, 118 Ind. 83, 20 N. E. 513, 3 L. R. A. 398, 10 Am. St. Rep. 107 (1889) (not compellable to write headnotes); *In re Headnotes*, 43 Mich. 641, 8 N. W. 552 (1881) (same); *Vaughn v. Harp*, 49 Ark. 160, 4 S. W. 751 (1887) (nor to give written opinions); *Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565 (1859) (same); *In re Jaultor of Supreme Court*, 35 Wis. 410 (1874) (choice of janitor); *State ex rel. Howard v. Smith*, 15 Mo. App. 412 (1884) (same); *Board of Com'rs of White County v. Gwin*, 136 Ind. 562, 36 N. E. 237, 22 L. R. A. 402 (1894) (repairs to court room); *Board of Com'rs of Vigo County v. Stout*, 136 Ind. 53, 35 N. E. 683, 22 L. R. A. 398 (1893) (control of court

peal." The power so conferred on the court is described in the act of 1893 as the power to approve and adopt a location and lay-out of a street railway, with such modifications therein as shall seem proper, in respect to the streets to be occupied, the location of the same as to grade and to the center line of the streets, and changes to be made in the street, the kind and quality of the track to be used, the motive power to be used, and the method of applying the same. Can such powers be conferred on the superior court? The limitation of their exercise to cases where there has been a prior failure of a municipal board to act cannot affect the principle involved. If the legislature can confer the power in a limited class of cases by calling an original application for its exercise an "appeal," it can confer the power in all cases without limitation. \* \* \*

The power which Judge Hall was asked to exercise in the present case does not seem to us to be a judicial power, within the meaning of our Constitution. It is claimed that the difficulty of defining the powers of government renders impracticable the enforcement by this court of their division, and so makes nugatory the most important command of the Constitution. \* \* \* But the difficulty now alleged is more apparent than substantial. \* \* \* One controlling consideration in deciding whether a particular act oversteps the limits of judicial power is the necessary inconsistency of such acts with the independence of the judicial department, and the preservation

house elevator); *Dahnke v. People*, 168 Ill. 102, 48 N. E. 137, 39 L. R. A. 197 (1897) (assignment of rooms); *Belvin v. City of Richmond*, 85 Va. 574, 8 S. E. 378, 1 L. R. A. 807 (1888) (control of noisy street near court); *Ex parte City of Birmingham*, 134 Ala. 609, 33 South. 13, 59 L. R. A. 572 (1902) (same).

May a court, whose jurisdiction is subject to legislative control, be deprived of the power to pass upon the constitutionality of a statute which it is otherwise empowered to consider and enforce? See *J. W. Bryan* in 41 Am. L. Rev. 834-43; *A. W. Richter* in 21 Jour. of Pol. Econ. 281.

**JUDICIAL CONTROL OF ADMISSION TO BAR.**—The power of the legislature to compel the admission to the bar of persons who have not complied with requirements exacted by the courts is more frequently denied than affirmed. *In denial:* *In re Day*, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519 (1899) (cases); *Splane's Petition*, 123 Pa. 527, 16 Atl. 481 (1889). *In affirmation:* *In re Cooper*, 22 N. Y. 67 (1860); *In re Applicants for License*, 143 N. C. 1, 55 N. E. 635, 10 L. R. A. (N. S.) 288, 10 Ann. Cas. 187 (1906) (legislature required admission of persons of bad character) (cases). The legislative power is admitted to *exclude* from the bar persons not complying with reasonable requirements. *In re Day*, above, 181 Ill. 94, 95, 54 N. E. 646, 50 L. R. A. 519. See, as to the effect of constitutional provisions in Indiana, *In re Leach*, 134 Ind. 665, 34 N. E. 641, 21 L. R. A. 701 (1893).

**LEGISLATIVE REGULATION OF EXECUTIVE PARDONING POWER.**—Most of our Constitutions lodge the general pardoning power with the executive. For the extent to which this is subject to legislative regulation through boards or otherwise, see *People v. Cummings*, 88 Mich. 249, 50 N. W. 310, 14 L. R. A. 285 (1891); *In re Conditional Discharge of Convicts*, 73 Vt. 414, 51 Atl. 10, 56 L. R. A. 658 (1901); *Fite v. State*, 114 Tenn. 646, 88 S. W. 941, 4 Ann. Cas. 1108 (1905), annotated in 1 L. R. A. (N. S.) 520; *Ex parte Ridley*, 3 Okl. Cr. 350, 106 Pac. 549, 26 L. R. A. (N. S.) 110 (1910). As to the judicial power to suspend sentence after conviction, see *People ex rel. Forsyth v. Court of Sessions of Monroe County*, 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856 (1894), and 14 L. R. A. 285, note.



of its sphere of action distinct from that of the legislative and executive departments. A main purpose of the division of powers between legislature and judicature is to prevent the same magistracy from exercising in respect to the same subject the functions of judge and legislator. This union of functions is a menace to civil liberty, and is forbidden by the Constitution. There is no intrinsic difficulty in recognizing a plain infraction of such prohibition. It is true that the different magistracies must act upon the same subjects, for every matter that may be dealt with by the state government may be acted on by each department thereof; but the action must be that belonging to the department whose powers are invoked.

The main difficulties suggested in argument result from a failure to distinguish between the exercise of a legitimate power and the employment of necessary means for exercising that power. The grant of the powers embraced in one of the great departments of government carries with it the right to use means appropriate to the exercise of that power. Any attempt to cripple the power through metaphysical classification of the means essential to its exercise must produce difficulties, if not absurdities. For example, the power to make laws may require the accurate ascertainment of facts. For this purpose, witnesses must be summoned, examined, and conclusions drawn from their conflicting testimony. This is a means peculiarly appropriate to the judicial power and the ordinary mark of an exercise of that power; yet, when so employed by the legislature (without violation of other constitutional provisions), it is a means within the limits of legislative power. But should the legislature, after the passage of an act, attempt, by another act, to adjudicate the rights of parties which have arisen under its provisions, such act, although only means appropriate to legislation might be employed, would be an exercise of judicial, and not of legislative, power. It would be void, because it involves the union, in the same magistracy, in respect to the same matter, of the functions of judge and legislator. Again, there are certain necessary executive acts which cannot be performed without the power of enforcing immediate obedience to an order authorized by law. The employment of legal restraint for the purpose of securing the essential immediate obedience is a means peculiarly appropriate to the exercise of judicial power; but for such purpose, and subject to the restrictions of other provisions of the Constitution, it is a means within the limits of the executive power. In *re Application of Clark*, 65 Conn. 17, 31 Atl. 522, 28 L. R. A. 242; *Den ex dem. Murray v. Hoboken Land, etc., Co.*, 18 How. 272, 15 L. Ed. 372. So, means of a legislative nature must be used by courts in establishing necessary rules of practice, and by executive officers in making regulations for the conduct of subordinates. Again, appointment to office is in the nature of an executive act. Apart from the purpose of the appointment, it is an exercise of executive power. Our own Constitution, like most constitutions, provides for certain



elective and legislative appointments; but, except in the cases specified, appointment to office is an exercise of executive power, unless used as a means appropriate to the exercise of powers granted to another department, and, when so used, it is not the exercise of executive power, within the meaning of the Constitution. \* \* \*

Under our state Constitution, appointments other than those whose mode is prescribed are governed by the division of governmental powers. This question has never come before us directly. It was incidentally considered in some recent cases in connection with the law allowing an appeal from the action of county commissioners in granting licenses. In *Smith's Appeal*, 65 Conn. 135, 31 Atl. 529, we held that the statute required the county commissioners to select, as the recipient of a license, one having "a personal fitness to perform the quasi public duties required by law of a licensee"; i. e. one who is shown to be suited or adapted to the orderly conduct of a business which the law regards as dangerous to public welfare, unless conducted by a carefully selected person duly licensed, whose fitness to the legal requirements must be determined in view of the statutory regulations. In *Hopson's Appeal*, 65 Conn. 140, 31 Atl. 531, we held that the selection or appointment of such a licensee was a means apparently appropriate both to the exercise of executive and judicial power, [and] that the uniform practice of courts and legislature in so treating such appointment might be safely accepted when the distinction to be drawn must be subtle and doubtful.<sup>1</sup> \* \* \*

<sup>1</sup> Regarding the power to grant licenses to sell liquor, it was said in this case by Hamersley, J. (65 Conn. pp. 145-147, 31 Atl. 532): "The subject-matter of jurisdiction is the selection, under statutory limitations, of a person suited to perform his part in carrying out a system of police regulation. The essential function of the selecting tribunal is the giving effect to a police regulation incidentally involving private rights or interests. It is evident that such a function cannot be executed without the use of means that are in their nature, independently of the purpose of their use, executive as well as judicial. We think such a function lies on the border line of the division between executive and judicial power, and that it is competent for the legislature to commit its exercise either to judicial or executive officers, as may be found necessary for the most efficient enforcement of its police regulations. \* \* \* The granting of a license is not so exclusively an executive function that the legislature has no power to confide it to a court, but it is nevertheless very clear that the function is different from that of settling disputed rights in the ordinary course of a judicial trial. The technical rules which bind a court in such a trial have been developed by the exigencies of judicial combats, where each party is entitled, *ex debito justitie*, to have a judgment, in case he maintains the facts alleged by testimony that must be received or rejected, and weighed, in strict compliance with the rules established for the conduct of such combats. But the exercise of the judicial function involved in the proceeding in question calls for no such trial. The judge does not preside over a judicial combat, as in the trial of a civil action. He receives aid in the formation of his personal judgment. The parties before him may properly attempt to influence that judgment, but it must be reached by the judge, not in subordination to the particular interests of these parties, but in the interests of the public, in whose behalf an appeal to such exercise of the judicial power is allowed. In reaching his conclusion, as well as in directing the production of evidence to aid him in reaching that conclusion, he acts in the exercise of a judicial discretion, which is not the

The meaning of the act of 1893, relating to street railways, is uncertain in several particulars; but there can be no doubt that it confers on municipal authorities, in addition to certain executive powers, the power of establishing regulations and conditions (within the limitations prescribed) which shall control all the street railways in the state, in the location, construction, and operation of railways. There can be no doubt that making such regulations is essentially and distinctively a legislative function. It is also certain that the judicial power does not include the exercise of such a legislative function, and that the duty of making such regulations cannot be imposed upon the superior court, because it involves the exercise of legislative power by the court, and because a power in the legislature to impose such duties is inconsistent with the existence of an independent and separate judicial department of government. The power to make the superior court a subordinate legislative body for one purpose involves the power to so utilize it for every purpose. \* \* \* We have assumed, as was assumed in argument, that the act of 1895 purports to confer the powers in question upon a judge, in his exercise of the judicial power vested in the superior court, and does not purport to appoint, for the exercise of the powers, an executive officer, designated by an official title, instead of by name. If the latter were true, the judge would be at liberty to accept or decline the appointment, and this court would have no jurisdiction to review his action. \* \* \*

Judgment reversed.<sup>2</sup>

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

subject of review, and which is essential, for certain purposes, to the exercise of judicial power. The discretion should be exercised in accordance with the appropriate analogies of the rules governing judicial trials; but, in the nature of things, the court cannot be bound in the particular application of such analogies as it is bound in the application of the strict rules of law in a judicial trial. The instances of the exercise of such discretion by courts, both in reaching a result and in the methods by which the needed information is obtained, are familiar."

This view is generally held, even where a wide discretion is given to act in the public interest. *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284 (1881); *Pierce v. Commonwealth*, 73 Ky. (10 Bush) 6 (1873); *State ex rel. Kyger v. Holt County Court Justices*, 59 Mo. 521 (1867); *Attorney General ex rel. Gillaspie v. Justices of Gullford County*, 27 N. C. 315 (1844); *Petition of Raudenbusch*, 120 Pa. 328, 14 Atl. 148 (1888); *Thomas' License*, 169 Pa. 111, 32 Atl. 100 (1895) (judge may exercise discretion on his own knowledge and against evidence presented); *French v. Noel*, 22 Grat. (63 Va.) 454 (1872). Where the court's duty is merely to decide whether an applicant has complied with certain definitely ascertainable conditions, the function is more clearly judicial. *McCrea v. Roberts*, 89 Md. 238, 43 Atl. 39, 44 L. R. A. 485 (1899).

Contra: *Martin v. Symonds*, 4 Misc. Rep. 6, 23 N. Y. Supp. 689 (1893); *Royal Aquarium Soc. v. Parkinson* (1892) 1 Q. B. 431, 443. Compare *Appeal of Moynihan*, 75 Conn. 358, 53 Atl. 903 (1902).

<sup>2</sup> Accord: *New York & N. J. Tel. Co. v. Borough of Bound Brook*, 66 N. J. Law, 168, 48 Atl. 1022 (1901) [see *City of Bayonne v. Lord*, 61 N. J. Law, 136, 38 Atl. 752 (1897)]. Contra: *City of Zanesville v. Zanesville Telegraph & Telephone Co.*, 64 Ohio St. 67, 59 N. E. 781, 52 L. R. A. 150, 83 Am. St. Rep. 725 (1901) (court authorized to direct how telegraph lines should be constructed in

## 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 ren-

city streets, whenever city and company could not agree or city delayed in agreeing).

In *Paul v. Gloucester County*, 50 N. J. Law, 585, 15 Atl. 272, 1 L. R. A. 86 (1888), it was held that a judge might be authorized by the legislature to determine whether the circumstances had arisen upon the occurrence of which an election was prescribed, and, if so, to appoint a day for the election. Contra: *Dickey v. Hurlburt*, 5 Cal. 343 (1855); *Board of Sup'rs of Election for Wicomico County v. Todd*, 97 Md. 247, 54 Atl. 963, 62 L. R. A. 809, 99 Am. St. Rep. 438 (1903).

DETERMINATION OF NEED OF MUNICIPAL INCORPORATION. In *State v. Simons*, 32 Minn. 540, 542-544, 21 N. W. 750, 751 (1884), Mitchell, J., said (holding invalid a statute authorizing a district court to order a village incorporated upon petition):

"It will be observed that under the provisions of this act the legislature has not, except as to certain preliminaries, determined or defined the facts or things upon the existence of which the territory shall be incorporated as a village. It will also be observed that the duty of the court is not simply to inquire and ascertain whether certain specified facts exist, or whether certain specified conditions have been complied with, but to proceed and determine whether the interests of the inhabitants will be promoted by the incorporation of the village, and, if so, what land ought in justice to be included within its limits. In short, it is left to the court to decide whether public interests will be subserved by creating a municipal corporation, and the determination of this question is left wholly to his views of expediency and public policy. That the determination of such question involves the exercise of purely and exclusively legislative power seems to us too clear to admit of argument. The granting of all charters of incorporation involves the exercise of legislative functions. The proposition (says Dillon) which lies at the foundation of the laws of corporations of the country is that they all, public or private, exist and can exist only by virtue of express legislative enactment creating or authorizing the creation of the corporate body.

"All municipal corporations are mere auxiliaries to the state government in the business of municipal rule. The act of deciding when and under what circumstances the public interests require the creation of these auxiliaries or aids to the state government is one of the highest and most important legislative powers and duties. \* \* \* Had the legislature, by the act in question, fixed and specified all the conditions and facts upon which the incorporation of certain territory should depend, we do not question their right to

dered, 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

refer to some tribunal or body the question of ascertaining and determining the existence of these facts and conditions. Neither do we decide that they might not delegate certain legislative powers regarding the organization and incorporation of villages to some appropriate municipal body which might constitutionally exercise local legislative powers. \* \* \* But the present act assumes to delegate these legislative powers to the district court,—a tribunal not authorized to exercise them, its jurisdiction under the Constitution being purely judicial.

"Cases may be found where it has been held that powers similar to those conferred by this act were properly delegated to certain so-called courts, but we think it will be found in almost every instance that these courts were not exclusively judicial, but also quasi municipal bodies invested with certain powers of local legislation. Such are the county courts in some states, which take the place of our boards of county commissioners in the municipal government of the county."

Accord: *People v. Town of Nevada*, 6 Cal. 143 (1856); *City of Galesburg v. Hawkinson*, 75 Ill. 152 (1874) [but see *People ex rel. Longenecker v. Nelson*, 133 Ill. 565, 27 N. E. 217 (1890)]; *People ex rel. Shunway v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107 (1874); *In re Ridgfield Park*, 54 N. J. Law, 288, 23 Atl. 674 (1892); *Territory ex rel. Kelly v. Stewart*, 1 Wash. 98, 23 Pac. 405, 8 L. R. A. 106 (1890); *In re Incorporation of Village of North Milwaukee*, 93 Wis. 616, 67 N. W. 1033, 33 L. R. A. 638 (1896) (cases).

Contra (upholding the statutory power of courts to determine the need for incorporation or the boundaries of proposed municipalities): *Forsythe v. City of Hammond* (C. C.) 68 Fed. 774 (1895); *Forsythe v. City of Hammond*, 142 Ind. 505, 40 N. E. 267, 41 N. E. 950, 30 L. R. A. 576 (1895); *City of Burlington v. Leebriek*, 43 Iowa, 252 (1876); *Callen v. City of Junction City*, 43 Kan. 627, 23 Pac. 652, 7 L. R. A. 736 (1890); *Morton v. Woodford*, 99 Ky. 367, 35 S. W. 1112 (1896); *Wahoo v. Dickinson*, 23 Neb. 426, 36 N. W. 813 (1888); *State v. Ueland*, 30 Minn. 29, 14 N. W. 58 (1882); *Kayser v. Trustees of Bremen*, 16 Mo. 88 (1852); *Mayor, etc., of City of Morristown v. Shelton*, 1 Head (Tenn.) 24 (1855); *Elder v. Incorporators of Central City*, 40 W. Va. 222, 21 S. E. 738 (1895).

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.<sup>1</sup> 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 *Railway Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567, it was also said that "it is not the province of courts to enter upon the merely administrative duty of framing a tariff of rates for carriage." \* \* \*

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 *Atelison, 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."

<sup>1</sup>"If \* \* \* the legislature intended to provide that the court should put itself in the place of the commission, try the matter *de novo*, and determine what are reasonable rates, without regard to the findings of the commission, such intent cannot be carried out, as a statute which so provided would be unconstitutional. The fixing of rates is a legislative or administrative act, not a judicial one."—Canty, J., in *Steenerson v. Great Northern Ry. Co.*, 69 Minn. 353, 375, 72 N. W. 713, 716 (1897).



In *Railway Co. v. Wellman*, 143 U. S. 339, 344, 12 Sup. Ct. 400, 402, 36 L. Ed. 176, 179, the court said that "the legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates."

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 de-

termine 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 becomes 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 employes 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 the 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.<sup>2</sup>

<sup>2</sup> Accord: *Steenerson v. Great Northern Ry. Co.*, 69 Minn. 353, 72 N. W. 713 (1897); *Brymer v. Butler Water Co.*, 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260 (1897); *Nebraska Tel. Co. v. State*, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113 (1898); *Michigan Tel. Co. v. City of St. Joseph*, 121 Mich. 502, 80 N. W. 383, 47 L. R. A. 87, 80 Am. St. Rep. 520 (1899); *State v. Johnson*, 61 Kan. 803, 60 Pac. 1068, 49 L. R. A. 662 (1900) (compare *Doster, J.*, dissenting, at page 835 ff.). See *Troutman v. Smith*, 105 Ky. 231, 48 S. W. 1084 (1899).

The cases holding that rate-fixing is not a judicial function are collected in 8 L. R. A. (N. S.) 529 ff., in a note to *City of Madison v. Madison Gas & Electric Co.*, 129 Wis. 249, 108 N. W. 65, 116 Am. St. Rep. 944, 9 Ann. Cas. 819 (1906) (no equitable jurisdiction for this purpose). See, also, *Prentis v. Atlantic Coast Line Co.*, post, p. 309; and *Austral. Boot Trade Fed. v. Whybrow & Co.*, 11 Com. L. Rep. 311 (1910, Australia).

All of the above cases arose under state Constitutions requiring a separation of the three great departments of government. 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.*, above]:

"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



## In re JANVRIN.

(Supreme Judicial Court of Massachusetts, 1899. 174 Mass. 514, 55 N. E. 351, 47 L. R. A. 319.)

[Case reserved upon a demurrer to a petition filed by the selectmen of Revere against the Revere Water Company, under the statute mentioned in the opinion below, alleging that unreasonable rates were charged and praying "that the court would fix the rate to be charged by the company for water supplied to the inhabitants of Revere at a reasonable sum."]

HOLMES, C. J. The only question raised by the demurrer is the constitutionality of the provision of St. 1897, c. 336, § 1, under which the petitioner proceeds. This section amends section 23 of the metropolitan water supply act (St. 1895, c. 488). It embodies a scheme which forbids cities or towns within 10 miles of the state house to use water for domestic purposes from any source not now used by them, except under the statute. This prohibition, standing alone, might seem to put into the hands of a water company now supply-

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 accepted 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.'

See the discussion of somewhat similar legislation, under a Constitution requiring a separation of powers, in *Sabre v. Rutland Ry. Co.* (Vt.) 85 Atl. 693 (1913) (majority and dissenting opinions).

A definite separation of state governmental powers is not essential to a "republican form of government" under the federal Constitution. *Forsyth v. Hammond*, 166 U. S. 506, 519, 17 Sup. Ct. 665, 41 L. Ed. 1095 (1897).

ing any such town or city the power to make exorbitant charges, by giving it a monopoly. Therefore, with a view, no doubt, of dealing with the danger, the section just referred to provides as follows: "The selectmen of a town or any persons deeming themselves aggrieved by the price charged for water by any such company may, in the year eighteen hundred and ninety-eight and every fifth year thereafter, apply by petition to the supreme judicial court, asking to have the rate fixed at a reasonable sum, measured by the standard above specified; and two or more judges of said court, after hearing the parties, shall establish such maximum rates as said court shall deem proper; and said maximum rates shall be binding upon said water company until the same shall be revised or altered by said court pursuant to this act."

When we first read this sentence, the impression of some of us was that it was an attempt to make out of this court a commission for the taking of one step in fixing a legislative rule of future conduct, irrespective of any present relation between the parties concerned, and that it was no more competent for the legislature to impose or for us to accept such a duty than if the proposition were to transfer to us the whole lawmaking power. See *Smith v. Strother*, 68 Cal. 194, 8 Pac. 852. But upon further reflection it seems to a majority of the court that the act can be sustained. If we can do so without perverting the meaning of the act, we are bound to construe it in such a way that it will be consistent with the Constitution, and we think that this can be done without any wresting of the sense, even if we should doubt (which we do not intimate that we do) whether the legislature had the limit of its power distinctly in mind.

The statute goes upon the footing that every taker of water from the companies in question has a right to be furnished with water at a reasonable rate. No one questions the power of the legislature to require these water companies to furnish water to the takers at reasonable rates (*Attorney General v. Old Colony R. Co.*, 160 Mass. 62, 86, 87, 35 N. E. 252, 22 L. R. A. 112; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 354, 4 Sup. Ct. 48, 28 L. Ed. 173; *Budd v. New York*, 143 U. S. 517, 537, 549, 552, 12 Sup. Ct. 468, 36 L. Ed. 247); and this statute does require the companies to do so, and thereby gives to water takers a corresponding right, or declares that they have it. It is with the relations between actual water takers and the companies that the statute calls on this court to deal. It does not undertake merely to make of the court a commission to determine what rule shall govern people who are not yet in relation to each other, and who may elect to enter or not to enter into relations as they may or may not like the rule which we lay down. It calls on us to fix the extent of actually existing rights. With regard to such rights, judicial determinations are not confined to the past. If it legitimately might be left to this court to decide whether a bill for

water furnished was reasonable, and, if not, to cut it down to a reasonable sum, it equally may be left to the court to enjoin a company from charging more than a reasonable sum in the immediate future.

But it has been regarded as competent for a court to pass on the reasonableness of a rate, even when established by the legislature, to the extent of declaring it unreasonably low. *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. Ed. 970; *Chicago & G. T. Railway v. Wellman*, 143 U. S. 339, 344, 12 Sup. Ct. 400, 36 L. Ed. 176; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819. A fortiori when the rate is established by the company, and it has undertaken to charge the plaintiff a sum which he alleges to be unreasonable, and the legislature, in terms, has referred him to this court, this court has "jurisdiction to inquire into that matter, and to award to the [plaintiff] any amount exacted from him in excess of a reasonable rate." *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 397, 14 Sup. Ct. 1047, 1054, 38 L. Ed. 1014, 1023.

It is true that in *Reagan v. Farmers' Loan & Trust Co.* it was said, also, that "it is not the function of the courts to establish a schedule of rates" (154 U. S. 400, 14 Sup. Ct. 1055, 38 L. Ed. 1024); and to that proposition we fully agree. But it will be observed that the proposition is laid down in connection with the statement that "the challenge in this case is of the tariff as a whole, and not of any particular rate upon any single class of goods." Probably to prepare a new schedule or to rearrange the old one would have gone beyond the scope of the rights immediately affected or threatened in the case before the court, into the realm of abstract lawmaking for the future, and so beyond the power of the court; and, if it had not been beyond the court's power, still very possibly it might have been refused, in the court's discretion, the court leaving it to the proper body to undertake that task. But it is implied that, if the challenge had been of a single rate threatened to be charged for a service demanded, the court might have determined the question between the parties for the immediate future, as it is stated three pages earlier that the court would determine it with regard to a charge for past services. When you are prepared to say that a given charge is too high or too low, it hardly would be consistent to say that you had not power or ability to say what is a proper charge.

It is true that the phrase, "shall establish such maximum rates as said court shall deem proper," and the following provision, that such "maximum rates shall be binding upon said water company until the same shall be revised or altered by said court," etc., suggest that the legislature had in mind the establishment of a rate to be charged to all parties for the use of water for domestic purposes, and not merely a rate to be charged the petitioner. It may be that the former was the main object which the legislature had in mind. But, al-

though we cannot doubt that the meaning of the words last quoted is that the rate shall be binding as a general rate, even that is not said distinctly; and we feel bound to assume, in support of the act, that the legislature is dealing primarily with the rights of the party aggrieved before the court, and only secondarily adopts in advance the rate thus fixed between the parties as a general rate for all. If this is so, the question whether such a legislative consequence can be attached to the decision is not before us. Even if it should fail, the failure would not necessarily affect the constitutionality of sending "persons deeming themselves aggrieved" to this court to get their rights settled. But, as it is not likely that a rate thus established for a given moment after full investigation would be departed from upon the application of a second person similarly circumstanced, it may be questioned whether there is anything to prevent the legislature from sanctioning without further hearing a rate which once has been declared judicially to be reasonable. It is to be remarked in this connection that the decisions which we have cited for the proposition that the legislature may require rates to be reasonable establish the further proposition that the legislature may fix what the rates shall be, subject only to judicial inquiry whether they are so unreasonably low as to deprive the company of its property without due compensation.

It will be understood from the reasoning on which we sustain the act that the court would not regard itself as warranted or called on to undertake the fixing of rates, except so far as they concern interests actually and legitimately before the court.

The liberty to apply to this court is confined to the year 1898 and every fifth year thereafter, so that seemingly it is contemplated that the rate, when fixed, will remain unchanged for five years. This is another indication that the legislature had its attention directed to the establishment of a general rate. But, supposing a party aggrieved should obtain an injunction, obviously the decree would be drawn so as to bind the defendant for a reasonable time, or if it were drawn in the common form, subject to review on a change of circumstances, the court would not be likely to grant leave to file a bill of review until a reasonable time had elapsed; and, if the legislature should say that in these cases five years was a reasonable time, we could not say that it was wrong. It is true that the party aggrieved if not given an injunction, in terms, by the act; and this is another peculiarity in the procedure, looking as it does to a decree affecting the future. Of course, it is assumed, and no doubt rightly, that a company would not venture to disregard the decree. But if a company should prove recalcitrant, in case such disregard should not be construed as *ipso facto* a contempt, undoubtedly the decree could be enforced by injunction.

There is still one more peculiarity in the statutory proceedings which adds a little to the difficulty of the question before us. We

have construed the statute to deal primarily with existing rights and grievances. But the proceedings are given to "the selectmen of a town or any persons deeming themselves aggrieved." So far as the alternative mention of the selectmen should be used as an argument that the primary purport of the act was not to deal with present rights, we should answer that it does not appear that the towns within the 10-mile radius do not all of them take water in their corporate capacity; and, if it was assumed by the legislature that they did, as they probably do, the argument would lose its force. It may be that the legislature thought of the selectmen rather as representing the whole body of water takers in the town. Whether they could be made compulsory agents to represent private interests in that way, it is not necessary to inquire. We may add that we understand the demurrer to be intended to raise the single question of constitutionality, and therefore we do not consider whether the petition, in strictness, ought not to show that the town, or whoever may be represented by the petitioning selectmen, is a water taker, and, in short, disclose enough to make out a present grievance. If there is any defect of form,—which we do not intimate,—probably it could be amended. \* \* \*

Demurrer overruled.<sup>1</sup>

<sup>1</sup> Accord: *Canada Southern Ry. Co. v. International Bridge Co.* (D. C.) 8 Fed. 190 (1881); *Brymer v. Butler Water Co.*, 179 Pa. 231, 250, 36 Atl. 249, 36 L. R. A. 260 (1897) (semble).

Contra: *Nebraska Tel. Co. v. State*, 55 Neb. 627, 635, 76 N. W. 171, 45 L. R. A. 113 ff. (1898).

In *People ex rel. Joline v. Willcox*, 194 N. Y. 383, 386, 387, 87 N. E. 517 (1909), Cullen, C. J., said (referring to *Prentis v. Atlantic Coast Line Co.*, post, p. 309, holding that the general fixing of future transportation rates could not be made an exercise of judicial power by a state):

"With great reluctance we express our inability to accept the doctrine of the Supreme Court (of course, only within the sphere [of state authority] indicated), as it is opposed to the uniform current of judicial authority in this state, a full review of which, as well as of the action of both Constitution makers and legislatures, will be found in the *Matter of Vil. of Sar. Springs v. Saratoga Gas, El. Light & P. Co.*, 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713, in which it was held, not only that the function of rate making could be devolved by the legislature upon other officers, but that the very question of what rates are reasonable could be given a judicial or quasi-judicial aspect. Nor are we now convinced that the function of prescribing a rate is necessarily nonjudicial solely because it enforces a rule of conduct for the future. It is true that 'a judicial inquiry investigates,' declares, and enforces liabilities as they stand on present and past facts under the laws supposed already to exist.' But a judicial decision often determines in advance what future action will be a discharge of existing liabilities or obligations. A notable instance of this is the specific enforcement of contracts which are to extend over a long period of time, in which the court may dictate the details of performance. *Prospect Park & C. I. R. R. Co. v. Coney Island & B. R. R. Co.*, 114 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610. In actions for divorce or separation, it is the constant practice of the courts to prescribe regulations for the custody and care of children, and also to provide for subsequent modification of those provisions from time to time as circumstances may alter. Indeed, this reservation of the right of either party to apply for a modification on change of circumstances is by no means an uncommon feature of the decrees of courts of equity in all branches of their juris-



## 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. 19-20, 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 government, 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.<sup>1</sup> 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

diction. If a judicial tribunal is competent to decide that the exaction of five cents is extortionate, and that a tender of three cents is inadequate, it is difficult to see why it may not be empowered to also decide that four cents is a reasonable and proper rate, and that such rate shall continue until circumstances so change that the judgment of the tribunal may again be invoked. The obligation of a carrier to carry at a reasonable rate, in the absence of any statutory rate, rests on statute or on the common law. The decree of a court does not create an obligation, but measures an existing one."

See *City of Madison v. Madison Gas & Electric Co.*, 129 Wis. 249, 268, 108 N. W. 65, 8 L. R. A. (N. S.) 529, 116 Am. St. Rep. 944, 9 Ann. Cas. 819 (1906).

<sup>1</sup> Accord: *Texas v. White*, 7 Wall. 700, 19 L. Ed. 227 (1869) ("reconstructed" state of Texas); *Griffin's Case*, Chase, 364, Fed. Cas. No. 5815 (1869) (Wheeling government of Virginia); *Taylor v. Beckham*, 178 U. S. 548, 20 Sup. Ct. 890, 1009, 44 L. Ed. 1187 (1900) (election of governor); *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U. S. 118, 32 Sup. Ct. 224, 56 L. Ed. 377 (1912) (initiative and referendum).



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.<sup>2</sup> 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

<sup>2</sup> See *Downes v. Bidwell*, note 6, post, p. 1012.

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."<sup>3</sup> 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.<sup>4</sup> It was a state of

<sup>3</sup> Accord: *Druecker v. Salomon*, 21 Wis. 621, 94 Am. Dec. 571 (1867) (execution of draft act against rioters).

<sup>4</sup> Accord (exercise of military authority by executive to suppress public disorder): *In re Boyle*, 6 Idaho, 609, 57 Pac. 706, 45 L. R. A. 832, 96 Am. St. Rep. 286 (1899); *Comm. ex rel. Wadsworth v. Shortall*, 206 Pa. 165, 55 Atl. 952, 65 L. R. A. 193, 98 Am. St. Rep. 759 (1903); *In re Moyer*, 35 Colo. 159, 85 Pac. 190, 12 L. R. A. (N. S.) 979, 117 Am. St. Rep. 189 (1905). Persons in custody under such authority will not be released by the courts on habeas corpus. *Id.*

Similarly, the determination by the political departments that a state of war exists, and of the date of its beginning and end, is binding upon the courts. *The Prize Cases*, 2 Black, 635, 670, 17 L. Ed. 459 (1863); *The Pro-*

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

tector, 12 Wall. 700, 20 L. Ed. 463 (1872); *The Pedro*, 175 U. S. 374, 20 Sup. Ct. 138, 44 L. Ed. 195 (1899).

As to the power of the legislature or of the executive to suspend the writ of habeas corpus or to declare martial law in domestic territory where the courts are still in ordinary operation, see *Ex parte Merryman*, Taney, 246, Fed. Cas. No. 9,487 (1861); *Ex parte Field*, 5 Blatchf. 61, Fed. Cas. No. 4,761 (1862); *In re Egan*, 5 Blatchf. 319, Fed. Cas. No. 4,303 (1866); *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281 (1866); *Ex parte Moore* (and following cases), 64 N. C. 802-834 (1870); *Marais v. Gen. Officer* (1902) A. C. 109; *Comm. ex rel. Wadsworth v. Shortall*, 206 Pa. 165, 55 Atl. 952, 65 L. R. A. 193, 98 Am. St. Rep. 759 (1903); *State v. Brown* (W. Va.) 77 S. E. 243 (1912). As to the validity under the federal Constitution of such proceedings by state officers, see *Moyer v. Peabody*, 212 U. S. 78, 29 Sup. Ct. 235, 53 L. Ed. 410 (1909). The *Egan*, *Milligan*, and *Brown* Cases, above, were cases of trials by military commissions. For an account of the practice of the United States during the Civil War, see 4 Rhodes, *Hist. of U. S.* 229 ff. The cases are collected in 45 L. R. A. 832, in a note to *In re Boyle*, 6 Idaho, 609, 57 Pac. 706, 96 Am. St. Rep. 286 (1899).

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.<sup>5</sup>

STATE OF GEORGIA v. STANTON (1867) 6 Wall. 50, 71, 75-77. Mr. Justice NELSON (dismissing for want of jurisdiction a bill seeking to restrain the Secretary of War and Generals Grant and Pope, commanding the military district including the state of Georgia, from enforcing in Georgia the federal "Reconstruction Acts"):

"It is urged that the matters involved, and presented for adjudication, are political and not judicial, and, therefore, not the subject of judicial cognizance. This distinction results from the organization of the government into the three great departments, executive, legislative, and judicial, and from the assignment and limitation of the powers of each by the Constitution. The judicial power is vested in one supreme court, and in such inferior courts as Congress may ordain and establish: the political power of the government in the other two departments.

"The distinction between judicial and political power is so generally acknowledged in the jurisprudence both of England and of this country, that we need do no more than refer to some of the authorities on the subject. They are all in one direction. *Nabob of Carnatic v. The East India Co.*, 1 Vesey, Jr., 375-393, S. C., 2 Vesey, Jr., 56-60; *Penn v. Lord Baltimore*, 1 Vesey, 446-447; *New York v. Connecticut*, 4 Dall. 4-6, 1 L. Ed. 717; *The Cherokee Nation v. Georgia*, 5 Pet. 1,

<sup>5</sup> POWER OF STATE COURTS TO DETERMINE LAWFUL LEGISLATURE OR GOVERNOR.—The courts will not entertain direct proceedings to admit, exclude, or reinstate any member of the state legislature contrary to the decision of that body after it has legally organized, *In re Gunn*, 50 Kan. 155, 251-253, 32 Pac. 470, 948, 19 L. R. A. 519 (1893) (cases); *Hiss v. Bartlett*, 3 Gray (Mass.) 468, 63 Am. Dec. 768 (1855); *French v. Senate*, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556, 2 Ann. Cas. 756 (1905); nor will they declare a vacancy in the membership thereof, *Covington v. Buffett*, 90 Md. 569, 45 Atl. 204, 47 L. R. A. 622 (1900).

As to the power of courts to question the legislation of a sole de facto legislature on the ground it is not de jure, see *Gormley v. Taylor*, 44 Ga. 76 (1871); *Macon & A. R. Co. v. Little*, 45 Ga. 370, 398-408 (1872); *State ex rel. Attorney General v. Francis*, 26 Kan. 724 (1882); *State v. Smith*, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829 (1886). As to a like jurisdiction to decide which of two rival organizations is legally a branch of the state legislature, see *In re Gunn*, 50 Kan. 155, 32 Pac. 470, 948, 19 L. R. A. 519 (1893) (cases—see dissent); *State v. Rogers*, 56 N. J. Law, 480, 614-618, 28 Atl. 726, 29 Atl. 173 (1894). See, also, *Answers of Justices*, 70 Me. 600 (1880); *Prince v. Skillin*, 71 Me. 361, 36 Am. Rep. 325 (1880)—cases of rival legislatures.

A like jurisdiction was exercised in quo warranto proceedings to determine the lawful governor in *Attorney General ex rel. Bashford v. Barstow*, 4 Wis. 567 (1856); *State v. Bulkeley*, 61 Conn. 287, 23 Atl. 186, 14 L. R. A. 657 (1892); *State ex rel. Thayer v. Boyd*, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602 (1891), reversed in *Boyd v. Neb.*, 143 U. S. 135, 12 Sup. Ct. 375, 36 L. Ed. 103 (1892) on non-jurisdictional grounds.



20, 29, 30, 51, 75, 8 L. Ed. 25; State of Rhode Island v. State of Massachusetts, 12 Pet. 657, 733, 734, 737, 738, 9 L. Ed. 1233. \* \* \*

“[Quoting from Thompson, J., in *Cherokee Nation v. Georgia*, above:] ‘I certainly do not claim, as belonging to the judiciary, the exercise of political power. That belongs to another branch of the government. The protection and enforcement of many rights secured by treaties, most certainly do not belong to the judiciary. It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief. This court can have no right to pronounce an abstract opinion upon the constitutionality of a state law. Such law must be brought into actual, or threatened operation upon rights properly falling under judicial cognizance, or a remedy is not to be had here.’ \* \* \*

“The bill filed presents a case which, if it be the subject of judicial cognizance, would, in form, come under a familiar head of equity jurisdiction, that is, jurisdiction to grant an injunction to restrain a party from a wrong or injury to the rights of another, where the danger, actual or threatened, is irreparable, or the remedy at law inadequate. But, according to the course of proceeding under this head in equity, in order to entitle the party to the remedy, a case must be presented appropriate for the exercise of judicial power; the rights in danger, as we have seen, must be rights of persons or property, not merely political rights, which do not belong to the jurisdiction of a court, either in law or equity.

“The remaining question on this branch of our inquiry is, whether, in view of the principles above stated, and which we have endeavored to explain, a case is made out in the bill of which this court can take judicial cognizance. In looking into it, it will be seen that we are called upon to restrain the defendants, who represent the executive authority of the government, from carrying into execution certain acts of Congress, inasmuch as such execution would annul, and totally abolish the existing state government of Georgia, and establish another and different one in its place; in other words, would overthrow and destroy the corporate existence of the state, by depriving it of all the means and instrumentalities whereby its existence might, and, otherwise would, be maintained. \* \* \*

“That these matters, both as stated in the body of the bill, and in the prayers for relief, call for the judgment of the court upon political questions, and, upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a state, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threaten-

ed infringement, is presented by the bill, in a judicial form, for the judgment of the court.

"It is true, the bill in setting forth the political rights of the state, and of its people to be protected, among other matters, avers, that Georgia owns certain real estate and buildings therein, state capitol, and executive mansion, and other real and personal property; and that putting the acts of Congress into execution, and destroying the state, would deprive it of the possession and enjoyment of its property. But, it is apparent, that this reference to property and statement concerning it, are only by way of showing one of the grievances resulting from the threatened destruction of the state, and in aggravation of it, not as a specific ground of relief. This matter of property is neither stated as an independent ground, nor is it noticed at all in the prayers for relief. Indeed the case, as made in the bill, would have stopped far short of the relief sought by the state, and its main purpose and design given up, by restraining its remedial effect, simply to the protection of the title and possession of its property. Such relief would have called for a very different bill from the one before us.<sup>1</sup> \* \* \*"

[CHASE, C. J., concurred in the conclusion.]

<sup>1</sup> See, also, *Cherokee Nation v. Georgia*, 5 Pet. 1, 20, 29-30, 51, 75, 8 L. Ed. 25 (1831). In *White v. Hart*, 13 Wall. 646, 20 L. Ed. 685 (1872), the courts were held to have no jurisdiction to consider the validity of the means adopted by Congress to secure the assent of Georgia to her Constitution of 1868, or (semble) to the fourteenth and fifteenth amendments.

The federal Supreme Court has passed upon the constitutionality of the rules of the House of Representatives in enacting legislation, *United States v. Ballin*, 144 U. S. 1, 12 Sup. Ct. 507, 36 L. Ed. 321 (1892); and of state statutes providing for the appointment of presidential electors, *McPherson v. Blacker*, 146 U. S. 1, 13 Sup. Ct. 3, 36 L. Ed. 869 (1892).

The courts generally have exercised jurisdiction to determine the validity of legislative apportionment acts. *State v. Cunningham*, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561 (1892); *Denney v. State ex rel. Basler*, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726 (1895); *Harrison v. Ballot Com'rs*, 45 W. Va. 179, 31 S. E. 394, 42 L. R. A. 591 (1898). Cases from other states are cited in these. But owing to the political character of the act involved the legislature is allowed a large measure of discretion in such matters. See *People ex rel. Woodyatt v. Thompson*, 155 Ill. 451, 40 N. E. 307 (1895); *People ex rel. Carter v. Rice*, 135 N. Y. 473, 31 N. E. 921, 16 L. R. A. 836 (1892) [but compare *Matter of Sherrill v. O'Brien*, 188 N. Y. 185, 81 N. E. 124, 117 Am. St. Rep. 841 (1907)].

**INDIVIDUAL POLITICAL RIGHTS.**—The political rights of individuals, where they can be urged in the form of a legally authorized controversy inter partes, will be protected by the courts, as in the cases of suits against election officers to secure registration or damages for interference with voting, 15 Cyc. 306, 314 (cases); or as in cases of contests between rival candidates for office, each claiming to be lawfully elected, 15 Cyc. 393 ff. (cases); *Toncray v. Budge*, 14 Idaho, 621, 633-644, 95 Pac. 26 (1908); but courts of equity have no inherent jurisdiction of this character, *Giles v. Harris*, 189 U. S. 475, 23 Sup. Ct. 639, 47 L. Ed. 909 (1903); 3 L. R. A. (N. S.) 382, note (cases). But compare *People ex rel. Attorney General v. Tool*, 35 Colo. 225, 86 Pac. 224, 229, 231, 6 L. R. A. (N. S.) 822, 117 Am. St. Rep. 198 (1905) (election frauds enjoined at suit of attorney general).

**JUDICIAL CONTROL OF POLITICAL PARTIES.**—As to this, both with and without express legislative authorization, see *Stephenson v. Board of Election*

## 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.<sup>1</sup> 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.

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 noth-

Com'rs, 118 Mich. 396, 76 N. W. 914, 42 L. R. A. 214, 74 Am. St. Rep. 402 (1898); Phillips v. Gallagher, 73 Minn. 528, 76 N. W. 285, 42 L. R. A. 222 (1898); People ex rel. Coffey v. Democratic General Committee, 164 N. Y. 335, 58 N. E. 124, 51 L. R. A. 674 (1900); State ex rel. McGranel v. Phelps, 144 Wis. 1, 128 N. W. 1011, 35 L. R. A. (N. S.) 353 (1910); A. H. Tuttle in 1 Mich. L. Rev. 466; F. R. Mechem in 3 Mich. L. Rev. 304.

<sup>1</sup> As to the character of the relief here sought, see *State of Georgia v. Stanton*, ante, p. 106.

ing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.<sup>2</sup>

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 imposed 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.

<sup>2</sup> For the distinction between ministerial and discretionary acts, see, also, *Druecker v. Salomon*, 21 Wis. 621, 630, 94 Am. Dec. 571 (1867); *United States ex rel. Dunlap v. Black*, 128 U. S. 40, 9 Sup. Ct. 12, 32 L. Ed. 35 (1888) (cases).

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 re-



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.<sup>3</sup>

<sup>3</sup> No officer, of whatever rank, can be compelled by mandamus to do a discretionary act, *United States ex rel. Dunlap v. Black*, 128 U. S. 40, 9 Sup. Ct. 12, 32 L. Ed. 354 (1888); nor can an officer of the state or federal executive department be controlled by either mandamus or injunction as to acts of a political or executive character not invading private rights of person or property, *Georgia v. Stanton*, ante, p. 106; *Martin v. Ingham*, 38 Kan. 641, 651, 17 Pac. 162, 167 (1888), where Valentine, J., said: "No court ever attempts, by either Injunction or mandamus, or by any other action or proceeding, to control legislative, judicial, executive, or political, discretion; and never indeed attempts to control any pure legislative, judicial, or executive act of any kind, nor pure discretion of any kind, except when a superior court, on appeal, reviews a decision of an inferior court."

See, also, *In re Legislative Adjournment*, 18 R. I. 824, 27 Atl. 324, 22 L. R. A. 716 (1893), as to sole power of executive to decide constitutional questions addressed to his judgment (cases).

If there be an official duty to exercise discretion this will be enforced, at least against all but the chief executive, though the mode of its exercise will not be prescribed. *Attorney General v. Taggart*, 66 N. H. 362, 370, 371, 29 Atl. 1027, 25 L. R. A. 613 (1890) (cases) (person entitled to governorship mandamus to assume office); *Interstate Commerce Commission v. U. S. ex rel. Humbolt S. S. Co.*, 224 U. S. 474, 484, 32 Sup. Ct. 556, 56 L. Ed. 849 (1912).

It is very generally held that officers below the chief executive (of state or United States) may be mandamus to perform ministerial duties, *United States ex rel. Dunlap v. Black*, above, and *Martin v. Ingham*, above (38 Kan. 649, 17 Pac. 162), and may be enjoined from invading private rights by illegal acts, *Ellingham v. Dye (Ind.)* 99 N. E. 1, 25, 26 (1912).

As to mandamus against the governor to perform ministerial duties, there is a conflict; the weight of authority being against it. See 6 L. R. A. (N. S.) 750, and 3 Mich. L. Rev. 631, collecting cases. The leading cases for and against are, perhaps, *Martin v. Ingham*, above, and *People ex rel. Sutherland v. Governor*, 29 Mich. 320, 18 Am. Rep. 89 (1874). Mandamus to compel interstate rendition was denied in *Kentucky v. Dennison*, 24 How. 66, 16 L. Ed. 717 (1861) [but see comment in *Ex parte Virginia*, 100 U. S. 339, 347, 348, 25 L. Ed. 676 (1880) under fourteenth amendment].

The federal courts have frequently enjoined governors, as members of state boards, *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447 (1873); *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. Ed. 623 (1876); *Rolston v. Missouri Fund Com'rs*, 120 U. S. 390, 7 Sup. Ct. 599, 30 L. Ed. 721 (1887); *Pennoyer v. McConaughy*, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363 (1891); as have also state courts in *Mott v. Pa. R. Co.*, 36 Pa. 9, 33, 72 Am. Dec. 664 (1858) (semble), and *Ellingham v. Dye*, above, 99 N. E. at pages 23-26.

Contra: *Frost v. Thomas*, 26 Colo. 222, 56 Pac. 599, 77 Am. St. Rep. 259 (1899); *State ex rel. Attorney General v. Huston*, 27 Okl. 606, 610, 614, 113 Pac. 190, 34 L. R. A. (N. S.) 380 (1910); *Bates v. Taylor*, 87 Tenn. 319, 11 S. W. 266, 3 E. R. A. 316 (1889) (suggesting a difference in this regard between the powers of state and federal courts) [but compare *Kentucky v. Dennison*, above].

In *United States v. Lee*, 106 U. S. 196, 208, 209, 220, 1 Sup. Ct. 240, 27 L. Ed. 171 (1882), *Miller, J.*, said:

"The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts

McCHORD v. LOUISVILLE & N. R. CO. (1902) 183 U. S. 483, 495-497, 22 Sup. Ct. 165, 46 L. Ed. 289, Mr. Chief Justice FULLER (reversing a federal Circuit Court decree enjoining the Kentucky Railroad Commission from fixing rates under a state statute alleged to be unconstitutional):

"The fixing of rates is essentially legislative in its character, and the general rule is that legislative action cannot be interfered with by injunction. \* \* \*

"In *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 482, 17 Sup. Ct. 161, 165, 41 L. Ed. 518, 524, the general rule was stated and applied, and Mr. Justice Harlan who delivered the opinion of the court, said: "We repeat that when the city council shall pass an ordinance that infringes the rights of the plaintiff, and is unconstitutional and void as impairing the obligation of its contract with the state, it will be time enough for equity to interfere, and by injunction prevent the execution of such ordinance." \* \* \*

"The rule was also applied by Mr. Justice Field in *Alpers v. San Francisco* (C. C.) 32 Fed. 503, where complainant sought an injunction to restrain the passage of an ordinance which he alleged would impair the obligation of a contract he had with the city. Mr. Justice Field said: "This no one will question as applied to the power of the legislature of the state. The suggestion of any such jurisdiction of the court over that body would not be entertained for a moment. The same exemption from judicial interference applies to all legislative bodies, so far as their legislative discretion extends. \* \* \* The courts cannot in the one case forbid the passage of a law nor in the other the passage of a resolution, order, or ordinance. If by either body, the legislature or the board of supervisors, an unconstitutional act be passed, its enforcement may be arrested. The parties seeking to execute the invalid

of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right. \* \* \* No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives."

As to the judicial power to subpoena a chief executive to give testimony, see *Appeal of Hartrauft*, 85 Pa. 433, 27 Am. Rep. 667 (1877) (cases); *Martin v. Ingham*, above, 38 Kan. at pp. 655, 660, 17 Pac. 162.

In a few states the immunity of the governor from judicial control is extended to the officers of the executive department (see cases cited in *Martin v. Ingham*, above, 38 Kan. at page 650, 17 Pac. 162); but the difficulty of maintaining this position is illustrated by the decisions reviewed in *State ex rel. Kinsella v. Eberhart*, 116 Minn. 313, 133 N. W. 857, 39 L. R. A. (N. S.) 788, Ann. Cas. 1913B, 785 (1911) (certiorari finally allowed against governor).

act can be reached by the courts, while the legislative body of the state or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction. The fact that in either case the legislative action threatened may be in disregard of constitutional restraints, and impair the obligation of a contract, as alleged in this case, does not affect the question. It is legislative discretion which is exercised and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary.'"<sup>1</sup>

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## SECTION 2.—DELEGATION OF POWERS

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### OPINION OF THE JUSTICES.

(Supreme Judicial Court of Massachusetts. 1894. 160 Mass. 586, 36 N. E. 488, 23 L. Ed. 113.)

[Advisory opinions given in response to the following questions asked by the state House of Representatives: "(1) Is it constitutional, in an act granting to women the right to vote in town and city elections, to provide that such act shall take effect throughout the commonwealth upon its acceptance by a majority vote of the voters of the whole commonwealth? (2) Is it constitutional to provide in such an act that it shall take effect in a city or town upon its acceptance by a majority vote of the voters of such city or town? (3) Is it constitutional, in an act granting to women the right to vote in town and city elections, to provide that such an act shall take effect throughout the commonwealth upon its acceptance by a majority vote of the voters of the whole commonwealth, including women specially authorized to register and to vote on this question alone?"]

FIELD, C. J., and ALLEN, MORTON, and LATHROP, JJ. \* \* \* The Constitution of Massachusetts was framed after much public discussion, and after 9 of the original 13 states had established Constitutions.

<sup>1</sup> Accord: See cases collected in 13 L. R. A. 844, note. Compare *Ellingham v. Dye*, ante, p. 11, and *State v. Thorson*, ante, p. 17, note. For qualifications of the general rule, see *Spring Valley Water Works v. Bartlett* (C. C.) 16 Fed. 615 (1883), and *Roberts v. City of Louisville*, 92 Ky. 95, 17 S. W. 216, 13 L. R. A. 844 (1891).

Of course the legislature itself may not be compelled by courts to discharge its constitutional duties, no matter of what character, *Turnbull v. Giddings*, 95 Mich. 314, 54 N. W. 887, 19 L. R. A. 853 (1893) (make journal entries); *People ex rel. Woodyatt v. Thompson*, 155 Ill. 451, 475, 40 N. E. 307 (1895) (pass apportionment act); nor can its officers be mandamused to perform discretionary acts, *Ex parte Echols*, 39 Ala. 698, 88 Am. Dec. 749 (1866); though they may be to perform ministerial duties, *State ex rel. Benton v. Elder*, 31 Neb. 169, 47 N. W. 710, 10 L. R. A. 796 (1891) (publish election returns).

The opinions of some of the men engaged in framing these Constitutions are well known. John Adams took a principal part in framing the Constitution of Massachusetts, and his opinions upon government, both before and after its adoption, are found in his published works. The characteristic feature of all these Constitutions is that they establish a government by representatives of the people, and not a government directly by the people. This was the kind of government to which the people were accustomed. All hereditary offices having been abolished, so far as they ever existed in any of the colonies, and appointments to office by the British crown having ceased at the time of the Revolution, the chief executive officers and the members of both branches of the legislature, where there were two branches, were to be elected by the people. But the model adopted was in other respects the English form of government. While a purely democratic form of government existed in the towns of New England, few if any persons seem to have been in favor of such a form of government for the state.

By the Constitution of Massachusetts, as originally adopted, not only were the powers of the representatives of the people limited, but the powers of the people themselves were limited. The people limited their right to vote by requiring for the electors of state officers certain qualifications, among which was a low property qualification. They required, in the persons to be voted for, higher qualifications. \* \* \* They provided for annual elections, and they declared that "the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent." Declaration of Rights, art. 10. \* \* \*

But there is nothing in any part of the Constitution which tends to show that the people desired that any law should ever be submitted to them for approval or rejection. The only expression of this kind relates to the manner of collecting the sentiments of the people in the year 1795, "on the necessity or expediency of revising the Constitution, in order to amendments," found in Const. Mass. c. 6, art. 10. They indeed declared that "all power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them" (Declaration of Rights, art. 5); but they provided for no appeal to themselves from any legislative, executive, or judicial act. They apparently relied upon frequent elections, when the officers were elective; upon the right of meeting and consulting upon the common good; upon the right to petition and of instructing their representatives; upon impeachment; and upon the right of reforming, altering, and totally changing the form of government, when the protection, safety, prosperity, and happiness of the people required it. Id. art. 7. Apparently, it was thought that the persons selected for the executive, legislative, and judicial offices, in the manner prescribed in the Con-

stitution, would be men of good character and intelligence, of some experience in affairs, and of some independence of judgment, and would have a better opportunity of obtaining information, taking part in discussion, and carefully considering conflicting opinions, than the people themselves; and the people therefore put the responsibility of carrying on the government upon their representatives. \* \* \*

The Constitutions of the different states resemble one another in many of their principal provisions, and it generally has been held, whenever the subject has come before the courts, that the legislative power cannot be delegated by the legislature to any other body or authority, and that the people themselves have not retained this power, except where they have expressly provided for it.<sup>1</sup> It is true that a general law can be passed by the legislature, to take effect upon the happening of a subsequent event.<sup>2</sup> Whether this subsequent event can be the adoption of the law by a vote of the people has occasioned some differences of opinion, but the weight of authority is that a general law cannot be made to take effect in this manner.<sup>3</sup> Whether such legislation is submitted to the people as a proposal for a law, to be voted upon by them, and to become a law if they approve it, or, as a law, to take effect if they vote to approve it, the substance of the transaction is that the legislative department declines to take the responsibility of passing the law; but the law has force, if at all, in consequence of the votes of the people. They, ultimately, are the legislators. It seems to us that by the Constitution the senate and the house of representatives have been made the legislative department of the government, and that there has not been reserved to the people any direct part in legislation. The various amendments made to the Constitution since its adop-

<sup>1</sup> Accord (submission of *general* legislation to popular vote): *Barto v. Himrod*, 8 N. Y. 483, 59 Am. Dec. 506 (1853); *Santo v. State*, 2 Iowa, 165, 63 Am. Dec. 487 (1856); *State ex rel. Pearson v. Hayes*, 61 N. H. 264 (1881); *Ex parte Wall*, 48 Cal. 279, 17 Am. Rep. 425 (1874); 23 L. R. A. 113, note (cases).

Contra: *State v. Parker*, 26 Vt. 357 (1854); *Smith v. City of Janesville*, 26 Wis. 291 (1870), affirmed in *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633 (1910).

<sup>2</sup> The determination of the occurrence of such event may be delegated to such officers as the legislature may designate, even though such determination may require the exercise of much judgment. *The Brig Aurora*, 7 Cranch, 382, 3 L. Ed. 378 (1813); *Marshall Field & Co. v. Clark*, 143 U. S. 649, 680-694, 12 Sup. Ct. 495, 36 L. Ed. 294 (1892) (tariff made dependent upon determination of President that duties of other countries on products of United States are unreasonable). See *In re Oliver*, 17 Wis. 681 (1864).

In *State v. Young*, 29 Minn. 474, 550 ff., 9 N. W. 737 (1881), it was denied that legislation could be made dependent upon the opinion of a special non-judicial tribunal as to its constitutionality.

<sup>3</sup> See the arguments upon this point in *People v. Collins*, 3 Mich. 343, 354-356, 380-381, 408-412, 418-420, 425-427 (1854), by an evenly divided court. As to legislation made contingent upon the future adoption of a constitutional amendment enlarging the powers of the legislature, see *Pratt v. Allen*, 13 Conn. 119, 128 (1839); *Etchison Drilling Co. v. Flournoy*, 59 South. 867, 871 (1912, La.). As to legislation made dependent, either as to taking effect or as to extent of operation, upon the future legislative action of another jurisdiction, see *People v. Fire Ass'n of Philadelphia*, 92 N. Y. 311, 44 Am. Rep. 380 (1883) (retaliatory legislation).



tion have not changed its character in this respect. By article 2 and article 9 of amendments to the Constitution an act constituting a town or towns a city government can be passed only with the consent of the inhabitants of such town or towns; and specific amendments to the Constitution, proposed by the general court, must be submitted to the qualified voters of the commonwealth. A city charter resembles a state Constitution in this: that the government of the town is made by the charter a representative government; and it was originally declared that the people alone have a right to institute government, and to change it. Declaration of Rights, art. 7. These amendments, as well as the other amendments, to the Constitution, indicate no intention of having laws submitted to the people for adoption or rejection.

For these reasons, we are of opinion that the first question should be answered in the negative.

The second question requires additional consideration. There have been laws, from the earliest times, which delegated legislative powers to the inhabitants of towns, or permitted legislative powers to be exercised by such inhabitants over subjects which were declared proper for municipal control. Laws conferring additional powers on towns or cities have been passed, and made to take effect in any town or city upon acceptance by the qualified voters of the town or city, or of the city council. Some examples are found in Pub. St. c. 27, §§ 13, 27, 65, 74. Special laws have been passed, conferring special powers on particular towns or cities, and general laws have been passed which relate to towns and cities having a certain population; and the consent of the inhabitants of a city or town, sometimes, has been required, before certain special powers can be used. See Pub. St. c. 44, §§ 2, 7; Id. c. 54, § 13; St. 1887, c. 411, § 92; St. 1891, c. 370. These statutes, in general, relate to local affairs, or to what has been called "police regulations." In *Stone v. City of Charlestown*, 114 Mass. 214, it was decided that a statute was constitutional which united two municipalities, and provided that the act should not take effect unless accepted by the voters of the respective municipalities. It was said: "Amid all the diversity of opinion upon the much-vexed question how far statutes may be made contingent upon being accepted by popular vote, without violating the principle that legislative power cannot be delegated, there is a complete harmony of adjudication in favor of the authority of the legislature, unless controlled by a special constitutional provision upon the subject, to submit statutes dividing or uniting counties or towns, or establishing or enlarging a city, to a vote of the inhabitants of the territory immediately affected."

There has been some conflict of authority upon the constitutionality of what are called "local option laws," which have been principally laws regulating the sale of intoxicating liquors, but they have been held to be constitutional by a majority of the courts which have considered them. They have been held to be constitutional in this commonwealth. *Com. v. Bennett*, 108 Mass. 27. In that case it is said:

"It has been argued in other cases, which have been brought before the court since the argument of the present case, that these statutes are unconstitutional, because they delegate to cities and towns a part of the legislative power. But we can see no ground for such a position. Many successive statutes of the commonwealth have made the lawfulness of sales of intoxicating liquors to depend upon licenses from the selectmen of towns or commissioners of counties, and such statutes have been held to be constitutional. 7 Dane, Abr. 43, 44; Com. v. Blackington, 24 Pick. 352. It is equally within the power of the legislature to authorize a town, by vote of the inhabitants, or a city, by vote of the city council, to determine whether the sale of particular kinds of liquors within its limits shall be permitted or prohibited. This subject, although not embraced within the ordinary power to make by-laws and ordinances, falls within the class of police regulations, which may be intrusted by the legislature, by express enactment, to municipal authority."

Certainly, it is a difficult question to determine how far the principle of local option can be carried, and to what subjects it can be applied. An act granting to women the right to vote in town and city elections does not relate to the powers of towns and cities, which in some respects may well be different in different towns and cities, on account of the number, wealth, and pursuits of the inhabitants. Such an act relates solely to the persons who should be invested with a share of political power. Whether women should be permitted to vote in town and city elections seems to us a matter of general, and not of local, concern. There is nothing in the history of Massachusetts which tends to show that the right to vote in towns and cities on town and city affairs has ever been regarded as a matter of police regulation, or of merely local interest, or as a right which might be granted or withheld by a licensing board. It always has been determined by the legislature by a general law, in force uniformly throughout the commonwealth.

Article 9 of the Declaration of Rights declares that "all elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments." This, in terms, is confined to elections in which the qualifications of the electors and of the persons to be elected are established by the frame of government; but the principle declared has, up to the present time, always been adopted by the legislature, in passing laws relating to the right to vote in the election of town and city officers. The qualified voters in towns in this commonwealth, and their representatives in cities, are possessed of a large measure of political power. They have the taxing power for all municipal purposes, and it is well known that the amount of the city or town tax of any person usually exceeds that of his state and county tax. The tax is imposed on all the inhabitants in the town or city liable to be taxed, and on all

the real property situated within the town or city, whether owned by residents or nonresidents. The power of taxation is one of the essential and fundamental powers of government. It certainly would constitute an anomaly heretofore never known in this commonwealth, if, in some cities and towns, women were permitted to vote on questions which concern taxation, and in other cities and towns were not permitted. The question, we think, comes to this: Whether the legislature, constitutionally, can delegate to the qualified voters of the inhabitants of a city or town the power of granting or refusing to grant to women who are inhabitants the right to vote in city and town affairs. We are not aware that, in any of the states where statutes have been passed conferring suffrage or municipal suffrage upon women, the principle of local option has been adopted in such statutes. \* \* \*

Considering the nature of the power intended to be conferred, the history of legislation on the subject from the earliest times, and the language of the Constitution, we are of opinion that, if a law is to be enacted such as the question contemplates, it must operate uniformly throughout the commonwealth, and that the second question should be answered in the negative.

For the reasons hereinbefore given, without considering others which might be suggested, the third question should be answered in the negative.

HOLMES, J. It is assumed in the questions that the legislature has power to grant women the right to vote in town and city elections. I see no reason to doubt that it has that power.

1. I admit that the Constitution establishes a representative government, not a pure democracy. It establishes a general court, which is to be the law-making power. But the question is whether it puts a limit upon the power of that body to make laws. In my opinion, the legislature has the whole law-making power, except so far as the words of the Constitution, expressly or impliedly, withhold it; and I think that, in construing the Constitution, we should remember that it is a frame of government for men of opposite opinions, and for the future, and therefore not hastily import into it our own views, or unexpressed limitations derived merely from the practice of the past. I ask myself, as the only question, what words express or imply that a power to pass a law subject to rejection by the people is withheld? I find none which do so. The question is not whether the people of their own motion could pass a law without any act of the legislature. That, no doubt, whether valid or not, would be outside the Constitution. So, perhaps, might be a statute purporting to confer the power of making laws upon them. But the question, put in a form to raise the fewest technical objections, is whether an act of the legislature is made unconstitutional by a proviso that, if rejected by the people, it shall not go into effect. If it does go into effect, it does so by the express enactment of the representative body. I see no evidence in the instrument that this question ever occurred to the framers of the Constitution. It is but a short

step further to say that the Constitution does not forbid such a law. I agree that the discretion of the legislature is intended to be exercised. I agree that confidence is put in it as an agent. But I think that so much confidence is put in it that it is allowed to exercise its discretion by taking the opinion of its principal, if it thinks that course to be wise. It has been asked whether the legislature could pass an act subject to the approval of a single man. I am not clear that it could not. The objection, if sound, would seem to have equal force against all forms of local option. But I will consider the question when it arises. The difference is plain between that case and one where the approval required is that of the sovereign body. The contrary view seems to me an echo of Hobbes' theory that the surrender of sovereignty by the people was final. I notice that the case from which most of the reasoning against the power of the legislature has been taken by later decisions states that theory in language which almost is borrowed from the *Leviathan*. *Rice v. Foster*, 4 Har. (Del.) 479, 488. Hobbes urged his notion in the interest of the absolute power of King Charles I, and one of the objects of the Constitution of Massachusetts was to deny it. I answer the first question, "Yes." I may add that, while the tendency of judicial decision seems to be in the other direction, such able judges as Chief Justices Parker, of Massachusetts, Dixon, of Wisconsin, Redfield, of Vermont, and Cooley, of Michigan, have expressed opinions like mine.

2. If the foregoing view of the power of the legislature is right. I am of opinion that the second question also should be answered, "Yes." I find nothing which forbids the legislature to establish a local option upon this point, any more than with regard to the liquor laws. Under the circumstances, I do not argue this or the following question at length.

3. The act suggested by the third question is open to the seeming objection that it might take a part of their power out of the hands of the present possessors, without their assent, except as given by their representatives. But if, as I believe, the legislature could give to women the right to vote, if they accepted it by a preliminary vote, and could impose as a second condition that the grant should not be rejected by the voters of the commonwealth, I do not see why it might not combine the two conditions into one, although, as a result, the grant might become a law against the will of a majority of the male voters. I answer this question, also, "Yes."

KNOWLTON, J. \* \* \* [After answering questions 1 and 3 in the negative, on the ground that the legislature could no more shift to the people the responsibility of deciding that a law should be enacted than that the governor could thus shift the pardoning power or the courts the power of deciding cases:<sup>4</sup>]

<sup>4</sup> That judicial power cannot be delegated by the possessor of it, see *Runkle v. United States*, 122 U. S. 543, 7 Sup. Ct. 1141, 30 L. Ed. 1167 (1887) (court-martial).

This is the rule in regard to what is strictly legislation,—that is to say, the enactment of general laws for the people of a state,—but it is very generally held that a legislature may submit to the voters of towns and cities questions which are local in their nature, or which have in them a local element, such as to make it proper that they should be dealt with differently in different places. This rule prevails in Massachusetts. \* \* \*

The doctrine on which these statutes are founded is not that the legislature may delegate legislative authority,—that is, authority to enact laws for all the people of the commonwealth,—but that it may submit to the voters of a city or town the right to vote on any question which may affect their interests differently from the interests of those in other parts of the commonwealth. In doing this, the legislature recognizes the principle of local self-government, which has always been a distinctive feature of our New England system.

Voting, in city and town elections, is simply a part of the management of the city's or town's business. It can in no way affect the state at large. The legislature may give cities and towns as large liberty as it chooses in regard to any question which is local. If the education, or experience in business, or wealth, of women, as compared with that of men, or the relative number of women and men, differs materially in different municipalities, so as to make the considerations properly to be regarded in favor of allowing women to vote in town elections much stronger in one town than in another, the legislature may leave to the voters of the town the question whether they will extend municipal suffrage to women. I think the legislature may find great differences in different parts of the commonwealth in regard to the desirability of the proposed change, and that the question to be considered is, in part at least, a local one. \* \* \*

BARKER, J. [Answering all questions, yes, and referring to last question:] \* \* \* Nor is it, to my mind, an objection to the validity of a law so framed that the body whose further assent is required is composed in part of inhabitants other than qualified voters. In the case of acts of incorporation the members of the voting body need not be even inhabitants, and yet without their assent the act is not law, and with their assent it is law.<sup>5</sup> \* \* \*

<sup>5</sup> But see the distinction between the validity of popular assent to proffered acts of incorporation, or to authority to tax or to make contracts or to do administrative acts, and a similar assent to legislative acts prescribing rules of conduct, discussed in *People v. Collins*, 3 Mich. 343, 378-380 (1854); *City of San Antonio v. Jones*, 28 Tex. 19, 32 (1866); *Locke's Appeal*, 72 Pa. 491, 508, 13 Am. Rep. 716 (1873).

LOCAL OPTION LEGISLATION.—The principle of local option legislation is generally upheld without express constitutional authorization.

"We may concede that the lawmaking body of the state is not authorized to submit to a popular vote of the state the question whether or not an act proposed by it shall become a law. This court has so held in a number of cases. \* \* \* But while this is so, it does not follow by any means that the lawmaking body may not reserve to the electors of a subdivision of the state—included within the intended scope of operation on an act designed



UNITED STATES *v.* GRIMAUD.

(Supreme Court of United States, 1910. 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563.)

[Error to the federal District Court for the Southern District of California. Congress passed various acts for the establishment and management of forest reservations upon the public lands, but permitting the entry of persons for lawful purposes, provided that they complied with the rules and regulations covering such reservations (30 Stat. 36—1897). It was also provided (30 Stat. 35) that the Secretary of Agriculture may make such rules and regulations and establish such service as will insure the objects of such reservation;

to have effect upon local government conditions—the right to determine on popular vote whether or not they will advantage themselves of the act. If an act in question is complete in itself, and requires nothing further to give it validity as a legislative act, it is not vulnerable to attack on constitutional grounds simply because the limits of its operation are made to depend upon a vote of the people.”—Bishop, J., in *Eckerson v. City of Des Moines*, 137 Iowa, 452, 478, 115 N. W. 177 (1908) (option to adopt commission form of city government). The cases and arguments on both sides of the question are fully collected in *State ex rel. Witter v. Forkner*, 94 Iowa, 1, 62 N. W. 772, 28 L. R. A. 206 (1895), and *Fouts v. Hood River*, 46 Or. 492, 81 Pac. 370, 1 L. R. A. (N. S.) 483, 7 Ann. Cas. 1160 (1905). See, also, the elaborate opinions in *People v. Collins*, 3 Mich. 343 (1854).

Nor is such legislation generally held to violate constitutional prohibitions against special legislation. *Adams v. City of Beloit*, 105 Wis. 363, 81 N. W. 869, 47 L. R. A. 441 (1900); *Cole v. Dorr*, 80 Kan. 251, 101 Pac. 1016, 22 L. R. A. (N. S.) 534 (1909). See, however, the distinctions taken in *State ex rel. Childs v. Copeland*, 66 Minn. 315, 69 N. W. 27, 34 L. R. A. 777, 61 Am. St. Rep. 410 (1896).

LEGISLATIVE POWER OF MUNICIPAL CORPORATIONS.—“It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities, and general affairs by the central authority; and hence, while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self-government has never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of the authority to prescribe local regulations, according to immemorial practice, subject, of course, to the interposition of the superior in cases of necessity.”—Fuller, C. J., in *Stoutenburgh v. Hennick*, 129 U. S. 141, 147, 9 Sup. Ct. 256, 32 L. Ed. 637 (1889) (Dist. of Columbia). Congress has generally given the legislatures of the organized territories “powers \* \* \* nearly as extensive as those exercised by any state legislature.” *Hornbuckle v. Toombs*, 18 Wall. 648, 655, 656, 21 L. Ed. 966 (1874). The wide discretionary power of local self-government that may be vested in municipal subdivisions of the state is often frankly recognized as an historical exception to the general rule that the substance of legislative power may not be delegated. *Fox v. McDonald*, 101 Ala. 51, 67-68, 13 South. 416, 21 L. R. A. 529, 46 Am. St. Rep. 98 (1892); *Brodline v. Revere*, 182 Mass. 598, 600, 66 N. E. 607 (1903).

The form that local municipal government may take is a matter of legislative discretion. It may be representative, a pure democracy, or by appointed boards or officers.

“The provision for the so-called initiative and referendum in regard to the adoption of ordinances is not unconstitutional. Legislation in towns, by by-laws, in regard to subjects strictly of local concern, has been a part of the law of Massachusetts from the earliest times. Opinions of the Justices, 160 Mass. 586, 590, 36 N. E. 488, 23 L. R. A. 113. Whether such legislation shall be inaugurated by the people, or entirely by a representative body or board of

namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished, as provided in R. S. U. S. § 5388. The defendants were indicted for grazing sheep on the Sierra Forest Reserve without having obtained the permission required by the regulations adopted by the Secretary of Agriculture. They demurred on the ground that the making of such regulations could not be delegated to the Secretary and their violation made a penal offense. The demurrers were sustained, and this judgment was at first affirmed by the Supreme Court by a divided vote. Upon a rehearing the following opinion was given:]

Mr. Justice LAMAR. \* \* \* Under these acts, therefore, any use of the reservation for grazing or other lawful purpose was re-

officers, is a matter of regulation in regard to which our Constitution is silent. It is therefore for the General Court to determine by enactment. The provisions of the Constitution which forbid the adoption of the so-called initiative and referendum in general legislation do not extend to the making of by-laws and ordinances by towns or cities under the authority of the Legislature, in regard to subjects of local concern. Opinions of the Justices, 160 Mass. 586, 589, 36 N. E. 488, 23 L. R. A. 113."—*Graham v. Roberts*, 200 Mass. 152, 158, 85 N. E. 1009 (1908), by Knowlton, C. J. Accord: *Clarke v. City of Rochester*, 28 N. Y. 605, 634 (1864); *In re Pfahler*, 150 Cal. 71, 88 Pac. 270, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911 (1906); *Dorr v. United States*, 195 U. S. 138, 24 Sup. Ct. 808, 49 L. Ed. 128, 1 Ann. Cas. 697 (1904) (Philippine Commission); *United States v. Heinszen*, 206 U. S. 370, 384, 385, 27 Sup. Ct. 742, 51 L. Ed. 1098, 11 Ann. Cas. 688 (1907) (President). See, also, *Brodhine v. Revere*, 182 Mass. 596, 600, 601, 66 N. E. 607 (1903). Contra: *Ex parte Farnsworth*, 61 Tex. Cr. R. 342, 135 S. W. 538 (1911) (local initiative and referendum).

In principle, the above doctrine seems to include all forms of local option legislation, as has been judicially observed by Deemer, J., in *State ex rel. Witter v. Forkner*, 94 Iowa, 1, 13, 62 N. W. 772, 28 L. R. A. 206 (1895), quoting with approval from Cooley, *Const. Lim.* 144, 145 (6th Ed.): "The same reason would apply in favor of permitting the people of the locality to accept or reject for themselves a particular police regulation, since this is only allowing less extensive powers of local government than a municipal charter would confer; and the fact that the rule of law on that subject might be different in different localities, according as the people accepted or rejected the regulation, would not seem to affect the principle, when the same result is brought about by the different regulations which municipal corporations establish for themselves in the exercise of an undisputed authority."

CONSTITUTIONAL RIGHT TO LOCAL SELF-GOVERNMENT.—Apart from express constitutional provisions to the contrary, it is generally held that the delegation of powers of local self-government is wholly within the discretion of the legislature and may be abridged or abrogated at its pleasure. *People v. Draper*, 15 N. Y. 532, 543-546 (1857); *State v. Smith*, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829 (1886); *Commonwealth v. Plaisted*, 148 Mass. 375, 383-387, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. Rep. 566 (1889); *Commonwealth v. Moir*, 199 Pa. 534, 49 Atl. 351, 53 L. R. A. 837, 85 Am. St. Rep. 801 (1901); *Redell v. Moores*, 63 Neb. 219, 88 N. W. 243, 55 L. R. A. 740, 93 Am. St. Rep. 431 (1901); *Hunter v. Pittsburgh*, 207 U. S. 161, 28 Sup. Ct. 40, 52 L. Ed. 151 (1907). Contra (as to strictly local functions): *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103 (1871); *State ex rel. Jameson v. Denny*, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79 (1888). See cases collected in 13 *Harv. L. Rev.* 441, 570, 638; 14 *Harv. L. Rev.* 20, 116; 15 *Harv. L. Rev.* 463; 43 L. R. A. 465 ff.; 1 L. R. A. (N. S.) 512 ff. The entire subject is discussed in *Gray, Lim. of Taxing Power*, §§ 616-691a. The federal Constitution secures no rights of local self-government to state municipalities. *Hunter v. Pittsburgh*, above. As to taxation, see *Kelly v. Pittsburgh*, post, p. 640, note.

quired to be subject to the rules and regulations established by the Secretary of Agriculture. To pasture sheep and cattle on the reservation, at will and without restraint, might interfere seriously with the accomplishment of the purposes for which they were established. But a limited and regulated use for pasturage might not be inconsistent with the object sought to be attained by the statute. The determination of such questions, however, was a matter of administrative detail. What might be harmless in one forest might be harmful to another. What might be injurious at one stage of timber growth, or at one season of the year, might not be so at another.

In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management. Each reservation had its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions, Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power. The authority actually given was much less than what has been granted to municipalities by virtue of which they make by-laws, ordinances, and regulations for the government of towns and cities. Such ordinances do not declare general rules with reference to rights of persons and property, nor do they create or regulate obligations and liabilities, nor declare what shall be crimes, nor fix penalties therefor.<sup>1</sup>

By whatever name they are called, they refer to matters of local management and local police. *Brodvine v. Revere*, 182 Mass. 599, 66 N. E. 607. They are "not of a legislative character in the highest sense of the term; and as an owner may delegate to his principal agent the right to employ subordinates, giving to them a limited discretion, so it would seem that Congress might rightfully intrust to the local legislature [authorities] the determination of minor matters." *Butte City Water Co. v. Baker*, 196 U. S. 126, 25 Sup. Ct. 211, 49 L. Ed. 412.<sup>2</sup>

It must be admitted that it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations. This difficulty has often been recognized, and was referred to by Chief Justice Marshall in *Wayman v. Southard*,

<sup>1</sup> But Congress has ordinarily delegated to territorial legislatures general legislative powers. See *Davis v. Beason*, 133 U. S. 333, 10 Sup. Ct. 299, 33 L. Ed. 637 (1890) (denying suffrage to polygamists); *New Mexico ex rel. McLean v. Denver & R. G. R. Co.*, 203 U. S. 38, 27 Sup. Ct. 1, 51 L. Ed. 78 (1906) (penal regulation of interstate commerce); *Maynard v. Hill*, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654 (1888) (legislative divorce); *Ex parte Larkin*, 1 Okl. 52, 25 Pac. 745, 11 L. R. A. 418 (1891) (general power to define and punish crime), approved in *United States v. Pridgeon*, 153 U. S. 48, 53, 54, 14 Sup. Ct. 746, 38 L. Ed. 631 (1894).

<sup>2</sup> Holding that Congress might delegate to the miners of a district or to state legislatures power to make regulations for locating mines upon the public domain. See, also, *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113 (1902) (Congress may give effect to local exemption laws in the national bankruptcy act). Compare *Ex parte Siebold*, post, p. 942; *Second Employers' Liability Cases*, post, p. 953, note.

10 Wheat. 42, 6 L. Ed. 262, where he was considering the authority of courts to make rules.<sup>3</sup> He there said; "It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others powers which the legislature may rightfully exercise itself." What were these non-legislative powers which Congress *could* exercise, but which might also be delegated to others, was not determined, for he said: "The line has not been exactly drawn which separates those important subjects which *must* be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."

From the beginning of the government, various acts have been passed conferring upon executive officers power to make rules and regulations,—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions "power to fill up the details" by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress, or measured by the injury done.

Thus it is unlawful to charge unreasonable rates or to discriminate between shippers, and the Interstate Commerce Commission has been given authority to make reasonable rates and to administer the law against discrimination. *Interstate Commerce Commission v. Illinois C. R. Co.*, 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280; *Interstate Commerce Commission v. Chicago, R. I. & P. R. Co.*, 218 U. S. 88, 30 Sup. Ct. 651, 54 L. Ed. 946. Congress provided that after a given date, only cars with drawbars of uniform height should be used in interstate commerce, and then constitutionally left to the Commission the administrative duty of fixing a uniform standard. *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 287, 28 Sup. Ct. 616, 52 L. Ed. 1064. In *Union Bridge Co. v. United States*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523, in *re Kollock*, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813, and *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525, it appeared from the statutes involved that Congress had either expressly or by necessary implication made it unlawful, if not criminal, to obstruct navigable streams; to sell unbranded oleomargarine; or to import unwholesome teas. With this unlawfulness as a predicate, the executive officers were authorized to make rules and regulations appropriate to the several matters covered by the various acts. A violation of these rules was then made an offense punishable as prescribed by Congress. But in

<sup>3</sup> It was here held that the courts may be authorized to regulate their procedure

making these regulations the officers did not legislate. They did not go outside of the circle of that which the act itself had affirmatively required to be done, or treated as unlawful if done. But confining themselves within the field covered by the statute, they could adopt regulations of the nature they had thus been generally authorized to make, in order to administer the law and carry the statute into effect.<sup>4</sup> \* \* \*

[After distinguishing the case of *United States v. Eaton*, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591:] In *Union Bridge Co. v. United States*, 204 U. S. 364, 386, 27 Sup. Ct. 367, 51 L. Ed. 533, Mr. Justice Harlan, speaking for the court, said: "By the statute in question, Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span, or other defects. It stopped, however, with this declaration of a general rule, and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power." \* \* \*

In *Brodhine v. Revere*, 182 Mass. 598, 66 N. E. 607, a boulevard and park board was given authority to make rules and regulations for the control and government of the roadways under its care. It was there held that the provision in the act that breaches of the rules thus made should be breaches of the peace, punishable in any court having jurisdiction, was not a delegation of legislative power which was unconstitutional. The court called attention to the fact that the punishment was not fixed by the board, saying that the making of the rules was administrative, while the substantive legislation was in the statute, which provided that they should be punished as breaches of the peace.<sup>5</sup>

That "Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Marshall Field & Co. v. Clark*, 143 U. S. 649, 692, 12 Sup. Ct. 495, 36 L. Ed. 309. But the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense. \* \* \*

The Secretary of Agriculture could not make rules and regulations for any and every purpose. *Williamson v. United States*, 207 U. S.

<sup>4</sup> Where the violation of administrative regulations is made criminal, such regulations "must have clear legislative basis." *United States v. George*, 228 U. S. 14, 22, 33 Sup. Ct. 412, 415, 57 L. Ed. — (1913).

<sup>5</sup> Accord: *Pierce v. Doolittle*, 130 Iowa, 333, 106 N. W. 751 (1906) (rules of board of health), annotated in 6 L. R. A. (N. S.) 143; *Whaley v. State*, 168 Ala. 152, 52 South. 941, 30 L. R. A. (N. S.) 499 (1909) (rules of street car companies regarding transfers) [compare *Dicey*, Law of the Const. (4th Ed.) 89-93].



462, 28 Sup. Ct. 163, 52 L. Ed. 297. As to those here involved, they all relate to matters clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined. The lands are set apart as a forest reserve. He is required to make provision to protect them from depredations and from harmful uses. He is authorized "to regulate the occupancy and use and to preserve the forests from destruction." A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty. \* \* \*

Judgments reversed.\*

\* Accord: Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co., 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713 (1908) (excellent discussion of commission rate-making and related topics); State v. Atlantic Coast Line R. Co., 56 Fla. 617, 47 South. 969 (1908) (general regulation of carriers by commission), annotated in 32 L. R. A. (N. S.) 639.

For the limits of the discretion that may be thus delegated, see State v. Great Northern R. Co., 100 Minn. 445, 111 N. W. 289, 10 L. R. A. (N. S.) 250 (1907) (undefined power to supervise increases of corporate stock); Hewitt v. State Board of Medical Examiners, 148 Cal. 590, 84 Pac. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750 (1906) (power to revoke physician's license); State v. Butler, 105 Me. 91, 73 Atl. 560, 24 L. R. A. (N. S.) 744, 18 Ann. Cas. 484 (1909) (power to create office of special prosecutor) (cases).

Compare Senate of Happy Home Club of America v. Board of Sup'rs of Alpena Co., 99 Mich. 117, 57 N. W. 1101, 23 L. R. A. 144 (1891).

In Brodline v. Revere, 182 Mass. 598, 601, 66 N. E. 607, 608 (1903), Knowlton, C. J., said (regarding the penal enforcement of rules made by local boards of health): "The validity of these statutes, which has long been recognized, stands upon one or both of two grounds: They may be considered as being within the principle permitting local self-government as to such matters; the board of health being treated as properly representing the inhabitants in making regulations, which often are needed at short notice, and which could not well be made, in all kinds of cases, by the voters in town meeting assembled. Perhaps some of these statutes may also be justified constitutionally on the ground that the work of the board of health is only a determination of details in the nature of administration, which may be by a board appointed for that purpose, and that the substantive legislation is that part of the statute which prescribes a penalty for the disobedience of the rules which they make as agents performing executive and administrative duties."

Compare with the cases in this section the British doctrine which permits a colonial legislature, clothed with limited powers under an act of Parliament, to delegate its powers at discretion. Reg. v. Burah, 3 A. C. 889 (1878) (India); Hodge v. Queen, 9 A. C. 117 (1883) (Canada); Powell v. Apollo Co., 10 A. C. 282 (1885) (New South Wales).

## PART II

### FUNDAMENTAL RIGHTS

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#### CHAPTER IV

#### POLITICAL RIGHTS

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#### SECTION 1.—CITIZENSHIP AND NATURALIZATION

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#### 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, 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 "ligality," "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, *Conf. 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<sup>1</sup> 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.<sup>2</sup> \* \* \*

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

<sup>1</sup> The authorities quoted and cited by the court use the words "British dominions" instead of "England."

<sup>2</sup> See, to this effect, *Lynch v. Clarke*, 1 Sandf. Ch. 583 (N. Y., 1844) (the leading case before the fourteenth amendment).

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. \* \* \*

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, *Conf. 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, Switzer-



and, 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. \* \* \*

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;<sup>3</sup> 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,

<sup>3</sup> See Taney, C. J., 19 How. 403-427, 15 L. Ed. 691, and compare the opposing view of Curtis, J., 19 How. 569-588, 15 L. Ed. 691. Before the fourteenth amendment it was admitted that a state might confer a purely domestic citizenship upon a person who did not thereby become a United States citizen and was neither entitled to the privileges of citizenship in other states nor to sue in the federal courts as a citizen of a state. See the observations of Taney, C. J., in *Scott v. Sandford*, 19 How. 405, 406, 15 L. Ed. 691, and of Curtis, J., 19 How. 579, 580, 586, 15 L. Ed. 691 (1857). Presumably the same is true to-day. See *Slaughter House Cases*, post, p. 219, and *Hammerstein v. Lyde* (D. C.) 200 Fed. 165 (1912) (discussing nature of state citizenship). Compare the practice of several states in permitting aliens to vote, after they have declared an intention to become United States citizens. See *Minor v. Happersett*, post, p. 113.

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 uncertainties 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 con-



tinual 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.<sup>4</sup> \* \* \*

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

<sup>4</sup> See, on these topics, Van Dyne, *Citizenship*, 32-50.

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. \* \* \*

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.<sup>5</sup> 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

<sup>5</sup> The reasons for this are discussed in *Scott v. Sandford*, 19 How. 393, 405, 406, 579, 580, 586, 15 L. Ed. 691 (1857).

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).<sup>6</sup> 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

<sup>6</sup> As to the meaning of "free white persons," see *In re Halladjian* (C. C.) 174 Fed. 834 (1909); *United States v. Balsara*, 180 Fed. 691, 103 C. C. A. 660 (1910); *In re Alverto* (D. C.) 198 Fed. 688 (1912); *In re Young* (D. C.) 198 Fed. 715 (1912).

The collective naturalization of alien inhabitants of a territory may be effected upon its admission as a state, by the recognition of them in the act of admission as voters and members of the new political community. *Boyd v. Nebraska ex rel. Thayer*, 143 U. S. 135, 12 Sup. Ct. 375, 36 L. Ed. 103 (1892).

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).<sup>7</sup> 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.<sup>8</sup>

[FULLER, C. J., gave a dissenting opinion, in which HARLAN, J., concurred.]

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## SECTION 2.—SUFFRAGE

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### MINOR v. HAPPERSETT.

(Supreme Court of United States, 1874. 21 Wall. 162, 22 L. Ed. 627.)

[Error to the Supreme Court of Missouri. Mrs. Minor sued in an inferior state court a registrar of voters in Missouri for refusing to register her; his refusal being based upon the terms of the state Constitution which confined the suffrage to male citizens of the United States. Judgment for the registrar was affirmed by the state Supreme Court.]

Mr. Chief Justice WAITE. \* \* \* It is contended that the provisions of the Constitution and laws of the state of Missouri, which

<sup>7</sup> Prior to the statute of 1868 the federal courts had generally recognized the English common-law rule that forbade the renunciation of allegiance without the sovereign's consent. See John B. Moore in 14 Harv. Law Rev. 179.

<sup>8</sup> Article III of the Russian treaty ceding Alaska (1867) excepted from citizenship the "uncivilized native tribes" therein. See Downes v. Bidwell, post, at p. 1009.

Article IX of the federal treaty with Spain (1898) provides: "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the congress."

Are the native inhabitants of Porto Rico and the Philippines, born before the treaty, citizens of the United States? See *Gonzales v. Williams*, 192 U. S. 1, 24 Sup. Ct. 171, 48 L. Ed. 317 (1904); *F. R. Coudert, Jr.*, in 3 Col. L. Rev. 13 (1903). What is the status of those born after the treaty? See the reasoning in *Downes v. Bidwell*, post, p. 988. Compare 34 Stat. 596, § 30 (1906), applying the federal naturalization laws to non-citizens "who owe permanent allegiance to the United States."

On the topic of American citizenship in general, see *D. O. McGovney* in 11 Col. L. Rev. 231, 326 (1911).

CORPORATIONS AND CITIZENSHIP.—As to how far various clauses in the Constitution concerning the rights of citizens affect corporations or their incorporators, see *Paul v. Virginia*, post, p. 200; and *Ohio & M. Ry. v. Wheeler*, post, p. 1340.

confine the right of suffrage and registration therefor to men, are in violation of the Constitution of the United States, and therefore void. The argument is, that as a woman, born or naturalized in the United States and subject to the jurisdiction thereof, is a citizen of the United States and of the state in which she resides, she has the right of suffrage as one of the privileges and immunities of her citizenship, which the state cannot by its laws or Constitution abridge.

There is no doubt that women may be citizens. They are persons, and by the fourteenth amendment "all persons born or naturalized in the United States and subject to the jurisdiction thereof" are expressly declared to be "citizens of the United States and of the state wherein they reside." But, in our opinion, it did not need this amendment to give them that position. Before its adoption the Constitution of the United States did not in terms prescribe who should be citizens of the United States or of the several states, yet there were necessarily such citizens without such provision. There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.

For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words "subject," "inhabitant," and "citizen" have been used, and the choice between them is sometimes made to depend upon the form of the government. Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the states upon their separation from Great Britain, and was afterwards adopted in the Articles of Confederation and in the Constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation, and nothing more. \* \* \* [Here follow references to the acquisition of citizenship by birth and naturalization—see *United States v. Wong Kim Ark*, ante, p. 128, and the federal naturalization laws are shown to be applicable to women, as well as the right to sue in the federal courts on grounds of diverse citizenship.]

The fourteenth amendment did not affect the citizenship of women any more than it did of men. In this particular, therefore, the rights of Mrs. Minor do not depend upon the amendment. She has always been a citizen from her birth, and entitled to all the privileges and immunities of citizenship. The amendment prohibited the state



of which she is a citizen, from abridging any of her privileges and immunities as a citizen of the United States; but it did not confer citizenship on her. That she had before its adoption. \* \* \* The Constitution does not define the privileges and immunities of citizens. For that definition we must look elsewhere. In this case we need not determine what they are, but only whether suffrage is necessarily one of them.

It certainly is nowhere made so in express terms. The United States has no voters in the states of its own creation. The elective officers of the United States are all elected directly or indirectly by state voters. The members of the House of Representatives, are to be chosen by the people of the states, and the electors in each state must have the qualifications requisite for electors of the most numerous branch of the state legislature. Constitution, art. 1, § 2. Senators are to be chosen by the legislatures of the states, and necessarily the members of the legislature required to make the choice are elected by the voters of the state. *Id.* art. 1, § 3. Each state must appoint, in such manner as the legislature thereof may direct, the electors to elect the President and Vice President. *Id.* art. 2, § 2. \* \* \*

The [fourteenth] 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. \* \* \*

It is clear, therefore, we think, that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted. This makes it proper to inquire whether suffrage was co-extensive with the citizenship of the states at the time of its adoption. If it was, then it may with force be argued that suffrage was one of the rights which belonged to citizenship, and in the enjoyment of which every citizen must be protected. But if it was not, the contrary may with propriety be assumed.

When the federal Constitution was adopted, all the states, with the exception of Rhode Island and Connecticut, had Constitutions of their own. These two continued to act under their charters from the Crown. Upon an examination of those Constitutions, we find that in no state were all citizens permitted to vote. Each state determined for itself who should have that power. \* \* \*

[The states are shown to have limited the suffrage variously, by prescribing qualifications of race, sex, age, property, and tax-paying. After referring to the federal guaranty of a republican form of government to the states, Const. art. 4, § 4:]

As has been seen, all the citizens of the states were not invested with the right of suffrage. In all, save perhaps New Jersey, this right was only bestowed upon men and not upon all of them. Under these circumstances it is certainly now too late to contend that a government is not republican, within the meaning of this guaranty

in the Constitution, because women are not made voters. \* \* \* Besides this, citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage. Thus, in Missouri, persons of foreign birth, who have declared their intention to become citizens of the United States, may under certain circumstances vote. The same provision is to be found in the Constitutions of Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Minnesota, and Texas.<sup>1</sup> \* \* \*

Being unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one, and that the Constitutions and laws of the several states which commit that important trust to men alone are not necessarily void, we affirm the judgment.

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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

<sup>1</sup> For a more recent list of such states, about a dozen in number, see Stimson, *Fed. and State Consts.* § 240 (1908).

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.<sup>1</sup>

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Ex parte YARBROUGH.

(Supreme Court of United States, 1884. 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274.)

[Petition for writ of habeas corpus to release several persons convicted in the federal Circuit Court for the Northern District of Georgia of conspiring to intimidate a colored person from voting for member of congress, in violation of a federal statute.]

Mr. Justice MILLER. \* \* \* That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration. If this government is anything more than a mere aggregation of delegated agents of other states and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends, from violence and corruption. If it has not this power, it is left helpless before the two great natural and

<sup>1</sup> See *United States v. Anthony*, 11 Blatch. 200, 205, Fed. Cas. No. 14,459 (1873); *Yiek Wo v. Hopkins*, 118 U. S. 356, 370, 6 Sup. Ct. 1064, 30 L. Ed. 220 (1886); *Murphy v. Ramsey*, 114 U. S. 15, 43, 5 Sup. Ct. 747, 29 L. Ed. 47 (1885).

Regarding certain provisions of the Mississippi Constitution, excluding from the suffrage persons not paying poll taxes or who had been convicted of certain crimes. McKenna, J., said, in *Williams v. Mississippi*, 170 U. S. 213, 221, 222, 18 Sup. Ct. 583, 587 (42 L. Ed. 1012) (1898): "The Constitution provides for the payment of a poll tax, and by a section of the Code its payment cannot be compelled by a seizure and sale of property. We gather from the brief of counsel that its payment is a condition of the right to vote, and, in a case to test whether its payment was or was not optional (*Batcliff v. Beal*, 74 Miss. 247, 20 South. 865, 34 L. R. A. 472), the supreme court of the state said: 'Within the field of permissible action under the limitations imposed by the federal Constitution, the convention swept the field of expedients, to obstruct the exercise of suffrage by the negro race.' And further the court said, speaking of the negro race: 'By reason of its previous condition of servitude and dependencies, this race had acquired or accentuated certain peculiarities of habit, of temperament, and of character, which clearly distinguished it as a race from the whites; a patient, docile people, but careless, landless, migratory within narrow limits, without forethought, and its criminal members given to furtive offenses, rather than the robust crimes of the whites. Restrained by the federal Constitution from discriminating against the negro race, the convention discriminates against its characteristics, and the offenses to which its criminal members are prone.' But nothing tangible can be deduced from this. If weakness were to be taken advantage of, it was to be done 'within the field of permissible action under the limitations

historical enemies of all republics, open violence and insidious corruption. \* \* \*

The congress [has] been slow to exercise the powers expressly conferred upon it in relation to elections by the fourth section of the first article of the Constitution. This section declares that "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 make or alter such regulations, except as to the place of choosing senators." It was not until 1842 that congress took any action under the power here conferred. \* \* \*

[Here are mentioned federal statutes requiring members of the house of representatives to be elected by districts, fixing a uniform day for the election of representatives and of presidential electors, and regulating the election of senators.]

Will it be denied that it is in the power of that body to provide laws for the proper conduct of those elections? To provide, if necessary, the officers who shall conduct them and make return of the result? And especially to provide, in an election held under its own authority, for security of life and limb to the voter while in the exercise of this function? Can it be doubted that congress can, by law, protect the act of voting, the place where it is done, and the man who votes from personal violence or intimidation, and the election itself from corruption and fraud? \* \* \*

It is said that the parties assaulted in these cases are not officers of the United States, and their protection in exercising the right to vote by congress does not stand on the same ground. But the distinction is not well taken. The power in either case arises out of the circum-

imposed by the federal Constitution,' and the means of it were the alleged characteristics of the negro race, not the administration of the law by officers of the state. Besides, the operation of the Constitution and laws is not limited by their language or effects to one race. They reach weak and vicious white men as well as weak and vicious black men, and whatever is sinister in their intention, if anything, can be prevented by both races by the exertion of that duty which voluntarily pays taxes and refrains from crime."

An amendment to the Oklahoma Constitution (1910), requiring voters to be able to read and write any section of the state Constitution, but excepting therefrom persons who, prior to January 1, 1866, were entitled to vote under any form of government, or who on that date resided in a foreign nation or who were lineal descendants of such persons, was held not to violate either the fourteenth or the fifteenth amendments, in *Atwater v. Hassett*, 27 Okl. 292, 315, 316, 111 Pac. 802, 812 (1910); *Williams, J.*, saying: "To say, because plaintiff or his ancestors, who were not entitled to vote under any organized form of government on or prior to January 1, 1866, or who were not then non-resident aliens having since come to the United States and become citizens by naturalization, that said amendment discriminates against them on account of race or color, is as unfounded as to say that a property qualification discriminates on account of previous condition of servitude for the reason that, if a man had not been held in bondage, he would have been able to acquire property, as a slave could not acquire property any more than he could vote. It is a matter of common knowledge that the population of this state is cosmopolitan, embracing people of every creed and race from practically every state in the Union. All of those persons who on January 1, 1866, or at any time prior thereto, were entitled to vote under any form of government



stance that the function in which the party is engaged or the right which he is about to exercise is dependent on the laws of the United States. In both cases it is the duty of that government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing. This duty does not arise solely from the interest of the party concerned, but from the necessity of the government itself that its service shall be free from the adverse influence of force and fraud practiced on its agents, and that the votes by which its members of congress and its president are elected shall be the *free* votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice.

This proposition answers, also, another objection to the constitutionality of the laws under consideration, namely, that the right to vote for a member of congress is not dependent upon the Constitution or laws of the United States, but is governed by the law of each state respectively. If this were conceded, the importance to the general government of having the actual election—the voting for those members—free from force and fraud is not diminished by the circumstance that the qualification of the voter is determined by the law of the state where he votes. It equally affects the government; it is as indispensable to the proper discharge of the great function of legislating for that government, that those who are to control this legislation shall not owe their election to bribery or violence, whether the class of persons who shall vote is determined by the law of the state, or by law of the United States, or by their united result.

But it is not correct to say that the right to vote for a member of

or state or territory of this Union, or who at that time residing in some foreign nation, afterwards came to the United States and by naturalization became citizens of the United States, and their lineal descendants, regardless of race or previous condition of servitude, are permitted to vote at the elections in this state, without complying with the educational requirements of said provision. That is a classification based upon a reason; that is, that any person who was entitled to vote under a form of government on or prior to said date is still presumed to be qualified to exercise such right, and the presumption follows as to his offspring—that is, that the virtues and intelligence of the ancestor will be imputed to his descendants, just as the iniquity of the fathers may be visited upon the children unto the third and fourth generation. But as to those who were not entitled to vote under any form of government on said date, or at any prior time, and their descendants, there is no presumption in favor of their qualification, and the burden is upon them to show themselves qualified. This does not apply to any one race, but to every race that falls within this disqualification. The alien who resided in some foreign country on the 1st day of January, 1866, who was not entitled to vote under that form of government, and who afterwards came to the United States, and became naturalized, was required to undergo an examination to show himself qualified and fitted for citizenship, and when the courts of this republic, or the different states thereof, exercising the powers of naturalization, have examined and passed upon his qualification, the presumption in favor of his qualification is recognized."

Contra, as to fifteenth amendment, see *Anderson v. Myers* (C. C.) 182 Fed. 223 (1910) (§500 property qualification for municipal suffrage, with exceptions similar to those of Oklahoma).

Congress does not depend on the Constitution of the United States. The office, if it be properly called an office, is created by that Constitution, and by that alone. It also declares how it shall be filled, namely, by election. Its language is: "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." Article 1, § 2. The states, in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of congress. Nor can they prescribe the qualification for voters for those *eo nomine*. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of congress in that state. It adopts the qualification thus furnished as the qualification of its own electors for members of congress. It is not true, therefore, that electors for members of congress owe their right to vote to the state law, in any sense which makes the exercise of the right to depend exclusively on the law of the state.

Counsel for petitioners, seizing upon the expression found in the opinion of the court in the case of *Minor v. Happersett*, 21 Wall. 173, 22 L. Ed. 627, that "the Constitution of the United States does not confer the right of suffrage upon any one," without reference to the connection in which it is used, insists that the voters in this case do not owe their right to vote in any sense to that instrument. But the court was combating the argument that this right was conferred on all citizens, and therefore upon women as well as men. In opposition to that idea, it was said the Constitution adopts as the qualification for voters of members of congress that which prevails in the state where the voting is to be done; therefore, said the opinion, the right is not definitely conferred on any person or class of persons by the Constitution alone, because you have to look to the law of the state for the description of the class. But the court did not intend to say that when the class or the person is thus ascertained, his right to vote for a member of congress was not fundamentally based upon the Constitution, which created the office of member of congress, and declared it should be elective, and pointed to the means of ascertaining who should be electors. The fifteenth amendment of the Constitution \* \* \* is in the following language:

"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.

"Sec. 2. The congress shall have power to enforce this article by appropriate legislation."

While it is quite true, as was said by this court in *U. S. v. Reese*, 92 U. S. 218, 23 L. Ed. 563, that this article gives no affirmative right to the colored man to vote, and is designed primarily to prevent

discrimination against him whenever the right to vote may be granted to others, it is easy to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slave-holding states had not removed from their Constitutions the words "white man" as a qualification for voting, this provision did, in effect, confer on him the right to vote, because, being paramount to the state law, and a part of the state law, it annulled the discriminating word "white," and thus left him in the enjoyment of the same right as white persons. \* \* \*

In the case of *U. S. v. Reese*, so much relied on by counsel, this court said, in regard to the fifteenth amendment, that "it has invested the citizens of the United States with a new constitutional right which is within the protecting power of congress. That right is an exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude."<sup>1</sup> This new constitutional right was mainly designed for citizens of African descent. The principle, however, that the protection of the exercise of this right is within the power of congress, is as necessary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimination. The exercise of the right in both instances is guaranteed by the Constitution, and should be kept free and pure by congressional enactments whenever that is necessary.

The reference to cases in this court in which the power of congress under the first section of the fourteenth amendment has been held to relate alone to acts done under state authority can afford petitioners no aid in the present case. For, while it may be true that acts which are mere invasions of private rights, which acts have no sanction in the statutes of a state, or which are not committed by any one exercising its authority, are not within the scope of that amendment, it is quite a different matter when congress undertakes to protect the citizen in the exercise of rights conferred by the Constitution of the United States, essential to the healthy organization of the government itself. \* \* \*

Writ denied.<sup>2</sup>

<sup>1</sup> For the limits of federal power to protect this right, see *United States v. Reese*, 92 U. S. 214, 23 L. Ed. 563 (1876); *James v. Bowman*, 190 U. S. 127, 23 Sup. Ct. 678, 47 L. Ed. 979 (1903).

<sup>2</sup> As to the probable meaning of Amend. 14, § 2, reducing state representation in congress for the denial or abridgement of male suffrage, see E. I. Smith in 2 *Harv. L. Rev.* 374-376.

As regards control of the choice of presidential electors, under Const. art. 2, § 1, pars. 2, 3, see *In re Green*, 134 U. S. 377, 10 Sup. Ct. 586, 33 L. Ed. 951 (1890); *McPherson v. Blacker*, 146 U. S. 1, 35, 13 Sup. Ct. 3, 10, 36 L. Ed. 869 (1892). In the latter case, after an elaborate review of the practice of 100 years, Fuller, C. J., said: "In short, the appointment and mode of appointment of electors belong exclusively to the states under the Constitution of the United States. They are, as remarked by Mr. Justice Gray in *Re Green*, 134 U. S. 377, 379, 10 Sup. Ct. 586 [33 L. Ed. 951], 'no more officers or agents of the United States than are the members of the state legislatures

## SECTION 3.—MISCELLANEOUS POLITICAL RIGHTS

## NOTE.

The scope of this volume does not permit the inclusion of material for the specific discussion of several important political rights secured by provisions of the federal Constitution, most of which are also protected by state Constitutions. These are:

(a) **REPUBLICAN FORM OF GOVERNMENT, AND PROTECTION AGAINST INVASION AND DOMESTIC VIOLENCE.**—Const. art. IV, § 4. Upon this topic, see *Luther v. Borden*, ante, p. 101; *Pacific States Telephone & Telegraph Co. v. State of Oregon*, 223 U. S. 118, 32 Sup. Ct. 224, 56 L. Ed. 377 (1912).

(b) **FREEDOM OF SPEECH AND PRESS.**—Const. Amend. I. See *Robertson v. Baldwin*, post, p. 154; *Patterson v. Colorado ex rel. Attorney General*, 205 U. S. 454, 461, 462, 27 Sup. Ct. 556, 51 L. Ed. 879, 10 Ann. Cas. 689 (1907); *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 437, 438, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 871 (1911); *Marx & Haas Jeans Clothing Co. v. Watson*, 168 Mo. 133, 143-150, 67 S. W. 391, 56 L. R. A. 951, 90 Am. St. Rep. 440 (1902); *Lindsay & Co. v. Montana Federation of Labor*, 37 Mont. 264, 275-277, 96 Pac. 127, 18 L. R. A. (N. S.) 707, 127 Am. St. Rep. 722 (1908); *Louthan v. Commonwealth*, 79 Va. 196, 52 Am. Rep. 626 (1884); *State ex rel. Ragan v. Junkin*, 85 Neb. 1, 122 N. W. 473, 23 L. R. A. (N. S.) 839 (1909); *Ex parte Harrison*, 212 Mo. 88, 110 S. W. 709, 126 Am. St. Rep. 557, 15 Ann. Cas. 1 (1908); *Atchison, T. & S. F. Ry. Co. v. Brown*, 80 Kan. 312, 102 Pac. 459, 23 L. R. A. (N. S.) 247, 133 Am. St. Rep. 213, 18 Ann. Cas. 346 (1909); *State v. Pioneer Press Co.*, 100 Minn. 173, 110 N. W. 867, 9 L. R. A. (N. S.) 480, 117 Am. St. Rep. 684, 10 Ann. Cas. 351 (1907); *In re Anderson*, 69 Neb. 686, 96 N. W. 149, 5 Ann. Cas. 421 (1903).

(c) **RIGHT OF ASSEMBLAGE AND PETITION.**—Const. Amend. I. See *United States v. Cruikshank*, 92 U. S. 542, 552, 553, 23 L. Ed. 588 (1876); *Commonwealth v. Abrahams*, 156 Mass. 57, 30 N. E. 79 (1892); *State ex rel. Ragan v. Junkin*, 85 Neb. 1, 122 N. W. 473, 23 L. R. A. (N. S.) 839 (1909); *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 336-339, 125 N. W. 961, 20 Ann. Cas. 633 (1910).

(d) **RIGHT TO KEEP AND BEAR ARMS.**—Const. Amend. II. See *United States v. Cruikshank*, 92 U. S. 542, 552, 23 L. Ed. 588 (1876); *Robertson v. Baldwin*, 165 U. S. 275, 282, 17 Sup. Ct. 326, 41 L. Ed. 715 (1897); *Salina v. Blaksley*, 72 Kan. 230, 83 Pac. 619, 7 Ann. Cas. 925 (1905), annotated in 3 L. R. A. (N. S.) 168 ff., and in 115 Am. St. Rep. 199-203; and later references in *Strickland v. State*, 137 Ga. 1, 72 S. E. 260, 36 L. R. A. (N. S.) 115, Ann. Cas. 1913B, 323.

when acting as electors of federal senators, or the people of the states when acting as the electors of representatives in congress.' Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be the same day throughout the United States; but otherwise the power and jurisdiction of the state is exclusive, with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed that congressional and federal influence might be excluded."

As to the effect of so-called "direct primaries" for United States senator held in a state before the seventeenth amendment, see *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 343-351, 125 N. W. 961, 20 Ann. Cas. 633 (1910).

## CHAPTER V

### PERSONAL AND RELIGIOUS LIBERTY

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CIVIL RIGHTS CASES<sup>1</sup> (1883) 109 U. S. 3, 20-25, 3 Sup. Ct. 18, 27 L. Ed. 835, Mr Justice BRADLEY (holding invalid the act of Congress discussed below):

"It is true that slavery cannot exist without law, any more than property in lands and goods can exist without law: and, therefore, the thirteenth amendment may be regarded as nullifying all state laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed, that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States: and upon this assumption it is claimed, that this is sufficient authority for declaring by law that all persons shall have equal accommodations and privileges in all inns, public conveyances, and places of amusement; the argument being, that the denial of such equal accommodations and privileges is, in itself, a subjection to a species of servitude within the meaning of the amendment. Conceding the major proposition to be true, that Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents, is the minor proposition also true, that the denial to any person of admission to the accommodations and privileges of an inn, a public conveyance, or a theatre, does subject that person to any form of servitude, or tend to fasten upon him any badge of slavery? If it does not, then power to pass the law is not found in the thirteenth amendment.

"In a very able and learned presentation of the cognate question as to the extent of the rights, privileges and immunities of citizens which cannot rightfully be abridged by state laws under the fourteenth amendment, made in a former case, a long list of burdens and disabilities of a servile character, incident to feudal vassalage in France, and which were abolished by the decrees of the National Assembly, was presented for the purpose of showing that all inequalities and observances exacted by one man from another were servitudes, or badges of slavery, which a great nation, in its effort to establish universal liberty, made haste to wipe out and destroy. But these were servitudes imposed by the old law, or by long custom, which had the force of law, and exacted by one man from another without the latter's

<sup>1</sup> The remainder of this case is printed post, p. 240.



consent. Should any such servitudes be imposed by a state law, there can be no doubt that the law would be repugnant to the fourteenth, no less than to the thirteenth amendment; nor any greater doubt that Congress has adequate power to forbid any such servitude from being exacted. \* \* \*

"The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offences. Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the thirteenth amendment, before the fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens. Whether this legislation was fully authorized by the thirteenth amendment alone, without the support which it afterwards received from the fourteenth amendment, after the adoption of which it was re-enacted with some additions, it is not necessary to inquire." \* \* \*

"The only question under the present head, therefore, is, whether the refusal to any persons of the accommodations of an inn, or a public conveyance, or a place of public amusement, by an individual, and without any sanction or support from any state law or regulation, does inflict upon such persons any manner of servitude, or form of slavery, as those terms are understood in this country? Many wrongs may be obnoxious to the prohibitions of the fourteenth amendment which are not, in any just sense, incidents or elements of slavery. Such, for example, would be the taking of private property without due process of law; or allowing persons who have committed certain crimes (horse-stealing, for example) to be seized and hung by the posse comitatus without regular trial; or denying to any person, or class of persons, the right to pursue any peaceful avocations allowed to others. What is called class legislation would belong to this category, and would be obnoxious to the prohibitions of the fourteenth amendment, but would not necessarily be so to the thirteenth, when not involving the idea of any subjection of one man to another. \* \* \*

"After giving to these questions all the consideration which their

<sup>2</sup> See *United States v. Rhodes*, 1 Abb. 28, Fed. Cas. No. 16,151 (1866); *United States v. Morris* (D. C.) 125 Fed. 322 (1903).

importance demands, we are forced to the conclusion that such an act of refusal has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the state; or if those laws are adverse to his rights and do not protect him, his remedy will be found in the corrective legislation which Congress has adopted, or may adopt, for counteracting the effect of state laws, or state action, prohibited by the fourteenth amendment. It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business.

\* \* \* There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens; yet no one, at that time, thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery. If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the thirteenth amendment (which merely abolishes slavery), but by force of the fourteenth and fifteenth amendments.<sup>3</sup> \* \* \*

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

▪ Accord: Slaughter House Cases, 16 Wall. 36, 68-69, 21 L. Ed. 394 (1873) (law forbidding individuals to maintain slaughter houses); Plessy v. Ferguson, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256 (1896) (separate coach law); Hodges v. United States, 203 U. S. 1, 27 Sup. Ct. 6, 51 L. Ed. 65 (1906) (private intimidation of persons from employment); Brawner v. Irvin (C. C.) 169 Fed. 964 (1909) (arrest for two hours and beating).

In Hodges v. United States, above, Brewer, J., said (203 U. S. 16-18, 27 Sup. Ct. 8, 9, 51 L. Ed. 65): "The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these terms a condition of enforced compulsory service of one to another. \* \* \* It is said, however, that one of the disabilities of slavery, one of the indicia of its existence, was a lack of power to make or perform contracts, and that when these defendants, by intimidation and force, compelled the colored men named in the indictment to desist from performing their contract, they, to that extent, reduced those parties to a condition of slavery,—that is, of subjection to the will of defendants, and deprived them of a freeman's power to perform his contract. But every wrong done to an individual by another, acting singly or in concert with others, operates pro tanto to abridge some of the freedom to which the individual is entitled. A freeman has a right to be protected in his person from an assault and battery. He is entitled to hold his property safe from trespass or appropriation; but no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery."

## ROBERTSON v. BALDWIN.

(Supreme Court of United States, 1897. 165 U. S. 275, 17 Sup. Ct. 326, 41 L. Ed. 715.)

[Appeal from the federal District Court for the Northern District of California. R. S. U. S. §§ 4598, 4599, provide that seamen who desert their vessel in violation of their contracts may be arrested and forcibly returned to their vessel for service, and section 4596 provides a punishment by imprisonment for desertion or absence without leave. Robertson and others deserted and were returned to their vessel. They refused to work and were held by the federal marshal to answer a charge under section 4596. A writ of habeas corpus was dismissed, and this appeal taken.]

Mr. Justice BROWN. \* \* \* The question whether sections 4598 and 4599 conflict with the thirteenth amendment, forbidding slavery and involuntary servitude, depends upon the construction to be given to the term "involuntary servitude." Does the epithet "involuntary" attach to the word "servitude" continuously, and make illegal any service which becomes involuntary at any time during its existence? or does it attach only at the inception of the servitude, and characterize it as unlawful because unlawfully entered into? If the former be the true construction, then no one, not even a soldier, sailor, or apprentice, can surrender his liberty, even for a day; and the soldier may desert his regiment upon the eve of battle, or the sailor abandon his ship at any intermediate port or landing, or even in a storm at sea, provided, only, he can find means of escaping to another vessel. If the latter, then an individual may, for a valuable consideration, contract for the surrender of his personal liberty for a definite time and for a recognized purpose, and subordinate his going and coming to the will of another during the continuance of the contract; not that all such contracts would be lawful, but that a servitude which was knowingly and willingly entered into could not be termed "involuntary." Thus, if one should agree, for a yearly wage, to serve another in a particular capacity during his life, and never to leave his estate without his consent, the contract might not be enforceable for the want of a legal remedy, or might be void upon grounds of public policy; but the servitude could not be properly termed "involuntary." Such agreements for a limited personal servitude at one time were very common in England, and by statute of June 17, 1823 (4 Geo. IV, c. 34, § 3), it was enacted that if any servant in husbandry, or any artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, laborer or other person, should contract to serve another for a definite time, and should desert such service during the term of the contract, he was

made liable to a criminal punishment. The breach of a contract for personal service has not, however, been recognized in this country, as involving a liability to criminal punishment, except in the cases of soldiers, sailors, and possibly some others; nor would public opinion tolerate a statute to that effect.

But we are also of opinion that, even if the contract of a seaman could be considered within the letter of the thirteenth amendment, it is not, within its spirit, a case of involuntary servitude. The law is perfectly well settled that the first 10 amendments to the Constitution, commonly known as the "Bill of Rights," were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy (article 5) does not prevent a second trial, if upon the first trial the jury failed to agree, or if the verdict was set aside upon the defendant's motion (*U. S. v. Ball*, 163 U. S. 662, 672, 16 Sup. Ct. 1192, 41 L. Ed. 300); nor does the provision of the same article that no one shall be a witness against himself impair his obligation to testify, if a prosecution against him be barred by the lapse of time, a pardon, or by statutory enactment (*Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, and cases cited). Nor does the provision that an accused person shall be confronted with the witnesses against him prevent the admission of dying declarations, or the depositions of witnesses who have died since the former trial.

The prohibition of slavery, in the thirteenth amendment, is well known to have been adopted with reference to a state of affairs which had existed in certain states of the Union since the foundation of the government, while the addition of the words "involuntary servitude" were said, in the *Slaughterhouse Cases*, 16 Wall. 36, 21 L. Ed. 394, to have been intended to cover the system of Mexican peonage and the Chinese coolie trade, the practical operation of which might have been a revival of the institution of slavery under a different and less offensive name. It is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional, such as military and naval enlistments, or to disturb the right of

parents and guardians to the custody of their minor children or wards.<sup>1</sup> The amendment, however, makes no distinction between a public and a private service. To say that persons engaged in a public service are not within the amendment is to admit that there are exceptions to its general language, and the further question is at once presented, where shall the line be drawn? We know of no better answer to make than to say that services which have from time immemorial been treated as exceptional shall not be regarded as within its purview.

From the earliest historical period the contract of the sailor has been treated as an exceptional one, and involving, to a certain extent, the surrender of his personal liberty during the life of the contract. Indeed, the business of navigation could scarcely be carried on without some guaranty, beyond the ordinary civil remedies upon contract, that the sailor will not desert the ship at a critical moment, or leave her at some place where seamen are impossible to be obtained,—as Molloy forcibly expresses it, “to rot in her neglected brine.” Such desertion might involve a long delay of the vessel while the master is seeking another crew, an abandonment of the voyage, and, in some cases, the safety of the ship itself. Hence, the laws of nearly all maritime nations have made provision for securing the personal attendance of the crew on board, and for their criminal punishment for desertion, or absence, without leave, during the life of the shipping articles. \* \* \* [The early maritime laws of various nations are here considered.]

Nearly all of the ancient commercial codes either make provision for payment of damages by seamen who absent themselves from their ships without leave, or for their imprisonment, or forcible conveyance on board. Some of the modern commercial codes of Europe and South America make similar provisions. Argentine Code, art. 1154. Others, including the French and Spanish Codes, are silent upon the subject. \* \* \* [English legislation to the same effect is here considered.]

The earliest American legislation which we have been able to find is an act of the colonial general court of Massachusetts, passed about 1668, wherein it was enacted that any mariner who departs and leaves a voyage upon which he has entered shall forfeit all his wages, and shall be further punished by imprisonment or otherwise, as the case may be circumstanced; and if he shall have received any considerable part of his wages, and shall run away, he shall be pursued as a disobedient runaway servant. Col. Laws Mass. (Ed. 1889) 251, 256.

The provision of Rev. St. § 4598, under which these proceedings were taken, was first enacted by congress in 1790. 1 Stat. 131, § 7.

<sup>1</sup> Accord (whether control be exercised by parents, or by state under its tutorial power): *Kennedy v. Meara*, 127 Ga. 68, 56 S. E. 243, 9 Ann. Cas. 396 (1906) (apprenticing of children by “home for the friendless”).



This act provided for the apprehension of deserters and their delivery on board the vessel, but apparently made no provision for imprisonment as a punishment for desertion; but by the shipping commissioners' act of June 7, 1872 (17 Stat. 243, 273, c. 322, § 51), now incorporated into the Revised Statutes as section 4596 (U. S. Comp. St. 1901, p. 3113), the court is authorized to add to forfeiture of wages for desertion imprisonment for a period of not more than three months, and for absence without leave imprisonment for not more than one month. In this act and the amendments thereto very careful provisions are made for the protection of seamen against the frauds and cruelty of masters, the devices of boarding-house keepers, and, as far as possible, against the consequences of their own ignorance and improvidence. At the same time discipline is more stringently enforced by additional punishments for desertion, absence without leave, disobedience, insubordination, and barratry. Indeed, seamen are treated by congress, as well as by the parliament of Great Britain, as deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults, and as needing the protection of the law in the same sense in which minors and wards are entitled to the protection of their parents and guardians.<sup>2</sup> "Quemadmodum pater in filios, magister in discipulos, dominus in servos vel familiares." The ancient characterization of seamen as "wards of admiralty" is even more accurate now than it was formerly.

In the face of this legislation upon the subject of desertion and absence without leave, which was in force in this country for more than 60 years before the thirteenth amendment was adopted, and similar legislation abroad from time immemorial, it cannot be open to doubt that the provision against involuntary servitude was never intended to apply to their contracts.

Judgment affirmed.<sup>3</sup>

[HARLAN, J., gave a dissenting opinion. GRAY, J., was absent.]

<sup>2</sup> See *Patterson v. The Eudora*, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002 (1903).

<sup>3</sup> The compulsory requirement from certain persons of two days' labor, annually, upon the public highways, has been held not to violate prohibitions against involuntary servitude. In *re Dassler*, 35 Kan. 678, 12 Pac. 130 (1880); *Dennis v. Simon*, 51 Ohio St. 233, 36 N. E. 832 (1894). "Such labor has never been regarded or construed by any of the authorities as falling within the terms of the Constitution prohibiting slavery and involuntary servitude. \* \* \* There are certain services which may be commanded of every citizen by his government, and obedience enforced thereto. Among these services are labor on the streets or highways and training in the militia."—Horton, C. J., in *re Dassler*, above (35 Kan. at page 684, 12 Pac. at page 134).

## 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:<sup>1</sup> \* \* \*

There is also a rule of evidence enforced by the courts of Alabama which must be regarded as having the same effect as if 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

<sup>1</sup> "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."

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 Yuc 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 arbi-

trary, 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.<sup>2</sup> \* \* \*

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 proscribe.

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:<sup>3</sup> \* \* \*

The act of March 2, 1867 (Rev. Stat. §§ 1990 and 5526, supra), was

<sup>2</sup> See *Mobile, J. & K. C. R. Co. v. Turnipseed*, post, p. 381.

<sup>3</sup> "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."

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 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.<sup>4</sup> \* \* \* 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.<sup>5</sup> 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.

<sup>4</sup> The legal status of peonage before the thirteenth amendment is discussed in *Jaramillo v. Romero*, 1 N. M. 190 (1857).

<sup>5</sup> See *Arthur v. Oakes*, 63 Fed. 310, 317, 11 C. C. A. 209, 25 L. R. A. 414 (1894).



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.<sup>6</sup>

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 indirectly, 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

<sup>6</sup> Accord: *Ex parte Drayton* (D. C.) 153 Fed. 986 (1907); *Ex parte Hollman*, 79 S. C. 9, 60 S. E. 19 (1908), annotated 21 L. R. A. (N. S.) 242 ff., 14 Ann. Cas. 1105. See, also, *United States v. Clement* (D. C.) 171 Fed. 974 (1909). In *Ex parte Hollman*, *Woods, J.*, said (79 S. C. 26, 60 S. E. 26, 21 L. R. A. [N. S.] 242, 14 Ann. Cas. 1105): "Even if prosperity is not always promoted by constitutional guarantees, liberty is better than prosperity."

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 therefore invalid. \* \* \*

Judgment reversed.<sup>7</sup>

[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).]

<sup>7</sup> As to the effect of the thirteenth amendment upon the power of courts of equity to decree performance of contracts of personal service, or to enjoin strikes, see *Arthur v. Oakes*, 63 Fed. 310 (1894); *In re Lennon*, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110 (1897).

As to the extent of a state's power to compel and to hire out the labor of convicts, see 27 L. R. A. 593 ff., note; *In re Thompson*, 117 Mo. 83, 22 S. W. 863, 20 L. R. A. 462, 38 Am. St. Rep. 639 (1893).

**IMPRISONMENT FOR DEBT.**—Most of our state Constitutions now forbid imprisonment for debt, unless fraudulently incurred. *Stimson, Fed. and State Consts.* § 80. For the general scope of these provisions, see the authorities in 31 L. R. A. 634 ff.; 17 L. R. A. (N. S.) 1140 ff.; 21 L. R. A. (N. S.) 259 ff.

**RELIGIOUS LIBERTY.**—See *Const. Amend. I*. Similar clauses are found in the state Constitutions. For their general scope and interpretation, see *Reynolds v. United States*, 98 U. S. 145, 161-167, 25 L. Ed. 244 (1879) (religious belief as excusing polygamy); *Davis v. Beason*, 133 U. S. 333, 10 Sup. Ct. 299, 33 L. Ed. 637 (1890) (same); *People v. Pierson*, 176 N. Y. 201, 68 N. E. 243, 63 L. R. A. 187, 98 Am. St. Rep. 666 (1903) (same, failure to call physician for minor); *Sweeney v. Webb*, 33 Tex. Civ. App. 324, 76 S. W. 766 (1903), affirmed in 97 Tex. 250, 77 S. W. 1135 (same, use of sacramental wine); *Lindenmuller v. People*, 33 Barb. (N. Y.) 548 (1861), affirmed in *Neuendorf v. Duryea*, 69 N. Y. 557, 25 Am. Rep. 235 (1877) (Sunday laws); *State v. Powell*, 58 Ohio St. 324, 50 N. E. 900, 41 L. R. A. 854 (1898) (same); *Pfeiffer v. Board of Education of Detroit*, 118 Mich. 560, 77 N. W. 250, 42 L. R. A. 536 (1898) (devotional exercises and Bible reading in schools); *State ex rel. Freeman v. Scheve*, 65 Neb. 853, 91 N. W. 846, 93 N. W. 169, 59 L. R. A. 927 (1902) (same); *People ex rel. v. Board of Education of Dist. 24*, 245 Ill. 334, 92 N. E. 251, 29 L. R. A. (N. S.) 442, 19 Ann. Cas. 220 (1910) (same).

## CHAPTER VI

## PROTECTION TO PERSONS ACCUSED OF CRIME

## SECTION 1.—EX POST FACTO LAWS—BILLS OF AT-TAINDER

## CALDER v. BULL.

(Supreme Court of United States, 1798. 3 Dall. 386, 1 L. Ed. 648.)

[Error to the Supreme Court of Connecticut. In March, 1793, the probate court for Hartford disapproved the will of Normand Morrison, under which Bull claimed, the result being that a right to recover certain property vested in Calder and his wife as heir of said Morrison. More than eighteen months later, after Bull's right of appeal had been barred by statute, the legislature in May, 1795, passed an act setting aside the decree of the probate court and granting Bull a new trial. On this trial the will was approved and Bull's claim was upheld, which was later affirmed by the state Supreme Court.]

Mr. Justice CHASE. \* \* \* The sole inquiry is, whether this resolution or law of Connecticut, having such operation, is an ex post facto law within the prohibition of the federal Constitution? \* \* \*

All the restrictions contained in the Constitution of the United States, on the power of the state legislatures, were provided in favor of the authority of the federal government. The prohibition against their making any ex post facto laws was introduced for greater caution, and very probably arose from the knowledge that the Parliament of Great Britain claimed and exercised a power to pass such laws, under the denomination of bills of attainder, or bills of pains and penalties; the first inflicting capital, and the other less punishment. These acts were legislative judgments; and an exercise of judicial power. Sometimes they respected the crime, by declaring acts to be treason which were not treason when committed;<sup>1</sup> at other times they violated the rules of evidence, to supply a deficiency of legal proof, by admitting one witness, when the existing law required two; by receiving evidence without oath; or the oath of the wife against the husband; or other testimony which the courts of justice

<sup>1</sup> The case of the Earl of Strafford, in 1640.—*Rep.*

would not admit;<sup>2</sup> at other times they inflicted punishments where the party was not by law liable to any punishment;<sup>3</sup> and in other cases they inflicted greater punishment than the law annexed to the offence.<sup>4</sup> The ground for the exercise of such legislative power was this, that the safety of the kingdom depended on the death, or other punishment, of the offender; as if traitors, when discovered, could be so formidable, or the government so insecure. With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment and vindictive malice. To prevent such, and similar acts of violence and injustice, I believe the federal and state legislatures were prohibited from passing any bill of attainder, or any *ex post facto* law.

The Constitution of the United States, art. 1, § 9, prohibits the legislature of the United States from passing any *ex post facto* law; and in section 10 lays several restrictions on the authority of the legislatures of the several states; and among them, "that no state shall pass any *ex post facto* law."

It may be remembered that the legislatures of several of the states, to wit, Massachusetts, Pennsylvania, Delaware, Maryland, and North and South Carolina, are expressly prohibited, by their state Constitutions, from passing any *ex post facto* law.

I shall endeavor to show what law is to be considered an *ex post facto* law, within the words and meaning of the prohibition in the federal Constitution. The prohibition, "that no state shall pass any *ex post facto* law," necessarily requires some explanation; for naked and without explanation it is unintelligible, and means nothing. Literally it is only that a law shall not be passed concerning, and after the fact, or thing done, or action committed. I would ask, what fact; of what nature or kind; and by whom done? That Charles I, King of England, was beheaded; that Oliver Cromwell was Protector of England; that Louis XVI, late King of France, was guillotined.—are all facts that have happened, but it would be nonsense to suppose that the states were prohibited from making any law after either of these events, and with reference thereto. The prohibition in the letter is not to pass any law concerning and after the fact, but the plain and obvious meaning and intention of the prohibition is this, that the legislatures of the several states shall not pass laws after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it. The prohibition, considered in this light, is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts, having a retrospective operation. I do not think it was inserted to secure the citizen in his private rights, of either property or con-

<sup>2</sup> The case of Sir John Fenwick, in 1696.—*Rep.*

<sup>3</sup> The banishment of Lord Clarendon, 1667, 19 Car. II, c. 10, and of Bishop Atterbury, in 1723, 9 Geo. I, c. 17.—*Rep.*

<sup>4</sup> The Coventry Act, in 1670, 22 & 23 Car. II, c. 1.—*Rep.*

tracts. The prohibitions not to make anything but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts, were inserted to secure private rights; but the restriction not to pass any *ex post facto* law, was to secure the person of the subject from injury or punishment, in consequence of such law. If the prohibition against making *ex post facto* laws was intended to secure personal rights from being affected or injured by such laws, and the prohibition is sufficiently extensive for that object, the other restraints I have enumerated were unnecessary, and therefore improper, for both of them are retrospective.

I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed. 4th. 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 offence, in order to convict the offender. All these and similar laws are manifestly unjust and oppressive. In my opinion, the true distinction is between *ex post facto* laws and retrospective laws. Every *ex post facto* law must necessarily be retrospective, but every retrospective law is not an *ex post facto* law; the former only are prohibited. Every law that takes away or impairs rights vested, agreeable to existing laws, is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule that a law should have no retrospect; but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion, or of pardon. They are certainly retrospective, and literally both concerning, and after, the facts committed. But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law; but only those that create, or aggravate, the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time, or to save time from the statute of limitations, or to excuse acts which were unlawful, and before committed, and the like, is retrospective. But such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an unlawful act lawful, and the making an innocent action criminal, and punishing it as a crime. The expressions "*ex post facto* laws" are technical; they had been in use long before the Revolution, and had acquired an appropriate meaning by legislators, lawyers, and authors. The celebrated and judicious Sir William Blackstone, in his Commentaries, considers an *ex post facto*



law precisely in the same light as I have done. His opinion is confirmed by his successor, Mr. Wooddeson, and by the author of the *Federalist*, whom I esteem superior to both, for his extensive and accurate knowledge of the true principles of government.

I also rely greatly on the definition, or explanation of *ex post facto* laws as given by the conventions of Massachusetts, Maryland, and North Carolina, in their several Constitutions, or forms of government. \* \* \* [Here follow quotations from these Constitutions, expressly forbidding retrospective criminal laws.]

I am of opinion, that the fact, contemplated by the prohibition, and not to be affected by a subsequent law, was some fact to be done by a citizen or subject. In 2 Lord Raymond, 1352, Raymond, J., called the Stat. 7 Geo. I, stat. 2, pt. 8, about registering contracts for South Sea stock, an *ex post facto* law; because it affected contracts made before the statute. \* \* \* There is no doubt that a man may be a trespasser from the beginning, by matter of after fact; as where an entry is given by law, and the party abuses it; or where the law gives a distress, and the party kills, or works the distress. I admit, an act unlawful in the beginning may, in some cases, become lawful by matter of after fact. \* \* \* There appears to me a manifest distinction between the case where one fact relates to, and affects another fact, as where an after fact, by operation of law, makes a former fact either lawful or unlawful; and the case where a law made after a fact done, is to operate on, and to affect such fact. In the first case both the acts are done by private persons. In the second case the first act is done by a private person, and the second act is done by the legislature to affect the first act. I believe that but one instance can be found in which a British judge called a statute that affected contracts made before the statute, an *ex post facto* law; but the judges of Great Britain always considered penal statutes, that created crimes, or increased the punishment of them, as *ex post facto* laws.

If the term *ex post facto* law is to be construed to include and to prohibit the enacting any law after a fact, it will greatly restrict the power of the federal and state legislatures; and the consequences of such a construction may not be foreseen. If the prohibition to make no *ex post facto* law extends to all laws made after the fact, the two prohibitions, not to make anything but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts, were improper and unnecessary.

It was further urged, that if the provision does not extend to prohibit the making any law after a fact, then all choses in action, all lands by devise, all personal property by bequest or distribution, by *elegit*, by execution, by judgments, particularly on torts, will be unprotected from the legislative power of the states; rights vested may be divested at the will and pleasure of the state legislatures; and, therefore, that the true construction and meaning of the prohibition

is, that the states pass no law to deprive a citizen of any right vested in him by existing laws. It is not to be presumed that the federal or state legislatures will pass laws to deprive citizens of rights vested in them by existing laws; unless for the benefit of the whole community; and on making full satisfaction. The restraint against making any *ex post facto* laws was not considered, by the framers of the Constitution, as extending to prohibit the depriving a citizen even of a vested right to property; or the provision, "that private property should not be taken for public use, without just compensation," was unnecessary. \* \* \*

Decree affirmed.<sup>5</sup>

[The concurring opinions of PATERSON, IREDELL, and CUSHING, JJ., are omitted.]

### SHEPHERD v. PEOPLE.

(Court of Appeals of New York, 1862. 25 N. Y. 406.)

[Writ of error to the Supreme Court of New York. Shepherd was indicted in the Court of General Sessions in October, 1857, for arson in the first degree, committed in June, 1857, and was found guilty in February, 1861. When the crime was committed its punishment was death. In April, 1860, it was changed to imprisonment for life at hard

<sup>5</sup> The meaning given by this case to the words "*ex post facto*" was the one intended by the Philadelphia Convention and understood by the state conventions that adopted the Constitution. See 5 Ell. Debates, 488; Federalist, (No. 84—Ford's Ed.) 571; *Id.*, appendix, 641.

**BILLS OF ATTAINDER.**—These are also prohibited by Const. art. I, § 9, par. 3. They are judicially discussed in *Cummings v. Missouri*, 4 Wall. 277, 323-325, 18 L. Ed. 356 (1867), Field, J., saying: "A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offence."

See, also, *Pierce v. Carskadon*, 16 Wall. 234, 21 L. Ed. 276 (1873).

As to the validity of the federal Confiscation Acts during the Civil War, see Const. art. III, § 3, par. 2; *Bigelow v. Forrest*, 9 Wall. 339, 19 L. Ed. 696 (1870); *Miller v. United States*, 11 Wall. 268, 20 L. Ed. 135 (1871).

**EX POST FACTO DECISIONS OF COURTS.**—The constitutional prohibition applies only to legislative acts of the states or United States, not to changes of decision by courts in criminal cases with a retroactive effect. *Ross v. Oregon*, 227 U. S. 150, 161 ff., 33 Sup. Ct. 220, 57 L. Ed. — (1913). See *State v. O'Neil*, 147 Iowa, 513, 126 N. W. 454, Ann. Cas. 1912B, 691 (1910), annotated in 33 L. R. A. (N. S.) 788 ff.

Compare the doctrine in similar cases arising under the contract clause of the Constitution, *post*, p. 791.

labor. Shepherd was sentenced to the latter punishment, and this was affirmed by the state Supreme Court.]

SUTHERLAND, J. When the crime of which the prisoner was convicted was committed it was punishable with death. The prisoner was sentenced to imprisonment in the state prison at Sing Sing for life. The prisoner must have been sentenced on the theory that the provisions of the Act of April 14, 1860, substituting imprisonment for life, for death, as the punishment for arson in the first degree, were intended to apply not only to an offence committed after that act took effect, but also to the offence of which the prisoner had been convicted, committed in 1857, before the passage of the act. \* \* \*

If, however, the provisions of the act, changing the punishment of arson in the first degree, should be held to have been intended to apply to offences committed before the passage of the act, in my opinion so far the act should be held to be *ex post facto* and void.<sup>1</sup>

I think this is shown conclusively by Judge Denio in his opinion in the Hartung Case;<sup>2</sup> but I will add that a law which increased the punishment with which an act was punishable when committed would be plainly *ex post facto*, although it might be said, perhaps, that the new law did not change the manner of the punishment; as, for instance, if, when the act was committed, it was punishable with thirty days' imprisonment and the new law declared that it should be punished with forty days' imprisonment; for as to the number of days' imprisonment by which the punishment was increased, the case would be precisely the same as if the act when committed had not been punishable at all, and under the new law the criminal could not be sentenced to any less number of days than were prescribed by it.

So also if an act, when committed, was punishable by thirty days' imprisonment, a subsequent law changing the punishment of the act to thirty stripes or to thirty dollars fine would be plainly *ex post facto*, for when the act was committed it was not punishable in that manner, and in view of the constitutional prohibition of *ex post facto* laws, the case would be precisely the same as if the act had not been punishable at all when committed. If you do not hold a law punishing an act in a different manner than it was punishable when committed to be *ex post facto*, irrespective of the question whether the new punishment is or is not more merciful or lenient, you will leave it to the discretion of the legislature and of judges to say whether the new punishment is or is

<sup>1</sup> As to whether an *ex post facto* law falls altogether, so that it does not repeal the prior law, under which prior crimes may still be punished, or whether it merely releases former criminals from punishment, being effectual as to future crimes, see *Flaherty v. Thomas*, 12 Allen (Mass.) 428, 434-437 (1866); *People v. McNulty*, 93 Cal. 427, 436, 26 Pac. 597, 29 Pac. 61 (1892).

<sup>2</sup> *Hartung v. People*, 22 N. Y. 95 (1860), holding a law *ex post facto* which substituted, for execution within four to eight weeks after sentence for murder, a year's imprisonment at hard labor and execution thereafter at the pleasure of the governor.

not more merciful or lenient than the old; and such a construction of the constitutional prohibition would impair its value and certainty of protection. A law, the effect of which is simply to reduce or diminish the punishment with which an act was punishable when committed, cannot be an *ex post facto* law, because it inflicts no new or additional punishment. In *Fletcher v. Peck*, 6 Cranch, 87, 3 L. Ed. 162, Chief Justice Marshall defined an *ex post facto* law to be one which makes an act punishable "in a manner in which it was not punishable when committed." Add to this, or which increases the punishment with which the act was punishable when committed, and I think the definition will be as complete, and certain and safe, as can well be made.

It is plain, then, that the moral or philosophical disquisition as to whether imprisonment for life at hard labor is better or more desirable or less severe than death, has really nothing to do with the question whether the Act of 1860, assuming that it was intended to have a retrospective operation, is, so far, *ex post facto* or not. Imprisonment for life at hard labor is an entirely different kind or manner of punishment, from punishment by death. The Act of 1860 entirely changed the punishment for arson in the first degree. It changed it from death to imprisonment for life. The two punishments have no elements in common. If it should be held that the Act of 1860 merely diminished the punishment with which the prisoner's crime was punishable when committed, because imprisonment for life at hard labor is generally considered a more lenient punishment than death, or one which the criminal would prefer to suffer, then it could be held that a law changing the punishment of an act from imprisonment for a certain number of days or months to a fine, or from a certain number of stripes to imprisonment for a certain number of days, was not *ex post facto*, because the court might think the new punishment more lenient than the old, or that the criminal would prefer to suffer the new punishment. Indeed, as I have before said, if you depart from the principle that a law is *ex post facto* because it punishes the offence in a different manner, or by a different kind of punishment, than it was punishable with when committed, the question whether the law is *ex post facto* is left to judicial discretion; for a decision of the question must depend upon the opinion of judges, as to whether the new punishment is more severe than the old, or whether the new punishment would or would not generally be preferred by criminals to the old. The construction of constitutional limitations should be left as little as possible to either legislative or judicial discretion.

My conclusion is, then, that the provisions of the Act of 1860, changing the punishment of arson in the first degree, were intended to apply only to offences thereafter committed; but if it should be held otherwise, then that those provisions are *ex post facto* and void, so far as they were intended to apply to a crime of arson in the first degree,

committed before the passage of the act. In either view of the act, and upon either holding, the judgment of the court below must be reversed. \* \* \*

Judgment reversed.\*

[Three judges dissented upon another point in the case.]

\* Accord: In re Medley, 134 U. S. 160, 10 Sup. Ct. 381, 33 L. Ed. 835 (1890) (requiring short period of solitary confinement to precede execution and increasing prisoner's uncertainty as to time of execution). But compare Storti's Case, 180 Mass. 57, 61 N. E. 759 (1901), and Rooney v. North Dakota, 196 U. S. 319, 25 Sup. Ct. 264, 49 L. Ed. 494, 3 Ann. Cas. 76 (1905).

In People v. Hayes, 140 N. Y. 484, 492, 35 N. E. 951, 953, 23 L. R. A. 830, 37 Am. St. Rep. 572 (1894), Peckham, J., said: "I do not think that the mere fact of an alteration in the manner of punishment, without reference to the question of mitigation, necessarily renders an act obnoxious to the constitutional provision. I know it is alluded to in the two cases in this state above cited,—that of Hartung and of Shepherd. \* \* \* I think that where a change is made in the manner of the punishment, if the change be of that nature which no sane man could by any possibility regard in any other light than that of a mitigation of punishment, the act would not be *ex post facto* where made applicable to offenses committed before its passage."

In several cases changes in the manner of punishment have been held valid. Commonwealth v. Wyman, 12 Cusb. (Mass.) 237 (1853) (death to life imprisonment); Commonwealth v. Gardner, 11 Gray (Mass.) 438 (1858) (same); McGuire v. State, 76 Miss. 504, 25 South. 495 (1898) (same); Rooney v. North Dakota, above (period of confinement before execution increased from 3—6 months to 6—9 months), Harlan, J., saying (196 U. S. 325, 25 Sup. Ct. 266, 49 L. Ed. 494, 3 Ann. Cas. 76): "The court must assume that every rational person desires to live as long as he may;" State v. Williams, 2 Rich. (S. C.) 418, 45 Am. Dec. 741 (1846) (death to whipping, imprisonment and fine); Strong v. State, 1 Blackf. (Ind.) 193 (1822) (whipping to imprisonment).

Where a statute expressly provides that previous crimes shall not be affected by a new punishment, unless it mitigates the old one, it has been held that the defendant may choose between the old and new punishments. Herber v. State, 7 Tex. 69 (1851); Clarke v. State, 23 Miss. 261 (1852). This election is expressly given by statute in Texas: Texas Penal Code, arts. 15, 19; McInturf v. State, 20 Tex. App. 335 (1886).

The remission of a separable part of the former punishment is of course valid. People v. Hayes, 140 N. Y. 484, 35 N. E. 951, 23 L. R. A. 830, 37 Am. St. Rep. 572 (1894).

A change in punishment that is in good faith referable to prison discipline as its primary object is valid, even though more onerous. Hartung v. People, 22 N. Y. 95, 105 (1860); Murphy v. Commonwealth, 172 Mass. 264, 269, 52 N. E. 505, 43 L. R. A. 154, 70 Am. St. Rep. 266 (1899) (cases).

A law changing the punishment for crime is *ex post facto* if it *requires* any penalty that may be more severe than the *least* one that could be imposed under the old law, or if it *permits* a penalty more severe than the *heaviest* one authorized by the old law. Flaherty v. Thomas, 12 Allen (Mass.) 428 (1866); In re Lambrecht, 137 Mich. 450, 100 N. W. 606 (1904); State ex rel. Theus v. Edwards, 109 Ia. 236, 33 South. 209 (1902). A subsequent law authorizing an indeterminate sentence not violating these rules is valid. Commonwealth v. Brown, 167 Mass. 144, 45 N. E. 1 (1896). As to the validity of an indeterminate sentence which qualifies prior definite rights to a shortening of term and permits of liberty for good conduct in prison, see Murphy v. Commonwealth, above.

A law imposing a heavier penalty upon second offenders, passed between the two offences, is valid. McDonald v. Massachusetts, 180 U. S. 311, 21 Sup. Ct. 389, 45 L. Ed. 542 (1901).



THOMPSON v. UTAH.<sup>1</sup>

(Supreme Court of United States, 1898. 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061.)

[Error to the Supreme Court of Utah. Thompson was charged with grand larceny, committed while Utah was a territory, and, after having been found guilty, was granted a new trial. The second trial was held after Utah became a state, and he was found guilty by a jury of eight jurors, this number being prescribed by the new Utah Constitution. His objection to the constitutionality of this was overruled in the state courts, and this writ of error was taken.]

Mr. Justice HARLAN. \* \* \* As the offense of which the plaintiff in error was convicted was a felony, and as, by the law in force when the crime was committed, he could not have been tried by a jury of a less number than twelve jurors, the question is presented whether the provision in the Constitution of Utah, providing for a jury of eight persons in courts of general jurisdiction, except in capital cases, can be made applicable to a felony committed within the limits of the state while it was a territory, without bringing that provision into conflict with the clause of the Constitution of the United States prohibiting the passage by any state of an ex post facto law. \* \* \*

It is not necessary to review the numerous cases in which the courts have determined whether particular statutes come within the constitutional prohibition of ex post facto laws. It is sufficient now to say that a statute belongs to that class which by its necessary operation and "in its relation to the offense, or its consequences, alters the situation of the accused to his disadvantage." U. S. v. Hall, 2 Wash. C. C. 366, Fed. Cas. No. 15,285; Kring v. Missouri, 107 U. S. 221, 228, 2 Sup. Ct. 443, 27 L. Ed. 506; In re Medley, 134 U. S. 160, 171, 10 Sup. Ct. 384, 33 L. Ed. 835. Of course, a statute is not of that class unless it materially impairs the right of the accused to have the question of his guilt determined according to the law as it was when the offense was committed. And therefore it is well settled that the accused is not entitled of right to be tried in the exact mode, in all respects, that may be prescribed for the trial of criminal cases at the time of the commission of the offense charged against him. Cooley, in his Treatise on Constitutional Limitations, after referring to some of the adjudged cases relating to ex post facto laws, says: "But, so far as mere modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if

<sup>1</sup> Parts of this case dealing with other topics appear post, p. 193.

every case was to be conducted only in accordance with the rules of practice and heard only by the courts in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime." Chapter 9 (6th Ed.) p. 326. And this view was substantially approved by this court in *Kring v. Missouri*, above cited. So, in *Hopt v. Utah*, 110 U. S. 574, 590, 4 Sup. Ct. 202, 28 L. Ed. 262, it was said that no one had a vested right in mere modes of procedure, and that it was for the state, upon grounds of public policy, to regulate procedure at its pleasure. This court, in *Duncan v. Missouri*, 152 U. S. 378, 382, 14 Sup. Ct. 570, 38 L. Ed. 485, said that statutes regulating procedure, if they leave untouched all the substantial protections with which existing law surrounds the person accused of crime, are not within the constitutional inhibition of *ex post facto* laws. But it was held in *Hopt v. Utah*, above cited, that a statute that takes from the accused a substantial right given to him by the law in force at the time to which his guilt relates would be *ex post facto* in its nature and operation, and that legislation of that kind cannot be sustained simply because, in a general sense, it may be said to regulate procedure. The difficulty is not so much as to the soundness of the general rule that an accused has no vested right in particular modes of procedure as in determining whether particular statutes by their operation take from an accused any right that was regarded, at the time of the adoption of the constitution, as vital for the protection of life and liberty, and which he enjoyed at the time of the commission of the offense charged against him.

Now, Thompson's crime, when committed, was punishable by the territory of Utah proceeding in all its legislation under the sanction of and in subordination to the authority of the United States. The court below substituted, as a basis of judgment and sentence to imprisonment in the penitentiary, the unanimous verdict of eight jurors in place of a unanimous verdict of twelve. It cannot, therefore, be said that the Constitution of Utah, when applied to Thompson's Case, did not deprive him of a substantial right involved in his liberty, and did not materially alter the situation to his disadvantage. If, in respect to felonies committed in Utah while it was a territory, it was competent for the state to prescribe a jury of eight persons, it could just as well have prescribed a jury of four or two, and, perhaps, have dispensed altogether with a jury, and provided for a trial before a single judge. \* \* \*

In our opinion, the provision in the Constitution of Utah providing for the trial in courts of general jurisdiction of criminal cases, not capital, by a jury composed of eight persons, is *ex post facto* in its application to felonies committed before the territory became a state.

because, in respect of such crimes, the Constitution of the United States gave the accused, at the time of the commission of his offense, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury.

Judgment reversed.<sup>2</sup>

[BREWER and PECKHAM, JJ., dissented.]

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### 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

<sup>2</sup> Accord: *State v. Ardoin*, 51 La. Ann. 169, 24 South. 802, 72 Am. St. Rep. 454 (1899) (nine out of twelve jurors authorized to find verdict).

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 imprisonment 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,<sup>1</sup> 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

<sup>1</sup> The law was changed before the first plea of guilty of murder in the second degree was made. See 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.* Otherwise, under the statutes considered in *Garvey v. People*, 6 Colo. 559, 45 Am. Rep. 531 (1883).

offense it was the law of Utah that no person convicted of a felony 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.<sup>2</sup>

<sup>2</sup> See *Frisby v. United States*, 38 D. C. App. 22, 37 L. R. A. (N. S.) 96 (1912) (*ex post facto* to permit use against defendant of evidence voluntarily produced by him in an equity suit under a former statute excluding it from criminal prosecutions). Other cases of alterations of rules of admissibility of evidence are collected in 37 L. R. A. (N. S.) 96, 97.

In the following cases changes in the law were held to be merely procedural and not *ex post facto*: *Ex parte McCardle*, 7 Wall. 506, 19 L. Ed. 264 (1858) (depriving defendant of appeal to higher court); *Gut v. Minnesota*, 9 Wall. 35, 19 L. Ed. 573 (1869) (changing place of trial); *Duncan v. Missouri*, 152 U. S. 377, 14 Sup. Ct. 570, 38 L. Ed. 485 (1894) (change in number of appellate judges); *Commonwealth v. Phelps*, 210 Mass. 78, 96 N. E. 349, 37 L. R. A. (N. S.) 567, Ann. Cas. 1912C, 1119 (1911) (same of trial judges); *Gibson v. Mississippi*, 162 U. S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075 (1896) (requiring higher qualifications of jurors); *Mallett v. North Carolina*, 181 U. S. 589, 21 Sup. Ct. 730, 45 L. Ed. 1015 (1901) (granting to state an appeal from judgment of intermediate appellate court giving convicted defendant a new trial); *Harris v. United States*, 4 Okl. Cr. 317, 111 Pac. 982, 31 L. R. A. (N. S.) 820, Ann. Cas. 1912B, 810 (1910) (reducing defendant's or increasing state's peremptory challenges).

As to the effect of a change in the mode of beginning a prosecution, from indictment to information, see *Garnsey v. State*, 4 Okl. Cr. 547, 112 Pac. 24, (1910), annotated in 38 L. R. A. (N. S.) 600-602. See, also, *State v. McCoy*, 87 Neb. 385, 127 N. W. 137, 28 L. R. A. (N. S.) 583 (1910) (increase in amount of penal bond required to suspend sentence is *ex post facto*). Compare *Kring v. Missouri*, 107 U. S. 221, 2 Sup. Ct. 443, 27 L. Ed. 506 (1882) (digested in principal case), and *Ratzky v. People*, 29 N. Y. 124 (1864) (law that an erroneous sentence entitles defendant to a discharge may be changed to permit correction of error).

## COMMONWEALTH v. GETCHELL.

(Supreme Judicial Court of Massachusetts, 1835. 16 Pick. 452.)

[Appeal from a municipal court judgment upon demurrer in February, 1835, imposing an additional punishment upon Getchell, who in 1827 was convicted of forgery, in 1830 discharged from prison therefor, and in April, 1831, was again convicted of forgery and sent to prison for four years. St. 1827, c. 118, made a convict liable to additional punishment if he were twice convicted; St. 1832, c. 73, imposed this only if he were twice discharged from prison; and St. 1833, c. 85, repealed the act of 1832, reviving the act of 1827.]

WILDE, J. In this case the defendant has been but twice convicted, and but once discharged. He would not, therefor, under the Statute of 1832, c. 73, be liable to an additional punishment. We apprehend that the act was not intended to have such an effect; but the language of the statute is express, and it will admit of but one construction. That statute, however, has been repealed by the Statute of 1833, c. 85, and the question is, whether the suspension of the liability of the defendant, while the former statute continued in force, is a legal discharge of his liability at the time of his second conviction. And we are of opinion that it is not. The offence for which he was a second time convicted, was committed, and he was also convicted, before the passage of the Statute of 1832.

If the crime had been committed, or if the defendant had been convicted, during the time that the Statute of 1832 was in force, the repealing Statute of 1833 might be considered as an *ex post facto* law in regard to him. But as the conviction took place in 1831, and he was then liable to the additional punishment, the act of 1832 operated only as a suspension of his liability, and not in nature of a pardon. That act having been repealed, his liability remains as it was at the time of his conviction.

Demurrer overruled.<sup>1</sup>

<sup>1</sup> Accord: *Commonwealth v. Mott*, 21 Pick. 492 (1839), under the same statutes; the last crime being committed in 1830 and a conviction for it had in 1834. The same principle applies to the prohibition against state laws impairing the obligation of contracts. *Knights Templars' & M. L. Indemnity Co. v. Jarman*, 187 U. S. 197, 208, 23 Sup. Ct. 108, 47 L. Ed. 139 (1902).

If defendant is *tried* while the second statute increasing the punishment is in force, this is *ex post facto*; nor can he be convicted under the first statute in the absence of a saving clause. He must therefore be acquitted, and then the revival of the first statute is ineffectual as to him. *Hartung v. People*, 26 N. Y. 167 (1863).

## 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<sup>1</sup> 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 legisla-

<sup>1</sup> This collection of statutes (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.

tion 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 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 prescribe 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.<sup>2</sup>

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

<sup>2</sup> Accord: *Meffert v. State Board of Medical Registration & Examination*, 66 Kan. 710, 72 Pac. 247, 1 L. R. A. (N. S.) 811 (1903) (revocation of physician's license for past immorality); *Shepherd v. Grimmett*, 3 Idaho (Hask.) 403, 31 Pac. 793 (1892) (past polygamists excluded from suffrage); *Boyd v. Mills*, 53 Kan. 594, 37 Pac. 16, 25 L. R. A. 486, 42 Am. St. Rep. 306 (1894) (same, for past disloyalty to government).

In *Cummings v. Missouri*, 4 Wall. 277, 319, 320, 18 L. Ed. 356 (1867), Field, J., said (holding invalid part of the Missouri Constitution of 1865 which disqualified persons guilty of various acts of past disloyalty from various offices and occupations, including those of teacher and clergyman): "Among the rights reserved to the states is the right of each state to determine the qualifications for office, and the conditions upon which its citizens may exercise their various callings and pursuits within its jurisdiction. \* \* \* But it by no means follows that, under the form of creating a qualification or attaching a condition, the states can in effect inflict a punishment for a past act which was not punishable at the time it was committed \* \* \* Qualifications relate to the fitness or capacity of the party for a particular pursuit or profession. Webster defines the term to mean 'any natural endowment or any acquirement which fits a person for a place, office, or employment, or enables him to sustain any character, with success.' It is evident from the nature of the pursuits and professions of the parties, placed under disabilities by the Constitution of Missouri, that many of the acts, from the taint of which they must purge themselves, have no possible relation to their fitness for those pursuits and professions. There can be no connection between the fact that Mr. Cummings entered or left the state of Missouri to avoid enrolment or draft in the military service of the United States and his fitness to teach the doctrines or administer the sacraments of his church; nor can a fact of this kind or the expression of words of sympathy with some of the persons drawn into the Rebellion constitute any evidence of the unfitness of the attorney or counsellor to practice his profession, or of the professor to teach the ordinary branches of education, or of the want of business knowledge or business capacity in the manager of a corporation, or in any director or trustee. It is manifest upon the simple statement of many of the acts and of the professions and pursuits, that there is no such relation between them as to render a denial of the commission of the acts at all appropriate as a condition of allowing the exercise of the professions and pursuits. The oath could not, therefore, have been required as a means of ascertaining

## SECTION 2.—SELF-CRIMINATION—SEARCHES AND SEIZURES

### HALE v. HENKEL.

(Supreme Court of United States, 1906. 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652.)

[Appeal from the United States Circuit Court for the Southern District of New York. In a proceeding before the federal grand jury to determine whether an indictment should be found against the American Tobacco Company and MacAndrews & Forbes Company for violating the federal anti-trust statutes, Hale, secretary and treasurer of the latter company, was served with a subpoena duces tecum ordering him to appear before the grand jury and testify, and to bring with him a large amount of documentary evidence specified in the opinion below. He refused to obey, for the reasons stated below, and was committed to custody by the Circuit Judge for contempt. From an order dismissing a writ of habeas corpus this appeal was taken.]

Mr. Justice BROWN. [After deciding that a grand jury might pursue an investigation before a regular indictment was laid before it:] 2. Appellant also invokes the protection of the fifth amendment to the Constitution, which declares that no person "shall be compelled in any criminal case to be a witness against himself," and in reply to

whether parties were qualified or not for their respective callings or the trusts with which they were charged. It was required in order to reach the person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen."

So, also, In re Garland, 4 Wall. 333, 18 L. Ed. 366 (1867) (oath of non-support of rebellion against United States required for admission to practice in federal courts). See the comment upon these cases in Dent v. West Virginia, 129 U. S. 114, 125-128, 9 Sup. Ct. 231, 32 L. Ed. 623 (1889).

Compare Johannessen v. United States, 225 U. S. 227, 242, 243, 32 Sup. Ct. 613, 617, 56 L. Ed. 1066 (1912), in which Pitney, J., said (upholding a federal act authorizing the cancellation of naturalization certificates previously procured by fraud): "The act imposes no punishment upon an alien who has previously procured a certificate of citizenship by fraud or other illegal conduct. It simply deprives him of his ill-gotten privileges. \* \* \* The act makes nothing fraudulent or unlawful that was honest and lawful when it was done. It imposes no new penalty upon the wrongdoer. But if, after fair hearing, it is judicially determined that by wrongful conduct he has obtained a title to citizenship, the act provides that he shall be deprived of a privilege that was never rightfully his. Such a statute is not to be deemed an ex post facto law." And so Bugajewitz v. Adams, 228 U. S. 585, 591, 33 Sup. Ct. 607, 57 L. Ed. — (1913) (deportation of alien for past prostitution—semble).

various questions put to him he declined to answer, on the ground that he would thereby incriminate himself.

The answer to this is found in a proviso to the general appropriation act of February 25, 1903 (32 Stat. 854-904, c. 755 [U. S. Comp. St. Supp. 1905, p. 602]), that "no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said acts," of which the antitrust law is one, providing, however, that "no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying." \* \* \*

The object of the amendment is to establish in express language and upon a firm basis the general principle of English and American jurisprudence, that no one shall be compelled to give testimony which may expose him to prosecution for crime. It is not declared that he may not be compelled to testify to facts which may impair his reputation for probity, or even tend to disgrace him; but the line is drawn at testimony that may expose him to prosecution. If the testimony relate to criminal acts long since past, and against the prosecution of which the statute of limitations has run, or for which he has already received a pardon or is guaranteed an immunity, the amendment does not apply.

The interdiction of the fifth amendment operates only where a witness is asked to incriminate himself,—in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the amendment ceases to apply. The criminality provided against is a present, not a past, criminality, which lingers only as a memory, and involves no present danger of prosecution. To put an extreme case, a man in his boyhood or youth may have committed acts which the law pronounces criminal; but it would never be asserted that he would thereby be made a criminal for life. It is here that the law steps in and says that if the offense be outlawed or pardoned, or its criminality has been removed by statute, the amendment ceases to apply.

The extent of this immunity was fully considered by this court in *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, 3 Interst. Com. R. 816, in which the immunity offered by Rev. St. § 860 (U. S. Comp. St. 1901, p. 661), was declared to be insufficient. In consequence of this decision an act was passed applicable to testimony before the Interstate Commerce Commission in almost the exact language of the act of February 25, 1903, above quoted. This act was declared by this court in *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, 5 Interst. Com. R. 369, to afford absolute immunity against prosecution for the offense to which the question related, and deprived the witness of his constitutional right to refuse to answer. Indeed, the act was passed apparently to meet

the declaration in *Counselman v. Hitchcock* (142 U. S. 586, 12 Sup. Ct. 206, 35 L. Ed. 1122, 3 Interst. Com. R. 828), that "a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." If the constitutional amendment were unaffected by the immunity statute, it would put it within the power of the witness to be his own judge as to what would tend to incriminate him, and would justify him in refusing to answer almost any question in a criminal case, unless it clearly appeared that the immunity was not set up in good faith.

We need not restate the reasons given in *Brown v. Walker*, both in the opinion of the court, and in the dissenting opinion, wherein all the prior authorities were reviewed, and a conclusion reached by a majority of the court, which fully covers the case under consideration.

The suggestion that a person who has testified compulsorily before a grand jury may not be able, if subsequently indicted for some matter concerning which he testified, to procure the evidence necessary to maintain his plea, is more fanciful than real. He would have not only his own oath in support of his immunity, but the notes often, though not always, taken of the testimony before the grand jury, as well as the testimony of the prosecuting officer, and of every member of the jury present. It is scarcely possible that all of them would have forgotten the general nature of his incriminating testimony or that any serious conflict would arise therefrom. In any event, it is a question relating to the weight of the testimony, which could scarcely be considered in determining the effect of the immunity statute. The difficulty of maintaining a case upon the available evidence is a danger which the law does not recognize. In prosecuting a case, or in setting up a defense, the law takes no account of the practical difficulty which either party may have in procuring his testimony. It judges of the law by the facts which each party claims, and not by what he may ultimately establish.

The further suggestion that the statute offers no immunity from prosecution in the state courts was also fully considered in *Brown v. Walker*, and held to be no answer. The converse of this was also decided in *Jack v. Kansas*, 199 U. S. 372, 26 Sup. Ct. 73, 50 L. Ed. 234, 4 Ann. Cas. 689,—namely, that the fact that an immunity granted to a witness under a state statute would not prevent a prosecution of such witness for a violation of a federal statute did not invalidate such statute under the fourteenth amendment. It was held both by this court and by the supreme court of Kansas that the possibility that information given by the witness might be used under the federal act did not operate as a reason for permitting the witness to refuse to answer, and that a danger so unsubstantial and remote did not impair the legal immunity. Indeed, if the argument were a sound one it might be carried still further and held to apply not only



to state prosecutions within the same jurisdiction, but to prosecutions under the criminal laws of other states to which the witness might have subjected himself. The question has been fully considered in England, and the conclusion reached by the courts of that country that the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty. *Queen v. Boyes*, 1 Best & S. 311; *King of the Two Sicilies v. Willcox*, 7 St. Tr. (N. S.) 1049, 1068; *State v. March*, 46 N. C. (1 Jones L.) 526; *State v. Thomas*, 98 N. C. 599, 4 S. E. 518, 2 Am. St. Rep. 351. The entire question of immunity is also exhaustively treated in Wigmore on Evidence, §§ 2255-2259. \* \* \*

But it is further insisted that, while the immunity statute may protect individual witnesses, it would not protect the corporation of which appellant was the agent and representative. This is true, but the answer is that it was not designed to do so. The right of a person under the fifth amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person. A privilege so extensive might be used to put a stop to the examination of every witness who was called upon to testify before the grand jury with regard to the doings or business of his principal, whether such principal were an individual or a corporation. The question whether a corporation is a "person" within the meaning of this amendment really does not arise, except, perhaps, where a corporation is called upon to answer a bill of discovery, since it can only be heard by oral evidence in the person of some one of its agents or employees. The amendment is limited to a person who shall be compelled in any criminal case to be a witness against himself; and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation. As the combination or conspiracies provided against by the Sherman anti-trust act can ordinarily be proved only by the testimony of parties thereto, in the person of their agents or employees, the privilege claimed would practically nullify the whole act of Congress. Of what use would it be for the legislature to declare these combinations unlawful if the judicial power may close the door of access to every available source of information upon the subject? Indeed, so strict is the rule that the privilege is a personal one that it has been held in some cases that counsel will not be allowed to make the objection. We hold that the questions should have been answered.

3. The second branch of the case relates to the nonproduction by the witness of the books and papers called for by the subpoena duces tecum. The witness put his refusal on the ground, first, that it was impossible for him to collect them within the time allowed; second, because he was advised by counsel that, under the circumstances, he

was under no obligation to produce them; and finally, because they might tend to incriminate him.

Had the witness relied solely upon the first ground, doubtless the court would have given him the necessary time. The last ground we have already held untenable. While the second ground does not set forth with technical accuracy the real reason for declining to produce them, the witness could not be expected to speak with legal exactness, and we think is entitled to assert that the subpoena was an infringement upon the fourth amendment to the Constitution, which declares that "the right of the people to be secure in their persons, houses, paper, 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."

The construction of this amendment was exhaustively considered in the case of *Boyd v. United States*, 116 U. S. 616, 622, 634, 6 Sup. Ct. 524, 528, 534, 29 L. Ed. 746, 748, 752, which was an information in rem against certain cases of plate glass, alleged to have been imported in fraud of the revenue acts. On the trial it became important to show the quantity and value of the glass contained in a number of cases previously imported; and the district judge, under section 5 of the act of June 22, 1874 (18 Stat. 187, c. 391 [U. S. Comp. St. 1901, p. 2018]), directed a notice to be given to the claimants, requiring them to produce the invoice of these cases under penalty that the allegations respecting their contents should be taken as confessed. We held "that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the fourth amendment to the Constitution, in all cases in which a search and seizure would be," and that the order in question was an unreasonable search and seizure within that amendment.

The history of this provision of the Constitution and its connection with the former practice of general warrants, or writs of assistance, was given at great length, and the conclusion reached that the compulsory extortion of a man's own testimony, or of his private papers, to connect him with a crime or a forfeiture of his goods, is illegal, "is compelling a man to be a witness against himself, within the meaning of the fifth amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the fourth amendment."

Subsequent cases treat the fourth and fifth amendments as quite distinct, having different histories, and performing separate functions. Thus, in the case of *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. Ed. 1047, 4 Interst. Com. R. 545, the constitutionality of the interstate commerce act, so far

as it authorized the Circuit Courts to use their processes in aid of inquiries before the Commission, was sustained, the court observing in that connection: "It was clearly competent for Congress, to that end, to invest the Commission with authority to require the attendance and testimony of witnesses, and the production of books, papers, tariffs, contracts, agreements, and documents relating to any matter legally committed to that body for investigation. We do not understand that any of these propositions are disputed in this case."

The case of *Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, which was a writ of error to the supreme court of the state of New York, involving the seizure of certain gambling paraphernalia, was treated as involving the construction of the fourth and fifth amendments to the federal Constitution. It was held, in substance, that the fact that papers pertinent to the issue may have been illegally taken from the possession of the party against whom they are offered was not a valid objection to their admissibility; that the admission as evidence in a criminal trial of papers found in the execution of a valid search warrant prior to the indictment was not an infringement of the fifth amendment, and that, by the introduction of such evidence, defendant was not compelled to incriminate himself. The substance of the opinion is contained in the following paragraph. It was contended that: "If a search warrant is issued for stolen property, and burglars' tools be discovered and seized, they are to be excluded from testimony by force of these amendments. We think they were never intended to have that effect, but are rather designed to protect against compulsory testimony from a defendant against himself in a criminal trial, and to punish wrongful invasion of the home of the citizen or the unwarranted seizure of his papers and property, and to render invalid legislation or judicial procedure having such effect."

The *Boyd Case* must also be read in connection with the still later case of *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. Ed. 860, which arose upon the petition of the Commission for orders requiring the testimony of witnesses and the production of certain books, papers, and documents. The case grew out of a complaint against certain railway companies that they charged unreasonable and unjust rates for the transportation of anthracite coal. Objection was made to the production of certain contracts between these companies upon the ground that it would compel the witnesses to furnish evidence against themselves, in violation of the fifth amendment, and would also subject the parties to unreasonable searches and seizures. It was held that the circuit court erred in holding the contracts to be irrelevant, and in refusing to order their production as evidence by the witnesses who were parties to the appeal. In delivering the opinion of the court the *Boyd Case* was again considered in connection with the fourth and fifth amendments, and the remark made by Mr. Justice Day that the immunity

statute of 1893 "protects the witness from such use of the testimony given as will result in his punishment for crime or the forfeiture of his estate."

Having already held that, by reason of the immunity act of 1903, the witness could not avail himself of the fifth amendment, it follows that he cannot set up that amendment as against the production of the books and papers, since, in respect to these, he would also be protected by the immunity act. We think it quite clear that the search and seizure clause of the fourth amendment was not intended to interfere with the power of courts to compel, through a subpoena duces tecum, the production, upon a trial in court, of documentary evidence. As remarked in *Summers v. Moseley*, 2 Comp. & M. 477, it would be "utterly impossible to carry on the administration of justice" without this writ. The following authorities are conclusive upon this question: *Amey v. Long*, 9 East, 473; *Bull v. Loveland*, 10 Pick. (Mass.) 9; *United States Exp. Co. v. Henderson*, 69 Iowa, 40. 28 N. W. 426; *Greenl. Ev.* 469a.

If, whenever an officer or employee of a corporation were summoned before a grand jury as a witness he could refuse to produce the books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers. Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the state. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the state or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the state, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the state, and can only be taken from him by due process of law, and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights.

Upon the other hand, the corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its

powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not, in the exercise of its sovereignty, inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.

It is true that the corporation in this case was chartered under the laws of New Jersey, and that it receives its franchise from the legislature of that state; but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the general government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws. Being subject to this dual sovereignty, the general government possesses the same right to see that its own laws are respected as the state would have with respect to the special franchises vested in it by the laws of the state. The powers of the general government in this particular in the vindication of its own laws are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over the state corporations.

4. Although, for the reasons above stated, we are of the opinion that an officer of a corporation which is charged with a violation of a statute of the state of its creation, or of an act of Congress passed in the exercise of its constitutional powers, cannot refuse to produce the books and papers of such corporation, we do not wish to be understood as holding that a corporation is not entitled to immunity, under the fourth amendment, against unreasonable searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the fourteenth amendment, against unlawful



discrimination. *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 154, 17 Sup. Ct. 255, 41 L. Ed. 666, 667, and cases cited. Corporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises.

We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the fourth amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd Case*, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpoena duces tecum, against which the person, be he individual or corporation, is entitled to protection.

Applying the test of reasonableness to the present case, we think the subpoena duces tecum is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts, or correspondence between the MacAndrews & Forbes Company, and no less than six different companies, as well as all reports made and accounts rendered by such companies from the date of the organization of the MacAndrews & Forbes Company, as well as all letters received by that company since its organization from more than a dozen different companies, situated in seven different states in the Union.

If the writ had required the production of all the books, papers, and documents found in the office of the MacAndrews & Forbes Company, it would scarcely be more universal in its operation or more completely put a stop to the business of that company. Indeed, it is difficult to say how its business could be carried on after it had been denuded of this mass of material, which is not shown to be necessary in the prosecution of this case, and is clearly in violation of the general principle of law with regard to the particularity required in the description of documents necessary to a search warrant or subpoena. Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers. A general subpoena of this description is equally [as] indefensible as a search warrant would be if couched in similar terms. *Ex parte Brown*, 72 Mo. 83, 37 Am. Rep. 426; *Shaftsbury v. Arrowsmith*, 4 Ves. Jr. 66; *Lee v. Angas*, L. R. 2 Eq. 59.

Of course, in view of the power of Congress over interstate commerce, to which we have adverted, we do not wish to be understood as holding that an examination of the books of a corporation, if duly

authorized by act of Congress, would constitute an unreasonable search and seizure within the fourth amendment.

Order affirmed.<sup>1</sup>

[HARLAN and McKENNA, JJ., gave concurring opinions on the ground that the fourth amendment extended no protection whatever to corporations. BREWER, J., gave a dissenting opinion in which FULLER, C. J., concurred.]

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### SECTION 3.—JURY TRIAL—PROCEDURE AND PUNISHMENT

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#### THOMPSON v. UTAH.

(Supreme Court of United States, 1898. 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061.)

[Error to the Supreme Court of Utah. The facts are printed ante, p. 172.]

Mr. Justice HARLAN. \* \* \* The Constitution of the United States provides: "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where

<sup>1</sup> As to the kind of facts and form of disclosure protected by the constitutional provision, see 4 Wigmore, Evidence, §§ 2254-2267, as well as *Boyd v. United States*, *Counselman v. Hitchcock*, *Brown v. Walker*, and *Jack v. Kansas*, all cited and discussed in the principal case, and in *re Jackson*, 96 U. S. 727, 24 L. Ed. 877 (1878) (protection afforded to sealed letters in the mail). As to the compulsory exhibition of any part of a defendant's person, see, also, 10 Mich. L. Rev. 400, 401.

In *Wilson v. United States*, 221 U. S. 361, 377-386, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558 (1911) it was held that a corporation could not claim protection from self-crimination against the visitatorial power of the state or United States, even when the subpoena for its books and papers was directed to it, instead of to its agent, and that the agent in actual custody of such documents on behalf of the corporation must produce them in obedience to such a subpoena, even though they contained matter incriminating himself personally. He was protected only as to his own private papers in his custody. The same rule applies (semble, 221 U. S. 380, 31 Sup. Ct. 544, 55 L. Ed. 771, Ann. Cas. 1912D, 558) to all public records and those required by law to be kept for the information of the government.

In *Wheeler v. United States*, 226 U. S. 478, 33 Sup. Ct. 158, 57 L. Ed. — (1913), the same ruling was applied to books of a dissolved corporation in the possession of its former officers; and in *Grant v. United States*, 227 U. S. 74, 33 Sup. Ct. 190, 57 L. Ed. — (1913) this was affirmed, even when title to the corporate documents had passed to their present possessor, and would tend to incriminate him. Compare *Johnson v. United States*, 228 U. S. 457, 33 Sup. Ct. 572, 57 L. Ed. — (1913).

See *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 28 Sup. Ct. 178, 52 L. Ed. 327, 12 Ann. Cas. 658 (1908) (similar powers exercised by state court under fourteenth amendment).

As to the non-applicability to corporations of various constitutional guarantees, see *San Mateo Co. v. So. Pac. Ry.*, post p. 219.

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." Const. U. S. art. 3, § 2. And by the sixth amendment of the Constitution it is declared: "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 defense." \* \* \*

Assuming, then, that the provisions of the Constitution relating to trials for crimes and to criminal prosecutions apply to the territories of the United States, the next inquiry is whether the jury referred to in the original Constitution and in the sixth amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less. 2 Hale, P. C. 161; 1 Chit. Cr. Law, 505. This question must be answered in the affirmative. When Magna Charta declared that no freeman should be deprived of life, etc., "but by the judgment of his peers or by the law of the land," it referred to a trial by twelve jurors. Those who emigrated to this country from England brought with them this great privilege "as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power." 2 Story, Const. § 1779. In Bac. Abr. tit. "Jurics," it is said: "The trial per pais, or by a jury of one's country, is justly esteemed one of the principal excellencies of our Constitution; for what greater security can any person have in his life, liberty, or estate than to be sure of not being divested of nor injured in any of these without the sense and verdict of twelve honest and impartial men of his neighborhood? And hence we find the common law herein confirmed by Magna Charta." So, in 1 Hale, P. C. 33: "The law of England hath afforded the best method of trial that is possible of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment, by the testimony of witnesses viva voce in the presence of the judge and jury, and by the inspection and direction of the judge."

It must consequently be taken that the word "jury" and the words "trial by jury" were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument; and that when Thompson committed the offense of grand larceny in the territory of Utah—which was under the complete jurisdiction of the United States for all purposes of government and legislation—the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons. And such was the requirement of the statutes of Utah while it was a territory.

Was it, then, competent for the state of Utah, upon its admission into the Union, to do, in respect of Thompson's crime, what the United States could not have done while Utah was a territory, namely, to provide for his trial by a jury of eight persons? \* \* \* [This was held invalid as an *ex post facto* law. See ante, p. 173.]

It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force when this crime was committed did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons. In the case of *Hopt v. Utah* [110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262], the question arose whether the right of an accused, charged with felony, to be present before triors of challenges to jurors was waived by his failure to object to their retirement from the court room, or to their trial of the several challenges in his absence. The court said:

"We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow creatures, merely upon their own authority. 1 Bl. Comm. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind. 4 Bl. Comm. 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony that he shall be personally present at the trial; that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

If one under trial for a felony the punishment of which is confinement in a penitentiary could not legally consent that the trial proceed in his absence, still less could he assent to be deprived of his liberty by a tribunal not authorized by law to determine his guilt. \* \* \*

Judgment reversed.<sup>1</sup>

[BREWER and PECKHAM, JJ., dissented.]

<sup>1</sup> The right of trial by jury includes all of its substantial common-law incidents, such as the defendant's right of challenge, *Lewis v. United States*, 146 U. S. 370, 13 Sup. Ct. 136, 36 L. Ed. 1011 (1892); and unanimity of verdict, *Maxwell v. Dow*, post, at p. 225.

"Trial by jury," in the primary and usual sense of the term at the common law and in the American Constitutions, is not merely a trial by a jury of 12 men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of 12 men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict, if, in his opinion, it is against the law or the evidence."—Gray, J., in *Capital Traction Co. v. Hof*, 174 U. S. 1, 13, 14, 19 Sup. Ct. 550, 43 L. Ed. 873 (1899). This power of the federal courts to advise the jury upon the facts cannot be controlled by state statutes to the contrary, though they may be valid in the state courts. *Vicksburg & M. Ry. Co. v. Putnam*, 118 U. S. 545, 553, 7 Sup. Ct. 1, 30 L. Ed. 257 (1886).

Aliens may be detained in confinement, pending deportation, without a jury trial, but may not be compelled to labor or to suffer confiscation of property. *Wong Wing v. United States*, post, p. 981 note, 16 Sup. Ct. 977, 41 L. Ed. 140. The constitutional requirement is confined to *crimes*, and does not include misdemeanors punishable by a small fine or short imprisonment. A jury trial of the latter may be omitted by statute or waived by the defendant. *Schick v. United States*, 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99, 1 Ann. Cas. 585 (1904).

WAIVER OF TRIAL BY JURY.—"A jury of 12 men being the only legally constituted tribunal for the trial of an indictment for a felony, it necessarily follows that the court or judge is not such tribunal, and that, in the absence of a jury, he has by law no jurisdiction. There is no law which authorizes him to sit as a substitute for a jury, and perform their functions in such cases, and, if he attempts to do so, his act must be regarded as nugatory. Especially must this be true where the jury are not only the judges of the facts as at common law, but are also the judges of the law as provided by our statute. But it is said that the right to a trial by a jury is a right which the defendant may waive. This may be admitted, since every plea of guilty is, in legal effect, a waiver of the right to a trial by the legally constituted tribunal. But, while a defendant may waive his right to a jury trial, he cannot by such waiver confer jurisdiction to try him upon a tribunal which has no such jurisdiction by law. Jurisdiction of the subject-matter must always be derived from the law, and not from the consent of the parties, but in the present case jurisdiction is sought to be based, not upon any law conferring it, but upon the defendant's consent and agreement to waive a jury, and submit her cause to the court for trial."—Bailey, J., in *Harris v. People*, 128 Ill. 585, 591, 21 N. E. 563, 564, 15 Am. St. Rep. 153 (1889).

The cases upon the validity of waivers of jury trial in criminal cases are collected in 11 L. R. A. (N. S.) 1136 ff.

As to the validity in general of waivers of constitutional rights by accused persons, see *Starr v. State*, 5 Okl. Cr. 440, 467, 468, 115 Pac. 356, 367 (1911) (presence of accused—confronting witnesses), *Doyle, J.*, saying: "Generally speaking, the constitutional provisions guaranteeing to every accused person in a criminal action certain rights may be separated into two classes: First, those in which the public generally, and as a community, is interested, as well as the accused, and which are jurisdictional as affecting the power of



## CHAPTER VII

## INTERSTATE PRIVILEGES AND IMMUNITIES OF CITIZENS

CORFIELD v. CORYELL, (1825) 4 Wash. C. C. 371, 380-382, Fed. Cas. No. 3,230, Mr. Justice WASHINGTON (upholding a New Jersey statute forbidding any person not an actual inhabitant or resident of the state from gathering oysters therein on board any vessel not wholly owned by an inhabitant or resident thereof):

"2. The next question is, whether this act infringes that section of the Constitution which declares that 'the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states'? 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

the court to try the cause; second, those more in the nature of privileges which are for the benefit of the accused alone, and do not affect the general public. The former cannot be waived. Jurisdiction to try the cause is conferred by the law. Consent cannot confer jurisdiction, but the accused may waive a constitutional right or privilege designed for his protection, where no question of public policy is involved. The public as well as the accused have an interest in every criminal trial. The life and liberty of the citizen is a matter of supreme importance to the state, and it should not allow him to throw either away by a failure, intentional or otherwise, to take advantage of his constitutional safeguards. It will not do, however, to say that because the state has a peculiar interest in protecting the citizen accused of crime to the extent of his constitutional rights that he shall in no case be allowed to waive them, for in some cases it may be to his interest to waive them, and the denial of the right to do so would defeat the very object in view when the rights were given, and cause them to operate to the injury rather than to the benefit of the accused."

See, also, 11 Mich. L. Rev. 465-469 and first three cases in note L. Twining v. New Jersey, post p. 283.

JURISDICTION OF EQUITY TO RESTRAIN CRIMINAL ACTS.—The constitutional requirement is not violated by the original exercise or by the statutory enlargement of the power of courts of equity, in suits brought on behalf of the public, to enjoin conduct prejudicial to the public interest, even though it be also criminal. See *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092 (1895) (in general); *Littleton v. Fritz*, 65 Iowa. 488, 22 N. W. 641, 54 Am. Rep. 19 (1885) (illegal sale of liquor); *State v. Markuson*, 5 N. D. 147, 64 N. W. 934 (1895) (same); *Stead v. Fortner*, 255 Ill. 468, 99 N. E. 680 (1912) (same); *State v. Ohio Oil Co.*, 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627 (1895) (waste of natural gas) (cases); *State ex rel. Crow v. Canty*, 207 Mo. 439, 105 S. W. 1078, 15 L. R. A. (N. S.) 747, 123 Am. St. Rep. 393, 13 Ann. Cas. 787 (1907) (bull fight); *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 342, 343, 17 Sup. Ct. 540, 41 L. Ed. 1007 (1897) (anti-trust act); *United States v. Michigan Cent. Ry. Co.* (C. C.) 122 Fed. 544 (1903) (interstate commerce act); *United States v. Milwaukee Refrigerator Transit Co.* (C. C.) 145 Fed. 1007 (1906) (same); *North American Ins. Co. v. Gates*, 214 Ill. 272, 73 N. E. 423 (1905) (exclusion of foreign corporations); *Attorney General v. Chicago, M. & St. P. Ry. Co.*, 35 Wis. 425, 523-553 (1874) (abuse of corporate

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 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 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

franchise); *People ex rel. Attorney General v. Tool*, 35 Colo. 225, 86 Pac. 224, 229, 231, 6 L. R. A. (N. S.) 822, 117 Am. St. Rep. 198 (1905) (election frauds). See, also, 7 Col. L. Rev. 357; *E. S. Mack* in 16 Harv. L. Rev. 389.

In *State v. Canty*, above, *Vallant, P. J.*, said (207 Mo. 460, 461, 105 S. W. 1085, 15 L. R. A. [N. S.] 747, 123 Am. St. Rep. 393, 13 Ann. Cas. 787): "A man charged with the commission of a crime has a constitutional right to a trial by jury, but a man who has not yet acted, but who merely proposes to commit an act which is not only criminal in its character, but also flagrantly offensive as a public nuisance, has no constitutional right to commit the act in order that he may thereafter enjoy the constitutional right of trial by jury."

**PROCEDURE AND PUNISHMENT.**—The consideration of the provisions of the fifth amendment, securing a grand jury and forbidding double jeopardy; of the sixth amendment, regarding the conduct of criminal trials; and of the eighth amendment regarding bail, fines, and punishments—all properly belong to the subject of Criminal Procedure, and are not treated in this collection. See, however, as to *grand juries*, *In re Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89 (1885); *Mackin v. United States*, 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909 (1886); *double jeopardy*, *In re Lange*, 18 Wall. 163, 21 L. Ed. 872 (1874); *Kepner v. United States*, 195 U. S. 100, 24 Sup. Ct. 797, 49 L. Ed. 114, 1 Ann. Cas. 655 (1904); *Trono v. United States*, 199 U. S. 521, 26 Sup. Ct. 121, 50 L. Ed. 292, 4 Ann. Cas. 773 (1905); *Grafton v. United States*, 206 U. S. 333, 27 Sup. Ct. 749, 51 L. Ed. 1084, 11 Ann. Cas. 640 (1907); *trial in district where crime committed*, *Hyde v. United States*, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114 (1912); *Brown v. Elliott*, 225 U. S. 392, 32 Sup. Ct. 812, 56 L. Ed. 1136 (1912); *information of nature of accusation*, *Rosen v. United States*, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606 (1896); *Bartell v. United States*, 227 U. S. 427, 33 Sup. Ct. 383, 57 L. Ed. — (1913); *crucial punishment*, *Wcems v. United States*, 217 U. S. 349, 30 Sup. Ct. 544, 54 L. Ed. 703, 19 Ann. Cas. 705 (1910).

As to how far the provisions of the Constitution for the protection of persons accused of crime apply to actions for penalties, civil in form, though quasi-criminal in nature, see *Hepner v. United States*, 213 U. S. 103, 29 Sup. Ct. 474, 53 L. Ed. 720, 27 L. R. A. (N. S.) 739, 16 Ann. Cas. 960 (1909) (cases); *Oceanic Steam Nav. Co. v. Stranahan*, 214 U. S. 320, 29 Sup. Ct. 671, 53 L. Ed. 1013 (1909).

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 expressions of the preamble of 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.'

"But we cannot accede to the proposition which was insisted on by the counsel, that, under this provision of the Constitution, the citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens; much less, than in regulating the use of the common property of the citizens of such state, the legislature is bound to extend to the citizens of all the other states the same advantages as are secured to their own citizens. A several fishery, either as the right to it respects running fish, or such as are stationary, such as oysters, clams, and the like, is as much the property of the individual to whom it belongs, as dry land, or land covered by water; and is equally protected by the laws of the state against the aggressions of others, whether citizens or strangers. Where those private rights do not exist to the exclusion of the common right, that of fishing belongs to all the citizens or subjects of the state. It is the property of all; to be enjoyed by them in subordination to the laws which regulate its use. They may be considered as tenants in common of this property; and they are so exclusively entitled to the use of it, that it cannot be enjoyed by others without the tacit consent, or the express permission of the sovereign who has the power to regulate its use. \* \* \*

"That this exclusive right of taking oysters in the waters of New Jersey has never been ceded by that state, in express terms, to the United States, is admitted by the counsel for the plaintiff; and having shown, as we think we have, that this right is a right of property, vested either in certain individuals, or in the state, for the use of the citizens thereof; it would, in our opinion, be going quite too far to construe the grant of privileges and immunities of citizens, as amounting to a grant of a co-tenancy in the common property of the state, to the citizens of all the other states. Such a construction would, in many instances, be productive of the most serious public inconvenience and injury, particularly, in regard to those kinds of fish, which, by being exposed to too general use, may be exhausted. 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."<sup>1</sup>

PAUL v. VIRGINIA (1869) 8 Wall. 168, 178, 180-182, 19 L. Ed. 357, Mr. Justice FIELD (upholding a Virginia statute requiring foreign insurance corporations alone to deposit certain securities with the state treasurer before doing business in the state):

"In no case which has come under our observation, either in the state or federal courts, has a corporation been considered a citizen within the meaning of that provision of the Constitution which declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states. \* \* \* [Here follows a statement of the reasoning in *Bank of Augusta v. Earle*, 13 Pet. 586, 10 L. Ed. 274 denying that this provision referred to corporations.]

"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. \* \* \*

"But the privileges and immunities secured to citizens of each state in the several states, by the provision in question, are those privileges and immunities which are common to the citizens in the latter states under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own states are not secured in other states by this provision. It was not intended by the provision to give to the laws of one state any operation in other states. They can have no such operation, except by the permission, express or implied, of those states. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other states to their enjoyment therein be given.

"Now a grant of corporate existence is a grant of special privileges

<sup>1</sup> Accord (as to various species of common property): *McCready v. Virginia*, 94 U. S. 391, 24 L. Ed. 248 (1877) (planting oysters in public waters); *Chambers v. Church*, 14 R. I. 398, 51 Am. Rep. 410 (1884) (fish); *State v. Tower*, 84 Me. 444, 24 Atl. 898 (1892) (same) [see *Manchester v. Massachusetts*, 139 U. S. 240, 11 Sup. Ct. 559, 35 L. Ed. 159 (1891) and *Geer v. Connecticut*, 161 U. S. 519, 528 ff., 16 Sup. Ct. 600, 40 L. Ed. 793 (1896)]; *Geer v. Connecticut*, above (wild game); *Allen v. Wyckoff*, 48 N. J. Law, 90, 2 Atl. 659, 57 Am. Rep. 548 (1886) (same); *McCarter v. Hudson County Water Co.*, 70 N. J. Eq. 695, 65-Atl. 489, 14 L. R. A. (N. S.) 197, 118 Am. St. Rep. 754, 10 Ann. Cas. 116 (1906) (running water in navigable stream), affirmed in 209 U. S. 349, 28 Sup. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560 (1908). Compare *State v. Smith*, 71 Ark. 478, 75 S. W. 1081 (1903) (stock of non-residents forbidden to run at large).

Contra: *Rossmiller v. State*, 114 Wis. 169, 89 N. W. 839, 58 L. R. A. 93, 91 Am. St. Rep. 910 (1902) (semble) (ice on navigable waters).

to the incorporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle*, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. \* \* \*

"If the right asserted of the foreign corporation, when composed of citizens of one state, to transact business in other states were even restricted to such business as corporations of those states were authorized to transact it would still follow that those states would be unable to limit the number of corporations doing business therein. They could not charter a company for any purpose, however restricted, without at once opening the door to a flood of corporations from other states to engage in the same pursuits. They could not repel an intruding corporation, except on the condition of refusing incorporation for a similar purpose to their own citizens; and yet it might be of the highest public interest that the number of corporations in the state should be limited; that they should be required to give publicity to their transactions; to submit their affairs to proper examination; to be subject to forfeiture of their corporate rights in case of mismanagement, and that their officers should be held to a strict accountability for the manner in which the business of the corporations is managed, and be liable to summary removal. 'It is impossible,' to repeat the language of this court in *Bank of Augusta v. Earle*, 'upon any sound principle, to give such a construction to the article in question,'—a construction which would lead to results like these."<sup>1</sup>

<sup>1</sup> Accord: *Anglo-American Provision Co. v. Davis Provision Co.*, 191 U. S. 373, 24 Sup. Ct. 92, 48 L. Ed. 225 (1903) (foreign corporation excluded from domestic courts in certain classes of cases); *Blake v. McClung*, post, at p. 209.

<sup>2</sup> Presumably the members of a common-law partnership are protected by this clause. See *State v. Cadigan*, 73 Vt. 245, 50 Atl. 1079, 57 L. R. A. 606, 87 Am. St. Rep. 714 (1901).

<sup>3</sup> As to the status of free negroes before the fourteenth amendment, see *Dred Scott v. Sandford*, 19 How. 393, 15 L. Ed. 691 (1857), mentioned in *United States v. Wong Kim Ark*, ante, at p. 133.



## 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, 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. \* \* \* [Here follow quotations from *Corfield v. Coryell*, ante, p. 198, and from *McCready v. Va.*, 94 U. S. 391, 395, 24 L. Ed. 248.]

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;<sup>1</sup> 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,<sup>2</sup> 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 high-

<sup>1</sup> The clause does not forbid the discrimination of private individuals, but only that of the state. See *United States v. Morris* (D. C.) 125 Fed. 322-323 (1903). Compare *Civil Rights Cases*, post, p. 240.

<sup>2</sup> Statutes are invalid that confine to residents the right to act as trustee of property within a state, *Farmers' Loan & Trust Co. v. Chicago & A. Ry.* (C. C.) 27 Fed. 146 (1886); *Roby v. Smith*, 131 Ind. 342, 30 N. E. 1093, 15 L. R. A. 792, 31 Am. St. Rep. 439 (1892); or to take property by will, *Magill v. Brown*, 16 Fed. Cas. 408 (1833).

er tax or excise than that exacted by law of such permanent residents." <sup>3</sup>

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." <sup>4</sup>

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 busi-

<sup>3</sup> Accord: *Oliver v. Washington Mills*, 11 Allen (Mass.) 268 (1865) (tax on corporate dividends); *Sprague v. Fletcher*, 69 Vt. 69, 37 Atl. 239, 37 L. R. A. 840 (1896) (tax on personal property); *Estate of Johnson*, 139 Cal. 532, 73 Pac. 424, 96 Am. St. Rep. 161 (1903) (inheritance tax).

But non-residents may be taxed in a different manner from residents, if in the result there is no substantial discrimination. *Travelers' Ins. Co. v. Connecticut*, 185 U. S. 364, 22 Sup. Ct. 673, 46 L. Ed. 949 (1902); *Redd v. St. Francis County*, 17 Ark. 416 (1856); *Taylor v. Crawford*, 72 Ohio St. 560, 74 N. E. 1065, 69 L. R. A. 805 (1905).

<sup>4</sup> Accord, see *Lenmon v. People*, 20 N. Y. 562, 608 (1860).

ness 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.<sup>5</sup> 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.<sup>6</sup> 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 Constitu-

<sup>5</sup> Accord: *Pyrolusite Manganese Co. v. Ward*, 73 Ga. 491 (1884) (attachment against non-resident debtors); *Campbell v. Morris*, 3 Har. & Mill. (Md.) 535 (1797) (same); *Head v. Daniels*, 38 Kan. 1, 15 Pac. 911 (1887) (attachment bond required of non-residents); *Marsh v. Steele*, 9 Neb. 96, 1 N. W. 869, 31 Am. Rep. 406 (1879) (same); *Holt v. Tennallytown & R. R. Co.*, 81 Md. 219, 31 Atl. 809 (1895) (security for costs); *Cummings v. Wingo*, 31 S. C. 427, 10 S. E. 107 (1889) (same); *Nease v. Capehart*, 15 W. Va. 299 (1879) (same); *Frost v. Brisbit*, 19 Wend. 11, 32 Am. Dec. 423 (1837) (arrest for debt).

A statute of limitations may bar claims of non-resident plaintiffs against non-residents, and not bar similar claims of resident plaintiffs. *Chemung Canal Bank v. Lowery*, 93 U. S. 72, 23 L. Ed. 806 (1876). A foreign attachment against the property of non-resident debtors may be granted to resident creditors only. *Kincaid v. Francis, Cooke* (3 Tenn.) 49 (1812). The jurisdiction of courts in suits against foreign corporations may be confined to cases where the plaintiffs are residents, or where the cause of action arose in the state, or the subject of it is situated there. *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 19 N. E. 625, 2 L. R. A. 636 (1889); *Central Railroad & Banking Co. v. Georgia Const. & Invest. Co.*, 32 S. C. 319, 11 S. E. 192 (1890). Contra: *Cofrode v. Circuit Judge of Wayne County*, 79 Mich. 332, 44 N. W. 623, 7 L. R. A. 511 (1890) (semble); *Eingartner v. Illinois Steel Co.*, 94 Wis. 70, 68 N. W. 664, 34 L. R. A. 503, 59 Am. St. Rep. 859 (1896) (semble).

A number of common procedural discriminations against non-residents are enumerated in *Marsh v. Steele*, 9 Neb. 96, 100, 1 N. W. 869, 31 Am. Rep. 406 (1879). Among the most frequent is the exemption of property from execution. See 18 Cyc. 1406 (cases).

<sup>6</sup> Accord: *People ex rel. Akin v. Loewler*, 175 Ill. 585, 607, 608, 51 N. E. 785 (1898); *Austin v. State*, 10 Mo. 591 (1817) (semble). The same is true of jury service. Ex parte *Virginia*, 100 U. S. 339, 366, 25 L. Ed. 676 (1879), in opinion dissenting upon other grounds.

Rights attached by law to certain relations usually governed by the law of the domicile may be confined to residents who maintain such relations. *Conner v. Elliot*, 18 How. 591, 15 L. Ed. 497 (1855) (matrimonial community of property); *Buffington v. Grosvenor*, 46 Kan. 730, 27 Pac. 157, 13 L. R. A. 282 (1891) (dower); *Bennett v. Harms*, 51 Wis. 251, 8 N. W. 222 (1881) (dower); *Conner v. Elliot*, above (rights of partners inter sese—semble).

"The clause has nothing to do with the distinctions founded on domicile."—*Denio, J.*, in *Lemmon v. People*, 20 N. Y. 562, 608 (1860). "It does not obliterate all distinctions which may arise from the fact of residence. \* \* \* A non-resident cannot vote, hold office, practice law, or enjoy school and many other privileges simply because he is a citizen and has those rights in another state."—*Stiness, J.*, in *Chambers v. Church*, 14 R. I. 398, 399, 400, 51 Am. Rep. 410 (1884).

tion 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.<sup>7</sup>

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.<sup>8</sup> 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

<sup>7</sup> A state may forbid its *own* citizens from enjoying in another state privileges extended by the latter state to all within its borders. *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538 (1890) (foreign attachment to gain preference over creditors at domicile); *Keyser v. Rice*, 47 Md. 203, 28 Am. Rep. 448 (1877) (same to evade domestic exemption laws); *Sweeny v. Hunter*, 145 Pa. 363, 22 Atl. 653, 14 L. R. A. 594 (1891) (same).

<sup>8</sup> Accord: *People v. Granite State Provident Ass'n*, 161 N. Y. 492, 55 N. E. 1053 (1900) (building and loan association); *Maynard v. Granite State Provident Ass'n*, 92 Fed. 435, 34 C. C. A. 438 (1899) (semble).

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. \* \* \*

[It was decided that the Virginia corporation, the Hull Coal Company, was not protected by this provision, following *Paul v. Virginia*, ante, p. 200.]

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.<sup>10</sup>]

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### EX PARTE SPINNEY.

(Supreme Court of Nevada, 1875. 10 Nev. 323.)

[Habeas corpus before the Supreme Court. Spinney was in custody under a warrant of arrest charging him with violating a state statute enacted to prevent the practice of medicine by unqualified persons. Other facts appear in the opinion below.]

BEATTY, J. \* \* \* The illegality of the imprisonment is alleged to consist in this: That the statute defining the offence and prescribing the penalty is unconstitutional and void, because [among other

\* Accord: *Sully v. American Nat. Bank*, 178 U. S. 280, 20 Sup. Ct. 935, 44 L. Ed. 10 (1900).

See *W. J. Meyers* in 1 Mich. L. Rev. 286, 364 (1903) collecting authorities upon this provision of the Constitution. In *Chambers v. Baltimore & O. Ry.*, 207 U. S. 142, 28 Sup. Ct. 31, 52 L. Ed. 143 (1907) a discrimination was upheld, based, not upon the citizenship of parties to the action, but upon the citizenship of the decedent, for whose wrongfully caused death suit was brought. See both the majority and the dissenting opinion.

<sup>10</sup> Compare the language of the fourteenth amendment: "All persons born or naturalized in the United States \* \* \* are citizens of the United States and of the state wherein they reside."

reasons] in conflict with \* \* \* the second section of article 4 of the Constitution of the United States, which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." \* \* \*

The law says, in effect, that, outside of his own family, except in the specified cases of emergency, no man shall practice or prescribe as a physician or surgeon in this state unless he is either a regular graduate, or unless he has practiced in this state for ten years next preceding the passage of the act. This is the rule of qualification for medical or surgical practice. It is contended that it is purely arbitrary in these particulars: \* \* \* Second. In admitting those who have practiced the requisite period in this state and excluding those who have practiced during the same period in other states. \* \* \* The second point was more strenuously insisted upon, the petitioner contending that there cannot be any reasonable ground for a distinction between those who have practiced ten years in this state and those who have practiced ten years elsewhere.

But I am not prepared to say that there may not be grounds for such a distinction. Disregarding individual exceptions, which can never be made the basis of general legislation, it may have been considered that physicians and surgeons who are versed in the sciences upon which the intelligent practice of their arts depends are always graduates, and that those who are not graduates and whose qualifications depend mainly upon their individual experience, while they may be reasonably safe advisers in the locality and among the diseases they are accustomed to, might be very unsafe advisers in another locality and climate, among a population mainly employed in other avocations, and where, as a consequence, different diseases prevail, and the same diseases may be modified by different surrounding circumstances, not only in their development, but even in their earliest stage. To express the idea more plainly, the legislature may have thought: The graduate is a man of science; his knowledge enables him to refer effects to their causes; it enables him to discriminate between the essential relations of phenomena and their accidental coincidence; it is sufficiently comprehensive to anticipate the operation of new causes and the influence of changed conditions. He will, therefore, be able to adapt his practice to the peculiar diseases or modifications of disease of any locality. The mere practitioner, on the other hand, who has not pursued the regular course of medical education, and who has learned merely to meet a certain symptom with a certain drug, without knowing what pathological condition is indicated by the symptom or what is the specific action of the drug, may do very well in the diseases he is accustomed to, or where the same symptom means the same thing, and the accustomed remedy meets the same counteracting or co-operating conditions; but he will be dangerous among new diseases or new modifications of disease.

If this was the idea of the legislature, there is certainly some rea

son and some truth to sustain it, and we are bound to presume that if they had no better reason for the rule they have established, the true reason was found in the consideration indicated. How much truth there may be in these suggestions, or how important it may be as a principle of discrimination, was a question solely for the legislature. Having the power to discriminate, it had full discretion, so far as the clause of our Constitution in question is concerned, to discriminate upon any principle which will serve as the basis of a general classification. The question was one of policy, and its decision is not subject to our review.

It is urged, however, that in point of fact there is no essential difference of climate between this state and Utah or California. This may be true, or may not be; but I again say of that the legislature was the judge. There is undoubtedly a difference between Nevada and Florida or Louisiana. If the extremes were to be divided, it could only be by a geographical line, and wherever that line was drawn it must necessarily have been arbitrary in the same sense that the distinction between ten years and nine years and eleven months is arbitrary.

It may be said, in conclusion, that the idea of the necessity of local experience as a qualification to practice a licensed calling is by no means novel. The case of pilots is an extreme case, where the necessity is apparent. The case of lawyers, however, is entirely analogous to that of physicians, and certainly it has not been unusual to require a local apprenticeship to the law as a condition of license to practice it. I presume the constitutionality of a law requiring a term of service in the office of a Nevada attorney as an essential condition of license to practice here would not be questioned, and yet there is probably less difference between the laws and law practice of California and Nevada than there is between diseases and their treatment in the two states. \* \* \*

But is this law in conflict with the Constitution of the United States? The first provision referred to, considered with reference to this case, amounts to no more than this: that citizens of other states are entitled to practice medicine and surgery here on precisely the same terms and subject only to the same restrictions as our own citizens. Now this law makes no distinction in terms between our own citizens and citizens of other states. It merely prescribes the qualifications that practitioners are required to possess, and admits all to practice who can bring themselves within the rule, whether they are citizens of this state or other states. But it is argued that one of the sorts of qualification recognized is such, that of necessity none but citizens of this state can possess it. This is so, but it does not follow, therefore, that the law is unconstitutional; for if the qualification is in itself reasonable, and such as tends to subserve public interests, the legislature had the right to exact it, and the circumstance that



citizens of other states cannot possess it may be a misfortune to them, but is no reason why a precaution, proper in itself, should be dispensed with. \* \* \*

Prisoner remanded.<sup>1</sup>

[HAWLEY, C. J., gave a concurring opinion.]

<sup>1</sup>The principal case has been generally followed. Many of the cases in accord are collected in 1 Mich. Law Rev. 294, and others are cited in *Craig v. Board of Medical Examiners*, 12 Mont. 203, 29 Pac. 532 (1892). Contra: *State v. Hinman*, 65 N. H. 103, 18 Atl. 194, 23 Am. St. Rep. 22 (1889). A similar statute has been upheld as applied to dentists. *State v. Creditor*, 44 Kan. 565, 24 Pac. 346, 21 Am. St. Rep. 306 (1890); and see *State v. Vandersluis*, 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119 (1889).

Retail liquor dealers are in several states required to be residents. *Welsh v. State*, 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664 (1890); *Austin v. State*, 10 Mo. 591 (1847); *Mette v. McGuckin*, 18 Neb. 323, 25 N. W. 338 (1885), affirmed by a divided court in United States Supreme Court, 37 L. Ed. 934 (1892). "It is not an unreasonable requirement that a person who desires to avail himself of a license to retail intoxicating liquor shall submit himself to the jurisdiction of the state, by becoming an inhabitant thereof, to the end that he may be readily apprehended and punished for any violation of the law in connection with his business."—Coffey, J., in *Welsh v. State*, above, 126 Ind. 78, 25 N. E. 885, 9 L. R. A. 664.

So, also, in *State v. Richcreek*, 167 Ind. 217, 229, 230, 77 N. E. 1085, 1089, 5 L. R. A. (N. S.) 874, 119 Am. St. Rep. 491, 10 Ann. Cas. 899 (1906), holding that an individual, or one member of a firm, conducting a banking business, must be a resident of the state, Montgomery, J., said: "The propriety of this provision is readily manifest. A private banker inverting the confidence and patronage of the public should not only possess suitable capital, but also a good character. The people entrusting their money to his care should be afforded an opportunity of learning something of his character, habits, and mode of life without going beyond state lines for information. A good character will not insure the safety of a business entrusted wholly to employes, but personal supervision is highly requisite. The situs of the bank assets for the purposes of taxation should be definitely fixed, and not left open to dispute by the nonresidence of the owner. It is important that the banker should be within the jurisdiction of our courts, civil and criminal, and be answerable personally to the complaints of creditors, and easily apprehended in case of a violation of the laws governing his business."

## CHAPTER VIII

### OPERATION OF FOURTEENTH AMENDMENT\* IN SECURING CIVIL RIGHTS

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#### SECTION 1.—IN GENERAL

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#### BARRON v. MAYOR, ETC., OF BALTIMORE.

(Supreme Court of United States, 1833. 7 Pet. 213, 8 L. Ed. 672.)

[Error to the Maryland Court of Appeals for the western shore of the state. The city of Baltimore in grading its streets diverted certain streams from their natural course, so that they made deposits of earth near Barron's wharf and prevented the access of vessels. He sued in case for these injuries. A verdict for him for \$4,500 in the county court was reversed by the Court of Appeals, and this writ of error was taken.]

Mr. Chief Justice MARSHALL. The judgment brought up by this writ of error having been rendered by the court of a state, this tribunal can exercise no jurisdiction over it, unless it be shown to come within the provisions of the twenty-fifth section<sup>1</sup> of the Judiciary Act. 1 Stats. at Large, 85. The plaintiff in error contends that it comes within that clause in the fifth amendment to the Constitution, which inhibits the taking of private property for public use, without just compensation. He insists that this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a state, as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause.

The question thus presented is, we think, of great importance, but not of much difficulty. The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a Constitution for itself, and, in that Constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States

\*So far as the matter in this chapter concerns the "due process" clause of the fourteenth amendment, the principles involved are equally applicable to the "due process" clause of the fifth amendment.

<sup>1</sup> This section gave jurisdiction over questions arising under the federal Constitution, laws, and treaties.

as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states. In their several Constitutions they have imposed such restrictions on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest.

The counsel for the plaintiff in error insists that the Constitution was intended to secure the people of the several states against the undue exercise of power by their respective state governments; as well as against that which might be attempted by their general government. In support of this argument he relies on the inhibitions contained in the tenth section of the first article. We think that section affords a strong if not a conclusive argument in support of the opinion already indicated by the court. The preceding section contains restrictions which are obviously intended for the exclusive purpose of restraining the exercise of power by the departments of the general government. Some of them use language applicable only to Congress; others are expressed in general terms. The third clause, for example, declares that "no bill of attainder or ex post facto law shall be passed." No language can be more general; yet the demonstration is complete that it applies solely to the government of the United States. In addition to the general arguments furnished by the instrument itself, some of which have been already suggested, the succeeding section, the avowed purpose of which is to restrain state legislation, contains in terms the very prohibition. It declares that "no state shall pass any bill of attainder or ex post facto law." This provision, then, of the ninth section, however comprehensive its language, contains no restriction on state legislation.

The ninth section having enumerated, in the nature of a bill of rights, the limitations intended to be imposed on the powers of the general government, the tenth proceeds to enumerate those which were to operate on the state legislatures. These restrictions are brought together in the same section, and are by express words applied to the states. "No state shall enter into any treaty," etc. Perceiving that in a Constitution framed by the people of the United States for the government of all, no limitation of the action of government on the people would apply to the state government, unless

expressed in terms; the restrictions contained in the tenth section are in direct words so applied to the states.

It is worthy of remark, too, that these inhibitions generally restrain state legislation on subjects intrusted to the general government, or in which the people of all the states feel an interest. A state is forbidden to enter into any treaty, alliance, or confederation. If these compacts are with foreign nations, they interfere with the treaty-making power, which is conferred entirely on the general government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the Constitution. To grant letters of marque and reprisal, would lead directly to war; the power of declaring which is expressly given to Congress. To coin money is also the exercise of a power conferred on Congress. It would be tedious to recapitulate the several limitations on the powers of the states which are contained in this section. They will be found, generally, to restrain state legislation on subjects intrusted to the government of the Union, in which the citizens of all the states are interested. In these alone were the whole people concerned. The question of their application to states is not left to construction. It is averred in positive words.

If the original Constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government, and on those of the states; if in every inhibition intended to act on state power, words are employed which directly express that intent,—some strong reason must be assigned for departing from this safe and judicious course in framing the amendments, before that departure can be assumed. We search in vain for that reason.

Had the people of the several states, or any of them, required changes in their Constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments; the remedy was in their own hands, and could have been applied by themselves. A convention could have been assembled by the discontented state, and the required improvements would have been made by itself. The unwieldy and cumbrous machinery of procuring a recommendation from two-thirds of Congress, and the assent of three-fourths of their sister states, could never have occurred to any human being as a mode of doing that which might be effected by the state itself. Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original Constitution, and have expressed that intention. Had Congress engaged in the extraordinary occupation of improving the Constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

But it is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government, not against those of the local governments. In compliance with a sentiment thus generally expressed to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them. \* \* \*

Writ dismissed.<sup>2</sup>

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### SLAUGHTER-HOUSE CASES.

(Supreme Court of United States, 1873. 16 Wall. 36, 21 L. Ed. 394.)

[Error to the Supreme Court of Louisiana. A Louisiana statute conferred upon the Crescent City Live-Stock Landing & Slaughter-House Company, a domestic corporation, the sole and exclusive right for 25 years to maintain within the parishes of Orleans, Jefferson, and St. Bernard a place for slaughtering animals to be sold for meat, and to have slaughtered therein all animals the meat of which was destined for sale in the parishes of Orleans and Jefferson. The company was to erect suitable slaughter houses and stock landings to accommodate all butchers, and was empowered to charge certain fees for the use thereof, and the animals were to be slaughtered under state inspection. The three parishes contained over 1,100 square miles and between 200,000 and 300,000 people, and the act affected

<sup>2</sup> The doctrine of the principal case as to the first ten amendments to the Constitution has been repeatedly affirmed. See *Spies v. Illinois*, 123 U. S. 131, 166, 8 Sup. Ct. 22, 31 L. Ed. 80 (1887) and *Brown v. New Jersey*, 175 U. S. 172, 174, 20 Sup. Ct. 77, 44 L. Ed. 119 (1899), citing many later cases. An earlier state case to the same effect is *Murphy v. People*, 2 Cow. (N. Y.) 815 (1824). In *People v. Goodwin*, 18 Johns. (N. Y.) 188, 201, 9 Am. Dec. 203 (1820), is a dictum to the contrary. See *Jackson ex dem. Wood v. Wood*, 2 Cow. 819 (1824), for an account of the rejection by the United States Senate of a proposed amendment restricting state action.

Counsel's error in alleging in the record that state legislation violates the due process clause of the fifth amendment, instead of the fourteenth, is fatal to the federal Supreme Court's jurisdiction on writ of error from a state court. *Chaplin v. Fye*, 179 U. S. 127, 21 Sup. Ct. 71, 45 L. Ed. 119 (1900); *Corkran Oil & Development Co. v. Arnaudet*, 199 U. S. 182, 26 Sup. Ct. 41, 50 L. Ed. 143 (1905).



the business of about 1,000 persons. In several test suits the monopoly was upheld by the Louisiana courts, and writs of error were taken.]

Mr. Justice MILLER. \* \* \* The plaintiffs in error \* \* \* allege that the statute is a violation of the Constitution of the United States in these several particulars: \* \* \*

That it creates an involuntary servitude forbidden by the thirteenth article of amendment;<sup>1</sup>

That it abridges the privileges and immunities of citizens of the United States;

That it denies to the plaintiffs the equal protection of the laws; and,

That it deprives them of their property without due process of law; contrary to the provisions of the first section of the fourteenth article of amendment.

This court is thus called upon for the first time to give construction to these articles.

We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, and of the several states to each other and to the citizens of the states and of the United States, have been before this court during the official life of any of its present members. We have given every opportunity for a full hearing at the bar; we have discussed it freely and compared views among ourselves; we have taken ample time for careful deliberation, and we now propose to announce the judgments which we have formed in the construction of those articles, so far as we have found them necessary to the decision of the cases before us, and beyond that we have neither the inclination nor the right to go.

Twelve articles of amendment were added to the federal Constitution soon after the original organization of the government under it in 1789. Of these all but the last were adopted so soon afterwards as to justify the statement that they were practically contemporaneous with the adoption of the original; and the twelfth, adopted in eighteen hundred and three, was so nearly so as to have become, like all the others, historical and of another age. But within the last eight years three other articles of amendment of vast importance have been added by the voice of the people to that now venerable instrument.

The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. Nor can such doubts, when any rea-

<sup>1</sup> The parts of the opinion dealing with the thirteenth amendment are omitted. See chapter V, ante, pp. 151-153.

sonably exist, be safely and rationally solved without a reference to that history; for in it is found the occasion and the necessity for recurring again to the great source of power in this country, the people of the states, for additional guarantees of human rights; additional powers to the federal government; additional restraints upon those of the states. Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt. \* \* \* [Here follows a brief history of the adoption of the thirteenth amendment.]

The process of restoring to their proper relations with the federal government and with the other states those which had sided with the Rebellion, undertaken under the proclamation of President Johnson in 1865, and before the assembling of Congress, developed the fact that, notwithstanding the formal recognition by those states of the abolition of slavery, the condition of the slave race would, without further protection of the federal government, be almost as bad as it was before. Among the first acts of legislation adopted by several of the states in the legislative bodies which claimed to be in their normal relations with the federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.

They were in some states forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.

These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the federal government in safety through the crisis of the Rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the fourteenth amendment, and they declined to treat as restored to their full participation in the government of the Union the states which had been in insurrection, until they ratified that article by a formal vote of their legislative bodies. \* \* \* [Here is briefly stated the history of the adoption of the fifteenth amendment.]

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and

on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese cooly labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the states which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say, and what we wish to be understood [as saying] is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.

The first section of the fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship—not only citizenship of the United States, but citizenship of the states.  
\* \* \* “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.” \* \* \* That its main purpose was to establish the citizenship of the negro can admit of no doubt. \* \* \*

The next observation is more important in view of the arguments of counsel in the present case. It is, that the distinction between citizenship of the United States and citizenship of a state is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a state, but an important element is necessary to convert the former into the latter. He must reside within the state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

It is quite clear, then, that there is a citizenship of the United

States, and a citizenship of a state, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several states. The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.

The language is, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It is a little remarkable, if this clause was intended as a protection to the citizen of a state against the legislative power of his own state, that the word citizen of the state should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the state, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.

If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the state as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.

The first occurrence of the words "privileges and immunities" in our constitutional history, is to be found in the fourth of the Articles of the old Confederation.

It declares "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 regress 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."

In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in section two of the fourth article, in the following words: "The cit-

izens of each state shall be entitled to all the privileges and immunities of citizens of the several states."

There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the Articles of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

Fortunately we are not without judicial construction of this clause of the Constitution. \* \* \* [Here follow quotations from *Coryell v. Coryell*, ante, p. 197, and *Paul v. Virginia*, ante, p. 200.]

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.

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 pretence 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 protection 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.

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the states as such, and that they are left to the state governments for security and protection, and not by this article placed under the special care of the federal government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no state can abridge, until some case involving those privileges may make it necessary to do so.

But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the federal government, its national character, its Constitution, or its laws.

One of these is well described in the case of *Crandall v. Nevada*, 6 Wall. 36, 18 L. Ed. 745. It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the sub-treasuries, land offices, and courts of justices in the several states." And quoting from the language of Chief Justice Taney in another case, it is said "that for all the great purposes for which the federal government, was established, we are one people,

with one common country, we are all citizens of the United States;" and it is, as such citizens, that their rights are supported in this court in *Crandall v. Nevada*.

Another privilege of a citizen of the United States is to demand the care and protection of the federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several states, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a state. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any state of the Union by a bona fide residence therein, with the same rights as other citizens of that state.<sup>2</sup> To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth, next to be considered.

But it is useless to pursue this branch of the inquiry, since we are of opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the fourteenth amendment under consideration. \* \* \* [This restraint upon the New Orleans butchers was held not to be a taking of their property without due process of law.]

"Nor shall any state deny to any person within its jurisdiction the equal protection of the laws."

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

If, however, the states did not conform their laws to its requirements, then by the fifth section of the article of amendment Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.<sup>3</sup> It

<sup>2</sup> Other implied privileges of national citizenship are mentioned in *Twining v. New Jersey*, 211 U. S. 78, 97, 29 Sup. Ct. 14, 53 L. Ed. 97 (1908).

<sup>3</sup> "[This] 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

is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a state that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of state oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the amendment.

In the early history of the organization of the government, its statesmen seem to have divided on the line which should separate the powers of the national government from those of the state governments, and though this line has never been very well defined in public opinion, such a division has continued from that day to this.

The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the federal power. And it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late Civil War. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the state organizations to combine and concentrate all the powers of the state, and of contiguous states, for a determined resistance to the general government.

Unquestionably this has given great force to the argument and added largely to the number, of those who believe in the necessity of a strong national government.

But, however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the states with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the states, and to confer additional power on that of the nation.

But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between state and federal power, and we trust that such may continue

the equal protection of the laws has not been affirmed by the later cases. \* \* \* That the primary reason for that amendment was to secure the full enjoyment of liberty to the colored race is not denied, yet it is not restricted to that purpose, and it applies to every one, white or black, that comes within its provisions."—Peckham, J., in *Maxwell v. Dow*, 176 U. S. 581, 591, 593, 20 Sup. Ct. 448, 452, 453, 44 L. Ed. 597 (1900).

to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts.

Judgment affirmed.

[Dissenting opinions were given by FIELD, BRADLEY, and SWAYNE, JJ. CHASE, C. J., also dissented.]

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MAXWELL v. DOW.

(Supreme Court of United States, 1900. 176 U. S. 581, 20 Sup. Ct. 418, 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. \* \* \* [This opinion, which appears ante, p. 216, is here discussed at length, and quotations are made from it and from the opinion of Washington, J., in *Corfield v. Coryell*, ante, p. 197.]

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 *Slaugh-*



ter-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 pow-

ers. 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.<sup>1</sup>

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

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DAVIDSON v. NEW ORLEANS (1878) 96 U. S. 97, 24 L. Ed. 616, Mr. Justice MILLER (upholding a Louisiana special assessment for draining swamp lands):

<sup>1</sup> Accord: *Twining v. New Jersey*, 211 U. S. 78, 93-99, 29 Sup. Ct. 14, 19, 20, 53 L. Ed. 97 (1908) (right against self-incrimination) (cases); *Moody v. J.*, saying: "It is possible that some of the personal rights safeguarded by the first eight amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979. If this is so, it is not because these rights are enumerated in the first eight amendments, but because they are of such a nature that they are included in the conception of due process of law."

"The prohibition against depriving the citizen or subject of his life, liberty, or property without due process of law, is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the fourteenth amendment, in the year 1866.

"The equivalent of the phrase 'due process of law,' according to Lord Coke, is found in the words 'law of the land,' in the Great Charter, in connection with the writ of habeas corpus, the trial by jury, and other guarantees of the rights of the subject against the oppression of the Crown. In the series of amendments to the Constitution of the United States, proposed and adopted immediately after the organization of the government, which were dictated by the jealousy of the states as further limitations upon the power of the federal government, it is found in the fifth, in connection with other guarantees of personal rights of the same character. Among these are protection against prosecutions for crimes, unless sanctioned by a grand jury, against being twice tried for the same offense, against the accused being compelled, in a criminal case, to testify against himself, and against taking private property for public use without just compensation.

"Most of these provisions, including the one under consideration, either in terms or in substance, have been embodied in the constitutions of the several states, and in one shape or another have been the subject of judicial construction. It must be confessed, however, that the constitutional meaning or value of the phrase 'due process of law,' remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the constitutions of the several states and of the United States.

"It is easy to see that when the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the Crown, except as provided by the law of the land, they meant by 'law of the land' the ancient and customary laws of the English people, or laws enacted by the Parliament of which those barons were a controlling element. It was not in their minds, therefore, to protect themselves against the enactment of laws by the Parliament of England. But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'no state shall deprive any person of life, liberty, or property without due process of law,' can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is

now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision.

"A most exhaustive judicial inquiry into the meaning of the words 'due process of law,' as found in the fifth amendment, resulted in the unanimous decision of this court, that they do not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts. *Murray's Lessee et al. v. Hoboken Land & Improvement Co.*, 18 How. 272, 15 L. Ed. 372. [See post, p. 262, for this case.]

"It is not a little remarkable, that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the states, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a state to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the state, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law.

"But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.<sup>1</sup> This court is, after an experience of nearly a

<sup>1</sup> Compare the remark of Brewer, J., dissenting, in *Austin v. Tennessee*, 179 U. S. 343, 383, 21 Sup. Ct. 132, 147, 45 L. Ed. 224 (1900): "I think, and I say it with all respect, that no case involving a constitutional question should be turned off on the simple declaration that upon its peculiar facts it falls on one side or the other of some undisclosed line of demarcation."

century, still engaged in defining the obligation of contracts, the regulation of commerce, and other powers conferred on the federal government, or limitations imposed upon the states.”

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HURTADO v. CALIFORNIA (1884) 110 U. S. 516, 530-532, 535-536, 4 Sup. Ct. 111, 292, 28 L. Ed. 232, Mr. Justice MATTHEWS (upholding a California criminal prosecution begun by information instead of by indictment):<sup>1</sup>

“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 receive 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

<sup>1</sup> The remainder of the case is printed post, p. 270.



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. \* \* \*

“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.”

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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.

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 re-

gard 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 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.<sup>1</sup>

<sup>1</sup> Compare *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297 (1895), and *Nutting v. Massachusetts*, 183 U. S. 553, 22 Sup. Ct. 235, 46 L. Ed. 324 (1902), cases of acts within the state by agents of prohibited foreign insurance companies.

"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 *Berthoff v. O'Reilly*, 74 N. Y. 509, 515, 30 Am. Rep. 323 (1875).

"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."—Peckham, J., in *Lochner v. New York*, 198 U. S. 45, 56, 25 Sup. Ct. 539, 543 (49 L. Ed. 937, 3 Ann. Cas. 1133) (1905).

"The terms 'life,' 'liberty,' and 'property,' are representative terms, and

## 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

intended to cover every right, to which a member of the body politic is entitled under the law. These terms include the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, the right freely to buy and sell as others may. Indeed, they may embrace all our liberties, personal, civil, and political, including the rights to labor, to contract, to terminate contracts, and to acquire property. None of these liberties and rights can be taken away, except by due process of law. 2 Story, Const. (5th Ed.) § 1950. The rights of life, liberty, and property embrace whatever is necessary to secure and effectuate the enjoyment of those rights. The rights of liberty and of property include the right to acquire property by labor and by contract. *Ritchie v. People*, 155 Ill. 98, 40 N. E. 451, 29 L. R. A. 79, 46 Am. St. Rep. 315. If an owner cannot be deprived of his property without due process of law, he cannot be deprived of any of the essential attributes which belong to the right of property without due process of law. Labor is property. The laborer has the same right to sell his labor, and to contract with reference thereto, as any other property owner. The right of property involves, as one of its essential attributes, the right not only to contract, but also to terminate contracts."—*Gillespie v. People*, 188 Ill. 176, 182, 183, 58 N. E. 1007, 1009, 52 L. R. A. 283, 80 Am. St. Rep. 176 (1900), by Magruder, J.

See C. E. Shattuck in 4 *Harv. L. Rev.* 365 (1891), discussing the historical meaning of "liberty" in our Constitutions, as derived from various equivalent terms in Magna Carta and other English constitutional documents; and see McKeehle, *Magna Carta*, 436-459 (1905).



misdeemeanor, 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 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.<sup>1</sup> 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

<sup>1</sup> "Congress, by virtue of the fifth section of the fourteenth amendment, may enforce the prohibitions whenever they are disregarded by either the legislative, the executive, or the judicial department of the state. The mode of enforcement is left to its discretion. It may secure the right, that is, enforce its recognition, by removing the case from a state court in which it is denied, into a federal court where it will be acknowledged."—Strong, J., in *Virginia v. Rives*, 100 U. S. 313, 318 (25 L. Ed. 667) (1880).

For the application of the present federal removal statutes to cases of denial of equal civil rights in the state courts, see *Virginia v. Rives*, above; *Neal v. Delaware*, 103 U. S. 370, 26 L. Ed. 567 (1880); *Gibson v. Mississippi*, 162 U. S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075 (1896). As to the stage of the controversy at which relief may be sought in the federal courts against unauthorized acts of subordinate state officers, see *Home Telephone Co. v. City of Los Angeles*, 227 U. S. 278, 33 Sup. Ct. 312, 57 L. Ed. — (1913), substantially overruling *Barney v. New York*, 193 U. S. 430, 24 Sup. Ct. 502, 48 L. Ed. 737 (1904).

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.<sup>2</sup> 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.]<sup>3</sup>

<sup>2</sup> "The constitutional provision is, 'Nor shall any state deprive any person of life, liberty, or property without due process of law.' Certainly a state cannot be deemed guilty of a violation of this constitutional obligation simply because one of its courts, while acting within its jurisdiction, has made an erroneous decision."—Waite, C. J., in *Arrowsmith v. Harmoning*, 118 U. S. 191, 195, 196, 6 Sup. Ct. 1023, 1024, 30 L. Ed. 243 (1886).

<sup>3</sup> "These prohibitions extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities." Gray, J., in *Scott v. McNeal*, 154 U. S. 34, 45, 14 Sup. Ct. 1108, 1112, 38 L. Ed. 896 (1894) (improper judicial action), approved in *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U. S. 226, 233-235, 17 Sup. Ct. 581, 41 L. Ed. 979 (1897).

"The state board of equalization is one of the instrumentalities provided by the state for the purpose of raising the public revenue by way of taxation. \* \* \* Acting under the Constitution and laws of the state, the board therefore represents the state, and its action is the action of the state. The provisions of the fourteenth amendment are not confined to the action of the state through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the state acts; and so it has been held that whoever, by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition; and as he acts in the name of the state and for the state, and is clothed with the state's powers, his act is that of the state."—Peckham, J., in *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20, 35, 36, 28 Sup. Ct. 7, 12, 52 L. Ed. 78, 12 Ann. Cas. 757 (1907).

That the state officer is acting without actual state authority, or even in obvious violation of his authority, does not prevent the application of the amendment. See *Yick Wo v. Hopkins*, post, p. 383, and *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 390, 14 Sup. Ct. 1047, 1051, 38 L. Ed. 1014 (1894), *Brewer, J.*, saying: "Neither will the constitutionality of the statute, if that be conceded, avail to oust the federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual."

In *Home Telephone Co. v. City of Los Angeles*, 227 U. S. 278, 287, 33 Sup. Ct. 312, 314, 57 L. Ed. — (1913), *White, C. J.*, said (answering a contention to the contrary): "The proposition relied upon presupposes that the terms of the fourteenth amendment reach only acts done by state officers which are within the scope of the power conferred by the state. The proposition, hence, applies to the prohibitions of the amendment the law of principal and agent governing contracts between individuals, and consequently assumes that no act done by an officer of a state is within the reach of the amendment unless such act can be held to be the act of the state by the application of such law

## 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).<sup>1</sup>]

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 condi-

of agency. In other words, the proposition is that the amendment deals only with the acts of state officers within the strict scope of the public powers possessed by them, and does not include an abuse of power by an officer as the result of a wrong done in excess of the power delegated. Here again the settled construction of the amendment is that it presupposes the possibility of an abuse by a state officer or representative of the powers possessed, and deals with such a contingency. It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the amendment forbids, even although the consummation of the wrong may not be within the powers possessed, if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the amendment is that where an officer or other representative of a state, in the exercise of the authority with which he is clothed, misuses the power possessed to do a wrong forbidden by the amendment, inquiry concerning whether the state has authorized the wrong is irrelevant, and the federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power."

The fourteenth amendment is not violated, however, merely because the acts of a state agency are illegal under the existing laws or Constitution of the state, if the state *could* authorize or ratify them without violation of the amendment. *Missouri ex rel. Hill v. Dockery*, 191 U. S. 165, 171, 24 Sup. Ct. 53, 48 L. Ed. 133 (1903); *Owensboro Waterworks Co. v. Owensboro*, 200 U. S. 38, 45-47, 26 Sup. Ct. 249, 50 L. Ed. 361 (1906).

<sup>1</sup>"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.

tions 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 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 every 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 commit an assault against the person, or commit mur-

der, 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 therefore 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 citizen 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. See Chapter V, supra.]

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.<sup>2</sup>

Judgment accordingly.<sup>3</sup>

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

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## SECTION 2.—APPLICATION TO CORPORATIONS

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COUNTY OF SAN MATEO v. SOUTHERN PAC. R. CO. (1882) 13 Fed. 722, 743, 744, 746, 747, Mr. Justice FIELD (holding a California tax upon the property of a railroad corporation invalid, both because valued in an improperly discriminatory manner, and for lack of due process of law under the fourteenth amendment, in failing to afford proper notice and hearing):

"Is the defendant, being a corporation, a person within the meaning of the fourteenth amendment, so as to be entitled, with respect to its property, to the equal protection of the laws? \* \* \* Private corporations are, it is true, artificial persons, but with the exception of a sole corporation, with which we are not concerned, they consist of aggregations of individuals united for some legitimate busi-

<sup>2</sup> See *Butts v. Mercantile Transp. Co.*, 230 U. S. 126, 33 Sup. Ct. 964, 57 L. Ed. — (1913) (act also invalid in places under federal jurisdiction outside of states because of inseparability of provisions of act).

<sup>3</sup> Accord: *Hodges v. United States*, 203 U. S. 1, 14, 27 Sup. Ct. 6, 51 L. Ed. 65 (1906) (semble). So as to fifteenth amendment, *James v. Bowman*, 190 U. S. 127, 23 Sup. Ct. 678, 49 L. Ed. 979 (1903) (conspiracy of individuals to bribe negroes not to vote); and as to interstate privileges and immunities clause (Const. art. IV, § 2), *United States v. Morris* (D. C.) 125 Fed. 322 (1903). Compare *Ex parte Riggs* (C. C.) 134 Fed. 404 (1904), and *United States v. Powell* (C. C.) 151 Fed. 648 (1907); one suggesting and the other denying that the act of private individuals in lynching a prisoner to prevent a state from affording him due process of law is punishable by the United States under the fourteenth amendment. See, also, *United States v. Harris*, 106 U. S. 629, 1 Sup. Ct. 601, 27 L. Ed. 290 (1883). As to when the lynching of a state prisoner may be contempt of a federal court, see *United States v. Shipp*, 203 U. S. 563, 27 Sup. Ct. 165, 51 L. Ed. 319, 8 Ann. Cas. 265 (1906); *Id.*, 214 U. S. 386, 29 Sup. Ct. 637, 53 L. Ed. 1041 (1909); *Id.*, 215 U. S. 581, 30 Sup. Ct. 397, 54 L. Ed. 337 (1909).

A state may alter its law of public callings so as to permit *individuals* engaged therein to refuse certain kinds of service to any or all persons. *State v. Lasater*, 9 Baxt. (68 Tenn.) 584 (1877); *Allen v. Pullman Palace Car Co.*, 191 U. S. 171, 182-183, 24 Sup. Ct. 39, 48 L. Ed. 134 (1903); *McCabe v. Atchison, T. & S. F. R. Co.*, 186 Fed. 966, 109 C. C. A. 110 (1911).

ness. In this state they are formed under general laws; and the Civil Code provides that they 'may be formed for any purpose for which individuals may lawfully associate themselves.' Any five or more persons may by voluntary association form themselves into a corporation. And, as a matter of fact, nearly all enterprises in this state, requiring for their execution an expenditure of large capital, are undertaken by corporations. They engage in commerce; they build and sail ships; they cover our navigable streams with steamers; they construct houses; they bring the products of earth and sea to market; they light our streets and buildings; they open and work mines; they carry water into our cities; they build railroads, and cross mountains and deserts with them; they erect churches, colleges, lyceums, and theaters; they set up manufactories, and keep the spindle and shuttle in motion; they establish banks for savings; they insure against accidents on land and sea; they give policies on life; they make money exchanges with all parts of the world; they publish newspapers and books, and send news by lightning across the continent and under the ocean. Indeed, there is nothing which is lawful to be done to feed and clothe our people, to beautify and adorn their dwellings, to relieve the sick, to help the needy, and to enrich and ennoble humanity, which is not to a great extent done through the instrumentalities of corporations. There are over 500 corporations in this state; there are 30,000 in the United States, and the aggregate value of their property is several thousand millions. It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation. We cannot accept such a conclusion. On the contrary, we think that it is well established by numerous adjudications of the Supreme Court of the United States and of the several states, that whenever a provision of the Constitution, or of a law, guarantees to persons the enjoyment of property, or affords to them means for its protection, or prohibits legislation injuriously affecting it, the benefits of the provision extend to corporations, and that the courts will always look beyond the name of the artificial being to the individuals whom it represents.<sup>1</sup>

"The fifth amendment to the Constitution 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

<sup>1</sup> In *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394, 396, 6 Sup. Ct. 1132, 30 L. Ed. 118 (1886), Walte, C. J., said: "The court does not wish to hear argument on the question whether the provision in the fourteenth amendment to the Constitution, which forbids a state to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does." This is the earliest judicial statement to this effect by the federal Supreme Court. See, also, *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 154, 17 Sup. Ct. 255, 41 L. Ed. 666 (1897).

actual service in time of war or public danger; nor shall any person be subject for the same offense to be put twice 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.<sup>1</sup>

"From the nature of the prohibitions in this amendment it would seem, with the exception of the last one, as though they could apply only to natural persons. No others can be witnesses; no others can be twice put in jeopardy of life or limb, or compelled to be witnesses against themselves;<sup>2</sup> and therefore it might be said with much force that the word 'person,' there used in connection with the prohibition against the deprivation of life, liberty, and property without due process of law, is in like manner limited to a natural person. But such has not been the construction of the courts. A similar provision is found in nearly all of the state Constitutions; and everywhere, and at all times, and in all courts, it has been held, either by tacit assent or express adjudication, to extend, so far as their property is concerned, to corporations.<sup>3</sup> And this has been because the property of a corporation is in fact the property of the corporators. To deprive the corporation of its property, or to burden it, is, in fact, to deprive the corporators of their property or to lessen its value. Their interest, undivided though it be, and constituting only a right during the continuance of the corporation to participate in its dividends, and on its dissolution to receive a proportionate share of its assets, has an appreciable value, and is property in a commercial sense, and whatever affects the property of the corporation necessarily affects the commercial value of their interests. If, for example, to take the illustration given by counsel, a corporation created for banking purposes acquires land, notes, stocks, bonds, and money, no stockholder can claim that he owns any particular item of this property, but he owns an interest in the whole of it which the courts will protect against unlawful seizure or appropriation by others, and on the dissolution of the company he will receive a proportionate share of its assets. Now, if a statute of the state takes the entire property, who suffers loss by the legislation? Whose property is taken? Certainly, the corporation is deprived of its property; but at the same time, in every just sense of the constitutional guaranty, corporators are also deprived of their property.

"The prohibition against the deprivation of life and liberty in the

<sup>2</sup> Accord: *Wilson v. United States*, ante, p. 193, note. See, also, *Hale v. Henkel*, ante, p. 184.

<sup>3</sup> "It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws." —Harlan, J., in *Covington & L. Turnpike Road Co. v. Sandford*, 164 U. S. 578, 592, 17 Sup. Ct. 198, 203, 41 L. Ed. 560 (1896) (citing cases).

same clause of the fifth amendment does not apply to corporations,<sup>4</sup> because, as stated by counsel, the lives and liberties of the individual corporators are not the life and liberty of the corporation."

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PEMBINA CONSOL. SILVER MIN. & MILL. CO. v. PENNSYLVANIA (1888) 125 U. S. 181, 188-190, 8 Sup. Ct. 737, 31 L. Ed. 650, Mr. Justice FIELD (upholding a Pennsylvania statute requiring an annual license fee from foreign corporations not investing or using their capital in the state):

"3. The application of the fourteenth amendment of the Constitution to the statute imposing the license tax in question is not more apparent than the application of the clause of the Constitution [as] to the rights of citizens of one state to the privileges and immunities of citizens in other states. The inhibition of the amendment that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Under the designation of person there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution. As said by Chief Justice Marshall, 'The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men.' *Providence Bank v. Billings*, 4 Pet. 514, 562 [7 L. Ed. 939]. The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the state. The plaintiff in error is not a corporation within the jurisdiction of Pennsylvania. The office it hires is within such jurisdiction, and on condition that it pays the required license tax it can claim the same protection in the use of the office that any other corporation having a similar office may claim. It would then have the equal protection of the law so far as it had anything within the jurisdiction of the state, and the constitutional amendment requires nothing more. The state is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, provided always such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce. It is not every corporation, lawful in the state of its creation, that other states may be willing to admit within their jurisdiction or consent that it have of-

<sup>4</sup> "The liberty guaranteed by the fourteenth amendment against deprivation without due process of law is the liberty of natural, not artificial, persons. *Northwestern Nat. L. Ins. Co. v. Riggs*, 203 U. S. 243 [27 Sup. Ct. 126, 51 L. Ed. 168, 7 Ann. Cas. 1104]."—Harlan, J., in *Western Turf Ass'n v. Greenberg*, 204 U. S. 359, 363, 27 Sup. Ct. 384, 386, 51 L. Ed. 520 (1907).



fices in them; such, for example, as a corporation for lotteries. And even where the business of a foreign corporation is not unlawful in other states the latter may wish to limit the number of such corporations, or to subject their business to such control as would be in accordance with the policy governing domestic corporations of a similar character. The states may, therefore, require for the admission within their limits of the corporations of other states, or of any number of them, such conditions as they may choose, without acting in conflict with the concluding provision of the first section of the fourteenth amendment. \* \* \*

"The only limitation upon this power of the state to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions, for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the federal government, is not to be restricted by state authority."

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

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PHILADELPHIA FIRE ASS'N v. NEW YORK (1886) 119 U. S. 110, 119, 120, 7 Sup. Ct. 108, 30 L. Ed. 342, Mr. Justice BLATCHFORD (upholding the imposition by New York upon a Pennsylvania corporation of a discriminatory annual license fee for the privilege of continuing to do business in the state, in retaliation for the imposition of like taxes of like amount by Pennsylvania upon foreign corporations doing business there):

"This Pennsylvania corporation came into the state of New York to do business, by the consent of the state, under this act of 1853, with a license granted for a year, and has received such license annually, to run for a year. It is within the state for any given year under such license, and subject to the conditions prescribed by statute. The state, having the power to exclude entirely, has the power to change the conditions of admission at any time for the future, and to impose as a condition the payment of a new tax, or a further tax, as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the state, or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given. The act of 1865 had been passed when the corporation first established an agency in the state. The amendment of 1875 changed the act of 1865 only by giving to the superintendent the power of remitting the fees and charges required to be collected by then existing laws. Therefore the corporation was at all times after 1872 subject, as a prerequisite to its power to do business in New York, to the same license

fee its own state, might thereafter impose on New York companies doing business in Pennsylvania. By going into the state of New York in 1872, it assented to such prerequisite as a condition of its admission within the jurisdiction of New York. It could not be of right within such jurisdiction until it should receive the consent of the state to its entrance therein under the new provisions, and such consent could not be given until the tax, as a license fee for the future should be paid."

[HARLAN, J., dissented.]

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BLAKE v. McCLUNG (1898) 172 U. S. 239, 260, 261, 19 Sup. Ct. 165, 43 L. Ed. 432, Mr. Justice HARLAN (upholding a Tennessee statute giving a preference to claims of resident creditors over those of a foreign corporation in the distribution of the Tennessee assets of an insolvent foreign corporation):

"It is equally clear that the Virginia corporation cannot rely upon the clause declaring that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' That prohibition manifestly relates only to the denial by the state of equal protection to persons 'within its jurisdiction.' Observe that the prohibition against the deprivation of property without due process of law is not qualified by the words 'within its jurisdiction,' while those words are found in the succeeding clause relating to the equal protection of the laws. The court cannot assume that those words were inserted without any object, nor is it at liberty to eliminate them from the Constitution, and to interpret the clause in question as if they were not to be found in that instrument. Without attempting to state what is the full import of the words, 'within its jurisdiction,' it is safe to say that a corporation not created by Tennessee, nor doing business there under conditions that subjected it to process issuing from the courts of Tennessee at the instance of suitors, is not, under the above clause of the fourteenth amendment, within the jurisdiction of that state.<sup>1</sup> Certainly, when the statute in question was enacted, the Virginia corporation was not within the jurisdiction of Tennessee. So far as the record discloses, its claim against the Embreeville Company was on account of coke sold and shipped from Virginia to the latter corporation at its place of business in Tennessee. It does not appear to have been doing business in Tennessee under the statute here involved, or under any statute that would bring it directly under the jurisdiction of the courts of Tennessee by service of process on its officers or agents. Nor do we think it came

<sup>1</sup> As to what constitutes "doing business" within a state, so as to subject a corporation to the service of process there, see the citations and references in 24 L. R. A. 295-297; 10 L. R. A. (N. S.) 693; 23 L. R. A. (N. S.) 834; 18 L. R. A. (N. S.) 142; and *International Text-Book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 24 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103 (1910).

within the jurisdiction of Tennessee, within the meaning of the amendment, simply by presenting its claim in the state court, and thereby becoming a party to this cause. Under any other interpretation, the fourteenth amendment would be given a scope not contemplated by its framers or by the people, nor justified by its language. We adjudge that the statute, so far as it subordinates the claims of private business corporations not within the jurisdiction of the state of Tennessee (although such private corporations may be creditors of a corporation doing business in the state under the authority of that statute) to the claims against the latter corporation of creditors residing in Tennessee, is not a denial of the 'equal protection of the laws' secured by the fourteenth amendment to persons within the jurisdiction of the state, however unjust such a regulation may be deemed."<sup>2</sup>

[FULLER, C. J., and BREWER, J., dissented upon other grounds.]

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SECURITY MUT. LIFE INS. CO. v. PREWITT (1906) 202 U. S. 246, 248, 249, 252, 256-258, 26 Sup. Ct. 619, 50 L. Ed. 1013, 6 Ann. Cas. 317, Mr. Justice PECKHAM (upholding a Kentucky statute authorizing yearly permits to be granted to foreign insurance companies to do business in the state, and making it the duty of the commissioner of insurance at once to revoke such permit to any company that removed to a federal court or instituted therein any suit between it and citizens of Kentucky. The insurance company asked an injunction against such revocation of its permit):

"The matter to be now determined is whether a state has the right to provide that if a foreign insurance company shall remove a case to the federal court, which has been commenced in a state court, the license of such company to do business within the state shall be thereupon revoked. \* \* \* A state has the right to prohibit a foreign corporation from doing business within its borders, unless such prohibition is so conditioned as to violate some provision of the federal Constitution. \* \* \* Having the power to prevent a foreign insurance company from doing business at all within the state, we think the state can enact a statute such as is above set forth. The question is, in our opinion, settled by the decisions of this court. \* \* \* [Here follow statements of *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. Ed. 365, and *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148.]

"In these two cases this court decided that any agreement made by a foreign insurance company not to remove a cause to the federal court was void, whether made pursuant to a statute of the state pro-

<sup>2</sup> See, also, *Paul v. Virginia*, ante, p. 200. A non-resident individual mortgagee of land in Tennessee is likewise not "within its jurisdiction," as against discriminating legislation by that state. *Sully v. American Nat. Bank*, 178 U. S. 289, 20 Sup. Ct. 933, 44 L. Ed. 1072 (1900).

viding for such agreement, or in the absence of such statute; but that the state, having power to exclude altogether a foreign insurance company from doing business within the state, had power to enact a statute which, in addition to providing for the agreement mentioned, also provided that if the company did remove a case from the state to a federal court, its right to do business within the state should cease, and its permit should be revoked. It was held there was a distinction between the two propositions, and one might be held void and the other not. \* \* \*

[Here follows a statement of *Barron v. Burnside*, 121 U. S. 186, 7 Sup. Ct. 931, 30 L. Ed. 915, holding invalid an Iowa statute requiring, as a condition precedent to a permit to do business in the state, that a foreign corporation agree not to remove into a federal court suit brought against it in the state courts. A railroad had not taken out this permit and its agents were held not punishable by the state for acting without such a permit.]

"The most that can be contended for is that the *Barron Case* holds that where the statute exacts a stipulation in advance, as a condition of granting a permit, and the statute is not separable into parts, the whole statute is void, and a provision for withdrawing the permit, if a case is removed, is not saved. That principle, as we have said, does not touch this case, as there is no exaction of a stipulation at any time.

"It has not been decided that a statute which has no requirement for a stipulation or agreement not to remove is void if there be simply a provision therein for a revocation of the permit, such as is contained in the statute under review.

"As a state has power to refuse permission to a foreign insurance company to do business at all within its confines, and as it has power to withdraw that permission when once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none for a valid act is immaterial.

"Counsel for the companies, in their brief, admit that the state 'has the right at any time to pass a statute expelling a company or revoking its license, and the validity of the statute of expulsion would not be affected by the motives of the state in so doing, even though the preamble expressly recited that the license was revoked because the company had removed a case. The statute would be valid—for the company had no constitutional right to remain in the state any longer than it chose to allow; and the statute would not abridge any right of removal—for, as the case had already been fully removed before the statute was in existence, the right of removal could not be said to have been hindered or abridged by a statute not even in existence.'

"Thus it is admitted that a state has power to prevent a company from coming into its domain, and that it has power to take away its right to remain after having been permitted once to enter, and that right may be exercised from good or bad motives; but what the com-

panies deny is the right of a state to enact in advance that if a company remove a case to a federal court its license shall be revoked.

"We think this distinction is not well founded. The truth is that the effect of the statute is simply to place foreign insurance companies upon a par with the domestic ones doing business in Kentucky. No stipulation or agreement being required as a condition for coming into the state and obtaining a permit to do business therein, the mere enactment of a statute which, in substance, says if you choose to exercise your right to remove a case into a federal court, your right to further do business within the state shall cease and your permit shall be withdrawn, is not open to any constitutional objection. The reasoning in the Doyle Case we think is good."<sup>1</sup>

[DAY and HARLAN, JJ., dissented in an opinion by DAY, J.]

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WESTERN UNION TELEGRAPH CO. v. KANSAS ex rel.  
COLEMAN.

(Supreme Court of United States, 1910. 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355.)

[Error to the Supreme Court of Kansas. Since 1854 defendant company had done a general telegraph business in Kansas, having entered the state unconditionally in accordance with its laws, and had constructed lines and established over 800 offices there. A statute of 1908 made it a condition of foreign corporations entering the state or continuing to do local business in it that they should pay to the state school fund a fee ranging from one-tenth to one-fiftieth of 1 per cent. of their total authorized capital. Defendant's entire capitalization was \$100,000,000, on which the fee would be \$20,100. Most of this capital was employed outside of Kansas. Defendant refused to pay this fee, and the state brought suit to oust defendant from the exercise of corporate powers in doing intrastate business in Kansas. A decree enjoining its transaction of such business was rendered, not affecting its interstate or federal governmental business. The opinion of the United States Supreme Court by HARLAN, J., reversed this decree as in violation both of the commerce and the due process clauses of the Constitution—the latter because being in substance a tax upon property outside of the state. The opinion upon the former point is printed post, p.1122.]

Mr. Justice WHITE, concurring: It is shown that the telegraph company, many years ago, went into the state of Kansas, constructed its lines, established its offices, etc., and has since been engaged in business, both interstate and local. It is not disputed that there was no law in the state forbidding the company from doing as it did.

<sup>1</sup> See *National Council v. State Council*, 203 U. S. 151, 27 Sup. Ct. 46, 51 L. Ed. 132 (1906); *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 342-343, 29 Sup. Ct. 370, 53 L. Ed. 530, 15 Ann. Cas. 645 (1909).



From this it results that the corporation went into the state, constructed its plant, and carried on its business, on the implied invitation, or, at least, with the tacit consent, of the state. No one questions that the tax which is here in dispute, imposed by the law of Kansas upon the corporation, is repugnant to the Constitution of the United States because wanting in due process, and that it is therefore confiscatory in character. The tax being thus conceded to be inherently vicious, there is, of course, no attempt to sustain its validity on its intrinsic merits. The sole contention is that, although the tax is void, the telegraph company may not invoke the protection of the Constitution of the United States, because it is in a position where it is not entitled to avail itself of the fundamental safeguards which it was the purpose of the Constitution to secure to all. The reasoning by which it is thus sought to sustain the right of the state to exert a power prohibited by the Constitution of the United States, and to outlaw the corporation by depriving it of the protection afforded by that instrument, is this:

The state, it is insisted, has the right to prevent a foreign corporation from coming into its jurisdiction and engaging there in local business, and this power, in the nature of things, must include the right to affix such conditions to the privilege of coming in as the state chooses to impose. Under these circumstances, the argument proceeds, it becomes immaterial to consider the character of the condition annexed by the state to the enjoyment of the right to come in, since, although such conditions be repugnant to the Constitution of the United States, and destructive of the most obvious and sacred rights, as the condition only becomes operative provided the corporation elects to come in, therefore the condition is not obligatory, but is voluntarily assented to by the corporation, and hence may not be by it questioned.

But even if, for the sake of the argument only, the general correctness of the proposition be conceded, it has no application to the case here presented. Such is the case, since this cause is concerned not with the power of the state to prevent a corporation from coming in for the purpose of doing local business, and to attach conditions to the privilege of so coming in, but involves the right of the state to confiscate the property of the corporation already within the state, and which has been there for years, devoted to the doing of local business, as the result of the implied invitation or tacit consent of the state, arising from its failure to forbid or to regulate the coming in. In other words, this case involves determining, not how far a state may arbitrarily exclude, but to what extent, after allowing a corporation to come in and acquire property, a state may take its property within the state without compensation, upon the theory that the corporation is not in the state, and has no property right therein which is not subject to confiscation. The difference between the

premise upon which the proposition contended for rests and the situation here presented seems to me self-evident. I say this because my mind fails to perceive how the doctrine of election or voluntary assumption of an unconstitutional burden can have any possible application to a case like this.

Let me illustrate. The telegraph company has expended in the state large sums of money, adequate for the purpose of enabling it to do both local and interstate business. The investment is there, and its magnitude, it is fair to assume, is, in part, a resultant of the requirements of the local business. The continued beneficial existence of the investment depends upon the right to use the property for the purpose for which it was acquired; that is, for both interstate and local business. The state law takes the property, or what is equivalent thereto, imposes an unconstitutional and confiscatory burden, upon the condition that such burden be discharged or the local business be abandoned. What possible election can there be? The property is in the state. It has been invested therein for the very purpose of doing local as well as other business. If the unconstitutional burden be not assumed, local business must cease, and hence the property established for the purpose of doing the local business becomes worthless and is in effect confiscated. If, on the other hand, the unconstitutional burden be borne, a like result takes place. \* \* \*

Mr. Justice HOLMES, dissenting: I think that the judgment of the supreme court of Kansas was right, and it will not take me long to give my reasons. I assume that a state cannot tax a corporation on commerce carried on by it with another state, or on property outside the jurisdiction of the taxing state, and I assume further that, for that reason, a tax on or measured by the value of the total stock of a corporation like the Western Union Telegraph Company is void. But I also assume that it is not intended to deny or overrule what has been regarded as unquestionable since *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. Ed. 284, that, as to foreign corporations seeking to do business wholly within a state, that state is the master, and may prohibit or tax such business at will. *Security Mut. L. Ins. Co. v. Prewitt*, 202 U. S. 246, 249, 26 Sup. Ct. 619, 50 L. Ed. 1013, 1014, 6 Ann. Cas. 317; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657; *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357. I make the same assumption as to what has been decided twice, at least, since I have sat on this bench, that the right to prohibit, regulate, or tax foreign corporations in respect of business done wholly within a state is not taken away by the fact that they also are engaged there in commerce among the states. *Pullman Co. v. Adams*, 189 U. S. 420, 23 Sup. Ct. 494, 47 L. Ed. 877; *Allen v. Pullman's Palace Car Co.*, 191 U. S. 171, 24 Sup. Ct. 39, 48 L. Ed. 134.

If it should be said that the corporation had a right to enter the state for commerce with other states, and, being there, had the same

right to use its property as others, I reply that this begs the question, if the premises be granted. If the corporation has the right to enter for one purpose, and the state has a right to exclude its entry for another, the two rights can coexist. To say that the disappearance of the latter is an incident of the ownership of property there is to declare that what is allowed only for a limited purpose must have general results. I think it more logical and more true to the scheme of the Union to recognize that what comes in only for a special purpose can claim constitutional protection only in its use for that purpose, and for nothing else. That, at all events, has been decided in the cases to which I have referred.

Now what has Kansas done? She has not undertaken to tax the Western Union. She has not attempted to impose an absolute liability for a single dollar. She simply has said to the company that, if it wants to do local business, it must pay a certain sum of money, just as Mississippi said to the Pullman Company that, if it wanted to carry on local traffic, it must pay a certain sum. It does not matter if the sum is extravagant. Even in the law the whole generally includes its parts. If the state may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way. I hardly can suppose that the provision is made any the worse by giving a bad reason for it or by calling it by a bad name. I quite agree that we must look through form to substance. The whole matter is left in the Western Union's hands. If the license fee is more than the local business will bear, it can stop that business and avoid the fee. Whether economically wise or not, I am far from thinking that the charge is inherently vicious or bad. If the imposition were absolute, or if the attempt were to oust the corporation from the state if it did not pay, the arguments that prevail would be apposite. But the state seeks only to oust the corporation from that part of its business that the corporation has no right to do unless the state gives leave.

Of course, the suggestion on the other side is that this is an attempt by indirection to break the taboo on the telegraph company's business with other states. The local and the interstate business may be necessary each to the other to make the whole pay. Or the telegraph company might carry on the local business at a loss, for the sake of popularity or other indirect sources of gain. In the last case the fee would come out of earnings that the state has no right to touch. But these considerations do not reach their aim. To deny the right of Kansas to do as it chooses with the local business is to require the local business to help to sustain that between the states. If the latter does not pay alone, that is no reason for cutting down powers that up to this time the states always have possessed. If the telegraph company chooses to pay the fee out of its other earnings, that is its affair. It is master of the situation and can stop if it sees fit. Exactly this argument was pressed in *Pullman Co. v. Adams*,

189 U. S. 420, 421, 23 Sup. Ct. 494, 47 L. Ed. 877, 878, and was rejected without dissent. See *Ashley v. Ryan*, 153 U. S. 436, 444, 14 Sup. Ct. 865, 38 L. Ed. 773, 777, 4 Interest. Com. R. 654.

What I have said shows, I think, the fallacy involved in talking about unconstitutional conditions. Of course, if the condition was the making of a contract contrary to the policy of the Constitution of the United States, the contract would be void. That was all that was decided in *Southern P. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942. But it does not follow that, if keeping the contract was made a condition of staying in the state, the condition would be void. I confess my inability to understand how a condition can be unconstitutional when attached to a matter over which a state has absolute arbitrary power. This court was equally unable to understand it in *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 315, 12 Sup. Ct. 403, 36 L. Ed. 164, 168, 4 Interest. Com. R. 57. In that case it was said: "Having the absolute power of excluding the foreign corporation, the state may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient; and it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital."

The consequence is the measure of the condition. When the only consequence of a breach is a result that the state may bring about directly in the first place, the condition cannot be unconstitutional. If, after this decision, the state of Kansas, without giving any reason, sees fit simply to prohibit the Western Union Telegraph Company from doing any more local business there, or from doing local business until it has paid \$20,100, I shall be curious to see upon what ground that legislation will be assailed. I am aware that the battle has raged with varying fortunes over this matter of unconstitutional conditions, but it appears to me ground for regret that the court so soon should abandon its latest decision. *Security Mut. L. Ins. Co. v. Prewitt*, 202 U. S. 246, 26 Sup. Ct. 619, 50 L. Ed. 1013, 6 Ann. Cas. 317.

Finally, in the absence of contract, the power of the state is not affected by the fact that the corporation concerned already is in the state, or even has been there for some time. *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657; *National Council v. State Council of Virginia*, 203 U. S. 151, 163, 27 Sup. Ct. 46, 51 L. Ed. 132, 137. Whatever the corporation may do or acquire there is infected with the original weakness of dependence upon the will of the state. This is a general principle, illustrated by many cases. \* \* \* In *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 12 Sup. Ct. 403, 36 L. Ed. 164, 4 Interst. Com. Rep. 57, the corporation showed by its answer that it had employed part of its capital in manufacturing in New York. It had got into the state and was at work there, yet it was held liable to pay a percentage

of its entire capital, although the greater part was outside the state. But furthermore, it is a short answer to this part of the argument that, in the present case, according to decisions relied upon by the majority, the state could not have prevented the entry of the corporation, because it entered for the purpose of commerce with other states.

[FULLER, C. J., and McKENNA, J., concurred in this dissent, as did PECKHAM, J., before his death.]<sup>1</sup>

<sup>1</sup> Accord (with the majority opinion): Pullman Co. v. Kansas ex rel. Coleman, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378 (1910) (sleeping car company); Ludwig v. Western Union Tel. Co., 216 U. S. 146, 30 Sup. Ct. 280, 54 L. Ed. 423 (1910); Southern R. Co. v. Greene, 216 U. S. 400, 30 Sup. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247 (1910). See particularly the opinion in the latter case, post, p. 623. Compare the opinions of White, J., and of Holmes, J., in the Pullman Case above (where the property in use could be easily withdrawn from the state), in 216 U. S. at pages 63, 64, and 75, 30 Sup. Ct. 232, 54 L. Ed. 378.

In Herndon v. Chicago, R. I. & P. R. Co., 218 U. S. 135, 158, 159, 30 Sup. Ct. 633, 639, 54 L. Ed. 970 (1910), Day, J., said (holding invalid a Missouri statute requiring the secretary of state to revoke the license to do intrastate business of any foreign railway corporation that removed to a federal court or instituted therein any suit between it and citizens of Missouri): "Applying the principles announced in those cases [cited above in this note] it is evident, that the act in controversy cannot stand, in view of the provisions of the Constitution of the United States. Moreover, this is not a case where the state has undertaken to prevent the coming of the corporation into its borders for the purpose of carrying on business. The corporation was within the state, complying with its laws, and had acquired, under the sanction of the state, a large amount of property within its borders, and thus had become a person within the state, within the meaning of the Constitution, and entitled to its protection. Under the statute in controversy, a domestic railroad company might bring an action in the federal court, or, in a proper case, remove one thereto, without being subject to the forfeiture of its right to do business, or to the imposition of penalties provided for in the act. In all the cases in this court, discussing the right of the states to exclude foreign corporations, and to prevent them from removing cases to the federal courts, it has been conceded that while the right to do local business within the state may not have been derived from the federal Constitution, the right to resort to the federal courts is a creation of the Constitution of the United States and the statutes passed in pursuance thereof."

In Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657 (1900), it was held that a foreign corporation, doing both local and interstate business in Texas under an unexpired license, might be excluded from the former as a penalty for violating the state anti-trust act.

MUNICIPAL CORPORATIONS.—As to how far the federal Constitution protects the property or powers of municipal corporations from state legislative action, see Hunter v. Pittsburg, 207 U. S. 161, 28 Sup. Ct. 40, 52 L. Ed. 151 (1907).



## CHAPTER IX

DUE PROCESS AND EQUAL PROTECTION OF LAW:  
PROCEDURE

## SECTION 1.—DUE PROCESS

DEN *ex dem.* MURRAY *v.* HOBOKEN LAND AND IMPROVE-  
MENT CO.

(Supreme Court of United States, 1855. 18 How. 272, 15 L. Ed. 372.)

[Certificate of division of opinion from the federal Circuit Court for New Jersey. An act of Congress of May 15, 1820, provided that when a federal revenue collector was found indebted to the United States by the Treasury Department a distress warrant could be issued by the agent of the department for the balance due, and that from the time of the record of the levy on the debtor's property under this warrant a lien for the amount due should exist on the lands of the debtor. Under this law a distress warrant was issued and levy made upon the lands of Swartwout, federal collector of the port of New York, and defendant claimed title under a sale by virtue of this warrant. Plaintiff claimed under an execution upon a judgment against Swartwout, rendered subsequently to the record of the levy under the warrant. The judges were divided in opinion upon plaintiff's action of ejectment, and asked the opinion of this court as to the validity of the warrant.]

Mr. Justice CURTIS. \* \* \* [The validity of the warrant] is denied by the plaintiffs, upon the ground that so much of the act of Congress as authorized it, is in conflict with the Constitution of the United States.

In support of this position, the plaintiff relies on that part of the first section of the third article of the Constitution which requires the judicial power of the United States to be vested in one Supreme Court and in such inferior courts as Congress may, from time to time, ordain and establish; the judges whereof shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office. Also, on the second section of the same article, which declares that the judicial power shall extend to controversies to which the United States shall be a party.

It must be admitted that, if the auditing of this account, and the ascertainment of its balance, and the issuing of this process, was an

exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power. They neither constituted a court of the United States, nor were they, or either of them, so connected with any such court as to perform even any of the ministerial duties which arise out of judicial proceedings.

The question, whether these acts were an exercise of the judicial power of the United States, can best be considered under another inquiry, raised by the further objection of the plaintiff, that the effect of the proceedings authorized by the act in question is to deprive the party, against whom the warrant issues, of his liberty and property, "without due process of law"; and, therefore, is in conflict with the fifth article of the amendments of the Constitution.

Taking these two objections together, they raise the questions, whether, under the Constitution of the United States, a collector of the customs, from whom a balance of account has been found to be due by accounting officers of the treasury, designated for that purpose by law, can be deprived of his liberty, or property, in order to enforce payment of that balance, without the exercise of the judicial power of the United States, and yet by due process of law, within the meaning of those terms in the Constitution; and if so, then, secondly, whether the warrant in question was such due process of law?

The words, "due process of law," were undoubtedly intended to convey the same meaning as the words, "by the law of the land," in *Magna Charta*. Lord Coke, in his commentary on those words (2 *Inst.* 50), says they mean due process of law. The constitutions which had been adopted by the several states before the formation of the federal Constitution, following the language of the great charter more closely, generally contained the words, "but by the judgment of his peers, or the law of the land." The ordinance of Congress of July 13, 1787, for the government of the territory of the United States northwest of the river Ohio, used the same words.

The Constitution of the United States, as adopted, contained the provision, that "the trial of all crimes, except in cases of impeachment, shall be by jury." When the fifth article of amendment containing the words now in question was made, the trial by jury in criminal cases had thus already been provided for. By the sixth and seventh articles of amendment, further special provisions were separately made for that mode of trial in civil and criminal cases. To have followed, as in the state Constitutions, and in the ordinance of 1787, the words of *Magna Charta*, and declared that no person shall be deprived of his life, liberty, or property but by the judgment of his peers or the law of the land, would have been in part superfluous and inappropriate. To have taken the clause, "law of the land," without its immediate context, might possibly have given rise to doubts, which would be effectually dispelled by using those words which the great commentator on *Magna Charta* had declared to be the true meaning of the phrase, "law

of the land," in that instrument, and which were undoubtedly then received as their true meaning.

That the warrant now in question is legal process, is not denied. It was issued in conformity with an act of Congress. But is it "due process of law"? The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process "due process of law," by its mere will. To what principles, 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. We apprehend there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the Crown, and especially those due from receivers of the revenues. It is difficult, at this day, to trace with precision all the proceedings had for these purposes in the earliest ages of the common law. That they were summary and severe, and had been used for purposes of oppression, is inferable from the fact that one chapter of Magna Charta treats of their restraint. It declares: "We or our bailiffs shall not seize any land or rent for any debt as long as the present goods and chattels of the debtor do suffice to pay the debt, and the debtor himself be ready to satisfy therefor." \* \* \*

By the common law, the body, lands, and goods of the king's debtor were liable to be levied on to obtain payment. In conformity with the above provision of Magna Charta, a conditional writ was framed, commanding the sheriff to inquire of the goods and chattels of the debtor, and, if they were insufficient, then to extend on the lands. 3 Co. 12 b; Com. Dig. Debt, G. 2; 2 Inst. 19. But it is said that since the statute 33 Hen. VIII, c. 39, the practice has been to issue the writ in an absolute form, without requiring any previous inquisition as to the goods. Gilbert's Exch. 127.

To authorize a writ of extent, however, the debt must be matter of record in the king's exchequer. The 33 Hen. VIII, c. 39, § 50, made all specialty debts due to the king of the same force and effect as debts by statute staple, thus giving to such debts the effect of debts of record. In regard to debts due upon simple contract, other than those due

from collectors of the revenue and other accountants of the Crown, the practice, from very ancient times, has been to issue a commission to inquire as to the existence of the debt.

This commission being returned, the debt found was thereby evidenced by a record, and an extent could issue thereon. No notice was required to be given to the alleged debtor of the execution of this commission (2 Tidd's Pr. 1047), though it seems that, in some cases, an order for notice might be obtained (1 Ves. 269). Formerly, no witnesses were examined by the commission (Chitty's Prerog. 267; West, 22); the affidavit prepared to obtain an order for an immediate extent being the only evidence introduced. But this practice has been recently changed. 11 Price, 29. By the statute 13 Eliz. ch. 4, balances due from receivers of the revenue and all other accountants of the Crown were placed on the same footing as debts acknowledged to be due by statute staple. These balances were found by auditors, the particular officers acting thereon having been, from time to time, varied by legislation and usage. The different methods of accounting in ancient and modern times are described in Mr. Price's Treatise on the Law and Practice of the Exchequer, ch. 9. Such balances, when found, were certified to what was called the pipe office, to be given in charge to the sheriffs for their levy. Price, 231.

If an accountant failed to render his accounts, a process was issued, termed a *capias nomine districtionis*, against the body, goods, and lands of the accountant. Price, 162, 233, note 3.

This brief sketch of the modes of proceeding to ascertain and enforce payment of balances due from receivers of the revenue in England, is sufficient to show that the methods of ascertaining the existence and amount of such debts, and compelling their payment, have varied widely from the usual course of the common law on other subjects; and that, as respects such debts due from such officers, "the law of the land" authorized the employment of auditors, and an inquisition without notice, and a species of execution bearing a very close resemblance to what is termed a warrant of distress in the act of 1820, now in question.

It is certain that this diversity in "the law of the land" between public defaulters and ordinary debtors was understood in this country, and entered into the legislation of the colonies and provinces, and more especially of the states, after the Declaration of Independence and before the formation of the Constitution of the United States. Not only was the process of distress in nearly or quite universal use for the collection of taxes, but what was generally termed a warrant of distress, running against the body, goods, and chattels of defaulting receivers of public money, was issued to some public officer, to whom was committed the power to ascertain the amount of the default, and by such warrant proceed to collect it. \* \* \* [Here follow references to similar legislation early passed by the states and by Congress.]

Tested by the common and statute law of England prior to the emi-

gration of our ancestors, and by the laws of many of the states at the time of the adoption of this amendment, the proceedings authorized by the act of 1820 cannot be denied to be due process of law, when applied to the ascertainment and recovery of balances due to the government from a collector of customs, unless there exists in the Constitution some other provision which restrains Congress from authorizing such proceedings. For, though "due process of law" generally implies and includes, actor, reus, judex, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings (2 Inst. 47, 50; *Hoke v. Henderson*, 15 N. C. 15, 25 Am. Dec. 677; *Taylor v. Porter*, 4 Hill [N. Y.] 146, 40 Am. Dec. 274; *Vanzant v. Waddel*, 2 Yerg. [Tenn.] 260; *State Bank v. Cooper*, 2 Yerg. [Tenn.] 599, 24 Am. Dec. 517; *Jones' Heirs v. Perry*, 10 Yerg. [Tenn.] 59, 30 Am. Dec. 430; *Greene v. Briggs*, 1 Curt. 311, Fed. Cas. No. 5,764), yet, this is not universally true. There may be, and we have seen that there are, cases, under the law of England after *Magna Charta*, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands, and goods of certain public debtors without any such trial; and this brings us to the question, whether those provisions of the Constitution which relate to the judicial power are incompatible with these proceedings?

That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense the act of the President in calling out the militia under the act of 1795 (*Martin v. Mott*, 12 Wheat. 19, 6 L. Ed. 537), or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial. But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. *United States v. Ferreira*, 13 How. 40, 14 L. Ed. 42. It is necessary to go further, and show not only that the adjustment of the balances due from accounting officers may be, but from their nature must be, controversies to which the United States is a party, within the meaning of the second section of the third article of the Constitution. We do not doubt the power of Congress to provide by law that such a question shall form the subject-matter of a suit in which the judicial power can be exerted. The act of 1820 makes such a provision for reviewing the decision of the accounting officers of the treasury. But, until reviewed, it is final and binding; and the question is, whether its subject-matter is necessarily, and without regard to the consent of Congress, a judicial controversy. And we are of opinion it is not.

Among the legislative powers of Congress are the powers "to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and welfare of the United States; to raise and support armies; to provide and maintain a navy; and to make all



laws which may be necessary and proper for carrying into execution those powers." What officers should be appointed to collect the revenue thus authorized to be raised, and to disburse it in payment of the debts of the United States; what duties should be required of them; when and how, and to whom they should account, and what security they should furnish, and to what remedies they should be subjected to enforce the proper discharge of their duties, Congress was to determine. In the exercise of their powers, they have required collectors of customs to be appointed; made it incumbent on them to account, from time to time, with certain officers of the treasury department, and to furnish sureties, by bond, for the payment of all balances of the public money which may become due from them. And by the act of 1820, now in question, they have undertaken to provide summary means to compel these officers—and in case of their default, their sureties—to pay such balances of the public money as may be in their hands.

The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the Constitution. The power has not been exhausted by the receipt of the money by the collector. Its purpose is to raise money and use it in payment of the debts of the government; and, whoever may have possession of the public money, until it is actually disbursed, the power to use those known and appropriate means to secure its due application continues.

As we have already shown, the means provided by the act of 1820, do not differ in principle from those employed in England from remote antiquity—and in many of the states, so far as we know without objection—for this purpose, at the time the Constitution was formed. It may be added, that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties, but always in some way observed and yielded to. \* \* \*

It was strongly urged by the plaintiff's counsel, that though the government might have the rightful power to provide a summary remedy for the recovery of its public dues, aside from any exercise of the judicial power, yet it had not done so in this instance. That it had enabled the debtor to apply to the judicial power, and having thus brought the subject-matter under its cognizance, it was not for the government to say that the subject-matter was not within the judicial power. That if it were not in its nature a judicial controversy, Congress could not make it such, nor give jurisdiction over it to the district courts. In short, the argument is, that if this were not, in its nature,

a judicial controversy, Congress could not have conferred on the district court power to determine it upon a bill filed by the collector. If it be such a controversy, then it is subject to the judicial power alone; and the fact that Congress has enabled the district court to pass upon it, is conclusive evidence that it is a judicial controversy.

We cannot admit the correctness of the last position. If we were of opinion that this subject-matter cannot be the subject of a judicial controversy, and that, consequently, it cannot be made a subject of judicial cognizance, the consequence would be, that the attempt to bring it under the jurisdiction of a court of the United States would be ineffectual. But the previous proceedings of the executive department would not necessarily be affected thereby. They might be final, instead of being subject to judicial review.

But the argument leaves out of view an essential element in the case, and also assumes something which cannot be admitted.

It assumes that the entire subject-matter is or is not, in every mode of presentation, a judicial controversy, essentially and in its own nature, aside from the will of Congress to permit it to be so; and it leaves out of view the fact that the United States is a party.

It is necessary to take into view some settled rules.

Though, generally, both public and private wrongs are redressed through judicial action, there are more summary extra-judicial remedies for both. An instance of extra-judicial redress of a private wrong is, the recapture of goods by their lawful owner; of a public wrong, by a private person, is the abatement of a public nuisance; and the recovery of public dues by a summary process of distress, issued by some public officer authorized by law, is an instance of redress of a particular kind of public wrong, by the act of the public through its authorized agents. There is, however, an important distinction between these. Though a private person may retake his property, or abate a nuisance, he is directly responsible for his acts to the proper judicial tribunals. His authority to do these acts depends not merely on the law, but upon the existence of such facts as are, in point of law, sufficient to constitute that authority; and he may be required, by an action at law, to prove those facts; but a public agent, who acts pursuant to the command of a legal precept, can justify his act by the production of such precept. He cannot be made responsible in a judicial tribunal for obeying the lawful command of the government; and the government itself, which gave the command, cannot be sued without its own consent.

At the same time there can be no doubt that the mere question, whether a collector of the customs is indebted to the United States, may be one of judicial cognizance. It is competent for the United States to sue any of its debtors in a court of law. It is equally clear that the United States may consent to be sued, and may yield this consent upon such terms and under such restrictions as it may think just. Though both the marshal and the government are exempt from

suit, for anything done by the former in obedience to legal process, still, Congress may provide by law, that both, or either, shall, in a particular class of cases, and under such restrictions as they may think proper to impose, come into a court of law or equity and abide by its determination. The United States may thus place the government upon the same ground which is occupied by private persons who proceed to take extra-judicial remedies for their wrongs, and they may do so to such extent, and with such restrictions, as may be thought fit.

When, therefore, the act of 1820 enacts, that after the levy of the distress warrant has been begun, the collector may bring before a district court the question, whether he is indebted as recited in the warrant, it simply waives a privilege which belongs to the government, and consents to make the legality of its future proceedings dependent on the judgment of the court; as we have already stated in case of a private person, every fact upon which the legality of the extra-judicial remedy depends may be drawn in question by a suit against him. The United States consents that this fact of indebtedness may be drawn in question by a suit against them. Though they might have withheld their consent, we think that, by granting it, nothing which may not be a subject of judicial cognizance is brought before the court.

To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. Equitable claims to land by the inhabitants of ceded territories form a striking instance of such a class of cases; and as it depends upon the will of Congress whether a remedy in the courts shall be allowed at all, in such cases, they may regulate it and prescribe such rules of determination as they may think just and needful. Thus it has been repeatedly decided in this class of cases, that upon their trial the acts of executive officers, done under the authority of Congress, were conclusive, either upon particular facts involved in the inquiry or upon the whole title. *Foley v. Harrison*, 15 How. 433, 14 L. Ed. 761; *Burgess v. Gray*, 16 How. 48, 14 L. Ed. 839; *Minnesota Mining Co. v. National Mining Co.*, 3 Wall. 332, 18 L. Ed. 42, at the present term. See, also, *Cooper v. Roberts*, 18 How. 173, 15 L. Ed. 338.

It is true, also, that even in a suit between private persons to try a question of private right, the action of the executive power, upon a matter committed to its determination by the Constitution and laws, is

conclusive. *Luther v. Borden*, 7 How. 1, 12 L. Ed. 581; *Doe ex dem. Clark v. Braden*, 16 How. 635, 14 L. Ed. 1090.

To apply these principles to the case before us, we say that, though a suit may be brought against the marshal for seizing property under such a warrant of distress, and he may be put to show his justification; yet the action of the executive power in issuing the warrant, pursuant to the act of 1820, passed under the powers to collect and disburse the revenue granted by the Constitution, is conclusive evidence of the facts recited in it, and of the authority to make the levy; that though no suit can be brought against the United States without the consent of Congress, yet Congress may consent to have a suit brought, to try the question whether the collector be indebted, that being a subject capable of judicial determination, and may empower a court to act on that determination, and restrain the levy of the warrant of distress within the limits of the debt judicially found to exist. \* \* \*

Questions answered in favor of defendant.<sup>1</sup>

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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.]

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

<sup>1</sup> Accord: *Springer v. United States*, 102 U. S. 586, 26 L. Ed. 253 (1881) (distrainment of land for non-payment of tax); *Scottish Union & Nat. Ins. Co. v. Bowland*, 196 U. S. 611, 25 Sup. Ct. 345, 49 L. Ed. 619 (1906) (same of personal property); *Palmer v. McMahon*, 133 U. S. 660, 10 Sup. Ct. 324, 33 L. Ed. 772 (1890) (seizure of person for same). In all of these cases the prior assessment of the tax was accompanied by notice and an opportunity for a hearing.

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 iudicium 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 dex dem. Murray v. Hoboken Land & Improvement Company*, 18 How. 272. 15 L. Ed. 372. \* \* \* [Here is quoted a passage from this case, printed ante, at p. 264.]

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 iudicium 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, *sum 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. \* \* \* [Here follows the passage printed ante, at p. 231, and quotations from various cases in this court.]

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 present-

ment 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 he be compelled in any criminal case to be 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. \* \* \* [Here follows the passage printed ante, at p. 232.]

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 regular judicial trial, conducted precisely as in cases of indictments. \* \* \*

Judgment affirmed.<sup>1</sup>

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

### 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

<sup>1</sup> Accord: *Ellenbecker v. Plymouth Co.*, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801 (1890) (enforcement of prohibition law by injunction and contempt proceedings); *Iowa Cent. Ry. Co. v. Iowa*, 160 U. S. 389, 16 Sup. Ct. 344, 40 L. Ed. 467 (1896) (common-law jury not necessary in civil cases); *Maxwell v. Dow*, 176 U. S. 581, 20 Sup. Ct. 448, 494, 44 L. Ed. 597 (1900) (same in criminal cases). As to procedural changes in general, see *Holden v. Hardy*, post, at pp. 409-410.

"It is clear that the fourteenth amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice, and affords fair opportunity to be heard before the issues are decided."—*White, J.*, in *Iowa Cent. Ry. v. Iowa*, above (160 U. S. 393, 16 Sup. Ct. 345, 40 L. Ed. 467).

**JURY TRIAL IN CIVIL CASES.**—Though due process of law does not require a jury trial in either civil or criminal cases, the federal Constitution and most of the state Constitutions have other provisions expressly requiring jury trials in all criminal prosecutions and in civil suits at common law. The provision for criminal cases is considered in *Thompson v. Utah*, ante, p. 193.

For the interpretation of the seventh amendment, regarding the right of trial by jury in suits at common law, see *Capital Traction Co. v. Hof*, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873 (1899) (in general); *Maxwell v. Dow*, ante, at p. 225 (unanimity); *Henderson's Distilled Spirits*, 14 Wall. 44, 53, 20 L. Ed. 815 (1872) (wolver); *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. — (1913) (control by appellate courts). As to what kinds of actions are "suits at common law," under such constitutional provisions, see *Parsons v. Bedford*, 3 Pet. 433, 7 L. Ed. 732 (1830); *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358 (1891); *McElrath v. United States*, 102 U. S. 426, 440, 26 L. Ed. 189 (1880); 443 Cans of Egg Product v. United States, 226 U. S. 172, 33 Sup. Ct. 50, 57 L. Ed. — (1912). Not only equity and admiralty cases, but most special, summary, and administrative proceedings are generally held to be excluded. See 24 Cyc. 100-141; 6 Am. & Eng. Ency. (2d Ed.) 974-986; *State v. Clausen*, post, p. 517, note; *Cunningham v. Northwestern Imp. Co.*, 44 Mont. 180, 215-217, 119 Pac. 554 (1911).

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,<sup>1</sup> 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.

<sup>1</sup> See, also, for the dependence of the requisites of due process upon the nature of the case, *In re Wall*, 107 U. S. 265, 288-290, 2 Sup. Ct. 569, 27 L. Ed. 552 (1883) (disbarment of attorney); *Moyer v. Peabody*, 212 U. S. 78, 84, 29 Sup. Ct. 235, 53 L. Ed. 410 (1909) (executive acts to suppress insurrection); *Reaves v. Ainsworth*, 219 U. S. 296, 304, 31 Sup. Ct. 230, 233, 55 L. Ed. 225 (1911), in which McKenna, J., said: "What is due process of law must be determined by circumstances. To those in the military or naval service of the United States the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts."



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 prin-

ciple 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.<sup>2</sup>

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 appropriate 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. Recla-

<sup>2</sup> That the duties of assessors in estimating the value of property for purposes of general taxation are judicial, see *Barhyte v. Shepherd*, 35 N. Y. 238, 250; *Hassan v. City of Rochester*, 67 N. Y. 528, 536; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Williams v. Weaver*, 75 N. Y. 30, 33; *Cooley, Tax'n*, 266; *Burroughs, Tax'n*, § 102; *Jordan v. Hyatt*, 3 Barb. 275, 283; *Ireland v. City of Rochester*, 51 Barb. (N. Y.) 416, 430, 431; *State v. Mayor, etc., of Jersey City*, 24 N. J. Law, 662, 666; *State v. Mayor, etc., of Town of Morristown*, 34 N. J. Law, 445; *Griffin v. Mixon*, 38 Miss. 437, 438.—*Rep.*

mation 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.\*

\* For the procedure necessary in taxation, see, also, *Spencer v. Merchant*, post, p. 640; *Norwood v. Baker*, post, p. 649, and notes.

In *Turpin v. Lemon*, 187 U. S. 51, 60, 23 Sup. Ct. 20, 24, 47 L. Ed. 70 (1902), *Brown, J.*, said (holding a tax deed might be made prima facie evidence of the regularity of all prior proceedings upon which it was based): "Under the fourteenth amendment the legislature is bound to provide a method for the assessment and collection of taxes that shall not be inconsistent with natural justice; but it is not bound to provide that the particular steps of a procedure for the collection of such taxes shall be proved by written evidence; and it may properly impose upon the taxpayer the burden of showing that in a particular case the statutory method was not observed."

As to the power of the legislature over presumptions and prima facie evidence in general, see the cases below under Chapter X, section 3, pp. 381-383.

As to the kind of notice and hearing necessary in taxation, see *Londouer v. City & County of Denver*, 210 U. S. 373, 385, 386, 28 Sup. Ct. 708, 714, 52 L. Ed. 1103 (1908), in which *Moody, J.*, said: "Where the legislature of a state, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that, at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing. \* \* \* If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal. *Pittsburgh, C., C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 426, 14 Sup. Ct. 1114, 38 L. Ed. 1031, 1036; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 171 et seq., 17 Sup. Ct. 56, 41 L. Ed. 369, 393."

In *Stuart v. Palmer*, 74 N. Y. 183, 188, 30 Am. Rep. 289 (1878), *Earl, J.*, said (regarding an assessment for local improvements): "It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has in fact been fairly apportioned. The constitutional validity of a law is to be tested, not by what has been done under it, but by what may by its authority be done."

See, also, *Winona & St. P. Land Co. v. Minnesota*, 159 U. S. 526, 16 Sup. Ct. 83, 40 L. Ed. 247 (1895); *Glidden v. Harrington*, 189 U. S. 255, 23 Sup. Ct. 574, 47 L. Ed. 795 (1903); *Central of Georgia Ry. Co. v. Wright*, 207 U. S. 127, 28 Sup. Ct. 47, 52 L. Ed. 134, 12 Ann. Cas. 463 (1907) (hearing conditional only upon admitting taxability of property is insufficient).

COLLECTION OF TAXES FROM PROPERTY OF STRANGERS TO THE TAX.—See cases in note to *Tappan v. Bank*, post, at p. 560, and also *Common Council of City of Detroit v. Board of Assessors of City of Detroit*, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59 (1892) (tax on interest of mortgagee a lien on mortgagor's fee); *Hodge v. Muscatine County*, 196 U. S. 276, 25 Sup. Ct. 237, 49 L. Ed. 477 (1905) (tax on business of tenant a lien on land); *Morrow v. Dows*, 28 N. J. Eq

## 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. Twin- ing 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 respec- tively. In accordance with the law of the state, the jury were in- structed that they might draw an unfavorable inference against the defendants' failure to testify in denial of evidence tending to incrim- inate him. The convictions being affirmed by the state appellate courts, this writ was taken on the ground that compulsory self-in- crimination 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 per- son could be compelled to be a witness against himself had become embodied in the common law and distinguished it from all other sys- tems of jurisprudence. It was generally regarded then, as now, as a privilege of great value, a protection to the innocent, though a shel- ter 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.*, ante, p. 262, and in *Hurtado v. California*, ante, p. 270:]

The question under consideration may first be tested by the ap- plication 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 com-

459 (1877) (goods of tenant seizable for tax on land); *Hersee v. Porter*, 100 N. Y. 403, 3 N. E. 338 (1885) (goods of A., with A.'s consent in possession of B., seizable for tax on any land of B.). Compare (contra in part to these doctrines): *Daniels v. Nelson*, 41 Vt. 161, 98 Am. Dec. 577 (1868); *Chauvin v. Valiton*, 8 Mont. 451, 20 Pac. 658, 3 L. R. A. 194 (1889); *Knoxville Traction Co. v. McMillan*, 111 Tenn. 521, 77 S. W. 665, 65 L. R. A. 296 (1903).

pulsory 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 ele-

ments 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.<sup>1</sup> \* \* \*

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 reason-

<sup>1</sup> Here follows a rather full citation of cases. See *Hopt v. Utah*, 110 U. S. 574, 579, 4 Sup. Ct. 202, 28 L. Ed. 262 (1884) (presence of accused at trial); *Howard v. Kentucky*, 200 U. S. 164, 26 Sup. Ct. 189, 50 L. Ed. 421 (1906) (same); *Diaz v. United States*, 223 U. S. 442, 32 Sup. Ct. 250, 56 L. Ed. 500 (1912) (same); *Simon v. Craft*, 182 U. S. 427, 21 Sup. Ct. 836, 45 L. Ed. 1165 (1901) (same—lunacy proceedings); *Schwab v. Berggren*, 143 U. S. 442, 12 Sup. Ct. 525, 36 L. Ed. 218 (1892) (same—appellate proceedings); *Felts v. Murphy*, 201 U. S. 123, 26 Sup. Ct. 366, 50 L. Ed. 689 (1906) (accused too deaf to hear evidence); *Louisville & N. Ry. Co. v. Schmidt*, 177 U. S. 230, 20 Sup. Ct. 620, 44 L. Ed. 747 (1900) (judgment against non-party); *West v. Louisiana*, 194 U. S. 258, 24 Sup. Ct. 650, 48 L. Ed. 965 (1904) (use of depositions as criminal evidence); *Rectz v. Michigan*, 188 U. S. 505, 23 Sup. Ct. 390, 47 L. Ed. 563 (1903) (no appeal necessary); *Rawlins v. Georgia*, 201 U. S. 638, 26 Sup. Ct. 560, 50 L. Ed. 899, 5 Ann. Cas. 783 (1906) (constitution of jury); *Crain v. United States*, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097 (1896) (necessity of criminal pleadings); *Mobile, etc., Ry. v. Turnipseed*, post, p. 381 (presumptions).

ing 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.<sup>2</sup>

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

<sup>2</sup> JURISDICTION.—What constitutes jurisdiction of a court to render judgments in personam and in rem is generally discussed in connection with the subject of Conflict of Laws. See, however, in addition to the cases cited in the principal case: *York v. Texas*, 137 U. S. 15, 11 Sup. Ct. 9, 34 L. Ed. 604 (1890); *Fitzgerald & M. Constr. Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608 (1890); *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517 (1895); *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569 (1899); *Schibsby v. Westenholz*, L. R. 6 Q. B. 155 (1870); *De La Montanya v. De La Montanya*, 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82 (1896), annotated in 53 Am. St. Rep. 179-191; *Grover & B. Sewing Mach. Co. v. Radcliffe*, 137 U. S. 287, 11 Sup. Ct. 92, 34 L. Ed. 670 (1890); *Feyerick v. Hubbard*, 71 L. J. K. B. 509 (1902); *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. Ed. 918 (1890) (proceedings in rem); *Cunnius v. Reading School Dist.*, 198 U. S. 458, 25 Sup. Ct. 721, 49 L. Ed. 1125, 3 Ann. Cas. 1121 (1905) (same); *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1 (1906) (divorce); *Michigan Trust Co. v. Ferry*, 228 U. S. 346, 33 Sup. Ct. 550, 57 L. Ed. — (1913) (accounts of administrator); *Selover, Bates & Co. v. Walsh*, 226 U. S. 112, 33 Sup. Ct. 69, 57 L. Ed. — (1912) (contract to sell foreign land).

As to jurisdiction to impose personal obligations (other than judgments) upon non-residents not subject to state process, see *Dewey v. Des Moines*, post, p. 571 (land taxes); *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163 (1907) (stockholder's liability for corporate debts); *Corry v. Baltimore*, 196 U. S. 466, 25 Sup. Ct. 297, 49 L. Ed. 556 (1905) (same—for taxes on shares of stock). As to jurisdiction to penalize extraterritorial acts, see *United States v. Holmes*, 5 Wheat. 412, 5 L. Ed. 122 (1820) (pirate vessel); *United States v. Rodgers*, 150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071

## 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

(1893) (domestic vessel); *Nielsen v. Oregon*, 212 U. S. 315, 29 Sup. Ct. 383, 53 L. Ed. 528 (1909) (non-resident); *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047 (1909) (domestic corporation); *U. S. v. Nord-Deutscher Lloyd*, 223 U. S. 512, 32 Sup. Ct. 214, 56 L. Ed. 531 (1912) (foreign corporation); *Strassheim v. Dally*, 221 U. S. 280, 284, 285, 31 Sup. Ct. 558, 55 L. Ed. 735 (1911) (foreign acts producing effect within state).

As to jurisdiction for taxation, see post, pp. 535-573.

NOTICE.—As to what constitutes a proper mode of giving notice, see *Hamilton v. Brown*, 161 U. S. 256, 16 Sup. Ct. 585, 40 L. Ed. 691 (1896) (publication—escheat); *Cunnius v. Reading School Dist.*, 198 U. S. 458, 25 Sup. Ct. 721, 49 L. Ed. 1125, 3 Ann. Cas. 1121 (1905) (same—distributing estate of absentee); *Jacob v. Roberts*, 223 U. S. 261, 32 Sup. Ct. 303, 56 L. Ed. 429 (1912) (same—quieting title); *Reetz v. Michigan*, 188 U. S. 505, 509, 23 Sup. Ct. 390, 47 L. Ed. 563 (1903) (statutory notice); *Roller v. Holly*, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520 (1900) (length of notice necessary); *In re Lennon*, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110 (1897) (notice valid against non-parties to suit); *Straub v. Lyman Land Co. (S. D.)* 138 N. W. 957 (1912) (notice served out of state); *Wetmore, Use of McKay, v. Karriek*, 205 U. S. 141, 27 Sup. Ct. 434, 51 L. Ed. 745 (1907) (vacation of judgment).

As to necessary content of notice, see *Ontario Land Co. v. Wilfong*, 223 U. S. 543, 32 Sup. Ct. 328, 56 L. Ed. 544 (1912) (description of property taxed); *Standard Oil Co. of Indiana v. Missouri ex inf. Hadley*, 224 U. S. 270, 32 Sup. Ct. 406, 56 L. Ed. 760 (1912) (judgment must be responsive to complaint); *Washington v. Fairchild*, 224 U. S. 510, 32 Sup. Ct. 535, 56 L. Ed. 863 (1912) (same of railway commission's orders).

HEARING.—As to what constitutes a proper hearing, see *Louisville & N. Ry.*

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,

*Co. v. Woodson*, 134 U. S. 614, 10 Sup. Ct. 628, 33 L. Ed. 1032 (1890); *Lowe v. Kansas*, 163 U. S. 81, 16 Sup. Ct. 1031, 41 L. Ed. 78 (1896); *Chin Yow v. United States*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369 (1908); *Londoner v. Denver*, ante, p. 279, note; *United States C. & C. Traction Co. v. Baltimore & O. S. W. Ry. Co.*, 226 U. S. 14, 20, 33 Sup. Ct. 5, 57 L. Ed. — (1912) (private investigation by tribunal); *Low Wah Suey v. Backus*, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165 (1912) (power to compel attendance of witnesses in alien exclusion case not necessary). It is sufficient if a hearing is afforded at any time before final judgment. *Wilson v. Standefer*, 184 U. S. 399, 415, 22 Sup. Ct. 384, 46 L. Ed. 612 (1902).

As to how far a party's own misconduct may validly operate to deprive him of a hearing, see *Allen v. Georgia*, 166 U. S. 138, 17 Sup. Ct. 525, 41 L. Ed. 949 (1897); *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215 (1897); *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 349 ff., 29 Sup. Ct. 370, 53 L. Ed. 530, 15 Ann. Cas. 645 (1909).

NON-PROCEDURAL PROTECTION TO PERSONS ACCUSED OF CRIME.—The principal case and its notes consider how far various procedural requirements (some of which are usually specifically secured by other constitutional provisions) are necessary to due process of law. Most Constitutions also secure to persons accused of crime certain additional privileges not strictly of a procedural character. As to how far some of these are also included in the notion of due process, see *Ex parte Ulrich (D. C.)* 42 Fed. 587 (1890) (double jeopardy) [reversed on other grounds in (C. C.) 43 Fed. 661 (1890)]; *In re Kennler*, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519 (1890) (punishment); *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 111, 29 Sup. Ct. 220, 53 L. Ed. 417 (1909) (same); *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 28 Sup. Ct. 178, 52 L. Ed. 327, 12 Ann. Cas. 658 (1908) (searches and seizures).



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, 503, 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.]

**ADMINISTRATIVE DETERMINATION OF FACTS.**—In respect to controversies arising out of the administration of law on behalf of the public, not involving the punishment of offenses, due process of law is afforded, in the absence of fraud or other manifest abuse of authority, by submitting to an administrative tribunal the final determination of facts, after a fair hearing. *Hilton v. Merritt*, 110 U. S. 97, 3 Sup. Ct. 548, 28 L. Ed. 83 (1884) (appraisal of imports); *Burfenning v. Chicago, St. P., M. & O. Ry. Co.*, 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175 (1896) (administration of public land system); *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 167-170, 17 Sup. Ct. 56, 41 L. Ed. 369 (1896) (lands benefited by an irrigation scheme); *Busbnell v. Leland*, 164 U. S. 684, 17 Sup. Ct. 209, 41 L. Ed. 598 (1897) (appointment of national bank receiver); *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 695, 17 Sup. Ct. 718, 41 L. Ed. 1165 (1897) (value of property taken by eminent domain); *United States ex rel. Bernardin v. Duell*, 172 U. S. 576, 583, 19 Sup. Ct. 286, 43 L. Ed. 559 (1899) (issuing of patents prior to 1836); *Louisville & N. Ry. Co. v. Kentucky*, 183 U. S. 503, 515, 516, 22 Sup. Ct. 95, 46 L. Ed. 298 (1902) (long and short haul regulation); *Hibben v. Smith*, 191 U. S. 310, 24 Sup. Ct. 88, 48 L. Ed. 195 (1903) (benefits from street improvement); *Bates & G. Co. v. Payne*, 194 U. S. 106, 24 Sup. Ct. 593, 48 L. Ed. 894 (1904) (classification of mail matter); *Public Clearing House v. Coyne*, 194 U. S. 497, 24 Sup. Ct. 789, 48 L. Ed. 1092 (1904) (excluding fraudulent matter from the mails); *Union Bridge Co. v. United States*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523 (1907) (obstruction of navigation by bridge).

**ADMINISTRATIVE DETERMINATION OF LAW.**—Likewise, whenever the determination of questions of law arising in administrative proceedings is clearly left to the final decision of an administrative tribunal, there can be no appeal to the courts save for abuse of authority. *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 23 Sup. Ct. 698, 47 L. Ed. 1074 (1903), approved in *Bates & G. Co. v. Payne*, 194 U. S. 106, 109, 24 Sup. Ct. 595, 48 L. Ed. 894 (1904) (citing earlier cases).

In *Reetz v. Michigan*, 188 U. S. 505, 507, 23 Sup. Ct. 390, 391, 47 L. Ed. 563 (1903), upholding the action of a state board vested with power finally to determine certain questions of law and fact upon which depended an applicant's right to practice medicine, Brewer, J., said: "We know of no provision in the federal Constitution which forbids a state from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question. Indeed, it not infrequently happens that a full discharge of their duties compels boards, or officers of a purely ministerial character, to consider and determine questions of a legal nature. Due process is not necessarily judicial process. *Den ex dem. Murray v. Hoboken Land & Improv. Co.*, 18 How. 272, 15 L. Ed. 372; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *In re Wall*, 107 U. S. 265, 289, 2 Sup. Ct. 569, 27 L. Ed. 532, 562; *Dreyer v. Illinois*, 187 U. S. 71, 83, 23 Sup. Ct. 28, 32, 47 L. Ed. 79; *People v. Hlabrouck*, 11 Utah, 291, 39 Pac. 918. In the last case this very question was presented, and in the opinion, on page 305, of 11 Utah, on page 921, of 39 Pac., it was said: "The objection that the statute attempts to confer judicial power on the board is not well founded. Many executive officers, even those who are spoken of as purely ministerial officers, act judicially in the determination of facts in the performance of their official duties; and in so doing they do not exercise "judicial power," as that phrase is commonly used, and as it is used in the organic act in conferring judicial power upon specified courts. The powers conferred on the board of medical examiners are nowise different in character in this respect from those exercised by the examiners of candidates to teach in our public schools, or by tax assessors or boards of equalization in determining for purposes of taxation, the value of property. The ascertainment and determination of qualifications to practice medicine by a board of competent experts, appointed for that purpose, is not the exercise of a power which appropriately belongs to the judicial department of the government."

So, also, *Meffert v. State Board of Medical Registration & Examination*, 66 Kan. 710, 72 Pac. 247 (1903) (revocation of physician's license), affirmed *Meffert v. Packer*, 195 U. S. 625, 25 Sup. Ct. 790, 49 L. Ed. 350, annotated in 1 L. R. A. (N. S.) 811-813.

See, also, *State v. Thorne*, ante, p. 72, note for the distinction between "acting judicially" and exercising such particular judicial powers as are generally vested in courts.

DETERMINATION OF ADMINISTRATIVE JURISDICTION.—Questions as to the existence or extent of the jurisdiction or authority claimed by an administrative tribunal are seldom left to its final determination, even if this would be consistent with due process, *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90 (1902); *Gonzales v. Williams*, 192 U. S. 1, 24 Sup. Ct. 171, 48 L. Ed. 317 (1901); and no doubt statutes will be less readily interpreted as designed to give such tribunals the final word in questions of law than in questions of fact. As to the distinction between a tribunal's power to determine its jurisdiction and to determine controversies within its jurisdiction, see *Fauntleroy v. Lum*, 210 U. S. 230, 231, 235, 28 Sup. Ct. 641, 52 L. Ed. 1039 (1908); *Interstate Commerce Commission v. Northern Pac. Ry. Co.*, 216 U. S. 538, 30 Sup. Ct. 417, 54 L. Ed. 608 (1910); *Interstate Commerce Commission v. United States ex rel. Humbolt S. S. Co.*, 224 U. S. 474, 484, 32 Sup. Ct. 556, 56 L. Ed. 849 (1912).

In *Interstate Commerce Commission v. Louisville & N. Ry. Co.*, 227 U. S. 88, 91, 92, 33 Sup. Ct. 185, 186, 57 L. Ed. — (1913), the Interstate Commerce Commission had acted under its statutory power to set aside a railroad rate, if, after a hearing, it was of the opinion that the rate was unreasonable. In discussing the extent to which a judicial review of this determination was permissible, Lamar, J., said: "The statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commis-

sion could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power. In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence' (*Tang Tun v. Edsell*, 223 U. S. 681, 32 Sup. Ct. 359, 56 L. Ed. 610; *Chin Yow v. United States*, 208 U. S. 13, 28 Sup. Ct. 201, 52 L. Ed. 370; *Low Wah Suey v. Backus*, 225 U. S. 468, 32 Sup. Ct. 734, 56 L. Ed. 1167; *Zakonaite v. Wolf*, 226 U. S. 272, 33 Sup. Ct. 31, 57 L. Ed. —), or if the facts found do not, as a matter of law, support the order made. \* \* \* Whether the order deprives the carrier of a constitutional or statutory right, whether the hearing was adequate and fair, or whether for any reason the order is contrary to law—are all matters within the scope of judicial power. Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable there was no jurisdiction to make the order. *Interstate Commerce Commission v. Northern Pac. R. Co.*, 216 U. S. 544, 30 Sup. Ct. 417, 54 L. Ed. 609. In a case like the present the courts will not review the Commission's conclusions of fact (*Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 220 U. S. 251, 31 Sup. Ct. 392, 55 L. Ed. 456) by passing upon the credibility of witnesses or conflicts in the testimony. But the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission."

See, also, the rules for reviewing the Commission's orders laid down in *Interstate Commerce Commission v. Union Pac. Ry. Co.*, 222 U. S. 541, 547, 32 Sup. Ct. 108, 56 L. Ed. 308 (1912). For the practical application of these rules see the discussion in the same case on the merits, and in *Southern Pac. Co. v. Interstate Commerce Commission*, 219 U. S. 433, 31 Sup. Ct. 258, 55 L. Ed. 283 (1911) [compare *Southern Pac. Co. v. United States (Com. C.)* 197 Fed. 167 (1912)]; *Interstate Commerce Commission v. Louisville & N. Ry. Co.*, above; *Atchison, T. & S. F. Ry. Co. v. Interstate Commerce Commission (Com. C.)* 190 Fed. 591 (1911) [compare *Atchison, T. & S. F. Ry. Co. v. United States (Com. C.)* 203 Fed. 56 (1913)].

SEPARATION OF DEPARTMENTS OF GOVERNMENT.—Due process of law does not necessarily require a separation of departments in the administration of government. *Forsyth v. Hammond*, 166 U. S. 506, 519, 17 Sup. Ct. 665, 41 L. Ed. 1095 (1897); *Dreyer v. Illinois*, 187 U. S. 71, 83, 84, 23 Sup. Ct. 28, 47 L. Ed. 79 (1902); *Michigan Cent. Ry. Co. v. Powers*, 201 U. S. 245, 294, 26 Sup. Ct. 459, 50 L. Ed. 744 (1906); *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 225, 29 Sup. Ct. 67, 53 L. Ed. 150 (1908); *Winchester, etc., Ry. v. Com.*, supra, p. 95, note.

CRIMINAL PUNISHMENT BY ADMINISTRATIVE TRIBUNAL.—An administrative tribunal cannot "under our system of government and consistently with due process of law be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. \* \* \* [This] can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises."—*Harlan, J.*, in *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 485, 155 U. S. 3, 14 Sup. Ct. 1125, 15 Sup. Ct. 19, 38 L. Ed. 1047, 39 L. Ed. 49 (1894), ante, at p. 74. See, also, *Wong Wing v. United States*, post, p. 981, note, 16 Sup. Ct. 977, 41 L. Ed. 140. Compare *Oceanic Steam Nav. Co. v. Stranahan*, 214 U. S. 320, 338-340, 29 Sup. Ct. 671, 53 L. Ed. 1013 (1909), permitting the infliction of a quasi-criminal pecuniary penalty by administrative coercion. See the reasoning of the extract from this case printed post, p. 298.

FALLBROOK IRRIGATION DIST. v. BRADLEY (1896) 164 U. S. 112, 167-170, 17 Sup. Ct. 56, 41 L. Ed. 369, Mr. Justice PECKHAM (reversing the judgment of the federal Circuit Court for the Southern District of California, and upholding the creation of an irrigation taxing district under a state statute authorizing a county board of supervisors, upon certain proceedings being taken, to include in said district all lands that would be benefited by a common system of irrigation. It was alleged that certain lands not benefited had been improperly included by said board):

"Assuming for the purpose of this objection that the owner of these lands had, by the provisions of the act, and before the lands were finally included in the district, an opportunity to be heard before a proper tribunal upon the question of benefits, we are of opinion that the decision of such a tribunal, in the absence of actual fraud and bad faith, would be, so far as this court is concerned, conclusive upon that question. It cannot be that upon a question of fact, of such a nature, this court has the power to review the decision of the state tribunal which has been pronounced under a statute providing for a hearing upon notice. The erroneous decision of such a question of fact violates no constitutional provision. The circuit court in this case has not assumed to undertake any such review of a question of fact. \* \* \*

"In view of the finding of the board of supervisors on this question of benefits, assuming that there has been one, this court cannot say, as a matter of law, that the lands of the plaintiff in this case have not been, or cannot be, benefited by this proposed irrigation. There can be no doubt that the board of supervisors (if it have power to hear the question of benefits, as to which something will be said under another head of this discussion) would be a proper and sufficient tribunal to satisfy the constitutional requirement in such case. In speaking of a board of supervisors, Mr. Chief Justice Waite, in *Spring Valley Waterworks Co. v. Schottler*, 110 U. S. 347, 354, 4 Sup. Ct. 48, 52, 28 L. Ed. 173, said: 'Like every other tribunal established by the legislature for such a purpose, their duties are judicial in their nature, and they are bound, in morals and in law, to exercise an honest judgment as to all matters submitted for their official determination. It is not to be presumed that they will act otherwise than according to this rule.' In that case the board was to fix the price of water, while in this it is to determine the fact of benefits to lands. The principle is the same in each case.

"It may be that the action of the board upon any question of fact as to contents or sufficiency of the petition, or upon any other fact of a jurisdictional nature, is open to review in the state courts. It would seem to be so held in the *Tregea Case*, decided in 1891. 83 Cal. 334, 26 Pac. 237.



"If the state courts would have had the right to review these findings of fact, jurisdictional in their nature, the United States circuit court had the same right in this case; but it has not done so, its judgment being based upon the sole ground that the act was a violation of the fourteenth amendment of the federal Constitution. Upon the question of fact as to benefits, decided by the board, it is held in the Tregga Case that its decision is conclusive. 88 Cal. 334, and 26 Pac. 237, *supra*. Whether a review is or is not given upon any of these questions of fact (if the tribunal created by the state had power to decide them, and if an opportunity for a hearing were given by the act) is a mere question of legislative discretion. It is not constitutionally necessary in such cases to give a rehearing or an appeal. *Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989; *Pearson v. Yewdall*, 95 U. S. 294, 24 L. Ed. 436.

"Very possibly a decision by the statutory tribunal which included tracts of land within the district that plainly could not, by any fair or proper view of the facts, be benefited by irrigation, would be the subject of a review in some form, and of a reversal by the courts, on the ground that the decision was based not alone upon no evidence in its favor, but that it was actually opposed to all the evidence, and to the plain and uncontradicted facts of common knowledge, and was given in bad faith. In such case the decision would not have been the result of fair or honest, although grossly mistaken, judgment, but would be one based upon bad faith and fraud, and so could not be conclusive, in the nature of things."

[FULLER, C. J., and FIELD, J., dissented.]

**ERRONEOUS DECISIONS.**—Mere error in a decision, whether of law or of fact, of a board or of a court, or in a civil or a criminal case, is not a denial of due process of law. In *re Converse*, 137 U. S. 624, 11 Sup. Ct. 191, 34 L. Ed. 796 (1890) (crime); *Abbott v. National Bank of Commerce*, 175 U. S. 409, 20 Sup. Ct. 153, 44 L. Ed. 217 (1899) (tort); *Chicago, B. & Q. Ry. Co. v. Babcock*, 204 U. S. 585, 27 Sup. Ct. 326, 51 L. Ed. 636 (1907) (taxation); *Tracy v. Ginzberg*, 205 U. S. 170, 27 Sup. Ct. 461, 51 L. Ed. 755 (1907) (title of property); *Thompson v. Kentucky*, 209 U. S. 340, 346, 28 Sup. Ct. 533, 536 (52 L. Ed. 822 [1908]), in which McKenna, J., said: "Due process of law does not assure to a taxpayer the interpretation of laws by the executive officers of a state as against their interpretation by the courts of the state, or relief from the consequences of a misinterpretation by either. \* \* \* At any rate, it is the province of the courts to interpret the laws of the state, and he who acts under them must take his chance of being in accord with the final decision. And this is a hazard under every law, and from which or the consequences of which we know of no security."

In *Patterson v. Colorado ex rel. Attorney General*, 205 U. S. 454, 460, 461, 27 Sup. Ct. 556, 557, 51 L. Ed. 879, 10 Ann. Cas. 685 (1907), Holmes, J., said: "It is argued that the decisions criticised, and in some degree that in the present case, were contrary to well-settled previous adjudications of the same court, and this allegation is regarded as giving some sort of constitutional right to the plaintiff in error. But while it is true that the United States courts do not always hold themselves bound by state decisions in cases arising before them, that principle has but a limited application to cases brought from the state courts here on writs of error. Except in exceptional cases the grounds on which the circuit courts are held authorized to follow an earlier state decision rather than a later one, or to apply the rules of com-

mercial law as understood by this court rather than those laid down by the local tribunals, are not grounds of constitutional right, but considerations of justice or expediency. There is no constitutional right to have all general propositions of law once adopted remain unchanged. Even if it be true, as the plaintiff in error says, that the supreme court at Colorado departed from earlier and well-established precedents to meet the exigencies of this case, whatever might be thought of the justice or wisdom of such a step, the Constitution of the United States is not infringed. It is unnecessary to lay down an absolute rule beyond the possibility of exception. Exceptions have been held to exist. But, in general, the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the fourteenth amendment merely because it is wrong or because earlier decisions are reversed."

So, also, *Central Land Co. v. Laidley*, 159 U. S. 103, 112, 16 Sup. Ct. 80, 40 L. Ed. 91 (1895).

May an error in the administration of state law be so gross, even though not fraudulent, as to constitute a denial of due process? See *Lent v. Tillson*, 140 U. S. 316, 331, 11 Sup. Ct. 825, 35 L. Ed. 419 (1891); *Chicago, B. & Q. Ry. Co. v. Chicago*, 166 U. S. 226, 232-235, 17 Sup. Ct. 581, 41 L. Ed. 979 (1897); *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 750, 19 Sup. Ct. 804, 43 L. Ed. 1154 (1899); *Thomas v. Texas*, 212 U. S. 278, 281, 29 Sup. Ct. 393, 53 L. Ed. 512 (1909); *McGovern v. New York*, 229 U. S. 363, 370, 371, 33 Sup. Ct. 876, 57 L. Ed. — (1913); *H. Schofield in 3 Ill. L. Rev.* 195. As to the propriety of reviewing the mental operations of a tribunal in reaching a particular decision, see *Chicago, B. & Q. Ry. Co. v. Babcock*, 201 U. S. 585, 593-598, 27 Sup. Ct. 326, 51 L. Ed. 636 (1907).

**FRAUDULENT DECISIONS.**—As stated in the principal case, such decisions deny due process. Dicta to this effect occur in *Chicago, M. & St. P. Ry. Co. v. Minnesota ex rel. Railroad & W. Commission*, 134 U. S. 418, 466, 10 Sup. Ct. 462, 702, 33 L. Ed. 970 (1890); in *Louisville & N. Ry. Co. v. Kentucky*, 183 U. S. 503, 515, 516, 22 Sup. Ct. 95, 46 L. Ed. 298 (1902); and in *Chicago, B. & Q. Ry. Co. v. Babcock*, 204 U. S. 585, 27 Sup. Ct. 326, 51 L. Ed. 636 (1907). As to what the fraud must consist of, in administrative cases, see *Ross v. Stewart*, 227 U. S. 530, 539, 33 Sup. Ct. 345, 57 L. Ed. — (1913).

**PARTIALITY OR INCOMPETENCE OF TRIBUNAL.**—In *Jordan v. Massachusetts*, 225 U. S. 167, 176, 32 Sup. Ct. 651, 652, 56 L. Ed. 1038 (1912), *Lurton, J.*, said: "Due process implies a tribunal both impartial and mentally competent to afford a hearing." As to what will satisfy these requirements, see *Jordan v. Massachusetts*, above; *Hibben v. Smith*, 191 U. S. 310, 323 ff., 24 Sup. Ct. 88, 48 L. Ed. 195 (1903); *Home Telephone & Telegraph Co. v. Los Angeles*, 211 U. S. 265, 279, 280, 29 Sup. Ct. 50, 53 L. Ed. 176 (1908). For the common-law disqualification of a judge for interest, see *Matter of Ryers*, 72 N. Y. 1, 10-15, 28 Am. Rep. 88 (1878); and as to special political tribunals, see *State ex rel. Cook v. Houser*, 122 Wis. 534, 100 N. W. 964 (1904). Due process is not afforded by a hearing before a judge who has in advance decided the case and written his opinion. *Ex parte Nelson (Mo.)* 157 S. W. 794, 806-808 (1913).

### LAWTON v. STEELE.

(Supreme Court of United States, 1894. 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385.)

[Error to the Supreme Court of New York. Steele, an officer of New York, acting under the authority of the statute quoted in the opinion below, seized and destroyed fifteen nets owned by Lawton, found to be worth \$216. Lawton was a fisherman, and at the time most of the nets were being used in fishing in New York waters in

Jefferson county, and the rest were lying on the shore, having been recently used for the same purpose. Lawton sued Steele for the value of the destroyed nets, and a judgment for plaintiff was reversed by the state Court of Appeals, and judgment for defendant ordered to be entered in the state Supreme Court.]

Mr. Justice BROWN. This case involves the constitutionality of an act of the Legislature of the state of New York [printed in the note below.<sup>1</sup>] \* \* \* This last section was alleged to be unconstitutional and void for three reasons: (1) As depriving the citizen of his property without due process of law. \* \* \*

The main, and only real difficulty connected with the act in question is in its declaration that any net, etc., maintained in violation of any law for the protection of fisheries, is to be treated as a public nuisance, "and may be abated and summarily destroyed by any person, and it shall be the duty of each and every protector aforesaid and ever game constable to seize, remove, and forthwith destroy the same." The legislature, however, undoubtedly possessed the power not only to prohibit fishing by nets in these waters, but to make it a criminal offence, and to take such measures as were reasonable and necessary to prevent such offences in the future. It certainly could not do this more effectually than by destroying the means of the offence. If the nets were being used in a manner detrimental to the interests of the public, we think it was within the power of the legislature to declare them to be nuisances, and to authorize the officers of the state to abate them. *Hart v. The Mayor*, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165; *Meecker v. Van Rensselaer*, 15 Wend. (N. Y.) 397.

An act of the Legislature which has for its object the preservation of the public interests against the illegal depredations of private individuals ought to be sustained, unless it is plainly violative of the Constitution, or subversive of private rights. In this case there can be no doubt of the right of the legislature to authorize judicial proceedings to be taken for the condemnation of the nets in question, and their sale or destruction by process of law. Congress has assumed this power in a large number of cases, by authorizing the condemnation of property which has been made use of for the purpose of defrauding the revenue. Examples of this are vessels illegally reg-

<sup>1</sup> By the act of 1880 (Laws 1880, c. 591) as amended by the act of 1883 (Laws 1883, c. 317):

"Sec. 2. Any net, pound, or other means or device for taking or capturing fish, or whereby they may be taken or captured, set, put, floated, had, found, or maintained, in or upon any of the waters of this state, or upon the shores of or islands in any of the waters of this state, in violation of any existing or hereafter enacted statutes or laws for the protection of fish, is hereby declared to be, and is, a public nuisance, and may be abated and summarily destroyed by any person, and it shall be the duty of each and every protector aforesaid and of every game constable to seize and remove and forthwith destroy the same \* \* \* and no action for damages shall lie or be maintained against any person for or on account of any such seizure and destruction."

istered or owned, or employed in smuggling or other illegal traffic; distilleries or breweries illegally carried on or operated, and buildings standing upon or near the boundary line between the United States and another country, and used as depots for smuggling goods. In all these cases, however, the forfeiture was decreed by judicial proceeding. But where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to summary abatement. Instances of this are the power to kill diseased cattle; to pull down houses in the path of conflagrations; the destruction of decayed fruit or fish or unwholesome meats, or infected clothing, obscene books or pictures, or instruments which can only be used for illegal purposes. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed. *Newark, etc., Ry. Co. v. Hunt*, 50 N. J. Law, 308, 12 Atl. 697; *Blazier v. Miller*, 10 Hun (N. Y.) 435; *Mouse's Case*, 12 Coke, 62; *Stone v. The Mayor*, 25 Wend. (N. Y.) 157, 173; *Am. Print Works v. Lawrence*, 21 N. J. Law, 248; *Same v. Same*, 23 N. J. Law, 590, 57 Am. Dec. 420.

It is not easy to draw the line between cases where property illegally used may be destroyed summarily and where judicial proceedings are necessary for its condemnation. If the property were of great value, as, for instance, if it were a vessel employed for smuggling or other illegal purposes, it would be putting a dangerous power in the hands of a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act as depriving him of his property without due process of law. But where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the legislature to order its summary abatement. For instance, if the legislature should prohibit the killing of fish by explosive shells, and should order the cartridges so used to be destroyed, it would seem like belittling the dignity of the judiciary to require such destruction to be preceded by a solemn condemnation in a court of justice. The same remark might be made of the cards, chips, and dice of a gambling-room.

The value of the nets in question was but \$15 apiece. The cost of condemning one (and the use of one is as illegal as the use of a dozen), by judicial proceedings, would largely exceed the value of the net, and doubtless the state would, in many cases, be deterred from executing the law by the expense. They could only be removed from the water with difficulty, and were liable to injury in the process of removal. The object of the law is undoubtedly a beneficent one, and the state ought not to be hampered in its enforcement by the ap-

plication of constitutional provisions which are intended for the protection of substantial rights of property. It is evident that the efficacy of this statute would be very seriously impaired by requiring every net illegally used to be carefully taken from the water, carried before a court or magistrate, notice of the seizure to be given by publication, and regular judicial proceedings to be instituted for its condemnation.

There is not a state in the Union which has not a constitutional provision entitling persons charged with crime to a trial by jury, and yet from time immemorial the practice has been to try persons charged with petty offences before a police magistrate, who not only passes upon the question of guilt, but metes out the proper punishment. This has never been treated as an infraction of the Constitution, though technically a person may in this way be deprived of his liberty without the intervention of a jury. *Callan v. Wilson*, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223, and cases cited. So the summary abatement of nuisances without judicial process or proceeding was well known to the common law long prior to the adoption of the Constitution, and it has never been supposed that the constitutional provision in question in this case was intended to interfere with the established principles in that regard.

Nor is a person whose property is seized under the act in question without his legal remedy. If in fact his property has been used in violation of the act, he has no just reason to complain; if not, he may replevy his nets from the officer seizing them, or, if they have been destroyed, may have his action for their value.<sup>2</sup> In such cases the burden would be upon the defendant to prove a justification under the statute. As was said by the Supreme Court of New Jersey in a similar case (*Am. Print Works v. Lawrence*, 21 N. J. Law, 248, 259): "The party is not, in point of fact, deprived of a trial by jury. The evidence necessary to sustain the defence is changed. Even if

<sup>2</sup> This is essential in cases of this character. See *North American Cold Storage Co. v. Chicago*, 211 U. S. 306, 318, 319, 29 Sup. Ct. 101, 53 L. Ed. 195, 15 Ann. Cas. 276 (1908) (cases), in which Peckham, J., quoted with approval the following extract from *Miller v. Horton*, 152 Mass. 540, 543, 544, 26 N. E. 100, 101 (10 L. R. A. 116, 23 Am. St. Rep. 850) (1891): "Of course there cannot be a trial by jury before killing an animal supposed to have a contagious disease, and we assume that the legislature may authorize its destruction in such emergencies without a hearing beforehand. But it does not follow that it can throw the loss on the owner without a hearing. If he cannot be heard beforehand he may be heard afterwards. The statute may provide for paying him in case it should appear that his property was not what the legislature has declared to be a nuisance, and may give him his hearing in that way. If it does not do so the statute may leave those who act under it to proceed at their peril, and the owner gets his hearing in an action against them."

See *Adams v. Milwaukee*, 228 U. S. 572, 584, 585, 33 Sup. Ct. 610, 57 L. Ed. — (1913) (summary destruction of impure milk). But compare *Raymond v. Fish*, 51 Conn. 80, 50 Am. Rep. 3 (1883) (destruction of oyster bed, thought to contain disease germs).



the party were deprived of a trial by jury, the statute is not, therefore, necessarily unconstitutional." Indeed, it is scarcely possible that any actual injustice could be done in the practical administration of the act.

It is said, however, that the nets are not in themselves a nuisance, but are perfectly lawful acts of manufacture, and are ordinarily used for a lawful purpose. This is, however, by no means a conclusive answer. Many articles, such, for instance, as cards, dice, and other articles used for gambling purposes, are perfectly harmless in themselves, but may become nuisances by being put to an illegal use, and in such cases fall within the ban of the law and may be summarily destroyed. It is true that this rule does not always follow from the illegal use of a harmless article. A house may not be torn down because it is put to an illegal use, since it may be as readily used for a lawful purpose (*Ely v. Supervisors*, 36 N. Y. 297), but where minor articles of personal property are devoted to such use the fact that they may be used for a lawful purpose would not deprive the legislature of the power to destroy them. The power of the legislature to declare that which is perfectly innocent in itself to be unlawful is beyond question (*People v. West*, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452), and in such case the legislature may annex to the prohibited act all the incidents of a criminal offence, including the destruction of property denounced by it as a public nuisance.

In *Weller v. Snover*, 42 N. J. Law, 341, it was held that a fish warden for a county, appointed by the Governor, had the right, under an act of the Legislature, to enter upon land and destroy a fish basket constructed in violation of the statute, together with the materials of which it was composed, so that it might not again be used. It was stated in that case that "after a statute has declared an invasion of a public right to be a nuisance it may be abated by the destruction of the object used to effect it. The person who, with actual or constructive notice of the law, sets up such nuisance cannot sue the officer whose duty it has been made by the statute to execute its provisions." So in *Williams v. Blackwall*, 2 H. & C. 33, the right to take possession of or destroy any engine placed or used for catching salmon in contravention of law was held to extend to all persons, and was not limited to conservators or officers appointed under the act.

It is true there are several cases of a contrary purport. Some of these cases, however, may be explained upon the ground that the property seized was of considerable value (*Leck v. Anderson*, 57 Cal. 251, 40 Am. Rep. 115, boats as well as nets; *Dunn v. Burleigh*, 62 Me. 24, teams and supplies in lumbering; *King v. Hayes*, 80 Me. 206, 13 Atl. 882, a horse)—in others the court seems to have taken a more technical view of the law than the necessities of the case or an adequate protection of the owner required. *Lowry v. Rainwater*, 70

Mo. 152, 35 Am. Rep. 420; *State v. Robbins*, 124 Ind. 308, 24 N. E. 978, 8 L. R. A. 438; *Ridgeway v. West*, 60 Ind. 371. \* \* \*

Judgment affirmed.<sup>3</sup>

[FULLER, C. J., gave a dissenting opinion, in which concurred FIELD and BREWER, JJ.]

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OCEANIC STEAM NAVIGATION CO. v. STRANAHAN (1909) 214 U. S. 320, 340-343, 29 Sup. Ct. 671, 53 L. Ed. 1013, Mr. Justice WHITE (affirming a judgment of the federal Circuit Court for the Southern District of New York, upholding a federal statute forbidding any person to bring into the United States any alien afflicted with certain diseases, and providing [section 9] that, if it should appear to the satisfaction of the Secretary of Commerce and Labor that the existence of such disease might have been detected by a competent medical examination at the time of foreign embarkation, then the transportation company bringing in such alien should be liable to the port collector for \$100 for each such case, and that none of its vessels should be granted clearance papers while said fine was unpaid. Plaintiff company sued to recover from the New York collector such a fine, payment of which was coerced by the certainty of great pecuniary loss if its vessels were not allowed to leave the port; other facts appearing in the opinion):

"It is urged that the fines which constituted the exactions were repugnant to the fifth amendment, because amounting to a taking of property without due process of law, since, as asserted, the fines were imposed, in some cases, without any previous notice, and in all cases without any adequate notice or opportunity to defend. Stated in the briefest form, the findings below show that on the arrival of a vessel, if the examining medical officers discovered that an immigrant was afflicted with one of the prohibited diseases, the owner of the vessel was notified of the fact. \* \* \* The findings also established that, where a fine was imposed under section 9 by the Secretary of Commerce and Labor, it was only done after the transmission to that official of the certificate of the examining medical officer that a particular alien immigrant had been found to be afflicted with one of the prohibited diseases, and that the state of the disease established in the opinion of the medical officer that it existed at the time of embarkation, and could then have been detected by a competent medical examination. \* \* \* It is evident that the statute unambiguously excludes the conception that the steamship company was entitled to be heard, in the sense of raising an issue and tendering evidence concerning the

<sup>3</sup> Accord: See cases in note to *Cal. Reduc. Co. v. Sanitary Co.*, post, p. 451.

Contra: *Wagner v. Upshur*, 95 Md. 519, 52 Atl. 509, 93 Am. St. Rep. 412 (1902) (judicial proceeding must precede seizure of slot machine susceptible of innocent use).

condition of the alien immigrant upon arrival at the point of disembarkation, as the plain purpose of the statute was to exclusively commit that subject to the medical officers for which the statute provided. We shall, therefore, test the soundness of the proposition we are considering upon that assumption.

"In view of the absolute power of Congress over the right to bring aliens into the United States we think it may not be doubted that the act would be beyond all question constitutional if it forbade the introduction of aliens afflicted with contagious diseases, and, as a condition to the right to bring in aliens, imposed upon every vessel bringing them in, as a condition of the right to do so, a penalty for every alien brought to the United States afflicted with the prohibited disease, wholly without reference to when and where the disease originated. It must then follow that the provision contained in the statute is of course valid, since it only subjects the vessel to the exaction when, as the result of the medical examination for which the statute provides, it appears that the alien immigrant afflicted with the prohibited malady is in such a stage of the disease that it must, in the opinion of the medical officer, have existed and been susceptible of discovery at the point of embarkation. Indeed, it is not denied that there was full power in Congress to provide for the examination of the alien by medical officers, and to attach conclusive effect to the result of that examination for the purposes of exclusion or deportation. But it is said the power to do so does not include the right to make the medical examination conclusive for the purpose of imposing a penalty upon the vessel for the negligent bringing in of an alien. We think the argument rests upon a distinction without a difference. It disregards the purpose which, as we have already pointed out, congress had in view in the enactment of the provision; that is, the guarding against the danger to arise from the wrongful taking on board of an alien afflicted with a contagious malady, not only to other immigrant passengers, but ultimately, it might be, to the entire people of the United States,—a danger arising from the possible admission of aliens who might contract the contagion during the voyage, and yet be entitled to admission because apparently not afflicted with the prohibited disease, owing to the fact that the time had not elapsed for the manifestation of its presence. In effect, all the contentions pressed in argument concerning the repugnancy of the statute to the due process clause really disregarded the complete and absolute power of Congress over the subject with which the statute deals. They mistakenly assume that mere form, and not substance, may be made by the courts the conclusive test as to the constitutional power of Congress to enact a statute. These conclusions are apparent, we think, since the plenary power of Congress as to the admission of aliens leaves no room for doubt as to its authority to impose the penalty, and its complete administrative control over the granting or refusal of a clearance also leaves no doubt of the right to endow administrative officers with discretion to

refuse to perform the administrative act of granting a clearance, as a means of enforcing the penalty which there was lawful authority to impose."<sup>1</sup>

CHICAGO, M. & ST. P. RY. CO. v. MINNESOTA ex rel. RAILROAD & WAREHOUSE COMMISSION.

(Supreme Court of United States, 1890. 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. Ed. 970.)

[Error to the Supreme Court of Minnesota. By statute a state railroad and warehouse commission was created, empowered, among other things, to alter railroad rates within the state wherever they were found by the commission to be unequal or unreasonable. If a railroad did not adopt the rate prescribed by the commission, within ten days after notice of the commission's action, the commission was to publish said rate as the lawful one thereafter, and might compel the railroad to carry out its order by a mandamus to be issued by a state court on the application of the commission. Acting under this statute the commission reduced the rate on milk over a certain part of defendants' line, and applied for a mandamus to compel obedience to its order. The defendant's answer alleged its old rate to be reasonable and the new one unreasonable and a taking of its property without due process of law. The state Supreme Court refused to allow defendant to take testimony as to the reasonableness of the new rate and issued the mandamus. This writ of error was then taken.]

Mr. Justice BLATCHFORD. The opinion of the Supreme Court of Minnesota is reported in 38 Minn. 281, 37 N. W. 782. In it the court in the first place construed the statute on the question as to whether the court itself had jurisdiction to entertain the proceeding, and held that it had. Of course, we cannot review this decision.

It next proceeded to consider the question as to the nature and extent of the powers granted to the commission by the statute in the matter of fixing the rates of charges. On that subject it said: "It seems

<sup>1</sup> Accord (no hearing permitted): *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525 (1904) (inspection of imported tea); *Wilson v. North Carolina ex rel. Caldwell*, 169 U. S. 586, 18 Sup. Ct. 435, 42 L. Ed. 865 (1898) (suspension of state officer by governor). Compare *Murray v. Hoboken Land Co.*, ante, p. 262; and see, also, *Cary v. Curtis*, 3 How. 236, 11 L. Ed. 576 (1845) (limitation of importer's right to recover illegal duties paid under protest) [but see *Atchison, T. & S. F. Ry. Co. v. O'Connor*, 223 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436 (1912)].

In *Japanese Immigrant Case*, 189 U. S. 86, 100, 101, 23 Sup. Ct. 611, 47 L. Ed. 721 (1903), it was said that an alien could not be deported by administrative officers without a hearing, inasmuch as liberty of the person was involved; and in *Chin Yow v. United States*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369 (1908) it was decided that a Chinese person could not be excluded from the country without a hearing on the question of his alleged citizenship, though an erroneous administrative decision thereof could not be corrected by the courts.

to us that, if language means anything, it is perfectly evident that the expressed intention of the legislature is that the rates recommended and published by the commission (assuming that they have proceeded in the manner pointed out by the act) should be not simply advisory, nor merely prima facie equal and reasonable but final and conclusive as to what are lawful or equal and reasonable charges; that, in proceedings to compel compliance with the rates thus published, the law neither contemplates nor allows any issue to be made or inquiry had as to their equality and reasonableness in fact. Under the provisions of the act, the rates thus published are the only ones that are lawful, and therefore, in contemplation of law, the only ones that are equal and reasonable; and, hence, in proceedings like the present, there is, as said before, no fact to traverse, except the violation of the law in refusing compliance with the recommendations of the commission. Indeed, the language of the act is so plain on that point that argument can add nothing to its force."

It then proceeded to examine the question of the validity of the act under the Constitution of Minnesota, as to whether the legislature was authorized to confer upon the commission the powers given to the latter by the statute. It held that, as the legislature had the power itself to regulate charges by railroads, it could delegate to a commission the power of fixing such charges, and could make the judgment or determination of the commission as to what were reasonable charges final and conclusive. \* \* \* In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable.

This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, 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 substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice.

Under section 8 of the statute, which the Supreme Court of Minnesota says is the only one which relates to the matter of the fixing by the commission of general schedules of rates, and which section, it says, fully and exclusively provides for that subject, and is complete in itself, all that the commission is required to do is, on the filing with it by a railroad company of copies of its schedules of charges, to "find" that any part thereof is in any respect unequal or unreasonable, and then it is authorized and directed to compel the company to change the same and adopt such charge as the commission "shall declare to be



equal and reasonable," and, to that end, it is required to inform the company in writing in what respect its charges are unequal and unreasonable. No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears that, prior to the decision of the commission, the company appeared before it by its agent, and the commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was or how the result was arrived at.

By the second section of the statute in question, it is provided that all charges made by a common carrier for the transportation of passengers or property shall be equal and reasonable. Under this provision, the carrier has a right to make equal and reasonable charges for such transportation. In the present case, the return alleged that the rate of charge fixed by the commission was not equal or reasonable, and the Supreme Court held that the statute deprived the company of the right to show that judicially. The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws. \* \* \*

Judgment reversed.

[MILLER, J., concurred on the ground that a railroad could not be deprived of the right judicially to attack rates prescribed for it that were unreasonably low. He thought, however, that the legislature could delegate to a commission the power to establish rates in the first instance without a hearing to the railroads.]

Mr. Justice BRADLEY [with whom concurred GRAY and LAMAR, JJ.], dissenting. \* \* \* I think it is perfectly clear, and well settled by the decisions of this court, that the legislature might have fixed the rates in question. If it had done so, it would have done it through the aid of committees appointed to investigate the subject, to acquire information, to cite parties, to get all the facts before them, and finally to decide and report. No one could have said that this was not due process of law. And if the legislature itself could do this, acting by its committees, and proceeding according to the usual forms adopted by

such bodies, I can see no good reason why it might not delegate the duty to a board of commissioners, charged, as the board in this case was, to regulate and fix the charges so as to be equal and reasonable. Such a board would have at its command all the means of getting at the truth and ascertaining the reasonableness of fares and freights, which a legislative committee has. It might, or it might not, swear witnesses and examine parties. Its duties being of an administrative character, it would have the widest scope for examination and inquiry. All means of knowledge and information would be at its command,—just as they would be at the command of the legislature which created it. Such a body, though not a court, is a proper tribunal for the duties imposed upon it. \* \* \* Due process of law does not always require a court. It merely requires such tribunals and proceedings as are proper to the subject in hand. \* \* \*

It is complained that the decisions of the board are final and without appeal. So are the decisions of the courts in matters within their jurisdiction. There must be a final tribunal somewhere for deciding every question in the world. Injustice may take place in all tribunals. All human institutions are imperfect—courts as well as commissions and legislatures. Whatever tribunal has jurisdiction, its decisions are final and conclusive unless an appeal is given therefrom. The important question always is, what is the lawful tribunal for the particular case? In my judgment, in the present case, the proper tribunal was the legislature, or the board of commissioners which it created for the purpose. \* \* \* It was alleged in *Davidson v. New Orleans*, 96 U. S. 97, 106, 24 L. Ed. 616, that the property assessed was not benefited by the improvement; but we held that that was a matter with which we would not interfere; the question was, whether there was due process of law. If a state court renders an unjust judgment, we cannot remedy it.

I do not mean to say that the legislature, or its constituted board of commissioners, or other legislative agency, may not so act as to deprive parties of their property without due process of law. The Constitution contemplates the possibility of such an invasion of rights. But, acting within their jurisdiction (as in these cases they have done), the invasion should be clear and unmistakable to bring the case within that category. Nothing of the kind exists in the cases before us. The legislature, in establishing the commission, did not exceed its power; and the commission, in acting upon the cases, did not exceed its jurisdiction, and was not chargeable with fraudulent behavior. There was merely a difference of judgment as to amount, between the commission and the companies, without any indication of intent on the part of the former to do injustice. The board may have erred; but if they did, as the matter was within their rightful jurisdiction, their decision was final and conclusive unless their proceedings could be impeached for fraud. Deprivation of property by mere arbitrary power on the part of the legislature, or fraud on the part of the commission,

are the only grounds on which judicial relief may be sought against their action. There was, in truth, no deprivation of property in these cases at all. There was merely a regulation as to the enjoyment of property, made by a strictly competent authority, in a matter entirely within its jurisdiction. \* \* \*<sup>1</sup>

<sup>1</sup> In *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247 (1892), it was held that the legislature might directly prescribe the rates to be charged by grain elevators, without a previous hearing to the elevator owners; it not appearing that the charges fixed were actually unreasonably low.

In *Ex parte Young*, 209 U. S. 123, 146-148, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764 (1908), the Minnesota legislature fixed certain railway rates, alleged by the railroads to be unreasonably low, and imposed, for each violation thereof, fines of \$5,000 to \$10,000 upon the railroad companies, and upon individual railroad agents fines not exceeding \$5,000 and imprisonment for not over five years. Various railroads obtained in the Minnesota federal courts a temporary injunction against the enforcement of this law until the validity of the rates established by it could be judicially ascertained, and one of the grounds urged for this was that the character of the penalties themselves operated in effect to deny the railroads a hearing. In contempt proceedings consequent upon a violation of this injunction by the state attorney general, this ground was discussed as follows by Peckham, J.:

"The necessary effect and result of such legislation must be to preclude a resort to the courts (either state or federal) for the purpose of testing its validity. The officers and employees could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing to the company. \* \* \* [Here follow quotations to this effect from *Cotting v. Kansas City Stock Yards*, 183 U. S. 79, 99-102, 22 Sup. Ct. 30, 46 L. Ed. 92.]

"If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. *Chicago, M. & St. P. R. Co. v. Minnesota*, supra [134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. Ed. 970]. A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as work an abandonment of the right rather than face the conditions upon which it is offered or may be obtained is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

"It is urged that there is no principle upon which to base the claim that a person is entitled to disobey a statute at least once, for the purpose of testing its validity, without subjecting himself to the penalties for disobedience provided by the statute in case it is valid. This is not an accurate statement of the case. Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines, as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction

## COMMONWEALTH v. SISSON.

(Supreme Judicial Court of Massachusetts, 1905. 189 Mass. 247, 75 N. E. 619, 1 L. R. A. [N. S.] 752, 109 Am. St. Rep. 630.)

[Appeal upon exceptions taken to rulings at the trial in the Superior Court. Acting under a Massachusetts statute, the fish and game commission of the state had ordered Sisson to cease to discharge sawdust from his sawmill into the Konkapot river upon which the mill was located. Complaint was made against him for violating this order. At the trial Sisson offered to show, inter alia, that in making the order the commission did not act upon sworn evidence or personal knowledge, and that it refused to give him a hearing. There were admitted to be edible fish in the river. Exceptions were taken to the exclusion of this evidence, and Sisson was found guilty.]

LORING, J. \* \* \* The defendants' grievance is that by an order of the board of fish and game commissioners they have been deprived, without compensation being made therefor, of the right to conduct the business of sawing wood as they and their predecessors in title have conducted it for 30 years last past, that from this decision there is no appeal, and that not only was the order made without a hearing, but, when a hearing was asked for by the defendants, it was denied. \* \* \*

In support of their contention they argue that the board, in determining (1) that the fish in Konkapot river are of sufficient value to

is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation; and over which the jurisdiction of the legislature is complete in any event.

"We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates."

And so Missouri Pac. R. Co. v. Tucker. 230 U. S. 340, 33 Sup. Ct. 961, 57 L. Ed. — (1913) (\$500 liquidated damages to shipper for each violation of doubtful rate law).

See, also, Missouri Pac. Ry. Co. v. Nebraska, 217 U. S. 196, 207, 208, 30 Sup. Ct. 461, 54 L. Ed. 727, 18 Ann. Cas. 989 (1910) (railway not liable to \$500 fine for failing to build siding demanded by shipper in advance of hearing as to reasonableness of request); Atchison, T. & S. F. Ry. Co. v. O'Connor, 223 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436 (1912) (right of party to pay doubtful tax under protest to escape penalties, and then to test tax in suit to recover payment); St. Louis, I. M. & S. Ry. Co. v. Wynne, 224 U. S. 354, 32 Sup. Ct. 493, 56 L. Ed. 799 (1912) (railway cannot be penalized by double actual damages for failure to pay excessive claim) [but see Mobile & O. Ry. v. Brandon, 98 Miss. 461, 53 South. 957, 42 L. R. A. (N. S.) 106 (1910) (\$25 penalty for failure to tender within 60 days actual amount of shipper's damage, despite latter's excessive claim)]. Compare Sherlin-Carpenter Co. v. Minn., post, p. 508, note (indefiniteness of description of statutory crime).

warrant the prohibition or regulation of the discharge of sawdust therein, and (2) that the discharge of sawdust from the defendants' mill materially injured such fish, was [acting judicially]; and, in connection with this argument, they rely on the distinction pointed out in *Salem v. Eastern Railroad Co.*, 98 Mass. 431, 96 Am. Dec. 650, between the action of a local board of health in making general regulations respecting articles capable of conveying infection or creating sickness and the authority of such a board to examine into the existence of any specific case of nuisance, filth, or cause of sickness dangerous to the public health and to make an order for the removal of it. The former, being a rule for all, is legislative in character; the latter, being a determination as to a particular thing, resulting in an order to the owner of it to do a specified act, is judicial in character. For a later case, where it is pointed out that similar legislative and judicial powers are given to the state board of health in connection with the pollution of a body of water used as a supply of a city or town, see *Nelson v. State Board of Health*, 186 Mass. 330, 71 N. E. 693.

We agree with the defendant's counsel as to what the order here in question is not. We agree that it is not a general regulation. What is determined by it is that the discharge of sawdust from the defendants' mill materially injures the fish in Konkapot river, and it orders the defendants to erect a blower, and forbids the defendants making a pile of sawdust in connection with the mill; and it resulted in an order served on these defendants to do these acts. This is not a general regulation. But we do not agree that, because it is not a general regulation, it is a judicial action. The question to be decided here does not depend upon a choice between the two classes dealt with in *Salem v. Eastern Railroad*, 98 Mass. 431, 96 Am. Dec. 650, and in *Nelson v. State Board of Health*, 186 Mass. 330, 71 N. E. 693, and for these reasons:

We are of opinion, in the first place, that it is within the power of the Legislature to protect and preserve edible fish in the rivers and brooks of the commonwealth, and for that purpose, if they think proper, to forbid any sawdust being discharged into any brook containing such fish. \* \* \*

We are of opinion, in the second place, that in case the Legislature thought that in regulating the conflicting rights of individuals to run sawmills on the banks of a river on the one hand, and of the public, on the other hand, to have fish live and increase in the same stream, it was not worth while to forbid sawdust being discharged into every stream in which there were edible fish, they could leave to a board having peculiar knowledge on the subject the selection of the brooks and rivers in which the fish were of sufficient value to warrant the prohibition or regulation of the discharge of sawdust. The right of the Legislature to delegate some legislative functions to state boards was considered by this court in *Brodline v. Revere*, 182 Mass. 598,



66 N. E. 607. And, further, in case the Legislature thought that an act which forbade any sawdust to be discharged into any of the streams selected by the board was an unnecessarily stringent one, they could, in our opinion, leave it to the board to settle in each particular case the practical details required to harmonize best these two conflicting rights.

The power thus delegated to the board of fitting the details of regulation to the particular circumstances of each case is of the same character as that long exercised by the fish and game commissioners and their predecessors, the board of inland fisheries, in prescribing the details of the construction of the fishways to be constructed in dams where by law fishways have to be maintained. See St. 1866, pp. 231, 232, c. 238, §§ 2, 6; St. 1867, p. 741, c. 344; Pub. St. 1882, c. 91, § 4. See, also, 3 Province Laws, 1745-46 (State Ed.) c. 20, p. 267. These acts provide that the board, after examination of dams upon rivers where the law requires fishways, is to determine whether the fishways in existence are sufficient, and to prescribe by an order in writing what changes or repairs, if any, shall be made, and at what times the fishways are to be kept open, and to give notice thereof to the owners of such dams. The action of the fish commissioners under these acts is unquestionably legislative in character, and we cannot doubt that their action under them, exercised and acquiesced in by the public for this length of time, is valid.

The result is that in our opinion the action of the board in the case at bar was the working out of details under a legislative act. The board is no more required to act on sworn evidence than is the Legislature itself, and no more than in case of the Legislature itself is it bound to act only after a hearing, or to give a hearing to the plaintiff when he asks for one; and its action is final, as is the action of the Legislature in enacting a statute, and, being legislative, it is plain that the questions of fact passed upon by the commissioners in adopting the provisions enacted by them cannot be tried over by the court. This court has been recently asked to try over the expediency of compulsory vaccination in an action under a statute requiring it. *Com. v. Jacobson*, 183 Mass. 242, 66 N. E. 719, 67 L. R. A. 935. On its declining to do so an appeal was taken to the Supreme Court of the United States, and its refusal to do so was held to be correct. *Jacobson v. Mass.*, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765. See particularly page 30 of 197 U. S., page 363 of 25 Sup. Ct., 49 L. Ed. 643. See, also, *Devens, J.*, in *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 531, 11 N. E. 929, 59 Am. Rep. 113.

The practical result is that the defendants are forbidden to conduct their sawmill as they had conducted it for 30 years by a board who have not heard evidence and have refused the defendants a hearing, that the action of the board is final, and that no compensa-

tion is due to them. This result may seem strange. But it is no less strange than the practical results in cases which are decided law. Take the case before the court in *Nelson v. State Board of Health*, 186 Mass. 330, 71 N. E. 693, namely, a farm on the banks of a pond used as the water supply of a town. The state board of health can pass a general regulation under section 113, c. 75, Rev. Laws, forbidding privies within a specified distance from its shore; and, if the defendant had had a privy there for 30 years, his right to maintain it would cease, although the order was made without hearing; and the action of the board is final. On the other hand, if the board had proceeded, under section 118, to investigate this particular privy, the defendant would have been entitled to a hearing and on appeal to a jury, as provided by section 119. Again, take, for example, the regulation of a local board of health in question in *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113, requiring all rags arriving at the port of Boston from any foreign port to be disinfected at the expense of the owner before being discharged. The power of the local board of health to declare these rags a nuisance per se, so as to impose upon the owner without trial the expense of disinfecting them, was established by this court in that case. Had the local board undertaken to investigate the particular rags in question in *Train v. Boston Disinfecting Co.*, under their jurisdiction to inquire into sources of filth, and they had been authorized under that act to abate the nuisance if they found the rags to be a nuisance, by ordering them to be disinfected at the expense of the defendant, they would have had to give the defendant a hearing on notice, and from their decision the defendant would have had a right to a trial by jury. That is what was decided in *Salem v. Eastern Railroad*, 98 Mass. 431, 96 Am. Dec. 650.

That is to say, on the one hand, where the law is general and the question is whether under it the defendants are committing a nuisance, the facts are determined by judicial action; on the other hand, the determination of the same facts is legislative in case the Legislature decides to make the thing a nuisance per se. And where it is legislative it is final, and no hearing is necessary; and where, as is the case here, it is made in the exercise of the police power, no compensation is due. The delegation of such legislative powers to a board is going a great way. But the remedy is by application to the Legislature, if a remedy should be given. In our opinion it is within its constitutional power, and the court can give no remedy.

For similar cases, where the use which can be made of property has been left to the final determination of boards, see *Newton v. Joyce*, 166 Mass. 83, 41 N. E. 116, 55 Am. St. Rep. 385; *Com. v. Roberts*, 155 Mass. 281, 29 N. E. 522, 16 L. R. A. 400. See, also, in this connection, *In re Wares, Petitioners*, 161 Mass. 70, 36 N. E. 586. The difference between the majority and the minority of the

court in *Miller v. Horton*, 152 Mass. 540, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 850, was on the construction of the act there in question.

Exceptions overruled.<sup>1</sup>

### PRENTIS v. ATLANTIC COAST LINE CO.

(Supreme Court of United States, 1908. 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150.)

[Appeals from the federal Circuit Court for the Eastern District of Virginia. The Virginia Constitution of 1902 established a state corporation commission empowered, among other things, to regulate transportation rates within the state. Before fixing any rate it was required to give notice and a hearing to parties affected thereby, and any party aggrieved by its orders was given an appeal to the highest state court, which was empowered, if it reversed the commission's orders, to substitute therefor such orders as in its opinion should have been made. No other state court was given jurisdiction over the action of the commission. After a rate was fixed, the commission was empowered, by its own process, to enforce against offenders the penalties established by law for disobedience to its orders. In this proceeding also a hearing was required, the validity and reasonableness of orders might be attacked again, and all defenses were open to alleged offend-

<sup>1</sup>As due process in the exercise of legislative power depends upon the validity of the resulting enactment and not upon the mode in which the legislative determination was reached (notice and hearing being therefore unnecessary), it would seem that where legislative power may be delegated at all to an administrative tribunal (see Chapter II, section 2, *supra*) it may be delegated as in the principal case, to be exercised without notice and hearing, provided that the legislature's intention to do this clearly appears. The federal authorities, chiefly dicta, are not harmonious, however. See, as to creation of municipal taxing districts, *Spencer v. Merchant*, post, at p. 644, and note 1; rate regulation, *Chicago, M. & St. P. Ry. Co. v. Minn.*, ante, p. 303, opinion of Bradley, J.; *Budd v. New York*, 143 U. S. 517, 545-548, 12 Sup. Ct. 468, 36 L. Ed. 247 (1892); *Home Telephone & Telegraph Co. v. Los Angeles*, 211 U. S. 265, 278, 29 Sup. Ct. 50, 53 L. Ed. 176 (1908); extent and expediency of taking in eminent domain, *People v. Smith*, 21 N. Y. 595 (1860); *Lynch v. Forbes*, 161 Mass. 302, 308, 309, 37 N. E. 437, 42 Am. St. Rep. 402 (1894); *United States v. Gettysburg Electric Ry. Co.*, 160 U. S. 668, 685, 16 Sup. Ct. 427, 40 L. Ed. 576 (1898).

DUE PROCESS IN EXECUTIVE ACTION.—Notice and hearing are not essential to due process in any purely executive determination. *Moyer v. Peabody*, 212 U. S. 78, 29 Sup. Ct. 235, 53 L. Ed. 410 (1909) (right of state executive to kill or imprison persons in bona fide efforts to suppress insurrection, even assuming such acts to be actually unnecessary); *Marbles v. Creedy*, 215 U. S. 63, 30 Sup. Ct. 32, 54 L. Ed. 92 (1909) (issuance of extradition warrant upon requisition papers) [see, also, *Pettibone v. Nichols*, 203 U. S. 192, 203-206, 27 Sup. Ct. 111, 51 L. Ed. 148, 7 Ann. Cas. 1047 (1906)]. So of removals from office by executive authority, *In re Hennen*, 13 Pet. 230, 10 L. Ed. 133 (1839); *Blake v. United States*, 103 U. S. 227, 26 L. Ed. 462 (1881); *Trainor v. Board of Auditors*, 89 Mich. 162, 50 N. W. 809, 15 L. R. A. 95 (1891); except where the removal must be for cause, when the power exercised is judicial in its nature and requires a hearing, *Dullam v. Willson*, 53 Mich. 392, 19 N. W. 112, 51 Am. Rep. 128 (1884). See, also, *Caldwell v. Willson*, 121 N. C. 425, 28 S. E. 554 (1897), affirmed in *Willson v. North Carolina ex rel. Caldwell*, 160 U. S. 586, 18 Sup. Ct. 435, 42 L. Ed. 865 (1898).

ers. In 1906, upon notice, a hearing was given to complainant railroads upon the question of passenger rates, and in April, 1907, an order was made fixing various such rates for different roads. Complainants then filed bills in equity in the above-mentioned court to enjoin the commission from enforcing this order as confiscatory under the fourteenth amendment. The defendants alleged by demurrer and plea that the proceedings before the commission were proceedings in a court of the state, which the courts of the United States were forbidden to enjoin (Rev. St. § 720, U. S. Comp. St. 1901, p. 581), and that the decision of the commission made the legality of the rates *res judicata*. From a decree for complainants on these pleadings, the defendants appealed.]

Mr. Justice HOLMES. \* \* \* We shall assume that when, as here, a state Constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder, so far as the Constitution of the United States is concerned. *Dreyer v. Illinois*, 187 U. S. 71, 83, 84, 23 Sup. Ct. 28, 47 L. Ed. 79, 85; *Winchester & S. R. Co. v. Com.*, 106 Va. 264, 268, 55 S. E. 692. We shall assume, as we have said, that some of the powers of the commission are judicial, and we shall assume, without deciding, that, if it was proceeding against the appellees to enforce this order and to punish them for a breach, it then would be sitting as a court and would be protected from interference on the part of courts of the United States.

But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body which, at another moment, or in its principal or dominant aspect, is a court such as is meant by section 720. A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind, as seems to be fully recognized by the supreme court of appeals (*Com. v. Atlantic Coast Line R. Co.*, 106 Va. 61, 64, 55 S. E. 572, 7 L. R. A. [N. S.] 1086, 117 Am. St. Rep. 983), and especially by its learned president in his pointed remarks in *Winchester & S. R. Co. v. Com.*, 106 Va. 264, 281, 55 S. E. 692. See, further, *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 499, 500, 505, 17 Sup. Ct. 896, 42 L. Ed. 243, 253, 255; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 440, 23 Sup. Ct. 571, 47 L. Ed. 892, 893.

Proceedings legislative in nature are not proceedings in a court, within the meaning of Rev. St. § 720, no matter what may be the general or dominant character of the body in which they may take place. *Southern R. Co. v. Greensboro Ice & Coal Co.* (C. C.) 134 Fed. 82, 94,

affirmed sub nom. *McNeill v. Southern Ry. Co.*, 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142. That question depends not upon the character of the body, but upon the character of the proceedings. In *re Virginia*, 100 U. S. 339, 348, 25 L. Ed. 676, 680. They are not a suit in which a writ of error would lie under Rev. St. § 709, and Act Feb. 18, 1875, c. 80, 18 Stat. 318 (U. S. Comp. St. 1901, p. 575). See *Upshur County v. Rich*, 135 U. S. 467, 10 Sup. Ct. 651, 34 L. Ed. 196; *Wallace v. Adams*, 204 U. S. 415, 423, 27 Sup. Ct. 363, 51 L. Ed. 547, 551. The decision upon them cannot be res judicata when a suit is brought. See *Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014, 4 Inters. Com. Rep. 560. And it does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up.

A judge sitting with a jury is not competent to decide issues of fact; but matters of fact that are merely premises to a rule of law he may decide. He may find out for himself, in whatever way seems best, whether a supposed statute ever really was passed. In *Pickering v. Barkley*, Style, 132, merchants were asked by the court to state their understanding as an aid to the decision of a demurrer. The nature of the final act determines the nature of the previous inquiry. As the judge is bound to declare the law, he must know or discover the facts that establish the law. So, when the final act is legislative, the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case.<sup>1</sup> If a state Constitution should provide for a hearing before any law should be passed, and should declare that it should be a judicial proceeding in rem and the decision binding upon all the world, it hardly is to be supposed that the simple device could make the constitutionality of the law res judicata, if it subsequently should be drawn in question before a court of the United States. And all that we have said would be equally true if an appeal had been taken to the supreme court of appeals and it had confirmed the rate. Its action in doing so would not have been judicial, although the questions debated by it might have been the same that might come before it as a court, and would have been discussed and passed upon by it in the same way that it would deal with them if they arose afterwards in a case properly so called. We gather that these are the views of the supreme court of appeals itself. *Atlantic Coast Line R. Co. v. Com.*, 102 Va. 599, 621, 46 S. E. 911. They are implied in many cases in this and other United States courts in which the enforcement of rates has been enjoined, notwithstanding notice and hearing, and what counsel in this

<sup>1</sup> Accord: *Bradley v. City of Richmond*, 227 U. S. 477, 33 Sup. Ct. 318, 57 L. Ed. — (1913) (classification of occupations for graded license tax is legislative act, though accompanied by notice and hearing).



case call "litigation" in advance. Legislation cannot bolster itself up in that way. Litigation cannot arise until the moment of legislation is past. See *Southern R. Co. v. Com.*, 107 Va. 771, 772, 60 S. E. 70, 17 L. R. A. (N. S.) 364. \* \* \*

Our hesitation has been on the narrower question whether the railroads, before they resorted to the circuit court, should not have taken the appeal allowed to them by the Virginia Constitution at the legislative stage, so as to make it absolutely certain that the officials of the state would try to establish and enforce an unconstitutional rule. Considerations of comity and convenience have led this court ordinarily to decline to interfere by habeas corpus where the petitioner had open to him a writ of error to a higher court of a state, in cases where there was no merely logical reason for refusing the writ. The question is whether somewhat similar considerations ought not to have some weight here.

We admit at once that they have not the same weight in this case. The question to be decided, we repeat, is legislative, whether a certain rule shall be made. Although the appeal is given as a right, it is not a remedy, properly so called. At that time no case exists. We should hesitate to say, as a general rule, that a right to resort to the courts could be made always to depend upon keeping a previous watch upon the bodies that make laws, and using every effort and all the machinery available to prevent unconstitutional laws from being passed. It might be said that a citizen has a right to assume that the Constitution will be respected, and that the very meaning of our system in giving the last word upon constitutional questions to the courts is that he may rest upon that assumption, and is not bound to be continually on the alert against covert or open attacks upon his rights in bodies that cannot finally take them away. It is a novel ground for denying a man a resort to the courts that he has not used due diligence to prevent a law from being passed.

But this case hardly can be disposed of on purely general principles. The question that we are considering may be termed a question of equitable fitness or propriety, and must be answered on the particular facts. The establishment of railroad rates is not like a law that affects private persons, who may never have heard of it till it was passed. It is a matter of great interest, both to the railroads and to the public, and is watched by both with scrutinizing care. The railroads went into evidence before the commission. They very well might have taken the matter before the supreme court of appeals. No new evidence and no great additional expense would have been involved.

The state of Virginia has endeavored to impose the highest safeguards possible upon the exercise of the great power given to the state corporation commission, not only by the character of the members of that commission, but by making its decisions dependent upon the assent of the same historic body that is intrusted with the preservation of the most valued constitutional rights, if the railroads see fit to ap-

peal. It seems to us only a just recognition of the solicitude with which their rights have been guarded, that they should make sure that the state, in its final legislative action, would not respect what they think their rights to be, before resorting to the courts of the United States.

If the rate should be affirmed by the supreme court of appeals and the railroads still should regard it as confiscatory, it will be understood from what we have said that they will be at liberty then to renew their application to the circuit court, without fear of being met by a plea of *res judicata*. It will not be necessary to wait for a prosecution by the commission. \* \* \*

Decrees reversed.<sup>2</sup>

[BREWER, J., dissented. FULLER, C. J., and HARLAN, J., concurred in the result, but gave opinions dissenting from the reasoning of the majority and holding the action of the Virginia commission to be judicial and that of a court, and hence protected by Rev. St. § 720 (U. S. Comp. St. 1901, p. 581). FULLER, C. J., said (211 U. S. 237, 29 Sup. Ct. 74, 53 L. Ed. 150): "I cannot see why the reasonableness and justness of a rate may not be judicially inquired into and judicially determined at the time of the fixing of the rate, as well as afterwards."]

<sup>2</sup> In *Winchester, etc., Ry. v. Commonwealth*, 106 Va. 264, 281, 55 S. E. 692, 698 (1906), referring to the Virginia corporation commission, Keith, P., said: "I do not doubt that it was competent for the state to create a commission and confer upon it executive, legislative, and judicial functions without trenching upon any provision of the Constitution of the United States; but the commission, in the exercise of those powers, must acquire jurisdiction over the parties to be affected by its action by due process of law, and conform its proceedings to the law of the land. When, in the exercise of its legislative functions, it has in obedience to the law of the state summoned persons, natural or artificial, before it to protect their rights, it has done what is not required to be done by the fourteenth amendment to the United States Constitution, and what it might have omitted to do, so far as that instrument is concerned; but when it comes to enforce its rules and regulations and to adjudicate the penalties for their violation, a stage has been reached at which the fourteenth amendment throws its ægls over the litigant, who must be summoned to appear and permitted to defend in accordance with the law of the land, and this right to be summoned to answer is not satisfied by the antecedent summons and appearance before the commission at a time when the adoption of the rule or regulation was under consideration. The commission may exercise legislative and judicial functions, but cannot confuse and blend them in one procedure, but when considering the adoption of a regulation is in the exercise of one department or head of its authority, and, when passing upon the violation of such regulation, is exercising a wholly separate function, and is to be controlled by wholly different considerations in order to meet the requirements of due process of law and to adjudicate rights in accordance with the law of the land."

Compare *People v. Wilcox*, ante, p. 100, note.

A party entitled to offer all competent evidence at a legislative hearing before a commission may, at least in the absence of surprise, mistake, or other extraordinary circumstance, be confined to the evidence offered before the commission, when the order of the latter is judicially reviewed. *State of Washington v. Fairchild*, 224 U. S. 510, 524-528, 32 Sup. Ct. 535, 56 L. Ed. 863 (1912). And if he refuses to appear at such legislative hearing, he is not entitled to a judicial review to correct errors in the legislative determination. *Bradley v. City of Richmond*, 227 U. S. 477, 485, 33 Sup. Ct. 318, 57 L. Ed. — (1913).

## SECTION 2.—EQUAL PROTECTION OF LAW

## 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,<sup>1</sup> 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 dis-

<sup>1</sup> The equal protection of the laws does not require that any part of a jury trying a negro shall necessarily be composed of negroes. In re Wood, 140 U. S. 278, 11 Sup. Ct. 738, 35 L. Ed. 505 (1891); In re Jigiro, 140 U. S. 686, 11 Sup. Ct. 1022, 35 L. Ed. 749 (1891) (Japanese). Nor is a white male defendant entitled to an opportunity to have women or negroes drawn upon his jury. McKinney v. Wyoming, 3 Wyo. 719, 30 Pac. 293, 16 L. R. A. 710 (1892) (cases).

like, 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.<sup>2</sup> 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.<sup>3</sup>

[FIELD, J., dissented on grounds stated in *In re Virginia*, note 3, below. CLIFFORD, J., concurred with him.]

<sup>2</sup> Lawyers, ministers, doctors, teachers, railroad engineers and firemen, and similar classes of persons may be excluded from jury duty so as not to interrupt their regular work for the community. *Rawlins v. Georgia*, 201 U. S. 638, 26 Sup. Ct. 560, 50 L. Ed. 899, 5 Ann. Cas. 783 (1906).

<sup>3</sup> Accord: *Carter v. Texas*, 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839 (1900) (grand jury); *Martin v. Texas*, 200 U. S. 316, 26 Sup. Ct. 338, 50 L. Ed. 497 (1906) (collecting cases—complainant must offer evidence to support contention, where based upon alleged unequal administration of law).

In *In re Virginia*, 100 U. S. 339, 367, 368, 25 L. Ed. 676 (1880), Field, J., dissenting, said:

"The fourth clause in the first section of the amendment declares that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' Upon this clause the counsel of the district judge chiefly rely to sustain the validity of the legislation in question. But the universality of the protection secured necessarily renders their position untenable. All persons within the jurisdiction of the state, whether permanent residents or temporary sojourners, whether old or young, male or female, are to be equally protected. Yet no one will contend that equal protection to women, to children, to the aged, to aliens, can only be secured by allowing persons of the class to which they belong to act as jurors in cases affecting their interests. The equality of protection intended does not require that all persons shall be permitted to participate in the government of the state and the administration of its laws, to hold its offices, or be clothed with any public trusts. As already said, the universality of the protection assured repels any such conclusion.

"The equality of the protection secured extends only to civil rights as dis-

## CHAPTER X

DUE PROCESS AND EQUAL PROTECTION OF LAW: PROTECTIVE AND REGULATIVE POWER  
(POLICE POWER)

## SECTION 1.—IN GENERAL

## COMMONWEALTH v. ALGER.

(Supreme Judicial Court of Massachusetts, 1851. 7 Cush. 53.)

[Alger was convicted in the Boston municipal court of erecting a wharf from his riparian land into Boston harbor beyond the established harbor lines, in violation of a statute. The wharf was not below low-water mark and did not actually impede navigation. The case was reported to the state Supreme Judicial Court for the decision of doubtful legal questions involved.]

SHAW, C. J. \* \* \* The manifest object of these statutes is to prevent injurious obstructions in the harbor of Boston, and to secure the free, common, and unobstructed use thereof, for the citizens of the

tinguished from those which are political, or arise from the form of the government and its mode of administration. \* \* \* It has no more reference to them than it has to social rights and duties, which do not rest upon any positive law, though they are more potential in controlling the intercourse of individuals. In the consideration of questions growing out of these amendments much confusion has arisen from a failure to distinguish between the civil and the political rights of citizens. Civil rights are absolute and personal. Political rights, on the other hand, are conditioned and dependent upon the discretion of the elective or appointing power, whether that be the people acting through the ballot, or one of the departments of their government. The civil rights of the individual are never to be withheld, and may be always judicially enforced. The political rights which he may enjoy, such as holding office and discharging a public trust, are qualified because their possession depends on his fitness, to be adjudged by those whom society has clothed with the elective authority. The thirteenth and fourteenth amendments were designed to secure the civil rights of all persons, of every race, color, and condition; but they left to the states to determine to whom the possession of political powers should be intrusted. This is manifest from the fact that when it was desired to confer political power upon the newly made citizens of the states, as was done by inhibiting the denial to them of the suffrage on account of race, color, or previous condition of servitude, a new amendment was required."

CLASSIFICATION OF PARTIES FOR PURPOSE OF DIFFERENCES IN PROCEDURE.—Any reasonable differences between parties to litigation or their situations with regard thereto affords a valid basis for the application to them of appropriately differing rules of procedure. See *District of Columbia v. Brooke*, post, p. 380, note; *Ballard v. Hunter*, 204 U. S. 241, 27 Sup. Ct. 261, 51 L. Ed. 461 (1907) (constructive service of process on non-resident taxpayers only); *Central Loan & T. Co. v. Campbell Commission Co.*, 173 U. S. 84, 19 Sup. Ct. 346, 43 L. Ed. 623 (1899) (same, as to attachment bond); *St. Mary's*

commonwealth, and all other persons, for navigation with ships, boats, and vessels of all kinds, as a common and public right. If this can be done, without an unwarrantable encroachment on the rights of private property, it is an object of great importance, and one in which the holders of riparian rights, as well as all other holders of real estate, and the whole community, have a deep and abiding interest.

We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others, having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide-waters, is derived directly or indirectly from the government, and held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient.

This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use,

*Franco-American Petroleum Co. v. West Virginia*, 203 U. S. 183, 27 Sup. Ct. 132, 51 L. Ed. 144 (1906) (different mode of service on non-resident corporations); *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 28 Sup. Ct. 178, 52 L. Ed. 327, 12 Ann. Cas. 658 (1908) (corporations alone required to produce papers); *United States v. Heinze*, 218 U. S. 532, 31 Sup. Ct. 95, 54 L. Ed. 1139, 21 Ann. Cas. 884 (1910) (interlocutory appeal to government only—semble); *Standard Oil Co. of Kentucky v. Tennessee ex rel. Cates*, 217 U. S. 413, 30 Sup. Ct. 543, 54 L. Ed. 817 (1910) (enforcement of anti-trust laws against corporations in equity instead of by indictment).

As to territorial differences in procedure, see *Missouri v. Lewis*, post, p. 329.

In *Cincinnati St. Ry. Co. v. Snell*, 193 U. S. 30, 36, 37, 24 Sup. Ct. 319, 321, 48 L. Ed. 604 (1904), an Ohio statute was upheld permitting to opponents of corporations having over 50 stockholders, but not to such corporations themselves, a change of venue for local prejudice; Mr. Justice White, saying: "The proposition to which the case reduces itself is therefore this: That although the protection of equal laws equally administered has been enjoyed, nevertheless there has been a denial of the equal protection of the law within the purview of the fourteenth amendment, only because the state has allowed one person to seek one forum and has not allowed another person, asserted to be in the same class, to seek the same forum, although as to both persons the law has afforded a forum in which the same and equal laws are applicable and administered. But it is fundamental rights which the fourteenth amendment safeguards, and not the mere forum which a state may see proper to designate for the enforcement and protection of such rights. Given, therefore, a condition where fundamental rights are equally protected and preserved, it is impossible to say that the rights which are thus protected and preserved have been denied because the state has deemed best to provide for a trial in one forum or another. It is not, under any view, the mere tribunal into which a person is authorized to proceed by a state which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the state has provided equal laws prevail."

whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the Constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same.

It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise. There are many cases in which such a power is exercised by all well-ordered governments, and where its fitness is so obvious, that all well-regulated minds will regard it as reasonable. Such are the laws to prohibit the use of warehouses for the storage of gunpowder near habitations or highways; to restrain the height to which wooden buildings may be erected in populous neighborhoods, and require them to be covered with slate or other incombustible material; to prohibit buildings from being used for hospitals for contagious diseases, or for the carrying on of noxious or offensive trades; to prohibit the raising of a dam, and causing stagnant water to spread over meadows, near inhabited villages, thereby raising noxious exhalations, injurious to health and dangerous to life.

Nor does the prohibition of such noxious use of property, a prohibition imposed because such use would be injurious to the public, although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation. If the owner of a vacant lot in the midst of a city could erect thereon a great wooden building, and cover it with shingles, he might obtain a larger profit of his land, than if obliged to build of stone or brick, with a slated roof. If the owner of a warehouse in a cluster of other buildings could store quantities of gunpowder in it for himself and others, he might be saved the great expense of transportation. If a landlord could let his building for a small-pox hospital, or a slaughter-house, he might obtain an increased rent. But he is restrained; not because the public have occasion to make the like use, or to make any use of the property, or to take any benefit or profit to themselves from it; but because it would be a noxious use, contrary to the maxim, "*Sic utere tuo, ut alienum non lædas.*" It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the right of eminent domain. The distinction, we think, is manifest in principle, although the facts and circumstances of different cases are so various, that it is often difficult to decide whether a particular exercise of legislation is properly attributable to the one or the other of these two acknowledged powers. \* \* \*<sup>1</sup>

<sup>1</sup> See *Beldler v. Sanitary Dist. of Chicago*, 211 Ill. 628, 638, 71 N. E. 1118, 67 L. R. A. 820 (1904).

Wherever there is a general right on the part of the public, and a general duty on the part of a land-owner, or any other person, to respect such right, we think it is competent for the legislature, by a specific enactment, to prescribe a precise, practical rule for declaring, establishing, and securing such right, and enforcing respect for it. It may be said in general terms, independently of any positive enactment, that it is the right of society, in the midst of a populous settlement, to be exempt from the proximity of dangerous and noxious trades; and that it is the duty of the owner of real estate, in the midst of many habitations, to abstain from erecting buildings thereon, or otherwise using it, for carrying on a trade dangerous to the lives, health, or comfort of the inhabitants of such dwellings; although a trade in itself useful and beneficial to the public. But such general duty and obligation not being fixed by a rule precise enough for practical purposes, we think it is competent for the legislature to interpose, and by a specific enactment to declare what shall be deemed a dangerous or noxious trade, under what circumstances and within what distance of habitations it may or shall not be set up, how the use of it shall be regulated, and to prohibit any other than such regulated use, by specific penalties.

This principle of legislation is of great importance and extensive use, and lies at the foundation of most enactments of positive law, which define and punish *mala prohibita*. Things done may or may not be wrong in themselves, or necessarily injurious and punishable as such at common law; but laws are passed declaring them offences, and making them punishable, because they tend to injurious consequences; but more especially for the sake of having a definite, known, and authoritative rule which all can understand and obey. In the case already put, of erecting a powder magazine or slaughter-house, it would be indictable at common law, and punishable as a nuisance, if in fact erected so near an inhabited village as to be actually dangerous or noxious to life or health. Without a positive law, everybody might agree that two hundred feet would be too near, and that two thousand feet would not be too near; but within this wide margin, who shall say, who can know, what distance shall be too near or otherwise? An authoritative rule, carrying with it the character of certainty and precision, is needed. The tradesman needs to know, before incurring expense, how near he may build his works without violating the law or committing a nuisance; builders of houses need to know, to what distance they must keep from the obnoxious works already erected, in order to be sure of the protection of the law for their habitations. This requisite certainty and precision can only be obtained by a positive enactment, fixing the distance, within which the use shall be prohibited as noxious, and beyond which it will be allowed, and enforcing the rule thus fixed, by penalties. \* \* \*



The reason why it is necessary to have a certain and authoritative law, is shown by the difficulty, not to say impracticability, of inquiring and deciding as a fact, in each particular case, whether a certain erection in tide-water is a nuisance at common law or not; and when ascertained and adjudged, it affords no rule for any other case, and can have little effect in maintaining and protecting the acknowledged public right. It is this consideration (the expediency and necessity of defining and securing the rights of the public), which creates the exigency, and furnishes the legislature with the authority to make a general and precise law; but when made, because it was just and expedient, and because it is law, it becomes the duty of every person to obey it and comply with it. The question under the statute therefore is, not whether any wharf, built after the statute was made and promulgated, was an actual obstruction to navigation, but whether it was within the prohibited limit. \* \* \*

Judgment affirmed.

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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 section 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;<sup>1</sup> and a contention that a particular exercise of it 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

<sup>1</sup> "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 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.

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 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 provision 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 directly 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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HENDERSON v. MAYOR OF NEW YORK (1875) 92 U. S. 259, 271, 272, 23 L. Ed. 543, Mr. Justice MILLER (discussing a state statute regulating the landing of immigrants at the port of New York):

"Assuming that, in the formation of our government, certain powers necessary to the administration of their internal affairs are reserved to the states, and that among these powers are those for the preservation of good order, of the health and comfort of the citizens, and their protection against pauperism and against contagious and infectious diseases, and other matters of legislation of like character, [it is insisted] that the power here exercised falls within this class, and belongs rightfully to the states.

"This power, frequently referred to in the decisions of this court, has been, in general terms, somewhat loosely called the police power. It is not necessary for the course of this discussion to attempt to define it more accurately than it has been defined already. It is not necessary, because whatever may be the nature and extent of that power, where not otherwise restricted, no definition of it, and no urgency for its use, can authorize a state to exercise it in regard to a



subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.

"Nothing is gained in the argument by calling it the police power. Very many statutes, when the authority on which their enactments rest is examined, may be referred to different sources of power, and supported equally well under any of them. A statute may at the same time be an exercise of the taxing power and of the power of eminent domain. A statute punishing counterfeiting may be for the protection of the private citizen against fraud, and a measure for the protection of the currency and for the safety of the government which issues it. It must occur very often that the shading which marks the line between one class of legislation and another is very nice, and not easily distinguishable.

"But, however difficult this may be, it is clear, from the nature of our complex form of government, that, whenever the statute of a state invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the states."<sup>1</sup>

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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

<sup>1</sup> "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."—*New Orleans Gas Light Co. v. Louisiana Light & Heat Producing & Mfg. Co.*, 115 U. S. 650, 661, 6 Sup. Ct. 252, 258, 29 L. Ed. 516 (1885), by Harlan, J.

"It is true that the police power of a state is the least limitable of its powers, but even it may not transcend the prohibition of the Constitution of the United States."—*Shevlin-Carpenter Co. v. Minnesota*, 218 U. S. 57, 69, 70, 30 Sup. Ct. 663, 666, 54 L. Ed. 930 (1910), by McKenna, J.

"The phrase 'police power' has been sometimes used by writers upon legal subjects as if it denoted some peculiar and transcendent form of legislative authority. The word 'police' does not naturally carry any such meaning. Its use in this connection came into our law early in the nineteenth century. *Russ. Police Power of State*, 231. \* \* \* As applied to the state, police laws are laws of general administration and government. Its power to enact such laws extends over all subjects within its territorial limits. *Prigg v. Pennsylvania*, 16 Pet. 539, 625, 10 L. Ed. 1060. The police powers of a state, in the apt words of Chief Justice Taney, 'are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions.' *The License Cases*, 5 How. 504, 583, 12 L. Ed. 256. If they are exercised by legislation which violates any right guaranteed by the national or state Constitution, they are so far forth invalid. *Lelsy v. Hardin*, 135 U. S. 100, 108, 10 Sup. Ct. 681, 34 L. Ed. 128; *State v. Conlon*, 65 Conn. 478, 33 Atl. 519, 31 L. R. A. 55, 48 Am. St. Rep. 227."—*McKeon v. N. Y. & N. H. R. Co.*, 75 Conn. 343, 347, 53 Atl. 656, 61 L. R. A. 736 (1902), by Baldwin, J.

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 employees):

"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 employees 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."<sup>1</sup>

<sup>1</sup> 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.

REGULATION BY TAXATION.—The regulative powers of both the states and the United States may be exercised through appropriate forms of taxation (not otherwise incompetent), as well as by direct legislative mandate. See *Head Money Cases*, 112 U. S. 580, 594-596, 5 Sup. Ct. 247, 28 L. Ed. 798 (1884); *Pabst Brewing Co. v. Creunshaw*, 198 U. S. 17, 25 Sup. Ct. 552, 49 L. Ed. 925 (1905); *Delamater v. South Dakota*, 205 U. S. 93, 104, 27 Sup. Ct. 447, 51 L. Ed. 724, 10 Ann. Cas. 733 (1907); *De Bary & Co. v. Louisiana*, 227 U. S. 108, 33 Sup. Ct. 239, 57 L. Ed. — (1913).

## SECTION 2.—CLASSIFICATION (EQUALITY)

## SLAUGHTER HOUSE CASES.

(Supreme Court of United States, 1873. 16 Wall. 36, 81, 21 L. Ed. 394.)

See ante, p. 223, for that part of the opinion of Mr. Justice MILLER beginning, "Nor shall any state deny to any person within its jurisdiction," and ending, "as it may have relation to this particular clause of the amendment."

## MISSOURI v. LEWIS.

(Supreme Court of United States, 1880. 101 U. S. 22, 25 L. Ed. 989.)

[Error to the Supreme Court of Missouri. The law of Missouri permitted an appeal to the state Supreme Court from all of the circuit courts of the state, except those of St. Charles, Lincoln, Warren, and St. Louis counties, and of the city of St. Louis. From the circuit courts of the latter places an appeal was allowed only to the St. Louis Court of Appeals, save in certain enumerated classes of cases. A judgment of disbarment having been affirmed by the latter court against one Bowman, the Supreme Court of Missouri refused to mandamus the St. Louis Court of Appeals to grant an appeal from this affirmance. From a similar judgment of disbarment in other counties of the state an appeal would have lain to the state Supreme Court.]

Mr. Justice BRADLEY. \* \* \* The plaintiff in error contends that this feature of the judicial system of Missouri is in conflict with the fourteenth amendment of the Constitution of the United States, because it denies to suitors in the courts of St. Louis and the counties named the equal protection of the laws, in that it denies to them the right of appeal to the Supreme Court of Missouri in cases where it gives that right to suitors in the courts of the other counties of the state.

If this position is correct, the fourteenth amendment has a much more far-reaching effect than has been supposed. It would render invalid all limitations of jurisdiction based on the amount or character of the demand. A party having a claim for only five dollars could with equal propriety complain that he is deprived of a right enjoyed by other citizens, because he cannot prosecute it in the superior courts; and another might equally complain that he cannot bring a suit for real estate in a justice's court, where the expense is small and the proceedings are expeditious. There is no difference in principle between

such discriminations as these in the jurisdictions of courts and that which the plaintiff in error complains of in the present case.

If, however, we take into view the general objects and purposes of the fourteenth amendment, we shall find no reasonable ground for giving it any such application. These are to extend United States citizenship to all natives and naturalized persons, and to prohibit the states from abridging their privileges or immunities, and from depriving any person of life, liberty, or property without due process of law, and from denying to any person within their jurisdiction the equal protection of the laws. It contemplates persons and classes of persons. It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made. The amendment could never have been intended to prevent a state from arranging and parceling out the jurisdiction of its several courts at its discretion. No such restriction as this could have been in view, or could have been included, in the prohibition that "no state shall deny to any person within its jurisdiction the equal protection of the laws." It is the right of every state to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter, and amount, and the finality and effect of their decisions, provided it does not encroach upon the proper jurisdiction of the United States, and does not abridge the privileges and immunities of citizens of the United States, and does not deprive any person of his rights without due process of law, nor deny to any person the equal protection of the laws, including the equal right to resort to the appropriate courts for redress. The last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress. Each state has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a state to regulate its internal affairs to deny to it this right. We think it is not denied or taken away by anything in the Constitution of the United States, including the amendments thereto.

We might go still further, and say, with undoubted truth, that there is nothing in the Constitution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the state of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the

surrounding counties, and the common law and its method of procedure for the rest of the state, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the fourteenth amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the state should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For as before said it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.

The fourteenth amendment 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. If diversities of laws and judicial proceedings may exist in the several states without violating the equality clause in the fourteenth amendment, there is no solid reason why there may not be such diversities in different parts of the same state. A uniformity which is not essential as regards different states cannot be essential as regards different parts of a state, provided that in each and all there is no infraction of the constitutional provision. Diversities which are allowable in different states are allowable in different parts of the same state. Where part of a state is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions—trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the state government if it could not, in its discretion, provide for these various exigencies.

If a Mexican state should be acquired by treaty and added to an adjoining state, or part of a state, in the United States, and the two should be erected into a new state, it cannot be doubted that such new state might allow the Mexican laws and judicature to continue unchanged in the one portion, and the common law and its corresponding judicature in the other portion. Such arrangement would not be prohibited by any fair construction of the fourteenth amendment. It would not be based on any respect of persons or classes, but on municipal considerations alone, and a regard to the welfare of all classes within the particular territory or jurisdiction.

It is not impossible that a distinct territorial establishment and jurisdiction might be intended as, or might have the effect of, a discrimination against a particular race or class, where such race or class should happen to be the principal occupants of the disfavored district



Should such a case ever arise, it will be time enough then to consider it. No such case is pretended to exist in the present instance. \* \* \* Judgment affirmed.<sup>1</sup>

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 of 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

<sup>1</sup> Accord: *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. 350, 30 L. Ed. 578 (1887); *Mallett v. North Carolina*, 181 U. S. 589, 598-599, 21 Sup. Ct. 730, 45 L. Ed. 1015 (1901); *Gardner v. Michigan*, 199 U. S. 325, 26 Sup. Ct. 106, 50 L. Ed. 212 (1905); *Guild v. First Nat. Bank*, 4 S. D. 566, 581-584, 57 S. W. 499 (1894) (interest rate); *United States v. Press Pub. Co.*, 219 U. S. 1, 31 Sup. Ct. 212, 55 L. Ed. 65, 21 Ann. Cas. 942 (1911) (federal criminal law); *People v. Flaynor*, 149 N. Y. 195, 43 N. E. 541, 31 L. R. A. 689, 52 Am. St. Rep. 707 (1896) (barber shops on Sunday allowed in two cities only). Contra: *State ex rel. Johnson v. Chicago, B. & Q. R. Co.*, 195 Mo. 228, 245-248, 93 S. W. 784, 113 Am. St. Rep. 661 (1906). So-called "local option" laws are of course valid under the federal Constitution. *Ohio ex rel. Lloyd v. Dollison*, 194 U. S. 445, 24 Sup. Ct. 703, 48 L. Ed. 1062 (1904).

As to the effect of local constitutional restrictions upon special and local legislation, see *Opinion of Justices*, ante, p. 122, note; and *Cotting v. Kansas City Stock Yards Co.*, post, p. 349, note.

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 circumstances 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."<sup>1</sup>

<sup>1</sup> And so in *Soon Hing v. Crowley*, 113 U. S. 703, 708, 709, 5 Sup. Ct. 730, 733, 28 L. Ed. 1145 (1885), by Field, J., upholding the same ordinance: "There

## GULF, C. &amp; 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

is no force in the objection that an unwarrantable discrimination is made against persons engaged in the laundry business, because persons in other kinds of business are not required to cease from their labors during the same hours at night. There may be no risks attending the business of others; certainly not as great as where fires are constantly required to carry them on. The specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws."

In *New York ex rel. Lieberman v. Van De Carr*, 199 U. S. 552, 563, 26 Sup. Ct. 144, 147, 50 L. Ed. 305 (1905), Day, J., said: "Nor do we think there is force in the contention that the plaintiff in error has been denied the equal protection of the laws because of the allegation that the milk business is the only business dealing in foods which is thus regulated by the sanitary code. All milk dealers within the city are equally affected by the regulations of the sanitary code. It is primarily for the state to select the kinds of business which shall be the subjects of regulation, and if the business affected is one which may be properly the subject of such legislation, it is no valid objection that similar regulations are not imposed upon other businesses of a different kind."

See, also, *Fischer v. St. Louis*, 194 U. S. 361, 24 Sup. Ct. 673, 48 L. Ed. 1018 (1904) (dairies and cow stables within city forbidden without a permit from city council).

Classification is not invalid because it excludes similar objects of regulation that are legally outside the authority of the regulating body. So, e. g., as to state bank regulation not including national banks, *Dolley v. Abilene Nat. Bank*, 179 Fed. 461, 162 C. C. A. 607, 32 L. R. A. (N. S.) 1065 (1910), affirmed 228 U. S. 1, 33 Sup. Ct. 409, 57 L. Ed. — (1913).

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 employes 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. Fenc-



ing 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 non-performance. 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 rea-

son 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.<sup>1</sup> 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. \* \* \*<sup>1</sup>

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ATCHISON, T. & S. F. R. CO. v. MATTHEWS (1899) 174 U. S. 96, 98-100, 19 Sup. Ct. 609, 43 L. Ed. 909, Mr. Justice BREWER (sustaining a Kansas statute allowing a reasonable attorney fee to successful plaintiffs in actions against railroad companies for damage due to the negligent escape of fire):

[Referring to the case of Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666]. "It was held to be simply a statute imposing a penalty on railroad corporations for failing to pay certain debts, and not one to enforce compliance with any police regulations. \* \* \* And there is no good reason why railroad corporations alone should be punished for not paying their debts. Compelling the payment of debts is not a police regulation. We see no reason to change the views then expressed, and, if the statute before us were the counterpart of that, we should be content to refer to that case as conclusive.

<sup>1</sup> See, also, *Chicago v. Netcher*, post p. 462, and note.

"But while there is a similarity, yet there are important differences, and differences which, in our judgment, compel an opposite conclusion. The purpose of this statute is not to compel the payment of debts, but to secure the utmost care on the part of railroad companies to prevent the escape of fire from their moving trains. This is obvious from the fact that liability for damages by fire is not cast upon such corporations in all cases, but only in those in which the fire is 'caused by the operating' of the road. It is true that no special act of precaution was required of the railroad companies, failure to do which was to be visited with this penalty, so that it is not precisely like the statutes imposing double damages for stock killed where there has been a failure to fence. *Railway Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463. And yet its purpose is not different. Its monition to the railroads is not, 'Pay your debts without suit or you will, in addition, have to pay attorney's fees;' but rather, 'See to it that no fire escapes from your locomotives, for if it does you will be liable, not merely for the damage it causes, but also for the reasonable attorney's fees of the owner of the property injured or destroyed.' It has been frequently before the supreme court of Kansas, has always been so interpreted by that court, and its validity sustained on that ground. In *Railway Co. v. Merrill*, 40 Kan. 404, 408, 19 Pac. 795, it was said: 'The objection that this legislation is special and unequal cannot be sustained. The dangerous element employed, and the hazards to persons and property arising from the running of trains and the operation of railroads, justifies such a law; and the fact that all persons and corporations brought under its influence are subjected to the same duties and liabilities, under similar circumstances, disposes of the objections raised.'

"And in the opinion filed in the present case that court (58 Kan. 447, 450, 49 Pac. 602) observed: 'Our statute is somewhat in the nature of a police regulation, designed to enforce care on the part of railroad companies to prevent the communication of fire and the destruction of property along railroad lines. It is not intended merely to impose a burden on railroad corporations that private persons are not required to bear, and the remedy offered is one the legislature has the right to give in such cases. This is the view heretofore held by this court, which we see no reason for changing. *Railway Co. v. Snavely*, 47 Kan. 637, 28 Pac. 615; *Same v. Curtis*, 48 Kan. 179, 29 Pac. 146; *Same v. McMullen*, 48 Kan. 281, 29 Pac. 147; *Railroad Co. v. Henning*, 48 Kan. 465, 29 Pac. 597.'

"It is true that the *Ellis Case* was one to recover damages for the killing of a colt by a passing train. And so it might be argued that the protection of the track from straying stock and the protection of stock from moving trains would, within the foregoing principles, uphold legislation imposing an attorney's fee in actions against railroad corporations. We were not insensible to this argument when that case was considered, but we accepted the interpretation of the statute

and its purpose given by the supreme court of Texas. \* \* \* Indeed, the limit in amount (\$50), found in that statute, made it clear that no police regulation was intended; for, if it were, the more stock found on the track the greater would be the danger and the more imperative the need of regulation and penalty.

"So that, according to the interpretation placed upon the Texas statute by its supreme court, its purpose was generally to compel the payment of small debts, and the fact that among the debts so provided for was the liability for stock killed was not sufficient to justify us in separating the statute into fragments, and upholding one part on a theory inconsistent with the policy of the state, while, on the other hand, the purpose of this statute is, as declared by the supreme court of Kansas, protection against fire,—a matter in the nature of a police regulation."

[HARLAN, BROWN, PECKHAM, and McKENNA, JJ., dissented in an opinion by HARLAN, J.]<sup>1</sup>

<sup>1</sup> In *Fidelity Mut. Life Ass'n v. Mettler*, 185 U. S. 308, 326, 22 Sup. Ct. 662, 669, 46 L. Ed. 922 (1902), in sustaining a Texas statute imposing a penalty of 12 per cent. damages and an attorney fee upon life and health insurance companies that unsuccessfully defended suits against them, Fuller, C. J., said: "The reasoning in *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909, applies rather than that in *Gulf, C. & S. F. R. Co. v. Ellis*. The ground for placing life and health insurance companies in a different class from fire, marine, and inland insurance companies is obvious, and we think that putting them in a different class from mutual benefit and relief associations doing business through lodges, and benevolent associations of the character mentioned in the Texas statutes, is not an arbitrary classification, but rests on sufficient reason. The legislature evidently intended to distinguish between life and health insurance companies engaged in business for profit (and we are not called on to refine as to the distribution of such profits) and lodges and associations of a mutual benefit or benevolent character, having in mind also the necessity of the prompt payment of the insurance money in very many cases, in order to provide the means of living of which the beneficiaries had been deprived by the death of the insured." [Harlan and Brown, JJ., dissented.]

In *Farmers' & M. Ins. Co. v. Dobney*, 189 U. S. 301, 305, 306, 23 Sup. Ct. 565, 567, 47 L. Ed. 82 (1903), in sustaining a Nebraska statute allowing an attorney fee to a successful plaintiff in a suit upon a fire insurance policy for a total loss of real property insured, White, J., said: "As the rule settled by the previous cases is that contracts of insurance from their very nature are susceptible of classification, not only apart from other contracts, but from each other, it must follow, as the lesser is included in the greater, that the character of the property insured and the extent of the loss afford reasons for subclassification. It is, however, argued that no reason could have existed for classifying losses on real estate separately from losses on other property. And by what process of reasoning, it is asked, could the legislative mind have discovered the foundation for allowing the recovery of a reasonable attorney's fee in case of a total loss of real estate insured, and not permit recovery of such fee when the property insured has been only partially destroyed? The distinction between real and personal property has in all systems of law constantly given rise to different regulations concerning such property. The differences of relation which may arise between the insurer and the insured, depending upon whether the property insured has been only partially damaged or has been totally destroyed, needs but to be suggested. In the one case, the amount of the damage affords possibilities for a reasonable difference of opinion between the parties in adjusting the payment under the policy. In the other, the amount being determined under the statute by the value

SEABOARD AIR LINE RY. v. SEEGER (1907) 207 U. S. 73, 77-79, 28 Sup. Ct. 28, 52 L. Ed. 108, Mr. Justice DAY (sustaining a South Carolina statute imposing a penalty of \$50 in favor of plaintiffs, recovering their full claims in suits against common carriers for damage to property while in their possession, provided the claim was not settled within 40 days after presentment to the defendant):

"We are of the opinion that this case comes within the limits of constitutionality. It is not an act imposing a penalty for the non-payment of debts. As the supreme court of South Carolina said in *Best v. Seaboard Air Line R. Co.*, 72 S. C. 479, 484, 52 S. E. 223, 225: 'The object of the statute was not to penalize the carrier for merely refusing to pay a claim within the time required, whether just or unjust, but the design was to bring about a reasonably prompt settlement of all proper claims, the penalty, in case of a recovery in court, operating as a deterrent of the carrier in refusing to settle just claims, and as compensation of the claimant for the trouble and expense of the suit which the carrier's unreasonable delay and refusal made necessary.'

"This ruling of the supreme court finds support, if any be needed, in the preamble of the statute, which reads: 'An act to regulate the manner in which common carriers doing business in this state shall adjust freight charges and claims for loss of or damage to freight.' It is not an act leveled against corporations alone, but includes all common carriers. The classification is based solely upon the nature of the business, that being of a public character. It is true that no penalty is cast upon the shipper, yet there is some guaranty against excessive claims in that, as held by the supreme court of the state in *Best v. Seaboard Air Line R. Co.* supra, there can be no award of a penalty unless there be a recovery of the full amount claimed.

"Further, the matter to be adjusted is one peculiarly within the knowledge of the carrier. It receives the goods and has them in its custody until the carriage is completed. It knows what it received and what it delivered. It knows what injury was done during the shipment, and how it was done. The consignee may not know what was in fact delivered at the time of the shipment, and the shipper may not know what was delivered to the consignee at the close of the transportation. The carrier can determine the amount of the loss more accurately and promptly and with less delay and expense than anyone else, and for the adjustment of loss or damage to shipments

fixed by both parties in the policy, the question of legal liability under the policy would be, as a general rule, the only matter to be considered in determining whether payment under the contract will be made. Besides, it is obvious that the total destruction of real estate covered by insurance necessarily concerns the homes of many of the people of the state. If, in regulating and classifying insurance contracts, the legislature took the foregoing considerations into view and provided for them, we cannot say that in doing so it acted arbitrarily and wholly without reason." [Harlan, Brewer, and Brown, JJ. dissented.]



within the state forty days cannot be said to be an unreasonably short length of time. It may be stated as a general rule that an act which puts in one class all engaged in business of a special and public character, requires of them the performance of a duty which they can do better and more quickly than others, and imposes a not exorbitant penalty for a failure to perform that duty within a reasonable time, cannot be adjudged unconstitutional as a purely arbitrary classification.

"While in this case the penalty may be large as compared with the value of the shipment, yet it must be remembered that small shipments are the ones which especially need the protection of penal statutes like this. If a large amount is in controversy, the claimant can afford to litigate. But he cannot well do so when there is but the trifle of a dollar or two in dispute, and yet justice requires that his claim be adjusted and paid with reasonable promptness. Further, it must be remembered that the purpose of this legislation is not primarily to enforce the collection of debts, but to compel the performance of duties which the carrier assumes when it enters upon the discharge of its public functions. We know there are limits beyond which penalties may not go even in cases where classification is legitimate; but we are not prepared to hold that the amount of penalty imposed is so great, or the length of time within which the adjustment and payment are to be made is so short, that the act imposing the penalty and fixing the time is beyond the power of the state."<sup>1</sup>

[PECKHAM, J., dissented.]

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CHARLOTTE, C. & A. R. CO. v. GIBBES (1892) 142 U. S. 386, 391, 393-395, 12 Sup. Ct. 255, 35 L. Ed. 1051, Mr. Justice FIELD (upholding a South Carolina statute imposing upon railroad corporations alone the expenses of the state railroad commission):

"If the tax were levied to pay for services in no way connected with the railroads, as, for instance, to pay the salary of the executive or judicial officers of the state, whilst railroad corporations were at the same time subjected to taxation upon their property equally with other corporations for such expenses, and other corporations were not taxed for the salaries mentioned, there would be just ground of complaint of unlawful discrimination against the railroad corporations, and of their not receiving the equal protection of the laws. But there is nothing of this nature in the tax in question. The railroad commissioners are charged with a variety of duties in connection with railroads, the performance of which is of great importance in the regulation of those instruments of transportation. \* \* \* That regulation may extend to all measures deemed essential not

<sup>1</sup> Compare *St. Louis, I. M. & S. R. Co. v. Wynne*, 224 U. S. 354, 32 Sup. Ct. 493, 56 L. Ed. 799 (1912) and *Mobile & O. R. Co. v. Brandon*, 98 Miss. 461, 53 South. 957, 42 L. R. A. (N. S.) 106 (1910).

merely to secure the safety of passengers and freight, but to promote the convenience of the public in the transaction of business with them, and to prevent abuses by extortionate charges and unjust discrimination. It may embrace a general supervision of the operation of their roads, which may be exercised by direct legislation commanding or forbidding, under severe penalties, the doing or omission of particular acts, or it may be exercised through commissioners specially appointed for that purpose. The mode or manner of regulation is a matter of legislative discretion. When exercised through commissioners, their services are for the benefit of the railroad corporations as well as of the public. Both are served by the required supervision over the roads and means of transportation, and there would seem to be no sound reason why the compensation of the commissioners in such case should not be met by the corporations, the operation of whose roads and the exercise of whose franchises are supervised. In exacting this there is no encroachment upon the fourteenth amendment.

"Requiring that the burden of a service deemed essential to the public, in consequence of the existence of the corporations and the exercise of privileges obtained at their request, should be borne by the corporations in relation to whom the service is rendered, and to whom it is useful, is neither denying to the corporations the equal protection of the laws or making any unjust discrimination against them. All railroad corporations in the state are treated alike in this respect. The necessity of supervision extends to them all, and for that supervision the like proportional charge is made against all. There is no occasion for similar regulations for the government of other than railroad corporations, and therefore no charge is made against them for the expenses and salaries of the commissioners. The rule of equality is not invaded where all corporations of the same kind are subjected to like charges for similar services, though no charge at all is made against other corporations. There is no charge where there is no service rendered. The legislative and constitutional provision of the state, that taxation of property shall be equal and uniform and in proportion to its value, is not violated by exacting a contribution according to their gross income in proportion to the number of miles of railroad operated in the state to meet the special service required. *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357. 28 L. Ed. 923; *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730. 28 L. Ed. 1145; *Missouri Pacific Railway v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463.

"There are many instances where parties are compelled to perform certain acts and to bear certain expenses when the public is interested in the acts which are performed as much as the parties themselves. Thus in opening, widening, or improving streets the owners of adjoining property are often compelled to bear the expenses, or at least a portion of them, notwithstanding the work done is chiefly for the

benefit of the public. So, also, in the draining of marsh lands, the public is directly interested in removing the causes of malaria, and yet the expense of such labor is usually thrown upon the owners of the property. Quarantine regulations are adopted for the protection of the public against the spread of disease, yet the requirement that the vessel examined shall pay for the examination is a part of all quarantine systems. *Morgan v. Louisiana*, 118 U. S. 455, 466, 6 Sup. Ct. 1114, 30 L. Ed. 237. So, the expense of a compulsory examination of a railroad engineer, to ascertain whether he is free from color blindness, has been held to be properly chargeable against the railroad company. *Nashville, Chattanooga & St. Louis Railway v. Alabama*, 128 U. S. 96, 101, 9 Sup. Ct. 28, 32 L. Ed. 352. So, where work is done in a particular county for the benefit of the public, the cost is oftentimes cast upon the county itself instead of upon the whole state. Thus, in *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238, it was held that a provision for the issuing of bonds by a county in Alabama could not be declared invalid, although it imposed upon one county the expense of an improvement in which the whole state was interested. In such instances, where the interests of the public and of individuals are blended in any work or service imposed by law, whether the cost shall be thrown entirely upon the individuals, or upon the state, or be apportioned between them, is matter of legislative direction." \* \* \*<sup>1</sup>

[Messrs. Justices BRADLEY and GRAY did not sit.]

FINLEY v. CALIFORNIA (1911) 222 U. S. 28, 32 Sup. Ct. 13, 56 L. Ed. 75, Mr. Justice McKENNA (affirming a California judgment which upheld a statute punishing life convicts alone with death, for an assault with a deadly weapon):

"It is elementary that the contention [denial of the equal protection of the laws] is to be tested by considering whether there is a basis for

<sup>1</sup> Accord: *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269 (1894) (expense of abolishing grade crossings); *St. Louis Consolidated Coal Co. v. Illinois*, 185 U. S. 203, 22 Sup. Ct. 616, 46 L. Ed. 872 (1902) (cost of inspecting mines); *Atlantic & P. Telegraph Co. v. Philadelphia*, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. Ed. 995 (1903) (cost of governmental supervision); *Comm. v. Carter*, 132 Mass. 12 (1882) (samples of milk for inspection).

The imposition is invalid if unreasonably excessive for its purpose, *Postal Tel. Cable Co. v. Taylor*, 192 U. S. 64, 24 Sup. Ct. 208, 48 L. Ed. 342 (1904); or if the expenditure to be defrayed has not been made specially necessary by the object of taxation, *In re Gardner*, 84 Kan. 264, 113 Pac. 1054, 35 L. R. A. (N. S.) 956 (1911); *Ætna Fire Ins. Co. v. Jones*, 78 S. C. 445, 59 S. E. 148 (1907), annotated in 13 L. R. A. (N. S.) 1147, 1148, 125 Am. St. Rep. 818. But compare *State v. Sutton* (N. J.) 84 Atl. 1057 (1912), and the doctrine of cases like *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 54, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034 (1909); *Com. v. Boston & N. St. R. Co.*, 212 Mass. 62, 98 N. E. 1075 (1912). See *Chicago v. Pennsylvania Co.*, 252 Ill. 185, 96 N. E. 833, 36 L. R. A. (N. S.) 1081, Ann. Cas. 1912D, 400 (1911) (railroad cannot be required to light highway under its crossing above grade).

the classification made by the statute. Applying that test, we see no error in the ruling. As said by Mr. Justice Henshaw, delivering the opinion of the court, 'The classification of the statute in question is not arbitrary, but is based upon valid reasons and distinctions.' And pointing out the distinction between life prisoners and other convicts, he said that 'the "life termers," as has been said, while within the prison walls, constitute a class by themselves,—a class recognized as such by penologists the world over. Their situation is legally different. Their civic death is perpetual.' [153 Cal. 62, 94 Pac. 248.] Manifestly there could be no extension of the term of imprisonment as a punishment for crimes they might commit, and whatever other punishment should be imposed was for the legislature to determine. The power of classification which the lawmaking power possesses has been illustrated by many cases which need not be cited. They demonstrate that the legislature of California did not transcend its power in the enactment of section 246."<sup>1</sup>

<sup>1</sup> So *McDonald v. Massachusetts*, 180 U. S. 311, 21 Sup. Ct. 389, 45 L. Ed. 542 (1901) (heavier penalty for habitual criminals). Compare *State v. Lewin*, 53 Kan. 679, 37 Pac. 168 (1894) (escaped convicts cannot be required to reserve original term).

In *State v. Hogan*, 63 Ohio St. 202, 58 N. E. 572, 52 L. R. A. 863, 81 Am. St. Rep. 626 (1900), an Ohio statute defined a "tramp" as any person, not a female or blind, who was found begging elsewhere than in the county of his residence, and various offences and threats by such persons were criminally punished much more severely than when not committed by "tramps." This was upheld, *Spear, J.*, saying (63 Ohio St. 210, 211, 217, 218, 58 N. E. 573, 575, 52 L. R. A. 863, 81 Am. St. Rep. 626):

"Nor is it an objection to a penal statute that it does not apply to all persons who might by any possibility commit the act interdicted. It is for the legislature to determine how far to go in order to afford the desired protection to society. The exemption of some, where it does not interfere with the rights of others, is not open to objection on constitutional grounds. The principle is illustrated in the statute under review. Females and blind persons are not included within its terms. This, presumably, from considerations of humanity, but principally because but little, if any, danger is threatened from such: and this exemption has not met with objection in this case. The act in question undertakes to define a tramp or vagrant, by stating what acts shall constitute such character. It is, in the main, the old method of describing a vagrant, and vagrancy, time out of mind, has been deemed a condition calling for special statutory provisions; i. e. such as may tend to suppress the mischief and protect society. • • •

"Is there not sufficient difference between the condition and opportunity of a pauper in his own county, and the same character abroad, and between the situation of the people of the county where the pauper resides and those of distant neighborhoods, to warrant a legal distinction? In the county of his residence the pauper, when in necessitous circumstances, and unable to supply his own physical needs,—and he is often in that condition,—has the legal right to call upon the poor authorities for support, and those authorities have the right and the power to use the proper public funds for that purpose. Ordinarily such persons become quite well known, and the people are less apt to be terrified by them and induced through fear to yield to their demands, than where they are strangers; and the paupers themselves are much less likely to become ruffians when at home and comparatively isolated than when they have burned their bridges, so to speak, and started on a tramp in pastures new, and joined their fortunes with others of like ilk. In short, tramping makes a different character of the same person. And why may they not, when thus grouped, be regarded as a class?"

COTTING v. KANSAS CITY STOCK YARDS CO. (1901) 183 U. S. 79, 103-105, 22 Sup. Ct. 30, 46 L. Ed. 92 (holding invalid a Kansas statute regulating the rates of stock yards within the state doing more than a certain volume of business, an amount actually exceeded only by the yards at Kansas City), Mr. Justice BREWER:

"It appears that a classification is attempted between stock yards doing a large and those doing a small business. The express and only basis of classification is in the amount of business done by the two classes. As evidence that we are right in our construction, we may refer to the brief of the learned attorney general, in which he says: 'The legislature has by this act classified the stock yards of the state into two classes, and has adopted the most natural and reasonable basis for such purposes that could be used, namely, the volume of business done. The reason for this is obvious; the stock yards doing a large volume of business are necessarily more of monopolies than those doing a smaller business. The public has greater interest in the business of large stock yards than it has in the business of smaller ones. \* \* \* Another reason why the classification should be based upon the volume of business done is that rates which are reasonable and proper and furnish a sufficient return upon the capital invested can very properly be made lower and different in a plant where the volume of business is large, while in a smaller plant doing a smaller volume of business higher rates may be necessary in order to afford adequate returns.'

"If the average daily receipts of a stock yard are more than 100 head of cattle, or more than 300 head of hogs, or more than 300 head of sheep, it comes within the purview of this statute. If less than that amount it is free from legislative restriction. No matter what yards it may touch to-day or in the near or far future, the express declaration of the statute is that stock yards doing a business in excess of a certain amount of stock shall be subjected to this regulation, and that all others doing less business shall be free from its provisions. Clearly the classification is based solely on the amount of business done, and without any reference to the character or value of the services rendered. Kindred legislation would be found in a statute like this: requiring a railroad company hauling ten tons or over of freight a day to charge only a certain sum per ton, leaving to other railroad companies hauling a less amount of freight the right to make any reasonable charge; or, one requiring a railroad company hauling 100 or more passengers a day to charge only a specified amount per mile for each, leaving those hauling 99 or less to make any charge which would be reasonable for the service; or if we may indulge in the supposition that the legislature has a right to interfere with the freedom of private contracts, one which would forbid a dealer in shoes and selling more than ten pairs a day from charging more than a certain price per pair, leaving the others selling a less number to charge that which they deemed reasonable; or forbidding farmers selling more than ten



bushels of wheat to charge above a specified sum per bushel, leaving to those selling a less amount the privilege of charging and collecting whatever they and the buyers may see fit to agree upon. In short, we come back to the thought that the classification is one not based upon the character or value of the services rendered, but simply on the amount of the business which the party does, and upon the theory that although he makes a charge which everybody else in the same business makes, and which is perfectly reasonable so far as the value of the services rendered to the individuals seeking them is concerned, yet if by the aggregation of business he is enabled to make large profits his charges may be cut down.

"The question thus presented is of profoundest significance. Is it true in this country that one who by his attention to business, by his efforts to satisfy customers, by his sagacity in discerning the probable courses of trade, and by contributing of his means to bring trade into those lines, succeeds in building up a large and profitable business, becomes thereby a legitimate object of the legislative scalping knife? Having created the facilities which the many enjoy, can the many turn around and say, you are making too much out of those facilities, and you must divide with us your profits? We cannot shut our eyes to well-known facts. Kansas is an agricultural state. Its extensive and fertile prairies produce each year enormous crops of corn and other grains. While portions of these crops are shipped to mills to be manufactured into meal and flour, it is found by many that there is a profit in feeding them to stock, so that the amount of stock which is raised and fattened in Kansas is large, and makes one of the great industries of the state. Now, shall they whose interests are all along the line of production, having by virtue of their numerical majority the control of legislation, be permitted to say to one who acts as an intermediary between transportation and sale, that while we permit no interference with the prices which we put upon our products, nevertheless we cut down your charges for intermediate services; and this, not because any particular charge is unreasonable, but because you are making by the aggregate of those charges too large a sum, and ought therefore to divide with us. \* \* \*

"It has been more than once said judicially that one of the principles upon which this government was founded is that of equality of right. It is emphasized in that clause of the fourteenth amendment which prohibits any state to deny to any individual the equal protection of the laws. That constitutional provision does not, it is true, invalidate legislation on the mere ground of inequality in actual result. Tax laws, for instance, in their nature are and must be general in scope, and it may often happen that in their practical application they touch one person unequally from another. But that inequality is something which it is impossible to foresee and guard against, and therefore such resultant inequality in the operation of a law does not defeat its validity. \* \* \*

"So, again, exercising the undoubted right of classification it may often happen that some classes are subjected to regulations, and some individuals are burdened with obligations which do not rest upon other classes or other individuals not similarly situated. License taxes are imposed on certain classes of business while others are exempt. It would practically defeat legislation if it was laid down as a rule that a statute was necessarily adjudged invalid if it did not bring all within its scope, or subject all to the same burdens. It would strip the legislature of its inherent power to determine generally what is for the general interests, which interests may often be promoted by certain regulations affecting one class which do not affect another, certain burdens imposed on one which do not rest upon another.

"But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other. There can be no pretense that a stock yard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements, and the only difference is that one does more business than the other. But the receipt of an extra 2 head of cattle per day does not change the character of the business. If once the door is opened to the affirmance of the proposition that a state may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guaranty of the equal protection of the laws is lost, and the door is opened to that inequality of legislation which Mr. Justice Catron referred to in the quotation above made. This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would.<sup>1</sup> \* \* \*"

<sup>1</sup> In *St. Louis Consolidated Coal Co. v. Illinois*, 185 U. S. 203, 207-208, 22 Sup. Ct. 616, 618, 46 L. Ed. 872 (1902), a coal mine inspection law was upheld; Brown, J., saying: "It is true that the act of 1897 amended the former law of 1895, by limiting its application to coal mines 'where more than five men are employed at any one time.' This is a species of classification which the legislature is at liberty to adopt, provided it be not wholly arbitrary or unreasonable, as it was in *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, sub nom. *Cotting v. Godard*, 22 Sup. Ct. 30, 46 L. Ed. 92, in which an act defining what should constitute public stock yards, and regulating all charges connected therewith, was held to be unconstitutional, because it applied only

## CONNOLLY v. UNION SEWER PIPE CO.

(Supreme Court of United States, 1902. 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679.)

[Error to the United States Circuit Court for the Northern District of Illinois. Plaintiff, an Ohio corporation doing business in Illinois, sued Connolly in this court upon two notes given in purchase

to one particular company, and not to other companies or corporations engaged in a like business in Kansas, and thereby denied to that company the equal protection of the laws. In the case under consideration there is no attempt arbitrarily to select one mine for inspection, but only to assume that mines which are worked upon so small a scale as to require only five operatives would not be likely to need the careful inspection provided for the larger mines, where the workings were carried on upon a larger scale or at a greater depth from the surface, and where a much larger force would be necessary for their successful operation. It is quite evident that a mine which is operated by only five men could scarcely have passed the experimental stage, or that precautions necessary in the operation of coal mines of ordinary magnitude would be required in such cases. There was clearly reasonable foundation for a discrimination here."

So, *McLean v. Arkansas*, 211 U. S. 539, 29 Sup. Ct. 206, 53 L. Ed. 315 (1909) (mines employing at least 10 men required to pay miners on basis of weight of coal dug before screening).

In *Borgnis v. Falk Co.*, 147 Wis. 327, 355-356, 133 N. W. 209, 218, 37 L. R. A. (N. S.) 489 (1911), a workmen's compensation act restricted to employers of more than three men was upheld; Winslow, C. J., saying: "Of course, there will be cases on the border line, where the difference in situation will be very slight, or perhaps entirely nonexistent. There will probably be no practical difference between the situation of the man who is one of four or five employes in a given employment and the situation of the man who is one of three; but this does not militate against the legitimacy of the classification. This is a necessary defect in all cases of classification based upon numbers. The question is not whether there may be some on one side of the line whose situation is practically the same as that of some on the other side but whether there is a distinction between the classes as classes, whether there are characteristics which, in a greater degree, persist through the one class than in the other which justify legal discrimination between them." *State v. Evans*, 130 Wis. 351, 110 N. W. 241."

A classification of cities according to population is ordinarily valid. *Mason v. Missouri ex rel. McCaffery*, 179 U. S. 328, 21 Sup. Ct. 125, 45 L. Ed. 214 (1900). But see *Sutton v. State*, 96 Tenn. 696, 36 S. W. 697, 33 L. R. A. 589 (1896) (classification bad if inflexibly based on population at a past census). Under the doctrine of *Missouri v. Lewis*, ante, p. 329, such objections must ordinarily be based upon local constitutional restrictions upon special and local legislation. As to this, see *Gray v. Taylor*, 227 U. S. 51, 33 Sup. Ct. 199, 57 L. Ed. — (1913). As to the classification of cities by various minute local details, see *Matter of Henneberger*, 25 App. Div. 164, 49 N. Y. Supp. 230 (1898), aff'd. in 155 N. Y. 420, 50 N. E. 61, 42 L. R. A. 132; *Sutton v. State*, above (even when details concern population).

Railroads under 50 miles in length may be exempted from various safety requirements. *New York, N. H. & H. R. R. Co. v. New York*, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853 (1897) (forbidding heating cars by stoves). *Chicago, R. I. & P. R. Co. v. Arkansas*, 219 U. S. 453, 31 Sup. Ct. 275, 55 L. Ed. 290 (1911) (number of brakemen on freight trains). Individuals or partnerships may be forbidden to receive money for deposit without a state license, unless the average amount received for deposit is at least \$500. *Engel v. O'Malley*, 219 U. S. 128, 31 Sup. Ct. 190, 55 L. Ed. 128 (1911). See *King v. Mullins*, 171 U. S. 404, 18 Sup. Ct. 925, 43 L. Ed. 214 (1898) (forfeiting tracts of over 1,000 acres for non-payment of taxes).

of sewer pipe from plaintiff. One of the defences alleged that plaintiff was a member of a trust prohibited by the Illinois statute of June 20, 1893, section 10 of which disabled such members from collecting the purchase price of goods sold by them. This statute forbade any persons or corporations to combine for the restriction of competition in commodities as set forth in the opinion below, but section 9 excepted from its operation agricultural products or live stock in the hands of producer or raiser. The Circuit Court held this statute invalid, and defendant took this writ of error.]

Mr. Justice HARLAN. \* \* \* The vital question, however, is whether the statute of Illinois of 1893 is not inconsistent with the Constitution of the United States, by reason of the fact that by the ninth section it declares that "the provisions of this act shall not apply to agricultural products or live stock while in the hands of producer or raiser." The Circuit Court held this section to be repugnant to the fourteenth amendment of the Constitution of the United States, and to be so connected and interwoven with other sections that its invalidity affected the entire act.

Looking specially at its provisions, it will be seen that, so far as the statute is concerned, two or more agriculturalists or two or more live-stock raisers may, in respect of their products or live stock in hand, combine their capital, skill, or acts for the purpose of creating or carrying out restrictions in the sale of such products or live stock; or limiting, increasing, or reducing their price; or preventing competition in their sale or purchase; or fixing a standard or figure whereby the price thereof to the public may be controlled; or making contracts whereby they would become bound not to sell or dispose of such agricultural products or live stock below a common standard figure or card or list price; or establishing the price of such products or stock in hand, so as to preclude free and unrestricted competition among themselves or others; or by agreeing to pool, combine, or unite any interest they may have in connection with the sale or transportation of their products or live stock that the price might be affected. All this, so far as the statute is concerned, may be done by agriculturalists or live-stock raisers in Illinois without subjecting them to the fine imposed by the statute. But exactly the same things, if done by two or more persons, firms, corporations, or associations of persons who shall have combined their capital, skill, or acts, in respect of their property, merchandise, or commodities held for sale or exchange, is made by the statute a public offense, and every principal, manager, director, agent, servant, or employee knowingly carrying out the purposes, stipulations, and orders of such combination is punishable by a fine of not less than \$2,000 nor more than \$5,000. Is not this such discrimination against those engaged in business (other than the sale of agricultural products and live stock in the hands of producers and raisers) as is forbidden by that clause

of the fourteenth amendment which declares that "no state shall \* \* \* deny to any person within its jurisdiction the equal protection of the laws?" \* \* \*

What may be regarded as a denial of the equal protection of the laws is a question not always easily determined, as the decisions of this court and of the highest courts of the states will show. It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the national Constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guaranty of the equal protection of the laws means "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances." *Missouri v. Lewis*, 101 U. S. 22, 31, 25 L. Ed. 989. \* \* \* [Here follow a quotation from *Barbier v. Connolly*, 113 U. S. 27, 31, 5 Sup. Ct. 357, 28 L. Ed. 923, ante, page 332, and references to *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 6 Sup. Ct. 1064, 30 L. Ed. 220, post, page 383, *Hayes v. Missouri*, 120 U. S. 68, 71, 7 Sup. Ct. 350, 30 L. Ed. 578, and *Duncan v. Missouri*, 152 U. S. 377, 382, 14 Sup. Ct. 570, 38 L. Ed. 485.]

These principles, applied to the case before us, condemn the statute of Illinois. We have seen that under that statute *all* except producers of agricultural commodities and raisers of live stock, who combine their capital, skill, or acts for any of the purposes named in the act, may be punished as criminals, while agriculturalists and live-stock raisers, in respect of their products or live stock in hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the state. The statute so provides notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of a state, and agriculturalists and raisers of live stock, are all in the same general class, that is, they are all alike engaged in domestic trade, which is, of right open to all, subject to such regulations, applicable alike to all in like conditions, as the state may legally prescribe.

The difficulty is not met by saying that, generally speaking, the state when enacting laws may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects. For this court has held that classification "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."

\* \* \* [Here follows a further quotation from *Gulf, etc., Ry. v. Ellis*, ante, p. 334, and references to *Cotting v. K. C. Stock Yards Co.*, ante, p. 346, and to *Magoun v. Ill. T. & S. Bank*, post, p. 629.]

In *American Sugar Ref. Co. v. Louisiana* [179 U. S. 89, 21 Sup. Ct. 43, 45 L. Ed. 102] we held that a statute of Louisiana exempting from its operation planters and farmers grinding and refining their



own sugar and molasses, but which imposed a license tax upon persons and corporations carrying on the business of refining sugar and molasses, did not deny the equal protection of the laws to such persons and corporations as were thus taxed. It was as if the statute had imposed a tax upon the *business* of refining sugar and molasses, and had declared, as reasonably it might have done, that those who only refined their own sugar and molasses should not be regarded as belonging to that class. \* \* \*

The decision now rendered is not at all in conflict with the views expressed in the two cases just cited. It is sufficient to say that those cases had reference to the taxing power of the state, and involved considerations that could not, in the nature of things, apply to a state enactment like the one involved in the present case. The power to tax persons and property is an incident of sovereignty, and the extent to which it may be exerted has been indicated in numerous cases. Taxing laws, it has been well said, furnish the measure of every man's duty in support of the public burdens and the means of enforcing it. A tax may be imposed only upon 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 a state could not tax any property or calling unless, at the same time, it taxed all property or all callings. Its discretion in such matters is very great, and should be exercised solely with reference to the general welfare as involved in the necessity of taxation for the support of the state. A state may, in its wisdom, classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States. But different considerations control when the state, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the state, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates. \* \* \*

Returning to the particular case before us, and repeating or summarizing some thoughts already expressed, it may be observed that if combinations of capital, skill, or acts, in respect of the sale or purchase of goods, merchandise, or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and live stock are not also hurtful. Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are under the statute, criminals, and subject to a fine, if they combine their capital, skill, or acts for the purpose of establishing, controlling, increasing, or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturalists and live-stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the prescribed penalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? It cannot be said that the exemption made by the ninth section of the statute was of slight consequence, as affecting the general public interested in domestic trade and entitled to be protected against combinations formed to control prices for their own benefit; for it cannot be disputed that agricultural products and live stock in Illinois constitute a very large part of the wealth and property of that state. \* \* \*

We therefore hold that the act of 1893 is repugnant to the Constitution of the United States, unless its ninth section can be eliminated, leaving the rest of the act in operation. \* \* \*

[It was held that the elimination of this section alone, making the act apply as well to the excepted classes, would not have been accepted by the legislature, and so the whole act failed.]

Judgment affirmed.

Mr. Justice McKENNA, dissenting. \* \* \* It seems like a contradiction to say that a law having inequality of operation may yet give equality of protection. Viewed rightly, however, the contradiction disappears; indeed, need not even be expressed. There are very few exertions of government which can be made applicable to all persons as such. Government is not a simple thing. It encounters and must deal with the problems which come from persons in an infinite variety of relations. Classification is the recognition of those relations, and in making it a legislature must be allowed a wide latitude of discretion and judgment. This has been decided many times against contentions based on a variety of facts. I will content myself by citing the later cases and commenting upon them very briefly. The cases are *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037; *Clark v. Kansas City*, 176 U. S.

114, 20 Sup. Ct. 284, 44 L. Ed. 392; *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. 633, 44 L. Ed. 725; *Petit v. Minnesota*, 177 U. S. 164, 20 Sup. Ct. 666, 44 L. Ed. 716; *Williams v. Fears*, 179 U. S. 270, 21 Sup. Ct. 128, 45 L. Ed. 186; *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 21 Sup. Ct. 43, 45 L. Ed. 102.

In these cases and the cases cited in them classifications were sustained which depended upon differences in the amounts of legacies; on differences between corporations; on differences between land dependent on its use for agriculture and other purposes in regard to the power of a city to annex it; on differences between fire insurance and other insurance; on the right of a legislature to declare, as a matter of law, that the work of a barber was not a work of necessity, while as to all other kinds of labor the fact was to be determined by a jury; on the difference between hiring persons to labor in the state and hiring persons to labor out of the state; on differences between sugar refiners based entirely and only on the fact of the production or purchase of the sugar refined.

In *American Sugar Ref. Co. v. Louisiana* a license tax was imposed on those engaged in carrying on the business of refining sugar and molasses. It was provided, however, that the law should not apply to "planters and farmers grinding and refining their own sugar."

Wherein did the Louisiana statute, which was held constitutional, differ from the Illinois statute, which is held to be unconstitutional? In the former case the distinction (in the opinion in the case it is called "discrimination") was between manufacturers of sugar and growers of it. In the case at bar the distinction is between traders in products and growers of them. Is not a parallel obvious? Can the cases be distinguished because in one a tax was imposed and in the other conduct is regulated or penalized? Indeed, is not the distinction verbal, each being means to an end? Besides, what justification for the distinction is there under the Constitution? None, I submit, can be found in the words of that instrument. Any state legislation which denies the equal protection of the laws is prohibited. The prohibition is independent of form or means. It would be strange, indeed, if the power of a state is limited and confined by the Constitution of the United States, when the state attempts by law to regulate conduct, and is unbounded in its discretion when it imposes taxes; that in one case it may see a difference between manufacturers and planters, and in the other case may not see a difference between traders in commodities acquired for the purposes of sale and such property when held by farmers by whose labor they were produced.

\* \* \* What ingenuity can find a difference in the act and process of sugar refining when done by a purchaser of raw sugar and a raiser (planter) of it; what difference in the product after it shall be refined, or in any element, thing, or circumstance, which can affect its use or sale. The whole and only distinction in the classes which the statute made was between the grower of sugar and the buyer of it—

the exact and only distinction of the Illinois law now held to be void, and yet the Louisiana law was sustained as constitutional. \* \* \*

What was the purpose of the Illinois statute, and what were the relations of its classes to that purpose? The statute was the expression of the purpose of the state to suppress combinations to control the prices of commodities, not, however, in the hands of the producers, but in the hands of traders, persons, or corporations. Shall we say that such suppression must be universal or not at all? How can we? What knowledge have we of the condition in Illinois which invoked the legislation, or in what form and extent the evil of combinations to control prices appeared in that state? Indeed, whether such combinations are evils or blessings, or to what extent either, is not a judicial inquiry. If we can assume them to be evil because the statute does so, can we go beyond the statute and determine for ourselves the local conditions and condemn the legislation dependent thereon? But are there not, between the classes which the statute makes, distinctions which the legislature had a right to consider? Of whom are the classes composed? The excluded class is composed of farmers and stockraisers while holding the products or live stock produced or raised by them. The included class is composed of merchants, traders, manufacturers, all engaged in commercial transactions. That is, one class is composed of persons who are scattered on farms; the other class is composed of persons congregated in cities and towns, not only of natural persons, but of corporate organizations. In the difference of these situations, and in other differences which will occur to any reflection, might not the legislature see difference in opportunities and power between the classes in regard to the prohibited acts? That differences exist cannot be denied. To describe and contrast them might be invidious. To consider their effect would take us from legal problems to economic ones, and this demonstrates to my mind how essentially any judgment or action based upon those differences is legislative and cannot be reviewed by the judiciary. \* \* \*

[GRAY, J., did not sit.]<sup>1</sup>

<sup>1</sup> Compare Holmes, J., in *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 410, 411, 26 Sup. Ct. 66, 67 (50 L. Ed. 246) (1905) (upholding an Iowa statute forbidding fire insurance companies to combine in regard to rates): "At the argument before us more special reasons were assigned. It was pressed that there is no justification for the particular selection of fire insurance companies for the prohibitions discussed. With regard to this it should be observed, as is noticed by the appellees, that a general statute of Iowa prohibits all contracts or combinations to fix the price of any article of merchandise or commodity, or to limit the quantity of the same produced or sold in the state (Code of 1897 § 5060), and that this section covers fire insurance. *Beechley v. Mulville*, 102 Iowa, 602, 70 N. W. 107, 71 N. W. 428, 63 Am. St. Rep. 479. Therefore the act in question does little if anything more than apply and work out the policy of the general law in a particular case. Again, 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. It does not for-

WILLIAMS v. ARKANSAS (1910) 217 U. S. 79, 89-90, 30 Sup. Ct. 493, 54 L. Ed. 673, 18 Ann. Cas. 865, Mr. Chief Justice FULLER (sustaining an Arkansas statute forbidding soliciting for certain kinds of business upon trains in the state):

"In the present case, the supreme court of Arkansas (85 Ark. 470, 108 S. W. 838, 26 L. R. A. [N. S.] 482, 122 Am. St. Rep. 47), said:

"The legislature clearly has the power to make regulations for the convenience and comfort of travelers on railroads, and this appears to be a reasonable regulation for their benefit. It prevents annoyance from the importunities of drummers. It is suggested in argument that the statute was especially aimed at the protection of travelers to the city of Hot Springs. If this be so, we can readily see additional reason why the regulation is a wholesome one. A large percentage of those travelers are persons from distant states, who are mostly complete strangers here, and many are sick. Drummers who swarm through the trains soliciting for physicians, bath houses, hotels, etc., make existence a burden to those who are subjected to their repeated solicitations. It is true that the traveler may turn a deaf ear to these importunities, but this does not render it any the less unpleasant and

bid the cautions advance, step by step, and the distrust of generalities which sometimes have been the weakness, but often the strength, of English legislation. *Otis v. Parker*, 187 U. S. 606, 610, 611, 23 Sup. Ct. 168, 47 L. Ed. 323, 328. And if this is true, then, in view of the possible teachings to be drawn from a practical knowledge of the business concerned, it is proper that courts should be very cautious in condemning what legislatures have approved. If the legislature of the state of Iowa deems it desirable artificially to prevent, so far as it can, the substitution of combination for competition, this court cannot say that fire insurance may not present so conspicuous an example of what that legislature thinks an evil as to justify special treatment."

In *Cleland v. Anderson*, 66 Neb. 252, 258-262, 92 N. W. 306, 93 N. W. 212, 98 N. W. 1075, 5 L. R. A. (N. S.) 136 (1902), it was held that the prohibition of combinations between persons engaged in the manufacture, sale, or transportation of goods need not include persons, such as laborers or laundresses, who merely bestowed labor or skill upon goods. In *W. W. Cargill Co. v. Minnesota ex rel. Railroad & W. Commission*, 180 U. S. 452, 21 Sup. Ct. 423, 45 L. Ed. 619 (1901), it was held the state might regulate the business and rates of elevators and warehouses, excluding those not located on railway rights of way.

See, also, *German Alliance Ins. Co. v. Hale*, 219 U. S. 307, 31 Sup. Ct. 246, 55 L. Ed. 229 (1911); *Western Union Tel. Co. v. Commercial Mill. Co.*, 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815 (1910) (telegraph companies alone forbidden to limit liability for negligence). In *Opinion of Justices*, 211 Mass. 618, 98 N. E. 337 (1912), it was denied that trades unions or associations of employers could alone be exempted from suit for tortious acts committed on their behalf. Compare Stat. 6 Edw. VII (1906) c. 47.

As to the validity of classifications requiring wages to be paid at certain intervals in certain enumerated employments, see *Braceville Coal Co. v. People*, 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. Rep. 206 (1893); *State v. Loomis*, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789 (1893) (majority and dissenting opinions); *Opinion of Justices*, 163 Mass. 589, 40 N. E. 713, 28 L. R. A. 344 (1895); *Lawrence v. Rutland R. Co.*, 80 Vt. 370, 384-386, 67 Atl. 1091, 13 Ann. Cas. 475 (1907), annotated in 15 L. R. A. (N. S.) 350-352.

A ten-hour law for working women may be confined to those who work in



annoying. The drummer may keep within the law against disorderly conduct, and still render himself a source of annoyance to travelers by his much beseeching to be allowed to lead the way to a doctor or a hotel.

"It is also argued that the act, literally construed, would prevent any person of the classes named from carrying on a private conversation on a train concerning his business. This is quite an extreme construction to place upon the statute, and one which the legislature manifestly did not intend. We have no such question, however, before us on the facts presented in the record.

"This statute is not an unreasonable restriction upon the privilege one should enjoy to solicit for his lawful business, which, it is rightly urged, is an incident to any business. It does not prevent anyone from advertising his business, or from soliciting patronage, except upon trains, etc. This privilege is denied him for the public good. It is a principle which underlies every reasonable exercise of the police power, that private rights must yield to the common welfare."

"As to the objection that the act discriminated against plaintiff in error and denied him the equal protection of the law, because forbid-

mechanical establishments, factories, and laundries, *Ritchie & Co. v. Wayman*, 244 Ill. 509, 91 N. E. 695, 27 L. R. A. (N. S.) 994 (1910); or a general law of this character may validly except women employed in preserving perishable products in canning establishments, *Withey v. Bloem*, 163 Mich. 419, 429-433, 128 N. W. 913, 35 L. R. A. (N. S.) 628 (1910). As to exemptions from the general operation of Sunday laws, see *Carr v. State*, 175 Ind. 241, 93 N. E. 1071, 32 L. R. A. (N. S.) 1190 (1911) (exemption of professional ball players valid).

In *Josma v. Western Steel Car & Foundry Co.*, 249 Ill. 508, 91 N. E. 915 (1911), a statute imposed criminal and civil liability (with an attorney fee for the latter) upon persons who persuaded workmen to change from one place to another by false representations concerning certain matters. In a suit for civil damages by a workman thus misled, the statute was held invalid for the imposition of criminal liability and an attorney's fee for this kind of deceit only. *Dunn, J.*, said (249 Ill. 516, 91 N. E. 917): "The class to whom this act applies is workmen changing from one place to another. The representations aimed at are those which concern the kind and character of the work, of the compensation, the sanitary and other conditions of the employment and the existence of a strike or other labor trouble. These conditions or some of them are as important to the stenographers in an office, the clerks in a store or a bank, the teachers in a school, or any of the professional or semiprofessional people who are employed by others, as to the workmen mentioned in the act. They are as important to the workman who does not leave his home for employment as to him who does. If persons entering into contracts of employment may be placed upon a different footing from persons entering into other contracts in the manner provided in this act, it can be only by an act sufficiently comprehensive to include all persons subject to the evil aimed at—the deception of employes as to the terms, character, and conditions of their employment."

So *Spokane v. Macho*, 51 Wash. 322, 98 Pac. 755, 21 L. R. A. (N. S.) 263, 130 Am. St. Rep. 1100 (1909), where a city ordinance punishing willful misrepresentations by keepers of employment agencies to persons seeking employment was held invalid because not including such conduct in *all* other businesses. "The crime defined is not common to the business of employment agencies, but common to all, and to be sustained must include within its terms all who may be likewise guilty." 51 Wash. 325, 98 Pac. 756.

ding the drumming or soliciting business or patronage on the trains for any 'hotel, lodging house, eating house, bath house, physician, masseur, surgeon, or other medical practitioner,' which, it was contended, was an unreasonable classification, the state supreme court said:

"The legislature, in framing this statute, met a condition which existed, and not an imaginary or improbable one. The class of drummers or solicitors mentioned in the act are doubtless the only ones who ply their vocation to any extent on railroad trains. It is rare that the commercial drummer finds opportunity to meet customers and solicit trade on trains, therefore the lawmakers deemed it unnecessary to legislate against an occasional act of that kind."<sup>1</sup>

<sup>1</sup> In *Otis v. Parker*, 187 U. S. 606, 610, 611, 23 Sup. Ct. 168, 170, 47 L. Ed. 323 (1903), a California statute avoiding all contracts for the sale of shares of corporate stock on margin was upheld, Holmes, J., saying: "With regard to the objection that this provision strikes at only some, not all, of the objects of possible speculation, it is enough to say that probably in California the evil sought to be stopped was confined in the main to stocks in corporations. California is a mining state, and mines offer the most striking temptations to people in a hurry to get rich. Mines generally are represented by stocks. Stock is convenient for purposes of speculation, because of the ease with which it is transferred from hand to hand, as well as for other reasons. If stopping the purchase and sale of stocks on margin would stop the gambling which it was desired to prevent, it was proper for the people of California to go no farther in what they forbade. The circumstances disclose a reasonable ground for the classification, and thus distinguish the case from *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679. We cannot say that treating stocks of corporations as a class subject to special restrictions was unjust discrimination or the denial of the equal protection of the laws." [Brewer and Peckham, JJ., dissented.]

In *Petit v. Minnesota*, 177 U. S. 164, 168, 20 Sup. Ct. 666, 667, 44 L. Ed. 716 (1900), Fuller, C. J., said (quoting with approval from the opinion of the state court below): "Courts will take judicial notice of the fact that, in view of the custom to keep barber shops open in the evening as well as in the day, the employees in them work more, and during later, hours than those engaged in most other occupations, and that this is especially true on Saturday afternoons and evenings; also that, owing to the habit of so many men to postpone getting shaved until Sunday, if such shops were to be permitted to be kept open on Sunday, the employees would ordinarily be deprived of rest during half of that day. In view of all these facts we cannot say that the legislature has exceeded the limits of its legislative police power in declaring that, as a matter of law, keeping barber shops open on Sunday is not a work of necessity or charity, while as to all other kinds of labor they have left that question to be determined as one of fact."

Compare *Eden v. People*, 161 Ill. 296, 43 N. E. 1108, 32 L. R. A. 659, 52 Am. St. Rep. 365 (1896) (prohibition of Sunday work for barbers alone invalid).

In *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521, 24 L. Ed. 734 (1878), a city ordinance was upheld forbidding a single named railroad from using locomotives on part of a certain street, no other railroad having or being able to acquire this privilege without the city's consent.

## MISSOURI, K. &amp; T. R. CO. OF TEXAS v. MAY.

(Supreme Court of United States, 1904. 194 U. S. 267, 24 Sup. Ct. 638, 45 L. Ed. 971.)

[Error to the county court of Bell county, Texas, to review a judgment against defendant railroad company under the statute set forth in the opinion below.]

Mr. Justice HOLMES. This is an action to recover a penalty of \$25, brought by the owner of a farm contiguous to the railroad of the plaintiff in error, on the ground that the latter has allowed Johnson grass to mature and go to seed upon its road. The penalty is given to contiguous owners by a Texas statute of 1901 (chapter 117) directed solely against railroad companies for permitting such grass or Russian thistle to go to seed upon their right of way, subject, however, to the condition that the plaintiff has not done the same thing. The case is brought here on the ground that the statute is contrary to the fourteenth amendment of the Constitution of the United States.

It is admitted that Johnson grass is a menace to crops, that it is propagated only by seed, and that a general regulation of it for the protection of farming would be valid. It is admitted also that legislation may be directed against a class when any fair ground for the discrimination exists. But it is said that this particular subjection of railroad companies to a liability not imposed on other owners of land on which Johnson grass may grow is so arbitrary as to amount to a denial of the equal protection of the laws. There is no dispute about general principles. The question is whether this case lies on one side or the other of a line which has to be worked out between cases differing only in degree.

With regard to the manner in which such a question should be approached, it is obvious that the legislature is the only judge of the policy of a proposed discrimination. The principle is similar to that which is established with regard to a decision of Congress that certain means are necessary and proper to carry out one of its express powers. *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579. When a state legislature has declared that, in its opinion, policy requires a certain measure, its action should not be disturbed by the courts under the fourteenth amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.

Approaching the question in this way we feel unable to say that the law before us may not have been justified by local conditions. It would have been more obviously fair to extend the regulation at least to highways. But it may have been found, for all that we know, that the seed of Johnson grass is dropped from the cars in such quantities as to cause special trouble. It may be that the neglected strips occupied by railroads afford a ground where noxious weeds especially flourish,

and that whereas self-interest leads the owners of farms to keep down pests, the railroad companies have done nothing in a matter which concerns their neighbors only. Other reasons may be imagined. Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.

Judgment affirmed.<sup>1</sup>

[BROWN, J., gave a dissenting opinion, in which WHITE and McKENNA, JJ., concurred.]

<sup>1</sup> The disposing of liquor in a public saloon may be treated differently from similar acts done in a drug store, a brewery, a private dwelling, or a dining car. *Ohio ex rel. Lloyd v. Pollison*, 194 U. S. 445, 24 Sup. Ct. 703, 48 L. Ed. 1062 (1904); *Reymann Brewing Co. v. Brister*, 179 U. S. 445, 21 Sup. Ct. 201, 45 L. Ed. 269 (1900).

A license from a board of medical examiners may be required from all medical practitioners except those who have practiced at least four years in the state, resident physicians or students in hospitals, students in physician's offices, midwives, and masseurs. *Watson v. Maryland*, 218 U. S. 173, 30 Sup. Ct. 644, 54 L. Ed. 987 (1910). Those who administer free treatment may also be excepted. *Collins v. Texas*, 223 U. S. 288, 32 Sup. Ct. 286, 56 L. Ed. 439 (1912).

In *Chicago Dock Co. v. Fraley*, 228 U. S. 680, 686-687, 33 Sup. Ct. 715, 716, 717 (57 L. Ed. —) (1913), in upholding an Illinois statute requiring the protection of openings used for hoisting materials in buildings in course of construction, McKenna, J., said: "That danger is the test may be conceded, but there may be degrees of it, and a difference in degree may justify classification. *Mutual Loan Co. v. Martell*, 222 U. S. 225, 236, 32 Sup. Ct. 74, 56 L. Ed. 175, 180, Ann. Cas. 1913B, 529. Who is to judge of the danger, whether absolutely considered or comparatively considered? Is it a matter of belief or proof? If of belief, we should be very reluctant to oppose ours to that of the legislature of the state, informed, no doubt, by experience, of conditions, and fortified by presumptions of legality, and confirmed, besides, by the opinion of the supreme court of the state. *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 365, 30 Sup. Ct. 301, 54 L. Ed. 515, 518; *Adams v. Milwaukee*, 228 U. S. 572, 33 Sup. Ct. 610, 57 L. Ed. —. If of proof, there is none in the record. There are assertions by counsel, and considering alone the openings necessary for hoisting machinery and the openings for stairs and other openings, an employee or materials can be imagined as falling through one of them with the same ease as he or the materials can through the others. But other things must be taken into account. The setting of the openings must be considered, the varying relations of the employees to them, and other circumstances. The legislation cannot be judged by abstract or theoretical comparisons. It must be presumed that it was induced by actual experience, and New York, it is said, has been induced by a like experience to enact like legislation. If it be granted that the legislative judgment be disputable or crude, it is, notwithstanding, not subject to judicial review. We have said many times that the crudities or even the injustice of state laws are not redressed by the fourteenth amendment. The law may not be the best that can be drawn, nor accurately adapted to all of the conditions to which it was addressed. It may be that it would have been more complete if it had gone farther and recognized and provided against the danger that all uninclosed openings in a building might cause, and should not have distinguished between holsts inside of a building and those outside; but we do not see how plaintiff in error is concerned with the omissions. It is not discriminated against. All in its situation are treated alike."

In *Rosenthal v. New York*, 226 U. S. 260, 271, 33 Sup. Ct. 27, 30, 57 L. Ed. — (1912), a similar objection to a New York statute, requiring all junk dealers who bought various metal articles used by railroad, telephone, tele-

## OZAN LUMBER CO. v. UNION COUNTY NAT. BANK.

(Supreme Court of United States, 1907. 207 U. S. 251, 28 Sup. Ct. 69, 52 L. Ed. 195.)

[Certiorari to United States Circuit Court of Appeals for the Eighth Circuit. An Arkansas statute made void all negotiable instruments given in payment for patented articles which did not show this fact upon their face, but by section 4 excepted from its operation "merchants and dealers who sell patented things in the usual course of business." Plaintiff bank demurred to a defence under this statute set up by defendant in a suit on certain notes. The federal Circuit Court for the Western District of Arkansas sustained the demurrer, and this judgment was affirmed by the Circuit Court of Appeals.]

Mr. Justice PECKHAM. \* \* \* We are of opinion that the exception contained in section 4 does not render the statute invalid. The plain purpose of the whole statute is to create and enforce a proper police regulation. Its passage showed that the legislature was of opinion that fraud and imposition were frequent in the sale of property of this nature, except in the cases mentioned in section 4, and that temptations to false representations in regard to the virtues and value of the article sold were also frequently yielded to. When the sale of the article was effected by such representations, and a note given for the amount of the sale, a transfer of the note to a bona fide purchaser for value before its maturity prevented the vendee from showing the fraud by which the sale had been accomplished. In order to reach such a transaction and to permit the vendee to show the fraud, the statute was passed. It was doubtless thought that merchants and dealers, as mentioned in the statute, while dealing with the patented things in the manner stated, would not be so likely to make representations or to engage in a fraud to effect a sale, as those covered by the statute. The various itinerant vendors of patented articles, whose fluency of speech and carelessness regarding the truth of their representations might almost be said to have become proverbial, were, of course, in the mind of the legislature, and were included in this legislation. Indeed, they are the principal people to be affected by it.

The manufacturer of a patented article, who also sells it in the usual course of business in his store or factory, would probably come within the exception of section 4. He may be none the less a dealer, selling in the usual course of his business, because he is also a manufacturer of the article dealt in. Exceptional and rare cases, not arising out of the

graph, gas, or electric light companies to make diligent inquiry as to the title of the vendors thereof, was answered by Pitney, J., saying: "The argument under this head concedes, and must concede, that the act is beneficial as far as it goes, the complaint being that it does not go far enough. But the federal Constitution does not require that all state laws shall be perfect, nor that the entire field of proper legislation shall be covered by a single enactment."



sale of patented things in the ordinary way, may be imagined where this general classification separating the merchants and dealers from the rest of the people might be regarded as not sufficiently comprehensive, because in such unforeseen, unusual, and exceptional cases the people affected by the statute ought, in strictness, to have been included in the exception. See opinion of Circuit Court herein, 127 Fed. 206. But we do not think the statute should be condemned on that account. It is because such imaginary and unforeseen cases are so rare and exceptional as to have been overlooked that the general classification ought not to be rendered invalid. In such case there is really no substantial denial of the equal protection of the laws within the meaning of the amendment.<sup>1</sup>

It is almost impossible, in some matters, to foresee and provide for every imaginable and exceptional case, and a legislature ought not to be required to do so at the risk of having its legislation declared void, although appropriate and proper upon the general subject upon which such legislation is to act, so long as there is no substantial and fair ground to say that the statute makes an unreasonable and unfounded general classification, and thereby denies to any person the equal protection of the laws. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things. See *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, and cases cited; *Missouri, K. & T. R. Co. v. May*, 194 U. S. 267, 24 Sup. Ct. 638, 48 L. Ed. 971. We can see reasons for excepting merchants and dealers who sell patented things, in the usual course of business, from the provisions of the statute, and we think the failure to exempt some few others, as above suggested, ought not to render the whole statute void as resulting in an unjust and unreasonable discrimination. \* \* \*

Judgment reversed.<sup>2</sup>

<sup>1</sup> "If the legislature thinks that a year is long enough to allow a party to recover his property from a third hand, and establishes that time in cases where he has not been heard of for fourteen years, and presumably is dead, it acts within its constitutional discretion. Now and then an extraordinary case may turn up, but constitutional law, like other mortal contrivances, has to take some chances, and in the great majority of instances, no doubt, justice will be done."—Holmes, J., in *Blinn v. Nelson*, 222 U. S. 1, 7, 32 Sup. Ct. 1, 2, 56 L. Ed. 65 (1911).

See *Provident Institution for Savings in Town of Boston v. Malone*, 221 U. S. 660, 31 Sup. Ct. 661, 55 L. Ed. 899, 34 L. R. A. (N. S.) 1129 (1911) (forfeiting to the state savings bank deposits unclaimed for 30 years).

<sup>2</sup> In *Mutual Loan Co. v. Martell*, 222 U. S. 225, 235-236, 32 Sup. Ct. 74, 75, 56 L. Ed. 175 (1911), a Massachusetts statute was upheld which restricted assignments of future wages unless made to national banks and certain other financial institutions under public supervision; McKenna, J., saying: "We have declared so often the wide range of discretion which the legislature possesses in classifying the objects of its legislation that we may be excused from a citation of the cases. We shall only repeat that the classification need not be scientific nor logically appropriate, and if not palpably arbitrary, and is uniform within the class, it is within such discretion. The legislation under review was directed at certain evils which had arisen, and the legis-

BORGNIS v. FALK CO. (1911) 147 Wis. 327, 353-355, 133 N. W. 209, 37 L. R. A. (N. S.) 489, WINSLOW, C. J. (upholding a workmen's compensation act taking away the defences of fellow service and assumed risk from employers electing not to accept the act, but retaining them for those who accepted the act, when sued by non-accepting employés):

"The rules governing classification are familiar and are in brief as follows: It must be based on substantial distinctions which make real differences; it must be germane to the purposes of the law; it must not be limited to existing conditions only and must apply equally to each member of the class. It seems to us that this classification fully meets these requirements; certainly there will be very real differences between the situation of the employer who elects to come under the law and the employer who does not. If the consenting employer only employs workmen who also elect to come under the law, he can never be mulcted in heavy damages, and will know whenever an employé is injured practically just what must be paid for the injury. Surely this is a different situation from the situation of the man who is liable to be brought into court by an injured employé at any time and obliged to defend common-law actions upon heavy claims unliquidated in their character, the outcome of which actions none can foretell. On the other hand, if, as seems quite likely, the greater part of the consenting employer's workmen consent, but some do not, and these latter are still retained in the employment, the same considerations will apply with somewhat less force.

"On the one hand, there is a class of consenting employers employing wholly or largely consenting workmen, and having definite and fixed obligations to their workmen in case of injury; on the other hand is a class of nonconsenting employers who have no such fixed obligations in case of injury to their workmen, but choose to meet every such workman in court and fight out the question of liability. There seems

lature, considering them and from whence they arose, might have thought or discerned that they could not or would not arise from a greater freedom to the institutions mentioned than to individuals. \* \* \* But even if some degree of evil which the statute was intended to prevent could be ascribed to loans made by the exempted institutions, their exception would not make the law unconstitutional. Legislation may recognize degrees of evil without being arbitrary, unreasonable, or in conflict with the equal-protection provision of the fourteenth amendment to the Constitution of the United States. *Ozan Lumber Co. v. Union County Nat. Bank*, 207 U. S. 251, 28 Sup. Ct. 89, 52 L. Ed. 195; *Heath & M. Mfg. Co. v. Worst*, 207 U. S. 338, 28 Sup. Ct. 114, 52 L. Ed. 236."

So, *Griffith v. Connecticut*, 218 U. S. 563, 31 Sup. Ct. 132, 54 L. Ed. 1151 (1910) (banks and mortgagees exempted from usury laws); *Lemieux v. Young*, 211 U. S. 489, 29 Sup. Ct. 174, 53 L. Ed. 295 (1909) (retail dealers alone forbidden to sell bulk of stock at once without notice to creditors); *Murphy v. California*, 225 U. S. 623, 32 Sup. Ct. 697, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153 (1912) (keeping billiard tables for hire forbidden except by hotels for registered guests).

a very robust difference between these two classes. But after all there is another distinction which seems perhaps more satisfactory. The consenting employer has done his share, and it must be considered a considerable share, in rendering successful the legislative attempt to meet and solve a difficult social and economic problem. Even if it be true (which, as before stated, is not decided) that he may not be compelled under our Constitutions, state and national, to assist in the solution of this problem, still does not his voluntary act in giving that assistance constitute a substantial distinction, making a real difference of situation between him and the employer who refuses his aid—a difference which justifies a difference in treatment?"

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COMMONWEALTH *v.* HANA (1907) 195 Mass. 262, 264-267, 81 N. E. 149, 11 L. R. A. (N. S.) 799, 122 Am. St. Rep. 251, 11 Ann. Cas. 514, KNOWLTON, C. J. (discussing the validity of a Massachusetts statute requiring peddlers to procure licenses):

"Under section 19, no one can obtain a license unless he is, or has declared his intention to become a citizen of the United States. It is contended that this provision is in violation of the fourteenth amendment to the Constitution of the United States which provides 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.' It is decided that this provision applies to aliens as well as to citizens of the United States, and it is clear that a statute, arbitrarily forbidding aliens to engage in ordinary kinds of business to earn their living, would be unconstitutional and void. *Yick Wo Lee v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; *In re Ah Chong* (C. C.) 2 Fed. 733; *In re Lee Sing* (C. C.) 43 Fed. 359; *Pearson v. Portland*, 69 Me. 278, 31 Am. Rep. 276. Accordingly, it was held in an elaborate opinion in *State v. Montgomery*, 94 Me. 192, 47 Atl. 165, 80 Am. St. Rep. 386, that a statute for the licensing of hawkers and peddlers in that state was unconstitutional and wholly void, because of a discrimination between aliens and citizens like that in our statute. See, also, *State v. Mitchell*, 97 Me. 66, 53 Atl. 887, 94 Am. St. Rep. 481. There is, however, an important question which was not much discussed in that case, whether the Legislature, in the exercise of the police power, could discover a reason for withholding peddlers' licenses from aliens. The business of peddling furnishes such opportunities for the practice of fraud that it is a proper subject for legislative regulation. That such regulation has been practiced from early times, both in Europe and America, is shown at length by Mr. Justice Gray in *Emert v. State of Missouri*, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430. The requirement of Rev. Laws, c. 65, § 19, that before receiving a license the applicant shall file a certificate from the mayor of a city or the majority of the selectmen of a town

that to the best of his or their knowledge and belief he is of good repute for morals and integrity, is a reasonable regulation for the protection of the public. If, in the same interest, the Legislature deems it important that licenses shall be granted only to citizens of the United States, or to those who have declared their intention to become citizens, it can hardly be said that they have exceeded their constitutional right in passing a law to that effect.

"Upon a similar question in reference to the granting of licenses to sell intoxicating liquors, decided in *Trageser v. Gray*, 73 Md. 250, 254, 255, 257, 20 Atl. 905, 906 (9 L. R. A. 780, 25 Am. St. Rep. 587), the court used this language: 'It is thought proper to confine the license to citizens of the United States, of temperate habits and good moral character. The privilege is very liable to be abused, and abuses would produce great public detriment. It therefore seemed wise to the Legislature to confer it only on those who, being natives of the country, might reasonably be supposed to have a regard for its welfare, or who, not being natives, had, as required by the naturalization law, proven by credible testimony before a court of justice that they were attached to the principles of the Constitution of the United States and were well disposed to their good order and happiness. It was certainly the function of the lawmaking department to exercise its judgment on this question, and this court has no right to criticise its conclusion.' The opinion then goes on to say that the right so to legislate is within the police power reserved to the states, and after a full discussion, to declare that it is not at variance with the fourteenth amendment to the Constitution of the United States. The same reasoning is equally applicable to the granting of licenses to hawkers and peddlers. Indeed, the nature of their business is such that their possession of a domicile and citizenship in this country might be important to those seeking remedies for wrongs done in their business. Notwithstanding the decision in *State v. Montgomery*, *ubi supra*, we are of opinion that the Legislature, in the exercise of the police power, might make this requirement as to the qualifications of applicants for a peddler's license.<sup>1</sup>

"The defendant also contends that the statute is unconstitutional in making a discrimination in section 19 by which a resident, in a city or town in which he pays taxes upon his stock in trade and is qualified to vote, shall not be required to pay any fee for his license for said city or town. There is also a provision in section 21, which has not been

<sup>1</sup> Accord: *Bloomfield v. State*, 86 Ohio St. 253, 99 N. E. 309, 41 L. R. A. (N. S.) 726 (1912) (license to sell liquor) (cases), *Johnson, J.*, saying with regard to statutes barring aliens from the retail liquor traffic (86 Ohio St. 266, 99 N. E. 312, 41 L. R. A. [N. S.] 726): "They are based on the belief that an alien cannot be sufficiently acquainted with our institutions and our life to enable him to appreciate the relation of this particular business to our entire social fabric."

Contra: *Templar v. State Board of Examiners of Barbers*, 131 Mich. 254, 90 N. W. 1058, 100 Am. St. Rep. 610 (1902) (barber's license) (cases). See also, 11 L. R. A. (N. S.) 799, 800, note (collecting all cases on question).

referred to in the argument, by which licenses may be granted without charge to a person seventy years of age or upwards, or to any soldier or sailor resident in this commonwealth who served in the army or navy during the War of the Rebellion or the War against Spain, and who has an honorable discharge from such service. Even before the adoption of the fourteenth amendment it was a settled principle of constitutional law that statutes in regard to the transaction of business must operate equally upon all citizens who desire to engage in the business, and that there shall be no arbitrary discrimination between different classes of citizens. Under the fourteenth amendment, all persons are entitled to the equal protection of the laws. In several states such a discrimination in the granting of licenses in favor of soldiers and sailors has come before the courts, and in all of them, so far as we are aware, the provision has been held unconstitutional. *State v. Shedroi*, 75 Vt. 277, 54 Atl. 1081, 63 L. R. A. 179, 98 Am. St. Rep. 825; *State v. Garbroski*, 111 Iowa, 496, 82 N. W. 959, 56 L. R. A. 570, 82 Am. St. Rep. 524; *State v. Whitcom*, 122 Wis. 110, 99 N. W. 468. See, also, *In re Keymer*, 148 N. Y. 219, 42 N. E. 667, 35 L. R. A. 447; *Brown v. Russell*, 166 Mass. 14, 43 N. E. 1005, 32 L. R. A. 253, 55 Am. St. Rep. 357.

"These cases and others show that a discrimination, founded on the residence of the applicant for a license or the amount of tax paid by him, cannot be sustained under the Constitution. *State v. Mitchell*, 97 Me. 66, 53 Atl. 887, 94 Am. St. Rep. 481; *State v. Gardner*, 58 Ohio St. 599, 51 N. E. 136, 41 L. R. A. 689, 65 Am. St. Rep. 785; *Com. v. Snyder*, 182 Pa. 630, 38 Atl. 356; *State v. Hoyt*, 71 Vt. 59, 42 Atl. 973; *In re Ah Chong (C. C.) 2 Fed.* 733; *In re Lee Sing (C. C.) 43 Fed.* 359; *Ex parte Jones*, 38 Tex. Cr. R. 482, 43 S. W. 513. We see no justifiable ground, under the Constitution, for a discrimination in favor of residents of a city or town who pay taxes there on their stock in trade, and who are qualified to vote there, nor of those who are 70 years of age or upwards. As the discrimination in favor of former soldiers and sailors was not referred to in argument, it is unnecessary to pass upon it; but as we have already seen, a similar discrimination has been held unconstitutional in other states."<sup>2</sup>

[The act was held invalid on other grounds.]

<sup>2</sup> As to the validity of legal discriminations in favor of Civil War veterans for appointment to public offices in the state civil service, see *Brown v. Russell*, 166 Mass. 14, 43 N. E. 1005, 32 L. R. A. 253, 55 Am. St. Rep. 357 (1896); *Opinion of Justices*, 166 Mass. 589, 44 N. E. 625, 34 L. R. A. 58 (1896).

DISCRIMINATION AGAINST NON-RESIDENTS.—Discrimination by a state in favor of its own citizens against those of other states is governed by Const. art. 4, § 2, discussed in Chapter VII, ante. Doubtless any discrimination valid under this clause against citizens of other states as such does not violate the fourteenth amendment. Discrimination against non-residents (not citizens of other states) does not violate the "equal protection of the laws" guaranteed by this amendment, for this applies only in favor of "persons within the jurisdiction." *Blake v. McClung*, ante, p. 253, Chapter VIII. Such discrimination (giving resident creditors a preference in the distribution of the



## 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; *Lechew v. Brummell*, 103 Mo. 546, 15 S. W. 765.

assets of a bankrupt corporation) was said to be no taking of a non-resident's property without due process in *Blake v. McClung*, 172 U. S. 239, 259, 260, 19 Sup. Ct. 165, 43 L. Ed. 432 (1898), and in *Sully v. American Nat. Bank*, 178 U. S. 289, 302, 303, 20 Sup. Ct. 935, 44 L. Ed. 1072 (1900).

See *Anglo-American Provision Co. v. Davis Provision Co.*, 191 U. S. 373, 24 Sup. Ct. 92, 48 L. Ed. 225 (1903).

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.<sup>1</sup>

[HARLAN, J., gave a dissenting opinion. BREWER, J., did not sit.]

<sup>1</sup> See *Berea College v. Commonwealth*, 123 Ky. 209, 94 S. W. 623, 124 Am. St. Rep. 344, 13 Ann. Cas. 337 (1906) holding a state may prohibit private educational institutions from teaching the two races at the same time and place. The cases on all phases of statutory race segregation are collected. The decision was affirmed in 211 U. S. 45, 29 Sup. Ct. 33, 53 L. Ed. 81 (1908), on another ground. For the validity of attempts at residential segregation of races, see *In re Lee Sing* (C. C.) 43 Fed. 359 (1890) (Chinese); 11 Col. Law Rev. 24 (negroes), article by W. B. Hunting; *Boyd v. Board of Council of City of Frankfort*, 117 Ky. 199, 77 S. W. 669, 111 Am. St. Rep. 240 (1907) (negro church building).

"Equality and not identity of privileges and rights is what is guaranteed to the citizen."—*People v. Gallagher*, 93 N. Y. 438, 455, 45 Am. Rep. 232 (1883) by Ruger, C. J.

A carrier may be authorized by statute to furnish separate dining and sleeping cars for either race only, as it sees fit. *McCabe v. Atchison, T. & S. F. Ry. Co.*, 186 Fed. 966, 109 C. C. A. 110 (1911). Compare the Tennessee statute abrogating altogether the common-law duty of carriers and innkeepers to serve all applicants. *State v. Lasater*, 68 Tenn. (9 Baxt.) 584 (1877); *Allen v. Pullman's Palace Car Co.*, 191 U. S. 171, 182, 183, 24 Sup. Ct. 39, 48 L. Ed. 134, (1903). Without statutory authority a carrier may lawfully separate the races. *Chiles v. Chesapeake & O. Ry. Co.*, 218 U. S. 71, 30 Sup. Ct. 667, 54 L. Ed. 936 (1910).

A school district may use public money for a white high school only, where so few colored children would attend a colored high school that the cost of maintaining it would cripple the colored elementary schools, *Cumming v. County Board of Education*, 175 U. S. 528, 20 Sup. Ct. 197, 44 L. Ed. 262 (1899) (semble); but it is unconstitutional to require the people of each race to support their own schools, *Claybrook v. City of Owensboro* (D. C.) 16 Fed. 297 (1883); *Pultt v. Commissioners*, 94 N. C. 709 (1886).

In *Opinion of Justices to House of Representatives*, 207 Mass. 601, 604, 605, 94 N. E. 558, 560, 34 L. R. A. (N. S.) 604 (1911), validity was denied to proposed legislation excluding young women from hotels or restaurants conducted by Chinese, the judges saying: "This legislation does not refer to the character or condition of the hotel or restaurant that a young woman may not enter, but refers only to the nationality of the person who conducts it. \* \* \* It forbids the entry of a young woman into the hotel or restaurant of a Chinese proprietor, even if it is a model of orderly and moral management, and it permits the entry of young women into a hotel or restaurant kept by an American, when it is known to be maintained in part for the promotion of immoral or criminal practices. The classification of hotels and restaurants into those that are open to young women and those that are closed to young women is not founded upon a difference that has any just or proper relation to the professed purpose of the classification. \* \* \* The fact that a man is white, or black, or yellow is not a just and constitutional

## 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.<sup>1</sup>

While there have been but few decisions bearing directly upon the question, the following sustain the constitutionality of such legislation:

ground for making certain conduct a crime in him, when it is treated as permissible and innocent in a person of a different color."

As to discrimination against Chinese witnesses, see *Fong Yue Ting v. United States*, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905 (1893); *Li Sing v. United States*, 180 U. S. 486, 21 Sup. Ct. 449, 45 L. Ed. 634 (1901).

<sup>1</sup> 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.

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. 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.<sup>2</sup>

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### LOUISVILLE & N. R. CO. v. MELTON.

(Supreme Court of United States, 1910. 218 U. S. 36, 30 Sup. Ct. 676, 54 L. Ed. 921.)

[Error to the Court of Appeals of Kentucky. An Indiana statute made railroad companies liable for injuries to any employé resulting from the negligence of any fellow employé under whose direction the

<sup>2</sup> Accord: *Ritchie & Co. v. Wayman*, 244 Ill. 509, 91 N. E. 695, 27 L. R. A. (N. S.) 994 (1910), perhaps overruling *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315 (1895), which, however, required an eight-hour day; *Commonwealth v. Riley*, 210 Mass. 387, 97 N. E. 367, Ann. Cas. 1912D, 388 (1912) (cases). See *People v. Williams*, 189 N. Y. 131, 81 N. E. 778, 12 L. R. A. (N. S.) 1130, 121 Am. St. Rep. 854, 12 Ann. Cas. 798 (1907), holding invalid a prohibition against women working in factories between 9 p. m. and 6 a. m. Compare *Bradwell v. Illinois*, 16

injured employé was hurt. Melton, a bridge carpenter, was one of a crew of six men and a foreman engaged in constructing in defendant's service a heavy timbered frame for the foundations of a coal tippie alongside defendant's track in Indiana. In lifting part of the frame to its place by a block and tackle, it fell upon Melton through the negligence of the foreman, inflicting serious injuries. Melton sued in Kentucky, where he lived, and a circuit court decision in his favor was affirmed by the Court of Appeals.]

Mr. Justice WHITE. \* \* \* The equal protection of the law clause. That the fourteenth amendment was not intended to and does not strip the states of the power to exert their lawful police authority is settled, and requires no reference to authorities. And it is equally settled—as we shall hereafter take occasion to show—as the essential result of the elementary doctrine that the equal protection of the law clause does not restrain the normal exercise of governmental power, but only abuse in the exertion of such authority, therefore that clause is not offended against simply because, as the result of the exercise of the power to classify, some inequality may be occasioned. That is to say, as the power to classify is not taken away by the operation of the equal protection of the law clause, a wide scope of legislative discretion may be exerted in classifying without conflicting with the constitutional prohibitor.

It is beyond doubt foreclosed that the Indiana statute does not offend against the equal protection clause of the fourteenth amendment, because it subjects railroad employees to a different rule as to the doctrine of fellow servant from that which prevails as to other employments in that state. *Tullis v. Lake Erie & W. R. Co.*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192; *Pittsburg, C. C. & St. L. R. Co. v. Ross*, 212 U. S. 560, 29 Sup. Ct. 688, 53 L. Ed. 652. But while conceding this, the argument is that classification of railroad employees for the purpose of the doctrine of fellow servant can only, consistently with equality and uniformity, embrace such employees when exposed to dangers peculiarly resulting from the operation of a railroad, thus affording ground for distinguishing them for the purpose of classification from coemployees not subject to like hazards or employees engaged in other occupations. The argument is thus stated: "Plaintiff

Wall. 130, 21 L. Ed. 442 (1873) (denying women admission to the bar); *Cronin v. Adams*, 192 U. S. 108, 24 Sup. Ct. 219, 48 L. Ed. 365 (1904) (forbidding women in wine rooms); *Blair v. Kilpatrick*, 40 Ind. 312 (1872) (restricting liquor licenses to men); *People ex rel. Barone v. Fox*, 141 App. Div. 611, 129 N. Y. Supp. 646 (1911) (examination and medical treatment of diseased prostitutes), reversed in 202 N. Y. 616, 96 N. E. 1126, on other grounds; *Oldknow v. City of Atlanta*, 9 Ga. App. 594, 597, 71 S. E. 1015, 1016 (1911) (requiring removal of women's hats at theaters), in which Russell, J., said: "The ordinance is not discriminatory because it does not include men within its operation. Men do not need any regulation on this subject. Public opinion, which demands that a man shall take off his hat in the presence of ladies, is sufficient, and does not need the aid of any police regulation."

See *Quong Wong v. Kirkendall*, post, p. 617, note. As to sex discrimination generally, see Freund, *Police Power*, §§ 701-703.

in error does not question the right of the legislature of Indiana to classify railroads in order to impose liability upon them for injuries to their employees incident to railroad hazards, but it does insist that, to make this a constitutional exercise of legislative power, the liability of the railroads must be made to depend upon the character of the employment, and not upon the character of the employer."

Thus stated, the argument tends to confuse the question for decision, since there is no contention that the statute as construed bases any classification upon some supposed distinction in the person of the employer. The idea evidently intended to be expressed by the argument is, that although, speaking in a general sense, it be true that the hazards arising from the operation of railroads are such that a classification of railroad employees is justified, yet, as in operating railroads some employees are subject to risks peculiar to such operation, and others to risks which, however serious they may be, are not, in the proper sense, risks arising from the fact that the employees are engaged in railroad work, the legislative authority in classifying may not confound the two by considering in a generic sense the nature and character of the work performed by railroad employees collectively considered, but must consider and separately provide for the distinctions occasioned by the varying nature and character of the duties which railroad operatives may be called upon to discharge.

In other words, reduced to its ultimate analysis the contention comes to this: That by the operation of the equal protection clause of the fourteenth amendment, the states are prohibited from exerting their legitimate police powers upon grounds of the generic distinction obtaining between persons and things, however apparent such distinction may be; but, on the contrary, must legislate upon the basis of a minute consideration of the distinctions which may arise from accidental circumstances as to the persons and things coming within the general class provided for. When the proposition is thus accurately fixed, it necessarily results that in effect it denies the existence of the power to classify, and hence must rest upon the assumption that the equal protection clause of the fourteenth amendment has a scope and effect upon the lawful authority of the states contrary to the doctrine maintained by this court without deviation. This follows, since the necessary consequence of the argument is to virtually challenge the legislative power to classify, and the numerous decisions upholding that authority. To this destructive end it is apparent the argument must come, since it assumes that however completely a classification may be justified by general considerations, such classification may not be made if inequalities be detected as to some persons embraced within the general class by a critical analysis of the relation of the persons or things otherwise embraced within the general class. A brief reference to some of the cases dealing with the power of a state to classify will make the error of the contention apparent.

In *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 294, 18 Sup.

Ct. 594, 42 L. Ed. 1043, while declaring that the power of a state to distinguish, select, and classify objects of legislation was, of course, not without limitation, it was said, "necessarily this power must have a wide range of discretion." After referring to various decisions of this court, it was observed: "There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."

Again considering the subject in *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552, it was reiterated that the legislature of a state has necessarily a wide range of discretion in distinguishing, selecting, and classifying, and it was declared that it was sufficient to satisfy the demand of the Constitution if a classification was practical, and not palpably arbitrary.

In *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 26 Sup. Ct. 159, 50 L. Ed. 322, a statute of Minnesota, providing that the liability of railroad companies for damages to employees should not be diminished by reason of accident occurring through the negligence of fellow servants, was held not to discriminate against any class of railroads, or to deny the equal protection of the laws because of a proviso which excepted employees engaged in construction of new and unopened railroads. In the course of the opinion the court said (199 U. S. 598, 26 Sup. Ct. 161 [50 L. Ed. 322]): "The whole case is put on the proviso, and the argument with regard to that is merely one of the many attempts to impart an overmathematical nicety to the prohibitions of the fourteenth amendment." These principles were again applied in *Martin v. Pittsburg & L. E. R. Co.*, 203 U. S. 284, 27 Sup. Ct. 100, 51 L. Ed. 184, 8 Ann. Cas. 87, and the doctrines were also fully considered and reiterated at this term in *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 54 L. Ed. 688, 30 Sup. Ct. 496.

And coming to consider the concrete application made of these general principles in the decisions of this court which have construed the statute here in question, and statutes of the same general character enacted in states other than Indiana, we think, when rightly analyzed, it will appear that they are decisive against the contention now made. It is true that in the *Tullis* Case, which came here on certificate, the nature and character of the work of the railroad employee who was injured was not stated, and that reference in the course of the opinion was made to some state cases, limiting the right to classify to employees engaged in the movement of trains. But that it was not the intention of the court to thereby intimate that a classification, if not so restricted, would be repugnant to the equal protection clause of the fourteenth amendment, will be made clear by observing that the previous case of *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675, was cited approvingly, in which, under a statute of Kansas classifying railroad employees, recovery was al-

lowed to a bridge carpenter employed by the railroad company, who was injured while attempting to load timber on a car. And in the opinion in the Pontius Case there was approvingly cited a decision of the court of appeals of the eighth circuit (Chicago, R. I. & P. R. Co. v. Stahley, 11 C. C. A. 88, 27 U. S. App. 157, 62 Fed. 362), wherein it was held that, under the same statute, an employee injured in a round-house while engaged in lifting a driving rod for attachment to a new engine could recover by virtue of the statute. All this is made plainer by the ruling in St. Louis Merchants' Bridge Terminal R. Co. v. Callahan, 194 U. S. 628, 24 Sup. Ct. 857, 48 L. Ed. 1157, where, upon the authority of the Tullis Case, the court affirmed a judgment of the supreme court of Missouri, which held that recovery might be had by a section hand upon a railroad, who, while engaged in warning passers-by in a street beneath an overhead bridge, was struck by a tie thrown from the structure.

While, as we have previously said, it is true there are state decisions dealing with statutes classifying railroad employees sustaining the restricted power to classify which is here insisted upon, we do not think it is necessary to review them or to notice those tending to the contrary. They are referred to in the opinions rendered in the court below. Nor do we think our duty in this respect is enlarged because, since the judgment below was rendered, the court of last resort in Indiana (Indianapolis Traction Co. v. Kinney, 171 Ind. 612, 85 N. E. 954, 23 L. R. A. (N. S.) 711, and Cleveland, C., C. & St. L. R. Co. v. Foland, 174 Ind. 411, 91 N. E. 594, 92 N. E. 165) has, upon the theory that it was necessary to save the statute in question from being declared repugnant to the equality clause of the state Constitution and the fourteenth amendment, unequivocally held that the statute must be construed as restricted to employees engaged in train service.

Judgment affirmed.<sup>1</sup>

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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

<sup>1</sup> Would an act like that in the principal case be valid if alone applicable to all railway employees, regardless of the branch of service in which employed? See Chicago H. L. Ry. Co. v. Hackett, 228 U. S. 559, 33 Sup. Ct. 581, 57 L. Ed. — (1913).



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 pur-

poses. 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.

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### SECTION 3.—ADMINISTRATIVE REGULATIONS AND DISCRETION

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ST. JOHN v. NEW YORK (1906) 201 U. S. 633, 636-638, 26 Sup. Ct. 554, 50 L. Ed. 896, 5 Ann. Cas. 909, Mr. Justice McKENNA (upholding a New York statute absolutely penalizing nonproducing vendors for selling milk below a certain test, while producing vendors might exempt themselves as indicated below):

"The contention of plaintiff in error is that nonproducing vendors are discriminated against, and hence denied the equal protection of the laws, contrary to the provisions of the fourteenth amendment of the Constitution of the United States, in that they may not, as producing vendors may, exempt themselves from actions or penalties for violations of subdivisions 1, 2, 3, 7, and 8 of section 20 by showing that the milk sold or offered for sale by them is in the same condition as when it left the herd of the producer.

"It has been decided many times that a state may classify persons and objects for the purpose of legislation. We will assume the cases are known and proceed immediately to consider whether the classification of the law is based on proper and justifiable distinctions, considering the purpose of the law and the means to be observed to effect that purpose. \* \* \* The purpose of the law is to secure to the population, adult and infant, milk attaining a certain standard of purity and strength. \* \* \*

"It is not contended that such purpose is not within the power of the state, but it is contended that the power is not exercised on all alike who stand in the same relation to the purpose, and quite dramatic illustrations are used to show discrimination. A picture is exhibited of producing and nonproducing vendors selling milk side by side; the latter, it may be, a purchaser from the former; the act of one permitted, the act of the other prohibited or penalized. If we could look no farther than the mere act of selling, the injustice of the law might be demonstrated; but something more must be considered. Not only the final purpose of the law must be considered, but the means of its administration,—the ways it may be defeated. Legislation, to be practical and efficient, must regard this special pur-

pose as well as the ultimate purpose. The ultimate purpose is that wholesome milk shall reach the consumer, and it is the conception of the law that milk below a certain strength is not wholesome, but a difference is made between milk naturally deficient and milk made so by dilution. It is not for us to say that this is not a proper difference, and regarding it the law fixes its standard by milk in the condition that it comes from the herd. It is certain that if milk starts pure from the producer it will reach the consumer pure, if not tampered with on the way. To prevent such tampering the law is framed and its penalties adjusted. As the standard established can be proved in the hands of a producing vender, he is exempt from the penalty; as it cannot certainly be proved in the hands of other venders so as to prevent evasions of the law, such venders are not exempt. In the one case the source of milk can be known and the tests of the statute applied; in the other case this would be impossible, except in few instances. We cannot see that any particular hardship results. The nonproducing vender must exercise care in his purchases, and good all around may be accomplished. Through penalty on the nonproducing vender the producer is ultimately reached, though he may seem to be indulged. He will have to raise the standard of the milk of his herd if he would keep or extend his trade as anything but a mere retailer of his product."<sup>1</sup>

<sup>1</sup> Accord: *Adams v. Milwaukee*, 228 U. S. 572, 33 Sup. Ct. 610, 57 L. Ed. — (1913) (different regulations for milk producers within and without city).

In *District of Columbia v. Brooke*, 214 U. S. 135, 150, 151, 29 Sup. Ct. 560, 563, 53 L. Ed. 941 (1909), a statute was upheld that provided different remedies against resident and non-resident house owners who failed to make sewer connections; McKenna, J., saying: "Classification need not be either logically appropriate or scientifically accurate. The problems which are met in the government of human beings are different from those involved in the examination of the objects of the physical world, and assigning them to their proper associates. \* \* \* The act in controversy makes a distinction in its provision between resident and nonresident lot owners, but this is a proper basis for classification. Regarded abstractly as human beings, regarded abstractly as lot owners, no legal difference may be observed between residents and nonresidents; but, regarded in their relation to their respective lots under regulating laws, the limitations upon jurisdiction, and the power to reach one and not the other, important differences immediately appear. We said in *St. John v. New York*, 201 U. S. at page 637, 26 Sup. Ct. 554, 50 L. Ed. 898, 5 Ann. Cas. 909, not only the purpose of a law must be considered, but the means of its administration,—the ways it may be defeated. Legislation, to be practical and efficient, must regard this special purpose as well as the ultimate purpose. This was in effect repeated in *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142, where a privilege to protest against a street improvement, given by the statute assailed to resident property owners and denied to nonresident property owners, was sustained, and the statute held not to violate the equality clause of the fourteenth amendment. See *Travelers' Ins. Co. v. Connecticut*, 185 U. S. 304, 22 Sup. Ct. 673, 46 L. Ed. 949. \* \* \* Against resident owners the coercion of the law is by criminal punishment, while against nonresident owners the remedy is by civil proceedings,—the District does the work that the nonresident owners neglect, and charges the expense thereof on their property. This is a distinction, a discrimination, it may be called, but it has even more justification than that sustained in *Field v. Barber Asphalt Paving Co.*, supra. The statute under consideration in the case at bar en-

MOBILE, J. & K. C. R. CO. v. TURNIPSEED (1910) 219 U. S. 35, 42-44, 31 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463, Mr. Justice LURTON (sustaining a Mississippi statute making injuries inflicted by the running of locomotives or cars prima facie evidence of negligence on the part of railroads):

"The law of evidence is full of presumptions either of fact or law. The former are, of course, disputable, and the strength of any inference of one fact from proof of another depends upon the generality of the experience upon which it is founded. For a discussion of some

joins a duty on both resident and nonresident lot owners,—a duty necessary to be followed to preserve the health of the city. There is a difference only in the manner of enforcing it,—a difference arising from the different situation of the lot owners, and therefore competent for Congress to regard in its legislation. In other words, under the circumstances presented by this record, the distinction between residents and nonresidents is a proper basis for classification. It might not be under other circumstances. *Blake v. McClung*, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432; *Blake v. McClung* 176 U. S. 59, 20 Sup. Ct. 307, 44 L. Ed. 371; *Sully v. American Nat. Bank*, 178 U. S. 289, 20 Sup. Ct. 935, 44 L. Ed. 1072."

As to the validity of various procedural distinctions between different classes of parties to litigation, see note to *Strauder v. W. Va.*, ante, p. 318.

More effectively to enforce its laws against the sale of wild game killed within the state during the closed season, a state may also forbid the sale of all imported game of a similar species, even though the latter in particular cases may have readily distinguishable physical characteristics, *New York ex rel. Silz v. Hesterberg*, 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75 (1908); as well as game artificially propagated in confinement by private owners, *Commonwealth v. Gilbert*, 160 Mass. 157, 35 N. E. 454, 22 L. R. A. 439 (1893). See *Pumpley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223 (1894) (sale of all colored oleomargarine forbidden). Compare *Ah Sin v. Wittman*, 198 U. S. 500, 506, 25 Sup. Ct. 756, 49 L. Ed. 1142 (1905) (can innocent visit to gaming house be penalized?).

In *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 201, 204, 33 Sup. Ct. 44, 46, 47, 57 L. Ed. — (1912), *Hughes, J.*, said (upholding the prohibition of the sale of a harmless beverage containing a low percentage of malt): "When a state exercising its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. \* \* \* It was competent for the legislature of Mississippi to recognize the difficulties besetting the administration of laws aimed at the prevention of traffic in intoxicants. It prohibited, among other things, the sale of 'malt liquors.' In thus dealing with a class of beverages which, in general, are regarded as intoxicating, it was not bound to resort to a discrimination with respect to ingredients and processes of manufacture which, in the endeavor to eliminate innocuous beverages from the condemnation, would facilitate subterfuges and frauds and fetter the enforcement of the law. \* \* \* The existence of this power, as the authorities we have cited abundantly demonstrate, is not to be denied simply because some innocent articles or transactions may be found within the proscribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat."

See, also, *Commonwealth v. Alger*, ante, p. 321, and *Schmidinger v. Chicago*, 226 U. S. 578, 33 Sup. Ct. 182, 57 L. Ed. — (1913) (fixing standard weights for loaves of bread and forbidding sale of other sizes).



common-law aspects of the subject, see *Cincinnati, N. O. & T. P. R. Co. v. South Fork Coal Co.*, 71 C. C. A. 316, 139 Fed. 528 et seq., 1 L. R. A. (N. S.) 533.

"Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, national and state, dealing with such methods of proof in both civil and criminal cases, abound, and the decisions upholding them are numerous. A few of the leading ones are *Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575; *People v. Cannon*, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668; *Horne v. Memphis & O. R. Co.*, 1 Cold. (Tenn.) 72; *Meadcroft v. People*, 163 Ill. 56, 45 N. E. 991, 35 L. R. A. 176, 54 Am. St. Rep. 447; *Com. v. Williams*, 6 Gray (Mass.) 1; *State v. Thomas*, 144 Ala. 77, 40 South. 271, 2 L. R. A. (N. S.) 1011, 113 Am. St. Rep. 17, 6 Ann. Cas. 744.

"We are not impressed with the argument that the supreme court of Mississippi, in construing the act, has declared that the effect of the statute is to create a presumption of liability, giving to it, thereby, an effect in excess of a mere temporary inference of fact. The statutory effect of the rule is to provide that evidence of an injury arising from the actual operation of trains shall create an inference of negligence, which is the main fact in issue. The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary. When that is done the inference is at an end, and the question of negligence is one for the jury, upon all of the evidence. In default of such evidence, the defendant, in a civil case, must lose, for the prima facie case is enough as matter of law.

"The statute does not, therefore, deny the equal protection of the law, or otherwise fail in due process of law, because it creates a presumption of liability, since its operation is only to supply an inference of liability in the absence of other evidence contradicting such inference.

"That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.

"If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.

"Tested by these principles, the statute as construed and applied by

the Mississippi court in this case is unobjectionable. It is not an unreasonable inference that a derailment of railway cars is due to some negligence, either in construction or maintenance of the track or trains, or some carelessness in operation.

"From the foregoing considerations it must be obvious that the application of the act to injuries resulting from 'the running of locomotives and cars' is not an arbitrary classification, but one resting upon considerations of public policy, arising out of the character of the business."<sup>1</sup>

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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. \* \* \* In the case of the petitioner, brought here by writ of error to the Supreme Court of California, our jurisdiction is limited to the question, whether the plaintiff in error has been denied a right in violation of the Constitution, laws, or treaties of the United States. The question whether his imprisonment is illegal, under the Constitution and laws of the state, is not open to us. And although that question might have been considered in the Circuit Court in the application made to it, and by this court on appeal from its order, yet judicial propriety is best consulted by accepting the judgment of the state court upon the points involved in that inquiry.

That, however, does not preclude this court from putting upon the ordinances of the supervisors of the county and city of San Francisco

<sup>1</sup> Accord: *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 81-83, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160 (1911). See particularly *Adams v. New York*, 192 U. S. 585, 598, 599, 24 Sup. Ct. 372, 48 L. Ed. 575 (1904); *People v. Cannon*, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668 (1893), and the cases there cited and discussed; *Opinion of Justices*, 208 Mass. 619, 623, 624, 94 N. E. 1044, 34 L. R. A. (N. S.) 771 (1911). Compare *Bailey v. Ala.*, ante, p. 158 (statutory presumptions regarding a constitutionally protected subject-matter).

an independent construction; for the determination of the question whether the proceedings under these ordinances and in enforcement of them are in conflict with the Constitution and laws of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge.<sup>1</sup>

We are consequently constrained, at the outset, to differ from the Supreme Court of California upon the real meaning of the ordinances in question. That court considered these ordinances as vesting in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, with a view to the protection of the public against the dangers of fire. We are not able to concur in that interpretation of the power conferred upon the supervisors. There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They 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.

This erroneous view of the ordinances in question led the Supreme Court of California into the further error of holding that they were justified by the decisions of this court in the cases of *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923, and *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145. \* \* \*

<sup>1</sup> It is now well settled that, on writ of error to a state court under the fourteenth amendment, the state court's construction of its own statutes is conclusive. *Tullis v. Lake Erie & W. Ry. Co.*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192 (1899); *W. W. Cargill Co. v. Minnesota ex rel. Railroad & W. Commission*, 180 U. S. 452, 21 Sup. Ct. 423, 45 L. Ed. 619 (1901); *Missouri ex rel. Hill v. Dockery*, 191 U. S. 165, 24 Sup. Ct. 53, 48 L. Ed. 133 (1903); *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 25 Sup. Ct. 379, 49 L. Ed. 689 (1905); *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160 (1911). See, also, *Olsen v. Smith*, 195 U. S. 332, 342, 25 Sup. Ct. 52, 49 L. Ed. 224 (1904) (under the commerce clause). For perhaps a certain confusion of thought between a statute's *meaning* and the *power* of which it may be thought to be an exercise, see *Atchison, T. & S. F. Ry. Co. v. Matthews*, 174 U. S. 96, 100, 101, 19 Sup. Ct. 609, 43 L. Ed. 909 (1899); *Hodge v. Muscatine County*, 196 U. S. 276, 25 Sup. Ct. 237, 49 L. Ed. 477 (1905).

The ordinance drawn in question in the present case is of a very different character. It 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.<sup>2</sup> 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.

<sup>2</sup> See *Ex parte Virginia*, note 3, ante, p. 239.



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.\*

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CROWLEY v. CHRISTENSEN (1890) 137 U. S. 86, 91, 92, 94, 95, 11 Sup. Ct. 13, 34 L. Ed. 620, Mr. Justice FIELD (sustaining Christensen's conviction for violating a San Francisco ordinance forbidding the granting of liquor licenses except to persons who obtained the written consent of a majority of the city board of police commissioners, or of twelve citizens owning real estate in the block where the business was to be carried on):

"There is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not a privilege of a citizen of the state or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may

\* Accord: *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757 (1907) (state board made unequal assessment in violation of state Constitution). In *Ah Sin v. Wittman*, 195 U. S. 500, 25 Sup. Ct. 756, 49 L. Ed. 1142 (1905), a San Francisco gambling ordinance was alleged to be enforced only against Chinese, but the case was dismissed for failure to aver that others violated it.

No relief can be granted against a law merely because it confers a discretion readily susceptible of abuse, if no actual discriminatory administration is shown. *Williams v. Mississippi*, 170 U. S. 213, 18 Sup. Ct. 583, 42 L. Ed. 1012 (1898) (registration board passing on ability of electors to interpret state Constitution).

deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only. As in many other cases, the officers may not always exercise the power conferred upon them with wisdom or justice to the parties affected. But that is a matter which does not affect the authority of the state, or one which can be brought under the cognizance of the courts of the United States.

"The Constitution of California vests in the municipality of the city and county of San Francisco the right to make 'all such local, police, sanitary, and other regulations as are not in conflict with general laws.' The supreme court of the state has decided that the ordinance in question, under which the petitioner was arrested, and is held in custody, was thus authorized, and is valid. That decision is binding upon us unless some inhibition of the Constitution or of a law of the United States is violated by it. We do not perceive that there is any such violation. The learned circuit judge saw in the provisions of the ordinance empowering the police commissioners to grant or refuse their assent to the application of the petitioner for a license, or, failing to obtain their assent upon application, requiring it to be given upon the recommendation of twelve citizens owning real estate in the block or square in which his business as a retail dealer in liquors was to be carried on, the delegation of arbitrary discretion to the police commissioners, and to real-estate owners of the block, which might be and was exercised to deprive the petitioner of the equal protection of the laws. And he considers that his view in this respect is supported by the decision in *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220 [ante, p. 383]. \* \* \*

[After discussing this case:] "It will thus be seen that that case was essentially different from the one now under consideration, the ordinance there held invalid vesting uncontrolled discretion in the board of supervisors with reference to a business harmless in itself and useful to the community, and the discretion appearing to have been exercised for the express purpose of depriving the petitioner of a privilege that was extended to others. In the present case the business is not one that any person is permitted to carry on without a license, but one that may be entirely prohibited or subjected to such restrictions as the governing authority of the city may prescribe. \* \* \*

"If there were no property holders in the block the discretionary authority would be exercised finally by the police commissioners, and their refusal to grant the license is not a matter for review by this court, as it violates no principle of federal law. We, however, find in the return a statement which would fully justify the action of the commissioners. It is averred that, in the conduct of the liquor business, the petitioner was assisted by his wife, and that she was twice arrested for larcenies committed from persons visiting his saloon, and in one case convicted of the offense, and sentenced to be imprisoned, and in the other held to answer. These larcenies alone were a sufficient indi-

cation of the character of the place in which the business was conducted for the exercise of the discretion of the police commissioners in refusing a further license to the petitioner." <sup>1</sup>

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PEOPLE OF STATE OF NEW YORK *ex rel.* LIEBERMAN *v.*  
VAN DE CARR.

(Supreme Court of United States, 1905. 199 U. S. 552, 26 Sup. Ct. 144, 50 L. Ed. 305.)

[Error to the Supreme Court of New York. Lieberman was arrested for violating section 66 of the New York City sanitary code. His writ of habeas corpus was dismissed by the state Supreme Court, and this judgment was affirmed by the Appellate Division and by the Court of Appeals, and then brought here. The facts appear in the opinion.]

Mr. Justice DAY. \* \* \* The section of the sanitary code complained of is as follows:

"Sec. 66. No milk shall be received, held, kept, either for sale or delivered in the city of New York, without a permit in writing from the board of health, and subject to the conditions thereof."

The violation of the sanitary code is made a misdemeanor. That the board of health had power to pass the sanitary code, which includes this section, is not open to question here, as it has been affirmatively decided in the state court. The objections on federal grounds for our consideration are two-fold: First, that the section under consideration devolves upon the board of health absolute and despotic power to grant or withhold permits to milk dealers, and is, therefore, not due process of law; second, that singling out the milk business for regulation is a denial of the equal protection of the laws to people engaged therein.

The record discloses that the plaintiff in error, engaged in selling milk in the city of New York before his arrest, had a permit, which was revoked by the board of health. He was thereafter found engaged through an agent in selling milk without a permit. In the testimony it appears, in a conversation between the plaintiff in error and an inspector in the department of health, the latter admitted that Lieberman's milk "stood well."

The right of the state to regulate certain occupations which may become unsafe or dangerous when unrestrained, in the exercise of the police power, with a view to protect the public health and welfare, has been so often and so recently before this court that it is only necessary to refer to some of the cases which sustain the proposition that the state has a right, by reasonable regulations, to protect the public health and safety. *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed.

<sup>1</sup> Compare *Ex parte Sing Lee*, 96 Cal. 354, 31 Pac. 245, 24 L. R. A. 195, 31 Am. St. Rep. 218 (1892) (laundries).

989; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620; *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385; *Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 26 Sup. Ct. 100, 50 L. Ed. 204; *Gardner v. Michigan*, 199 U. S. 325, 26 Sup. Ct. 106, 50 L. Ed. 212.

The contention of counsel for plaintiff in error is not that a business so directly affecting the health of the inhabitants of the city as the furnishing of milk may not be the subject of regulation under the authority of the state, but that the Court of Appeals of New York has sustained this right of regulation to the extent of authorizing the board of health to exercise arbitrary power in the selection of those it may see fit to permit to sell milk under the section quoted; and, thus construed, it works the deprivation of the plaintiff in error's liberty and property without due process of law. We do not so understand the decision of the highest court of New York. As we read it, the authority sustained is the grant of power to issue or withhold permits in the honest exercise of a reasonable discretion. In the opinion of the Appellate Division, whose judgment was affirmed in the Court of Appeals, it was said: "Such regulations, however, should be uniform, and the board should not act arbitrarily; and if this section of the sanitary code vested in them arbitrary power to license one dealer [in a lawful commodity] and refuse a license to another similarly situated, undoubtedly it would be invalid (*Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. 633, 44 L. Ed. 725; *Noel v. People*, 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287, 79 Am. St. Rep. 238; *Dunham v. Rochester*, 5 Cow. (N. Y.) 462; *Brooklyn v. Breslin*, 57 N. Y. 591); but such was not its purpose, nor is that its fair construction. It is unnecessary now to determine whether the action of the board in refusing or revoking such a permit would be judicial, and thus reviewable by mandamus or certiorari, or whether, if the authority should be arbitrarily or improperly exercised, the only remedy would be an application for the removal of the officers; for those are questions that may arise in the administration of the law, but do not go to its validity. The section, properly construed, does not permit unjust discrimination, and, therefore, it is valid." *People ex rel. Lieberman v. Vandecarr*, 81 App. Div. 132, 80 N. Y. Supp. 1108.

The Court of Appeals, affirming the decision of the Appellate Division, did not speak with equal emphasis upon this point, but it leaves no doubt that it sustained the statute as authorizing the exercise of a reasonable discretion. While that court held that the discretion to grant or withhold permits might be vested in a board of health with opportunities to know and investigate local conditions and surroundings, it further said: "In the case before us the requirement of section

66 of the sanitary code, that the relator should not sell milk without a permit, is reasonable, and violates neither federal nor state Constitution, is in accordance with law and long-established precedent. In the argument of this case several questions have been discussed that are not presented by the appeal. It is, for instance, argued that, even conceding a permit to be necessary, the provision that the holder is to be 'subject to the conditions thereof' cannot be sustained for a variety of reasons suggested. It is a complete answer that the form of the permit is not in the record; it does not appear that it has attached to it conditions reasonable or otherwise. We consequently express no opinion on the subject. What we have already said applies with equal force to the argument that the permit might be loaded with conditions, the nature of which is not limited or stated; that it may be used to build up monopoly, to help a favored few as opposed to the many; that there is no other statute which presents such possibilities for blackmail and oppression. These and many other like criticisms are indulged in by appellant. If the question was before us, the well-settled canon of construction permits of no such argument. It is presumed that public officials will discharge their duties honestly and in accordance with the rules of law."

We do not think that this language leaves any question as to the disposition of the highest court of New York to prevent the oppression of the citizen, or the deprivation of his rights, by an arbitrary and oppressive exercise of the power conferred. That this court will not interfere because the states have seen fit to give administrative discretion to local boards to grant or withhold licenses or permits to carry on trades or occupations, or perform acts which are properly the subject of regulation in the exercise of the reserved power of the states to protect the health and safety of its people, there can be no doubt.

In *Davis v. Massachusetts*, 167 U. S. 43, 17 Sup. Ct. 731, 42 L. Ed. 71, an ordinance of the city of Boston, providing that no person shall make any public address in or upon the public grounds, except in accordance with a permit from the mayor, was held not in conflict with the fourteenth amendment to the Constitution of the United States.

In *Wilson v. Eureka City*, 173 U. S. 32, 19 Sup. Ct. 317, 43 L. Ed. 603, an ordinance requiring persons to obtain written permission from the mayor or president of the city council, or, in their absence, a councilor, before moving a building upon any of the public streets of the city, was sustained as not violative of the federal Constitution. In the opinion of the court a number of instances were given in which acts were prohibited except with the consent of an administrative board, and which were sustained as proper exercises of the police power.

In *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. 633, 44 L. Ed. 725, an ordinance was sustained permitting the mayor to license persons to deal in cigarettes when he was satisfied that the person applying for the license was of good character and reputation, and a suitable person to be intrusted with their sale. And in the recent case of *Ja-*



cobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765, this court sustained a compulsory vaccination law which delegated to the boards of health of cities or towns the determination of the necessity of requiring the inhabitants to submit to compulsory vaccination.

And in *Fischer v. St. Louis*, 194 U. S. 361, 24 Sup. Ct. 673, 48 L. Ed. 1018, an ordinance of the city of St. Louis providing that no dairy or cow stable should thereafter be built or established within the limits of the city, and no such stable not in existence at the time of the passage of the ordinance should be maintained on any premises, unless permission should have been first obtained from the municipal assembly by ordinance, was sustained as a proper exercise of the police power. After sustaining the right to vest in a board of men acquainted with the local conditions of the business to be carried on, power to grant or withhold permits, this court said: "It has been held in some of the state courts to be contrary to the spirit of American institutions to vest this dispensing power in the hands of a single individual (*Chicago v. Trotter*, 136 Ill. 430, 26 N. E. 359; *Re Frazee*, 63 Mich. 396, 30 N. W. 72, 6 Am. St. Rep. 310; *State v. Fiske*, 9 R. I. 94; *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Sioux Falls v. Kirby*, 6 S. D. 62, 60 N. W. 156, 25 L. R. A. 621), and in others that such authority cannot be delegated to the adjoining lot owners (*St. Louis v. Russell*, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721; *Ex parte Sing Lee*, 96 Cal. 354, 31 Pac. 245, 24 L. R. A. 195, 31 Am. St. Rep. 218). But the authority to delegate that discretion to a board appointed for that purpose is sustained by the great weight of authority (*Quincy v. Kennard*, 151 Mass. 563, 24 N. E. 860; *Com. v. Davis*, 162 Mass. 510, 39 N. E. 113, 26 L. R. A. 712, 44 Am. St. Rep. 389), and by this court the delegation of such power, even to a single individual, was sustained in *Wilson v. Eureka City*, 173 U. S. 32, 19 Sup. Ct. 317, 43 L. Ed. 603, and *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. 633, 44 L. Ed. 725."

These cases leave in no doubt the proposition that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the state is not violative of rights secured by the fourteenth amendment. There is no presumption that the power will be arbitrarily exercised, and when it is shown to be thus exercised against the individual, under sanction of state authority, this court has not hesitated to interfere for his protection, when the case has come before it in such manner as to authorize the interference of a federal court. *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220. \* \* \*

There is nothing to show upon what ground the action of the board was taken. For aught that appears, he may have been conducting his business in such wise, or with such surroundings and means, as to render it dangerous to the health of the community; or his manner of

selling or delivering the milk may have been objectionable. There is nothing in the record to show that the action against him was arbitrary or oppressive and without a fair and reasonable exercise of that discretion which the law reposed in the board of health. We have, then, an ordinance which, as construed in the highest court of the state, authorizes the exercise of a legal discretion in the granting or withholding of permits to transact a business which, unless controlled, may be highly dangerous to the health of the community, and no affirmative showing that the power has been exerted in so arbitrary and oppressive a manner as to deprive the appellant of his property or liberty without due process of law.

In such cases it is the settled doctrine of this court that no federal right is invaded, and no authority exists for declaring a law unconstitutional, duly passed by the legislative authority, and approved by the highest court of the state. \* \* \*

Judgment affirmed.<sup>1</sup>

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#### SECTION 4.—VALIDITY OF LEGISLATIVE OBJECT

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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-

<sup>1</sup> The legislative propriety of granting an administrative discretion to make exceptions of a character difficult to define in advance by general rules is approved in *Fischer v. St. Louis*, 194 U. S. 361, 371, 372, 24 Sup. Ct. 673, 48 L. Ed. 1018 (1904). In the absence of such general rules to guide the exercise of administrative discretion, it will be assumed that it is to be exercised reasonably and for appropriate cause. *Engel v. O'Malley*, 219 U. S. 128, 137, 31 Sup. Ct. 190, 55 L. Ed. 128 (1911). Compare *Commonwealth v. Maletsky*, 203 Mass. 241, 89 N. E. 245, 24 L. R. A. (N. S.) 1168 (1909).

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, is it 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 law-making 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.*, post, p. 863, *Stone v. Mississippi*, post, p. 860, and *New Orleans Gas Co. v. Louisiana Light Co.*, post, p. 865, —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 es-



sential 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 thereby 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,<sup>1</sup>  
Decree of Circuit Court reversed.

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### Ex parte QUONG WO.

(Supreme Court of California, 1911. 161 Cal. 220, 118 Pac. 714.)

[Habeas corpus. A Los Angeles ordinance established seven "industrial districts" in the city and declared the rest of its territory to be a "residence district," with certain exceptions from time to time authorized by the council. In the residence district it was forbidden to maintain any stone-crusher, rolling-mill, carpet-beating establishment, fireworks or soap factory, or any factory using mechanical power, or any hay barn, wood or lumber yard, public laundry or washhouse, or to establish anew any hospital, asylum for feeble-minded, wine or brandy manufactory, or blacksmith shop (existing ones being unaffected). Quong Wo was convicted of violating this ordinance by continuing to conduct a laundry within the residence district at a place where he had done so for some years before this ordinance was passed, and of which he still had an unexpired two-year lease. He applied for release by writ of habeas corpus.]

ANGELLOTTI, J. \* \* \* There can be no question that the power to regulate the carrying on of certain lawful occupations in a city includes the power to confine the carrying on of the same to certain limits, whenever such restrictions may reasonably be found necessary to subserve the ends for which the police power exists, viz., to protect the public health, morals, safety, and comfort. It is, of course, primarily for the legislative body clothed with this power to determine when

<sup>1</sup> Accord: *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036 (1878) (compulsory abandonment of \$15,000 rendering plant that had become offensive nuisance by growth of city); *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346 (1888) (manufacture of liquor solely for shipment out of state); *Austin v. Tennessee*, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224 (1900) (sale of cigarettes); *Murphy v. California*, 225 U. S. 623, 32 Sup. Ct. 697, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153 (1912) (prohibition of keeping of existing billiard rooms); *State v. Allmond*, 2 Houst. 612 (Del., 1856) (liquor possessed prior to act); *State v. Paul*, 5 R. I. 185 (1858) (same).

Contra: *Wynehamer v. People*, 13 N. Y. 378 (1856) (as to liquor possessed prior to the act); *Commonwealth v. Campbell*, 133 Ky. 50, 117 S. W. 383, 24 L. R. A. (N. S.) 172, 19 Ann. Cas. 159 (1909) (private keeping or use of liquor). In *St. Joseph v. Harris*, 59 Mo. App. 122 (1894), it was held invalid to forbid private drunkenness not annoying to others. See, also, *State v. Lowry*, 166 Ind. 372, 77 N. E. 728, 4 L. R. A. (N. S.) 528, 9 Ann. Cas. 350 (1906).

A state monopoly of the retail sale of liquor is valid. *State ex rel. George v. Aiken*, 42 S. Car. 222, 20 S. E. 221, 26 L. R. A. 345 (1894). The cases discussing the validity of prohibition, local option, and "dispensary" legislation are fully collected in 15 L. R. A. (N. S.) 908-948 (1908).

such regulations are essential, and its determination in this regard, in view of its better knowledge of all the circumstances, and the presumption that it is acting with a due regard for the rights of all parties, will not be disturbed in the courts, unless it can plainly be seen that the regulation has no relation to the ends above stated, but is a clear invasion of personal or property rights under the guise of police regulation. In the case of *Grumbach v. Leland*, 154 Cal. 679, 98 Pac. 1059, in which this court declared the well-settled rule last stated, it is said: "It is well settled that it is entirely within the police power to limit the conduct of the liquor or other businesses coming within its regulatory scope or to exclude such businesses from specified districts"—citing cases. The limitation in the case last cited was in regard to the business of selling intoxicating liquors, but the power is by no means confined to occupations of that character, and, whatever be the business or occupation to which it is attempted to be applied, the question of the validity of the limitation depends on whether it has some relation to the ends for which the police power is conferred.

The necessity of such regulation in the case of necessary and lawful occupations carried on in cities and towns was recognized by the Supreme Court of the United States in *Crowley v. Christensen*, 137 U. S. 90, 11 Sup. Ct. 15, 34 L. Ed. 620, where it is said: "Some occupations by the noise made in their pursuit, some by the odors they engender, and some by the dangers accompanying them require regulation as to the locality in which they shall be conducted." That the power to regulate includes the power to confine certain occupations within prescribed limits in a city has been held in many cases, of which the following are examples: *Ex parte Byrd*, 84 Ala. 17, 4 South. 397, 5 Am. St. Rep. 328; *In re Wilson*, 32 Minn. 145, 19 N. W. 723; *Shea v. City of Muncie*, 148 Ind. 14, 46 N. E. 138; *Cronin v. People*, 82 N. Y. 318, 37 Am. Rep. 564; *City of Newton v. Joyce*, 166 Mass. 83, 44 N. E. 116; *State v. Beattie*, 16 Mo. App. 131; *Ex parte Lacey*, 108 Cal. 326, 41 Pac. 411, 38 L. R. A. 640, 49 Am. St. Rep. 93. In the last-mentioned case, the limitation was, as we have seen, regarding the operation of a steam shoddy or steam carpet-beating machine; in *State v. Beattie*, supra, a livery stable; in *City of Newton v. Joyce*, supra, a livery stable for more than four horses; in *Cronin v. People*, supra, the slaughtering of cattle; in *Ex parte Byrd*, supra, the selling of fresh meat; and in the other cases the sale of intoxicating liquor. Warrant for this character of regulation in regard to all these occupations and many others that might be named is to be found in the fact that it may reasonably be determined necessary to the health, morals, safety, or comfort of the people of a city. \* \* \*

The design of the ordinance here involved undoubtedly was to protect such portions of the city of Los Angeles as are devoted principally to residence purposes from the dangers and discomfort attendant upon the operation of certain kinds of business which, while not necessarily nuisances per se, have always been recognized as proper

subjects of police regulation. We do not feel warranted in saying that, as to public laundries and washhouses, the conclusion of the city council was clearly unreasonable. \* \* \* Owing to the peculiar conditions existing in cities, courts are not keen to question the wisdom of the legislative exercise of their police power in these respects. \* \* \* The mere fact that "large portions of the residence district are sparsely built up" cannot affect the determination of this proceeding. Doubtless it was assumed by the city council that such portions would not be "sparsely populated" for any great length of time, an assumption probably warranted by the growth and population of the city during the last few years. \* \* \*

Writ discharged.<sup>1</sup>

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CITY OF PASSAIC v. PATERSON BILL POSTING, ADVERTISING & SIGN PAINTING CO.

(Court of Errors and Appeals of New Jersey 1905. 72 N. J. Law, 285, 62 Atl. 267, 111 Am. St. Rep. 676, 5 Ann. Cas. 995.)

[Error to the Supreme Court of New Jersey. The facts appear in the opinion below.]

SWAYZE, J. The plaintiff in error was convicted of the violation of an ordinance of the city of Passaic regulating signs or billboards and the conviction was affirmed by the Supreme Court. 71 N. J. Law, 75, 58 Atl. 343. The ordinance provides that no sign or billboard shall be at any point more than eight feet above the surface of the ground, and requires that it shall be constructed not less than ten feet from the street line. \* \* \*

It is obvious that the effect of the ordinance is to deprive the landowner of the ordinary use for a lawful business purpose of a portion of his land. Such deprivation is a taking within the meaning of the constitutional provision (*Trenton Water Power Co. v. Raff*, 36 N. J. Law, 335, approved by this court in *Pennsylvania R. R. Co. v. Angel*, 41 N. J. Eq. 316, 7 Atl. 432, 56 Am. Rep. 1); and where no compensation is given to the land owner, the taking can only be justified if it is done in the exercise of the police power of the state. \* \* \*

The Supreme Court held that because the erection of such signs

<sup>1</sup> "Nuisances may thus be classified: First, those which in their nature are nuisances per se or are so denounced by the common law or by statute; second, those which in their nature are not nuisances, but may become so by reason of their locality, surroundings, or the manner in which they may be conducted, managed, etc.; third, those which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds. The power granted by the statute to the governing bodies of municipal corporations to declare what shall be nuisances, and to abate the same, etc., authorizes such bodies to conclusively denounce those things falling within the first and third of these classes to be nuisances, but as to those things falling within the second class the power possessed is only to declare such of them to be nuisances as are in fact so."—*Laugel v. City of Bushnell*, 197 Ill. 20, 26, 27, 63 N. E. 1086, 1088, 58 L. R. A. 266 (1902), by Boggs, J.

might be attended with danger to the public at times of severe storms or by the decay of their supports, the ordinance was not without legal authority. In our opinion the legality of the ordinance does not depend upon the possibility of danger thus suggested, but upon whether such a regulation is reasonably necessary for the public safety. There must always be a possibility of danger from the erection of any structure, and from its decay; but such a possibility is not sufficient to justify the municipal authorities in depriving a man of the ordinary use of his land. In all our cities and towns, fences and buildings are erected upon the street line, involving the same or even greater possibility of danger from severe storms or natural decay, but it would hardly be maintained that a municipality could be authorized by the Legislature to compel the owners of buildings already erected to take them down or move them back ten feet from the street line. Yet the danger to the public from bricks or slates, ice and snow, falling from a building is much greater than any possible danger from a billboard. In determining whether a regulation is reasonably necessary to secure the public safety, and therefore within the legitimate exercise of the police power, existing habits and customs are of great weight, and the universal custom of building upon the street line is cogent evidence that the public safety does not require that structures like billboards should be set back from the line. The very fact that this ordinance is directed against signs and billboards only, and not against fences, indicates that some consideration other than the public safety led to its passage. It is obvious from the face of the ordinance that the object of the first section was not to secure the public safety; that section contains no reference to a dangerous condition of billboards, while the second section expressly undertakes to deal with those that become dangerous.

We think the control attempted to be exercised is in excess of that essential to effect the security of the public. It is probable that the enactment of section 1 of the ordinance was due rather to æsthetic considerations than to considerations of the public safety. No case has been cited, nor are we aware of any case which holds that a man may be deprived of his property because his tastes are not those of his neighbors. Æsthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation. In two similar cases, the courts of other states have reached the same result. *Crawford v. Topeka*, 51 Kan. 756, 33 Pac. 476, 20 L. R. A. 692, 37 Am. St. Rep. 323; *Commonwealth v. Boston Advertising Co.*, 188 Mass. 348, 74 N. E. 601, 69 L. R. A. 817, 108 Am. St. Rep. 494. The view taken by the majority of the Appellate Division in New York is to the same effect. *People v. Green*, 85 App. Div. 400, 83 N. Y. Supp. 460.

In Missouri it was held that the owners of property along a boule-



ward could not be restricted from building within forty feet of the street. *St. Louis v. Hill*, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226.<sup>1</sup> And in Maryland it was held that an ordinance of Baltimore forbidding the grant of a building permit unless in the judgment of the municipal board, the size, general character, and appearance of the building would conform to the general character of the buildings previously erected in the same locality, was invalid. The proposed building in that case was for the purpose of showing wild animals and in reality conducting a continuous circus performance upon one of the most beautiful streets in Baltimore. *Bostock v. Sams*, 95 Md. 400, 52 Atl. 665, 59 L. R. A. 282, 93 Am. St. Rep. 394.

The case differs from *Rideout v. Knox*, 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560. The statute in that case gave a right of action in tort to an adjoining owner where a fence unnecessarily exceeding six feet in height was maliciously erected and maintained. Two elements were necessary for the right of action; the unnecessary character of the fence, and the malicious motive; and the court held that not only must the motive be malicious but the malevolence must be the dominant motive. Such a statute does not deprive the landowner of any ordinary or beneficial use of his property. It merely prevents him from using it to injure his neighbors without benefit to himself.

In *Rochester v. West*, 164 N. Y. 510, 58 N. E. 673, 53 L. R. A. 548, 79 Am. St. Rep. 659, the ordinance under consideration went no further than to require the permission of the common council for the erection of a billboard more than 6 feet in height, and that permission could only be given after notice to owners and occupants of land within 200 feet. The ordinance did not authorize the council to regulate the location and position of the billboard, and we must assume that in granting or withholding the permission, the council would act judicially and solely with reference to considerations of the safety, health, or morals of the public. The court said: "We think this statute conferred upon the common council of the city authority to regulate boards erected for the purpose of bill posting, so far, at least, as such regulation was necessary to the safety or welfare of the inhabitants of the city or persons passing along its streets."<sup>2</sup>

<sup>1</sup> Accord: *Eubank v. Richmond*, 226 U. S. 137, 33 Sup. Ct. 76, 57 L. Ed. —, 42 L. R. A. (N. S.) 1123 (1912) (building line established for each block at will of owners of two-thirds of frontage); *Water Power Cases*, 148 Wis. 124 (1912) (riparian owners deprived of right to create water power). Similarly a city may not, without compensation, plat streets upon private property and refuse to pay for the destruction of buildings erected across such proposed streets before they are afterwards opened. *Forster v. Scott*, 136 N. Y. 577, 32 N. E. 976, 18 L. R. A. 543 (1893). See, also, *Koch v. Delaware, L. & W. R. Co.*, 53 N. J. Law, 256, 21 Atl. 284 (1891). Compare *Matter of New York*, 196 N. Y. 255, 89 N. E. 814, 36 L. R. A. (N. S.) 273, 17 Ann. Cas. 1032 (1909); *In re Chestnut St.*, 118 Pa. 593, 12 Atl. 585 (1888).

<sup>2</sup> See *St. Louis Gunning Advertising Co. v. City of St. Louis*, 235 Mo. 99, 137 S. W. 929 (1911), for an elaborate opinion sustaining such legislation upon

The invalidity of the ordinance in the present case, in our opinion, lies in the fact that it exceeds that necessity. Since the effect of the ordinance is to take private property without compensation, and cannot be justified as an exercise of the police power, it is invalid.

Judgment reversed.<sup>3</sup>

various grounds of public welfare. So of statutes limiting the height of buildings. *Weich v. Swasey*, 193 Mass. 364, 79 N. E. 745, 23 L. R. A. (N. S.) 1160, 118 Am. St. Rep. 523 (1907), affirmed in 214 U. S. 91, 29 Sup. Ct. 567, 53 L. Ed. 923 (1909).

<sup>3</sup> Accord: *People ex rel. Wineburgh Advertising Co. v. Murphy*, 195 N. Y. 126, 88 N. E. 17 (1909) (signs on tops of private buildings), annotated in 21 L. R. A. (N. S.) 735-737.

In *Commonwealth v. Boston Advertising Co.*, 188 Mass. 348, 351, 352, 74 N. E. 601, 602, 69 L. R. A. 817, 108 Am. St. Rep. 494 (1905), *Barker, J.*, said (holding invalid a regulation forbidding the display of large advertising signs upon land or buildings near public parks or parkways): "The question here is not of the power of the state to expend money or to lay taxes to promote aesthetic ends, or to regulate the use of property with a view to promote such ends. It is of the right of the state by such regulations to deprive the owner of property of a natural use of that property without giving compensation for the resulting loss to the owner. Probably no one would care at present to deny that without compensation 'the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community.' *Field, J.*, in *Crowley v. Christensen*, 137 U. S. 86, 89, 11 Sup. Ct. 13, 34 L. Ed. 620. Beyond the purpose named, there are many others of a public nature, the promotion of which may involve the taking or damaging of the property of individuals, and as to which there well may be differences of opinion as to whether the state must afford compensation if such loss or damage is inflicted. One of them is the education of youth. Probably all will agree that, judged by any fair standard, the promotion of education stands upon a higher plane than the promotion of aesthetic culture or enjoyment, and would the better justify the imposition of a burden without compensation. But no one would contend that the state could authorize the taking of land for a schoolhouse without providing compensation for the owner. In a very recent case this court, in dealing with a statute requiring street railway companies to transport school children at reduced rates of fare, has held that, if it appeared that the enforcement of the act would cause expense which the carrier must bear or put upon other patrons, we should be obliged to hold that there was a taking of property without due process of law. *Com. v. Interstate Cons. St. Ry. Co.*, 187 Mass. 436, 73 N. E. 530 [11 L. R. A. (N. S.) 973, 2 Ann. Cas. 419]. If the police power, technically so called, will not justify a taking of property without compensation to promote the education of youth, it cannot justify such a taking for the promotion of merely aesthetic purposes."

Advertising vans may be prohibited in crowded city streets. *Fifth Ave. Coach Co. v. City of New York*, 194 N. Y. 19, 86 N. E. 824, 21 L. R. A. (N. S.) 744, 16 Ann. Cas. 695 (1909), affirmed in 221 U. S. 467, 31 Sup. Ct. 709, 55 L. Ed. 815 (1911).

Compare *Questions and Answers*, 103 Me. 506, 69 Atl. 627 (1907) (restriction of tree cutting on wild private land); *Bigelow v. Whitcomb*, 72 N. H. 473, 57 Atl. 680, 65 L. R. A. 676 (1904) (same on highways where public has only an easement).

DOBBINS v. LOS ANGELES (1904) 195 U. S. 223, 238-241, 25 Sup. Ct. 18, 49 L. Ed. 169, Mr. Justice DAY (holding invalid as against plaintiff an ordinance suddenly changing the limits within which gas-works might be operated in the city):

"We think a case is made which called for the protection of the courts against arbitrary interference with the rights of the plaintiff in error. Complying with the terms of the ordinance which was in force when the plaintiff in error was about to begin the erection of the gas-works in controversy, a tract of land was purchased within the district wherein the erection of such works was permitted, a contract was entered into for the construction of the works, a considerable sum of money was expended. It may be admitted as being a correct statement of the law as held by the California supreme court that, notwithstanding the grant of the permit, and even after the erection of the works, the city might still, for the protection of the public health and safety, prohibit the further maintenance and continuance of such works, and the prosecution of the business, originally harmless, may become by reason of the manner of its prosecution or a changed condition of the community, a menace to the public health and safety. In other words, the right to exercise the police power is a continuing one, and a business lawful to-day may, in the future, because of the changed situation, the growth of population, or other causes, become a menace to the public health and welfare, and be required to yield to the public good. *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.*, 115 U. S. 672, 6 Sup. Ct. 252, 29 L. Ed. 524.

"But the exercise of the police power is subject to judicial review, and property rights cannot be wrongfully destroyed by arbitrary enactment. It was averred that the works would be so constructed so as not to interfere with the health or safety of the people. No reasonable explanation for the arbitrary exercise of power in the case is suggested. The narrowing of the limits within which the plaintiff in error, in compliance with the ordinance of the city and the permit of the board of fire commissioners, was proceeding to erect the gasworks, to the smaller and more limited section, was not demanded by the public welfare, and, taking the facts as alleged in the bill, seems rather to have been actuated by the purpose to exclude the plaintiff in error from further prosecution of the enterprise. The limits of the privileged district were fixed late in August. In September the complainant began the construction of the works. In November, without changed conditions or adequate reason, the council, by an amended ordinance, draw a line embracing a part of the district including the complainant's property, and declare that, too, shall be prohibited territory. This action is strongly corroborative of the allegations of the bill that the purpose was not police regulation in the interest of the public, but the destruction of the plaintiff's rights, and the building up of another

company still within the privileged district after the passage of the amendment. Being the owner of the land, and having partially erected the works, the plaintiff in error had acquired property rights, and was entitled to protection against unconstitutional encroachments which would have the effect to deprive her of her property without due process of law.

"It is averred in the bill of complaint that the district within which the works were being erected was one given over to manufacturing enterprises, some of which were fully as obnoxious as gasworks possibly could be; that it contained large spaces of unoccupied lands, worthless except for manufacturing purposes, and, by clear inference, that there was nothing in the situation which rendered it necessary, in order to protect the city from a noisome and unhealthy business, to decrease the area within which gasworks could lawfully be erected.

"It is urged that, where the exercise of legislative or municipal power is clearly within constitutional limits, the courts will not inquire into the motives which may have actuated the legislative body in passing the law or ordinance in question. Whether, when it appears that the facts would authorize the exercise of the power, the courts will restrain its exercise because of alleged wrongful motives inducing the passage of an ordinance, is not a question necessary to be determined in this case; but where the facts as to the situation and conditions are such as to establish the exercise of the police power in such manner as to oppress or discriminate against a class or an individual, the courts may consider and give weight to such purpose in considering the validity of the ordinance. This court in the case of *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, held that, although an ordinance might be lawful upon its face, and apparently fair in its terms, yet, if it was enforced in such a manner as to work a discrimination against a part of the community, for no lawful reason, such exercise of power would be invalidated by the courts. \* \* \*

"In this case we think the allegations of the bill disclose such character of territory, such sudden and unexplained change of its limits after the plaintiff in error had purchased the property and gone forward with the erection of the works, as to bring it within that class of cases wherein the court may restrain the arbitrary and discriminatory exercise of the police power which amounts to a taking of property without due process of law and an impairment of property rights protected by the fourteenth amendment to the federal Constitution."

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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 determine. 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 department 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.<sup>1</sup>

[Mr. Justice FIELD gave a dissenting opinion.]

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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.)

See ante, p. 232, for a report of this case.

<sup>1</sup> Contra: *People v. Marx*, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34 (1885) (where, however, assumed object of statute was protection of dairy interests from competition). As to power of state over oleomargarine in interstate commerce, see *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223 (1894); *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49 (1898); *Collins v. New Hampshire*, 171 U. S. 30, 18 Sup. Ct. 768, 43 L. Ed. 60 (1898).

## HOLDEN v. HARDY.

(Supreme Court of United States, 1898. 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780.)

[Error to the Supreme Court of Utah. A Utah statute forbade the employment of workmen over eight hours a day in any underground mine, or in any smelter or other institution for reducing or refining ores, except in cases of emergency imminently dangerous to life or property. Holden was convicted in a justice's court in Salt Lake county of violating both prohibitions of this statute, and petitioned the state Supreme Court for a writ of habeas corpus to discharge him from the sheriff's custody upon each conviction. From a denial of this application he took this writ of error.]

Mr. Justice BROWN. \* \* \* [The cases that have arisen under the fourteenth amendment] may be divided, generally, into two classes: First, where a state legislature or a state court is alleged to have unjustly discriminated in favor of or against a particular individual or class of individuals, as distinguished from the rest of the community, or denied them the benefit of due process of law; second, where the legislature has changed its general system of jurisprudence by abolishing what had been previously considered necessary to the proper administration of justice, or the protection of the individual. \* \* \* [Various cases are here mentioned or commented upon.]

An examination of both these classes of cases under the fourteenth amendment will demonstrate that, in passing upon the validity of state legislation under that amendment, this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that, in some of the states, methods of procedure which, at the time the constitution was adopted, were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals, had proved detrimental to their interests, while, upon the other hand, certain other classes of persons (particularly those engaged in dangerous or unhealthful employments) have been found to be in need of additional protection. Even before the adoption of the constitution, much had been done towards mitigating the severity of the common law, particularly in the administration of its criminal branch. The number of capital crimes in this country, at least, had been largely decreased. Trial by ordeal and by battle had never existed here, and had fallen into disuse in England. The earlier practice of the common law, which denied the benefit of witnesses to a person accused of felony, had been abolished by statute, though, so far as it deprived him of the assistance of counsel and compulsory process for the attendance of his witnesses, it had not been changed in England. But, to the credit of her American colonies, let it be said that so oppressive a doctrine had never obtained a foothold there.

The present century has originated legal reforms of no less importance. The whole fabric of special pleading, once thought to be necessary to the elimination of the real issue between the parties, has crumbled to pieces. The ancient tenures of real estate have been largely swept away, and land is now transferred almost as easily and cheaply as personal property. Married women have been emancipated from the control of their husbands, and placed upon a practical equality with them, with respect to the acquisition, possession, and transmission of property. Imprisonment for debt has been abolished. Exemptions from execution have been largely added to, and in most of the states homesteads are rendered incapable of seizure and sale upon forced process. Witnesses are no longer incompetent by reason of interest, even though they be parties to the litigation. Indictments have been simplified, and an indictment for the most serious of crimes is now the simplest of all. In several of the states, grand juries, formerly the only safeguard against a malicious prosecution, have been largely abolished; and in others the rule of unanimity, so far as applied to civil cases, has given way to verdicts rendered by a three-fourths majority.

This case does not call for an expression of opinion as to the wisdom of these changes, or their validity under the fourteenth amendment, although the substitution of prosecution by information in lieu of indictment was recognized as valid in *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. Ed. 232. They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that, while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a large extent inflexible, and exceedingly difficult of amendment, should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens, as they may deem best for the public welfare, without bringing them into conflict with the supreme law of the land.

Of course, it is impossible to forecast the character or extent of these changes; but in view of the fact that, from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and particularly to the new relations between employers and employés, as they arise. \* \* \*

Recognizing the difficulty in defining with exactness the phrase "due process of law," it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the state, without compensation, and that

no one shall be condemned in his person or property without an opportunity of being heard in his own defense.

As the possession of property, of which a person cannot be deprived, doubtless implies that such property may be acquired, it is safe to say that a state law which undertakes to deprive any class of persons of the general power to acquire property would also be obnoxious to the same provision. Indeed, we may go a step further, and say that as property can only be legally acquired, as between living persons, by contract, a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property, would be equally invalid. \* \* \* [Here follows a quotation from *Allgeyer v. Louisiana*, ante, p. 235.]

This right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous or so far detrimental to the health of employes as to demand special precautions for their well-being and protection, or the safety of adjacent property. While this court has held (notably in the cases of *Davidson v. New Orleans*, 96 U. S. 97, and *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064) that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances, and a large discretion "is necessarily vested in the legislature, to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." *Lawton v. Steele*, 152 U. S. 133, 136, 14 Sup. Ct. 499, 38 L. Ed. 385. \* \* \*

While the business of mining coal and manufacturing iron began in Pennsylvania as early as 1716, and in Virginia, North Carolina, and Massachusetts even earlier than this, both mining and manufacturing were carried on in such a limited way, and by such primitive methods, that no special laws were considered necessary, prior to the adoption of the Constitution, for the protection of the operatives; but, in the vast proportions which these industries have since assumed, it has been found that they can no longer be carried on, with due regard to the safety and health of those engaged in them, without special protection against the dangers necessarily incident to these employments. In consequence of this, laws have been enacted in most of the states designed to meet these exigencies, and to secure the safety of persons peculiarly exposed to these dangers. Within this general category are ordinances providing for fire escapes for hotels, theaters, factories, and other large buildings; a municipal inspection of boilers; and appliances designed to secure passengers upon railways and steamboats against the dangers necessarily incident to these methods of transportation. In states where manufacturing is carried on to a



large extent, provision is made for the protection of dangerous machinery against accidental contact; for the cleanliness and ventilation of working rooms; for the guarding of well holes, stairways, elevator shafts; and for the employment of sanitary appliances. In others, where mining is the principal industry, special provision is made for the shoring up of dangerous walls; for ventilation shafts, bore holes, escapement shafts, means of signaling the surface; for the supply of fresh air, and the elimination, as far as possible, of dangerous gases; for safe means of hoisting and lowering cages; for a limitation upon the number of persons permitted to enter a cage; that cages shall be covered; and that there shall be fences and gates around the top of shafts, besides other similar precautions. \* \* \* [Here follow references to various state statutes.]

But, if it be within the power of a legislature to adopt such means for the protection of the lives of its citizens, it is difficult to see why precautions may not also be adopted for the protection of their health and morals. It is as much for the interest of the state that the public health should be preserved as that life should be made secure. With this end in view, quarantine laws have been enacted in most, if not all, of the states; insane asylums, public hospitals, and institutions for the care and education of the blind established; and special measures taken for the exclusion of infected cattle, rags, and decayed fruit. In other states laws have been enacted limiting the hours during which women and children shall be employed in factories; and while their constitutionality, at least as applied to women, has been doubted in some of the states, they have been generally upheld. \* \* \*

Upon the principles above stated, we think the act in question may be sustained as a valid exercise of the police power of the state. The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction, or refining of ores or metals. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employés; and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the federal courts.

While the general experience of mankind may justify us in believing that men may engage in ordinary employments more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases generated by the processes of refining or smelting. \* \* \*

The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The for-

mer naturally desire to obtain as much labor as possible from their employés, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority.

It may not be improper to suggest in this connection that although the prosecution in this case was against the employer of labor, who apparently, under the statute, is the only one liable, his defense is not so much that his right to contract has been infringed upon, but that the act works a peculiar hardship to his employés, whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace and greater cogency from the latter class. But the fact that both parties are of full age, and competent to contract, does not necessarily deprive the state of the power to interfere, where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. "The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer."

We have no disposition to criticise the many authorities which hold that state statutes restricting the hours of labor are unconstitutional. Indeed, we are not called upon to express an opinion upon this subject. It is sufficient to say of them that they have no application to cases where the legislature had adjudged that a limitation is necessary for the preservation of the health of employés, and there are reasonable grounds for believing that such determination is supported by the facts. \* \* \*

Judgment affirmed.<sup>1</sup>

[BREWER and PECKHAM, JJ., dissented.]

<sup>1</sup> As to how far a person may be compelled to refrain from private acts injurious principally to himself, see *Ah Lim v. Territory*, 1 Wash. 156, 24 Pac. 588, 9 L. R. A. 395 (1890) (smoking opium); *City of St. Joseph v. Harris*, 59 Mo. App. 122 (1894) (intoxication); *City of Greenville v. Kennels*, 58 S. C. 427, 36 S. E. 727, 50 L. R. A. 725 (1900) (gambling); *City of St. Louis v. Fitz*, 53 Mo. 582 (1873) (association with thieves and prostitutes) [see, also, *Ex parte Smith*, 135 Mo. 223, 36 S. W. 628, 33 L. R. A. 606, 58 Am. St. Rep. 576]; *In re Morgan*, 26 Colo. 415, 58 Pac. 1071, 47 L. R. A. 52, 77 Am. St. Rep. 269 (1899) (miners' eight-hour law).

## 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 employee 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 employees 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 employees, 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. Christensen*, 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 con-

tract. 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 employee), 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*, \* \* \* [ante, p. 409, which is here stated.]

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 employees 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*, post, p. 444, and *Petit v. Minnesota*, ante, p. 358, note, 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 constitu-

tional 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 necessary 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 employee, 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 employee. 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, law-

yers, real estate, and many other kinds of business, aided by many clerks, messengers, and other employees. 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 employees 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 employees, 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 employees 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 employees, 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 employees, 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 employees (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 employees. Under such circumstances the freedom of master and employee 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. \* \* \*<sup>1</sup>

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

<sup>1</sup> In *Low v. Rees Printing Co.*, 41 Neb. 127, 59 N. W. 362, 24 L. R. A. 702, 43 Am. St. Rep. 670 (1894), a general eight-hour law, applicable to most employments without regard to considerations of health was held invalid. So *Opinion of Justices*, 208 Mass. 619, 94 N. E. 1044, 34 L. R. A. (N. S.) 771 (1911) (semble).

Laws forbidding labor on Sunday, save in emergencies, are everywhere upheld. *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166 (1896); *Petit v. Minnesota*, 177 U. S. 164, 20 Sup. Ct. 666, 44 L. Ed. 716 (1900).

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 post-office, 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.<sup>2</sup>

<sup>2</sup> In *Matter of Jacobs*, 98 N. Y. 98, 103, 112-114, 50 Am. Rep. 636 (1885), the court held invalid a New York statute entitled "An act to improve the public health," etc., the material parts of which were:

"Section 1. The manufacture of cigars or preparation of tobacco in any form on any floor, or in any part of any floor, in any tenement-house is hereby prohibited, if such floor or any part of such floor is by any person occupied as a home or residence for the purpose of living, sleeping, cooking, or doing any household work therein.

"Sec. 2. Any house, building, or portion thereof occupied as the home or residence of more than three families living independently of one another, and doing their cooking upon the premises, is a tenement-house within the meaning of this act.

"Sec. 3. The first floor of said tenement-house on which there is a store for the sale of cigars and tobacco shall be exempt from the prohibition provided in section one of this act."

The act was applicable only to cities of over 500,000 inhabitants, and its violation was made a misdemeanor. Earl, J., said:

"The facts as they appeared before the police justice were as follows: The relator at the time of his arrest lived with his wife and two children in a tenement-house in the city of New York in which three other families also lived. There were four floors in the house, and seven rooms on each floor, and each floor was occupied by one family living independently of the others and doing their cooking in one of the rooms so occupied. The relator at the



ATKIN v. KANSAS (1903) 191 U. S. 207, 220, 221-223, 24 Sup. Ct. 124, 48 L. Ed. 148, Mr. Justice HARLAN (upholding a Kansas statute punishing any contractor employed upon *public* work who permitted his employees to labor more than eight hours a day upon such work, except where necessary to protect life or property in emergencies):

"Such corporations are the creatures—mere political subdivisions—of the state, for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted. What they law-

time of his arrest was engaged in one of his rooms in preparing tobacco and making cigars, but there was no smell of tobacco in any part of the house except the room where he was thus engaged. \* \* \*

"A law enacted in the exercise of the police power must in fact be a police law. If it be a law for the promotion of the public health, it must be a health law, having some relation to the public health. \* \* \* We must take judicial notice of the nature and qualities of tobacco. \* \* \* It has never been said, so far as we can learn, and it was not affirmed even on the argument before us, that its preparation and manufacture into cigars were dangerous to the public health. We are not aware and are not able to learn, that tobacco is even injurious to the health of those who deal in it, or are engaged in its production or manufacture. We certainly know enough about it to be sure that its manipulation in one room can produce no harm to the health of the occupants of other rooms in the same house. It was proved in this case that the odor of the tobacco did not extend to any of the other rooms of the tenement-house. \* \* \*

"To justify this law it would not be sufficient that the use of tobacco may be injurious to some persons, or that its manipulation may be injurious to those who are engaged in its preparation and manufacture; but it would have to be injurious to the public health. This law was not intended to protect the health of those engaged in cigarmaking, as they are allowed to manufacture cigars everywhere except in the forbidden tenement-houses. It cannot be perceived how the cigarmaker is to be improved in his health or his morals by forcing him from his home and its hallowed associations and beneficent influences, to ply his trade elsewhere. It was not intended to protect the health of that portion of the public not residing in the forbidden tenement-houses, as cigars are allowed to be manufactured in private houses, in large factories and shops in the two crowded cities, and in all other parts of the state. What possible relation can cigarmaking in any building have to the health of the general public? Nor was it intended to improve or protect the health of the occupants of tenement-houses. If there are but three families in the tenement-house, however numerous and gregarious their members may be, the manufacture is not forbidden; and it matters not how large the number of the occupants may be if they are not divided into more than three families living and cooking independently. If a store is kept for the sale of cigars on the first floor of one of these houses, and thus more tobacco is kept there than would otherwise be, and the baneful influence of tobacco, if any, is thus increased, that floor, however numerous its occupants, or the occupants of the house, is exempt from the operation of the act. What possible relation to the health of the occupants of a large tenement-house could cigarmaking in one of its remote rooms have? If the legislature had in mind the protection of the occupants of tenement-houses, why was the act confined in its operation to the two cities only? It is plain that this is not a health law, and that it has no relation whatever to the public health."

For the limitations upon legislative power to regulate tenement and boarding houses, see *Bonnett v. Vallier*, 136 Wis. 193, 116 N. W. 885, 17 L. R. A. (N. S.) 486, 128 Am. St. Rep. 1061 (1908).

fully do of a public character is done under the sanction of the state. They are, in every essential sense, only auxiliaries of the state for the purposes of local government. \* \* \*

"The improvement of the boulevard in question was a work of which the state, if it had deemed it proper to do so, could have taken immediate charge by its own agents; for it is one of the functions of government to provide public highways for the convenience and comfort of the people. Instead of undertaking that work directly, the state invested one of its governmental agencies with power to care for it. Whether done by the state directly or by one of its instrumentalities, the work was of a public, not private character.

"If then, the work upon which the defendant employed Reese was of a public character, it necessarily follows that the statute in question, in its application to those undertaking work for or on behalf of a municipal corporation of the state, does not infringe the personal liberty of any one. It may be that the state, in enacting the statute, intended to give its sanction to the view held by many, that, all things considered, the general welfare of employees, mechanics, and workmen, upon whom rest a portion of the burdens of government, will be subserved if labor performed for eight continuous hours was taken to be a full day's work; that the restriction of a day's work to that number of hours would promote morality, improve the physical and intellectual condition of laborers and workmen, and enable them the better to discharge the duties appertaining to citizenship.

"We have no occasion here to consider these questions, or to determine upon which side is the sounder reason; for whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the state to declare that no one undertaking work *for it or for one of its municipal agencies* should permit or require an employe on such work to labor in excess of eight hours each day, and to inflict punishment upon those who are embraced by such regulations and yet disregard them. It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern.

"If it be contended to be the right of every one to dispose of his labor upon such terms as he deems best,—as undoubtedly it is,—and that to make it a criminal offense for a contractor for public work to permit or require his employe to perform labor upon that work in excess of eight hours each day is in derogation of the liberty both

of employees and employer, it is sufficient to answer that no employee is entitled, of absolute right and as a part of his liberty, to perform labor for the state; and no contractor for public work can excuse a violation of his agreement with the state by doing that which the statute under which he proceeds distinctly and lawfully forbids him to do. \* \* \*

"Some stress is laid on the fact stipulated by the parties for the purposes of this case, that the work performed by defendant's employee is not dangerous to life, limb, or health, and that daily labor on it for ten hours would not be injurious to him in any way. In the view we take of this case, such considerations are not controlling. We rest our decision upon the broad ground that the work being of a public character, absolutely under the control of the state and its municipal agents acting by its authority, it is for the state to prescribe the conditions under which it will permit work of that kind to be done. Its action touching such a matter is final so long as it does not, by its regulations, infringe the personal rights of others; and that has not been done."<sup>1</sup>

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

#### McLEAN v. ARKANSAS.

(Supreme Court of United States, 1900. 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

<sup>1</sup> Contra: See *People v. Orange County Road Const. Co.*, 175 N. Y. 84, 67 N. E. 129, 65 L. R. A. 33 (1903); *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. Rep. 605 (1901) (rate of wages)—both overruled by constitutional amendment; *People ex rel. Williams Engineering & Contracting Co. v. Metz*, 193 N. Y. 148, 85 N. E. 1070, 24 L. R. A. (N. S.) 201 (1908). The cases accord and contra are collected in 8 L. R. A. (N. S.) 131-134. See the argument of Cullen, C. J., in *People ex rel. Cossey v. Grout*, 179 N. Y. 417, 425-428, 72 N. E. 464, 1 Ann. Cas. 39 (1904). See, also, *Adams v. Brennan*, post, p. 411.

*Atkin v. Kansas* was followed in *Ellis v. United States*, 206 U. S. 246, 27 Sup. Ct. 600, 51 L. Ed. 1047, 11 Ann. Cas. 589 (1907), as to the exercise of a similar power by the United States. See note, p. 963, post.

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 employees, did not conflict with any provisions of the Constitution of the United States, protecting the right of contract.<sup>1</sup> 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

<sup>1</sup> Compare *Jordan v. State*, 51 Tex. Cr. R. 531, 103 S. W. 633, 11 L. R. A. (N. S.) 603, 14 Ann. Cas. 616 (1907) (penal prohibition of issue of store orders even at *employee's* option, invalid—collecting cases).

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;<sup>2</sup> 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

<sup>2</sup> Accord: *City of Chicago v. Schmidinger*, 243 Ill. 167, 90 N. E. 369, 17 Ann. Cas. 614 (1909), affirmed *Schmidinger v. City of Chicago*, 226 U. S. 578, 33 Sup. Ct. 182, 57 L. Ed. — (1913).



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.<sup>3</sup>

[BREWER and PECKHAM, JJ., dissented.]

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FROST v. CHICAGO (1899) 178 Ill. 250, 251-253, 52 N. E. 869, 49 L. R. A. 657, 69 Am. St. Rep. 301, Mr. Chief Justice CARTER:

"Plaintiff in error was found guilty in the court below of violating an ordinance of the city of Chicago, and fined \$15 and costs. The ordinance provided:

"Sec. 1000. Colored Netting for Covering.—It shall be and is hereby made unlawful to cover any box, basket, or any other package or parcel of fruit, berries or vegetables of any kind, with any colored netting, or any other material which has a tendency to conceal the true color or quality of any such goods which may be sold, offered for sale or had in possession for the purpose of being sold or offered for sale. Any person who shall violate the provisions of this section shall, upon conviction, be fined not less than \$10 or more than \$25 for each offense."

"The testimony tended to show that the defendant below sold peaches in baskets covered with red tarlatan,—a perforated cloth,—and that these baskets of peaches had been shipped to him from the state of Michigan, put up in the same manner in which he sold them. There was some evidence to the effect that this colored netting tended to conceal the 'true color or quality' of the fruit, and some to the con-

<sup>3</sup> As to validity of statutes requiring weekly or biweekly payment of wages, see Opinion of Justices, 163 Mass. 589, 40 N. E. 713, 28 L. R. A. 344 (1895); New York Cent. & H. R. Ry. Co. v. Williams, 199 N. Y. 108, 92 N. E. 404, 35 L. R. A. (N. S.) 549, note, 139 Am. St. Rep. 850 (1910).

In *State v. Loomis*, 115 Mo. 307, 329, 330, 22 S. W. 350, 356, 21 L. R. A. 780 (1893), Barclay, J., dissenting, said (discussing a Missouri statute forbidding persons engaged in manufacturing or mining to issue any "store orders" in payment of wages unless redeemable in cash at the option of the holder): "[The] decisions show that the right of self-preservation, which exists in the commonwealth no less than in the individual, may, in some circumstances, justify limitations upon freedom of contract; and that when, for any reason (for instance, the existence of a monopoly), real liberty of action is wanting on the side of one of the parties, in dealings forming part of the activities of civilized society, a reasonable check may justly be placed by law upon the power of the other to oppress his fellow-citizen. Such checks upon liberty of contract have been sustained by the highest courts. \* \* \* As the employer fixes the price of the goods, he is not prejudiced by such a regulation. Its effect is to establish a just standard of value for every dollar due for wages. It does not differ in principle from governmental regulations in the form of laws by which a person who has contracted to receive a yard of cloth or a bushel of corn is protected against the necessity of accepting such a short yard or light bushel as the seller may choose to impose upon him. Statutes designed to prevent that sort of overreaching have been universally regarded as proper exertions of the police power."

trary. It appears from the record that large quantities of fruit put up in this manner are shipped and sold; that a covering of some kind is necessary to prevent loss of the fruit by pilfering and other means, and to protect it from insects; that such fruit requires ventilation; and that experience has demonstrated that a covering of netting is better than one of wood, paper, or other material, because it allows free access of air, does not bruise the fruit, and affords better means of inspection. \* \* \*

"We have reached the conclusion that the ordinance is a vexatious and unreasonable interference with and restriction upon the rights of dealers in certain articles of trade and commerce. The only valid basis upon which such a regulation can rest is that its purpose is to prevent deception, and imposition upon buyers of such articles as are named in the ordinance. The evidence shows, as common observation would teach, that such packages must have some covering, and shows, also, that tarlatan has been found the best and most suitable covering for the preservation of fruit so packed and sold; and the validity of the ordinance is made to depend, and indeed its validity is defended only, upon the question of the color of the material. It is not pretended that there is anything in red tarlatan which is deleterious to health, or which imparts to the fruit any noxious material or quality, but only that it tends to impart to the fruit beneath a more wholesome tint or appearance than it would otherwise have.

"It is natural, and not unlawful, for the packer and dealer to put up and offer for sale his goods in an attractive form; and a regulation would not seem to be reasonable which would prevent the dealer in certain commodities from offering for sale his goods in packages tinted so as to correspond in some degree with the color of the goods themselves. No buyer who is ordinarily careful and intelligent is deceived by such devices of tradesmen. He may examine what he buys, and no law can protect him from the consequences arising only from his own folly. At most, the colored netting would tend to conceal the true color or quality of only the top layer of the fruit in the package, leaving the same latitude for deception as in cases where no covering is used. It will be noticed that the provision in question of the ordinance does not make it unlawful to sell decayed or unwholesome fruit, or to practice deception on the public by methods employed in packing or displaying it. \* \* \* It was shown, and is a matter of common knowledge, that much fruit is shipped and sold wrapped up in tissue paper and in tinfoil, and in packages and baskets covered with wood, all of which material effectually conceals the 'true color and quality' of the fruit, until removed. It would be as reasonable to prohibit the one as the other."

Judgment reversed.<sup>1</sup>

<sup>1</sup> In *People v. Hawkins*, 157 N. Y. 1, 9, 51 N. E. 257, 259, 42 L. R. A. 490, 63 Am. St. Rep. 736 (1898), holding invalid a law requiring the labeling of all convict-made goods, O'Brien, J., said (in an individual opinion): "It would

STATE v. SHOREY (1906) 48 Or. 396, 398-400, 86 Pac. 881, 24 L. R. A. (N. S.) 1121, BEAN, J. (upholding a statute forbidding the employment of children under 16 years of age for more than 10 hours a day or 6 days a week. This was claimed to violate the fourteenth amendment and the state Constitution):

"These constitutional provisions do not limit the power of the state to interfere with the parental control of minors, or to regulate the right of a minor to contract, or of others to contract with him. 2 Tiedeman on State & Fed. Const. § 195. It is competent for the state to forbid the employment of children in certain callings merely because it believes such prohibition to be for their best interest, although the prohibited employment does not involve a direct danger to morals, decency, or of life or limb. Such legislation is not an unlawful interference with the parents' control over the child or right to its labor, nor with the liberty of the child. *People v. Ewer*, 141 N. Y. 129, 36 N. E. 4, 25 L. R. A. 794, 38 Am. St. Rep. 788, affirming *In re Ewer*, 70 Hun. 239, 24 N. Y. Supp. 500. Laws prohibiting the employment of adult males for more than a stated number of hours per day or week are not valid unless reasonably necessary to protect the public

be trifling with the constitution to attempt to uphold this law on the ground that all producers or vendors of goods may be required to tell the truth concerning them, both as to their quality and the means by which or the place where they were manufactured. A knowledge of the truth concerning the origin of every article of property which is the subject of sale, trade, or commerce cannot be essential to the public welfare; and, even if it was, the law could be effective only when applied to all property alike, and not limited to articles made in certain places, and by a certain class of workmen. Any attempt to carry the police power to such an extent as to require the owner of an article of property kept for sale, such as a scrubbing brush, to label it with the history of its origin, and to indicate the place where it was made, and the class of workmen that produced it, and to enforce such regulations by the aid of the criminal law must be regarded as an inexcusable and intolerable invasion of the rights and liberty of the citizen." [A majority of the court concurred upon the ground of the commerce clause of the federal Constitution. See, also, *Opinion of Justices*, 211 Mass. 605, 98 N. E. 334, Ann. Cas. 1913B, 815 (1912).]

Parker, C. J. (with whom concurred Bartlett and Haight, JJ.) dissenting (157 N. Y. 28, 29, 51 N. E. 266 [42 L. R. A. 490, 68 Am. St. Rep. 730]): "The people of the state have forbidden the selling of articles manufactured in our prisons, for the reason that they deemed it to be against a sound public policy to permit some of the citizens of the state skilled in certain kinds of labor to be subjected to competition with the unpaid labor of convicts. \* \* \* This statute neither prohibits nor attempts to prohibit other states, or the citizens of other states, from putting prison-made goods upon our markets; nor does it prohibit our own citizens from buying or selling them. If it did, then, concededly, the statute would be in violation of the commerce clause of the federal constitution, and void. It simply requires that prison-made merchandise shall be so branded that our citizens shall know where the goods they are buying were made. This they have a right to know, for they voted to burden themselves with additional taxation rather than longer to permit a competition which they regarded as a public wrong, and they are, therefore, entitled to such legislation as will permit them to know the truth in regard to articles offered them for sale, in order that they may not, through lack of information, have forced upon them that which they would not buy advisedly."

health, safety, morals or general welfare, because the right to labor or employ labor on such terms as may be agreed upon is a liberty or property right guaranteed to such persons by the fourteenth amendment to the Constitution of the United States, and with which the state cannot interfere. *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133. But laws regulating the right of minors to contract do not come within this principle. They are not *sui juris*, and can only contract to a limited extent. They are wards of the state and subject to its control. As to them the state stands in the position of *parens patriæ* and may exercise unlimited supervision and control over their contracts, occupation, and conduct, and the liberty and right of those who assume to deal with them. This is a power which inheres in the government for its own preservation and for the protection of the life, person, health, and morals of its future citizens. 'It has been well remarked,' says Mr. Justice Gray in *People v. Ewer*, *supra*, 'that the better organized and trained the race, the better it is prepared for holding its own. Hence it is that laws are enacted looking to the compulsory education by parents of their children, and to their punishment for cruel treatment; and which limit and regulate the employment of children in the factory and the workshop to prevent injury from excessive labor. It is not, and cannot be disputed, that the interest which the state has in the physical, moral, and intellectual well-being of its members warrants the implication, and the exercise, of every just power, which will result in preparing the child, in future life, to support itself, to serve the state and in all the relations and duties of adult life to perform well and capably its part.'

"The supervision and control of minors is a subject which has always been regarded as within the province of legislative authority. How far it shall be exercised is a question of expediency and propriety which it is the sole province of the Legislature to determine. The judiciary has no authority to interfere with the Legislature's judgment on that subject, unless, perhaps, its enactments are so manifestly unreasonable and arbitrary as to be invalid on that account. \* \* \* Mr. Freund, in his work on *Police Power*, says: 'The constitutionality of legislation for the protection of children or minors is rarely questioned; and the Legislature is conceded a wide discretion in creating restraints.' And: 'Even the courts which take a very liberal view of individual liberty and are inclined to condemn paternal legislation would concede that such paternal control may be exercised over children, so especially in the choice of occupations, hours of labor, payment of wages, and everything pertaining to education, and in these matters a wide and constantly expanding legislative activity is exercised.' Freund, *Police Power*, § 259."<sup>1</sup>

<sup>1</sup> Accord: *People v. Ewer*, 141 N. Y. 129, 36 N. E. 4, 25 L. R. A. 794, 38 Am. St. Rep. 788 (1894) (employment of children under 14 in theatrical exhibitions, etc.).

## In re SHARP.

(Supreme Court of Idaho, 1908. 15 Idaho, 120, 96 Pac. 563, 18 L. R. A. [N. S.] 880.)

[Habeas corpus. An Idaho statute (Laws 1905, p. 106) provided for the detention and care of delinquent children at a state industrial training school. Hazel Sharp, a girl 14 years old, was committed to this institution by a county probate judge under this act, no irregularity being alleged in the proceedings. Her father applied for a writ of habeas corpus for her discharge, alleging the act to be unconstitutional upon the grounds, among others, stated in the opinion.]

AILSHIE, C. J. \* \* \* The first contention made by petitioner's counsel is that the act of March 2, 1905, entitled "An act to provide for the care of delinquent children" (Sess. Laws 1905, p. 106), is in conflict with and in violation of sections 6, 7, 13, and 18, of article 1 of the Constitution, for the reason that it denies the right of trial by jury, speedy and public hearing, process for attendance of witnesses, the right to appear and defend in person and by counsel, and the right of bail, and that the proceeding is without due process of law. We shall not go into a discussion of this question, or into any extended consideration of the distinction between this act and its purposes and provisions and that of the general spirit of the criminal law. These questions have all been so extensively, exhaustively, and lucidly considered and discussed by so many courts within recent years that we shall content ourselves with a citation of some of the authorities. We may premise our citation of authorities, however, by a general statement that this statute is clearly not a criminal or penal statute in its nature. Its purpose is rather to prevent minors under the age of 16 from prosecution and conviction on charges of misdemeanors, and in that respect to relieve them from the odium of criminal prosecutions and punishments. Its object is to confer a benefit both upon the child and the community in the way of surrounding the child with better and more elevating influences, and of educating and training him in the direction of good citizenship and thereby saving him to society and adding a good and useful citizen to the community. This, too, is done for the minor at a time when he is not entitled, either by natural law or the laws of the land, to his absolute freedom, but rather at a time when he is subject to the restraint and custody of either a natural guardian or a legally constituted and appointed guardian to whom he owes obedience and subjection. Under this law the state, for the time being, assumes to discharge the parental duty and to direct his custody and assume his restraint.

As late as 1905, the Supreme Court of Pennsylvania in *Commonwealth v. Fisher*, 213 Pa. 48, 62 Atl. 198, 5 Ann. Cas. 92, had under consideration these same constitutional objections to a legislative act



providing for the care and custody of delinquent children, and, in the course of its opinion, the court said: "In pressing the objection that the appellant was not taken into custody by due process of law, the assumption, running through the entire argument of the appellant, is contended that the proceedings of the act of 1903 are of a criminal nature for the punishment of offenders for crimes committed, and that the appellant was so punished. But he was not, and he could not have been without due process of law; for the constitutional guaranty is that no one charged with a criminal offense shall be deprived of life, liberty, or property without due process of law. To save a child from becoming a criminal, or from continuing in a career of crime, to end in maturer years in public punishment and disgrace, the Legislature surely may provide for the salvation of such a child, if its parents or guardian be unable or unwilling to do so, by bringing it into one of the courts of the state without any process at all, for the purpose of subjecting it to the state's guardianship and protection. The natural parent needs no process to temporarily deprive his child of its liberty by confining it in his own home, to save it and to shield it from the consequences of persistence in a career of waywardness; nor is the state, when compelled, as *parens patriæ*, to take the place of the father for the same purpose, required to adopt any process as a means of placing its hands upon the child to lead it into one of its courts. When the child gets there, and the court, with the power to save it, determines on its salvation, and not its punishment, it is immaterial how it got there. The act simply provides how children who ought to be saved may reach the court to be saved. If experience should show that there ought to be other ways for it to get there, the Legislature can, and undoubtedly will, adopt them, and they will never be regarded as undue processes for depriving a child of its liberty or property as a penalty for crime committed. The last reason to be noticed why the act should be declared unconstitutional is that it denies the appellant a trial by jury. Here again, is the fallacy that he was tried by the court for any offense. 'The right of trial by jury shall remain inviolate' are the words of the Bill of Rights, and no act of the Legislature can deny this right to any citizen, young or old, minor or adult, if he is to be tried for a crime against the commonwealth. But there was no trial for any crime here, and the act is operative only when there is to be no trial."<sup>1</sup> \* \* \*

[Here follow the citation of numerous cases and this quotation from *Milwaukee Industrial School v. Supervisors*, 40 Wis. 328, 22 Am. Rep. 702:] "When the state, as *parens patriæ*, is compelled by the misfortune of a child to assume for it parental duty, and to

<sup>1</sup> If the act purports to authorize the criminal punishment of the child, as by imposing a fine, it must conform to the appropriate constitutional provisions regarding criminal trials. *Robison v. Wayne Circuit Judges*, 151 Mich. 315, 115 N. W. 682 (1908).

charge itself with its nurture, it is compelled also to assume parental authority over it. This authority must necessarily be delegated to those to whom the state delegates the nurture and education of the child. The state does not, indeed, we might say, could not, intrude this assumption of authority between parent and child standing in no need of it. It assumes it only upon the destitution and necessity of the child, arising from want or default of parents. And, in exercising a wholesome parental restraint over the child, it can be properly said to imprison the child no more than the tenderest parent exercising like power of restraint over children. This seems too plain to need authority; but the cases cited for the respondent, and others, amply sustain our view. \* \* \* It goes on the total failure of the parent to provide for the child. And it is difficult to comprehend the right of a parent to complain that the discharge by the state of his own duty to his child, which he has wholly failed to perform, is an imprisonment of the child as against his parental right in it."

Although a child is in the care and custody of its parents, still the state assumes direction and control of its education to the extent of making its attendance upon the public schools compulsory, and that power is now recognized in almost every state in the Union. In the exercise of this supervision and control on the part of the state, the child is not deprived of any constitutional or inalienable right, nor is the parent deprived of any right. On the contrary, the state is only demanding and enforcing obedience to both the natural duties and obligations of the parent or guardian as well as the legal duties and obligations demanded by society and the public welfare. It would be carrying the protection of "inalienable rights," guaranteed by the Constitution, a long way to say that that guaranty extends to a free and unlimited exercise of the whims, caprices, or proclivities of either a child or its parents or guardians for idleness, ignorance, crime, indigence, or any kindred dispositions or inclinations. \* \* \*

Writ denied.<sup>2</sup>

<sup>2</sup> "All the decisions rest upon the proposition that the state in its sovereign power has the right, when necessary, to substitute itself as guardian of the person of the child for that of the parent or other legal guardian, and thus to educate and save the child from a criminal career; that it is the welfare of the child that moves the state to act, and not to inflict punishment or to mete out retributive justice for any offense committed or threatened. In other words, to do that which it is the duty of the father or guardian to do, and which the law assumes he will do by reason of the love and affection he holds for his offspring and out of regard for the child's future welfare. The duty thus rests upon the father first. As the duty is imposed by the moral as well as the laws of society upon the father first, so it must likewise logically follow that he must be given the first right to discharge that duty. Indeed, the common law based the right of the father to have custody and dominion over the person of his child upon the ground that he might better discharge the duty he owed the child and the state in respect to the care, nurture, and education of the child. The right and duty are therefore, reciprocal, and may be termed natural, as well as legal and moral. Before the state can be substituted to the right of the parent it must affirmatively be made to appear

## MAYNARD v. HILL:

(Supreme Court of United States, 1888. 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654.)

[Appeal from the Supreme Court of the Territory of Washington. The case involved the validity of a legislative divorce granted by special act of the legislature of the territory of Oregon in 1852, which was upheld in the courts below. Other facts appear in the opinion.]

Mr. Justice FIELD. \* \* \* Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effect upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.

It is conceded that to determine the propriety of dissolving the marriage relation may involve investigations of a judicial nature, which can properly be conducted by the judicial tribunals. Yet, such investigations are no more than those usually made when a change of the law is designed. They do not render the enactment, which follows the information obtained, void as a judicial act because it may recite the cause of its passage. Many causes may arise, physical, moral, and intellectual, such as the contracting by one of the parties of an incurable disease like leprosy, or confirmed insanity, or hopeless idiocy,

that the parent has forfeited his natural and legal right to the custody and control of the child by reason of his failure, inability, neglect, or incompetency to discharge the duty and thus to enjoy the right. Section 6 of the act defines the acts which constitute a child a delinquent and thus a fit subject to be brought before the juvenile court for examination. \* \* \* When a complaint is filed and one or more of the acts constituting delinquency are set forth the court only acquires jurisdiction of the child for the purpose of investigating into its condition or conduct. \* \* \* But when the court has investigated the matters set forth in the complaint and finds some or all of the charges to be true, it does not follow, from that fact alone, that the state should forthwith be substituted in place of the parent or legal guardian and take full control of the person of the child. All that the court has established so far is that the child is a delinquent in view of the provisions of the act. The question as to whether the parent has been derelict in respect to his duty, or whether he is a competent person or not to have charge of the child, and whether he has forfeited his natural and legal right to continue the relation, has not been touched upon, and no finding or adjudication of that fact has been made. There is nothing, therefore, up to this point, in the proceedings upon which a judgment can be based substituting the state as guardian of the person of the child in place of the parent. The whole fabric of the law, as is clearly shown by all the decisions cited, supra, rests upon this theory, and those laws are sustained by virtue of it. Until something is made to appear that the child is not cared and provided for in respect to the matters involved, there exists no reason for the state to take charge of the person of the child, and hence no right exists to do so under the act. True, the parent need not be made a party to, or even have notice of, the proceedings against the child. The parent is not bound by the judgment against the child, and may at any time institute proper proceedings to obtain custody of him. But

or a conviction of a felony, which would render the continuance of the marriage relation intolerable to the other party, and productive of no possible benefit to society. When the object of the relation has been thus defeated, and no jurisdiction is vested in the judicial tribunals to grant a divorce, it is not perceived that any principle should prevent the legislature itself from interfering, and putting an end to the relation in the interest of the parties as well as of society. If the act declaring the divorce should attempt to interfere with the rights of property vested in either party, a different question would be presented.

When this country was settled, the power to grant a divorce from the bonds of matrimony was exercised by the parliament of England. The ecclesiastical courts of that country were limited to the granting of divorces from bed and board. Naturally, the legislative assemblies of the colonies followed the example of parliament and treated the subject as one within their province. And, until a recent period, legislative divorces have been granted with few exceptions, in all the states. \* \* \* [Here follow extracts from Bishop, Cooley, and Kent, and quotations from *Cronise v. Cronise*, 54 Pa. 255, *Crane v. Meginnis*, 1 Gill & J. (Md.) 463, 19 Am. Dec. 237, and *Starr v. Pease*, 8 Conn. 541.]

The same doctrine is declared in numerous other cases, and positions similar to those taken against the validity of the act of the legislative assembly of the territory, that it was beyond the competency of a legislature to dissolve the bonds of matrimony, have been held untenable. These decisions justify the conclusion that the division of government

the matter now under consideration lies deeper than this; it is one of power to render judgment placing the child in charge of one guardian, the state, before determining or passing upon the qualifications of the natural guardian to have charge of the child. The court might as well enter up a judgment without any complaint or investigation whatever. The relative rights and duties of the father or mother are so well and thoroughly discussed in the case of *Nugent v. Powell*, 4 Wyo., at pages 189 to 199. 33 Pac. 23, 20 L. R. A. 199, 62 Am. St. Rep. 17, that we shall do no more than to refer to the discussion there presented. \* \* \* Some of the acts constituting delinquency as defined by section 6 of the act are so trivial in themselves that any thoughtless boy might commit them and thus be adjudged a delinquent and by a careless judge be sent to the industrial school when the parent was not only willing, but most competent, to have control of the child, and would offer it better surroundings and training than the state at best could give or afford. We are constrained to hold, therefore, that before a child can be made a ward of the state, at least two things must be found: (1) That the child is a delinquent within the provisions of chapter 117; and (2) that the parent or legal guardian is incompetent or has neglected and failed to care and provide for the child the training and education contemplated and required by both law and morals.—*Mill v. Brown*, 31 Utah, 473, 482-485, 88 Pac. 609, 120 Am. St. Rep. 935 (1907), by Frick, J.

See "The Juvenile Court," by Hon. Julian W. Mack, 23 Harv. L. Rev. 104.

The legislature may, either by special or general acts, authorize the sale of property owned by minors or other persons (e. g., insane) under disabilities. *Rice v. Parkman*, 16 Mass. 326 (1820). Compare *Brevoort v. Grace*, 53 N. Y. 245 (1873), and the measure of legislative control exercised over the contracts of sailors. *Patterson v. The Eudora*, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002 (1903).

into three departments, and the implied inhibition through that cause upon the legislative department to exercise judicial functions, was neither intended nor understood to exclude legislative control over the marriage relation. In most of the states the same legislative practice on the subject has prevailed since the adoption of their Constitutions as before, which, as Mr. Bishop observes, may be regarded as a contemporaneous construction that the power thus exercised for many years was rightly exercised. The adoption of late years, in many constitutions, of provisions prohibiting legislative divorces would also indicate a general conviction that, without this prohibition, such divorces might be granted, notwithstanding the separation of the powers of government into departments, by which judicial functions are excluded from the legislative department. There are, it is true, decisions of state courts of high character, like the supreme court of Massachusetts and of Missouri, holding differently; some of which were controlled by the peculiar language of their state constitutions. *Sparhawk v. Sparhawk*, 116 Mass. 315; *State v. Fry*, 4 Mo. 120, 138. The weight of authority, however, is decidedly in favor of the position that, in the absence of direct prohibition, the power over divorces remains with the legislature.

We are therefore justified in holding—more, we are compelled to hold,—that the granting of divorces was a rightful subject of legislation according to the prevailing judicial opinion of the country, and the understanding of the profession at the time the organic act of Oregon was passed by congress, when either of the parties divorced was at the time a resident within the territorial jurisdiction of the legislature. If within the competency of the legislative assembly of the territory, we cannot inquire into its motives in passing the act granting the divorce; its will was a sufficient reason for its action. One of the parties, the husband, was a resident within the territory, and, as he acted soon afterwards upon the dissolution and married again, we may conclude that the act was passed upon his petition. If the assembly possessed the power to grant a divorce in any case, its jurisdiction to legislate upon his status, he being a resident of the territory is undoubted, unless the marriage was a contract within the prohibition of the federal Constitution against its impairment by legislation, or within the terms of the Ordinance of 1787, the privileges of which were secured to the inhabitants of Oregon by their organic act,—questions which we will presently consider.

The facts alleged in the bill of complaint, that no cause existed for the divorce, and that it was obtained without the knowledge of the wife, cannot affect the validity of the act. Knowledge or ignorance of parties of intended legislation does not affect its validity, if within the competency of the legislature. The facts mentioned as to the neglect of the husband to send to his wife, whom he left in Ohio, any means for her support or that of her children, in disregard of his promise, shows conduct meriting the strongest reprobation, and, if the facts stated had been brought to the attention of congress, that body might



and probably would have annulled the act. Be that as it may, the loose morals and shameless conduct of the husband can have no bearing upon the question of the existence or absence of power in the assembly to pass the act. \* \* \*

Judgment affirmed.<sup>1</sup>

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GOULD v. GOULD (1905) 78 Conn. 242, 243-245, 265, 266, 267, 61 Atl. 604, 2 L. R. A. (N. S.) 531, BALDWIN, J. (upholding a statute forbidding the intermarriage or cohabitation of a man and woman, either of whom was epileptic, imbecile, or feeble-minded, when the woman was under 45. The precise question was its validity as to epileptics):

"The Constitution of this state (preamble and article 1, § 1) guarantees to its people equality under the law in the rights to 'life, liberty, and the pursuit of happiness.' State v. Conlon, 65 Conn. 478, 489-491, 33 Atl. 519, 31 L. R. A. 55, 48 Am. St. Rep. 227. One of these is the right to contract marriage, but it is a right that can only be exercised under such reasonable conditions as the Legislature may see fit to impose. It is not possessed by those below a certain age. It is denied to those who stand within certain degrees of kinship. The mode of celebrating it is prescribed in strict and exclusive terms. Gen. St. 1902, § 4538. The universal prohibition in all civilized countries of marriages between near kindred proceeds in part from the established fact that the issue of such marriages are often, though by no means always, of an inferior type of physical or mental development.

"That epilepsy is a disease of a peculiarly serious and revolting character, tending to weaken mental force, and often descending from parent to child, or entailing upon the offspring of the sufferer some other grave form of nervous malady, is a matter of common knowledge, of which courts will take judicial notice. State v. Main, 69 Conn. 123, 135, 37 Atl. 80, 36 L. R. A. 623, 61 Am. St. Rep. 30. One mode of guarding against the perpetuation of epilepsy obviously is to forbid sexual intercourse with those afflicted by it, and to preclude such opportunities for sexual intercourse as marriage furnishes. To impose such a restriction upon the right to contract marriage, if not intrinsically unreasonable, is no invasion of the equality of all men before the law, if it applies equally to all, under the same circumstances, who belong to a certain class of persons, which class can reasonably be regarded as one requiring special legislation either for their protection or for the protection from them of the community at large. It cannot be pronounced by the judiciary to be intrinsically unreasonable if it should be regarded as a determination by the General Assembly that a law of this kind is necessary for the preservation of public

<sup>1</sup> Legislative divorces are now forbidden by many state constitutions. See Stinson, Fed. and State Consts. bk. III, §§ 395, 430.

health, and if there are substantial grounds for believing that such determination is supported by the facts upon which it is apparent that it was based. *Holden v. Hardy*, 169 U. S. 366, 398, 18 Sup. Ct. 383, 42 L. Ed. 780; *Bissell v. Davison*, 65 Conn. 183, 192, 32 Atl. 348, 29 L. R. A. 251.

"There can be no doubt as to the opinion of the General Assembly. nor as to its resting on substantial foundations. The class of persons to whom the statute applies is not one arbitrarily formed to suit its purpose. It is certain and definite. It is a class capable of endangering the health of families and adding greatly to the sum of human suffering. Between the members of this class there is no discrimination, and the prohibitions of the statute cease to operate when, by the attainment of a certain age by one of those whom it affects, the occasion for the restriction is deemed to become less imperative. While Connecticut was the pioneer in this country with respect to legislation of this character, it no longer stands alone. Michigan, Minnesota, Kansas, and Ohio have, since 1895, acted in the same direction. 2 *Howard on Matrimonial Institutions*, 400, 479, 480; *Sess. Laws Ohio*, 1904, p. 83. Laws of this kind may be regarded as an expression of the conviction of modern society that disease is largely preventable by proper precautions, and that it is not unjust in certain cases to require the observation of these, even at the cost of narrowing what in former days was regarded as the proper domain of individual right. It follows that the statute in question was not invalid, as respects marriages contracted by epileptics, after it took effect."

HAMERSLEY, J. (concurring in the result). \* \* \* "The act done by the parties—that of marrying—is not only a harmless act, but the exercise of a right belonging to every citizen; and the punishment is inflicted for exercising this right in a manner forbidden by law. \* \* \* Because the inmates of a poorhouse, or persons who by reason of sickness, feeble-mindedness, or imbecility are a charge, or liable to become a charge, upon the state, may be punished for marrying each other, it does not follow that every one who is sick or feeble-minded may be prevented from marrying. \* \* \* If the act forbade marriages between persons who are living at the public charge, and unable to support themselves, or between any clearly marked class of such persons, it might be sustained as restraining the dependent wards of the state from unnecessarily imposing burdens upon the public. *McCarthy v. Hinman*, 35 Conn. 538-540. \* \* \*

"The opinion seems to intimate that such a law would be regarded as expressive of the conviction of modern society that disease is largely preventable by proper precautions, and might therefore be rightly enforced, even at the cost of what in former days was regarded as the proper domain of individual right, namely, the natural right of marriage, the freedom of contract in the exercise of the right, and freedom of conscience in the performance of the personal

duties it may involve. This individual right has been and is regarded as protected by the Constitution from arbitrary invasion. These guaranteed rights may be restricted by appropriate regulations for the protection of the health, morals, and safety of the public, but no one has yet dreamed that the limits of this field of protective legislation can be extended beyond the citizens of to-day, so as to embrace the citizens of all future generations. It has been held that these guaranteed rights of personal freedom cannot be directly destroyed by legislation merely because such destruction may be deemed to be generally useful, or to serve differing views of social and economic problems which are working their own solution independent of legislatures and courts. *State v. Conlon*, 65 Conn. 478, 489, 33 Atl. 519, 31 L. R. A. 55, 48 Am. St. Rep. 227; *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133.”<sup>1</sup>

<sup>1</sup> The cases discussing the validity of various legislative restrictions upon marriage, including the prohibition of miscegenation, are collected in 2 L. R. A. (N. S.) 531-536 (1906).

In *State v. Feilen*, 70 Wash. 65, 126 Pac. 75, 41 L. R. A. (N. S.) 418 (1912) a statute was upheld that, in addition to other punishment, authorized an operation to prevent procreation to be performed upon persons convicted of rape. Crow, J., said (70 Wash. 68, 126 Pac. 76, 77 [41 L. R. A. (N. S.) 418]): “On the theory that modern scientific investigation shows that idioecy, insanity, imbecility, and criminality are congenital and hereditary, the Legislatures of California [St. Cal. 1909, p. 1093, c. 720], Connecticut [Pub. Laws Conn. 1909, c. 209], Indiana [Laws Ind. 1907, c. 215], Iowa [Laws Iowa 1911 c. 129], New Jersey [Laws N. J. 1911, c. 190], and perhaps other states, in the exercise of the police power, have enacted laws providing for the sterilization of idiots, insane, imbeciles and habitual criminals. In the enforcement of these statutes vasectomy seems to be a common operation. Dr. Clark Bell, in an article on hereditary criminality and the asexualization of criminals, found at page 134, vol. 27, *Medico-Legal Journal*, quotes with approval the following language: \* \* \* ‘Vasectomy is known to the medical profession as “an office operation,” painlessly performed in a few minutes, under an anæsthetic (cocaine), through a skin cut half an inch long, and entailing no wound infection, no confinement to bed.’ \* \* \* ‘The sterilization of convicts by vasectomy was actually performed for the first time in this country, so far as is known, in October, 1899, by Dr. H. C. Sharp of Indianapolis, then physician to the Indiana State Reformatory, at Jeffersonville, though the value of the operation for healing purposes had long been known. He continued to perform this operation with the consent of the convict (not by legislative authority) for some years. Influential physicians heard of his work, and were so favorably impressed with it that they indorsed the movement, which resulted in the passage of the law now upon the Indiana statute books. Dr. Sharp has this to say of this method of relief to society: “Vasectomy consists of ligating and resecting a small portion of the vas deferens. This operation is, indeed, very simple and easy to perform; I do it without administering an anæsthetic, either general or local. It requires about three minutes’ time to perform the operation, and the subject returns to his work immediately, suffers no inconvenience, and is in no way impaired for his pursuit of life, liberty, and happiness, but is effectively sterilized.”’”

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 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 domicile, 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."<sup>1</sup>

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### LEAVITT v. CITY OF MORRIS.

(Supreme Court of Minnesota, 1908. 105 Minn. 170, 117 N. W. 393, 17 L. R. A. [N. S.] 984, 15 Ann. Cas. 961.)

[Appeal from an order of the Stevens county district court overruling defendant's demurrer to a complaint. A statute gave to the state board of control two per cent. of the liquor license fees of all municipalities to provide a state hospital farm for the compulsory treatment of inebriates. Defendant city resisted the collection of this, alleging the invalidity of this object.]

START, C. J. \* \* \* We \* \* \* only decide the question of the

<sup>1</sup>The validity of various kinds of legislation affecting the social evil is also discussed or involved in *St. Louis v. Filz*, 53 Mo. 582 (1873); *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471 (1873); *Dunn v. Commonwealth*, 105 Ky. 334, 49 S. W. 813, 43 L. R. A. 701, 88 Am. St. Rep. 344 (1899); *Heehinger v. Maysville*, 57 S. W. 610, 22 Ky. Law Rep. 486, 49 L. R. A. 114 (1900); *State v. Botkin*, 71 Iowa, 57, 32 N. W. 185, 60 Am. Rep. 780 (1887).



validity of the provisions of the act relating to the commitment of inebriates, without their consent, to a public hospital for the treatment of inebriates to be provided and conducted by the state. The provisions of the act relevant to such question are to the effect following: Section 2 declares that the term "inebriate" shall include every species of chronic inebriety, whether caused by the excessive use of intoxicating liquors, morphine, or other narcotics. Section 4 provides that upon the filing with the probate court of a verified petition that any person in the county is an inebriate and in need of care and treatment, or that it is dangerous for him to remain at large, stating therein the petitioner's relationship, if any, to the inebriate, and the indications of his lack of self-control in the use of liquors or narcotics, the court shall issue its warrant to bring the inebriate before it for examination as to his alleged inebriety. Section 5 provides for the appointment of two reputable persons, one of whom, at least, must be a qualified physician, and that such persons, with the judge of the court, shall constitute a board to examine the alleged inebriate and determine his inebriety. Section 21 provides that the county attorney shall be notified, and shall appear and take such action as may be necessary to protect the rights of such inebriate and the interests of the county. Section 6 requires the board to hear all proper testimony, and the court may cause witnesses to be subpoenaed. When the examination is completed the board shall determine whether the person charged is an inebriate, and make and file a report of their proceedings, including their findings. Section 9 provides that if the board determine that such person is an inebriate he shall be committed to the hospital farm for treatment for an indeterminate period, but not for more than two years without being released on parol, and, further, that such person shall have a right to appeal from the decision of the probate court to the district court, and that on such appeal all questions involved in such examination shall be tried *de novo*. Section 11 requires that whenever a person is discharged from the hospital a certificate of such fact shall be sent to the judge of probate.

The provisions of the act relating to the examination and commitment of an alleged inebriate carefully safeguard his rights, providing, as they do, for full notice and opportunity to be heard,<sup>1</sup> and a trial of all questions by a jury in case he appeals to the district court. They are substantially the same, with the exception of the right of appeal, as those relating to the examination and commitment of insane persons. Rev. Laws 1905, §§ 3852-3861. There is, however, a clear distinction between a person who gets drunk and an insane person, and it may be conceded that one who is simply a drunkard, but is able properly to take care of himself, his family, and his property, and is not menace to the public, cannot be committed to and de-

<sup>1</sup> This is essential for more than a mere temporary detention. *People ex rel. Ordway v. St. Saviour's Sanitarium*, 34 App. Div. 363, 56 N. Y. Supp. 431 (1898); *People ex rel. Barone v. Fox*, 202 N. Y. 616, 96 N. E. 1126 (1911).

tained in a hospital for inebriates without his consent, for the personal rights and liberties of such a person are guaranteed by the Constitution. 15 Enc. of Law, 243. But the state, in the exercise of its police power, has the undoubted right to punish drunkenness, and to provide for the detention and treatment in hospitals controlled by it of those who are habitual drunkards, and have so far lost the power of self-control that they are either incapable of properly caring for themselves or are a menace to the public weal. The state has the power to reclaim submerged lands, which are a menace to the public health, and make them fruitful. Has it not, also, the power to reclaim submerged men, overthrown by strong drink, and help them to regain self-control?

The state for many years has punished drunkenness as a crime by a fine or imprisonment, and for the third and all subsequent offenses by imprisonment alone. Laws 1907, p. 235, c. 208. The necessary effect of the enforcement of the statute against drunkenness is to deprive the person guilty of the offense of his property and his liberty for a time; but no question has ever been made in the courts of this state as to the validity of such a statute. The trend, however, of legislation is to treat habitual drunkenness as a disease of mind and body, analogous to insanity, and to put in motion the power of the state, as the guardian of all of its citizens, to save the inebriate, his family, and society from the dire consequences of his pernicious habit. 15 Enc. of Law, 229. The statute here under consideration is of such a character. It is not a penal, but a paternal, statute, seeking, not the punishment of the inebriate, but the safeguarding of his interests and the safety of the public, by treating him as, what he is in fact, a man of unsound mind, and placing him under the guardianship of the state, to the end that he may be healed of his infirmity. The act provides that such guardianship shall be administered by the probate court, and there can be no question of the jurisdiction of such court; for the Constitution (section 7, art. 6) confers upon it jurisdiction over the general subject of guardianship of persons. *State v. Wilcox*, 24 Minn. 143.

Again, the statute does not seek to place under the guardianship of the state hospital for inebriates persons who are guilty of occasional acts of drunkenness and who are capable of controlling themselves and their property. It is limited to habitual drunkards—that is, to persons who have lost the power or will to control their appetite for intoxicating liquors or narcotics, and have the fixed habit of drunkenness (4 Words and Phrases, 3202), who are in need of care and treatment, and to those it would be dangerous to leave at large. The difference between such persons and insane persons is one of degree only, and they lawfully may be so treated by the state without any impairment of their constitutional rights. \* \* \*

Order affirmed.<sup>2</sup>

<sup>2</sup> Accord: *People ex rel. Barone v. Fox*, 144 App. Div. 611, 129 N. Y. Supp. 646 (1911) (medical treatment of diseased prostitutes).

## 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.<sup>1</sup> 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 small-pox, 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.<sup>2</sup>

[BREWER and PECKHAM, JJ., dissent.]

<sup>1</sup> Compare the remark of the same court in holding a workmen's compensation act invalid: "In a government like ours theories of public good or necessity are often so plausible or sound as to command popular approval, but courts are not permitted to forget that law is the only chart by which the ship of state is to be guided."—*Ives v. South Buffalo R. Co.*, 201 N. Y. 271, 294, 295, 94 N. E. 431, 440, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156 (1911), by Werner, J.

<sup>2</sup> In *Laurel Hill Cemetery v. City and County of San Francisco*, 216 U. S. 358, 364-366, 30 Sup. Ct. 301, 302, 54 L. Ed. 515 (1910), a city ordinance forbidding the burial of the dead within the city as detrimental to the public health was upheld against the contention of the owners of a large private cemetery in which 40,000 lots had been sold and where over \$2,000,000 had been spent in improvements, Holmes, J., saying: "To aid its contention, and in support of the averment that its cemetery, although now bordered by many dwellings, is in no way harmful, the plaintiff refers to opinions of scientific men who have maintained that the popular belief is a superstition. Of these we are asked, by implication, to take judicial notice, to adopt them, and, on the strength of our acceptance, to declare the foundation of the ordinance a mistake and the ordinance void. \* \* \* If every member of this bench clearly agreed that burying grounds were centers of safety, and thought the board of supervisors and the supreme court of California wholly wrong, it would not dispose of the case. There are other things to be considered.

NICKERSON v. BOSTON (1881) 131 Mass. 306, 307-308, MOR-  
TON, J. (upholding a statute applicable to a certain district in Boston):

"By the statute, the city council are authorized to order the owners of lands situated in the district described therein 'to raise the grade of their said lands, filling up the same with good materials to such permanent grade as may be deemed necessary by the board of aldermen in order to secure a complete drainage thereof, so as to abate and prevent nuisances, and to preserve the public health of the city,' and, if the owner fails to comply with the order, to fill up the land and assess the necessary expenses, which shall constitute a lien upon the land. The statute itself defines the purpose of its enactment and indicates its character. It is not a statute to levy a tax, but its object is to abate and prevent nuisances, and to preserve the public health. It belongs to that class of police regulations to which private rights are held subject, and is founded upon the right of the public to protect itself from nuisances, and to preserve the general health. The authority of the Legislature to pass laws of this character is too well settled to be questioned. Taunton v. Taylor, 116 Mass. 254; Salem v. Eastern Railroad, 98 Mass. 431, 96 Am. Dec. 650; Wright v. Boston, 9 Cush. 233. The objection of the petitioner that the law is unconstitutional cannot therefore be sustained."<sup>1</sup>

Opinion still may be divided, and if, on the hypothesis that the danger is real, the ordinance would be valid, we should not overthrow it merely because of our adherence to the other belief. Similar arguments were pressed upon this court with regard to vaccination, but they did not prevail. On the contrary, evidence that vaccination was deleterious was held properly to have been excluded. *Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765, s. c. 183 Mass. 242, 66 N. E. 719, 67 L. R. A. 935. See *Otis v. Parker*, 187 U. S. 606, 608, 609, 23 Sup. Ct. 168, 47 L. Ed. 323, 327, 328. Again, there may have been other grounds fortifying the ordinance besides those recited in the preamble. And yet again, the extent to which legislation may modify and restrict the uses of property consistently with the Constitution is not a question for pure abstract theory alone. Tradition and the habits of the community count for more than logic. Since, as before, the making of Constitutions, regulation of burial and prohibition of it in certain spots, especially in crowded cities, have been familiar to the Western world. This is shown sufficiently by the cases cited by the court below; e. g., *Coates v. New York*, 7 Cow. (N. Y.) 585; *Kincaid's Appeal*, 66 Pa. 411, 5 Am. Rep. 377; *Sohler v. Trinity Church*, 109 Mass. 1, 21; *Carpenter v. Yeadon*, 83 C. C. A. 122, 158 Fed. 766. The plaintiff must wait until there is a change of practice, or at least an established consensus of civilized opinion. Before it can expect this court to overthrow the rules that the lawmakers and the court of his own state uphold."

<sup>1</sup> See, also, *Missouri, K. & T. Ry. Co. v. May*, ante, p. 359 (noxious weeds), and *Ex parte Hodges*, 87 Cal. 162, 164-166, 25 Pac. 277, 278 (1890), in which *Works, J.*, said: "The ordinance requires that all occupants of lands, within ninety days, exterminate and destroy the ground squirrels on their respective lands, and thereafter keep said lands free and clear therefrom. This might be successfully done by the free and judicious use of poison, and perhaps by some other means, on very small tracts of land, but on large tracts it would certainly require eternal vigilance, if it could be accomplished at all, and if, after the extermination of the intruders on his own lands, one, only one,

CALIFORNIA REDUCTION CO. v. SANITARY REDUCTION WORKS (1905) 199 U. S. 306, 321-323, 26 Sup. Ct. 100, 50 L. Ed. 204, Mr. Justice HARLAN (upholding a San Francisco ordinance requiring all garbage and refuse to be delivered in closed wagons at the works of the Sanitary Company, there to be cremated at the expense of the person conveying it there. The Sanitary Company sought by injunction against householders and a rival reduction works to compel compliance with this ordinance, it having a 50-year monopoly of said cremation at 20 cents a load):

"The defendants insist that the requirement that the substances mentioned should be delivered at the plaintiff's works for cremation or destruction, at the expense of the person, company, or corporation conveying the same, was a taking of private property for public use without compensation. We cannot assent to this view. It is the duty, primarily, of a person on whose premises are garbage and refuse material, to see to it, by proper diligence, that no nuisance arises therefrom which endangers the public health. The householder may be compelled to submit even to an inspection of his premises, at his own expense, and forbidden to keep them, or allow them to be kept, in such condition as to create disease. He may, therefore, have been required, at his own expense, to make, from time to time, such disposition of obnoxious substances originating on premises occupied by him as would be necessary in order to guard the public health. If the householder himself removed them from his premises, it must have been at his own expense; and the scavenger who took to the crematory the material from the premises of origin, under some arrangement with the householder, was, in effect, the representative, in that matter, of the householder, and was performing a duty resting upon the house-

should come over from the land of his neighbor, the ordinance would be violated. The occupant of lands bordering on another county, where no such regulation prevailed, and the pesky squirrel was allowed to propagate and grow unmolested, would be in a most unfortunate condition. Such an ordinance differs materially from laws requiring an occupant of lands to keep them free from noxious weeds, or such as make it the duty of an owner of diseased domestic animals to kill them, in order to prevent the spread of the disease. These are matters over which the property-owner has control, and the requirements are reasonable and just. \* \* \* We know of no law which can be held to authorize a board of supervisors to enact such an ordinance, and we are quite clear that it cannot be enforced, for the reason that it is unreasonable and burdensome in the extreme."

In *Commonwealth v. Tewksbury*, 11 Metc. (Mass.) 55 (1846), a statute was upheld which, for the protection of Boston harbor by the preservation of its natural embankments, forbade even a riparian owner to remove stones, gravel, or sand from the beaches of Chelsea. Shaw, C. J., said (page 59): "A law prohibiting an owner from removing the soil composing a natural embankment to a valuable, navigable stream, port, or harbor, is not such a taking, such an interference with the right and title of the owner, as to give him a constitutional right to compensation, and to render an act unconstitutional which makes no such provision, but is a just restraint of an injurious use of the property, which the legislature have authority to make."

Compare *Dingley v. Boston*, post, p. 686, note.

holder. So that if the requirement that the person conveying the material should pay a given price for having it cremated or destroyed, in effect put some expense on the householder, that gave him no ground for complaint; for it was his duty to see to the removal of garbage and house refuse having its origin on his premises. Still less has the licensed scavenger a right to complain; for his right to convey garbage and refuse through the public streets, in covered wagons, was derived from the public, and he was subject to such regulations as the constituted authorities, in their exercise of the police power, might adopt. The whole arrangement may be fairly regarded as one in the interest and for the convenience of the householder. He gets his proportionate benefit of any revenue derived by the city, and at the same time shares the protection given to him by the community. Nor did the destruction of garbage and refuse, at an approved crematory, amount, in itself, and under the circumstances disclosed, to a taking of private property for public use without compensation, even if some of the substances destroyed at the crematory had a value for certain purposes. The authorities were not bound, prior to the removal of such substances from the premises on which they were found, to separate those that were confessedly worthless from those which might be utilized. The garbage and refuse matter were all together, on the same premises, and, as a whole or in the mass, they constituted a nuisance which the public could abate or require to be abated, and to the continuance of which the community was not bound to submit. And when the obnoxious garbage and refuse was removed from the place of their origin, and put in covered wagons to be carried away, the municipal authorities might well have doubted whether the substances that were per se dangerous or worthless would be separated from such as could be utilized, and whether the former would be deposited by the scavenger at some place that would not endanger the public health. They might well have thought that the safety of the community could not be assured unless the entire mass of garbage and refuse constituting the nuisance, from which the danger came, was carried to a crematory, where it could be promptly destroyed by fire, and thus minimize the danger to the public health."<sup>1</sup>

<sup>1</sup> Accord: *Slaughter House Cases*, 16 Wall. 36, 21 L. Ed. 394 (1873) (monopoly of keeping slaughter houses in New Orleans); *Gardner v. Michigan*, 199 U. S. 325, 26 Sup. Ct. 106, 50 L. Ed. 212 (1905) (garbage collection monopoly). See, also, *North American Cold Storage Co. v. Chicago*, 211 U. S. 306, 320, 321, 29 Sup. Ct. 101, 53 L. Ed. 195, 15 Ann. Cas. 276 (1908) (destruction of unwholesome food having some value for other purposes); *Sentell v. New Orleans & C. R. Co.*, 166 U. S. 698, 17 Sup. Ct. 693, 41 L. Ed. 1169 (1897) (unassessed dogs deprived of protection of law); *Surocco v. Geary*, 3 Cal. 69, 53 Am. Dec. 385 (1853) (destruction of movables, otherwise rescuable, to check fire); *Bowditch v. Boston*, 101 U. S. 16, 25 L. Ed. 980 (1880) (same).



## MILLER v. HORTON.

(Supreme Judicial Court of Massachusetts, 1891. 152 Mass. 540, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 850.)

[Bill of exceptions. A board of cattle commissioners were authorized by statute (section 13) to condemn and kill any animals infected with glanders. Under their authority plaintiff's horse was examined, decided to have glanders, and was killed by defendants, members of the Rehoboth board of health. For this plaintiff sued in tort and established the fact that his horse had neither glanders nor any contagious disease. From a judgment for defendant, plaintiff alleged exceptions.]

HOLMES, J. \* \* \* The main ground for reading into the statute an intent to make the commissioners' order an absolute protection is that there is no provision for compensation to the owner in this class of cases, and, therefore, unless the order is a protection, those who carry it out will do so at their peril. Such a construction, when once known, would be apt to destroy the efficiency of the clause, as few people could be found to carry out orders on these terms. \* \* \*

It may be said, suppose that the decision of the board is not conclusive that the plaintiff's horse had the glanders, still the legislature may consider that self-protection requires the immediate killing of all horses which a competent board deem infected, whether they are so or not, and, if so, the innocent horses that are killed are a sacrifice to necessary self-protection, and need not be paid for.

In *Train v. Disinfecting Co.*, 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113 it was held that all imported rags might be required to be put through a disinfecting process at the expense of the owner. Of course, the order did not mean that the legislature or board of health declared all imported rags to be infected, but simply that the danger was too great to risk an attempt at discrimination. If the legislature could throw the burden on owners of innocent rags in that case, why could it not throw the burden on the owners of innocent horses in this? If it could order all rags to be disinfected, why might it not have ordered such rags to be disinfected as a board of three should determine summarily, and without notice or appeal? The latter provision would have been more favorable to owners, as they would have had a chance at least of escaping the burden, and it would stand on the same ground as the severer law.

The answer, or a part of it, is this: Whether the motives of the legislature are the same or not in the two cases supposed, it declares different things to be dangerous and nuisances unless disinfected. In the one, it declares all imported rags to be so; in the other, only all infected rags. Within limits, it may thus enlarge or diminish the number of things to be deemed nuisances by the law, and courts cannot inquire why it includes certain property, and whether the mo-

tive was to avoid an investigation. But wherever it draws the line, an owner has a right to a hearing on the question whether his property falls within it, and this right is not destroyed by the fact that the line might have been drawn so differently as unquestionably to include that property. Thus, in the first case, the owner has a right to try the question whether his rags were imported; in the second, whether they were infected. His right is no more met in the second case by the fact that the legislature might have made the inquiry immaterial by requiring all imported rags to be disinfected, than it would be in the first by the suggestion that possibly the legislature might require all rags to be put through the same process whether imported or not. But if the property is admitted to fall within the line, there is nothing to try, provided the line drawn is a valid one under the police power. All that *Train v. Disinfecting Co.* decided was that the line there considered was a valid one.

Still it may be asked, if self-protection required the act, why should not the owner bear the loss? It may be answered that self-protection does not require all that is believed to be necessary to that end, nor even all that reasonably is believed to be necessary to that end. It only requires what is actually necessary. It would seem doubtful at least whether actual necessity ought not to be the limit when the question arises under the constitution between the public and an individual. Such seems to be the law as between private parties in this commonwealth in the case of fires, as we have seen. It could not be assumed as a general principle without discussion that even necessity would exonerate a party from civil liability for a loss inflicted knowingly upon an innocent person who neither by his person nor by his property threatens any harm to the defendant. It has been thought by great lawyers that a man cannot shift his misfortunes upon his neighbor's shoulders in that way when it is a question of damages, although his act may be one for which he would not be punished. *Gilbert v. Stone*, *Aleyn*, 35, *S. C. Style*, 72; *Scott v. Shepherd*, 2 *W. Bl.* 892, 896. See *Fairbanks v. Snow*, 145 *Mass.* 153, 155, 13 *N. E.* 596, 1 *Am. St. Rep.* 446. Upon this we express no opinion. It is enough to say that in this case actual necessity required the destruction only of infected horses, and that was all that the legislature purported to authorize.

Again, there is a pretty important difference of degree, at least. (*Rideout v. Knox*, 148 *Mass.* 368, 372, 19 *N. E.* 390, 2 *L. R. A.* 81, 12 *Am. St. Rep.* 560) between regulating the precautions to be taken in keeping property, especially property sought to be brought into the state, and ordering its destruction. We cannot admit that the legislature has an unlimited right to destroy property without compensation, on the ground that destruction is not an appropriation to public use within article 10 of the declaration of rights. When a healthy horse is killed by a public officer, acting under a general statute, for fear that it should spread disease, the horse certainly would

seem to be taken for public use as truly as if it were seized to drag an artillery wagon. The public equally appropriate it, whatever they do with it afterwards. Certainly the legislature could not declare all cattle to be nuisances, and order them to be killed without compensation. *Watertown v. Mayo*, 109 Mass. 315, 319, 12 Am. Rep. 694; *In re Jacobs*, 98 N. Y. 98, 109, 50 Am. Rep. 636. It does not attempt to do so. As we have said, it only declares certain diseased animals to be nuisances. And even if we assume that it could authorize some trifling amount of innocent property to be destroyed as a necessary means to the abatement of a nuisance, still, if in this section 13 it had added in terms that such healthy animals as should be killed by mistake for diseased ones should not be paid for, we should deem it a serious question whether such a provision could be upheld. See, further, *Hutton v. Camden*, 39 N. J. Law, 122, 23 Am. Rep. 203; *Hale v. Lawrence*, 21 N. J. Law, 714, 47 Am. Dec. 190; *Grant v. U. S.*, 1 Ct. Cl. 41; *Wiggins v. U. S.*, 3 Ct. Cl. 412; *Mitchell v. Harmony*, 13 How. 115, 134, 14 L. Ed. 75.

For these reasons, the literal, and, as we think, the true, construction of section 13 seems to us the only safe one to adopt, and accordingly we are of opinion that the authority and jurisdiction of the commissioners to condemn the plaintiff's horse under section 13 was conditional upon its actually having the glanders.<sup>1</sup> If this be so, their order would not protect the defendants in a case where the commissioners acted outside their jurisdiction. \* \* \*

Exceptions sustained.<sup>2</sup>

[DEVENS, J., gave a dissenting opinion, concurred in by ALLEN and KNOWLTON, JJ.]

### 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 stat-

<sup>1</sup> See the quotation from *Huddart & Co. v. Moorehead*, ante, pp. 75, 76, note.

<sup>2</sup> Accord: *Lowe v. Conroy*, 120 Wis. 151, 97 N. W. 942, 66 L. R. A. 907, 102 Am. St. Rep. 983, 1 Ann. Cas. 341 (1904) (cases). Compare *Raymond v. Fish*, 51 Conn. 80, 50 Am. Rep. 3 (1883).

ute 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. \* \* \*<sup>1</sup>

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

<sup>1</sup> Accord: *Hawker v. New York*, 170 U. S. 189, 18 Sup. Ct. 573, 42 L. Ed. 1002 (1898) (requirement of good character); *Collins v. Texas*, 223 U. S. 288, 32 Sup. Ct. 286, 56 L. Ed. 439 (1912) (appropriate scientific training required for osteopaths).



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.<sup>2</sup>

### WEED v. BERGH.

(Supreme Court of Wisconsin, 1910. 141 Wis. 569, 124 N. W. 604.)

[Appeal from Waupaca county circuit court. A Wisconsin statute forbade any person to conduct a banking business in the state except in corporate form, and gave three months for other existing banks to become incorporated under state or national laws. Plaintiffs, a private banking partnership, sought to enjoin the banking commissioner and district attorney from enforcing this law against them, and a demurrer to their complaint was sustained.]

<sup>2</sup> "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 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. Riehey v. Smith*, 42 Wash. 237, 248, 219, 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.

See, also, *Bessette v. People*, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558 (1901) (horseshoeing); *Douglas v. People*, 225 Ill. 536, 80 N. E. 341, 8 L. R. A. (N. S.) 1116, 116 Am. St. Rep. 162 (1907) (plumbing); *Wyeth v. Board of Health of City of Cambridge*, 200 Mass. 474, 86 N. E. 925, 23 L. R. A. (N. S.) 147, 128 Am. St. Rep. 439 (1909) (undertaking); *Moler v. Whisman*, 243 Mo. 571, 147 S. W. 985, 40 L. R. A. (N. S.) 629 (1912) (barbering).

WINSLOW, C. J. \* \* \* The plaintiffs claim that the act of 1909 is unconstitutional on two general grounds: First, because every citizen has a common-law right to transact a banking business, and the law in question amounts to a prohibition of that right; second, because the law in question fixes so short a time within which the plaintiffs must convert their private institution into an incorporated institution that it cannot be obeyed without a ruinous sacrifice of property amounting to practical confiscation.

1. There are some fundamental propositions so well settled that it is only necessary to state them. Among these are the following: First, banking is a common-law right pertaining equally to every member of the community; second, being a common-law right, it cannot be prohibited under a Constitution like ours, which recognizes the right and grants power to the Legislature to regulate and supervise it; third, under such a Constitution as ours, banking may be regulated so far as may be reasonably necessary to secure the public welfare and safety, but it must be true regulation, not prohibition under the guise of regulation. 1 Morse on Banks and Banking (4th Ed.) § 13.

With these principles in mind, it seems evident that the ultimate question under this head is whether the requirement that all who wish to enter into the business should incorporate is in fact regulation or prohibition masquerading as regulation. The question is not whether it be the wisest form of regulation, or whether it be a form which commends itself to the judgment as ideal, but whether it be in fact a bona fide form of regulation with some reasonable adaptation to meet and overcome any evils or dangers to the public which may lurk in unrestrained exercise of banking rights by individuals. We think it is. If it should be granted that individual bankers may be successfully subjected to all the provisions as to visitation, inspection, examination, and the making of reports to the same extent as corporations, it still must be conceded that there are at least two well-defined dangers to the public which are and must be present in private banking which are eliminated in corporate banking. The first of these is the danger that the private banker, by engaging in outside business ventures, may subject his banking assets to the claims of business creditors, and thus greatly prejudice, if not destroy, the remedies of bank depositors, and the second is the danger and inconvenience which is likely to result when a private banker dies and the business has to be temporarily suspended for the purpose of probating the estate, involving perhaps destruction of public confidence and a run on the institution.

Both of these dangers are quite real and serious, and both are quite effectually eliminated in the case of a corporation whose business enterprises are strictly limited to banking, and which does not die. It will not avail to say that possibly remedies might be devised to meet these inherent dangers arising in individual banking by other forms of regulation, though we are inclined to think that this would be very difficult of accomplishment without overstepping some of the consti-

tutional guarantees of rights to the citizens. If, as matter of fact, the requirement of incorporation is a form of regulation reasonably calculated to meet and remedy these difficulties, though not in the wisest way, it must be sustained as an exercise of the police power. We have been referred to but one case which holds the contrary doctrine, viz., *State v. Scougal*, 3 S. D. 55, 51 N. W. 858, 15 L. R. A. 477, 44 Am. St. Rep. 756; which, indeed, holds that an act requiring incorporation as a condition of doing banking is unconstitutional. The discussion of the question there is long and learned<sup>1</sup> but not convincing to us. It is to be noted, further, that the Constitution of South Dakota contains an unusual provision which figures largely in the result. This provision is to the effect that no law shall grant to any citizen, class of citizens, or corporations, privileges or immunities which on the same terms shall not equally belong to all citizens or corporations. The weight of decision as well as text-book authority is the other way, however. 1 *Morse on Banks & Banking* (4th Ed.) § 13; 5 *Cyc.* 433; *Boone on Banking*, § 10; *State v. Woodmansee*, 1 N. D. 246, 46 N. W. 971, 11 L. R. A. 420; *Myers v. Manhattan Bank*, 20 Ohio, 283.

The objection that the law absolutely prohibits an individual banker from doing business, and hence cannot be considered as valid regulation, is plausible, but not convincing. Many police regulations have the effect of prohibiting a business unless certain conditions are first complied with. The Legislature says: "If you wish to engage in this quasi public business of banking, you must first secure a corporate charter." It does not say, "You cannot go into it," but, "You must go into it in a certain way which is deemed the safest for the public." The obtaining of a bank charter is made by the act practically a matter of course. Three adult residents of the state may at any time associate together, execute the required articles and file them, and the corporation is formed. The danger that any citizen who wishes to go into the banking business will be unable to find two other adult residents who will be willing to join in executing the written articles of incorporation is so small as to be negligible. People can do banking as before, except that they must do it by means of a corporate organization. This is regulation not prohibition. *Commonwealth v. Vrooman*, 164 Pa. 306, 30 Atl. 217, 25 L. R. A. 250, 44 Am. St. Rep. 603; *People v. Loew*, 19 Misc. Rep. 248, 44 N. Y. Supp. 42. \* \* \*

[The second objection was held to be groundless in fact.]

Order affirmed.<sup>2</sup>

<sup>1</sup> This opinion is worth reading.

<sup>2</sup> Accord: *Noble State Bank v. Haskell*, post, p. 511 (semble); *Shallenberger v. First State Bank of Holstein, Neb.*, 219 U. S. 114, 31 Sup. Ct. 189, 55 L. Ed. 117 (1911); *Commonwealth v. Vrooman*, 164 Pa. 306, 317-320, 30 Atl. 217, 25 L. R. A. 250, 44 Am. St. Rep. 603 (1891) (similar arguments as to business of insurance).

The states have exercised a wide discretion in regulating banking, insurance and allied occupations. See *Banking: State v. Richcreek*, 167 Ind. 217,

## 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 Eng-

77 N. E. 1085, 5 L. R. A. (N. S.) 874, 119 Am. St. Rep. 491, 10 Ann. Cas. 899 (1906), and the cases in 219 U. S. 104-139 (1911).

*Insurance*: *State v. Stone*, 118 Mo. 388, 24 S. W. 164, 25 L. R. A. 243, 40 Am. St. Rep. 388 (1893); *State v. Ackerman*, 51 Ohio St. 163, 37 N. E. 828, 24 L. R. A. 298 (1894); *Lyons v. Boston & L. R. Co.*, 181 Mass. 551, 64 N. E. 404 (1902); *Head Camp Woodmen of the World v. Sloss*, 49 Colo. 177, 112 Pac. 49, 31 L. R. A. (N. S.) 831 (1910).

lish-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.<sup>1</sup>

[BREWER and PECKHAM, JJ., dissented.]

### 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,

<sup>1</sup> Accord: *Booth v. Illinois*, 184 U. S. 425, 22 Sup. Ct. 425, 46 L. Ed. 623 (1902) (criminal prohibition of option contracts upon any commodity).

RESTRICTIONS ON POWER OF ALIENATION.—As to legislative control of this, with respect to various kinds of property, see *Lemieux v. Young*, 211 U. S. 489, 29 Sup. Ct. 174, 53 L. Ed. 295 (1909) (stock in trade in bulk); *Mutual Loan Co. v. Martell*, 222 U. S. 236, 32 Sup. Ct. 74, 56 L. Ed. 175 (1911) (assignment of wages); *Bushnell v. Loomis*, 234 Mo. 371, 137 S. W. 257, 36 L. R. A. (N. S.) 1029 (1911) (land, particularly homesteads).

RESTRICTIONS ON CREATION OF FUTURE ESTATES IN PROPERTY.—See *Magoun v. Ill. Tr. & Sav. Bank*, post, p. 634, note 4.

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 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.<sup>1</sup>

<sup>1</sup> Accord: *Hauser v. North British & Mercantile Ins. Co.*, 206 N. Y. 455, 100 N. E. 52, 42 L. R. A. (N. S.) 1139 (1912) (attempted prohibition of insurance brokerage to all those not principally engaged in that business or in real estate).

For the validity of anti-trading stamp or premium legislation, see *State ex rel. Simpson v. Sperry & Hutchinson Co.*, 110 Minn. 378, 126 N. W. 120, 30 L. R. A. (N. S.) 966 (1910) (collecting cases); *District of Columbia v. Kraft*, 35 App. D. C. 253, 30 L. R. A. (N. S.) 957 (1910); *Kanne v. Segerstrom Piano Co.*, 118 Minn. 483, 137 N. W. 170, 41 L. R. A. (N. S.) 1041 (1912).

The sale of other goods may be prohibited in saloons, *State v. Gerhardt*, 145 Ind. 439, 465, 466, 44 N. E. 469, 33 L. R. A. 313 (1896). As to laws forbidding the use of the national flag for advertising purposes, see *Halter v. Nebraska*, 205 U. S. 34, 27 Sup. Ct. 419, 51 L. Ed. 696, 10 Ann. Cas. 525 (1907); *Ruhrstrat v. People*, 185 Ill. 133, 57 N. E. 41, 49 L. R. A. 181, 76 Am. St. Rep. 30 (1900).

In *Columbia Trust Co. v. Lincoln Institute of Kentucky*, 138 Ky. 804, 129 S. W. 113, 29 L. R. A. (N. S.) 53 (1910) it was held invalid to prohibit the location of any private industrial school in a voting precinct without the consent of a majority of the voters therein, *Barker, C. J.*, quoting with approval (138 Ky. 811, 129 S. W. 115, 29 L. R. A. [N. S.] 53): "The doctrine of legislative permission, as a condition precedent to the conduct of any useful or harmless business, is grossly repugnant to those obvious principles of human right which lie at the foundation of just government among men."

## AIKENS v. WISCONSIN.

(Supreme Court of United States, 1901. 195 U. S. 194, 25 Sup. Ct. 3, 49 L. Ed. 154.)

[Error to the Supreme Court of Wisconsin. Defendants were convicted in the Milwaukee municipal court of violating a statute forbidding two or more persons to combine "for the purpose of wilfully or maliciously injuring another in his reputation, trade, business, or profession, by any means whatever." As publishers of newspapers in Milwaukee they had combined to refuse advertisements save at an increased rate from any person who advertised in a competing newspaper at a rate higher than defendants' regular rates. The conviction was affirmed by the state Supreme Court, and this writ taken on the ground that the statute violated the fourteenth amendment.]

Mr. Justice HOLMES. \* \* \* We interpret "maliciously injuring" to import doing a harm malevolently, for the sake of the harm as an end in itself, and not merely as a means to some further end legitimately desired. \* \* \*

We come, then, to the question whether there is any constitutional objection to so much of the act as applies to this case. It has been thought by other courts as well as the supreme court of Wisconsin that such a combination, followed by damage, would be actionable even at common law. It has been considered that, *prima facie*, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape. *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 598, 613 [1892] A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101. If this is the correct mode of approach, it is obvious that justifications may vary in extent, according to the principle of policy upon which they are founded, and that while some—for instance, at common law, those affecting the use of land—are absolute (*Bradford v. Pickens*, [1895] A. C. 587), others may depend upon the end for which the act is done. *Moran v. Dunphy*, 177 Mass. 485, 487, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289; *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 30; *Squires v. Wason Mfg. Co.*, 182 Mass. 137, 140, 141, 65 N. E. 32. See cases cited in 62 L. R. A. 673. It is no sufficient answer to this line of thought that motives are not actionable, and that the standards of the law are external. That is true in determining what a man is bound to foresee, but not necessarily in determining the extent to which he can justify harm which he has foreseen. *Quinn v. Leatham*, [1901] A. C. 495, 524, 70 L. J. P. C. N. S. 76, 85 L. T. N. S. 28, 50 Week. Rep. 139, 65 J. P. 708.

Whether, at common law, combinations would make conduct actionable which would be lawful in a single person, it is unnecessary to

consider. *Quinn v. Leathem*, [1901] A. C. 495, 70 L. J. P. C. N. S. 76, 85 L. T. N. S. 289, 50 Week. Rep. 139, 65 J. P. 708. We are aware, too, that a prevailing opinion in England makes motives immaterial, although it is probable that in *Allen v. Flood*, [1898] A. C. 1, 94, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, 62 J. P. 595, the jury were instructed, as in *Temperton v. Russell*, [1893] 1 Q. B. 715, 719, 62 L. J. Q. B. N. S. 412, 4 Reports, 376, 69 L. T. N. S. 78, 41 Week. Rep. 565, 57 J. P. 676, in such a way that their finding of malice meant no more than that the defendant had acted with foresight of the harm which he would inflict, as a means to an end. *Quinn v. Leathem*, [1901] A. C. 495, 514. However these things may be, we have said enough to show that there is no anomaly in a statute, at least, which punishes a combination such as is charged here. It has been held that even the free use of land by a single owner for purely malevolent purposes may be restricted constitutionally, although the only immediate injury is to a neighboring landowner. *Rideout v. Knox*, 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560. Whether this decision was right or not, when it comes to the freedom of the individual, malicious mischief is a familiar and proper subject for legislative repression. *Com. v. Walden*, 3 Cush. (Mass.) 558. Still more are combinations for the purpose of inflicting it. It would be impossible to hold that the liberty to combine to inflict such mischief, even upon such intangibles as business or reputation, was among the rights which the fourteenth amendment was intended to preserve. The statute was assumed to be constitutional in *Arthur v. Oakes*, 63 Fed. 310, 325, 326, 11 C. C. A. 209, 25 L. R. A. 414, 4 *Interst. Com. R.* 744, 24 U. S. App. 239.

But if all these general considerations be admitted, it is urged, nevertheless, that the means intended to be used by this particular combination were simply the abstinence from making contracts; that a man's right so to abstain cannot be infringed on the ground of motives; and further, that it carries with it the right to communicate that intent to abstain to others, and to abstain in common with them. It is said that if the statute extends to such a case it must be unconstitutional. The fallacy of this argument lies in the assumption that the statute stands no better than if directed against the pure nonfeasance of singly omitting to contract. The statute is directed against a series of acts, and acts of several,—the acts of combining, with intent to do other acts. "The very plot is an act in itself." *Mulcahy v. Queen*, L. R. 3 H. L. 306, 317. But an act which, in itself, is merely a voluntary muscular contraction, derives all its character from the consequences which will follow it under the circumstances in which it was done. When the acts consist of making a combination calculated to cause temporal damage, the power to punish such acts, when done maliciously, cannot be denied because they are to be followed and worked out by conduct which might have been lawful if not preceded by the acts. No conduct has such an absolute privilege as to justify all possible schemes of



which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law.

It was urged farther that to make a right depend upon motives is to make it depend upon the whim of a jury, and to deny the right. But it must be assumed that the constitutional tribunal does its duty, and finds facts only because they are proved. The power of the legislature to make the fact of malice material we think sufficiently appears from what we already have said. \* \* \*

Judgment affirmed.

[WHITE, J., gave a short dissenting opinion, based upon a wider construction of the statute.]

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GRENADA LUMBER CO. v. MISSISSIPPI (1910) 217 U. S. 433, 440, 442, 30 Sup. Ct. 535, 54 L. Ed. 826. Mr. Justice LURTON (upholding a Mississippi statute criminally forbidding a combination of retailers not to buy from wholesalers who sold directly to consumers):

"That any one of the persons engaged in the retail lumber business might have made a fixed rule of conduct not to buy his stock from a producer or wholesaler who should sell to consumers in competition with himself is plain. No law which would infringe his freedom of contract in that particular would stand. But when the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many, acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public, or to the individual against whom the concerted action is directed. *Callan v. Wilson*, 127 U. S. 555, 556, 8 Sup. Ct. 1301, 32 L. Ed. 228.

"But the plaintiffs in error say that the action which they have taken is purely defensive, and that they cannot maintain themselves as independent dealers, supplying the consumer, if the producers or wholesalers from whom they buy may not be prevented from competing with them for the direct trade of the consumer.

"For the purpose of suppressing this competition, they have not stopped with an individual obligation to refrain from dealing with one who sells within his own circle, and thereby deprives him of a possible customer, but have agreed not to deal with anyone who makes sales to consumers, which sales might have been made by any one of the seventy-seven independent members of the association. Thus they have stripped themselves of all freedom of contract in order to

compel those against whom they have combined to elect between their combined trade and that of consumers. That such an agreement is one in restraint of trade is undeniable, whatever the motive or necessity which has induced the compact. Whether it would be an illegal restraint at common law is not now for our determination. It is an illegal combination and conspiracy under the Mississippi statute. That is enough if the statute does not infringe the fourteenth amendment.

"The argument that the situation is one which justified the defensive measures taken by the plaintiffs in error is one which we need neither refute nor concede. Neither are we required to consider any mere question of the expediency of such a law. It is a regulation of commerce purely intrastate,—a subject as entirely under the control of the state as is the delegated control over interstate commerce exercised by the United States. The power exercised is the police power reserved to the states. The limitation upon its exercise, contained in the federal Constitution, is found in the fourteenth amendment, whereby no state may pass any law by which a citizen is deprived of life, liberty, or property without due process of law. A like limitation upon the legislative power will be found in the Constitution of each state. That legislation might be so arbitrary or so irrational in depriving a citizen of freedom of contract as to come under the condemnation of the amendment may be conceded.

"In dealing with certain Kansas legislation in regulation of state commerce, which was claimed to be so extreme as to be an unwarranted infringement of liberty of contract, this court, in *Smiley v. Kansas*, 196 U. S. 447, 457, 25 Sup. Ct. 289, 291, 49 L. Ed. 546, 551, said: 'Undoubtedly there is a certain freedom of contract which cannot be destroyed by legislative enactment. In pursuance of that freedom, parties may seek to further their business interests, and it may not be always easy to draw the line between those contracts which are beyond the reach of the police power, and those which are subject to prohibition or restraint. But a secret arrangement, by which, under penalties, an apparently existing competition among all the dealers in a community in one of the necessities of life is substantially destroyed, without any merging of interests through partnership or incorporation, is one to which the police power extends. This is as far as we need go in sustaining the judgment in this case.'"<sup>1</sup>

<sup>1</sup> Accord: *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 571-573, 19 Sup. Ct. 25, 43 L. Ed. 259 (1898) (reasonable pooling agreement by railroads); *Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679 (1904) (corporation formed to hold stock of competing railroads); *United States v. American Tobacco Co.*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663 (1911) (monopolizing tobacco trade by acts unduly restrictive of competition). The United States may forbid a railroad from carrying in interstate commerce commodities produced by it. *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836 (1909).

RIDEOUT v. KNOX (1889) 148 Mass. 368, 372, 373, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560, HOLMES, J. (upholding a Massachusetts statute making the malicious erection of a fence over six feet high, for the purpose of annoying adjoining occupants, a private nuisance):

"It is plain that the right to use one's property for the sole purpose of injuring others is not one of the immediate rights of ownership. It is not a right for the sake of which property is recognized by the law, but is only a more or less necessary incident of rights which are established for very different ends. It has been thought by respectable authorities that even at common law the extent of a man's rights in cases like the present might depend upon the motive with which he acted. *Greenleaf v. Francis*, 18 Pick. 117, 121, 122. See *Carson v. Railroad Co.*, 8 Gray, 423, 424; *Roath v. Driscoll*, 20 Conn. 533, 544, 52 Am. Dec. 352; *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721; *Swett v. Cutts*, 50 N. H. 439, 447, 9 Am. Rep. 276.

"We do not so understand the common law, and we concede further that to a large extent the power to use one's property malevolently in any way which would be lawful for other ends is an incident of property which cannot be taken away even by legislation. It may be assumed that under our constitution the legislature would not have power to prohibit putting up or maintaining stores or houses with malicious intent,<sup>1</sup> and thus to make a large part of the property of the commonwealth dependent upon what a jury might find to have been the past or to be the present motives of the owner.

But it does not follow that the rule is the same for a boundary fence, unnecessarily built more than six feet high. It may be said that the difference is only one of degree. Most differences are, when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the legislature to exercise the police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; larger ones could not be, except by the exercise of the right of eminent domain. *Sawyer v. Davis*, 136 Mass. 239, 243, 49 Am. Rep. 27.

The statute is confined to fences and structures in the nature of fences, and to such fences only as unnecessarily exceed six feet in height. It is hard to imagine a more insignificant curtailment of the rights of property. Even the right to build a fence above six feet is not denied when any convenience of the owner would be served by building higher."<sup>2</sup>

<sup>1</sup> Accord: *Karasek v. Peter*, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345 (1900).

<sup>2</sup> In *Horan v. Byrnes*, 72 N. H. 93, 98, 101, 54 Atl. 945, 947, 949 (62 L. R. A. 602, 101 Am. St. Rep. 670) (1900), in upholding a similar statute. Parsons, C. J., said: "It is true that an act which one has the right to do under all circumstances, like the bringing of a suit upon a valid claim *Hallett v. Plumer*, 60 N. H. 498, 43 Atl. 618, 76 Am. St. Rep. 190, cannot be made

## 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 person 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.

actionable by the motive which accompanies it. But as applied to the use of real estate the argument begs the question, which is whether the enjoyment of real estate includes the right to use it solely to injure another. Because when employed for a useful purpose such use may rightfully injure another, it does not follow that the same use for a wrongful purpose may also rightfully injure another, except upon the theory of absolute dominion, because the character of the use is an element of the right. \* \* \* But the landowner's right in the enjoyment of his estate being that of reasonable use merely, there attaches at once to each the correlative right not to be disturbed by the malicious, and hence unreasonable, use made by another. To hold that a right is infringed because, by the noxious use made by another, the air coming upon a landowner's premises is made more or less injurious, and to deny the invasion of a right by an unreasonable use which shuts off air and light entirely, is an attempt to bound a right inherent and essential to the common enjoyment of property by the limitations of an ancient form of action. An unreasonable use of one estate may constitute a nuisance by its diminution of the right of enjoyment of another, without furnishing all the elements necessary to maintain an action *quare clausum fregit*; though in particular cases it may be said that no right is invaded unless something comes from the one lot to the other."

See *Sperry & Hutchinson Co. v. Rhodes*, 220 U. S. 502, 31 Sup. Ct. 490, 55 L. Ed. 561 (1911) (act changing former law so as to forbid unauthorized publication of photograph of living person as an advertisement).

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 very 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 entrenched 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 necessities of life. Tobacco is not one of the necessities 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 necessities 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.<sup>1</sup>

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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 employees, and by section 10 made it a misdemeanor for such carriers or their agents to "threaten any employee with loss of employment," or "unjustly [to] discriminate against any employee 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

<sup>1</sup> Accord: *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 33 Sup. Ct. 66, 57 L. Ed. — (1912) (prohibition of sales at one place lower than at another with intent to destroy competition); *Opinion of the Justices*, 211 Mass. 620, 99 N. E. 294 (1912) (same, with intent to create a monopoly); *State v. Fairmont Creamery Co. of Nebraska*, 153 Iowa, 702, 133 N. W. 895, 42 L. R. A. (N. S.) 821 (1912) (similar prohibition against discriminatory purchase of dairy products); *State v. Bridgeman & Russell Co.*, 117 Minn. 186, 134 N. W. 496 (1912) (same).

In *Central Lumber Co. v. South Dakota*, above, Holmes, J., said (226 U. S. 161, 33 Sup. Ct. 67, 57 L. Ed. —): "We must assume that the legislature of South Dakota considered that people selling in two places made the prohibited use of their opportunities, and that such use was harmful, although the usual efforts of competitors were desired. It might have been argued to the legislature with more force than it can be to us that recoupment in one place of losses in another is merely an instance of financial ability to compete. If the legislature thought that that particular manifestation of ability usually came from great corporations whose power it deemed excessive and for that reason did more harm than good in their state, and that there was no other case of frequent occurrence where the same could be said, we cannot review their economics or their facts. That the law embodies a widespread conviction appears from the decisions in other states."

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 employee 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. 414, 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 employee 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 employee. 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 employee 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 employee, 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 employee in his personal service any more than an employee 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 employees, 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 employees 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 1893 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 employees 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 employees 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 employee, 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 employee 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 entrenched impregably 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 lawfully 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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ADAMS v. BRENNAN (1893) 177 Ill. 194, 199-201, 52 N. E. 314, 42 L. R. A. 718, 69 Am. St. Rep. 222, Mr. Justice CARTWRIGHT (holding invalid a stipulation of the Chicago board of education requiring contractors to employ only union workmen upon school buildings):

"It is plain that the rule adopted by the board and included in this contract is a discrimination between different classes of citizens, and of such a nature as to restrict competition and to increase the cost of work. It is unquestionable that if the legislature should enact a statute containing the same provision as this contract in regard to any work to be done for boards of education, or if they should, by a statute, undertake to require this board, as the agency of the state in the management of school affairs in the city of Chicago, to adopt such a rule or insert such a clause in its contracts, or should undertake to authorize it to do so, the provision would be absolutely null and void, as in conflict with the constitution of the state. If such a restriction were sought to be enforced by any law of the state, it would constitute an infringement upon the constitutional rights of citizens, so that the state, in its sovereign capacity, through its legislature, could not enact such a provision. *Millett v. People*, 117 Ill. 294, 7 N. E. 631, 57 Am. Rep. 869; *Frorer v. People*, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492; *Braceville Coal Co. v. People*, 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. Rep. 206; *Ramsey v. People*, 142 Ill. 380, 32 N. E. 364, 17 L. R. A. 853; *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315; *People v. Chicago Live Stock Exchange*, 170 Ill. 556, 48 N. E. 1062, 39 L. R. A. 373, 62 Am. St. Rep. 404. There is no more reason or justification for such a contract as this than there would be for a provision that no one should be employed except members of some particular party or church. In any such case it might be said that the board entertained a bona fide opinion that the members of some political party were more intelligent and better capable of performing the work, so that better results would be attained; or that the members of a church, on account of their higher standard of morality, would more faithfully and conscientiously carry out the contract. The fact that the board may have been of the opinion that its action was for the benefit of the public cannot afford a justification for limiting competition in bidders, and requiring them to abandon the right to contract with whomsoever they may choose for the performance of the work.

"There seems, however to be a claim that the board of education, although it could not be lawfully required or authorized to make such a contract, may have some sort of discretion to do so; and the only question in the case on the subject of the validity of such contract is whether the board possesses power beyond that of the legislature, in which is vested the entire legislative authority of the state. Upon what theory it could be claimed that this board of education, which exercises merely the function of the state in maintaining public schools within a limited portion of the state, can possess either power or discretion which the state in its sovereign capacity could not confer upon it, we are unable to imagine. No argument is made which would justify such a conclusion. There can be no greater power of

the board to act of its own motion than by virtue of positive law. The results in either case are equally in conflict with the organic law, and such legislation, contract, or action, whatever form it may take, is void. Nor can the fact, if it be a fact, that an individual might make such a bargain, authorize these public officers exercising a public trust to do so. The individual may, if he chooses, give away his money; but the public officer, acting as a trustee, has no such liberty, and no right to surrender to a committee or any one else the rights of those for whom he acts."<sup>1</sup>

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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

<sup>1</sup> Accord: See cases collected in 23 L. R. A. (N. S.) 815, 816.

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 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 Congress, 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 directly affects the body of the people. Upon this principle, in this state, tavern-keepers 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.<sup>1</sup>

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

<sup>1</sup> See *Carew v. Rutherford*, 106 Mass. 1, 14, 8 Am. Rep. 287 (1870) for a reference to Massachusetts colonial acts regulating the prices of labor and commodities.



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.<sup>2</sup>

[FIELD, J., gave a dissenting opinion, in which STRONG, J., concurred.]

<sup>2</sup> Accord: *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247 (1892) (collecting cases of rate regulation of carriers, warehousemen, and gas, water, telephone, and telegraph companies); *Brass v. North Dakota ex rel. Stolser*, 153 U. S. 391, 14 Sup. Ct. 857, 38 L. Ed. 757 (1894) (grain elevators in state where no monopoly); *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 85, 22 Sup. Ct. 30, 46 L. Ed. 92 (1901) (stock yards); *German Alliance Ins. Co. v. Barnes*, 189 Fed. 769 (1911) (fire insurance); and cases concerning various other occupations collected in 6 L. R. A. (N. S.) 834.

Contra: *American Surety Co. of New York v. Shallenberger*, 183 Fed. 636 (1910) (surety bonds); *Ex parte Diekey*, 144 Cal. 234, 77 Pac. 924, 66 L. R. A. 928, 103 Am. St. Rep. 82, 1 Ann. Cas. 428 (1904) (employment agencies).

Compare the common practice of legally restricting rates of interest, *Griffith v. Connecticut*, 218 U. S. 563, 569, 31 Sup. Ct. 134, 54 L. Ed. 1155 (1910); and see the observations of Barclay, J. (dissenting), in *State v. Loomis*, ante, p. 427, note.

Regulations forbidding *discrimination* in service or rates by businesses affected by a public interest are also widely upheld. So, places of amusement, *People v. King*, 110 N. Y. 418, 18 N. E. 245, 1 L. R. A. 293, 6 Am. St. Rep. 389 (1888); *Western Turf Ass'n v. Greenberg*, 204 U. S. 359, 27 Sup. Ct. 384, 51 L. Ed. 520 (1907); and life insurance companies, *Equitable Life Assur. Soc. of United States v. Commonwealth*, 113 Ky. 126, 67 S. W. 388 (1902). See *Seaboard Air Line R. Co. v. Florida ex rel. Ellis*, 203 U. S. 261, 27 Sup. Ct. 109, 51 L. Ed. 175 (1906) (discrimination not permissible even if necessary for a profit). Compare *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671 (1911) (retroactive invalidation of annual pass for life issued in settlement of damage claim).

As to the validity of various kinds of *mandatory regulation* of such businesses, see *Gladson v. Minnesota*, 166 U. S. 427, 17 Sup. Ct. 627, 41 L. Ed. 1064 (1897); *Lake Shore & M. S. Ry. Co. v. Ohio ex rel. Lawrence*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702 (1899); *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194 (1900); *W. W. Cargill Co. v. Minnesota ex rel. Railroad & W. Commission*, 180 U. S. 452, 21 Sup. Ct. 423, 45 L. Ed. 619 (1901); *Minneapolis & St. L. R. Co. v. Minnesota ex rel. Railroad & W. Commission*, 193 U. S. 53, 24 Sup. Ct. 396, 48 L. Ed. 614 (1904); *Louisville & N. R. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 29 Sup. Ct. 246, 53 L. Ed. 441 (1909); *Missouri Pac. R. Co. v. Nebraska*, 217 U. S. 196, 30 Sup. Ct. 461, 54 L. Ed. 727, 18 Ann. Cas. 989 (1910); *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7 (1911); *Washington v. Fairchild*, 224 U. S. 510, 32 Sup. Ct. 535, 56 L. Ed. 863 (1912); *Chicago, B. & Q. R. Co. v. Cram*, 228 U. S. 70, 33 Sup. Ct. 437, 57 L. Ed. — (1913). See, also, *State v. Scougal*, 3 S. D. 55, 75, 51 N. W. 858, 15 L. R. A. 477, 44 Am. St. Rep. 756 (1892) (banking affected by a public interest); *Weed v. Bergh*, ante, p. 457.

Can a business which does not offer to perform services for any one other than its owner, but which occupies a position of great economic and physical advantage, like a private pipe line for oil, be compelled by statute to serve the public for just compensation, unless it is taken outright by eminent domain? See *Pralrie Oil & Gas Co. v. United States*, 204 Fed. 798 (1913).

## REAGAN v. FARMERS' LOAN &amp; TRUST CO.

(Supreme Court of United States, 1894. 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014.)

[Appeal from the United States Circuit Court for the Western District of Texas. A Texas statute established a railroad commission and authorized it to fix reasonable rates for freight and passenger service in the state, after notice and hearing to the railroads affected. The rates thus established were to be deemed reasonable until the contrary was found in a proceeding instituted for this purpose by a railroad in a court of competent jurisdiction in Travis county, Texas, and the burden of proving them unreasonable by clear evidence was placed on the railroad. The plaintiff trust company, on behalf of bondholders of the International & Great Northern Railroad, filed a bill against the commission and the state Attorney General in the federal Circuit Court having jurisdiction in Travis county, alleging in detail the unreasonableness of a schedule of freight rates established for said railroad by the commission, and asking an injunction against its enforcement. From a decree in favor of the plaintiff, defendants took this appeal. Other facts appear in the opinion.]

Mr. Justice BREWER. \* \* \* It appears from the bill that, in pursuance of the powers given to it by this act, the state commission has made a body of rates for fares and freights. This body of rates, as a whole, is challenged by the plaintiff as unreasonable, unjust, and working a destruction of its rights of property. The defendant denies the power of the court to entertain an inquiry into that matter, insisting that the fixing of rates for carriage by a public carrier is a matter wholly within the power of the legislative department of the government and beyond examination by the courts.

It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates. 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. \* \* \* [Here follow quotations from various cases, particularly Railroad Commission Cases, 116 U. S. 307, 331, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636, and Chicago, etc., Ry. v. Minnesota, ante, p. 300.]

These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every Constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the fourteenth amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held. It was, therefore, within the competency of the Circuit Court of the United States for the Western District of Texas, at the instance of the plaintiff, a citizen of another state, to enter upon an inquiry as to the reasonableness and justice of the rates prescribed by the railroad commission. Indeed, it was in so doing only exercising a power expressly named in the act creating the commission. \* \* \*

And now, what deductions are fairly to be drawn from all the facts before us? Is there anything which detracts from the force of the general allegation that these rates are unjust and unreasonable? This clearly appears. The cost of this railroad property was \$40,000,000; it cannot be replaced to-day for less than \$25,000,000. There are \$15,000,000 of mortgage bonds outstanding against it, and nearly \$10,000,000 of stock. These bonds and stock represent money invested in the construction of this road. The owners of the stock have never received a dollar's worth of dividends in return for their investment. The road was thrown into the hands of a receiver for default in payment of the interest on the bonds. The earnings for the last three

years prior to the establishment of these rates was insufficient to pay the operating expenses and the interest on the bonds. In order to make good the deficiency in interest the stock-holders have put their hands in their pockets and advanced over a million of dollars. The supplies for the road have been purchased at as cheap a rate as possible. The officers and employes have been paid no more than is necessary to secure men of the skill and knowledge requisite to suitable operation of the road. By the voluntary action of the company the rate in cents per ton per mile has decreased in ten years from 2.03 to 1.30. The actual reduction by virtue of this tariff in the receipts during the six or eight months that it has been enforced amounts to over \$150,000. Can it be that a tariff which under these circumstances has worked such results to the parties whose money built this road is other than unjust and unreasonable? Would any investment ever be made of private capital in railroad enterprises with such as the proffered results?

It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others. There may be circumstances which would justify such a tariff; there may have been extravagance and a needless expenditure of money; there may be waste in the management of the road; enormous salaries, unjust discrimination as between individual shippers, resulting in general loss. The construction may have been at a time when material and labor were at the highest price, so that the actual cost far exceeds the present value; the road may have been unwisely built, in localities where there is no sufficient business to sustain a road. Doubtless, too, there are many other matters affecting the rights of the community in which the road is built as well as the rights of those who have built the road.

But we do hold that a general averment in a bill that a tariff as established is unjust and unreasonable, is supported by the admitted facts that the road cost far more than the amount of the stock and bonds outstanding; that such stock and bonds represent money invested in its construction; that there has been no waste or mismanagement in the construction or operation; that supplies and labor have been purchased at the lowest possible price consistent with the successful operation of the road; that the rates voluntarily fixed by the company have been for ten years steadily decreasing until the aggregate decrease has been more than fifty per cent.; that under the rates thus voluntarily established, the stock, which represents two-fifths of the value, has never received anything in the way of dividends, and that for the last three years the earnings above operating expenses have been insufficient to pay the interest on the bonded debt, and that the proposed

tariff, as enforced, will so diminish the earnings that they will not be able to pay one-half the interest on the bonded debt above the operating expenses; and that such an averment so supported will, in the absence of any satisfactory showing to the contrary, sustain a finding that the proposed tariff is unjust and unreasonable, and a decree reversing it being put in force. \* \* \*

Decree affirmed (as to this point).<sup>1</sup>

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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

<sup>1</sup> Accord: *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819 (1898), in an elaborate opinion.

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.<sup>1</sup> 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

<sup>1</sup> In *Norfolk & S. Turnpike Co. v. Commonwealth of Virginia*, 225 U. S. 264, 32 Sup. Ct. 828, 56 L. Ed. 1082 (1912), it was held the state might suspend the collecting of tolls by a turnpike company while its roads were out of repair, even though the travel on them did not yield enough revenue to keep them repaired; White, C. J., saying (225 U. S. 271, 32 Sup. Ct. 831, 56 L. Ed. 1082): "To suspend the taking of tolls while the roads were out of repair manifestly was not a taking of property, but was simply a method provided by statute to enforce the discharge of the public duty respecting the safe and convenient maintenance of a public highway. In other words, \* \* \* the burden of keeping the turnpikes in repair was made a condition precedent to the right to collect tolls."

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."<sup>2</sup>

<sup>2</sup> Compare the individual opinion of Brewer, J., in *Cotling v. Kansas City Stock Yards Co.*, 183 U. S. 79, 91 ff., 22 Sup. Ct. 30, 46 L. Ed. 92 (1901), suggesting a different basis for rates where the service rendered is not governmental in its nature.



## CITY OF KNOXVILLE v. KNOXVILLE WATER CO.

(Supreme Court of United States, 1909. 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371.)

[Appeal from the federal Circuit Court for the Eastern District of Tennessee to review a decree enjoining the enforcement of a municipal ordinance fixing water rates of plaintiff company. A special master, to whom the cause was referred, found various facts, indicated in the opinion below, from which he inferred that the new rates would earn an income of less than 6 per cent. upon the value of the company's property. He thought the company entitled to earn 8 per cent., 2 per cent. of which was for depreciation. The Circuit Court confirmed the master's report and issued the injunction.]

Mr. Justice Moody. \* \* \* At the threshold of the consideration of the case the attitude of this court to the facts found below should be defined. Here are findings of fact by a master, confirmed by the court. The company contends that under these circumstances, the findings are conclusive in this court, unless they are without support in the evidence, or were made under the influence of erroneous views of law. We need not stop to consider what the effect of such findings would be in an ordinary suit in equity. The purpose of this suit is to arrest the operation of a law on the ground that it is void and of no effect. It happens that in this particular case it is not an act of the legislature that is attacked, but an ordinance of a municipality. Nevertheless the function of rate-making is purely legislative in its character, and this is true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power. *Prentis v. Southern R. Co.*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150; *Honolulu Rapid Transit & Land Co. v. Hawaii*, 211 U. S. 282, 29 Sup. Ct. 55, 53 L. Ed. 186.

There can be at this day no doubt, on the one hand, that the courts, on constitutional grounds, may exercise the power of refusing to enforce legislation, nor, on the other hand, that that power ought to be exercised only in the clearest cases. The constitutional invalidity should be manifest, and where that invalidity rests upon disputed questions of fact, the invalidating facts must be proved to the satisfaction of the court. In view of the character of the judicial power invoked in such cases it is not tolerable that its exercise should rest securely upon the findings of a master, even though they be confirmed by the trial court. The power is best safeguarded against abuse by preserving to this court complete freedom in dealing with the facts of each case. Nothing less than this is demanded by the respect due from the judicial to the legislative authority. It must not be understood that the findings of a master, confirmed by the trial court, are without weight,

or that they will not, as a practical question, sometimes be regarded as conclusive. All that is intended to be said is, that in cases of this character this court will not fetter its discretion or judgment by any artificial rules as to the weight of the master's findings, however useful and well settled these rules may be in ordinary litigation. We approach the discussion of the facts in this spirit.

The first fact essential to the conclusion of the court below is the valuation of the property devoted to the public uses, upon which the company is entitled to earn a return. That valuation (\$608,000) must now be considered. It was made up by adding to the appraisement, in minute detail of all the tangible property, the sum of \$10,000 for "organization, promotion, etc.," and \$60,000 for "going concern." The latter sum we understand to be an expression of the added value of the plant as a whole over the sum of the values of its component parts, which is attached to it because it is in active and successful operation and earning a return.<sup>1</sup> We express no opinion as to the propriety of including these two items in the valuation of the plant, for the purpose for which it is valued in this case, but leave that question to be considered when it necessarily arises. We assume, without deciding, that these items were properly added in this case. The value of the tangible property found by the master is, of course, \$608,000, lessened by \$70,000, the value attributed to the intangible property, making \$538,000. This valuation was determined by the master by ascertaining what it would cost, at the date of the ordinance, to reproduce the existing plant as a new plant. \* \* \*

The cost of reproduction is not always a fair measure of the present value of a plant which has been in use for many years. The items composing the plant depreciate in value from year to year in a varying degree. Some pieces of property, like real estate for instance, depreciate not at all, and sometimes, on the other hand, appreciate in value. But the reservoirs, the mains, the service pipes, structures upon real estate, standpipes, pumps, boilers, meters, tools and appliances of every kind begin to depreciate with more or less rapidity from the moment of their first use. It is not easy to fix at any given time the

<sup>1</sup> In *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 223 U. S. 655, 669, 670, 32 Sup. Ct. 389, 390 (56 L. Ed. 594) (1912), a gas rate case, Holmes, J., said: "Although it is argued that the court excluded going value, the court expressly took into account the fact that the plant was in successful operation." What it excluded was the good will or advantage incident to the possession of a monopoly, so far as that might be supposed to give the plaintiff the power to charge more than a reasonable price. *Willcox v. Consolidated Gas Co. of New York*, 212 U. S. 19, 52, 29 Sup. Ct. 192, 53 L. Ed. 382, 399, 15 Ann. Cas. 1054. An adjustment of this sort under a power to regulate rates has to steer between Scylla and Charybdis. On the one side, if the franchise is taken to mean that the most profitable return that could be got, free from competition, is protected by the fourteenth amendment, then the power to regulate is null. On the other hand, if the power to regulate withdraws the protection of the amendment altogether, then the property is naught. This is not a matter of economic theory, but of fair interpretation of a bargain. Neither extreme can have been meant. A midway between them must be hit."

amount of depreciation of a plant whose component parts are of different ages, with different expectations of life. But it is clear that some substantial allowance for depreciation ought to have been made in this case. The officers of the company, alio intuitu, estimated what they called "incomplete depreciation" of this plant (which we understand to be the depreciation of the surviving parts of it still in use) at \$77,000, which is 14 per cent of the master's appraisal of the tangible property. A witness called by the city placed the reproduction value of the tangible property at \$363,000, and estimated the allowance that should be made for depreciation at \$118,000, or 32 per cent. In the view we take of the case it is not necessary that we should undertake the difficult task of determining exactly how much the master's valuation of the tangible property ought to have been diminished by the depreciation which that property had undergone. It is enough to say that there should have been a considerable diminution, sufficient, at least, to raise the net income found by the court above 6 per cent upon the whole valuation thus diminished. If, for instance, the master's valuation should be diminished by \$50,000, allowed for depreciation, the net earnings found by him would show a return of substantially 6.5 per cent.

Counsel for the company urge rather faintly that the capitalization of the company ought to have some influence in the case in determining the valuation of the property. It is a sufficient answer to this contention that the capitalization is shown to be considerably in excess of any valuation testified to by any witness, or which can be arrived at by any process of reasoning. The cause for the large variation between the real value of the property and the capitalization in bonds and preferred and common stock is apparent from the testimony. All, or substantially all, the preferred and common stock was issued to contractors for the construction of the plant, and the nominal amount of the stock issued was greatly in excess of the true value of the property furnished by the contracts. A single instance taken from the testimony will illustrate this. At the very start of the enterprise a contract was entered into for the construction of a part of the plant, which was of a value slightly, if at all, exceeding \$125,000. The price paid the contractor was \$125,000 in bonds and \$200,000 in common stock. Other contracts for construction showed a like disproportion between value furnished and nominal capitalization received for that value. It perhaps is unnecessary to say that such contracts were made by the company with persons who, at the time, by stock ownership, controlled its action. Bonds and preferred and common stock issued under such conditions afford neither measure of, nor guide to, the value of the property

\* \* \*

The company's original case was based upon an elaborate analysis of the cost of construction. To arrive at the present value of the plant large deductions were made on account of the depreciation. This depreciation was divided into complete depreciation and incomplete de-

preciation. The complete depreciation represented that part of the original plant which, through destruction or obsolescence, had actually perished as useful property. The incomplete depreciation represented the impairment in value of the parts of the plant which remained in existence and were continued in use. It was urgently contended that, in fixing upon the value of the plant upon which the company was entitled to earn a reasonable return, the amounts of complete and incomplete depreciation should be added to the present value of the surviving parts. The court refused to approve this method, and we think properly refused. A water plant, with all its additions, begins to depreciate in value from the moment of its use. Before coming to the question of profit at all the company is entitled to earn a sufficient sum annually to provide not only for current repairs, but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The company is not bound to see its property gradually waste, without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that, at the end of any given term of years, the original investment remains as it was at the beginning. It is not only the right of the company to make such a provision, but it is its duty to its bond and stock holders, and, in the case of a public service corporation, at least, its plain duty to the public. If a different course were pursued the only method of providing for replacement of property which has ceased to be useful would be the investment of new capital and the issue of new bonds or stocks. This course would lead to a constantly increasing variance between present value and bond and stock capitalization,—a tendency which would inevitably lead to disaster either to the stockholders or to the public, or both. If, however, a company fails to perform this plain duty and to exact sufficient returns to keep the investment unimpaired, whether this is the result of unwarranted dividends upon over issues of securities, or of omission to exact proper prices for the output, the fault is its own. When, therefore, a public regulation of its prices comes under question, the true value of the property then employed for the purpose of earning a return cannot be enhanced by a consideration of the errors in management which have been committed in the past. \* \* \*

In the course of presenting its case the city offered evidence of the net income of some years subsequent to the passage of the ordinance. The case is peculiar. The company has never observed the ordinance. The suit was begun nine months after its enactment and tried considerably later. In the meantime the company's gross income had largely increased. But the decision in the court below was based solely on the operations of the fiscal year ending March 31, 1901, and the amount of net income ascertained, namely, \$36,000, was obtained by applying the reductions made by the ordinance to the operations of that fiscal year. We think it was error to confine the investigation to, and base

the judgment upon, that year alone. The precise subject of inquiry was, what would be the effect of the ordinance in the future. The operations of the preceding fiscal year, or of any other past fiscal year, were valueless if the year was abnormal, and were only of significance so far as they foretold the future. If, as in this case, sufficient time has passed, so that certainty instead of prophecy can be obtained, the certainty would be preferable to the prophecy. In this case there could be no absolute certainty, because the ordinance had never been put in operation. But evidence of the operations of the years succeeding to the ordinance is relevant and of great importance, and by a consideration of such evidence a much greater degree of certainty could be obtained. Suppose, by way of illustration, that before bringing suit the company had put the ordinance into effect and had observed it for a number of years, and the result showed that a sufficient net income had been realized,—is it possible that a suit then could be brought and the evidence confined to a period prior to the ordinance, and, by a process of speculation, the conclusion reached that the ordinance would be confiscatory? Some evidence regarding the income of the company after the passage of the ordinance is in the record, but it subsequently was excluded from consideration. It showed an increase of gross and net earnings, but also an increase in the property devoted to the public use. We are unable to say what the effect of the evidence excluded would be; all we can say is, that the inquiry was unduly limited by the exclusion of the evidence of the operation of subsequent years. \* \* \*

In ordinary cases full justice would be done by reversing the decree and remanding the cause for further proceedings in the court below, there to undergo a new and doubtless prolonged investigation. It is more than seven years since the enactment of the ordinance, and it has never been observed in any respect. This litigation ought now to be ended, if it is possible to end it with due regard to the rights of the contending parties. Disregarding for the moment all the errors which were committed in the court below, the decision of this cause may be rested upon a broader ground, which is clearly indicated by the previous judgments of this court. The jurisdiction which is invoked here ought, as has been said, to be exercised only in the clearest cases. If a company of this kind chooses to decline to observe an ordinance of this nature, and prefers rather to go into court with the claim that the ordinance is unconstitutional, it must be prepared to show to the satisfaction of the court that the ordinance would necessarily be so confiscatory in its effect as to violate the Constitution of the United States. \* \* \*

In *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 23 Sup. Ct. 571, 47 L. Ed. 892, after repeating with approval this language, it was said (p. 441): "In a case like this we do not feel bound to re-examine and weigh all the evidence, although we have done so, or to proceed according to our independent opinion as to what were proper



rates. It is enough if we cannot say that it was impossible for a fair-minded board to come to the result which was reached." <sup>2</sup>

It cannot be doubted that, in a clear case of confiscation, it is the right and duty of the court to annul the law. \* \* \* But the case before us is not a case of this kind. Upon any aspect of the evidence the company is certain to obtain a substantial net revenue under the operation of the ordinance. The net income, in any event, would be substantially 6 per cent., or 4 per cent. after an allowance of 2 per cent. for depreciation. See *Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co.*, 192 U. S. 201, 24 Sup. Ct. 241, 48 L. Ed. 406. We cannot know clearly that the revenue would not much exceed that return. We do not feel called upon to determine whether a demonstrated reduction of income to that point would or would not amount to confiscation. Where the case rests, as it does here, not upon observation of the actual operation under the ordinance, but upon speculations as to its effect based upon the operations of a prior fiscal year, we will not guess whether the substantial return certain to be earned would lack something of the return which would save the effect of the ordinance from confiscation. It is enough that the whole case leaves us in grave doubt. The valuation of the property was an estimate and is greatly disputed. The expense account was not agreed upon. The ordinance had not actually been put into operation; the inferences were based upon the operations of the preceding year; and the conclusion of the court below rested upon that most unsatisfactory evidence, the testimony of expert witnesses employed by the parties. The city authorities acted in good faith, and they tried, without success, to obtain from the company a statement of its property, capitalization, and earnings.

The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind. Regulations of public service corporations, which perform their duties under conditions of necessary monopoly, will occur with greater and greater frequency as time goes on. It is a delicate and dangerous function, and ought to be exercised with a keen sense of justice on the part of the regulating body, met by a frank disclosure on the part of the company to be regulated. The courts ought not to bear the whole burden of saving property from confiscation, though they will not be found wanting where the proof is clear. The legislatures and subordinate bodies, to whom the legislative power has

<sup>2</sup> "The courts cannot, after the board has fully and fairly investigated and acted, by fixing what it believes to be reasonable rates, step in and say its action shall be set aside and nullified, because the courts, upon a similar investigation, have come to a different conclusion as to the reasonableness of the rates fixed. There must be actual fraud in fixing the rates, or they must be so palpably and grossly unreasonable and unjust as to amount to the same thing."—Harlan, J., in *San Diego Land & Town Co. v. National City*, 171 U. S. 739, 750, 19 Sup. Ct. 804, 808 (43 L. Ed. 1151) (1899).

been delegated, ought to do their part. Our social system rests largely upon the sanctity of private property; and that state or community which seeks to invade it will soon discover the error in the disaster which follows. The slight gain to the consumer, which he would obtain from a reduction in the rates charged by public service corporations, is as nothing compared with his share in the ruin which would be brought about by denying to private property its just reward, thus unsettling values and destroying confidence. On the other hand, the companies to be regulated will find it to their lasting interest to furnish freely the information upon which a just regulation can be based.

If hereafter it shall appear, under the actual operation of the ordinance, that the returns allowed by it operate as a confiscation of property, nothing in this judgment will prevent another application to the courts of the United States or to the courts of the state of Tennessee. But, as the case now stands, there is no such certainty that the rates prescribed will necessarily have the effect of denying to the company such a return as would avoid confiscation.

Decree reversed.<sup>3</sup>

<sup>3</sup> VALUATION AND RATE OF RETURN.—For valuable discussions of the rate of return and elements of capitalization proper under various circumstances, see, also, *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 23 Sup. Ct. 571, 47 L. Ed. 892 (1903); *Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co.*, 192 U. S. 201, 24 Sup. Ct. 241, 48 L. Ed. 406 (1904); *Willcox v. Consolidated Gas Co. of New York*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034 (1909); *Spring Valley Waterworks Co. v. San Francisco*, 124 Fed. 574 (1903); *Id.*, 165 Fed. 657, 667 (1904); *Id.*, 192 Fed. 137 (1911); *Brunswick & T. Water District v. Maine Water Co.*, 99 Me. 371, 59 Atl. 537 (1904); *Contra Costa Water Co. v. City of Oakland*, 159 Cal. 323, 113 Pac. 668 (1911); *Steenerson v. Great Northern Ry. Co.*, 69 Minn. 353, 72 N. W. 713 (1897); *Shepard v. Northern Pac. R. Co.*, 184 Fed. 765 (1911); *Arkansas Rate Cases*, 187 Fed. 290 (1911); *Cumberland Telephone & Telegraph Co. v. Louisville*, 187 Fed. 637 (1911); *State Journal Printing Co. v. Madison Gas, etc., Co.*, 4 Wis. R. Com. 501 (1910). Whitten, *Valuation of Public Service Corporations* (1912), treats the entire topic admirably.

RELATION OF WHOLE SCHEDULE TO ITS PARTS.—For the relation of particular rates or services to the schedule as a whole, see *Lake Shore & M. S. Ry. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858 (1899); *Minneapolis & St. L. R. Co. v. Minnesota ex rel. Railroad & W. Commission*, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 1151 (1902); *Willcox v. Consolidated Gas Co. of New York*, 212 U. S. 19, 54, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034 (1909); *Northern Pac. R. Co. v. North Dakota ex rel. McCue*, 216 U. S. 579, 30 Sup. Ct. 423, 54 L. Ed. 624 (1910); *Interstate Consol. St. R. Co. v. Massachusetts*, 207 U. S. 79, 86, 28 Sup. Ct. 26, 52 L. Ed. 111, 12 Ann. Cas. 555 (1907); *Commonwealth v. Interstate Consol. St. R. Co.*, 187 Mass. 436, 73 N. E. 530, 11 L. R. A. (N. S.) 973, 2 Ann. Cas. 419 (1905); *Commonwealth v. Boston & N. St. R. Co.*, 212 Mass. 82, 98 N. E. 1075 (1912); *In re Gardner*, 84 Kan. 264, 113 Pac. 1054, 33 L. R. A. (N. S.) 956 (1911); *State v. Sutton* (N. J. Sup.) 84 Atl. 1057 (1912); *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398 (1907); *Missouri Pac. Ry. v. Kansas ex rel. Taylor*, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472 (1910).

TESTING DOUBTFUL SCHEDULES.—As to upholding rates in cases of doubt, until actual trial of them, see, also, *Willcox v. Consolidated Gas Co. of New York*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034 (1909); *Northern Pac. R. Co. v. North Dakota ex rel. McCue*, 216 U. S. 579, 30 Sup. Ct. 423, 54 L. Ed. 624 (1910); *City of Louisville v. Cumberland Telephone &*

## MINNESOTA RATE CASES.

(Supreme Court of the United States, 1913. 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. —.)

[Appeals from the federal Circuit Court for Minnesota. By two acts of the Minnesota legislature in 1907, and by two orders of the state Railroad and Warehouse Commission in 1906 and 1907, the passenger and freight rates for intrastate carriage of the Northern Pacific, the Great Northern, and the Minneapolis & St. Louis Railroad Companies were substantially reduced. After elaborate hearings before a master, in injunction suits brought by the railroads, decrees were made enjoining the enforcement of these rates upon the grounds. (1) That their incidental effect upon interstate rates to certain competing points in other states amounted to an illegal regulation of interstate commerce by the state; and (2) that the rates produced so low a rate of return as to constitute a taking of property without due process of law. The first ground is discussed in the part of the case printed post, p. 1174. The second is considered in the opinion below.]

Mr. Justice HUGHES. \* \* \* Second. Are the state's acts and orders confiscatory? \* \* \* The general principles which are applicable in a case of this character have been set forth in the decisions.

(1) The basis of calculation is the "fair value of the property" used for the convenience of the public. *Smyth v. Ames*, 169 U. S. 546, 42 L. Ed. 849, 18 Sup. Ct. 418. \* \* \*

(2) The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment, having its basis in a proper consideration of all relevant facts. \* \* \* [Quoting the passage from *Smyth v. Ames* that appears ante, p. 490, in *San Diego Land Co. v. National City*.]

(3) Where the business of the carrier is both interstate and intrastate, the question whether a scheme of maximum rates fixed by the state for intrastate transportation affords a fair return must be determined by considering separately the value of the property employed in the intrastate business and the compensation allowed in that business under the rates prescribed. This was also ruled in the *Smyth Case* (*Id.* p. 541). The reason, as there stated, is that the state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, and, on the other hand, the carrier cannot justify unreasonably high rates on domestic business because only in that way is it able to meet losses on its interstate business. \* \* \*

[After analyzing the estimates of the cost of reproducing the rail-

*Telegraph Co.*, 225 U. S. 470, 32 Sup. Ct. 741, 56 L. Ed. 1151 (1912). Compare the course of procedure in the *Arkansas Rate Cases*, 163 Fed. 141 (1908); *Id.*, 168 Fed. 720 (1909); *Id.*, 187 Fed. 290 (1911); *Id.*, 230 U. S. 553, 33 Sup. Ct. 1030, 57 L. Ed. — (1913).

road rights of way and terminals, upon which their valuation for rate-making purposes was based—which estimates were reached by taking the price a railroad would probably have to pay to-day for land so located (a price estimated considerably in excess of the normal market value of such land), and by adding to this from 30 per cent. to 200 per cent. more for cost of acquisition (including value of improvements likely to be found on the land and consequential damages), and finally about 20 per cent. more for items of engineering, superintendence, legal expenses, contingencies, and interest during construction:] It is impossible to assume, in making a judicial finding of what it would cost to acquire the property, that the company would be compelled to pay more than its fair market value. It is equipped with the governmental power of eminent domain. In view of its public purpose, it has been granted this privilege in order to prevent advantage being taken of its necessities. It would be free to stand upon its legal rights, and it cannot be supposed that they would be disregarded. \* \* \*

Moreover, it is manifest that an attempt to estimate what would be the actual cost of acquiring the right of way if the railroad were not there is to indulge in mere speculation. The railroad has long been established; to it have been linked the activities of agriculture, industry, and trade. Communities have long been dependent upon its service, and their growth and development have been conditioned upon the facilities it has provided. The uses of property in the communities which it serves are to a large degree determined by it. The values of property along its line largely depend upon its existence. It is an integral part of the communal life. The assumption of its nonexistence, and at the same time that the values that rest upon it remain unchanged, is impossible and cannot be entertained. The conditions of ownership of the property and the amounts which would have to be paid in acquiring the right of way, supposing the railroad to be removed, are wholly beyond reach of any process of rational determination. The cost-of-reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty. But it does not justify the acceptance of results which depend upon mere conjecture. It is fundamental that the judicial power to declare legislative action invalid upon constitutional grounds is to be exercised only in clear cases. The constitutional invalidity must be manifest, and if it rests upon disputed questions of fact, the invalidating facts must be proved. And this is true of asserted value as of other facts. \* \* \*

[The] question is whether, in determining the fair present value of the property of the railroad company as a basis of its charges to the public, it is entitled to a valuation of its right of way not only in excess of the amount invested in it, but also in excess of the market value of contiguous and similarly situated property. For the purpose

of making rates, is its land devoted to the public use to be treated (irrespective of improvements) not only as increasing in value by reason of the activities and general prosperity of the community, but as constantly outstripping in this increase, all neighboring lands of like character, devoted to other uses? If rates laid by competent authority, state or national, are otherwise just and reasonable, are they to be held to be unconstitutional and void because they do not permit a return upon an increment so calculated?

It is clear that in ascertaining the present value we are not limited to the consideration of the amount of the actual investment. If that has been reckless or improvident, losses may be sustained which the community does not underwrite. As the company may not be protected in its actual investment, if the value of its property be plainly less, so the making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost. The property is held in private ownership, and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law. But still it is property employed in a public calling, subject to governmental regulation, and while, under the guise of such regulation, it may not be confiscated, it is equally true that there is attached to its use the condition that charges to the public shall not be unreasonable. And where the inquiry is as to the fair value of the property, in order to determine the reasonableness of the return allowed by the rate-making power, it is not admissible to attribute to the property owned by the carriers a speculative increment of value, over the amount invested in it and beyond the value of similar property owned by others, solely by reason of the fact that it is used in the public service. That would be to disregard the essential conditions of the public use, and to make the public use destructive of the public right. \* \* \*

Assuming that the company is entitled to a reasonable share in the general prosperity of the communities which it serves, and thus to attribute to its property an increase in value, still the increase so allowed, apart from any improvements it may make, cannot properly extend beyond the fair average of the normal market value of land in the vicinity having a similar character.<sup>1</sup> Otherwise we enter the realm of mere conjecture. We therefore hold that it was error to base the estimates of value of the right of way, yards and terminals upon the so-called "railway value" of the property. The company would certainly have no ground of complaint if it were allowed a value for these lands equal to the fair average market value of similar land in the vicinity, without additions by the use of multipliers, or otherwise, to cover hypothetical outlays. The allowances made

<sup>1</sup> This "normal market value" of railroad property cannot be satisfactorily established by the mere unexplained records of valuations for the purposes of taxation. *Missouri Rate Cases*, 230 U. S. 174, 33 Sup. Ct. 975, 57 L. Ed. 144 (1913).



below for conjectural cost of acquisition and consequential damages must be disapproved; and, in this view, we also think it was error to add to the amount taken as the present value of the lands the further sums, calculated on that value, which were embraced in the items of "engineering, superintendence, legal expenses," "contingencies," and "interest during construction."

By reason of the nature of the estimates, and the points to which the testimony was addressed, the amount of the fair value of the company's land cannot be satisfactorily determined from the evidence, but it sufficiently appears, for the reasons we have stated, that the amounts found were largely excessive. Finding this defect in the proof, it is not necessary to consider the objections which relate to the sources from which the property was derived or its mode of acquisition, or those which are urged to the inclusion of certain lands which it is said were not actually used as a part of the plant; and we express no opinion upon the merits of these contentions. \* \* \*

The apportionment of the value of the property, as found, between the interstate and intrastate business, was made upon the basis of the gross revenue derived from each. This is a simple method, easily applied, and for that reason has been repeatedly used. It has not, however, been approved by this court, and its correctness is now challenged. \* \* \* In support of this method, it is said that a division of the value of the property according to gross earnings is a division according to the "value of the use," and therefore proper. But it would seem to be clear that the value of the use is not shown by gross earnings. The gross earnings may be consumed by expenses, leaving little or no profit. \* \* \* [Here follows a quotation from Chicago, etc., Ry. v. Tompkins, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. Ed. 417, criticising this method.] \* \* \* The value of the use, as measured by return, cannot be made the criterion when the return itself is in question.<sup>2</sup> \* \* \*

When rates are in controversy, it would seem to be necessary to find a basis for a division of the total value of the property independently of revenue, and this must be found in the use that is made of the property. That is, there should be assigned to each business that proportion of the total value of the property which will correspond to the extent of its employment in that business. It is said that this is extremely difficult; in particular, because of the necessity for making a division between the passenger and freight business, and the obvious lack of correspondence between ton-miles and passenger-miles. It does not appear, however, that these are the only units

<sup>2</sup> Accord (apportionment of value of railroad property on basis of gross revenue from internal and interstate traffic): Missouri Rate Cases, 230 U. S. 474, 33 Sup. Ct. 975, 57 L. Ed. — (1913); Arkansas Rate Cases, 230 U. S. 553, 33 Sup. Ct. 1030, 57 L. Ed. — (1913). See the mode of apportionment used in *Trust Co. of America v. Chicago, etc., R. Co.* (D. C.) 199 Fed. 593 (1912).

available for such a division; and it would seem that, after assigning to the passenger and freight departments respectively, the property exclusively used in each, comparable use-units might be found which would afford the basis for a reasonable division with respect to property used in common. \* \* \*

Our conclusions may be briefly stated. The statements of the complainants' witnesses as to the extra cost of interstate business, while entitled to respect as expressions of opinion, manifestly involve wide and difficult generalizations. They embrace, without the aid of statistical information derived from appropriate tests and submitted to careful analysis, a general estimate of all the conditions of transportation, and an effort to express in the terms of a definite relation, or ratio, what clearly could be accurately arrived at only by prolonged and minute investigation of particular facts with respect to the actual traffic as it was being carried over the line. The extra cost, as estimated by these witnesses, is predicated not simply of haulage charges, but of all the outlays of the freight service, including the share of the expenses for maintenance of way and equipment assigned to the freight department. And the ratio, to be accurately stated, must also express the results of a suitable discrimination between the interstate and intrastate traffic on through and local trains respectively, and of an attribution of the proper share of the extra cost of local train service to the interstate traffic that uses it. The wide range of the estimates of extra cost, from three to six or seven times that of the interstate business per ton mile, shows both the difficulty and the lack of certainty in passing judgment.

We are of opinion that, on an issue of this character, involving the constitutional validity of state action, general estimates of the sort here submitted, with respect to a subject so intricate and important, should not be accepted as adequate proof to sustain a finding of confiscation.<sup>3</sup> While accounts have not been kept so as to show the relative cost of interstate and intrastate business, giving particulars of the traffic handled on through and local trains, and presenting data from which such extra cost as there may be of intrastate business, may be suitably determined, it would appear to have been not impracticable to have had such accounts kept or statistics prepared, at least during test periods, properly selected. It may be said that this would have been a very difficult matter, but the company, having assailed the constitutionality of the state acts and orders, was bound to establish its case, and it was not entitled to rest on expressions of judgment when it had it in its power to present accurate data which would permit the court to draw the right conclusion. \* \* \*

Decrees reversed as to Northern Pacific and Great Northern Companies, but modified and affirmed as to the Minneapolis & St. Louis

<sup>3</sup> Accord: See cases cited in note 2, above.

Company [whose revenues had been much more seriously affected than had those of the other companies].

[McKENNA, J., concurred in the result.]

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SHEVLIN-CARPENTER CO. v. MINNESOTA (1910) 218 U. S. 57, 67-70, 30 Sup. Ct. 663, 54 L. Ed. 930, Mr. Justice McKENNA (upholding a Minnesota statute penalizing timber cutting upon state lands regardless of defendant's knowledge or intent):

"The next contention of plaintiffs in error is that 'both the provisions of section 7 make a casual and involuntary trespasser liable to the state in double damages, and that declaring his act a felony violates the fourteenth amendment,' because those provisions 'eliminate altogether the question of intent,' and that the 'elimination of intent as an element of an offense is contrary to the requirements of due process of law.' To support the contention, plaintiffs in error attack the power of a legislature to make an innocent act a crime, and say that the 'principle that the legislature cannot, by its mere fiat, make an act otherwise innocent a crime, and punishable as such, is one to which this court will give effect, even though it be not expressly enunciated by the Constitution.' The principle as thus expressed is very general, and takes no account of whether a law have prospective or retrospective operation. It would seem, therefore, to destroy the well-recognized distinction between mala in se and mala prohibita. The principle contended for is probably not intended to be taken so broadly, and its generality is further limited by concession that it may have exceptions 'where so-called criminal negligence supplies a place of criminal intent, or where, in a few instances, the public welfare has made it necessary to declare a crime, irrespective of the actor's intent.' A concession of exceptions would seem to destroy the principle. If the principle gets its life or its protection from the fourteenth amendment, it cannot be destroyed by the legislature upon any conception of the public welfare. The Constitution declares the principle upon which the public welfare is to be promoted, and opposing ones cannot be substituted. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 558, 22 Sup. Ct. 431, 46 L. Ed. 679, 689.

"It will be seen that the foundation of the arguments of plaintiffs in error is that their trespass was an innocent act. There is some ambiguity as to what is meant by 'innocence.' They quote Mr. Justice Chase in *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648. It was there said that 'a law that punished a citizen for an innocent action, or, in other words, for an act which, when done, was in violation of no existing law,' could not 'be considered a rightful exercise of legislative power.' But it was said: 'The legislature may enjoin, permit, forbid, and punish; they may declare new crimes and establish rules of conduct for all its citizens in future cases.' In other words, inno-

cence cannot be asserted of an action which violates existing law, and ignorance of the law will not excuse. The law in controversy has no *ex post facto* element or effect in it. It was existing law when the trespass of plaintiffs in error was committed, and a trespass is a legal wrong, not an innocent act. There is no element of deception or surprise in the law. When the permit was issued, plaintiffs in error knew the limitations of it, and they took it at the risk and consequences of transgression. The state sought to guard against its wilful or accidental abuse. Permits had been abused and the lands of the state despoiled of their timber. The offenders were difficult to detect, or, if detected, the character of their acts, whether wilful, accidental, or involuntary, equally difficult to establish; and the state, the supreme court said, had been 'defrauded and robbed of large sums of money.' Double and treble damages and a criminal prosecution were provided to meet the situation.<sup>1</sup> It would be strange, indeed, if it were not within the competency of the legislature. To hold otherwise would take from the legislature the power to adjust legislation to evils as they arise and to the ways by which they may be effected. We held in *St. John v. New York*, 201 U. S. 633, 26 Sup. Ct. 554, 50 L. Ed. 896, 5 Ann. Cas. 909, that a state did not offend the equality clause of the fourteenth amendment by taking as a basis of classification the ways by which a law may be defeated. That case was applied in *District of Columbia v. Brooke*, 214 U. S. 138, 29 Sup. Ct. 560, 53 L. Ed. 941, to sustain a statute which provided a criminal proceeding against resident owners of property for neglecting to connect their property with sewers, and civil proceedings against non-resident owners for a like neglect.

"We do not understand the position of plaintiffs in error to be that a legislature may not prescribe a larger measure of damages than simple punishment, but that anything in excess of such compensation is punishment,<sup>2</sup> and cannot be constitutionally prescribed where there is no 'conscious intent' to do wrong. And yet plaintiffs in error except from the principle 'certain instances within the police power,' overlooking that the principle, if it exist at all, must be universal. It is true that the police power of a state is the least limitable of its pow-

<sup>1</sup> "The power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion. The statutes of nearly every state of the Union provide for the increase of damages where the injury complained of results from the neglect of duties imposed for the better security of life and property, and make that increase in many cases double, in some cases treble, and even quadruple the actual damages." *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 523, 6 Sup. Ct. 110, 114 (29 L. Ed. 463) (1885). by Field, J.

<sup>2</sup> Even upon the theory of simple compensation, a statute may provide a reasonably definite measure of damages for injuries whose pecuniary value is difficult to estimate or prove. *Chicago, B. & Q. R. Co. v. Cram*, 228 U. S. 70, 33 Sup. Ct. 437, 57 L. Ed. — (1913) (cases).

ers, but even it may not transcend the prohibition of the Constitution of the United States. If, as contended, intent is an essential element of crime, or, more restrictively, if intent is essential to the legality of penalties, it must be so, no matter under what power of the state they are prescribed. Plaintiffs in error, while considering there may be exceptions to the principle contended for in the exercise of the police power, urge that the legislation in controversy is not of that character. The supreme court of the state, however, expressed a different view. [102 Minn. 470, 113 N. W. 634, 114 N. W. 738.] It decided that the legislation was in effect an exercise of the police power, and cited a number of cases to sustain the proposition that public policy may require that in the prohibition or punishment of particular acts it may be provided that he who shall do them shall do them at his peril, and will not be heard to plead in defense good faith or ignorance. Those cases are set forth in the opinion of the court, and some of them reviewed.

"We will not repeat them. It was recognized that such legislation may, in particular instances, be harsh, but we can only say again what we have so often said, that this court cannot set aside legislation because it is harsh."<sup>3</sup>

[HARLAN, J., concurred in the result.]

<sup>3</sup> Accord (as to criminal or quasi-criminal liability): *Chicago, B. & Q. Ry. v. United States*, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582 (1911); *Welch v. State*, 145 Wis. 86, 129 N. W. 656, 32 L. R. A. (N. S.) 746 (1911); *New York Cent. & H. R. R. Co. v. United States*, 212 U. S. 481, 29 Sup. Ct. 304, 53 L. Ed. 613 (1909) (liability of corporation for agents); *United States v. Adams Exp. Co.*, 229 U. S. 381, 33 Sup. Ct. 878, 57 L. Ed. — (1913) (same of partnership or joint-stock association). See 33 L. R. A. (N. S.) 419, 423, 424, note (principal criminally liable for agent's unauthorized violation of liquor laws).

"The power of the legislature to declare an offence, and to exclude the elements of knowledge and due diligence from any inquiry as to its commission, cannot, we think, be questioned."—Harlan, J. in *Chicago B. & Q. R. Co. v. United States*, above, 220 U. S. 578, 31 Sup. Ct. 617, 55 L. Ed. 582.

Compare *Kilbourne v. State*, 84 Ohio St. 247, 95 N. E. 824, 35 L. R. A. (N. S.) 766 (1911); *People v. Rosenthal*, 197 N. Y. 394, 90 N. E. 991 (1910), affirmed 226 U. S. 260, 33 Sup. Ct. 27, 57 L. Ed. — (1912).

So, as to civil liability. *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611 (1897) (fire from railroads); *Jones v. Brim*, 165 U. S. 180, 17 Sup. Ct. 282, 41 L. Ed. 677 (1897) (injury to road from driven animals); *Chicago, R. I. & P. R. Co. v. Zerneck*, 183 U. S. 582, 22 Sup. Ct. 229, 46 L. Ed. 339 (1902) (injuries to railway passengers—semble); *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061 (1908) (injuries to employees from unsafe car coupling, in which *Moody, J.*, said (210 U. S. 295, 296, 28 Sup. Ct. 621, 52 L. Ed. 1061): "When applied to the case at bar the argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interests of the employee and of the public. Where an injury happens through the absence of a safe drawbar there must be hardship. Such an injury must be an irreparable misfortune to someone. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose



CITY OF CHICAGO v. STURGES (1911) 222 U. S. 313, 322-324, 32 Sup. Ct. 92, 56 L. Ed. 215, Mr. Justice LURTON (upholding an Illinois statute making cities absolutely liable for three-fourths of the damage done to property therein by mob of over 12 persons, and giving it a remedy over against the rioters):

"The objection [is narrowed] to the single question of legislative power to impose liability regardless of fault. It is a general principle of our law that there is no individual liability for an act which ordinary human care and foresight could not guard against. It is also a general principle of the same law that a loss from any cause purely accidental must rest where it chanced to fall. But behind and above these general principles which the law recognizes as ordinarily prevailing, there lies the legislative power, which, in the absence of organic restraint, may, for the general welfare of society, impose obligations and responsibilities otherwise nonexistent.

"Primarily, governments exist for the maintenance of social order. Hence it is that the obligation of the government to protect life, liberty, and property against the conduct of the indifferent, the careless, and the evil-minded may be regarded as lying at the very foundation of the social compact. A recognition of this supreme obligation is found in those exertions of the legislative power which have as an end the preservation of social order and the protection of the welfare of the public and of the individual. If such legislation be reasonably

their burdens upon those who could measureably control their causes, instead of upon those who are, in the main, helpless in that regard."

In *St. Louis & S. F. R. Co. v. Mathews*, above, 165 U. S. 26, 17 Sup. Ct. 252, 41 L. Ed. 611, Gray, J., said: "Railroad corporations, in order the better to carry out the public object of their creation, the sure and prompt transportation of passengers and goods, have been authorized by statute to use locomotive engines propelled by steam generated by fires lighted upon those engines. It is within the authority of the legislature to make adequate provision for protecting the property of others against loss or injury by sparks from such engines. The right of the citizen not to have his property burned without compensation is no less to be regarded than the right of the corporation to set it on fire. To require the utmost care and diligence of the railroad corporations in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of the railroads. When both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railroad company, which employs the instruments and creates the peril for its own profit, rather than upon the owner of the property, who has no control over or interest in those instruments."

But the state courts have generally held it unconstitutional to impose on railroads an absolute liability for stock killed by trains, 25 L. R. A. 162, note; 35 L. R. A. (N. S.) 1018, note; except as a penalty for failure to discharge some duty, such as maintaining fences or cattle guards, 31 L. R. A. (N. S.) 862, 863, note. Compare *Ohio & M. R. Co. v. Lackey*, 78 Ill. 55, 20 Am. Rep. 259 (1875); *Memphis & C. R. Co. v. Smith*, 56 Tenn. (9 Helsk.) 860 (1872); *Holder v. Chicago, St. L. & N. O. R. Co.*, 79 Tenn. (11 Lea) 176, 178-179 (1883).

The door of acts that are or may be made illegal may be made liable by statute for consequences more remote than those recognized by the common

adapted to the end in view, affords a hearing before judgment, and is not forbidden by some other affirmative provision of constitutional law, it is not to be regarded as denying due process of law under the provisions of the fourteenth amendment.

"The law in question is a valid exercise of the police power of the state of Illinois. It rests upon the duty of the state to protect its citizens in the enjoyment and possession of their acquisitions, and is but a recognition of the obligation of the state to preserve social order and the property of the citizen against the violence of a riot or a mob.

"The state is the creator of subordinate municipal governments. It vests in them the police powers essential to the preservation of law and order. It imposes upon them the duty of protecting property situated within their limits from the violence of such public breaches of the peace as are mobs and riots. This duty and obligation thus intrusted to the local subordinate government is by this enactment emphasized and enforced by imposing upon the local community absolute liability for property losses resulting from the violence of such public tumults.

"The policy of imposing liability upon a civil subdivision of government exercising delegated police power is familiar to every student of the common law. We find it recognized in the beginning of the police system of Anglo-Saxon people. Thus, 'the Hundred,' a very early form of civil subdivision, was held answerable for robberies committed within the division. By a series of statutes, beginning pos-

law. *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323 (1878); *Marvin v. Trout*, 199 U. S. 212, 26 Sup. Ct. 31, 50 L. Ed. 157 (1905).

**INDEFINITENESS OF CRIME.**—As to how far definiteness of description is a constitutional requisite of a statutory crime, see *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 108 ff., 29 Sup. Ct. 220, 53 L. Ed. 417 (1909); *Standard Oil Co. of New Jersey v. United States*, 221 U. S. 1, 69-70, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734 (1911); *Nash v. United States*, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. — (1913).

**CONFISCATION BY EXCESSIVE FINES OR DAMAGES.**—"It is contended that the fines imposed are so excessive as to constitute a taking of the defendant's property without due process of law. It is not contended in this connection that the prohibition of the eighth amendment to the federal Constitution against excessive fines operates to control the legislation of the states. The fixing of punishment for crime or penalties for unlawful acts against its laws is within the police power of the state. We can only interfere with such legislation and judicial action of the states enforcing it if the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law. *Coffey v. Harlan County*, 204 U. S. 659, 27 Sup. Ct. 305, 51 L. Ed. 666."—*Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 111, 29 Sup. Ct. 220, 227 (53 L. Ed. 417) (1909), by Day, J., upholding fines of \$1,500 a day for 1,033 days, and of \$50 a day for 1,480 days, during which periods business was conducted in Texas in violation of its anti-trust laws, making a total of \$1,623,500 against a corporation owning \$40,000,000 of property and earning 700 per cent. on a capital stock of \$100,000.

Nor can excessive damages be exacted as a civil penalty, though reasonable punitive damages are permissible. *Standard Oil Co. of Indiana v. Missouri*, 224 U. S. 270, 286, 32 Sup. Ct. 406, 56 L. Ed. 760 (1912) (\$50,000 fine in oyster proceedings upheld); *Missouri Pac. R. Co. v. Tucker*, 230 U. S. 340, 33 Sup. Ct. 961, 57 L. Ed. — (1913) (\$500 damages for slight overcharge of carrier).

sibly in 1285, in the statutes of Westminster, coming on down to the 27th Elizabeth, the riot act of George I, and act of George II, chap. 10, we may find a continuous recognition of the principle that a civil subdivision intrusted with the duty of protecting property in its midst, and with police power to discharge the function, may be made answerable not only for negligence affirmatively shown, but absolutely as not having afforded a protection adequate to the obligation. Statutes of a similar character have been enacted by several of the states and held valid exertions of the police power. *Darlington v. New York*, 31 N. Y. 164, 88 Am. Dec. 248; *Fauvia v. New Orleans*, 20 La. Ann. 410; *Allegheny County v. Gibson*, 90 Pa. 397, 35 Am. Rep. 670. The imposition of absolute liability upon the community when property is destroyed through the violence of a mob is not, therefore, an unusual police regulation. Neither is it arbitrary, as not resting upon reasonable grounds of policy. Such a regulation has a tendency to deter the lawless, since the sufferer must be compensated by a tax burden which will fall upon all property, including that of the evil doers as members of the community. It is likewise calculated to stimulate the exertions of the indifferent and the lawabiding to avoid the falling of a burden which they must share with the lawless. In that it directly operates on and affects public opinion, it tends strongly to the upholding of the empire of the law."

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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 insignificant 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 requires 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.<sup>1</sup>

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STATE ex rel. YAPLE v. CREAMER.

(Supreme Court of Ohio, 1912. 85 Ohio St. 349, 97 N. E. 602, 39 L. R. A. [N. S.] 694.)

[Demurrer to a petition of mandamus directed to Creamer, state treasurer, involving the validity of a workmen's compensation act set out in the opinion below.]

JOHNSON, J. The statute in question provides for the creation of a state liability board of awards, which shall establish a state insurance fund, from premiums paid by employers and employes in the manner provided in the act. It provides a plan of compensation for injuries, not willfully self-inflicted, resulting from accidents to employes of employers, both of whom have voluntarily contributed to the fund in the proportion of 10 and 90 per cent. respectively. It applies only where the employer has five or more operators regularly in the same business or in or about the same establishment. An employer who complies with the act is relieved from liability to respond in damages at common law, or by statute, for injury or death of an employe who has complied with its provisions, except when the injury arises from the willful act of himself or officer or agent, or from failure to comply with any law or ordinance providing for protection of life and safety of employes, in which event the employe or his representatives have their election between a suit for damages and a claim under the act. Employers of five or more who do not pay premiums into the fund are deprived in actions against them of the common-law defenses of the fellow-servant rule, the assumption of risk, and of contributory negligence. Where the parties are operating under the act, the injured employe and his dependents in case of death are compelled to accept compensation from the insurance fund in the manner provided, except in the cases above set forth. \* \* \*

<sup>1</sup> See, also, *Jones v. Great Southern Fire Proof Hotel Co.*, 86 Fed. 370, 30 C. C. A. 108 (1898), affirmed in 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778 (1904) (upholding mechanics' lien in favor of sub-contractor); *Kelly v. Johnson*, 251 Ill. 135, 95 N. E. 1068, 36 L. R. A. (N. S.) 573 (1911) (contra); *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7 (1911) (initial carrier liable for default of connecting carrier); *Lindsay & P. Co. v. Mullen*, 176 U. S. 126, 20 Sup. Ct. 325, 44 L. Ed. 400 (1900) (all of logs in boom subject to lien for scaling fees against any owner); *Horace Waters & Co. v. Gerard*, 189 N. Y. 302, 82 N. E. 143, 24 L. R. A. (N. S.) 953, 121 Am. St. Rep. 886, 12 Ann. Cas. 397 (1907) (hotel lien on stranger's goods in possession of guest); *People v. Hill*, 163 Ill. 186, 46 N. E. 796, 36 L. R. A. 634 (1896) (brothers and sisters liable to support pauper).

The law was passed after a report referred to in the briefs, of a commission appointed by the Governor, in obedience to a statute passed for that purpose. The report was prepared after an exhaustive research into industrial conditions in many countries, and an examination of laws, which have been passed in the effort to improve such conditions. Substantially, its conclusions are: That the system which has been followed in this country, of dealing with accidents in industrial pursuits, is wholly unsound; that there is an intelligent and widespread public sentiment which calls for its modification and improvement; that the general welfare requires it; that there has been enormous waste under the present system, and that the action for personal injuries by employé against employer no longer furnishes a real and practical remedy, annoys and harasses both, and does not meet the economic and social problem which has resulted from modern industrialism. Conceding the desirability of improvement, of legislative and governmental action, and the good results in other countries which have no written Constitution to limit the legislative power, we in this country have the problem of devising a plan which shall not infringe the fundamental law. \* \* \*

We think it clear that the objects and purposes as above set forth, which the Legislature contemplated in the passage of the law in question, are sufficient to sustain the exercise of the police power, and the participation of the state in the manner provided. Whether the plan adopted is the most appropriate or best calculated to accomplish those objects are matters with which the court is not concerned, and the law should not be held to be invalid unless clearly in violation of some provision of the Constitution.

It is urgently insisted that while the law is apparently permissive and leaves its operation to the election of employers and employés, it is really coercive, and upon this premise much persuasive argument against the validity of the law is based. This is an important question in the case.

An examination of the sections touching the questions made is here necessary. After providing in section 20—1 that an employer who elects to comply with the act shall be relieved from liability to the employé at common law, or by statute (except as provided in section 21—2), it is then enacted, in section 21—1: "All employers who shall not pay into the insurance fund, \* \* \* shall be liable to their employés for damages, \* \* \* caused by the wrongful act, neglect or default of the employer, his agents," etc. And in such cases the defenses of assumption of risk, fellow servant, and contributory negligence are not available. So that an employer who elects not to come into the plan of insurance may still escape liability if he is not guilty of wrongful act, neglect, or default. His liability is not absolute, as in the case of the New York statute hereinafter referred to. And it cannot be said that the withdrawal of the defenses of assumption

of risk, fellow servant, and contributory negligence, as against an employer who does not go into the plan, is coercive, for such withdrawal is in harmony with the legislative policy of the state for a number of years past. The law known as the Norris law, passed in 1910, withdrew these defenses in the particulars covered by the law.

As to the employé, if the parties do not elect to operate under the act, he has his remedy for the neglect, wrongful act, or default of his employer and agents as before the law was passed, and is not subject to the defenses named. If the parties are operating under the act, the employé contributes to an insurance fund for the benefit of himself or his heirs, and, in case he is injured or killed, he or they will receive the benefit even though his injury or death was caused by his own negligent or wrongful act, not willful. And that is not all. Under section 21—2, if the parties are operating under the act, and the employé is injured or killed, and the injury arose from the willful act of his employer, his officer or agent, or from failure of the employer or agent to comply with legal requirements, as to safety of employés, then the injured employé or his legal representative has his option to claim under the act or sue in court for damages. Therefore the only right of action which this statute removes from the employé is the right to sue for mere negligence (which is not willful or statutory) of his employer, and it is within common knowledge that this has become in actual practice a most unsubstantial thing.

It is conceded by counsel that the particulars named in section 21—2 are such as form the basis for a large portion of claims for personal injuries. Many employers may elect to remain outside its provisions; it would not be strange if many do so. On the other hand, some workmen may feel disposed to do likewise in spite of what would seem to be to their manifest advantage in securing the benefits of the insurance. However, if there should be such general acceptance of and compliance with the statute as its framers hope for, so as to bring a large part of the labor employed in the industrial enterprises of the state within its influence and operation, that would not demonstrate its coercive character. On the contrary, it would justify the enactment. Naturally time and experience will disclose imperfections and inefficiencies in the plan; but if it should prove to be feasible, and appropriate in a general way, these imperfections can be corrected by the Legislature. On account of the common-law and statutory rights still preserved to the parties by this statute (as we have pointed out) in cases where the election is made to come under its provisions as well as not to do so, taken in connection with the advantage to each which the plan contemplates, we cannot say that the statute is coercive. As was said in the Wisconsin case: "Laws cannot be set aside upon mere conjecture or speculation. The court must be able to say with certainty that an unlawful result will follow." We do not see how any such thing can be said here. Every consideration of prudence and self-interest (things not easily associated with compul-

sion and coercion) would seem to lead an employé to voluntarily make the contribution and waiver contemplated.

Second. Does this statute take private property without due process of law and deny the guaranties of the Constitution as claimed? \* \* \* The case of *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 276, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156 (relied on by some of counsel), involved a statute different in many essentials from the Ohio law. Its controlling feature was that every employer engaged in any of the classified industries should be liable to a workman for injury arising in the course of the work by a necessary risk inherent in the business whether the employer was at fault or not and whether the employé was at fault or not, except when his fault was willful. The court held the law invalid, as imposing the ordinary risks of a business (which under the common law the employé was held to assume) on the employer. The court states one of the premises on which it proceeds as follows: "When our Constitutions were adopted, it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another." But that rule was not of universal application. At common law one may sustain such relation to the inception of an undertaking that he will be held liable for negligence in the progress of the enterprise, even though he have no part or connection with the negligent act itself which caused the injury. Such for instance, as where the owner of property contracts with an independent contractor to do work which though entirely lawful, yet has inherent probabilities of harm if negligently performed. The position in the line of causation which employers sustain in modern industrial pursuits is of course the basic fact on which employer's liability laws rest.

As to the right to abolish the defense of assumption of risk, it is enough to say here that the great weight of authority is against the New York position and the position of such of the counsel in this case as insist on that rule. Some of counsel appearing against the validity of this law concede the right to abolish the defenses referred to. The Supreme Courts of Massachusetts, Wisconsin, and Washington have recently held, in cases sustaining the validity of statutes similar to the one here attacked, that it is within the legislative power to abolish the defense referred to. In *re Opinion of Justices*, 209 Mass. 607, 69 N. E. 308; *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489; *State ex rel. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466.

Since the argument of this case the Supreme Court of the United States has decided the case of *Mondou v. N. Y., N. H. & H. Ry. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44 and has sustained the constitutionality of the employer's liability law passed by Congress. The abolition of these rules was urged as an objection to the law. The court say: "Of the objection to these changes it is enough to observe: First. A person has no property, n<sup>o</sup>

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 \* \* \* 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. *Munn v. Illinois*, 94 U. S. 113, 134 [24 L. Ed. 77]; *Martin v. Pittsburgh & Lake Erie R. R. Co.*, 203 U. S. 284, 294 [27 Sup. Ct. 100, 51 L. Ed. 184, 8 Ann. Cas. 87]; *The Lottawanna*, 21 Wall. 558, 577 [22 L. Ed. 654]; *Western Union Telegraph Co. v. Commercial Milling Co.*, 218 U. S. 406, 417 [31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815].” \* \* \*

*State ex rel. v. Hubbard*, 22 Ohio Cir. Ct. R. 253, affirmed without opinion 65 Ohio St. 574, 64 N. E. 109, 58 L. R. A. 654, and *State ex rel. v. Guilbert*, 56 Ohio St. 575, 47 N. E. 551, 38 L. R. A. 519, 60 Am. St. Rep. 756, involving the validity of statutes creating a teachers' pension fund and the Torrens law to establish an insurance fund for the protection of land titles, concerned laws which were wholly compulsory with no element of choice and were not claimed to have been passed under the police power to cure undesirable public conditions, but for mere private benefit. These cases can therefore have no relation to a plan adopted to promote the general welfare, the contributions to which are made after an election by the parties to participate in the undertaking.

It is urged by counsel opposing this law that the case of *Byers v. Meridian Printing Co.*, 84 Ohio St. 408, 95 N. E. 917, 38 L. R. A. (N. S.) 913 is of conclusive weight condemnatory of the legislation we are examining. In that case it is ruled that an amendment to section 5094, Revised Statutes (changing the presumption of malice and burden of proof in actions for libel where retraction is made on demand, in the manner stated) is unconstitutional. The decision was put on the ground that plaintiff was guaranteed his remedy by due course of law for an injury done in his land, goods, person, or reputation, under article 1, § 16, Constitution of Ohio. When the injury was done to the reputation of plaintiff by the libel, he was entitled to his constitutional remedy at law;<sup>1</sup> but at the same time he was en-

<sup>1</sup> As to the extent to which a plaintiff's remedies for defamation may be validly abridged, see *Osborn v. Leach*, 135 N. C. 628, 47 S. E. 811, 66 L. R. A. 648 (1904) (cases). As to remedies for other torts, see *Follett Wool Co. v. Albany Terminal Warehouse Co.*, 61 App. Div. 296, 70 N. Y. Supp. 474 (1901) (action against innocent but wrongful possessor of chattels); *Poindexter v. Greenhow*, 114 U. S. 270, 303, 304, 5 Sup. Ct. 903, 962, 29 L. Ed. 185 (1885) (same, as to dispossessor); *Goldberg, Bowen & Co. v. Stableman's Union*, 149 Cal. 429, 434, 86 Pac. 806, 8 L. R. A. (N. S.) 460, 117 Am. St. Rep. 145, 9 Ann. Cas. 1219 (1906) (injunction against tortious picketing). Compare *Louisiana ex rel. Folsom v. Mayor of New Orleans*, 109 U. S. 285, 3 Sup. Ct.



titled to demand of the publisher a retraction of the libel. Therefore the Legislature had no right to put him on his election as to two courses both of which he was entitled to follow. The court is careful to declare that it is not disposed to question that a citizen may waive a constitutional right. But being compelled to elect between two rights, both of which a person is entitled to, has no resemblance to waiver. And under the law under investigation here, as already shown, the right of action (for injury by willful act of the employer and for his failure to comply with requirements as to the safety of employes) is still reserved to the employes. So that the only thing withdrawn by this law, and to which withdrawal he consents by his voluntary election to operate under the law, is his right of action for mere negligence, and in place of it he receives the substantial protections and privileges under the state insurance fund.

It is stated in *Butt v. Green*, 29 Ohio St. 677, that persons may expressly or impliedly waive either constitutional or statutory provisions intended for their benefit, and, as above shown, the court in the *Byers Case* state it is not disposed to question that one may waive a constitutional right.

We think that in a case such as is presented here, in which the state itself has undertaken a great enterprise in the interest of the general good, and in the exercise of its police power, and presents to its citizens the option to join in the undertaking and receive its protection and benefit, on a right of action being withdrawn by the Legislature, which experience has shown to be difficult of practical enforcement, while preserving the valuable and substantial kindred rights of action, it cannot be said that in such withdrawal there is a violation of the Constitution in the respects claimed. \* \* \* It must be remembered that the whole proceeding is with and against the board of awards. His claim is not against the employer. There is no dispute between them. His claim is for the benefits of the insurance fund. \* \* \*

Demurrer overruled.<sup>2</sup>

211, 27 L. Ed. 936 (1883) (enforcement of tort judgment against city). See, also, *Sawyer v. Davis*, post, p. 722, and notes.

<sup>2</sup> Accord: *Opinion of Justices*, 209 Mass. 607, 96 N. E. 308 (1911); *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489 (1911); *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466 (1911) (compulsory insurance plan); *Cunningham v. North Western Imp. Co.*, 44 Mont. 180, 119 Pac. 554 (1911) (same). The Montana act failed for permitting a double liability, but was otherwise upheld. In *Ires v. South Buffalo R. Co.*, 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156 (1911), a compulsory individual liability law was declared unconstitutional. The New York and Washington laws applied only to extrahazardous employments, and the Montana act to mining only. In these five cases are cited and discussed most of the cases and historical usages alleged to involve principles similar to those approved in the principal case.

In *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 177-178, 195, 197, 198, 207-211, 117 Pac. 1101, 1106, 1107, 1113, 37 L. R. A. (N. S.) 466 (1911), Fullerton, J., said (upholding a compulsory insurance plan):

"In the statute books of the several states are many statutes held constitutional by the courts where liability is created without fault, and where the

CHICAGO, B. & Q. R. CO. v. McGUIRE (1911) 219 U. S. 549, 569, 571-573, 31 Sup. Ct. 259, 55 L. Ed. 328, Mr. Justice HUGHES (upholding an Iowa statute abolishing the fellow-servant rule on railroads, and denying effect to any contract restricting liability or the acceptance of any insurance benefits as a defence to personal injury actions brought against railroads by their employees):

[After referring to many of the cases printed ante, in this chapter.] "Where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an

property of one person is taken to pay the obligations of another, and this where no compensation is made to the person who is thus made liable or whose property is thus taken, other than perhaps the bestowal upon him of some privilege. The test of the validity of such a law is not found in the inquiry: Does it do the objectionable things? But is found rather in the inquiry: Is there no reasonable ground to believe that the public safety, health, or general welfare is promoted thereby? \* \* \* The clause of the Constitution now under consideration was intended to prevent the arbitrary exercise of power, or undue, unjust, and capricious interference with personal rights; not to prevent those reasonable regulations that all must submit to as a condition of remaining a member of society. In other words, the test of a police regulation, when measured by this clause of the Constitution, is reasonableness, as contradistinguished from arbitrary or capricious action.

\* \* \*

"That the statute here in question has the attribute of reasonableness, rather than that of capriciousness, seems incontrovertible. The evil it seeks to remedy is one that calls loudly for action. Accidents to workmen engaged in the industries enumerated in it are all but inevitable. \* \* \* Heretofore these losses have been borne by the injured workmen themselves, by their dependents, or by the state at large. It was the belief of the legislature that they should be borne by the industries causing them, or, perhaps more accurately, by the consumers of the products of such industries. That the principle thus sought to be put into effect is economically, sociologically, and morally sound, we think must be conceded. It is so treated by the learned counsel who have filed briefs in support of the auditor's contentions; it is so conceded by all modern statesmen, jurists, and economic writers who have voiced their opinion on the subject; and the principle has been enacted into law by nearly all of the civilized countries of Europe, by Australia, by New Zealand, by the Transvaal, by the principal provinces of the Dominion of Canada, and in a partial form at least by one or more of South American republics. Indeed, so universal is the sentiment that to assert to the contrary is to turn the face against the enlightened opinion of mankind. The common law does not purport to afford a remedy for the condition here found to exist. It affords relief to an injured workman in only a limited number of cases—cases where the injury is the result of fault on the part of the employer and there is want of fault on the part of the workman. For the greater number of injuries traceable to the dangers incident to industry, no remedy at all is afforded. The act, therefore, having in its support these economic and moral considerations, is not unconstitutional for the reasons suggested upon this branch of the argument. \* \* \*

"The right of the state to regulate any form of industry arises from the fact that its pursuit affects injuriously the health, safety, morals, or welfare of the persons engaged in it, or is inimical in some form to some portion of the individuals of the community. It is not necessary that it always affect injuriously the public at large. On the contrary, it may be regulated if it affects injuriously those engaged in it, or those brought in direct contact

object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance. \* \* \*

"In the cases within its purview it [the statute] extended the liability

with it, even though its pursuit may benefit generally the people of the state at large. Nor is there any particular form which the regulation must take. The conduct of the business may be prohibited entirely in a particular place or in a particular manner; its pursuit may be restricted to certain hours of the day; it may be permitted to be conducted only in case protective devices are used; or it may be permitted in certain forms, and a sum of money exacted from the individuals carrying it on for the purpose of recompensing those who suffer losses because thereof.

"So, in this instance, if the legislature believed that, to permit the pursuit of the industries named after the present manner of conducting them was generally for the public good in spite of the losses the method of pursuit entailed, there is no reason why it should not confine its regulations to compelling the owners and conductors of such industries to create a fund out of which the losses caused thereby should be made good. \* \* \*

"It is said that the legislature cannot fix a procrustean rule for the admeasurement of damages arising from injuries received by one in the employment of another, as the employer and the employé alike have the right to submit to a jury both the question of the right to recover for any such injury, and the question of the amount that may be recovered therefor. But we cannot think the rule absolute. It may be that the legislature cannot fix the amount of recovery, or provide for an absolute recovery, in all cases where one person is injured by another, regardless of the relation of the parties, or the question whether the injury is or is not the result of negligence; but it does not follow that it may not so provide where the injury happens in that class of employment subject to legislative regulation and control. If it be, as we have attempted to show, a proper regulation of hazardous industries to compel those engaged therein as owners or operators to pay a fixed sum into a fund to be used for the purpose of compensating the employés thereof for injuries received by them, it is difficult to understand why it is not also proper regulation to require the employés of such industries to accept a given sum for any injury they may receive while so engaged. \* \* \*

"The grounds upon which the employer may be held to contribute to a fund for the relief of all injuries sustained by his employés, whatever the cause, we have already stated. The obligation of the employé to accept the conditions of the statute can rest on like grounds, namely, the welfare of the state. The relation being one of contract between employer and employé, the state may make it a condition of the contract that the employé shall accept a fixed sum for any injury he may receive while engaged in the employment, whether the injury be the result of the inherent dangers of the employment or the result of some fault of his employer. \* \* \*

"The common-law system of making awards for personal injuries has no such inherent merit as to make a change undesirable. \* \* \* For the greater number of injuries the common law affords no remedy at all. For this unscientific system it is proposed to substitute a system which will make an award in all cases of injury, regardless of the cause or manner of its infliction; limited in amount, it is true, but commensurate in some degree to

of the common law by abolishing the fellow-servant rule. Having authority to establish this regulation, it is manifest that the legislature was also entitled to insure its efficacy by prohibiting contracts in derogation of its provisions. In the exercise of this power, the legislature was not limited with respect either to the form of the contract, or the nature of the consideration, or the absolute or conditional character of the engagement. It was as competent to prohibit contracts which, on a specified event, or in a given contingency, should operate to relieve the corporation from the statutory liability which would otherwise exist, as it was to deny validity to agreements of absolute waiver. \* \* \* It does not aid the argument to describe the defense as one of accord and satisfaction. The payment of benefits

the disability suffered. The desirability of this substitution is unquestioned, and we believe that the legislature had the power to make it without violating any principle of the fundamental law.

"The objection may be answered also in another way. The Constitution does not undertake to define what shall constitute a cause of action, nor to prohibit the legislature from so doing. The right of trial by jury accorded by the Constitution, as applicable to civil cases, is incident only to causes of action recognized by law. The act here in question takes away the cause of action on the one hand and the ground of defense on the other and merges both in a statutory indemnity fixed and certain. If the power to do away with a cause of action in any case exists at all in the exercise of the police power of the state, then the right of trial by jury is thereafter no longer involved in such cases. The right of jury trial being incidental to the right of action, to destroy the one is to leave the other nothing upon which to operate."

In *Ives v. South Buffalo R. Co.*, 201 N. Y. 271, 317-318, 94 N. E. 431, 449, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156 (1911), Cullen, C. J., said: "I concede that the Legislature may abolish the rule of fellow servant as a defense to an action by employé against the employer. Indeed, we have decided that in upholding the so-called 'Barnes act.' *Schradin v. N. Y. C. & H. R. R. Co.*, 194 N. Y. 534, 87 N. E. 1126. I concede that the Legislature may also abolish as a defense the rule of assumption of risk and that of contributory negligence unless the accident proceed from the willful act of the employé. I concede that in a work, occupation, or business of such a nature that the Legislature might prohibit its pursuit or exercise altogether, the Legislature may prescribe terms under which it may be carried on. Plainly, this litigation does not present such a case. The Legislature could not revoke the franchise it had previously given to the defendant to operate a railroad. *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684. I am not prepared to deny that where the effects of the work, even though prosecuted carefully, go beyond a person's own property and injure third persons in no way connected therewith, the person for whose account the work is done may be held liable for injuries occasioned thereby. I also concede the most plenary power in the Legislature to prescribe all reasonable rules for the conduct of the work which may conduce to the safety and health of persons employed therein. But I do deny that a person employed in a lawful vocation, the effects of which are confined to his own premises, can be made to indemnify another for injury received in the work unless he has been in some respect at fault. I am not impressed with the argument that the common law imposed upon the employé entire responsibility for injuries arising out of the necessary risks or dangers of the employment. The statute before us merely shifts such liability upon the employer.' It is the physical law of nature, not of government, that imposes upon one meeting with an injury, the suffering occasioned thereby. Human law cannot change that. All it can do is to require pecuniary indemnity to the party injured, and I know of no principle on which one can be compelled to indemnify another for loss unless it is based upon contractual obligation or fault."

is the performance of the promise to pay, contained in the contract of membership. If the legislature may prohibit the acceptance of the promise as a substitution for the statutory liability, it should also be able to prevent the like substitution of its performance.

"For the reasons we have stated, the considerations which properly bear upon the wisdom of the legislation need not be discussed. On the one hand it is said that the relief department is in the control of the corporation; that by reason of their exigency the employees may readily be constrained to become members; that the relief fund consists in larger part of contributions made from wages; that the acceptance of benefits takes place at a time when the employee is suffering from the consequences of his injury, and, being seriously in need of aid, he may easily be induced to accept payment from the fund in which, by reason of his contributions, he feels that he is entitled to share; and that such a plan, if it were permitted, through the payment of benefits, to result in a discharge of the liability for negligence, would operate to transfer from the corporation to its employees a burden which, in the interest of their protection and the safety of the public, the corporation should be compelled to bear. On the other hand, it is urged that the relief plan is a beneficent scheme, avoiding the waste of litigation, securing prompt relief in case of need due to sickness or injury, making equitable provision for deserving cases, and hence tends in an important way to promote the good of the service and the security of the employment. Even a partial statement of these various considerations shows clearly that they are of a character to invoke the judgment of the legislature in deciding, within the limits of its power, upon the policy of the state. And whether the policy declared by the statute in question is approved or disapproved, it cannot be said that the legislative power has been exceeded, either in defining the liability or in the means taken to prevent the legislative will, with respect to it, from being thwarted."<sup>1</sup>

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OHIO OIL CO. v. INDIANA (1900) 177 U. S. 190, 207-211, 20 Sup. Ct. 576, 44 L. Ed. 729, Mr. Justice WHITE (upholding an Indiana statute forbidding any one in control of gas or oil wells to permit the gas or oil to escape into the open air without being confined in pipes on other receptacles):

"In *Townsend v. State*, 147 Ind. 624, 49 N. E. 19, 37 L. R. A. 294, 62 Am. St. Rep. 477, the constitutionality of a statute forbidding the burning of natural gas in flambeau lights was attacked because

<sup>1</sup> See, also, *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552 (1899) (making all fire insurance valued); *Northwestern Nat. Life Ins. Co. v. Riggs*, 203 U. S. 243, 27 Sup. Ct. 126, 51 L. Ed. 168, 7 Ann. Cas. 1104 (1906) (forbidding defence of fraud, not causing death of insured); *Whitfield ex rel. Hadley v. Aetna Life Ins. Co.*, 205 U. S. 459, 27 Sup. Ct. 378, 51 L. Ed. 895 (1907) (forbidding defence of suicide of insured).



it was asserted to violate the fourteenth amendment to the Constitution of the United States and various provisions of the Constitution of the state of Indiana. The court held that the statute was not amenable to the assaults made upon it. In a full opinion reviewing the nature of the ownership in oil and natural gas, the power of the state to regulate and control their use and waste in the interest of all those within the gas field and of the public at large was elaborately considered. Reviewing its own previous adjudications, which we have cited, and those of the supreme court of the state of Pennsylvania, to which we have also referred, it was decided that the owners of the surface of the land within the gas field, whilst they had the exclusive right on their land to sink wells for the purpose of extracting the oil and gas, had no right of property therein until by the actual drawing of the oil and gas to the surface of the earth they had reduced these substances to physical possession. It was further held that in consequence of the nature of the deposits, of their transmissibility, of their interdependence, of the rights of all and of the public at large, the state could lawfully exercise the power to regulate the right of the surface owners among themselves to seek to obtain possession, and to prevent the waste of the products in which all the surface owners within the area wherein the gas and oil were deposited, as well as the public, had an interest, because in the preservation of these substances the well-being and prosperity of the entire community was largely involved. \* \* \*

"If the analogy between animals *feræ naturæ* and mineral deposits of oil and gas, stated by the Pennsylvania court and adopted by the Indiana court, instead of simply establishing a similarity of relation, proved the identity of the two things, there would be an end of the case. This follows because things which are *feræ naturæ* belong to the 'negative community'; in other words, are public things subject to the absolute control of the state, which, although it allows them to be reduced to possession, may at its will not only regulate, but wholly forbid, their future taking. *Geer v. Connecticut*, 161 U. S. 519, 525, 16 Sup. Ct. 600, 40 L. Ed. 793, 795. But whilst there is an analogy between animals *feræ naturæ* and the moving deposits of oil and natural gas, there is not identity between them. Thus, the owner of land has the exclusive right on his property to reduce the game there found to possession, just as the owner of the soil has the exclusive right to reduce to possession the deposits of natural gas and oil found beneath the surface of his land. The owner of the soil cannot follow game when it passes from his property; so, also, the owner may not follow the natural gas when it shifts from beneath his own to the property of someone else within the gas field. It being true as to both animals *feræ naturæ* and gas and oil, therefore, that whilst the right to appropriate and become the owner exists, proprietorship does not take being until the particular subjects of the right become property by being reduced to actual possession. The identity, however, is for

many reasons wanting. In things *feræ naturæ* all are endowed with the power of seeking to reduce a portion of the public property to the domain of private ownership by reducing them to possession. In the case of natural gas and oil no such right exists in the public. It is vested only in the owners in fee of the surface of the earth within the area of the gas field.

"This difference points at once to the distinction between the power which the lawmaker may exercise as to the two. In the one, as the public are the owners, every one may be absolutely prevented from seeking to reduce to possession. No divesting of private property under such a condition can be conceived, because the public are the owners, and the enacting by the state of a law as to the public ownership is but the discharge of the governmental trust resting in the state as to property of that character. *Geer v. Connecticut*, 161 U. S. 519, 525, 16 Sup. Ct. 600, 40 L. Ed. 793, 795. On the other hand, as to gas and oil the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them, without a taking of private property. But there is a coequal right in them all to take from a common source of supply the two substances which in the nature of things are united, though separate. It follows from the essence of their right and from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right to the detriment of the others, or by waste by one or more to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment, by them, of their privilege to reduce to possession, and to reach the like end by preventing waste. This necessarily implied legislative authority is borne out by the analogy suggested by things *feræ naturæ*, which it is unquestioned the legislature has the authority to forbid all from taking, in order to protect them from undue destruction, so that the right of the common owners, the public, to reduce to possession, may be ultimately efficaciously enjoyed. Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law of the state of Indiana which is here attacked because it is asserted that it divested private property without due compensation, in substance, is a statute protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of the others. \* \* \*

"It is said the law by making it unlawful to allow the gas to escape made it practically impossible to profitably extract the oil. That is, as the oil could not be taken at a profit by one who made no use of

the gas, therefore he must be allowed to waste the gas into the atmosphere, and thus destroy the interest of the other common owners in the reservoir of gas. These contentions but state in a different form the matters already disposed of. They really go, not to the power to make the regulations, but to their wisdom. But with the lawful discretion of the legislature of the state we may not interfere."<sup>1</sup>

<sup>1</sup> Accord: *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160 (1911). See *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793 (1896) (game laws); *Windsor v. State*, 103 Md. 611, 64 Atl. 288, 12 L. R. A. (N. S.) 869 (1906) (oyster laws).

In *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355-357, 28 Sup. Ct. 529, 531 (52 L. Ed. 828, 14 Ann. Cas. 560) (1908), the right of New Jersey to forbid anyone to transport water from the Passaic river out of the state by pipes or ditches was upheld, Holmes, J., saying:

"All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.

"It sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point. But it is recognized that the state, as quasi-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. *Kansas v. Colorado*, 185 U. S. 125, 141, 142, 22 Sup. Ct. 552, 46 L. Ed. 838, 844, 845, s. c., 206 U. S. 46, 99, 27 Sup. Ct. 655, 51 L. Ed. 956, 975, *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 238, 27 Sup. Ct. 618, 51 L. Ed. 1038, 1044, 11 Ann. Cas. 488. What it may protect by suit in this court from interference in the name of property outside of the state's jurisdiction, one would think that it could protect by statute from interference in the same name within. On this principle of public interest and the police power, and not merely as the inheritor of a royal prerogative, the state may make laws for the preservation of game, which seems a stronger case. *Geer v. Connecticut*, 161 U. S. 519, 534, 16 Sup. Ct. 600, 40 L. Ed. 793, 798.

"The problems of irrigation have no place here. Leaving them on one side, it appears to us that few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a state, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down by statute, without compensation, in the exercise of the police power, of what otherwise would be private rights of property, or that, apart from statute, those

## 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,

rights do not go to the height of what the defendant seeks to do, the result is the same. But we agree with the New Jersey courts, and think it quite beyond any rational view of riparian rights, that an agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the state in which it flows. The private right to appropriate is subject not only to the rights of lower owners, but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.

"We are of opinion, further, that the constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the state is not required to submit even to an æsthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will."

Compare *West v. Kansas Natural Gas Co.*, post, p. 1193, note.

In *Questions and Answers*, 103 Me. 506, 511-512, 69 Atl. 627 (1907), the Maine legislature was told that it might without compensation prohibit or restrict the wasteful or unnecessary cutting of small trees on wild land when not done to clear the land for beneficial use. The judges said: "There are two reasons of great weight for applying this strict construction of the constitutional provision to property in land: (1) Such property is not the result of productive labor, but is derived solely from the state itself, the original owner; (2) the amount of land being incapable of increase, if the owners of large tracts can waste them at will without state restriction, the state and its people may be helplessly impoverished and one great purpose of government defeated. Regarding the question submitted, in the light of the doctrine above stated (being that of Maine and Massachusetts at least), we do not think the proposed legislation would operate to 'take' private property within the inhibition of the Constitution. While it might restrict the owner of wild and uncultivated lands in his use of them, might delay his taking some of the product, might defer his anticipated profits, and even thereby might cause him some loss of profit, it would nevertheless leave him his lands, their product, and increase untouched, and without diminution of title, estate, or quantity. He would still have large measure of control and large opportunity to realize values. He might suffer delay, but not deprivation. While the use might be restricted, it would not be appropriated or 'taken.' [Citing various restrictive statutes upheld elsewhere, including] (prohibiting the wasteful burning of natural gas by the owner) *Townsend v. State*, 147 Ind. 624, 47 N. E. 19, 37 L. R. A. 294, 62 Am. St. Rep. 477; (prohibiting the use of artificial means by the owners of gas wells to increase the natural flow of the gas from them) *Manufacturers' Gas Co. v. Indiana Natural Gas Co.*, 155 Ind. 467, 57 N. E. 912, 50 L. R. A. 768; \* \* \* (prohibiting the flow of water from a private artesian well except for certain specified beneficial purposes, as irrigation or domestic use) *Ex parte Elam*, 6 Cal. App. 233, 91 Pac. 811. In *Windsor v. State*, 103 Md. 611, 64 Atl. 288, 12 L. R. A. (N. S.) 869, a statute restricted owners of private oyster beds in taking oysters from them. It was held constitutional, and not a taking of private property."

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 eminent 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,<sup>1</sup> any one of them may

<sup>1</sup> Regarding the legislative power to turn existing joint-tenancies into tenancies in common, abrogating the right of survivorship, see *Miller v. Miller*, 16 Mass. 59 (1819); *Bambaugh v. Bambaugh*, 11 Serg. & R. (Pa.) 191 (1824); *Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co.*, 25 Mont. 41, 70-71, 63 Pac. 825 (1901). As to a similar power to turn estates tail into fees, see the cases cited post. p. 886, note, under *Dunbar v. Boston & Prov. R. Co.*; and as to the power to compel unwilling owners of contingent future interests to sell in order to clear the title, see *Sohier v. Mass. General Hospital, Brevoort v. Grace*, and *Linsley v. Hubbard*, cited in the same note. The legislature may authorize changes of investment of trust property which otherwise



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

could not be validly sold against the objection of beneficiaries. *Sohler v. Mass. General Hospital*, 3 Cush. 483 (1849); *Sohler v. Trinity Church*, 109 Mass. 1 (1871).

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 reasonable 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.<sup>2</sup>

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 sustained, 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

<sup>2</sup> As to the mode and certainty of compensation requisite, see *Otis Co. v. Ludlow Co.*, post, p. 787, note.

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.<sup>3</sup>

<sup>3</sup> Compare *Talbot v. Hudson*, post, p. 678, and *Lowell v. Boston*, post, p. 573. In *Wurts v. Hoagland*, 114 U. S. 606, 610-614, 5 Sup. Ct. 1086, 1088, 1089, 29 L. Ed. 229 (1885), Gray, J., said:

"General laws authorizing the drainage of tracts of swamp and low lands, by commissioners appointed upon proceedings instituted by some of the owners of the lands, and the assessment of the whole expense of the work upon all the lands within the tract in question, have long existed in the state of New Jersey, and have been sustained and acted on by her courts, under the Constitution of 1776, as well as under that of 1844. \* \* \* In *State v. Newark*, 27 N. J. Law, 185, 194, the Supreme Court said: 'Laws for the drainage or embanking of low grounds, and to provide for the expense, for the mere benefit of the proprietors, without reference to the public good, are to be classed, not under the taxing, but the police power of the government.' In *Coster v. Tide Water Co.*, 18 N. J. Eq. 54, and *Tide Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634, the same view was strongly asserted in the Court of Chancery and in the Court of Errors. The point there decided was that a statute providing for the drainage of a large tract of land overflowed by tide-water, by a corporation chartered for the purpose, none of the members of which owned any lands within the tract, if it could be maintained as an exercise of the right of eminent domain for a public use, yet could not authorize an assessment on the owners of such lands for anything beyond the benefits conferred upon them. But the case was clearly and sharply distinguished from the case of the drainage of lands for the exclusive benefit of the owners upon proceedings instituted by some of them. Chancellor Zabriskie said: 'But there is another branch of legislative power that may be appealed to, as authorizing the taking of the lands required for the works to drain these meadows. It is the power of the government to prescribe public regulations for the better and more economical management of property of persons whose property adjoins, or which, from some other reason, can be better managed and improved by some joint operation, such as the power of regulating the building of party walls; making and maintaining partition fences and ditches; constructing ditches and sewers for the draining of up-lands or marshes, which can more advantageously be drained by a common sewer or ditch. This is a well-known legislative power, recognized and treated of by all juriconsults and writers upon law through the civilized world; a branch of legislative power exercised by this state before and since the Revolution, and before and since the adoption of the present Constitution, and repeatedly recognized by our courts. The legislature has power to regulate these subjects, either by general law, or by particular laws for certain localities or particular and defined tracts of land. When the Constitution vested the legislative power in the Senate and General Assembly, it conferred the power to make these public regulations as a well understood part of that legislative power.' 'The principle of them all is, to make an improvement common to all concerned, at the common expense of all. And to effect this object, the acts provide that the works to effect the drainage may be located on any part of the lands drained, paying the owner of the land thus occupied compensation for the damage by such use. So far private property is taken by them; farther it is not. In none of them is the owner divested of his fee, and in most there is no corporation in which it could be vested,

## SECTION 5.—REGULATION INCIDENTAL TO POWER OF PROHIBITION

NEW YORK CENT. & H. R. R. CO. v. WILLIAMS (1910) 199 N. Y. 108, 116-119, 92 N. E. 404, 35 L. R. A. (N. S.) 549, 139 Am. St. Rep. 850, BARTLETT, J. (upholding a New York statute requiring all persons and corporations operating steam surface railways to pay wages semi-monthly in cash):

"In the briefs of counsel the constitutionality of the 'semi-monthly cash payment law' (which term I use for convenience in referring to the provisions of the statute prescribing the time of payment and requiring it to be in cash) is discussed in two aspects: (1) As an exercise of the police power of the Legislature, and (2) as an exercise of the reserved power to amend the charters of corporations. In the view which I have taken of the case I shall proceed to consider only the question of its validity as warranted by the reserved power to amend. \* \* \* Even if the enactment should be deemed unconstitutional so far as persons are concerned, the provision relating to them is readily separable from the rest of the statute relating to corporations, and its invalidity in this respect, if so adjudged, need not affect the application of the provision to steam surface railroad corporations. Berea College v. Kentucky, 211 U. S. 45, 29 Sup. Ct. 33.

and for all other purposes the title of the land remained in the owner. To effect such common drainage, power was in some cases given to continue these drains through adjacent lands not drained, upon compensation. All this was an ancient and well-known exercise of legislative power, and may well be considered as included in the grant of legislative power in the Constitution.' 18 N. J. Eq. 68-71. Chief Justice Beasley, in delivering the judgment of the court of errors, enforced the same distinction, saying: 'This case, with regard to the grounds on which it rests, is to be distinguished from that class of proceedings by which meadows and other lands are drained on the application of the landowners themselves. In the present instance, the state is the sole actor, and public necessity or convenience is the only justification of her intervention. But the regulations established by the legislative power, whereby the owners of meadow lands are compelled to submit to an equal burden of the expense incurred in their improvement, are rules of police of the same character as provisions concerning party walls and partition fences. To these cases, therefore, the principle upon which the decision of the present case rests is not to be extended.' 18 N. J. Eq. 531, 90 Am. Dec. 634. \* \* \*

"This review of the cases clearly shows that general laws for the drainage of large tracts of swamps and low lands, upon proceedings instituted by some of the proprietors of the lands to compel all to contribute to the expense of their drainage, have been maintained by the courts of New Jersey (without reference to the power of taking private property for the public use under the right of eminent domain, or to the power of suppressing a nuisance dangerous to the public health) as a just and constitutional exercise of the power of the legislature to establish regulations by which adjoining



53 L. Ed. 81. It matters not that both provisions are contained in the same section. *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 490, 21 Sup. Ct. 174, 45 L. Ed. 280.

"In exercising the reserved power to amend corporate charters, the Legislature may not deprive a corporation of property already acquired, or the proceeds of lawful contracts previously made, or destroy or substantially impair the purposes of the grant or rights which are vested in the corporation thereunder; but it may make any alteration or amendment of a charter 'which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the Legislature may deem necessary to secure either that object or any public right.' *Close v. Glenwood Cemetery*, 107 U. S. 466, 476, 2 Sup. Ct. 267, 27 L. Ed. 408. In the case of corporations such as railroad companies, which are clothed to some extent with a public trust, and are under an obligation to discharge duties which affect the community at large, the Legislature may make amendments in furtherance of the public interest for the benefit of their employes, even though such amendments operate as limitations upon the exercise of the right to contract. Such is substantially the doctrine enunciated in the case of *St. Louis, Iron Mountain & St. Paul Ry. Co. v. Paul*, 173 U. S. 404, 19 Sup. Ct. 419, 43 L. Ed. 746, where the Supreme Court of the United States was called upon to pass on the constitutional validity of an act of the Arkansas Legislature which required railroad companies, whenever they discharged an employe, to pay him his unpaid wages then earned at the contract rate without abatement or deduction on the day of his discharge. The state court upheld this legislation as a valid exercise of the power to amend cor-

lands, held by various owners in severalty, and in the improvement of which all have a common interest, but which, by reason of the peculiar natural condition of the whole tract, cannot be improved or enjoyed by any of them without the concurrence of all, may be reclaimed and made useful to all at their joint expense. The case comes within the principle upon which this court upheld the validity of general mill acts in *Head v. Amoskeag Manufacturing Co.*, 113 U. S. 9, 5 Sup. Ct. 441, 28 L. Ed. 889."

Contra: *Matter of Tuthill*, 163 N. Y. 133, 57 N. E. 303, 49 L. R. A. 781, 79 Am. St. Rep. 574 (1900).

As to compulsory party walls, see *Swift v. Calnan*, 102 Iowa, 206, 71 N. W. 233, 37 L. R. A. 462, 63 Am. St. Rep. 443 (1897); and as to partition fences, see *Tomlinson v. Bainaka*, 163 Ind. 112, 70 N. E. 155 (1904) (cases).

MISCELLANEOUS SERVIITUDES OF PROPERTY AND OBLIGATIONS OF PERSONAL PUBLIC SERVICE.—Here may be mentioned together a variety of instances where persons are compelled, in the public interest, without compensation, to render services, to undergo expense or to suffer the use of their property by others. Of the first sort are militia training and jury duty; attendance and testimony as a witness, *Dixon v. People*, 168 Ill. 179, 48 N. E. 108 (1897) (expert testimony compellable free), annotated 39 L. R. A. 116 ff.; and labor on the highways, *Norwood v. Baker*, *infra*, p. 657, note. Of the second, is the power of the state to compel property owners to lay and clean street sidewalks in front of their premises, *Norwood v. Baker*, *post*, p. 657, note. And of the third, see *Eldridge v. Trezevant*, *post*, p. 670, and note. No mention is made here of actions proper in great emergencies, such as war, public disorder, or great catastrophes. See *American Print Works v. Lawrence*, *post*, p. 669.

porate charters reserved to the Legislature in the state Constitution. It was contended in the Supreme Court of the United States that as to railroad corporations organized prior to its passage the statute was void, because in violation of the fourteenth amendment; or, in other words, because it amounted to a deprivation of property forbidden by the federal Constitution. The court, however, declined to sustain this view, but affirmed the judgment of the Supreme Court of Arkansas holding that inasmuch as the right to contract was not absolute, but might be subjected to the restraints demanded by the safety and welfare of the state, the legislative power to amend corporate charters in this manner could not be disputed on the ground that its exercise was an infraction of the fourteenth amendment.

"In the Sinking Fund Cases, 99 U. S. 700, 720, 25 L. Ed. 496, the same court in discussing the power reserved to Congress to amend the charters of the great Pacific railroads, reviewed the earlier decisions on the general subject, and held that the reservation of the power of amendment 'affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the state'; citing *Tomlinson v. Jessup*, 15 Wall. 459, 21 L. Ed. 204.

"In this state the same rule has been laid down with equal emphasis. As illustrations of the extent to which the Legislature might subject corporations to new restrictions or increased burdens in the exercise of its reserved power to amend corporate charters, Judge Denio, in *Albany Northern R. R. Co. v. Brownell*, 24 N. Y. 345, called attention to one case in which the Court of Appeals had held that the line of a plank road might be extended and its capital increased, and to another in which a banking corporation chartered under the general act of 1838, without personal liability on the part of the shareholders, was so changed as to render the shareholders liable for all the debts of the company to an amount equal to the stock held by them respectively. See *Schenectady & S. Plankroad Co. v. Thatcher*, 11 N. Y. 102; *Matter of Oliver Lee & Co.'s Bank*, 21 N. Y. 9. 'It is difficult to put precise limits upon the power of the Legislature thus reserved over corporations created by it or under its authority,' said Judge Earl in *Mayor, etc., of N. Y. v. Twenty-Third St. Ry. Co.*, 113 N. Y. 311, 317, 21 N. E. 60, 62. '\* \* \* As it has the power utterly to deprive the corporation of its franchise to be a corporation, it may prescribe the conditions and terms upon which it may live and exercise such franchise. It may enlarge or limit its powers, and it may increase or limit its burdens.' The appellant complains because the Legislature has increased its burdens by the sum of \$60,000 additional expenses which it must incur annually in order to pay its employes with the frequency prescribed by the statute; but the corporators must be deemed to have contemplated the possibility of any change of burden within the legislative power to make when they organized the railroad company.

"In New York a special charter may be amended by a general act which does not refer specifically to such charter. *Pratt Institute v. City of New York*, 183 N. Y. 151, 75 N. E. 1119, 5 Ann. Cas. 198; *People ex rel. Cooper Union v. Gass*, 190 N. Y. 323, 83 N. E. 64, 123 Am. St. Rep. 549, 13 Ann. Cas. 678. The case of *State v. Haun*, 61 Kan. 146, 59 Pac. 340, 47 L. R. A. 369, is cited as authority against this method of amendment, but it is in opposition to the view repeatedly asserted and assumed in this court, and is also opposed to decisions on the subject in other jurisdictions, where it is held that the fact that an act of the Legislature is general in its terms, and makes no direct or express reference to the charter of any particular corporation does not prevent it from operating as an amendment to the charter of any corporation comprehended in the classes to which it refers. Such was the effect given by the Supreme Court of the United States to a general statute of Kentucky, which was construed as operative to amend the charter of Berea College, although it was not in terms designated as an amendment thereof. *Berea College v. Kentucky*, supra. \* \* \*

"The semimonthly payment clause of the labor law being applicable to all steam surface railroad corporations in the state operated as a repeal of all the charters of such corporations, if there were any, which provided for a different time of payment for employes and as an amendment or addition to all charters in which no time of payment was prescribed."<sup>1</sup>

<sup>1</sup> Accord: *Lawrence v. Rutland R. Co.*, 80 Vt. 370, 67 Atl. 1091, 15 L. R. A. (N. S.) 350, 13 Ann. Cas. 475 (1907) (cases). Other clauses in particular state Constitutions, prescribing the mode of amending corporate charters, may prevent a broad application of the doctrine of the principal case. *Braceville Coal Co. v. People*, 147 Ill. 66, 74-75, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. Rep. 206 (1893).

In *Ives v. South Buffalo R. Co.*, 201 N. Y. 271, 319-320, 94 N. E. 431, 449, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B. 156 (1911). Cullen, C. J., said (holding invalid a New York statute making employers in certain hazardous occupations absolutely liable for injuries to employes sustained therein): "I concur with Judge Werner that the act, as applicable to the case before us, cannot be considered as an exercise of the power of the state to regulate corporations. The act is general, not confined to corporations, and, even if it were, I think its effect would be a deprivation of property not authorized by the reserved power to regulate. As to corporations hereafter formed, the question is very different. The franchise to be a corporation is not one inherent in the citizen, but proceeds solely from the bounty of the Legislature, and for that reason the Legislature may dictate the terms on which it will be granted and require the acceptance of the provisions of this act as a condition of incorporation. *Purdy v. Erie R. R. Co.*, 162 N. Y. 42, 56 N. E. 508, 48 L. R. A. 669; *Minor v. Erie R. R. Co.*, 171 N. Y. 566, 64 N. E. 454; *People ex rel. Schurz v. Cook*, 110 N. Y. 443, 18 N. E. 113; s. c., 148 U. S. 397, 13 Sup. Ct. 645, 37 L. Ed. 498; *Chicago, R. I. & Pac. R. Co. v. Zernecke*, 183 U. S. 582, 22 Sup. Ct. 229, 46 L. Ed. 339. Even in the case of existing corporations, the corporate existence of all those created since the Constitution of 1846 may be revoked by the Legislature, though the property rights of such corporations and their special franchises other than the one to be a corporation cannot be impaired. *Const. art. 8, § 1*; *Lord v. Equitable Life Assur. Soc.*, 194 N. Y. 212, 87 N. E. 443, 22 L. R. A. (N. S.) 420. The property and franchise would have to be managed by the owners as partners

## CHAPTER XI

DUE PROCESS AND EQUAL PROTECTION OF LAW:  
TAXATION

## SECTION 1.—JURISDICTION

## 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.

or tenants in common, and the Legislature might require as a condition of the continued right to be a corporation that before the expiration of a reasonable period the provisions of the statute should also be accepted also by them."

CONDITIONS IMPOSED UPON PROHIBITABLE ACTS OR PROPERTY.—As to the validity of onerous regulations imposed upon conduct or property that might be prohibited altogether, see *Sentell v. New Orleans & C. R. Co.*, 166 U. S. 698, 17 Sup. Ct. 698, 41 L. Ed. 1169 (1897) (dogs); *McGlone v. Womack*, 129 Ky. 274, 111 S. W. 688, 17 L. R. A. (N. S.) 855 (1908) (same); *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323 (1878) (saloons), explained in *Ives v. South Buffalo R. Co.*, 201 N. Y. 308, 94 N. E. 445, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156, by Werner, J.: "In that case, as in the case of *Marvin v. Trout*, 199 U. S. 212, 26 Sup. Ct. 31, 50 L. Ed. 157 the controlling principle was that the state had the right to prohibit, and therefore the absolute right to control."

Compare the analogous doctrine as to procedural due process in *Oceanic Co. v. Stranahan*, ante, p. 298, and in taxation of corporate franchises, post, pp. 618-622.

Section 4020 of the Kentucky Statutes, under which this assessment was made, provides that "all real and personal estate within 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 domicile 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 estate within a foreign jurisdiction. Whatever be the rights of the state with respect to the taxation

of such income,<sup>1</sup> 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 domicile, 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 domicile 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 domicile 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.

<sup>1</sup> As to jurisdiction to levy income taxes, see *Railway Co. v. Jackson*, 7 Wall. 262, 19 L. Ed. 88 (1869); *United States v. Baltimore & O. R. Co.*, 17 Wall. 322, 21 L. Ed. 597 (1873); *Railway Co. v. Collector*, 100 U. S. 595, 25 L. Ed. 647 (1880); *United States v. Erie R. Co.*, 106 U. S. 327 and 703, 1 Sup. Ct. 223, 27 L. Ed. 151 (1882). Compare the remark of Taney, C. J., in *License Cases*, 5 How. 504, 576 (12 L. Ed. 256) (1847): "Undoubtedly a state may impose a tax upon its citizens in proportion to the amount they are respectively worth"—even though part of their property consist of non-taxable imports.

The arguments in favor of the taxation of intangible property at the domicile 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 domicile 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 Interst. 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 general 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 appraisal, 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 domicile 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.

NEW YORK ex rel. NEW YORK CENTRAL & H. R. R. CO.  
v. MILLER.

(Supreme Court of United States, 1906. 202 U. S. 534, 26 Sup. Ct. 714, 50 L. Ed. 1155.)

[Error to the Supreme Court and Court of Appeals of New York in various cases. The state levied what the statute called a "franchise tax" upon domestic corporations, based upon the amount of capital stock employed within the state. For the reasons stated in the opinion below, the relator caused writs of certiorari to be addressed to the state comptroller to reduce the taxes thus imposed upon it. All of the state courts refused relief.]

Mr. Justice HOLMES. \* \* \* The relator is a New York corporation, owning or hiring lines without as well as within the state, having arrangements with other carriers for through transportation, routing, and rating, and sending its cars to points without as well as within the state, and over other lines as well as its own. The cars are often out of the relator's possession for some time, and may be transferred to many roads successively, and even may be used by other roads for their own independent business, before they return to the relator or the state. In short, by the familiar course of railroad business a considerable portion of the relator's cars constantly is out of the state, and on this ground the relator contended that that proportion should be deducted from its entire capital, in order to find the capital stock employed within the state. \* \* \*

Evidence was offered \* \* \* of the car mileage outside and inside of the state, in order to show, on one footing or the other, that a certain proportion of cars, although not the same cars, was continuously without the state during the whole tax year. The comptroller refused to make any reduction of the tax. \* \* \* We are to assume that the statute purports and intends to allow no deduction from the capital stock taken as the basis of the tax, unless some specific portion of the corporate property is outside of the state during the whole tax year. We must assume, further, that no part of the corporate property in question was outside of the state during the whole tax year.  
\* \* \*

We are not curious to inquire exactly what kind of a tax this is to be called. If it can be sustained by the name given to it by the local courts, it must be sustained by us. It is called a franchise tax in the act, but it is a franchise tax measured by property. A tax very like the present was treated as a tax on the property of the corporation in *Delaware, L. & W. R. Co. v. Pennsylvania*, 198 U. S. 341, 353, 49 L. Ed. 1077, 1081, 25 Sup. Ct. 669. This seems to be regarded as such a tax by the Court of Appeals in this case. See *People ex rel. Commer-*



cial Cable Co. v. Morgan, 178 N. Y. 433, 439, 67 L. R. A. 960, 70 N. E. 967. If it is a tax on any franchise which the state of New York gave, and the same state could take away, it stands at least no worse. The relator's argument assumes that it must be regarded as a tax of a particular kind, in order to invalidate it, although it might be valid if regarded as the state court regards it.

Suppose, then, that the state of New York had taxed the property directly, there was nothing to hinder its taxing the whole of it. It is true that it has been decided that property, even of a domestic corporation, cannot be taxed if it is permanently out of the state. *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 201, 211, 50 L. Ed. 150, 26 Sup. Ct. 36, 4 Ann. Cas. 493; *Delaware, L. & W. R. Co. v. Pennsylvania*, 198 U. S. 341, 49 L. Ed. 1077, 25 Sup. Ct. 669; *Louisville & J. Ferry Co. v. Kentucky*, 188 U. S. 385, 47 L. Ed. 519, 23 Sup. Ct. 468. But it has not been decided, and it could not be decided, that a state may not tax its own corporations for all their property within the state during the tax year, even if every item of that property should be taken successively into another state for a day, a week, or six months, and then brought back. Using the language of domicile, which now so frequently is applied to inanimate things, the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts. *Ayer & L. Tie Co. v. Kentucky*, 202 U. S. 409, 50 L. Ed. 1082, 26 Sup. Ct. 679, 6 Ann. Cas. 205. See also *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 208, 209, 50 L. Ed. 150, 26 Sup. Ct. 36, 4 Ann. Cas. 493.

It was suggested that this case is but the complement of *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. Ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. 876, and that, as there a tax upon a foreign corporation was sustained, levied on such proportion of its capital stock as the miles of track over which its cars were run within the state bore to the whole number of miles over which its cars were run, so here, in the domicile of such a corporation there should be an exemption corresponding to the tax held to be lawfully levied elsewhere. But, in that case, it was found that the "cars used in this state have, during all the time for which tax is charged, been running into, through, and out of the state." The same cars were continuously receiving the protection of the state, and, therefore, it was just that the state should tax a proportion of them. Whether, if the same amount of protection had been received in respect of constantly changing cars, the same principle would have applied, was not decided, and it is not necessary to decide now. In the present case, however, it does not appear that any specific cars or any average of cars was so continuously in any other state as to be taxable there. The absences relied on were not in the course of travel upon fixed routes, but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads. Therefore

we need not consider either whether there is any necessary parallelism between liability elsewhere and immunity at home.

Judgments affirmed.<sup>1</sup>

<sup>1</sup> In *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 81-82, 19 Sup. Ct. 599, 604, 43 L. Ed. 599 (1899), Colorado assessed a foreign car company upon the value of an average of 40 cars employed by it within the state at a time during a certain assessment period. This was upheld, Shiras, J., saying: "The state statutes impose no burdens on the business of the plaintiff in error, but contemplate only the assessment and levy of taxes upon the property situated within the state; and the only question is whether it was competent to ascertain the number of the cars to be subjected to taxation by inquiring into the average number used within the state limits during the period for which the assessment was made. It having been settled, as we have seen, that where a corporation of one state brings into another, to use and employ, a portion of its movable personal property, it is legitimate for the latter to impose upon such property thus used and employed its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens, we think that such a tax may be properly assessed and collected. In cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business, and that the tax may be fixed by an appraisal and valuation of the average amount of the property thus habitually used and employed. Nor would the fact that such cars were employed as vehicles of transportation in the interchange of interstate commerce render their taxation invalid. *Marye v. Railroad Co.*, 127 U. S. 123, 8 Sup. Ct. 1037, 32 L. Ed. 94 (1888); *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613 (1891)." [Harlan and White, JJ., dissented.]

**SITUS OF VESSELS FOR TAXATION.**—See *Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299, 25 Sup. Ct. 686, 49 L. Ed. 1059, 3 Ann. Cas. 1100 (1905) (taxable in state where wholly employed, though registered, enrolled and owned elsewhere); *Ayer & Lord Co. v. Kentucky*, 202 U. S. 409, 26 Sup. Ct. 679, 50 L. Ed. 1082, 6 Ann. Cas. 205 (1906) (not taxable at port of call where enrolled, owner's domicile being in another state); *Southern Pac. Co. v. Kentucky*, 222 U. S. 63, 32 Sup. Ct. 13, 56 L. Ed. 96 (1911) (taxable at owner's domicile though in fact never there, if no permanent situs elsewhere) (discussing all cases), in which Lurton, J., said (222 U. S. 73-76, 32 Sup. Ct. 17, 18, 56 L. Ed. 96): "The general rule has long been settled as to vessels plying between the ports of different states, engaged in the coastwise trade, that the domicile of the owner is the situs of a vessel for the purpose of taxation, wholly irrespective of the place of enrolment, subject, however, to the exception that where a vessel engaged in interstate commerce has acquired an actual situs in a state other than the place of the domicile of the owner, it may there be taxed because within the jurisdiction of the taxing authority. \* \* \* To lay down a principle that vessel property has no situs for purposes of taxation other than that of actual permanent location would introduce elements of uncertainty concerning the situs of such property not presented by other kinds of movable property. It is one thing to find that a movable, such as a railway car, a stock of merchandise, or a herd of cattle, has become a part of the permanent mass of property in a particular state, and quite another to attribute to a sea-going ship an actual situs at any particular port into which it goes for supplies or repairs, or for the purpose of taking on or discharging cargo or passengers. A ship is not intended to stay in port, but to navigate the seas. Its stay in port is a mere incident of its voyage, and to determine that it has acquired an actual situs in one port rather than another would involve such grave uncertainty as to result often in an entire escape from taxation. \* \* \* The difficulties attendant upon the taxation of intangible property elsewhere than at the domicile of the owner have largely preserved the domicile of the owner as the proper situs for purposes of taxation. The legality of a tax is not to be measured by the benefit received by the taxpayer, although equality of burdens be the general standard sought to

## BUCK v. BEACH.

(Supreme Court of United States, 1907. 206 U. S. 392, 27 Sup. Ct. 712, 51 L. Ed. 1106, 11 Ann. Cas. 732.)

[Error to the Supreme Court of Indiana. One Nash, a resident of New York, owned a large sum in notes owed to him by residents of Ohio. These notes were kept by an agent in a safe in Indiana, except when any business was done with regard to them, when they were sent to an Ohio agent for this purpose. No other use was made of them in Indiana. On the death of Nash, an action was brought against Buck, a trustee under his will, by Beach, a county treasurer of Indiana, to collect back taxes in Indiana upon these notes, and a decision in favor of Beach was affirmed by the state Supreme Court. Other facts appear in the opinion.]

Mr. Justice PECKHAM. \* \* \* The plaintiff in error asserts that the simple physical presence of the Ohio notes in Indiana, payable to, and not indorsed by, the decedent, did not constitute taxable property there, because such notes were given and were payable and were paid in Ohio, by residents of Ohio, and to a nonresident of Indiana, and for loans made in Ohio, the capital represented by such notes never having been used in business in Indiana, and he insists that a tax upon such capital or upon the notes themselves as representing that capital, is an illegal tax, and that to take property in payment of such an illegal tax is to take it without due process of law, and constitutes a violation of the fourteenth amendment. \* \* \*

The sole question, then, for this court, is whether the mere presence of the notes in Indiana constituted the debts of which the notes were the written evidence property within the jurisdiction of that state, so that such debts could be therein taxed. Generally, property, in order to be the subject of taxation, must be within the jurisdiction of the power assuming to tax. \* \* \*

be attained. Protection and taxation are not necessarily correlative obligations, nor precise equality of burden attainable, however desirable. The taxing power is one which may be interfered with upon grounds of unjustness only when there has been such flagrant abuse as may be remedied by some affirmative principle of constitutional law. Take the case in hand. The Southern Pacific Company is a corporation having much extraordinary power. It only exists and exercises this power by virtue of the law of Kentucky. By the law of its being it resides in Kentucky, and there maintains its general office, and there holds its corporate meetings. To say that the protection which the corporation receives from the state of its origin and domicile affords no basis for imposing taxes upon tangibles which have not acquired an actual situs under some other jurisdiction is not supportable upon grounds of either abstract justice or concrete law. What is the protection accorded these vessels at any of the ports to which they temporarily go for purpose of business? What protection do they receive from the state or city of New York other than that accorded to every other ship which visits that port, foreign or domestic, for repairs, supplies, or other business?" [The vessels were all enrolled at New York, plied only on the ocean, and perhaps could not have reached Kentucky by water.]

In regard to tangible property the old rule was *mobilia sequuntur personam*, by which personal property was supposed to follow the person of its owner, and to be subject to the law of the owner's domicil. For the purpose of taxation, however, it has long been held that personal property may be separated from its owner, and he may be taxed on its account at the place where the property is, although it is not the place of his own domicil, and even if he is not a citizen or resident of the state which imposes the tax. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 22, 35 L. Ed. 613, 616, 3 Inters. Com. Rep. 595, 11 Sup. Ct. 876; *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. Ed. 189; *People ex rel. Hoyt v. Tax & A. Com'rs*, 23 N. Y. 224, 240. The same rule applies to intangible property. Generally speaking, intangible property in the nature of a debt may be regarded, for the purposes of taxation, as situated at the domicil of the creditor and within the jurisdiction of the state where he has such domicil. It is property within that state. Thus it has been held that a debt owned by a citizen of one state against a citizen of another state and evidenced by the bond of the debtor, secured by a deed of trust or mortgage upon real estate situated in the state where the debtor resides, is properly taxed by the state of the residence of the creditor, if the statute of that state so provides, and such tax violates no provision of the federal Constitution. *Kirtland v. Hotchkiss*, 100 U. S. 491, 498, 25 L. Ed. 558, 562.<sup>1</sup>

Rejecting the fiction of law in regard to the situs of personal property, including therein choses in action, the courts of Indiana have asserted jurisdiction by reason of the statute of that state over these Ohio notes for the purpose of taxation in Indiana, founded upon the simple fact that such notes were placed in the latter state by the Ohio agent of the decedent under the circumstances above set forth. The supreme court of Indiana refused to accept the testimony of the agents that the Ohio notes were sent to Lafayette merely for safekeeping, and for clerical convenience, and said that "the court below was authorized to make the opposite deduction from the uniform course of the business in respect to the keeping of said notes and mortgages and from the evidence that decedent gave the direction which established the practice that was pursued in that particular. More than that, the evidence clearly warranted the conclusion that Buck was vested with a control of said notes and securities for the purpose of enabling decedent to escape taxation in Ohio. We must, therefore, conclude, in support of the general finding, that the court below found that in conducting the business of the Ohio agency the decedent separated from said business the possession of said notes and mortgages and vested the right to such possession in said Buck. There was no return for taxation

<sup>1</sup> But see *Commonwealth v. West India Oil Co.*, 138 Ky. 828, 129 S. W. 301, 36 L. R. A. (N. S.) 295 (1910) (credits of domestic corporation non-taxable, where all business and property outside of taxing state).

of said notes, or of the investments represented by them, either in Ohio or New York during the lifetime of the decedent."

Taking this to be a finding of fact by the supreme court of the state, it is plain that the action of the decedent in sending the Ohio notes into the state of Indiana for the purpose stated (whether successful or not) was improper and unjustifiable. The record does show, however, that the executors subsequently paid the Ohio authorities over \$40,000 for taxes on the moneys invested in Ohio.

But an attempt to escape proper taxation in Ohio does not confer jurisdiction to tax property asserted to be in Indiana which really lies outside and beyond the jurisdiction of that state. Jurisdiction of the state of Indiana to tax is not conferred or strengthened by reason of the motive which may have prompted the decedent to send into the state of Indiana these evidences of debts owing him by residents of Ohio. The question still remains: Was there any property within the jurisdiction of the state of Indiana, so as to permit that state to tax it, simply because of the presence of the Ohio notes in that state? It was not the value of the paper as a tangible thing, on which these promises to pay the debts existing in Ohio were written, that was taxed by that state. The property really taxed was the debt itself, as each separate note was taxed at the full amount of the debt named therein or due thereon. And jurisdiction over these debts for the purpose of taxation was asserted and exercised solely by reason of the physical presence in Indiana of the notes themselves, although they were only written evidence of the existence of the debts which were in fact thereby taxed.

A distinction has been sometimes taken between bonds and other specialty debts belonging to the deceased, on the one hand, and simple contract debts on the other, for the purpose of probate jurisdiction, and the probate court where the bonds are found has been held to have jurisdiction to grant probate, while, in the other class of debts (including promissory notes), jurisdiction has attached to the probate court where the debtor resided at the death of the creditor. 1 Wms. Ex'rs (6th Am. from 7th English Ed.) bottom paging 288, 290, note (h); *Wyman v. Halstead* (*Wyman v. United States*) 109 U. S. 654, 27 L. Ed. 1068, 3 Sup. Ct. 417. See also *Beers v. Shannon*, 73 N. Y. 292, 299; *Owen v. Miller*, 10 Ohio St. 136, 75 Am. Dec. 502.

Under such rule, the debts here in question were not property within the state of Indiana, nor were the promissory notes themselves, which were only evidence of such debts. The rule giving jurisdiction where the specialty may be found has no application to a promissory note. Assuming such a rule, the case here is not covered by it.

Questions of the validity of state taxation with reference to the federal Constitution have become quite frequent in this court within the last few years. The case of *Metropolitan L. Ins. Co. v. New Orleans*, 205 U. S. 395, 51 L. Ed. 853, 27 Sup. Ct. 499, is the latest. The question there was in relation to the validity of certain taxes assessed in



the city of New Orleans against the Metropolitan Life Insurance Company by reason of the company doing business in lending money to the holders of its policies in New Orleans. The domicile of the company was in the city of New York, and the evidences of the credits, in the form of notes, were kept most of the time in New York, being sent to New Orleans when due. The tax was, under the laws of the state of Louisiana, levied on the "credits, money loaned, bills receivable," etc., of the plaintiff in error, and its amount was ascertained by computing the sum of the face value of all the notes held by the company in New Orleans at the time of the assessment. The assessment was made under an act which provided that "bills receivable, obligations, or credits arising from the business done in this state," shall be assessable at the business domicile of the nonresident, the assessment being made in such a way under the statute as would "represent in their aggregate a fair average on the capital, both cash and credits, employed in the business of the party or parties to be assessed." The tax was sustained because, as is stated in the opinion of the court, which was delivered by Mr. Justice Moody, "the insurance company chose to enter into the business of lending money within the state of Louisiana, and employed a local agent to conduct that business. It was conducted under the laws of the state. The state undertook to tax the capital employed in the business precisely as it taxed the capital of its own citizens in like situation. For the purpose of arriving at the amount of capital actually employed, it caused the credits arising out of the business to be assessed. We think the state had the power to do this, and that the foreigner doing business cannot escape taxation upon his capital by removing temporarily from the state evidences of credits in the form of notes. Under such circumstances, they have a taxable situs in the state of their origin." The temporary absence of the notes given for the loans from the state (being in New York, the domicile of the company) except when they became due was regarded as unimportant. The law, it was said, regarded the place of their origin as their true home, to which they would return to be paid, and their temporary absence, however long continued, was left out of account.<sup>2</sup>

The prior cases of *New Orleans v. Stempel*, 175 U. S. 309, 44 L. Ed. 174, 20 Sup. Ct. 110, and *State Assessors v. Comptoir National D'Escompte*, 191 U. S. 388, 48 L. Ed. 232, 24 Sup. Ct. 109, were also cited. In the first there was a tax on credits, evidenced by notes (secured by mortgages on real estate in New Orleans) which the owner,

<sup>2</sup> *Accord: Liverpool, etc., Co. v. Board of Assessors*, 221 U. S. 346, 31 Sup. Ct. 550, 55 L. Ed. 762 (1911) (taxation of amounts due on open accounts for premiums from policy-holders in state—no written evidence of debt); *Orient Ins. Co. v. Board of Assessors*, 221 U. S. 358, 31 Sup. Ct. 551, 55 L. Ed. 769 (1911) (same, where uncollected premiums charged to agents of company). Compare *Board of Assessors v. New York Life Ins. Co.*, 216 U. S. 517, 30 Sup. Ct. 385, 54 L. Ed. 597 (1910) (so-called "policy loans," debited against reserve value of life insurance policies, not taxable, because never really creating a debt, but only a set-off).

a nonresident, who had inherited them, left in Louisiana in the possession of an agent, who collected the principal and interest as they became due. The capital of the owner was thus invested in the state, and was thereby subject to taxation there, and the notes did not alter the nature of the debt, but were merely evidence of it. In the latter case a foreign banking company did business in New Orleans, and through an agent lent money which was evidenced by checks drawn upon the agent, treated as overdrafts and secured by collateral, the checks and collateral remaining in the hands of the agent until the transactions were closed. The credits thus evidenced were held taxable in Louisiana. The corporation was held to be doing business and had capital employed in the city of New Orleans, to the extent of the assessment made upon it therein.

In *Bristol v. Washington County*, 177 U. S. 133, 44 L. Ed. 701, 20 Sup. Ct. 585, the assessment was upheld because it appeared that the person assessed was doing business in Minnesota through an agent, in lending money in that state, which was secured by mortgages on real property therein. The amount of money thus invested in that state was held to be properly taxable therein.

In *Savings & L. Soc. v. Multnomah County*, 169 U. S. 421, 42 L. Ed. 803, 18 Sup. Ct. 392, the assessment was upon the real estate mortgaged, the interest of the mortgagee therein being taxed to him and the rest to the mortgagor, and it was held by this court that the fact that the mortgage was owned by a citizen of another state, and in his possession outside of the state of Oregon, where the real estate was situated, did not violate the fourteenth amendment. It was stated that "the state may tax real estate mortgaged, as it may all other property within its jurisdiction, at its full value. It may do this, either by taxing the whole to the mortgagor, or by taxing to the mortgagee the interest therein represented by the mortgage, and to the mortgagor the remaining interest in the land. And it may, for the purpose of taxation, either treat the mortgage debt as personal property, to be taxed like other choses in action, to the creditor at his domicile, or treat the mortgagee's interest in the land as real estate, to be taxed to him, like other real property, at its situs." Under the statute of Oregon the assessment was made against the mortgagee upon his interest in the land as real estate.

There are no cases in this court where an assessment such as the one before us has been involved. We have not had a case where neither the party assessed nor the debtor was a resident of or present in the state where the tax was imposed, and where no business was done therein by the owner of the note or his agent relating in any way to the capital evidenced by the notes assessed for taxation. We cannot assent to the doctrine that the mere presence of evidences of debt, such as these notes, under the circumstances already stated, amounts to the presence of property within the state for taxation. That promissory notes may be the subject of larceny, as stated in 48 N. Y., cited below,

does not make the debts evidenced by them property liable to taxation within the state, where there is no other fact than the presence of the notes upon which to base the claim.

In *People ex rel. Westbrook v. Ogdensburgh*, 48 N. Y. 390, it was held that money due upon a contract for the sale of land was personal property, and that where such contract belonging to a nonresident was in the hands of a resident agent, it might, for the purposes of municipal taxation, be assessed to the agent and taxed. In the opinion Judge Earl said: "The debts due upon these contracts are personal estate, the same as if they were due upon notes or bonds; and such personal estate may be said to exist where the obligations for payment are held." The contracts spoken of in that case were contracts for the sale of land by a nonresident owner to persons within the county where the lands were situated. The debtors resided within the state, and the agent of the nonresident for the sale of the land resided in the state and had possession of the contracts. A different case as to its facts from the one before us.

In *People ex rel. Jefferson v. Smith*, 88 N. Y. 576, jurisdiction to tax in New York was denied under the statute of that state, because the personal estate was not within the state, although the same principle (page 581) as contained in 48 N. Y., *supra*, was asserted.

If payment of these notes had to be enforced it would not be to the courts of Indiana that the owner would resort. He would have to go to Ohio to find the debtor as well as the lands mortgaged as security for the payment of the notes. It is true that if the notes were stolen while in Indiana, and they were therein a subject of larceny, the Indiana courts would have to be resorted to for the punishment of the thieves. That would be in vindication of the general criminal justice of the state. This consideration, however, is not near enough to the question involved to cause us to change our views of the law in regard to the taxation of property, and make that property within the state which we think is clearly outside it.

Although public securities, consisting of state bonds and bonds of municipal bodies, and circulating notes of banking institutions, have sometimes been treated as property in the place where they were found, though removed from the domicile of the owner (*State Tax on Foreign-Held Bonds*, 15 Wall. 300, 324, 21 L. Ed. 179, 188) \* it has not been held in this court that simple contract debts, though evidenced by promissory notes, can, under the facts herein stated, be treated as property, and taxed in the state where the notes may be found.

As is said in the above-cited case (at page 320, L. Ed. at page 187): "All the property there can be in the nature of things in debts of cor-

\* In this case it was held that Pennsylvania could not validly impose a tax upon the payment of interest due from a railway corporation to non-resident holders of its bonds, secured by a mortgage upon the entire railroad, part of which was in Pennsylvania. Compare *Murray v. Charleston*, 96 U. S. 432, 24 L. Ed. 760 (1877).

porations belongs to the creditors, to whom they are payable, and follows their domicil, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities and no forms of expressions could add anything to its obvious truth, which is recognized upon its simple statement."

The cases cited in *Metropolitan L. Ins. Co. Case*, supra, show that this rule is enlarged to the extent of holding that capital evidenced by written instruments, invested in a state, may be taxed by the authorities of the state, although their owner is a nonresident and such evidences of debt are temporarily outside of the state when the assessment is made. Although the language of the opinion in the case of *State Tax on Foreign-Held Bonds*, supra, has been somewhat restricted so far as regards the character of the interest of the mortgagee in the land mortgaged (*Savings & L. Soc. v. Multnomah County*, 169 U. S. 421, 428, 42 L. Ed. 803, 805, 18 Sup. Ct. 392), the principle upon which the case itself was decided has not been otherwise shaken by the later cases (*New Orleans v. Stempel*, 175 U. S. 309, 319, 320, 44 L. Ed. 174, 180, 20 Sup. Ct. 110; *Blackstone v. Miller*, 188 U. S. 189, 206, 47 L. Ed. 439, 445, 23 Sup. Ct. 277). In the *Stempel Case*, supra, the notes, as we have said, represented the capital of the owner invested in the state, and the capital was taxed, although the owner was a nonresident.

Cases arising under collateral inheritance tax or succession tax acts have been cited as affording foundation for the right to tax as herein asserted. The foundation upon which such acts rest is different from that which exists where the assessment is levied upon property. The succession or inheritance tax is not a tax on property, as has been frequently held by this court (*Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969, 20 Sup. Ct. 747, and *Blackstone v. Miller*, 188 U. S. 189, 47 L. Ed. 439, 23 Sup. Ct. 277), and therefore the decisions arising under such inheritance tax cases are not in point.

Our decision in this case has no tendency to aid the owner of taxable property in any effort to avoid or evade proper and legitimate taxation. The presence of the notes in Indiana formed no bar to the right, if it otherwise existed, of taxing the debts evidenced by the notes in Ohio. It does, however, tend to prevent the taxation in one state of property in the shape of debts not existing there, and which, if so taxed, would make double taxation almost sure, which is certainly not to be desired, and ought, wherever possible, to be prevented.

\* \* \*

Judgment reversed.<sup>4</sup>

[DAY, J., gave a dissenting opinion, in which BREWER, J., concurred.]

<sup>4</sup> Warehouse receipts for whiskey stored outside of Kentucky cannot be taxed by Kentucky at the full value of the whiskey, at least unless the

## ADAMS EXPRESS CO. v. OHIO STATE AUDITOR.

(Supreme Court of United States, 1897. 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965.)

[Appeal from federal Circuit Court of Appeals for the Sixth Circuit. Ohio, Indiana, and Kentucky adopted laws taxing express companies, which were interpreted by the courts of those states to authorize the taxation at the true value in money of the entire property, tangible and intangible, of such companies within those states respectively. Such valuation was obtained by a consideration of the receipts, mileage, and capital stock of such companies, and bore the same proportion to the value of the whole capital stock of each company that the gross receipts and mileage within each state bore to the total receipts and mileage of each company. The express companies sought injunctions against the collection of those taxes, and their bills in the federal courts were dismissed on demurrer. Appeals to the Supreme Court were also decided adversely,<sup>1</sup> and petitions for a rehearing were refused in the following opinion:]

Mr. Justice BREWER. We have had before us at the present term several cases involving the taxation of the property of express companies, some coming from Ohio, some from Indiana, and one from Kentucky; also a case from the latter state involving the taxation of the property of the Henderson Bridge Company.<sup>2</sup> The Ohio and Indiana cases were decided on the 1st of February. 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683. Petitions for rehearing of those cases have been presented, and are now before us for consideration.

The importance of the questions involved, the close division in this court upon them, and the earnestness of counsel for the express companies in their original arguments, as well as in their briefs on this application, lead those of us who concurred in the judgments to add a few observations to what has hitherto been said.

Again and again has this court affirmed the proposition that no state can interfere with interstate commerce through the imposition of a tax, by whatever name called, which is in effect a tax for the

transfer of the receipt is necessary to pass title to the whiskey. "The receipt \* \* \* would be property of some small value distinct from that to which it gave access. But it would not be a counterpart, doubling the riches of the owner of the goods."—*Selliger v. Kentucky*, 213 U. S. 200, 206, 29 Sup. Ct. 449, 450, 53 L. Ed. 761 (1909). As to the possible taxation of stock certificates of foreign corporations, see *People ex rel. Hatch v. Beardon*, 184 N. Y. 431, 451, 77 N. E. 970, 8 L. R. A. (N. S.) 314, 112 Am. St. Rep. 628, 6 Ann. Cas. 515 (1906).

<sup>1</sup> *Adams Exp. Co. v. Ohio*, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683 (1897); *American Exp. Co. v. Indiana*, 165 U. S. 255, 17 Sup. Ct. 391, 41 L. Ed. 707 (1897); *Adams Exp. Co. v. Kentucky*, 166 U. S. 171, 17 Sup. Ct. 527, 41 L. Ed. 960 (1897). White, Field, Harlan, and Brown, JJ., dissented in each case.

<sup>2</sup> *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 17 Sup. Ct. 532, 41 L. Ed. 953 (1897).



privilege of transacting such commerce; and it has as often affirmed that such restriction upon the power of a state to interfere with interstate commerce does not in the least degree abridge the right of a state to tax at their full value all the instrumentalities used for such commerce.

Now, the taxes imposed upon express companies by the statutes of the three states of Ohio, Indiana, and Kentucky are certainly not in terms "privilege taxes." They purport to be upon the property of the companies. They are therefore not, in form at least, subject to any of the denunciations against privilege taxes which have so often come from this court. The statutes grant no privilege of doing an express business, charge nothing for doing such a business, and contemplate only the assessment and levy of taxes upon the property of the express companies situated within the respective states; and the only really substantial question is whether, properly understood and administered, they subject to the taxing power of the state property not within its territorial limits. The burden of the contention of the express companies is that they have within the limits of the state certain tangible property, such as horses, wagons, etc.; that that tangible property is their only property within the state; that it must be valued as other like property, and upon such valuation alone can taxes be assessed and levied against them.

But this contention practically ignores the existence of intangible property, or, at least, denies its liability for taxation. In the complex civilization of to-day, a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the federal Constitution which restrains a state from taxing at its real value such intangible property. Take the simplest illustration: B., a solvent man, purchases from A. certain property, and gives to A. his promise to pay, say, \$100,000 therefor. Such promise may or may not be evidenced by a note or other written instrument. The property conveyed to B. may or may not be of the value of \$100,000. If there be nothing in the way of fraud or misrepresentation to invalidate that transaction, there exists a legal promise on the part of B. to pay A. \$100,000. That promise is a part of A.'s property. It is something of value, something on which he will receive cash, and which he can sell in the markets of the community for cash. It is as certainly property, and property of value, as if it were a building or a steamboat, and is as justly subject to taxation. It matters not in what this intangible property consists,—whether privileges, corporate franchises, contracts, or obligations. It is enough that it is property which, though intangible, exists, which has value, produces income, and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country. Now, whenever separate articles of tangible property are joined to-

gether, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property. Upon what theory of substantial right can it be adjudged that the value of this intangible property must be excluded from the tax lists, and the only property placed thereon be the separate pieces of tangible property?

The first question to be considered, therefore, is whether there is belonging to these express companies intangible property,—property differing from the tangible property; a property created by either the combined use or the manner of use of the separate articles of tangible property, or the grant or acquisition of franchises or privileges, or all together. To say that there can be no such intangible property, that it is something of no value, is to insult the common intelligence of every man. Take the Henderson Bridge Company's property, the validity of the taxation of which is before us in another case. The facts disclosed in that record show that the bridge company owns a bridge over the Ohio, between the city of Henderson, in Kentucky, and the Indiana shore, and also 10 miles of railroad in Indiana; that that tangible property—that is, the bridge and railroad track—was assessed in the states of Indiana and Kentucky at \$1,277,695.54, such, therefore, being the adjudged value of the tangible property. Thus, the physical property could presumably be reproduced by an expenditure of that sum, and if placed elsewhere on the Ohio river, and without its connections or the business passing over it or the franchises connected with it, might not of itself be worth any more. As mere bridge and tracks, that was its value. If the state's power of taxation is limited to the tangible property, the company should only be taxed in the two states for that sum; but it also appears that it, as a corporation, had issued bonds to the amount of \$2,000,000, upon which it was paying interest; that it had a capital stock of \$1,000,000; and that the shares of that stock were worth not less than \$90 per share in the market. The owners, therefore, of that stock, had property which, for purposes of income and purposes of sale, was worth \$2,900,000.<sup>3</sup> What gives this excess of value? Obviously, the franchises, the privileges the company possesses,—its intangible property.

Now, it is a cardinal rule, which should never be forgotten, that whatever property is worth for the purposes of income and sale it is also worth for purposes of taxation. Suppose such a bridge were entirely within the territorial limits of a state, and it appeared that the bridge itself cost only \$1,277,000, could be reproduced for that sum, and yet it was so situated with reference to railroad or

<sup>3</sup> Adding the market value of its shares of stock to the market value of its bonded debt is a valid method of ascertaining the total value of a corporation's assets or capital stock. *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663 (1876).

other connections, so used by the traveling public, that it was worth to the holders of it, in the matter of income, \$2,900,000, could be sold in the markets for that sum, was therefore in the eyes of practical business men of the value of \$2,900,000, can there be any doubt of the state's power to assess it at that sum, and to collect taxes from it upon that basis of value? Substance of right demands that, whatever be the real value of any property, that value may be accepted by the state for purposes of taxation, and this ought not to be evaded by any mere confusion of words. Suppose an express company is incorporated to transact business within the limits of a state, and does business only within such limits, and, for the purpose of transacting that business, purchases and holds a few thousands of dollars' worth of horses and wagons, and yet it so meets the wants of the people dwelling in that state, so uses the tangible property which it possesses, so transacts business therein, that its stock becomes in the markets of the state of the actual cash value of hundreds of thousands of dollars. To the owners thereof, for the purposes of income and sale, the corporate property is worth hundreds of thousands of dollars. Does substance of right require that it shall pay taxes only upon the thousands of dollars of tangible property which it possesses? Accumulated wealth will laugh at the crudity of taxing laws which reach only the one, and ignore the other; while they who own tangible property, not organized into a single producing plant, will feel the injustice of a system which so misplaces the burden of taxation.

A distinction must be noticed between the construction of a state law and the power of a state. If a statute, properly construed, contemplates only the taxation of horses and wagons, then those belonging to an express company can be taxed at no higher value than those belonging to a farmer. But, if the state comprehends all property in its scheme of taxation, then the good will of an organized and established industry must be recognized as a thing of value. The capital stock of a corporation and the shares in a joint-stock company represent not only the tangible property, but also the intangible, including therein all corporate franchises and all contracts, privileges, and good will of the concern.

Now, the same reality of the value of its intangible property exists when a company does not confine its work to the limits of a single state. Take, for instance, the Adams Express Company. According to the return filed by it with the auditor of the state of Ohio, as shown in the records of these cases, its number of shares was 120,000, the market value of each \$140 to \$150. Taking the smaller sum gives the value of the company's property taken as an entirety as \$16,800,000. In other words, it is worth that for the purposes of income to the holders of the stock, and for purposes of sale in the markets of the land. But in the same return it shows that the value of its real estate in Ohio was only \$25,170, of real estate owned outside of Ohio \$3,005,157.52, or a total of \$3,030,327.52; the value of its per-

sonal property in Ohio \$42,065, of personal property outside of Ohio \$1,117,426.05, or a total of \$1,159,491.05,—making a total valuation of its tangible property \$4,189,818.57; and upon that basis it insists that taxes shall be levied. But what a mockery of substantial justice it would be for a corporation whose property is worth to its stockholders, for the purposes of income and sale, \$16,800,000, to be adjudged liable for taxation upon only one-fourth of that amount. The value which property bears in the market, the amount for which its stock can be bought and sold, is the real value. Business men do not pay cash for property in moonshine or dreamland. They buy and pay for that which is of value in its power to produce income, or for purposes of sale.

It is suggested that the company may have bonds, stocks, or other investments which produce a part of the value of its capital stock, and which have a special situs in other states or are exempt from taxation. If it has, let it show the fact. Courts deal with things as they are, and do not determine rights upon mere possibilities. If half of the property of the Adams Express Company, which by its own showing is worth \$16,000,000 and over, is invested in United States bonds, and therefore exempt from taxation, or invested in any way outside the business of the company, and so as to be subject to purely local taxation, let that fact be disclosed; and then, if the state of Ohio attempts to include within its taxing power such exempted property or property of a different situs, it will be time enough to consider and determine the rights of the company.<sup>4</sup> That, if such facts exist, they must be taken into consideration by a state in its proceedings under such tax laws as are here presented, has been heretofore recognized and distinctly affirmed by this court. *Railway Co. v. Backus*, 154 U. S. 421, 443, 14 Sup. Ct. 1114, 38 L. Ed. 1031; *Telegraph Co. v. Taggart*, 163 U. S. 1, 23, 16 Sup. Ct. 1054, 41 L. Ed. 49; *Adams Exp. Co. v. Ohio*, 165 U. S. 194, 227, 17 Sup. Ct. 305, 41 L. Ed. 683. Presumably, all that a corporation has is used in the transaction of its business; and, if it has accumulated assets which for any reason affect the question of taxation, it should disclose them. It is called upon to make return of its property, and if its return admits that it is possessed of property of a certain value, and does not disclose anything to show that any portion thereof is not subject to taxation, it cannot complain if the state treats its property as all taxable.

But where is the situs of this intangible property? The Adams Express Company has, according to its showing, in round numbers \$4,000,000 of tangible property scattered through different states, and.

<sup>4</sup> For the deductions to be made, under the "unit rule" of assessment, for various kinds of property held out of the state and not used in the business taxed, see *Fargo v. Hart*, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. Ed. 761 (1904). As to disproportionately valuable railway terminals outside of state, see *Pittsburg, C., C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 431, 14 Sup. Ct. 1114, 38 L. Ed. 1031 (1894). Compare *Filnt v. Stone Tracy Co.*, 220 U. S. 107, 165-167, 31 Sup. Ct. 342, 55 L. Ed. 389, *Ann. Cas.* 1912B, 1312 (1911).

with that tangible property thus scattered, transacts its business. By the business which it transacts, by combining into a single use all these separate pieces and articles of tangible property, by the contracts, franchises, and privileges, which it has acquired and possesses, it has created a corporate property of the actual value of \$16,000,000. Thus, according to its figures, this intangible property, its franchises, privileges, etc., is of the value of \$12,000,000, and its tangible property of only \$4,000,000. Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the state which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter. Every state within which it is transacting business, and where it has its property, more or less, may rightfully say that the \$16,000,000 of value which it possesses springs not merely from the original grant of corporate power by the state which incorporated it, or from the mere ownership of the tangible property, but it springs from the fact that that tangible property it has combined with contracts, franchises, and privileges into a single unit of property; and this state contributes to that aggregate value not merely the separate value of such tangible property as is within its limits, but its proportionate share of the value of the entire property. That this is true is obvious from the result that would follow if all the states other than the one which created the corporation could and should withhold from it the right to transact express business within their limits. It might continue to own all its tangible property within each of those states, but, unable to transact the express business within their limits, that \$12,000,000 of value attributable to its intangible property would shrivel to a mere trifle.

It may be true that the principal office of the corporation is in New York, and that for certain purposes the maxim of the common law was, "*Mobilia personam sequuntur*;" but that maxim was never of universal application, and seldom interfered with the right of taxation. *Car Co. v. Pennsylvania*, 141 U. S. 18, 22, 11 Sup. Ct. 876, 35 L. Ed. 613. It would certainly seem a misapplication of the doctrine expressed in that maxim to hold that, by merely transferring its principal office across the river to Jersey City, the situs of \$12,000,000 of intangible property, for purposes of taxation, was changed from the state of New York to that of New Jersey.

It is also true that a corporation is, for purposes of jurisdiction in the federal courts, conclusively presumed to be a citizen of the state which created it; but it does not follow therefrom that its franchise to be is for all purposes to be regarded as confined to that state. For the transaction of its business it goes into various states, and wherever it goes as a corporation it carries with it that franchise to be. But the franchise to be is only one of the franchises of a corporation. The franchise to do is an independent franchise, or rather a combina-



tion of franchises, embracing all things which the corporation is given power to do; and this power to do is as much a thing of value and a part of the intangible property of the corporation as the franchise to be. Franchises to do go wherever the work is done. The Southern Pacific Railway Company is a corporation chartered by the state of Kentucky; yet, within the limits of that state, it is said to have no tangible property, and no office for the transaction of business. The vast amount of tangible property which, by lease or otherwise, it holds and operates, and all the franchises to do which it exercises, exist and are exercised in the states and territories on the Pacific slope. Do not these intangible properties,—these franchises to do,—exercised in connection with the tangible property which it holds, create a substantive matter of taxation to be asserted by every state in which that tangible property is found?<sup>5</sup>

It is said that the views thus expressed open the door to possibilities of gross injustice to these corporations, through the conflicting action of the different states in matters of taxation. That may be so, and the courts may be called upon to relieve against such abuses. But such possibilities do not equal the wrong which sustaining the contention of the appellant would at once do. In the city of New York are located the headquarters of a corporation whose corporate property is confessedly of the value of \$16,000,000.—a value which can be realized by its stockholders at any moment they see fit. Its tangible property and its business are scattered through many states, all whose powers are invoked to protect its property from trespass, and secure it in the peaceful transaction of its widely dispersed business. Yet, because that tangible property is only \$4,000,000, we are told that that is the limit of the taxing power of these states. In other words, it asks these states to protect property which to it is of the value of \$16,000,000, but is willing to pay taxes only on the basis of a valuation of \$4,000,000. The injustice of this speaks for itself.

In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are, and as possessing a value which is accorded to them in the markets of the world; and that no

<sup>5</sup> In *Western Union Tel. Co. v. Missouri ex rel. Gottlieb*, 190 U. S. 412, 421, 422, 23 Sup. Ct. 730, 47 L. Ed. 1116 (1903), a Missouri assessment under the "unit rule" was upheld which included part of the value of a New York franchise under which a telegraph company did business in Missouri. McKenna, J., quoted with approval from the state court below as follows: "The franchise derived by the defendant from the state of New York was considered by the board in determining the value of the property of the defendant located in this state. \* \* \* The right to exist—the franchise—of the defendant was property, and was subject to taxation, either directly, in the proportion that the portion of the franchise exercised in this state bore to the proportion of the franchise exercised in all other states, or indirectly, as was done in Massachusetts and was done here, by being impressed upon the tangible property owned by it, thereby increasing its value, and by considering the franchise and its tangible property as a system, and then assessing the part of the property forming a part of the system and located in Missouri as of its proportionate value of the whole property constituting the system."

finest theories about situs should interfere to enable these large corporations, whose business is carried on through many states, to escape from bearing in each state such burden of taxation as a fair distribution of the actual value of their property among those states requires.

Petition denied.\*

\* "A railroad must be regarded for many, indeed for most, purposes as a unit. The track of the road is but one track from one end of it to the other, and, except in its use as one track, is of little value. In this track as a whole each county through which it passes has an interest much more important than it has in the limited part of it lying within its boundary. Destroy by any means a few miles of this track within an interior county, so as to cut off the connection between the two parts thus separated, and, if it could not be repaired or replaced, its effect upon the value of the remainder of the road is out of all proportion to the mere local value of the part of it destroyed. A similar effect on the value of the interior of the road would follow the destruction of that end of the road lying in Chicago, or some other place where its largest traffic centers. It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole."—Miller, J., in *State Ry. Tax Cases*, 92 U. S. 575, 608, 23 L. Ed. 603 (1875).

"As to railroad, telegraph, and sleeping-car companies, engaged in interstate commerce, it has often been held by this court that their property, in the several states through which their lines or business extended, might be valued as a unit for the purposes of taxation, taking into consideration the uses to which it was put, and all the elements making up aggregate value, and that a proportion of the whole, fairly and properly ascertained, might be taxed by the particular state, without violating any federal restriction. *W. U. Tel. Co. v. Attorney General of Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790 (1888); *Massachusetts v. W. U. Tel. Co.*, 141 U. S. 40, 11 Sup. Ct. 889, 35 L. Ed. 628 (1891); *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, 12 Sup. Ct. 121, 163, 35 L. Ed. 994 (1891); *Railroad Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031 (1894); *Railroad Co. v. Backus*, 154 U. S. 439, 14 Sup. Ct. 1122, 38 L. Ed. 1040 (1894); *Telegraph Co. v. Taggart*, 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. Ed. 49 (1896); *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613 (1891). The valuation was, thus, not confined to the wires, poles, and instruments of the telegraph company, or the roadbed, ties, rails and spikes of the railroad company, or the cars of the sleeping-car company, but included the proportionate part of the value resulting from the combination of the means by which the business was carried on,—a value existing to an appreciable extent throughout the entire domain of operation. And it has been decided that a proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular state is, in the case of railroads, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole (*Railroad Co. v. Backus*, 154 U. S. 429, 14 Sup. Ct. 1114, 38 L. Ed. 1031 [1894]), or taking as the basis of assessment such proportion of the capital stock of a sleeping-car company as the number of miles of railroad over which its cars are run in a particular state bears to the whole number of miles traversed by them in that and other states (*Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613 [1891]), or such a proportion of the whole value of the capital stock of a telegraph company as the length of its lines within a state bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the state (*Telegraph Co. v. Taggart*, 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. Ed. 49)."—Fuller, C. J., in *Adams Express Co. v. Ohio*, 165 U. S. 194, 220, 221, 17 Sup. Ct. 305, 41 L. Ed. 683 (1897).

## TAPPAN v. MERCHANTS' NAT. BANK.

(Supreme Court of United States, 1873. 19 Wall. 490, 22 L. Ed. 189.)

[Appeal from a decree of the United States Circuit Court for the Northern District of Illinois granting an injunction against the collection of taxes upon the shares of stock in appellee bank under the statute of Illinois passed June 13, 1867. The facts are sufficiently stated in the opinion.]

Mr. Chief Justice WAITE. We are called upon in this case to determine whether the General Assembly of the state of Illinois could, in 1867, provide for the taxation of the owners of shares of the capital stock of a national bank in that state at the place within the state where the bank was located, without regard to their places of residence. \* \* \* It is conceded that it was within the power of the state to tax the shares of non-resident shareholders at the place where the bank was located, but it is claimed that under the Constitution of the state resident shareholders could only be taxed at the places of their residence. We have not been referred to any express provision of the Constitution to that effect. \* \* \*

This power of locating personal property for the purpose of taxation without regard to the residence of the owner has been often exercised in Illinois, and sustained by the courts. *City of Dunleith v. Reynolds*, 53 Ill. 45. Since the adoption of the Constitution of 1870, which did not enlarge the powers of the General Assembly in this particular, very extended legislation has been had with a view to such location. Thus, live stock and other personal property used upon a farm, must be listed and assessed where the farm is situated; property in the hands of agents at the place where the business of the agent is transacted; water-craft where they are enrolled; or, if not enrolled, where they are kept; the property of bankers, brokers, merchants, manufacturers, and many other classes of persons specially enumerated, at the place where their business is carried on. This became necessary in order that the burdens of taxation might be equally distributed among those who should bear them.

We do not understand the counsel for the appellee to dispute this power, where the property is tangible and capable of having, so to speak, an actual situs of its own, but he claims that if it is intangible, it cannot be separated from the person of its owner. It must be borne in mind that all this property, intangible though it may be, is within the state. That which belongs to residents is there by reason of their residence. All the owners have submitted themselves to the jurisdiction of the state, and they must obey its will when kept within the limits of constitutional power.

The question is then presented whether the General Assembly, having complete jurisdiction over the person and the property, could separate a bank share from the person of the owner for the purposes

of taxation. It has never been doubted that it was a proper exercise of legislative power and discretion to separate the interest of a partner in partnership property from his person for that purpose, and to cause him to be taxed on its account at the place where the business of the partnership was carried on. And this, too, without reference to the character of the business or the property. The partnership may have been formed for the purpose of carrying on mercantile, banking, brokerage, or stock business. The property may be tangible or intangible, goods on the shelf or debts due for goods sold. The interest of the partner in all the property is made taxable at the place where the business is located.

A share of bank stock may be in itself intangible, but it represents that which is tangible. It represents money or property invested in the capital stock of the bank. That capital is employed in business by the bank, and the business is very likely carried on at a place other than the residence of some of the shareholders. The shareholder is protected in his person by the government at the place where he resides; but his property in this stock is protected at the place where the bank transacts his business. If he were a partner in a private bank doing business at the same place, he might be taxed there on account of his interest in the partnership. It is not easy to see why, upon the same principle, he may not be taxed there on account of his stock in an incorporated bank. His business is there as much in the one case as in the other. He requires for it the protection of the government there, and it seems reasonable that he should be compelled to contribute there to the expenses of maintaining that government. It certainly cannot be an abuse of legislative discretion to require him to do so. If it is not, the General Assembly can rightfully locate his shares there for the purpose of taxation. \* \* \*

Decree reversed.<sup>1</sup>

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### BRADLEY v. BAUDER.

(Supreme Court of Ohio, 1880. 36 Ohio St. 28, 38 Am. Rep. 547.)

[Appeal from district court of Cuyahoga county. Plaintiffs owned shares of stock in corporations whose franchises, property, and business were wholly outside of Ohio where plaintiffs lived. A preliminary injunction was granted by the above-mentioned court against the taxation in Ohio of such shares.]

<sup>1</sup>The state of the corporation's domicile may require it to pay the tax on the shares of non-resident stockholders, giving the corporation a personal right of action therefor against them and a lien on their stock. *Corry v. Baltimore*, 196 U. S. 466, 25 Sup. Ct. 297, 49 L. Ed. 556 (1905) [compare *Stapylton v. Thaggard*, 91 Fed. 93, 33 C. C. A. 353 (1898) (bank insolvent)]. So also as to the resident possessors of tangible property owned by non-residents. *Carstairs v. Cochran*, 193 U. S. 10, 24 Sup. Ct. 318, 48 L. Ed. 596 (1904); *Thompson v. Kentucky*, 209 U. S. 340, 28 Sup. Ct. 533, 52 L. Ed. 822 (1908) (even though property subject to prior lien of United States).

BOYNTON, J. \* \* \* The capital of the corporation is the property of the corporation, and it can only be taxed in the state where the property is located. It is very clearly settled, that the right of taxation is limited to persons, property and business within the jurisdiction of the state where the right is attempted to be exercised. *Railroad Company v. Pennsylvania*, 15 Wall. 300, 21 L. Ed. 179. But investments in stocks in foreign companies, owned by residents here, being property within the state, are not only made subject to taxation by the Constitution, but, as we have seen, their taxation is expressly required by the statute.

But it is said, that because the capital of the company is invested in real and fixed property in the state where the corporation is located, and in which state, taxes upon the same are regularly levied and paid, a tax here upon the shares of stock of those residing here, is a tax upon the same property, and therefore results in double taxation.

The argument is that the capital of the corporation is invested in property which is taxed in the name of the corporation, and that the shares in the capital stock, when owned by individuals, only represent proportions in the ownership of such property, and hence, to tax the shares is another mode of taxing the property of the corporation, and that a tax upon both, although the tax upon one is imposed by another state, violates the rule or principle of equality established by the Constitution. This argument, however plausible it seems, has never met with favor from the courts. Double taxation, in a legal sense, does not exist, unless the double tax is levied upon the same property within the same jurisdiction. Here the property owned by the plaintiffs is not only not the same as that owned by the corporation, but its situs, so far as shares of stock are capable of one, is in a different state.

The capital of a corporation, whatever invested in, and the individual shares of stock, are distinct species of property. *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558. The owner of a share of stock owns no part of the capital of the company. *Watson v. Spratley*, 10 Exch. 236. The corporation is its sole owner, holding the same, it is true, in trust, for the purposes for which the corporation was created, and upon its winding up, for the benefit of creditors and shareholders. The ownership of a share of stock, so far as the property of the corporation is concerned, is but the ownership of the right to participate, from time to time, in the net profits of the business, and upon the dissolution of the corporation to a proportion of the assets after the payment of the corporate debts. It is personal property, which, upon the death of the owner, goes to his administrator, although the entire capital of the corporation may consist of real estate. The owner may sell or dispose of his stock at pleasure, and, in so doing, works no change or modification in the title to the corporate property. From this it would seem to result necessarily, that its situs, for purposes of



taxation, when not otherwise provided by statute, is that of the domicile of the owner. That shares of stock may be separated from the person of the owner, by statute, and given a situs of their own, was held in *Tappan v. Merchants' National Bank*, 19 Wall. 490, 22 L. Ed. 189. But when not so separated, that their situs follows and adheres to the domicile of the owner, is supported by a great weight of authority. *State v. Branin*, 3 Zab. (23 N. J. Law) 484; *City of Newark v. Assessor*, 30 N. J. Law, 13; *Great Barrington v. County Com'rs*, 16 Pick. (Mass.) 572; *Oliver v. Washington Mills*, 11 Allen (Mass.) 268; *Whitesell v. County of Northampton*, 49 Pa. St. 526; *Cooley on Taxation*, 16; *Burroughs on Taxation*, 188.

The same principle governs a chose in action; for purposes of taxation, its situs is that of the domicile of the owner, although the debt is secured by a mortgage upon realty in another state, and by agreement of the parties expressly made subject to its laws. *Kirtland v. Hotchkiss*, 42 Conn. 426, 19 Am. Rep. 546. See same case in 100 U. S. 491, 25 L. Ed. 558.

The constitutional power to tax shares of stock, owned by our citizens in corporations located without the state, does not depend on whether the capital of the corporation is or is not taxed in the state where the corporation is created. The power is the same, whether the capital of the corporation is there taxed or not; otherwise, the power of taxation conferred by the constitution would be made to depend upon the operation of laws of a foreign jurisdiction—a proposition so obviously ill founded that the moment it is stated its falsity becomes apparent.

Injunction vacated.<sup>1</sup>

### BALDWIN v. WASHINGTON COUNTY.

(Court of Appeals of Maryland, 1897. 85 Md. 145, 36 Atl. 764.)

[Appeal from Circuit Court of Washington County, Maryland. Between 1879 and 1884 an estate was settled in the orphans' court of that county, showing a balance of about \$44,000 in the hands of the guardian of Columbus C. Baldwin, an infant, on behalf of said ward. In 1891 Wm. W. Baldwin was appointed such guardian by that court. The property of the ward consisted entirely of stocks and bonds of companies organized and located outside of Maryland, and the stock certificates and bonds were kept outside that state. Both guardian and

<sup>1</sup> See *Sturges v. Carter*, 114 U. S. 511, 5 Sup. Ct. 1014, 29 L. Ed. 240 (1885), and *Kidd v. Alabama*, 188 U. S. 730, 23 Sup. Ct. 401, 47 L. Ed. 669 (1903). Shares of stock may be taxed at the residence of the owner, even though they are also taxed at the domicile of the corporation in another state. *Dyer v. Osborne*, 11 R. I. 321, 23 Am. Rep. 460 (1876). A fortiori this is true when it is the capital stock of the corporation, not its shares, that is taxed at its domicile. *Greenleaf v. Board of Review*, 184 Ill. 226, 56 N. E. 295, 75 Am. St. Rep. 168 (1900); *Bacon v. State Board*, 126 Mich. 22, 85 N. W. 307, 60 L. R. A. 321, 86 Am. St. Rep. 524 (1901).

ward lived in New York. In 1893 and 1894 this property was assessed for taxation in Washington county. The guardian filed a bill to enjoin the collection of the tax, and the circuit court of that county dismissed it.]

BOYD, J. \* \* \* It must, of course, be admitted that the situs of property of this kind, for the purposes of taxation, is ordinarily at the domicile of the owner, but the legislature has the power to fix a different situs, provided, of course, there be no conflict with some provision in the constitution. 1 *Desty, Tax'n*, 97; *Cooley, Tax'n*, 373. We have in this state some statutes which do determine where property shall be deemed to be situate for the purposes of taxation. For example, section 131 of article 81 of the Code provides where the stock of certain domestic corporations owned by nonresidents shall be deemed to be situate. So, by section 9 of article 81, above quoted, the legislature has fixed the place where personal property in the hands of the guardian shall be taxed. When it requires the register of wills to make the returns to the county commissioners, it means, of course, that the register of wills of each county shall make the returns to the commissioners of his county; and it provides that "all such property, if not before assessed, shall then be assessed," and "every executor, administrator, or guardian shall be liable to pay the taxes thereon." It does not say every guardian who is a resident of this state, or every guardian whose ward is a resident of this state, but the language used is at least broad enough to apply to every guardian who has been appointed as such in this state, and includes all property of such guardian; that is, of course, all property of such character as is taxable in this state. It fixes the situs of the property in the county or city where the guardian was appointed, and it matters not where the person who is guardian may reside. The office of guardian, so to speak, is fixed at the county where the appointment is made. If that be not so, then, if this ward was a resident of Washington county, his personal property would escape taxation there, because his guardian lived in New York. That would seem to be contrary to the manifest object and intention of the section of the Code above quoted.

In the case of *Bonaparte v. State*, 63 Md. 465, this same section was under consideration, and this court held that, although Mr. Bonaparte, the executor of Mrs. Patterson, lived in Baltimore county, yet he was liable to Baltimore city for taxes on bonds and stocks of his testatrix, because letters testamentary had been granted to him by the orphans' court of Baltimore city. It was there said, in answer to the suggestion of the executor, that, because he was a resident of Baltimore county, he was taxable there, and nowhere else, by reason of the legal title to the intangible property being in him; "that he held such legal title is true; but he held it in the special character of an officer of the law, for the specific and temporary purpose of the administration of the property under the supervision and direction of the court from which he received letters testamentary. The domicile of the testator, when

living, determines the situs of his personal property of an intangible nature not permanently located elsewhere, for purposes of taxation, and his place of domicile at the time of his death determines the place of administering his estate. The situs of the personal property, generally speaking, and the residence of the administrator, for the purposes of administration, place them, in legal contemplation, in the city or county of the court exercising jurisdiction. The personal property, therefore, of an intangible nature, not permanently located elsewhere, such as bonds and stocks, must be deemed to remain within the jurisdiction of the court pending the settlement of the estate, and be there liable to taxation. When distribution has been made, and the fact of its transfer has been communicated to the tax authorities, the administrator's or executor's liability to pay the taxes upon it, of course, ceases." The court then quoted the section of the Code above referred to.

Now, if it be true that the situs, for taxation, of property in the hands of a resident executor (and, of course, the same must apply to an administrator or guardian) is where he was appointed, and not where he resided, how can it be consistently said in this case that the property cannot be subject to taxation because the guardian resides beyond the state? \* \* \* In contemplation of our statute, the officer of the law known as the guardian of Columbus C. Baldwin is in Washington county for the purpose of dealing with, accounting for, and holding the property of his ward. The individual holding that office may be domiciled in that county or in New York, but the law does not concern itself about that.

There are a number of provisions in our testamentary laws for the appointment and control of guardians by the orphans' courts of this state. They not only provide for the appointment of guardians of resident infants, but by section 203 of article 93 of the Code express provision is made for the appointment of guardians of nonresident infants who have no guardians where they reside, but have property in this state. Can it be doubted that such guardians are subject to the same control by the orphans' courts of this state as those whose wards reside here? They are required to give bond with security in the same manner as if the infants resided in this state, and the wards' property is entitled to the same protection as that of resident wards. Once in each year, or oftener, if required by the court, the guardian must settle an account of his trust with the orphans' court. The court is authorized to direct how the money of the ward can be invested, and when investments are made under certain provisions of the Code they can only be transferred under the orders of the court. No guardian can sell any of the property of his ward without an order of the court appointing him, and other provisions might be cited which show that the policy of our testamentary laws is to keep the personal property of all wards whose guardians are appointed by the orphans' courts of this state within the control and supervision of those courts.

Whatever may be true in actual practice, the theory of the law is that the personal estate of the ward is where the guardian is appointed, and not where the guardian or ward may be. \* \* \* If the appellant did not want to pay taxes in Washington county as other guardians appointed by the orphans' court of that county are required to do, he could have had a guardian appointed where the ward resides; but so long as he remained guardian here he was required, by the express terms of the statute, as we understand its meaning, to pay taxes on the property in his hands liable to taxation. When, for convenience or other causes, a guardian is appointed in this state for a nonresident infant, who may thereby have the protection and care of one of our orphans' courts from year to year during his minority, it is certainly no hardship to require his estate to pay taxes on such property as the guardian of a resident ward must pay. So, if we view this case merely from an equitable standpoint, we fail to find any good reason why guardians of nonresident infants should occupy the time of our orphans' courts, at the expense of the public, and yet not pay such taxes as the guardians of resident infants must pay. \* \* \*

Decree affirmed.<sup>1</sup>

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### BLACKSTONE v. MILLER.

(Supreme Court of United States, 1903. 188 U. S. 180, 23 Sup. Ct. 277, 47 L. Ed. 439.)

Mr. Justice HOLMES. This a writ of error to the surrogate's court of the county of New York. It is brought to review a decree of the court, sustained by the appellate division of the supreme court (69 App. Div. 127, 74 N. Y. Supp. 508), and by the court of appeals (171 N. Y. 682, 64 N. E. 1118), levying a tax on the transfer by will of certain property of Timothy B. Blackstone, the testator, who died domiciled in Illinois. The property consisted of a debt of \$10,692.24, due to the deceased by a firm, and of the net sum of \$4,843,456.72, held on a deposit account by the United States Trust Company of New York.  
\* \* \*

The deposit in question represented the proceeds of railroad stock sold to a syndicate and handed to the trust company, which, by arrangement with the testator, held the proceeds subject to his order, paying interest in the meantime. Five days' notice of withdrawal was required, and if a draft was made upon the company it gave its check upon one of its banks of deposit. The fund had been held in this way from March 31, 1899, until the testator's death, on May 26, 1900. It is probable of course, that he did not intend to leave the fund there

<sup>1</sup> In *Guthrie v. Pittsburgh, C. & St. L. Ry.*, 158 Pa. 433, 27 Atl. 1052 (1893), it was held that Pennsylvania might tax a resident trustee upon trust securities kept in the District of Columbia, when the testator who created the trust and the beneficiary were both residents of that District.

forever, and that he was looking out for investments, but he had not found them when he died. \* \* \* The whole succession has been taxed in Illinois, the New York deposit being included in the appraisal of the estate. \* \* \*

In view of the state decisions it must be assumed that the New York statute is intended to reach the transfer of this property if it can be reached. *New Orleans v. Stempel*, 175 U. S. 309, 316, 44 L. Ed. 174, 20 Sup. Ct. 110; *Morley v. Lake Shore & M. S. R. Co.*, 146 U. S. 162, 166, 36 L. Ed. 925, 928, 13 Sup. Ct. 54. We also must take it to have been found that the property was not in transitu in such a sense as to withdraw it from the power of the state, if otherwise the right to tax the transfer belonged to the state.<sup>1</sup> The property was delayed within the jurisdiction of New York an indefinite time, which had lasted for more than a year, so that this finding at least was justified. *Kelley v. Rhoads*, 188 U. S. 1, 23 Sup. Ct. 259, 47 L. Ed. 359. Both parties agree with the plain words of the law that the tax is a tax upon the transfer, not upon the deposit, and we need spend no time upon that. Therefore the naked question is whether the state has a right to tax the transfer of such deposit by will.

The answer is somewhat obscured by the superficial fact that New York, like most other states, recognizes the law of the domicile as the law determining the right of universal succession. The domicile, naturally, must control a succession of that kind. Universal succession is the artificial continuance of the person of a deceased by an executor, heir, or the like, so far as succession to rights and obligations is concerned. It is a fiction, the historical origin of which is familiar to scholars, and it is this fiction that gives whatever meaning it has to the saying *mobilia sequuntur personam*. But being a fiction it is not allowed to obscure the facts, when the facts become important. To a considerable, although more or less varying, extent the succession determined by the law of the domicile is recognized in other jurisdictions. But it hardly needs illustration to show that the recognition is limited by the policy of the local law. Ancillary administrators pay the local debts before turning over the residue to be distributed, or distributing it themselves, according to the rules of the domicile. The title of the principal administrator, or of a foreign assignee in bankruptcy,—another type of universal succession,—is admitted in but a limited way or not at all. See *Crapo v. Kelly*, 16 Wall. 610, 21 L. Ed. 430; *Chipman v. Manufacturers' Nat. Bank*, 156 Mass. 147-149, 30 N. E. 610.

To come closer to the point, no one doubts that succession to a tangi-

<sup>1</sup> As to the possible exemption from a *property* tax of a merely transitory bank deposit of a non-resident doing business in the state, see *Assessors v. N. Y., etc., Ins. Co.*, 216 U. S. 517, 523, 30 Sup. Ct. 385, 54 L. Ed. 597 (1910). As to when tangible property (not the subject of interstate commerce) may escape taxation because only transitorily in the state, see *Robinson v. Longley*, 18 Nev. 71, 1 Pac. 377 (1883) (traveling circus); *Gromer v. Standard Co.*, 224 U. S. 362, 32 Sup. Ct. 499, 56 L. Ed. 801 (1912) (dredge temporarily employed in state—see especially dissenting opinion).



ble chattel may be taxed wherever the property is found, and none the less that the law of the situs accepts its rules of succession from the law of the domicile, or that by the law of the domicile the chattel is part of a universitas and is taken into account again in the succession tax there. *Eidman v. Martinez*, 184 U. S. 578, 586, 587, 592, 46 L. Ed. 697, 702, 704, 22 Sup. Ct. 515. See *Mager v. Grima*, 8 How. 490, 493, 12 L. Ed. 1168; *Coe v. Errol*, 116 U. S. 517, 524, 29 L. Ed. 715, 717, 6 Sup. Ct. 475; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 22, 35 L. Ed. 613, 616, 3 Inters. Com. Rep. 595, 11 Sup. Ct. 876; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. Ed. 1037, 18 Sup. Ct. 594; *New Orleans v. Stempel*, 175 U. S. 309, 44 L. Ed. 174, 20 Sup. Ct. 110; *Bristol v. Washington County*, 177 U. S. 133, 44 L. Ed. 701, 20 Sup. Ct. 585; and for state decisions, *Re Romaine*, 127 N. Y. 80, 12 L. R. A. 401, 27 N. E. 759; *Callahan v. Woodbridge*, 171 Mass. 595, 51 N. E. 176; *Greves v. Shaw*, 173 Mass. 205, 53 N. E. 372; *Allen v. National State Bank*, 92 Md. 509, 52 L. R. A. 760, 84 Am. St. Rep. 517, 48 Atl. 78.

No doubt this power on the part of two states to tax on different and more or less inconsistent principles leads to some hardship. It may be regretted, also, that one and the same state should be seen taxing on the one hand according to the fact of power, and on the other, at the same time, according to the fiction that, in successions after death, *mobilia sequuntur personam* and domicile governs the whole. But these inconsistencies infringe no rule of constitutional law. *Coe v. Errol*, 116 U. S. 517, 524, 29 L. Ed. 715, 717, 6 Sup. Ct. 475; *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969, 20 Sup. Ct. 747.

The question, then, is narrowed to whether a distinction is to be taken between tangible chattels and the deposit in this case. There is no doubt that courts in New York and elsewhere have been loath to recognize a distinction for taxing purposes between what commonly is called money in the bank and actual coin in the pocket. The practical similarity more or less has obliterated the legal difference. *Re Houdayer*, 150 N. Y. 37, 34 L. R. A. 235, 44 N. E. 718; *New Orleans v. Stempel*, 175 U. S. 309, 316, 44 L. Ed. 174, 178, 20 Sup. Ct. 110; *City Nat. Bank v. Charles Baker Co.*, 180 Mass. 40, 42, 61 N. E. 223. In view of these cases and the decision in the present case, which followed them, a not very successful attempt was made to show that by reason of the facts which we have mentioned, and others, the deposit here was unlike an ordinary deposit in a bank. We shall not stop to discuss this aspect of the case, because we prefer to decide it upon a broader view.

If the transfer of the deposit necessarily depends upon and involves the law of New York for its exercise, or, in other words, if the transfer is subject to the power of the state of New York, then New York may subject the transfer to a tax. *United States v. Perkins*, 163 U. S. 625, 628, 629, 41 L. Ed. 287, 288, 16 Sup. Ct. 1073; *McCulloch v. Maryland*, 4 Wheat. 316, 429, 4 L. Ed. 579, 607. But it is plain that

the transfer does depend upon the law of New York, not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor. The principle has been recognized by this court with regard to garnishments of a domestic debtor of an absent defendant. *Chicago, R. I. & P. Ry. Co. v. Sturm*, 174 U. S. 710, 43 L. Ed. 1144, 19 Sup. Ct. 797. See *Wyman v. Halstead*, 109 U. S. 654, sub nom. *Wyman v. United States ex rel. Halstead*, 27 L. Ed. 1068, 3 Sup. Ct. 417. What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. It does not matter that the law would not need to be invoked in the particular case. Most of us do not commit crimes, yet we nevertheless are subject to the criminal law, and it affords one of the motives for our conduct. So, again, what enables any other than the very creditor in proper person to collect the debt? The law of the same place. To test it, suppose that New York should turn back the current of legislation, and extend to debts the rule still applied to slander, that *actio personalis moritur cum persona*, and should provide that all debts hereafter contracted in New York and payable there should be extinguished by the death of either party. Leaving constitutional considerations on one side, it is plain that the right of the foreign creditor would be gone.

Power over the person of the debtor confers jurisdiction, we repeat. And this being so, we perceive no better reason for denying the right of New York to impose a succession tax on debts owned by its citizens than upon tangible chattels found within the state at the time of the death. The maxim, *mobilia sequuntur personam*, has no more truth in the one case than in the other. When logic and the policy of a state conflict with a fiction due to historical tradition, the fiction must give way.

There is no conflict between our views and the point decided in the case reported under the name of *State Tax on Foreign-Held Bonds*, 15 Wall. 300, sub nom. *Cleveland, P. & A. R. Co. v. Pennsylvania*, 21 L. Ed. 179. The taxation in that case was on the interest on bonds held out of the state. Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. *Bacon v. Hooker*, 177 Mass. 335, 337, 58 N. E. 1078, 83 Am. St. Rep. 279. Therefore, considering only the place of the property, it was held that bonds held out of the state could not be reached.<sup>2</sup> The decision has been cut down to its precise point by later cases. *Savings & L. Soc. v. Multnomah County*, 169 U. S. 421, 428, 42 L. Ed. 803, 805, 18 Sup. Ct. 392; *New Orleans v. Stempel*, 175 U. S. 309, 319, 320, 44 L. Ed. 174, 180, 20 Sup. Ct. 110.

In the case at bar the law imposing the tax was in force before the deposit was made, and did not impair the obligation of the contract, if

<sup>2</sup> See another distinction of this case in *Buck v. Beach*, ante, at pp. 549-550.

a tax otherwise lawful ever can be said to have that effect. *Pinney v. Nelson*, 183 U. S. 144, 147, 46 L. Ed. 125, 127, 22 Sup. Ct. 52. The fact that two states, dealing each with its own law of succession, both of which the plaintiff in error has to invoke for her rights, have taxed the right which they respectively confer, gives no cause for complaint on constitutional grounds. *Coe v. Errol*, 116 U. S. 517, 524, 29 L. Ed. 715, 718, 6 Sup. Ct. 475; *Knowlton v. Moore*, 178 U. S. 53, 44 L. Ed. 975, 20 Sup. Ct. 747. The universal succession is taxed in one state, the singular succession is taxed in another. The plaintiff has to make out her right under both in order to get the money. See *Adams v. Batchelder*, 173 Mass. 258, 53 N. E. 824, 73 Am. St. Rep. 282. The same considerations answer the argument that due faith and credit are not given to the judgment in Illinois. The tax does not deprive the plaintiff in error of any of the privileges and immunities of the citizens of New York. It is no such deprivation that if she had lived in New York the tax on the transfer of the deposit would have been part of the tax on the inheritance as a whole. See *Mager v. Grima*, 8 How. 490, 12 L. Ed. 1168; *Brown v. Houston*, 114 U. S. 622, 635, 29 L. Ed. 257, 261, 5 Sup. Ct. 1091; *Wallace v. Myers*, 4 L. R. A. 171, 38 Fed. 184. It does not violate the fourteenth amendment. See *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. Ed. 1037, 18 Sup. Ct. 594. \* \* \*

Decree affirmed.\*

[WHITE, J., dissented.]

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PEOPLE ex rel. HATCH v. REARDON (1906) 184 N. Y. 431, 449-450, 77 N. E. 970, 8 L. R. A. (N. S.) 314, 112 Am. St. Rep. 628, 6 Ann. Cas. 515, VANN, J. (sustaining a New York statute taxing all

\* "Fundamentally considered, it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties."—Mr. Justice White in *Knowlton v. Moore*, 178 U. S. 41, 57, 20 Sup. Ct. 747, 44 L. Ed. 969 (1900).

The jurisdiction of a state to levy succession taxes upon various kinds of property of resident and non-resident decedents has been considered in the following cases, among others: *Property of resident decedents*: *Mager v. Grima*, 8 How. 490, 12 L. Ed. 1168 (1850) (property of every nature within state); *Matter of Estate of Swift*, 137 N. Y. 77, 32 N. E. 1096, 18 L. R. A. 709 (1893) (real estate and chattels outside of state); *Frothingham v. Shaw*, 175 Mass. 59, 55 N. E. 623, 78 Am. St. Rep. 475 (1899) (stock of foreign corporations, bonds and certificates of indebtedness of foreign debtors, foreign bank deposits—all kept out of state). *Property of non-resident decedents*: *Callahan v. Woodbridge*, 171 Mass. 595, 51 N. E. 176 (1898) (tangible property and bonds of foreign debtors, kept within state); *Matter of Whiting*, 150 N. Y. 27, 41 N. E. 715, 34 L. R. A. 232, 55 Am. St. Rep. 680 (1896) (stock certificates of foreign corporations, kept within state); *Matter of Bronson*, 150 N. Y. 1, 44 N. E. 707, 34 L. R. A. 238, 55 Am. St. Rep. 632 (1896) (bonds and stock certificates of domestic corporations, kept out of state).

See *Keeney v. New York*, 222 U. S. 525, 32 Sup. Ct. 105, 56 L. Ed. 299, 38 L. R. A. (N. S.) 1139 (1912) (jurisdiction to tax transfer by deed effectual at grantor's death, where payment of tax postponed to latter period).

sales of stock made within the state, even as applied to shares in a foreign corporation sold by and to nonresidents):

"The question is whether the state has jurisdiction to impose a tax on a certain class of contracts when made within its territorial limits? Jurisdiction over the persons who make the contract does not depend on their residence, but on their presence within the state when the contract is made. Jurisdiction over property depends on its physical presence here, or if it is personal property, either its presence here or the residence of the owner here. The fiction of the common law, 'mobilia sequuntur personam,' has no foundation in the Constitution and does not control the legislature, which rejects or adopts it at will as applied to the subject of taxation. When two citizens of Connecticut come into this state and make a contract here, to be enforced here, both they and their contract are subject to its laws, and they are not only entitled to the protection thereof, but are under the same obligation to obey as if they were citizens. Such a contract is valid or invalid as our laws declare.<sup>1</sup> When the law commands that if they, or any other persons, whether residents or not, make a certain contract here they must pay a certain tax for the privilege, the command is personal, addressed to them as persons then within the state, and is as binding on them as if they resided in the state. Their rights and their obligations in reference to such a contract are the same as if they were citizens, no greater and no less. The fact that the contract, though made here, may relate to property, real or personal, situated elsewhere, has no bearing upon the question. By coming into the state they subjected themselves to its laws, and to its taxing power, so far as the making of such a contract is concerned. It is immaterial whether the contract is between residents or nonresidents, or between a resident and a nonresident, for if it is made within the state it is subject to taxation by the state. This necessarily follows from the power of the state over the subject of taxation. It has power to tax all property within its territory, all business done and all contracts made within that territory, provided they are not protected as federal agencies, whether the property is owned or the business is done or the contracts are made by residents or nonresidents. 'It has never been questioned that the legislature can impose a tax on all sales of property, upon all incomes, upon all acquisitions of property, upon all business and upon all transfers.' *Matter of McPherson*, 104 N. Y. 306, 317, 10 N. E. 685, 686, 58 Am. Rep. 502."<sup>2</sup>

<sup>1</sup> As to the domestic enforcement of contracts affecting foreign property, see *Selover v. Walsh*, 226 U. S. 112, 33 Sup. Ct. 69, 57 L. Ed. — (1912).

<sup>2</sup> Affirmed in *People ex rel. Hatch v. Reardon*, 204 U. S. 152, 158, 159, 27 Sup. Ct. 188, 189, 190, 51 L. Ed. 415, 9 Ann. Cas. 736 (1907), Holmes, J., saying: "It is urged further that a tax on sales is really a tax on property, and that therefore the act, as applied to the shares of a foreign corporation owned by nonresidents, is a taking of property without due process of law. *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. Ed. 150, 26 Sup. Ct. 36, 4 Ann. Cas. 493 (1905). This argument presses the expressions in

## DEWEY v. DES MOINES.

(Supreme Court of United States, 1899. 173 U. S. 193, 19 Sup. Ct. 379, 43 L. Ed. 665.)

[Error to the Supreme Court of Iowa. Dewey, a resident of Chicago, owned lots in Des Moines, Iowa, upon which a paving assessment was placed to an amount beyond their value. By statute a personal judgment was authorized against the owner in such cases. He brought suit in Iowa to set aside the assessment, the contractor being made a party, and the latter recovered judgment against Dewey, on a counterclaim for the paving, for any deficiency remaining after the sale of the lots. The state Supreme Court affirmed this judgment.]

Mr. Justice PECKHAM. \* \* \* In this case no question arises with regard to the validity of a personal judgment like the one herein against a resident of the state of Iowa, and we therefore express no opinion upon that subject. This plaintiff was at all times a nonresident of that state, and we think that a statute authorizing an assessment to be levied upon property for a local improvement, and imposing upon the lot owner, who is a nonresident of the state, a personal liability to pay such assessment, is a statute which the state has no power to enact, and which cannot, therefore, furnish any foundation for a personal claim against such nonresident. There is no course of reasoning as to the character of an assessment upon lots for a local improvement by which it can be shown that any jurisdiction to collect the assessment personally from a nonresident can exist. The state may provide for the sale of the property upon which the assessment is laid, but it cannot, under any guise or pretense, proceed further, and impose a personal liability upon a nonresident to pay the assessment or any part of it. To enforce an assessment of such a nature against

Brown v. Maryland, 12 Wheat. 419, 444, 6 L. Ed. 678, 687 (1827), Fairbank v. United States, 181 U. S. 283, 45 L. Ed. 862, 21 Sup. Ct. Rep. 648 (1901), and intervening cases, to new applications, and farther than they properly can be made to go. Whether we are to distinguish or to identify taxes on sales and taxes on goods depends on the scope of the constitutional provision concerned. Compare Fopplano v. Speed, 199 U. S. 501, 520, 50 L. Ed. 288, 292, 26 Sup. Ct. 138 (1905). A tax on foreign bills of lading may be held equivalent to a tax on exports as against article 1, § 9; a license tax on importers of foreign goods may be held an unauthorized interference with commerce; and yet it would be consistent to sustain a tax on sales within the state as against the fourteenth amendment, so far as that alone is concerned. Whatever the right of parties engaged in commerce among the states, a sale depends in part on the law of the state where it takes place for its validity and, in the courts of that state, at least, for the mode of proof. No one would contest the power to enact a statute of frauds for such transactions. Therefore the state may make parties pay for the help of its laws, as against this objection. A statute requiring a memorandum in writing is quite as clearly a regulation of the business as a tax. It is unnecessary to consider other answers to this point."

See Fopplano v. Speed, 199 U. S. 501, 519-520, 26 Sup. Ct. 138, 50 L. Ed. 288 (1905) (regulation of contracts made between parties en route through state). Compare the probable doctrine as to the nontaxability of property transitorily present, Blackstone v. Miller, ante, p. 366, note.



a nonresident, so far as his personal liability is concerned, would amount to the taking of property without due process of law, and would be a violation of the federal Constitution.

In this proceeding of the lot owner to have the assessment set aside, and the statutory liability of plaintiff adjudged invalid, the court was not justified in dismissing the petition, and giving the contractor, not only judgment on his counterclaim foreclosing his lien, but also inserting in that judgment a provision for a personal liability against the plaintiff and for a general execution against him. Such a provision against a nonresident, although a litigant in the courts of the state, was not only erroneous, but it was so far erroneous as to constitute, if enforced, a violation of the federal Constitution, for the reason already mentioned. By resorting to the state court to obtain relief from the assessment and from any personal liability provided for by the statute, the plaintiff did not thereby in any manner consent, or render himself liable, to a judgment against him providing for any personal liability. Nor did the counterclaim made by the defendant contractor give any such authority.

The principle which renders void a statute providing for the personal liability of a nonresident to pay a tax of this nature is the same which prevents a state from taking jurisdiction through its courts, by virtue of any statute, over a nonresident not served with process within the state, to enforce a mere personal liability, and where no property of the nonresident has been seized or brought under the control of the court. This principle has been frequently decided in this court. One of the leading cases is *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, and many other cases therein cited. *Railway Co. v. Pinkney*, 149 U. S. 194, 209, 13 Sup. Ct. 859, 37 L. Ed. 699.

The lot owner never voluntarily or otherwise appeared in any of the proceedings leading up to the levying of the assessment. He gave no consent which amounted to an acknowledgment of the jurisdiction of the city or common council over his person.

A judgment without personal service against a nonresident is only good so far as it affects the property which is taken or brought under the control of the court or other tribunal in an ordinary action to enforce a personal liability, and no jurisdiction is thereby acquired over the person of a nonresident further than respects the property so taken. This is as true in the case of an assessment against a nonresident of such a nature as this one as in the case of a more formal judgment.

The jurisdiction to tax exists only in regard to persons and property or upon the business done within the state, and such jurisdiction cannot be enlarged by reason of a statute which assumes to make a nonresident personally liable to pay a tax of the nature of the one in question. All subjects over which the sovereign power of the state extends are objects of taxation. *Cooley, Tax'n* (1st Ed.) pp. 3, 4; *Burroughs, Tax'n*, § 6. The power of the state to tax extends to all

objects within the sovereignty of the state. Per Mr. Justice Clifford, in *Hamilton Co. v. Massachusetts*, 6 Wall. 632, at page 638, 18 L. Ed. 904. The power to tax is, however, limited to persons, property, and business within the state, and it cannot reach the person of a non-resident. *Case of the State Tax on Foreign-Held Bonds*, 15 Wall. 300, 319, 21 L. Ed. 179. In *Cooley, Tax'n* (1st Ed.) p. 121, it is said that "a state can no more subject to its power a single person or a single article of property, whose residence or legal situs is in another state, than it can subject all the citizens or all the property of such other state to its power." These are elementary propositions, but they are referred to only for the purpose of pointing out that a statute imposing a personal liability upon a nonresident to pay such an assessment as this oversteps the sovereign power of a state. \* \* \*

Judgment reversed.<sup>1</sup>

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## SECTION 2.—PUBLIC PURPOSE

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### LOWELL v. BOSTON.

(Supreme Judicial Court of Massachusetts, 1873. 111 Mass. 454, 15 Am. Rep. 39.)

[Bill in equity by Lowell and others, taxable inhabitants of Boston, to restrain the issue of bonds authorized by a statute of 1872 to an amount not exceeding \$20,000,000. The proceeds of the bonds were to be loaned by commissioners to the owners of land burned over in the great Boston fire, secured by first mortgage on such land, and conditioned upon rebuilding in one year. Demurrer, and case reserved for the full court.]

WELLS, J. The issue of bonds by the city, whatever provision may be made for their redemption, involves the possible and not improbable consequence of a necessity to provide for their payment by the city. The right to incur the obligation implies the right to raise money by taxation for payment of the bonds; or, what is equivalent, the right to levy a tax for the purposes for which the fund is to be raised by means of the bonds so authorized. \* \* \*

The power to levy taxes is founded on the right, duty, and responsibility to maintain and administer all the governmental functions of the

<sup>1</sup> Compare *Corry v. Baltimore*, 196 U. S. 466, 25 Sup. Ct. 297, 49 L. Ed. 556 (1905) (non-resident stockholder liable for tax on shares of domestic corporation). The *resident* owner of taxable property may be made personally liable for the tax. *Davidson v. New Orleans*, 96 U. S. 97, 106, 24 L. Ed. 616 (1877) (realty); *Palmer v. McMahon*, 133 U. S. 600, 10 Sup. Ct. 324, 33 L. Ed. 772 (1890) (personalty).

state, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns the public welfare. 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.

The principle of this distinction is fundamental. It underlies all government that is based upon reason rather than upon force. It is expressed in various forms in the Constitution of Massachusetts. In article XI, c. 2, § 1, by restricting the issuing of moneys from the treasury to purposes of "the necessary defence and support of the commonwealth; and for the protection and preservation of the inhabitants thereof, agreeably to the Acts and Resolves of the General Court." In article IV, c. 1, § 1, by declaring the purposes for which the power of taxation, in its various forms, may be exercised by the General Court to be "for the public service, in the necessary defence and support of the government of the said commonwealth, and the protection and preservation of the subjects thereof." \* \* \* Article X declares: "\* \* \* And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."

The power of the government, thus constituted, to affect the individual in his private rights of property, whether by exacting contributions to the general means, or by sequestration of specific property, is confined, by obvious implication as well as by express terms, to purposes and objects alone which the government was established to promote, to wit, public uses and the public service. This power, when exercised in one form, is taxation; in the other, is designated as the right of eminent domain. The two are diverse in respect of the occasion and mode of exercise, but identical in their source, to wit, the necessities of organized society; and in the end by which alone the exercise of either can be justified, to wit, some public service or use. It is due to their identity in these respects that the two powers, otherwise so unlike, are associated together in the same article. So far as it concerns the question what constitutes public use or service that will

justify the exercise of these sovereign powers over private rights of property, which is the main question now to be solved, this identity renders it unnecessary to distinguish between the two forms of exercise, as the same tests must apply to and control in each. An appropriation of money raised by taxation, or of property taken by right of eminent domain, by way of gift to an individual for his own private uses exclusively, would clearly be an excess of legislative power. The distinction between this and its appropriation for the construction of a highway is marked and obvious. It is independent of all considerations of resulting advantage. The individual, by reason of his capacity, enterprise, or situation, might be enabled to employ the money or property thus conferred upon him in such a manner as to furnish employment to great numbers of the community, to give a needed impulse to business of various kinds, and thus promote the general prosperity and welfare. In this view, it might be shown to be for the public good to take from the unenterprising and thriftless their unemployed capital and intrust it to others who will use it to better advantage for the interests of the community. But it needs no argument to show that such an arbitrary exercise of power would be a violation of the constitutional rights of those from whom the money or property was taken, and an unjustifiable usurpation.

In the case of a highway, on the other hand, its direct purpose of public use determines conclusively the question in support of the exercise, both of the right of eminent domain and of taxation, however trifling the advantage to the public compared with that to individuals. The extent or value of the public use, and the wisdom and propriety of the appropriation, are matters to be determined exclusively by the legislature, either directly or by its delegated authority. When the power exists, it is not within the province of the court to interfere with its exercise, by any inquiry into its expediency.

The two instances above referred to illustrate the sense in which the furthering of the public good by promotion of the interests of many individuals differs from a public service. A public service may or may not be productive, practically, of public advantage. Resulting advantage to the public does not of itself give to the means by which it is produced the character of a public service.

There are, indeed, many cases in which the sovereign power of government is exercised to affect private rights of property in favor of private parties, either individuals or corporations. Most conspicuous among these are turnpikes and railroads, in whose favor this right of eminent domain is frequently exercised. Private rights are thus taken and transferred, not to the state, but to the private corporation; and the compensation to the persons injured, required by the Constitution, is also rendered from the corporation. Such an appropriation of property is justified, and can only be justified, by the public service thereby secured in the increased facilities for transportation of freight and passengers, of which the whole community may rightfully avail itself.

The franchises of the corporation are held charged with this duty and trust for the performance of the public service, for which they were granted. *Commonwealth v. Wilkinson*, 16 Pick. 175, 26 Am. Dec. 654; *Same v. Boston & Maine Railroad*, 3 Cush. 25, 45; *Old Colony & Fall River Railroad Co. v. County of Plymouth*, 14 Gray, 155, 161.

This right of eminent domain is often allowed to be exercised in favor of private aqueduct companies. Here, too, the public service, intended as the object of the grant of the right, is obvious. And although the interests of the aqueduct company are ordinarily relied upon to secure the proper performance of the service, yet, in case of any failure or abuse, the obligation may doubtless be otherwise enforced. *Lumbard v. Stearns*, 4 Cush. 60.

The Mill Acts, so called, are often referred to as authorizing the exercise of the right of eminent domain by private parties for their exclusive private benefit. And the language of the court, used arguendo, has been sometimes such as to imply that the growth and prosperity of manufacturing and other industrial enterprises were of such importance to the public welfare as to justify the exercise of the right of eminent domain in their behalf, as a public use. *Boston & Roxbury Mill Co. v. Newman*, 12 Pick. 467, 23 Am. Dec. 622; *Hazen v. Essex Co.*, 12 Cush. 475, 478; *Talbot v. Hudson*, 16 Gray, 417, 426.

That mills for the sawing of lumber for purposes of building, grinding grain for food, and the manufacture of material for clothing, may be of such necessity to a community, especially in the early settlement of a country, as to make their establishment a provision for a public service, we do not question. It is doubtless within the power of the legislature to declare the existence of a public exigency for the establishment of a mill, for which the right of eminent domain may properly be exercised; as in the case of the *Boston & Roxbury Mill Corporation*, and the *Salem Milldam Corporation*. What may be the limits of legislative power in that direction, and whether there are any limits except in the sound discretion of the legislature, it is needless now to inquire. We are satisfied that the Mill Acts are not founded upon that power, and do not authorize its exercise.

The advantages to be derived from a running stream by the several riparian proprietors are of natural right. Each one may make use of its waters, as they flow through his lands, in a reasonable manner, for such purposes as they are adapted to serve. In order that each may have his opportunity in turn, each is entitled to have the water allowed to flow to and from his land as it has been accustomed to flow, with only such modifications as result from such reasonable use. Hence, all proprietors upon a stream, from its source to its mouth, have, in a certain sense, a common interest in it, and a common right to the enjoyment of all its capacities. Among those capacities no one is more important than that of the force of the current to supply power for the operation of mills. To make that force



practically serviceable requires a considerable head and fall at the point where it is to be applied; often more than can be gained within the limits of one proprietor. The use of the stream in this mode has always been regarded as a reasonable use, notwithstanding the effect of the dam, by which the head is created, to retard the water in its flow to the proprietor below, and to set it back and thus diminish or destroy the force of the current above. One who thus appropriates the force of the current is in the enjoyment of a common right, in which he is protected, although he may thereby prevent a like use subsequently by the proprietor above. *Hatch v. Dwight*, 17 Mass. 289, 296, 9 Am. Dec. 145; *Cary v. Daniels*, 8 Metc. 466, 41 Am. Dec. 532; *Gould v. Boston Duck Co.*, 13 Gray, 442. But this protection extends no farther than to justify the appropriation of a part of that quality of the stream which, until so appropriated, is common to all. It does not justify any, even the least, injury to land outside the channel. Without some law to control, the mill owner would be exposed, not merely to the liability to make just compensation for injuries thus occasioned, but to harassing suits for damages and to abatement of his dam as causing a nuisance. This liability and the inevitable controversies growing out of conflicting rights in the stream itself, tending to defeat all advantageous use of its power, led to the adoption of laws regulating and protecting the beneficial use of streams for mill purposes. \* \* \* But there is no public service secured through the Mill Acts, except so far as it may result incidentally, and as the inducements of private interest may lead mill-owners to devote their mills to purposes favorable to the public accommodation. \* \* \*

A consideration, still more conclusive to this point, is, that in fact no private property, or right in the nature of property, is taken by force of the Mill Acts, either for public or private use. They authorize the maintenance of a dam to raise a head of water, although its effect will be to overflow the land of another proprietor. This right of flowage is sometimes inaccurately called an easement. *Hunt v. Whitney*, 4 Metc. 603; *Talbot v. Hudson*, 16 Gray, 417, 422, 426. But it is not so. It confers no right in the land upon the mill-owner, and takes none from the land-owner. *Murdock v. Stickney*, 8 Cush. 113; *Storm v. Manchaug Co.*, 13 Allen, 10. In *Murdock v. Stickney*, Chief Justice Shaw remarks in reference to the Mill Acts, "The principle on which this law is founded is not, as has sometimes been supposed, the right of eminent domain, the sovereign right of taking private property for public use. It is not in any proper sense a taking of the property of an owner of the land flowed, nor is any compensation awarded by the public." In *Bates v. Weymouth Iron Co.*, 8 Cush. 548, 553, he says, "It is a provision by law, for regulating the rights of proprietors, on one and the same stream, from its rise to its outlet, in a manner best calculated, on the whole, to promote and secure their common rights in it." Similar declarations are made in *Fiske*

v. Framingham Manuf. Co., 12 Pick. 68; *Williams v. Nelson*, 23 Pick. 141, 34 Am. Dec. 45.

This regulation of the rights of riparian proprietors, both in respect to the stream and to their adjacent lands, liable to be affected by its use, involves no other governmental power than that "to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances," as the General Court "shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same." Const. of Mass. c. 1, § 1, art. IV.

All individual rights of property are held subject to this power, which alone can adjust their manifold relations and conflicting tendencies. The absolute right of the individual must yield to and be modified by corresponding rights in other individuals in the community. The resulting general good of all, or the public welfare, is the foundation upon which the power rests, and in behalf of which it is exercised; whether by restricting the use of private property in a manner prejudicial to the public (*Commonwealth v. Alger*, 7 Cush. 53); or by imposing burdens upon it for the protection or convenience in part of the public (*Goddard, Petitioner*, 16 Pick. 504, 28 Am. Dec. 259); *Baker v. Boston*, 12 Pick. 184, 193, 22 Am. Dec. 421 (*Salem v. Eastern Railroad Co.*, 98 Mass. 431, 96 Am. Dec. 650); or by modifying rights of individuals, in respect of their mutual relations, in order to secure their more advantageous enjoyment by each.

It is pro bono publico that general provisions of law exist by which joint tenants and tenants in common of houses and mills may require necessary repairs to be made, with indemnity out of the joint rents or income for the cost thereof. *Calvert v. Aldrich*, 99 Mass. 74, 96 Am. Dec. 693. Upon the same principle one joint tenant is allowed to sever the joint tenancy by conveyance or partition, and thus change the nature of the estate of his co-tenant, as well as his own. *Shaw v. Hearsey*, 5 Mass. 521; Gen. Sts. c. 136, § 1.

Estates in common may be divided at the suit of any one of the co-tenants; and if not conveniently or advantageously divisible equally, one may be required to accept less than his full share, with an equivalent in money for the deficiency. *Hagar v. Wiswall*, 10 Pick. 152; *Buck v. Wolcott*, 13 Gray, 268. And by a recent statute, under certain conditions, the whole may be sold, and the proceeds in money divided instead of the land. St. 1871, c. 111.

Upon the same principle, proprietors of wharves, or of general fields, affected by a common interest or a common necessity, are allowed to adopt measures to secure their common advantage, although burdens or restrictions result therefrom which must be shared by the minority, as well as the majority, by whose determination the measures were adopted. Gen. Sts. c. 67; *Wright v. Boston*, 9 Cush. 233.

No other power was exercised for the construction of drains and sewers until 1841 when cities and towns were authorized to exercise

for that object the power of taxation. St. 1841, c. 115. The property in such drains and sewers was by the same act vested in the city or town; so that there was a public use as well as a public service, for which that power was delegated. The exercise of the right of eminent domain, for the same object, was delegated to the city of Boston by the St. of 1857, c. 225, § 1, and to all other cities and towns by the St. of 1869, c. 111.

In the statutes for the improvement of meadows, the provisions for the assessment and collection of the expenses, in form, resemble taxation, and the power exercised over private property is sometimes ascribed to the right of eminent domain. *Talbot v. Hudson*, 16 Gray, 417, 428. But there is no taking for public use. It is a proceeding of a semi-judicial nature, in which all those whose lands are to be affected are joined as parties. The action taken therein relates to that in which all have a common interest, or in reference to which all are affected by a common necessity. That common necessity is met, and that common interest secured, by subjecting the individual rights to such modifications as the commissioners may judge to be most practicable to secure the best advantage of all. The natural conflict of rights which would arise if each were left to insist on his own, regardless of consequences to others, is avoided by the intervention of this common agent, by whom they are adjusted with due regard to the interests of all as well as of each. For this purpose they are treated as owners of a common property. *Coomes v. Burt*, 22 Pick. 422. \* \* \*

We find in these statutes no exercise of the right of eminent domain, or of the governmental power of taxation. That which, in form, resembles taxation, is, in effect, only an equitable apportionment, among the parties to the proceedings, of the expenses incurred for their common benefit, by their common agents, or rather by the officers of the tribunal charged by the legislature with the conduct of those proceedings which it authorizes for the execution of its wholesome and reasonable orders and laws in that behalf made and provided. It differs from assessments for drains (*Hildreth v. Lowell*, 11 Gray, 345), sidewalks (*Lowell v. Hadley*, 8 Metc. 180), and street "betterments" (*Jones v. Aldermen of Boston*, 104 Mass. 461), not only in the manner in which all persons to be assessed are required to be made parties to the whole proceedings, but also and especially in the absence of any public use or service as the leading and direct object of the expenditure for which it is made.

"The good and welfare of this commonwealth," for which "reasonable orders, laws, statutes, and ordinances" may be made, by force of which private rights of property may be affected, is a much broader and less specific ground of exercise of power than "public use" and "public service." The former expresses the ultimate purpose, or result sought to be attained by all forms of exercise of legislative power over property. The latter imply a direct relation between the primary object of an appropriation and the public enjoyment. The circum-

stances may be such that the use or service intended to be secured will practically affect only a small portion of the inhabitants or lands of the commonwealth. The essential point, is that it affects them as a community, and not merely as individuals. *Cooley, Const. Limit.* 531. This distinction is indicated, and recognized as vital, in *Talbot v. Hudson*, 16 Gray, 417, 423, 425, and it lies at the foundation of the decision in that case. There was a taking of private property by direct authority of the legislature, which the court held to have been intended as an exercise of the constitutional power to take private property for public use, rendering compensation. The main question was, whether the relief of an extensive territory of valuable lands, in a thickly settled agricultural region, from the nuisance of flooding by the waters of a stream, caused by a single dam below, constituted such an object of public concern as to justify the exercise of the power by removing the dam. The court recognized the difficulty that, so far as the removal of the dam benefited each land-owner, it was a private use which would not justify the exercise of that power. But the obstruction in the stream injuriously affected "so large a territory, situated in different towns, and owned by a great number of persons," as to give it the character of a public nuisance, the removal of which "would seem to come fairly within the scope of legislative action." While we do not assent to the suggestions in that opinion, that the general provisions of law for the regulation of mills and the improvement of meadows are based upon the constitutional power to appropriate private property under the right of eminent domain, we accord fully with the judgment rendered and the general principle upon which it is founded. \* \* \* [*Dorgan v. Boston*, 12 Allen, 223, *Dingley v. Boston*, 100 Mass. 544, and *Hazen v. Essex Co.*, 12 Cush. 475, are here referred to as involving important public services as well as private advantages that promoted general prosperity.]

There is no public use or public service declared in the statute now under consideration, and we are of opinion that none can be found in the purposes of its provisions. By its terms the proceeds of the bonds, thereby authorized, are to be expended in loans to persons who are or may become owners of land in Boston, "the buildings upon which were burned by the fire in said Boston on the ninth and tenth days of November." 1872. The ultimate end and object of the expenditure, as indicated by the provisions of the statute itself, is "to insure the speedy rebuilding on said land."

The general result may indeed be thus stated collectively, as a single object of attainment; but the fund raised is intended to be appropriated distributively, by separate loans to numerous individuals, each one of which will be independent of any relation to the others, or to any general purpose, except that of aiding individual enterprise in matters of private business. The property thus created will remain exclusively private property, to be devoted to private uses at the discretion of the owners of the land; with no restriction as to the character

of the buildings to be erected, or the uses to which they shall be devoted; and with no obligation to render any service or duty to the commonwealth, or to the city,—except to repay the loan,—or to the community at large or any part of it. If it be assumed that the private interests of the owners will lead them to re-establish warehouses, shops, manufactories, and stores, and that the trade and business of the place will be enlarged or revived by means of the facilities thus provided, still these are considerations of private interest, and, if expressly declared to be the aim and purpose of the act, they would not constitute a public object, in a legal sense.

As a judicial question the case is not changed by the magnitude of the calamity which has created the emergency; nor by the greatness of the emergency, or the extent and importance of the interests to be promoted. These are considerations affecting only the propriety and expediency of the expenditure as a legislative question. If the expenditure is, in its nature, such as will justify taxation under any state of circumstances, it belongs to the legislature exclusively to determine whether it shall be authorized in the particular case, and however slight the emergency, or limited or unimportant the interests to be promoted thereby, the court has no authority to revise the legislative action.

On the other hand, if its nature is such as not to justify taxation in any and all cases in which the legislature might see fit to give authority therefor, no stress of circumstances affecting the expediency, importance, or general desirableness of the measure, and no concurrence of legislative and municipal action, or preponderance of popular favor in any particular case, will supply the element necessary to bring it within the scope of legislative power.

The expenditure authorized by this statute being for private and not for public objects, in a legal sense, it exceeds the constitutional power of the legislature; and the city cannot lawfully issue the bonds for the purposes of the act. \* \* \*

Demurrer overruled.<sup>1</sup>

<sup>1</sup> Accord: *Feldman & Co. v. City Council*, 23 S. C. 57, 55 Am. Rep. 6 (1884) (similar facts).

In the following cases taxation was held unconstitutional because not for a public purpose: *Hooper v. Emery*, 14 Me. 375 (1837) (division of money among families of town); *State v. Osawkee Township*, 14 Kan. 418, 19 Am. Rep. 99 (1875) (seed grain for farmers in financial distress); *Deering & Co. v. Peterson*, 75 Minn. 118, 77 N. W. 568 (1898) (same); *Wisconsin Keeley Institute Co. v. Milwaukee Co.*, 95 Wis. 153, 70 N. W. 68, 36 L. R. A. 55, 60 Am. St. Rep. 105 (1897) (treatment of indigent drunkards at private institution); *State, ex rel. Garth v. Switzler*, 143 Mo. 287, 45 S. W. 245, 40 L. R. A. 280, 65 Am. St. Rep. 653 (1898) (cash scholarship to defray general expenses of indigent students at state university); *Auditor v. State ex rel.*, 75 Ohio St. 114, 78 N. E. 955, 7 L. R. A. (N. S.) 1196 (1906) (\$25 quarterly to indigent, adult, blind persons).

In the following cases taxation for somewhat similar purposes was upheld: *Gillan v. Gillan*, 55 Pa. 430 (1867) (compensation for property burned by Confederates); *State v. Nelson*, 1 N. D. 88, 45 N. W. 33, 8 L. R. A. 283, 26



## 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 interests 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

Am. St. Rep. 609 (1890) (seed grain for farmers—distress widespread); Mayor, etc., v. Keeley Institute, 81 Md. 106, 31 Atl. 437 (1895) (treatment of indigent drunkard at private institution); In re House, 23 Colo. 87, 46 Pac. 117, 33 L. R. A. 832 (1896) (same); State ex rel. v. Davidson, 114 Wis. 563, 88 N. W. 596, 90 N. W. 1067, 58 L. R. A. 739 (1902) (relief to persons injured and impoverished by cyclone).

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 governments, 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 treasury to the importunities of two-thirds of the business men of the city or town. \* \* \*

Judgment affirmed.<sup>1</sup>

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

PEOPLE v. SALEM (1870) 20 Mich. 452, 480, 481, 483-487. 4 Am. Rep. 400, COOLEY, J. (holding unconstitutional an act authorizing municipal corporations to pledge their credit to aid private corporations in railroad construction):

"If we examine the subject critically, we shall find that the most important consideration in the case of eminent domain is the necessity of accomplishing some public good which is otherwise impracticable, and we shall also find that the law does not so much regard the means as the need. [Here follows a discussion of this proposition, which is printed post, pp. 676-677.]

"When we examine the power of taxation with a view to ascertain the purposes for which burdens may be imposed upon the public, we perceive at once that necessity is not the governing consideration, and

<sup>1</sup> Accord: *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238 (1882); *Cole v. La Grange*, 113 U. S. 1, 5 Sup. Ct. 416, 28 L. Ed. 896 (1885) (citing cases); *Commercial Bank v. Iola*, 2 Dill. 353, Fed. Cas. No. 3,061 (1873); *Coates v. Campbell*, 37 Minn. 498, 35 N. W. 366 (1887); *Deal v. Mississippi Co.*, 107 Mo. 464, 18 S. W. 24, 14 L. R. A. 622 (1891) (tree planting bounty); *Mich. Sugar Co. v. Auditor General*, 124 Mich. 674, 83 N. W. 625, 56 L. R. A. 329, 83 Am. St. Rep. 354 (1900).

All of the above cited federal cases, including the principal case, were apparently decided under provisions of state Constitutions, not under the fourteenth amendment. See *Davidson v. New Orleans*, 96 U. S. 97, 103, 24 L. Ed. 616 (1877); *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 155, 17 Sup. Ct. 56, 41 L. Ed. 369 (1896); *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239, 260, 25 Sup. Ct. 251, 49 L. Ed. 462 (1905).

In *First Municipality v. Orleans Theatre Co.*, 2 Rob. (La.) 209 (1842), a municipal subscription of \$200,000 to the capital of a private theatre company was upheld after ratification by the legislature. The object was stated to be to "afford a place of relaxation and amusement that would tend to correct the morals and enlighten the minds of the citizens."

TAX EXEMPTIONS.—Some courts hold that tax exemptions to enterprises primarily of a private nature stand on the same footing as grants of public money derived from taxation. *Brewer Brick Co. v. Brewer*, 62 Me. 62, 16 Am. Rep. 395 (1873) (brickyard); *Weeks v. Milwaukee*, 10 Wis. 242 (1860) (hotel). More commonly such exemptions are assumed to be a valid means of encouraging various species of industry. *Opinton of the Court*, 58 N. H. 623 (1879); *Mississippi Const.* (1890) §§ 182, 192; *Kentucky Const.* (1891) § 170; *South Carolina Const.* (1895) art. 8, § 8; *Oklahoma Const.* (1907) art. 10, § 6; *Illinois Cent. Ry. v. Decatur*, 147 U. S. 190, 201, 13 Sup. Ct. 293, 37 L. Ed. 132 (1893) (semble); *Florida Cent. Ry. v. Reynolds*, 183 U. S. 471, 476, 22 Sup. Ct. 176, 46 L. Ed. 283 (1902) (semble); 45 Cent. Dig., Taxation, §§ 383-87 (cases). Compare the analogous case of the common prohibition in American Constitutions against state aid to sectarian institutions, which is usually held not to prohibit the exemption of church property from taxation. *Trustees v. Iowa*, 46 Iowa, 275, 26 Am. Rep. 138 (1877). Questions of exemption on the ground of public uses naturally tend to become questions of classification for taxation, a matter in which the legislature has very great latitude. *Amer. Sugar Ref. Co. v. Louisiana*, post, p. 611.

that in many cases it has little or nothing to do with the question presented. Certain objects must of necessity be provided for under this power, but in regard to innumerable other objects for which the state imposes taxes upon its citizens, the question is always one of mere policy, and if the taxes are imposed, it is not because it is absolutely necessary that those objects should be accomplished, but because on the whole it is deemed best by the public authorities that they should be. On the other hand certain things of absolute necessity to civilized society the state is precluded, either by express constitutional provisions, or by necessary implication, from providing for at all; and they are left wholly to the fostering care of private enterprise and private liberality. We concede, for instance, that religion is essential, and that without it we should degenerate to barbarism and brutality; yet we prohibit the state from burdening the citizen with its support, and we content ourselves with recognizing and protecting its observance on secular grounds. Certain professions and occupations in life are also essential, but we have no authority to employ the public moneys to induce persons to enter them. The necessity may be pressing, and to supply it may be, in a certain sense, to accomplish a 'public purpose'; but it is not a purpose for which the power of taxation may be employed. The public necessity for an educated and skillful physician in some particular locality may be great and pressing, yet if the people should be taxed to hire one to locate there, the common voice would exclaim that the public moneys were being devoted to a private purpose. The opening of a new street in a city or village may be of trifling public importance as compared with the location within it of some new business or manufacture; but while the right to pay out the public funds for the one would be unquestionable, the other by common consent is classified as a private interest, which the public can aid as individuals if they see fit, while they are not permitted to employ the machinery of the government to that end. Indeed, the opening of a new street in the outskirts of a city is generally very much more a matter of private interest than of public concern; so much so that the owner of the land voluntarily throws it open to the public without compensation; yet even in a case where the public authorities did not regard the street of sufficient importance to induce their taking the necessary action to secure it, it would not be doubted that the moment they should consent to accept it as a gift, the street would at once become a public object and purpose, upon which the public funds might be expended with no more restraints upon the action of the authorities in that particular, than if it were the most prominent and essential thoroughfare of the city.

"By common consent also a large portion of the most urgent needs of society are relegated exclusively to the law of demand and supply. It is this in its natural operation, and without the interference of the government, that gives us the proper proportion of tillers of the soil, artisans, manufacturers, merchants and professional men, and that de-



termines when and where they shall give to society the benefit of their particular services. However great the need in the direction of any particular calling, the interference of the government is not tolerated, because, though it might be supplying a public want, it is considered as invading the domain that belongs exclusively to private inclination and enterprise. We perceive, therefore, that the term 'public purposes,' as employed to denote the objects for which taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit which is to follow. It is, on the other hand, merely a term of classification, to distinguish the object for which according to settled usage, the government is to provide, from those which, by the like usage, are left to private inclination, interest or liberality.

"It creates a broad and manifest distinction—one in regard to which there need be neither doubt nor difficulty—between public works and private enterprises; between the public conveniences which it is the business of government to provide and those which private interest and competition will supply whenever the demand is sufficient. When we draw this line of distinction, we perceive immediately that the present case falls outside of it. It was at one time in this state deemed true policy that the government should supply railroad facilities to the traveling and commercial public, and while that policy prevailed, the right of taxation for the purpose was unquestionable. Our policy in that respect has changed; railroads are no longer public works, but private property; individuals and not the state own and control them for their own profit; the public may reap many and large benefits from them, and indeed are expected to do so, but only incidentally, and only as they might reap similar benefits from other modes of investing private capital. It is no longer recognized as proper or politic that the state should supply the means of locomotion by rail to the people, and this species of work is therefore remitted to the care of private enterprise, and cannot be aided by the public funds, any more than can any other private undertaking which in like manner falls outside the line of distinction indicated.

"In the course of the argument of this case allusion was made to the power of the state to pay bounties. But it is not in the power of the state, in my opinion, under the name of bounty or under any other cover or subterfuge, to furnish the capital to set private parties up in any kind of business, or to subsidize their business after they have entered upon it. A bounty law of which this is the real nature is void, whatever may be the pretense on which it may be enacted. The right to hold out pecuniary inducements to the faithful performance of public duty in dangerous or responsible positions, stands upon a different footing altogether; nor have I any occasion to question the right to pay rewards for the destruction of wild beasts and other public pests; a provision of this character being a mere police regulation. But the discrimination by the state between different classes of occupations, and the favoring of one at the expense of the rest, whether that one be

'farming or banking, merchandising or milling, printing or railroading, is not legitimate legislation, and is an invasion of that equality of right and privilege which is a maxim in state government. When the door is once opened to it, there is no line at which we can stop and say with confidence that thus far we may go with safety and propriety, but no further. Every honest employment is honorable, it is beneficial to the public; it deserves encouragement. The more successful we can make it, the more does it generally subserve the public good. But it is not the business of the state to make discriminations in favor of one class against another, or in favor of one employment against another. The state can have no favorites. Its business is to protect the industry of all, and to give all the benefit of equal laws. It cannot compel an unwilling minority to submit to taxation in order that it may keep upon its feet any business that cannot stand alone. Moreover, it is not a weak interest only that can give plausible reasons for public aid: when the state once enters upon the business of subsidies, we shall not fail to discover that the strong and powerful interests are those most likely to control legislation, and that the weaker will be taxed to enhance the profits of the stronger. I shall not question the right of the people, by their Constitution, to open the door to such discriminations, but in this state they have not adopted that policy, and they have not authorized any department of the government to adopt it for them."

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PERRY v. KEENE.

(Supreme Court of New Hampshire, 1876. 56 N. H. 514.)

[Bill in equity on an agreed statement of facts. A New Hampshire statute authorized towns by a two-thirds vote to raise by tax or loan a sum not exceeding 5 per cent. of their property valuation, and appropriate it to aid in railway construction. Plaintiffs, who are taxpayers of Keene, ask an injunction against an appropriation of \$130,000 by that town under this act, being 3 per cent. of its taxable valuation.]

LADD, J. \* \* \* Is the building of a railroad a public purpose? The legislature have undoubtedly passed their judgment on that question, and determined that it is. It is not to be denied that the levying of taxes is specially and entirely a legislative function, and the court are not to encroach upon the province of a co-ordinate branch of the government in the exercise of that power. Where is the line that divides the province of the court from that of the legislature in a matter of this sort? The court is to expound and administer the laws, and there the judicial function and duty end. How much of the question, whether a given object is public, lies within the province of the law, and how much in the domain of political science and statesmanship? When the judge has declared all the law that enters into the problem, how much is still left to the determination of the legis-

lator? Admitting, as has indeed been more than intimated in this state (*Concord Railroad v. Greely*, 17 N. H. 57), that it is for the court finally to determine whether the use is public,—what is the criterion? What are the rules which the law furnishes to the court wherewith to eliminate a true answer to the inquiry? In what respect does the question as presented to the court differ from the same question as presented to the legislature? If the court stop when they reach the borders of legislative ground, how far can they proceed?

If the legislature should take the property of A, or the property of all the tax-payers in the town of A, and hand it over, without consideration, without pretence of any public obligation or duty, to B, to be used by him in buying a farm, or building a house, or setting himself up in business, the case would be so clear that the commonsense of every one would at once say the limits of legislative power had been overstepped by a taking of private property, and devoting it to a private use. That is the broad ground upon which such cases as *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185, *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39, and *Citizens' Loan Association v. Topeka*, 20 Wall. 655, 22 L. Ed. 455, were decided. And yet, what rule of law do the courts find to aid them in thus revising the judgment of the legislature? Is it not clear that the question they pass upon is the same question as that decided by the legislature, and that they must determine it in the same way the legislature have done, simply by the exercise of reason and judgment? What is it that settles the character of a given purpose, in respect of its being public or otherwise? It has been said that for the legislature to declare a use public does not make it so—17 N. H. 57; and the same may certainly be said with equal truth of a like declaration by the court. A judicial christening can no more affect the nature of the thing itself, than a legislative christening. Judging a priori, and without some knowledge of the wants of mankind when organized in communities and states, I do not quite understand how it could be predicated of any use, that it is "per se" public, as is said by Dixon, C. J., in *Whiting v. Sheboygan Railway Co.*, 9 Am. Law Reg. (N. S.) 161. Of light, air, water, etc., the common bounties of providence, it might, indeed, be said beforehand that they are in a very broad sense public; but it is not of such uses that we are speaking. Without knowledge of human nature, knowledge derived from experience and observation of what may be needful for the comfort, well-being, and prosperity of the people of a state advanced in civilization,—and knowledge, gained in the same way, as to what necessary conditions of their welfare will be supplied by private enterprise, and what will go unsupplied without interference by the state,—I do not see how any use could be said to be per se public, or how either a legislature, or a court, could form a judgment that would not be founded almost wholly upon theory and conjecture.

No one doubts that the building and maintaining of our common highways is a public purpose. Why? Certainly for no other reason than that they furnish facilities for travel, the transmission of intelligence, and the transportation of goods. But why should the state take this matter under its fostering care, imposing upon the people a very great yearly burden in the shape of taxes for their support, any more than many others that might be mentioned, of equal and perhaps greater importance to its citizens? Is it of greater concern to the citizen that he should have a road to travel on, when he desires to visit his neighbor in the next town, or transport the products of his farm or of his factory to market and bring back the commodities for which they may be exchanged, than that he should have a mill to grind his corn,—a tanner, a shoemaker, and a tailor to manufacture his raw material into clothing, wherewith his body may be covered? Doubtless highways are a great public benefit. Without them I suppose the whole state would soon return to its primal condition of a howling wilderness, fit only for the habitation of wild beasts and savages. How would it be if there were no mills for the manufacture of lumber, no joiners or masons to build houses, no manufacturers of cloth, no merchants or tradesmen to assist in the exchange of commodities? These suppositions may appear somewhat fanciful, but they illustrate the inquiry, Why is the building of roads to be regarded as a public service, while many other things equally necessary for the upholding of life, the security of property, the preservation of learning, morality, and religion, are by common consent regarded as private, and so left to the private enterprise of the citizens? The answer to this question, surely, is not to be found in any abstract principle of law. It is essentially a conclusion of fact and public policy, the result of an inquiry into the individual necessities of every member of the community (which in the aggregate show the character and urgency of the public need), and the likelihood that those necessities will be supplied without interference from the state. Obviously it bears a much closer resemblance to the deduction of a politician, than the application of a legal principle by a judge. Should it be found by experience that no person in the state would, voluntarily and unaided, establish and carry on any given trade or calling, necessary, and universally admitted to be necessary, for the upholding of life, the preservation of health, the maintenance of decency, order, and civilization among the people, would not the carrying on of such necessary trade or calling thereupon become a public purpose, for which the legislature might lawfully impose a tax? <sup>1</sup>

Experience shows that highways would not be built, or, if built, would not be located in the right places with reference to convenient transit between distant points, nor kept in suitable repair, but for the

<sup>1</sup> Compare *Burlington v. Beasley*, 94 U. S. 310, 24 L. Ed. 161 (1877) (public aid in construction of steam grist-mill in Kansas in 1872, required to serve public).

control assumed over the whole matter by the state; and so the state interferes, and establishes a system, and imposes an enormous burden upon the people in the shape of taxes, compelling them to supply themselves with what they certainly need, but need no more than they need shoes or bread,—and nobody ever complained that the interference was unauthorized, or the purpose other than a public one.

Enough has been said to show the delicate nature of the task imposed upon the court when they are called upon to revise the judgment of the legislature in a matter of this description. It is especially delicate for two reasons,—first, because the discretion of the legislature, with respect to the whole subject of levying taxes, is so very large, and their power so exclusive, that it is not always easy to say when the limits of that discretion and power have been passed; and, second, because the rule to be applied is furnished, not so much by the law as by those general considerations of public policy and political economy to which allusion has been made. I do not deny the power and duty of the court, when private rights of property are in question, to settle those rights according to a just interpretation of the Constitution; and the discharge of that duty may involve a revision of the judgment of the legislature upon a question which, like this, partakes more or less of a political character. But before the court can reverse the judgment of the legislature and the executive, and declare a statute levying or authorizing a tax to be inoperative and void, a very clear case must be shown. After the legislature and the executive have both decided that the purpose for which a tax is laid is public, nothing short of a moral certainty that a mistake has been made, can, in my judgment, warrant the court in overruling that decision, especially when nothing better can be set up in its place than the naked opinion of the court as to the character of the use proposed. Certainly it is not for the court to shrink from the discharge of a constitutional duty; but, at the same time, it is not for this branch of the government to set an example of encroachment upon the province of the others. It is only the enunciation of a rule that is now elementary in the American states, to say that, before we can declare this law unconstitutional, we must be fully satisfied—satisfied beyond a reasonable doubt—that the purpose for which the tax is authorized is private and not public.

I have spoken incidentally of our common highways; and it has been said that their purpose is, to furnish to the public facilities for travel, for the transmission of intelligence, and the carrying of goods. No one will contend that to build and maintain them is not a public purpose. Indeed, the public nature of this use is so very obvious that it has been classed among those said to be public per se (*Whiting v. Sheboygan Railway Co.*, *supra*), standing in need of no credentials from the court to entitle it to legislative recognition. Wherein does the use of a railroad differ? What public benefit can be mentioned, that comes from the building of a common road, that does not come,



in kind if not in degree, from the building of a railroad? It is not necessary to enlarge upon the benefits of either: they are, doubtless, numerous and varied,—so numerous, indeed, so interwoven with everything that distinguishes an intelligent, virtuous, rich, well-organized, and well-governed state, from a tribe of primitive barbarians, that an attempt to trace them all would be little less than an attempt to search out the sources of our civilization. The point is, they are alike in kind; and when it is admitted that the construction of one class of roads is clearly, beyond all possibility of doubt, a public purpose, I cannot conceive upon what ground it is to be said that the construction of the other class is, beyond all reasonable doubt, a private purpose.

It is said that railroad corporations are private; that the roads are built and run for private gain; that the public can only enjoy the benefits offered by them upon payment of a toll,—and, therefore, their purpose is private. The short and conclusive answer to all this, in my mind, is, that the character of the agency employed does not and cannot determine the nature of the end to be secured. To say of a railroad corporation that it is a private corporation, and therefore the construction of a railroad is a private purpose, seems to me, in truth, no more logical, if less absurd, than to say of any officer or agent of the state,—He is an individual, with all the private interests and private associations of other citizens; therefore the purpose of his office and of all his official acts is private. The argument that because a toll is granted, therefore the purpose must be private, carried to its logical results, would certainly declare the purpose of a very large number of public offices in the state to be private,—among them the secretary of state, justices of the peace and of police courts, registers of probate, registers of deeds, sheriffs, clerks of the courts, town-clerks, etc., etc.

If the purpose is public, it makes no difference that the agent by whose hand it is to be attained is private. Nor, if the purpose were private, would it make any difference that a public agent was employed. The question, therefore, whether a railroad corporation is to be regarded as public, or private, or both,—that is, public in one aspect and private in another,—seems to me quite immaterial, and that the decision of that question one way or the other does not advance the inquiry we have in hand.

It has been admitted by some, who have maintained with singular ability and zeal the position of the plaintiffs in this case, that the state might legally take into its own hands the whole matter of railroads within its limits; might build, equip, operate, and control them, making use of no intermediate agents in the business,—because in that case the people would remain owners of the property into which their money had been converted. With great deference, it seems to me, this is a concession of the very point in dispute. The form of the argument seems to be this: The state cannot levy a tax for a private

purpose. So much, all admit. The building of a railroad is a private purpose; but the state may nevertheless levy a tax to build a railroad, provided the tax be large enough to carry through the whole enterprise without calling in the aid of any other agency;—or, to draw from the same premises the conclusion sought to be established here, the state cannot levy a tax for a private purpose. The state may levy a tax to wholly build, equip, and run a railroad; therefore the building of a railroad is a private purpose. This does not bear examination.

Another argument may be noticed here. It has been said by courts, whose decisions we are accustomed to regard with great respect, that, admitting the power of the legislature to authorize towns and cities to subscribe for stock in railroad corporations, and issue bonds or levy taxes in payment thereof, it does not follow that they can lawfully authorize the direct appropriation of the public funds to aid in the construction of a railroad where no stock is taken; because, in that event, no interest or ownership results to the town in the property of the corporation, and no voice in the control and management of its affairs is secured. I do not understand how this can be said by a court of law. Upon what ground can the legislature authorize the raising of a tax to pay for stock in a corporation of any sort, unless the purchase of such stock will be a devotion of the public funds to a public service? It is a matter of common knowledge that the original stock in railroad corporations often becomes worthless, or nearly so; but whether such a result is to be apprehended or not, makes no difference, so far as I can see, with the argument. If the end in view is private and not public, the legislature might as well authorize a town to enter into copartnership with any private person, in the prosecution of any private enterprise or business, and furnish its stipulated proportion of the capital to be invested, by levying a tax, as to authorize it to purchase such stock, even were it likely to advance in value on their hands, and the people thus be gainers by the operation. Deny that the end is public, and at the same time admit that a tax may be levied for the purchase of the stock, and the inevitable conclusion appears to be, that towns may be authorized to engage in the private and perilous business of dealing in stocks, and so apply the public funds to a purpose as remote as any that can well be conceived from that permitted by the Constitution, to say nothing of the fact that such investment must be made with a reasonable assurance that the money will be lost. Clearly, one or the other of these propositions must be changed; either we must admit that the end in view is public, or deny the power to purchase stocks when the end in view is merely a private end.<sup>2</sup> \* \* \*

<sup>2</sup> The distinction here denied, between a donation to a railroad and a subscription to its stock, is adopted in *Wisconsin. Whiting v. Sheboygan, etc., R. Co.*, 25 Wis. 167, 3 Am. Rep. 30 (1870); *Ellis v. Northern Pac. Ry.*, 77 Wis.

It is nowhere contended, and is not contended by the plaintiffs, that a railroad is not a public use in such sense that land, the private property of individuals, may be taken for its construction. But a strenuous effort has been made to distinguish between the nature of a public use that warrants the exercise of the power of eminent domain, and that which warrants the exercise of the taxing power in its behalf. Of course the use which warrants the taking of land for a road-bed must be public, otherwise every charter granting that right, and every general law recognizing its existence and regulating the mode of its exercise, has been nothing less than an arbitrary and despotic interference by the legislature with private rights of property, in flagrant violation of article 12 of the Bill of Rights, as well as the other provisions of the Constitution whereby those rights are secured. The argument, then, admits that the use is public, but holds that it is not sufficiently public, or is not public in the particular way, to bring it within the category of objects for which taxes may be imposed: either in degree or kind, the public quality which it confessedly possesses falls short of that required by the Constitution to justify an exercise of the taxing power.

It is incumbent on those who undertake to maintain this distinction, to point out clearly the differences on which it rests. An assertion that it does exist is not enough, nor is the argument advanced by a repetition of such assertion, even though made in confident and emphatic terms. What is the rule wherewith we are to determine when a given public use is of a character to warrant the exercise of one power and not the other? What is the principle to be applied? No one will contend that the power of eminent domain and the taxing power, though similar, are in all respects identical; but all agree that neither can be exercised except for a public end. Which is the higher power? or, in other words, which requires the greater public exigency to call it forth? What is the nature of those objects which lie on one side of the line, and what of those upon the other side? Where is the line to be drawn, and what are the reasons that determine its location? These are some of the questions not to be evaded, or met with much speech and ingenious ratiocination, but to be answered fairly and clearly, before a court can say that the legislature have beyond all reasonable doubt transcended their constitutional powers in declaring that a use which is of such character—that is, public in such sense that private property may be taken and appropriated in its behalf—is also public in such sense that taxes may be levied in its behalf. In those cases to which we have been referred by the plaintiffs' counsel, where an attempt to do this is made, it does appear to me the failure has been rendered only more conspicuous by the eminent ability of those who have undertaken the task. And, after a most careful ex-

amination of those cases, if we were to hold that a railroad, being a public use for which the land of individuals may be taken against their consent, is not a public purpose for which taxes may be imposed, I should be utterly at a loss what sound reason to give for the distinction, or in what terms to frame a rule to govern the future action of the legislature in cases of a like description. \* \* \*

Bill dismissed.<sup>3</sup>

[SMITH and RAND, JJ., gave concurring opinions.]

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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

<sup>3</sup> Apparently the only state in which public aid to a privately owned railroad is held unconstitutional as not a public purpose is Michigan. *People v. Salem*, 20 Mich. 452, 4 Am. Rep. 400 (1870). An earlier case to that effect in Iowa was overruled. *Stewart v. Board of Supervisors*, 30 Iowa, 9, 1 Am. Rep. 238 (1870). Most state Constitutions now expressly forbid the practice. Of the cases sustaining it, it was said in one of the most notable of them: "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."—Black, C. J., in *Sharpless v. Mayor*, 21 Pa. 147, 175, 176, 59 Am. Dec. 759 (1853).

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 Califor-



nia, 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 without 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. \* \* \* [Here follow ap-



proving references to the doctrine of *Lowell v. Boston*, ante, p. 573, with a quotation therefrom.] 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.<sup>1</sup>

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 furnish-

<sup>1</sup> Holding that the powers of taxation and of eminent domain could not be used to purchase land adjoining a proposed commercial thoroughfare, with the design of reselling or leasing it subject to restrictions that should secure its beneficial commercial use in the public interest. See post, p. 684.

ing coal or fuel to the public.<sup>2</sup> 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.

<sup>2</sup> For possible qualifications of this in cases of great emergency, see the opinions in 182 Mass. 605, 66 N. E. 25 (1903).

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.<sup>3</sup>

<sup>3</sup> See 31 L. R. A. (N. S.) 116-123, for cases and references upon the power of municipalities to engage both in businesses ordinarily purely private, and in those that are generally classified as "public utilities."

MISCELLANEOUS PUBLIC PURPOSES.—"[The] statute authorizes the city to appropriate a sum of money for the erection of a memorial hall, to be used and maintained as a memorial to the soldiers and sailors of the war of the Rebellion. This may properly be deemed to be a public purpose, and a statute authorizing the raising of money by taxation for the erection of such a memorial hall may be vindicated on the same grounds as statutes authorizing the raising of money for monuments, statues, gates, or archways, celebrations, the publication of town histories, parks, roads leading to points of fine natural scenery, decorations upon public buildings, or other public ornaments or embellishments, designed merely to promote the general welfare, either by providing for fresh air or recreation, or by educating the public taste, or by inspiring sentiments of patriotism, or of respect for the money of worthy individuals. The reasonable use of public money for such purposes has been sanctioned by several different statutes, and the constitutional right of the legislature to pass such statutes rests on sound principles. Pub. St. c. 27, §§ 10, 11; St. 1882, cc. 154, 255, § 5; St. 1883, c. 119; St. 1884, c. 42; St. 1886, c. 76; St. 1889, c. 21; *Higginson v. Nahant*, 11 Allen, 530."—O. Allen, J., in *Kingman v. Broekton*, 153 Mass. 255, 256, 26 N. E. 998, 11 L. R. A. 123 (1891). But such a building cannot be devoted to the private use of a G. A. R. post. *Id.*

DISCHARGING MORAL OBLIGATIONS.—In 1890 Congress provided a bounty to sugar growers in lieu of a protective tariff, and when this was later repealed an act directed the payment of bounties already earned. The bounty law had not been questioned by any court or officer of the government, and had been relied upon by sugar producers in investing large sums. The last act was held valid, regardless of the validity of the original bounty law.

"These parties cannot be held bound, upon the question of equitable or moral consideration, to know what no one else actually knew, and what no one could know prior to the determination by some judicial tribunal that

## SECTION 3.—CLASSIFICATION

## 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 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

the law was unconstitutional. \* \* \* We are of the opinion that the parties, situated as were the plaintiffs in these actions, acquired claims upon the government of an equitable, moral, or honorary nature. \* \* \* Under the provisions of the Constitution (article 1, § 8), congress has power to lay and collect taxes, etc., 'to pay the debts' of the United States. \* \* \* The term 'debts' includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a 'debt' to an individual when his claim grows out of general principles of right and justice,—when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are blinding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law."—Peckham, J., in *United States v. Realty Co.*, 163 U. S. 427, 438-440, 16 Sup. Ct. 1120, 41 L. Ed. 215 (1896). Compare *Mich. Sugar Co. v. Auditor General*, 124 Mich. 674, 83 N. W. 625, 56 L. R. A. 329, 83 Am. St. Rep. 351 (1900). See, also, *Bush v. Board of Supervisors*, 159 N. Y. 212, 53 N. E. 1121, 45 L. R. A. 556, 70 Am. St. Rep. 538 (1899); *Opinion of Justices*, 211 Mass. 608, 98 N. E. 338 (1912); *Gulfport v. Board of Supervisors*, 13 N. Y. 143 (1855); *Matter of Chipman v. New York*, 168 N. Y. 89, 61 N. E. 108, 56 L. R. A. 846, 85 Am. St. Rep. 661 (1911); *Allen v. Board of Auditors*, 122 Mich. 324, 81 N. W. 113, 47 L. R. A. 117, 80 Am. St. Rep. 573 (1899).

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.<sup>1</sup> *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

<sup>1</sup> Neither the fifth nor the fourteenth amendment forbids double taxation so long as it bears equally upon all persons or property in a validly created class. It may take the form either of taxing nominally separate interests in the same source of value, *New Orleans v. Houston*, post, p. 622, note; *Paddell v. New York*, 211 U. S. 446, 29 Sup. Ct. 139, 53 L. Ed. 275, 15 Ann. Cas. 187 (1908) (land and mortgage debt); or of a higher rate for some kinds of property, *Mich. C. Ry. v. Powers*, post, p. 611, note; or of different kinds of taxes on the same property, *Patton v. Brady*, 184 U. S. 608, 621-622, 22 Sup. Ct. 493, 46 L. Ed. 713 (1902) (general tax and excise—semble); *Income Tax Cases*, 148 Wls. 456, 506-508, 134 N. W. 673, 135 N. W. 164 (1912) (taxes on land and on income therefrom); or of repeating a tax at unwontedly brief intervals, *Patton v. Brady*, above (successive excises on same property).

Even such discriminatory double taxation as would be incompetent to a single jurisdiction may result in fact from our state and federal system. "The state of Alabama is not bound to make its laws harmonize in principle with those of other states. If property is untaxed by its laws, then for the purpose of its laws the property is not taxed at all."—Holmes, J., in *Kidd v. Alabama*, 188 U. S. 730, 732, 23 Sup. Ct. 401, 47 L. Ed. 669 (1903). So, *Judy v. Beckwith*, 137 Iowa, 24, 114 N. W. 565, 15 L. R. A. (N. S.) 142, 15 Ann. Cas. 890 (1908) (cases).



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,<sup>2</sup> 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

<sup>2</sup> Legislative authority to levy, and a properly prescribed method for assessment and collection are indispensable in taxation. *Scottish, etc., Ins. Co. v. Bowland*, 196 U. S. 611, 25 Sup. Ct. 315, 49 L. Ed. 619 (1905); *Beers v. Glynn*, 211 U. S. 477, 29 Sup. Ct. 186, 53 L. Ed. 290 (1909).

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 complainant, is within the exclusive control of the Legislature, with no power in the courts to interfere. \* \* \*

Order affirmed.<sup>3</sup>

<sup>3</sup> Affirmed in 204 U. S. 152, 27 Sup. Ct. 188, 51 L. Ed. 415, 9 Ann. Cas. 736 (1907). Accord: *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 30 Sup. Ct. 496, 54 L. Ed. 688 (1910) (tax on wholesale dealers in oil only); *Broadnax v. Missouri*, 219 U. S. 285, 31 Sup. Ct. 238, 55 L. Ed. 219 (1911) (tax on business exchanges).

"The power of the legislature over the subject of taxation, except as limited by constitutional restrictions, is unbounded. It is for that body, in the exercise of its discretion, to select the objects of taxation. It may impose all the taxes upon lands, or all upon personal property, or all upon houses or upon incomes. It may raise revenue by capitation taxes, by special taxes upon carriages, horses, servants, dogs, franchises, and upon every species of property, and upon all kinds of business and trades. *People v. Mayor of Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266 (1851); *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289 (1878); *People v. Equitable Trust Co.*, 96 N. Y. 387 (1884); *Portland Bank v. Apthorp*, 12 Mass. 252 (1815); *Cooley, Tax'n*, 7. Taxes upon legacies and inheritances have been approved generally by writers upon political economy and systems of taxation, and no tax can be less burdensome, and interfere less with the productive and industrial agencies of society."—*Earl, J.*, in *Matter of McPherson*, 104 N. Y. 306, 316, 317, 10 N. E. 685, 686, 58 Am. Rep. 502 (1887).

"The provision in the fourteenth amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. 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 would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases. They must be decided as they arise. We think that we are safe in saying that the fourteenth amendment was not intended to compel the states to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the states, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material, but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice, and which every state, in one form or another, deems

PEOPLE *ex rel.* FARRINGTON *v.* MENSCHING.

(Court of Appeals of New York, 1907. 187 N. Y. 8, 79 N. E. 884, 10 L. R. A. [N. S.] 625, 10 Ann. Cas. 101.)

[Appeal from an order of the Appellate Division of the Supreme Court of New York for the First Department. The New York statute of 1905, referred to in *People v. Reardon*, ante, p. 605, was amended so as to impose a stamp tax of two cents on each share of \$100 of face value, or fraction thereof, on all transfers of stock. One Farrington, without paying any tax, sold a large number of shares of stock in mining and manufacturing companies of a face value of from one cent to one dollar a share, and of an actual value of from two to fourteen cents each. When arrested, he sought liberty by virtue of a writ of habeas corpus, alleging the invalidity of this tax. The lower courts dismissed the writ.]

VANN, J. \* \* \* The act now before us does not classify by arranging according to quality, but by arranging according to accident. While it places all corporate shares in a class, still it does not treat all members of the class alike, but without method or order bears heavily upon some and lightly upon others, which, in effect, is a further classification. Thus it imposes the same tax on the sale of dollar shares and hundred dollar shares. The tax is measured by the number of shares, regardless of face value or actual value. Shares of the same corporation might be taxed 10 times as much, or only one-tenth as much, in one year as compared with the next, if simply the face value of each share were changed, without changing the aggregate of the face value of all the shares, or the amount of capital invested, or the value of the assets in which it was invested. Shares are so classified as to tax the sale of those issued by one corporation several times as

it expedient to adopt."—Bradley, J., in *Bell's Gap Ry. v. Pennsylvania*, 134 U. S. 232, 237, 10 Sup. Ct. 533, 535, 33 L. Ed. 892 (1889).

In *Michigan C. Ry. v. Powers*, 201 U. S. 245, 300, 302, 26 Sup. Ct. 459, 50 L. Ed. 744 (1906), Brewer, J., said (upholding an ad valorem property tax on all railroads in Michigan, determined by averaging the local tax rates of all municipal subdivisions regardless of the presence or absence of railroad property in any of them): "That, so far as the restraints of the federal Constitution are concerned, it is within the power of a state to separate a particular class of property, subject it to assessment and taxation in a mode and at a rate different from that imposed upon other property, and apply the proceeds to state rather than to local purposes, is not open to question. \* \* \* A legislature is not bound to impose the same rate of tax upon one class of property that it does upon another. As it may exempt all of one class, so it may impose a different rate of taxation. It is sufficient if all of the same class are subjected to the same rate and the tax is administered impartially upon them."

A number of state Constitutions contain special provisions that taxation shall be uniform or proportional. These greatly limit the legislative discretion in classification. See, e. g., *Opinion of Justices*, 195 Mass. 607, 84 N. E. 499 (1908). To some extent such provisions also check double taxation. See note 1, above, and also *People v. Brooklyn*, post, p. 649, note 2.



much as those issued by another of the same kind and in exactly the same situation, without any reason for the distinction. Possibly a valid distinction might be founded on the nature or object of the corporation, or on the fact that it enjoyed special privileges, putting banking and railroad corporations in and leaving manufacturing corporations out, for instance, but we think none can rest on an accidental and non-essential quality without the violation of fundamental principles.

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).

Perhaps an answer to these questions may be found in *Cotting v. Kansas City Stockyard Co.*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92, where a general act, the effect of which was to so classify stockyards in the state of Kansas as to discriminate against the largest stockyard in the state, but without mentioning it by name, was held to be unconstitutional because it denied to that company the equal protection of the laws. A similar fate met an act of another state, which provided that a certain tax should be imposed only upon those taxable inhabitants of a school district who had not paid a tax assessment in the year 1871. (*State ex rel. Trustees v. Township, etc.*, 36 N. J. Law, 66. Even if a tax on farms according to acreage might be sustained,

it is obvious that a tax on farms according to the number of fields into which they are divided would not be valid. Such a classification would not treat all in the same class alike, and would impose a heavier burden upon one farm than upon another of the same size, situation, and value. A statute imposing such a tax would not give "that equal protection and security" to which all, under like circumstances, are entitled "in the enjoyment of their personal and civil rights." *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *Matter of Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34. \* \* \*

While the sale of all shares is taxed an equal amount per share, the tax is unequal when the shares are issued for different amounts and the record shows a wide range in that respect. The business corporations law requires shares to be not less than \$5 and not more than \$100 each. Laws 1890, p. 1168, c. 567, § 2. Other corporations do not appear to be limited in this regard. Perhaps a face value of \$100 is the most common, but shares of \$50 are not unusual, and shares of more than \$100 are occasionally issued. In mining stocks the shares generally range from \$1 to \$10. \* \* \*

The serious objection to the statute under consideration is not that in some abnormal instance of low face value the tax might amount to confiscation, but that the classification is as purely arbitrary as the division of land into fields to which we have alluded. Granting the almost unlimited power of the Legislature to classify as it sees fit, still there is no plausible or possible reason why 100 acres in a single field should not pay the same tax as 100 acres of equal value in 10 fields. It seems equally clear that no distinction in liability to taxation can be drawn between 10 shares of the face value of \$100 each and 100 shares of the face value of \$10 each. \* \* \*

While it is true that the face value, which in multiples of \$100 we held in the *Hatch Case* to be a proper basis of classification, does not necessarily indicate actual value, still it bears some relation thereto, but a share apart from its size or face value can bear no relation whatever to its actual value. The classification was arbitrary, which "can never be justified by calling it classification." *Gulf, Colorado & Santa Fé Railway Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666. \* \* \*

The rule governing the subject, as laid down by the Supreme Court of the United States, is that there must be "some difference which bears a reasonable and proper relation to the attempted classification." It cannot be "mere arbitrary selection." [Citing cases, most of which are discussed in this section or in Chapter X, section 2, of this volume.] \* \* \* By this we do not understand that great court to mean that the relation must necessarily be "reasonable and proper" according to the judgment of reviewing judges, but that the court must be able to see that legislators could regard it as reasonable and proper without doing violence to common sense. In other words, there must be

enough reason for it to support an argument, even if the reason is unsound. At all events that is as far as it is necessary for us to go in this case, where no reason whatever can be seen for selecting certain individuals of a class and taxing them more heavily than others in the same situation. We regard this as an arbitrary "discrimination in favor of one as against another of the same class," and as a violation of primary rights. \* \* \* [The amendment being invalid, the tax of 1905 was held to be in force and Farrington liable for non-compliance with that.]

Order affirmed.<sup>1</sup>

### AMERICAN SUGAR REFINING COMPANY v. LOUISIANA.

(Supreme Court of United States, 1900. 179 U. S. 89, 21 Sup. Ct. 43, 45 L. Ed. 102.)

[Error to the Supreme Court of Louisiana. Louisiana imposed an annual license tax upon all persons or corporations engaged in the business of refining sugar and molasses, based upon the gross annual receipts from such business, but excepting from the tax "planters and farmers grinding and refining their own sugar and molasses,"

<sup>1</sup> In holding invalid the exaction of a \$500 yearly license fee from persons selling convict-made goods in New York, Clarke, J., said, in *People v. Raynes*, 136 App. Div. 417, 423, 424, 120 N. Y. Supp. 1053, 1057, 1058 (1910): "That classification is based upon the origin of the goods dealt in, without regard to the quality or character or nature of the goods themselves. Clothing, household furniture, shoes, scrubbing brushes, brooms, harness, anything that can be made by hand or machinery, falls within one classification, provided the origin is the same. Substitute a state for a prison, and no one would be willing to say that a law which required all persons who might deal in goods, wares, and merchandise made in New Jersey to take out a license would be valid; or, if it be objected that that would be a direct violation of the federal Constitution, made in Troy, or in Schenectady, or in Buffalo. Take another classification, that a license fee should be required for dealers in all goods made by machinery, or all goods made by hand. If such classification be valid, and if the purpose of the act, as is claimed, is to protect free labor from prison labor, why in these days of contest between organized and unorganized labor should not an act be passed which provided for such a license for selling all goods made in a shop which did not employ union labor, and then, if the advocates of a free shop were in power, repeal it, and provide for such license for all goods made in shops which employed union labor, or single out for license dealers in goods made in shops employing members of certain races, religions, or political parties. All these classifications would be based on origin, as is that under consideration."

A tax upon the property of each race (white and colored) for the support of its own separate schools is invalid. *Claybrook v. City of Owensboro*, 16 Fed. 297 (1883); *Puitt v. Com'rs*, 94 N. C. 709, 55 Am. Rep. 638 (1886). In the former case, it was said (16 Fed. 302): "The equal protection of the laws guaranteed by this amendment must and can only mean that the laws of the states must be equal in their benefit as well as equal in their burdens, and that less would not be the equal protection of the laws." This does not mean absolute equality in distributing the benefits of taxation. This is impracticable; but it does mean the distribution of the benefits upon some fair and equal classification or basis."

or who "granulate syrup for other planters during the rolling season." The state tax collector began suit against the defendant company for the above tax in the district court of Orleans parish, and, though defeated there, was successful upon appeal to the state Supreme Court. The company then took this writ of error.]

Mr. Justice BROWN. \* \* \* The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid. Of course, if such discrimination were purely arbitrary, oppressive, or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations, or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes. But from time out of mind it has been the policy of this government, not only to classify for purposes of taxation, but to exempt producers from the taxation of the methods employed by them to put their products upon the market. The right to sell is clearly an incident to the right to manufacture or produce, and it is at least a question for the legislature to determine whether anything done to prepare a product most perfectly for the needs of the market shall not be treated as an incident to its growth or production. The act is not one exempting planters who use their sugar in the manufacture of articles of a wholly different description, such as confectionery, preserves, or pastry, or such as one which should exempt the farmer who devoted his corn or rye to the making of whisky, while other manufacturers of these articles were subjected to a tax. A somewhat different question might arise in such case, since none of these articles are the natural products of the farm,—such products only becoming useful by being commingled with other ingredients. Refined sugar, however, is the natural and ultimate product of the cane, and the various steps taken to perfect such product are but incident to the original growth.

With reference to the analogous right of importation, it was said by this court at an early day, in *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678, that the right to sell was an incident to the right to import foreign goods, and that a license tax upon the sale of imported goods, while still in the hands of the importer in their original packages, was in conflict with that provision of the Constitution which prohibits a state from laying an impost or duty upon imports.

Congress, too, has repeatedly acted upon the principle of the Louisiana statute. Thus, after having imposed by act of August 2, 1813, a license tax upon the retailers of wines and spirits, for the purpose of providing for the expense of the war with Great Britain, it was further enacted by an act of February 8, 1815 (3 Stat. at L. 205, chap. 40), that it should not be construed "to extend to vine dressers who sell at the place where the same is made, wine of their own growth;

nor shall any vine dresser for vending solely at the place where the same is made, wine of his growth, be compelled to take out license as a retailer of wine." So, too, in the internal revenue act of 1862 (12 Stat. at L. 432, chap. 119), a license tax was imposed (section 64) upon retail dealers in all goods, wares, and merchandise, but with a proviso, in section 66, that the act should not be construed "to require a license for the sale of goods, wares, and merchandise made or produced and sold by the manufacturer or producer at the manufactory or place where the same is made or produced; to vinters who sell, at the place where the same is made, wine of their own growth; nor to apothecaries, as to wines or spirituous liquors which they use exclusively in the preparation or making up of medicines for sick, lame, or diseased persons." Another paragraph of the same section (64) exempts distillers who sell the products of their own stills, from a tax as wholesale dealers in liquors. While no question of the power of Congress is involved, these instances show that its general policy does not differ from that of the act in question, and that the discrimination is based upon reasonable grounds. \* \* \* [Among other cases the court here quotes from *Bell's Gap Ry. v. Pennsylvania* part of the extract printed ante, p. 610, note.]

In *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. Ed. 1035, 3 Interst. Com. Rep. 810, 12 Sup. Ct. 250, a state statute defining an express company to be such as carried on the business of transportation on contracts for hire with railroad or steamboat companies, did not invidiously discriminate against the express companies defined by it, by exempting other companies carrying express matter in vehicles of their own. This case is specially pertinent to the one under consideration. See also *Giozza v. Tiernan*, 148 U. S. 657, 37 L. Ed. 599, 13 Sup. Ct. 721; *Columbus Southern R. Co. v. Wright*, 151 U. S. 470, 38 L. Ed. 238, 14 Sup. Ct. 396; *Duncan v. Missouri*, 152 U. S. 377, 38 L. Ed. 485, 14 Sup. Ct. 570; *Western U. Teleg. Co. v. Indiana*, 165 U. S. 304, 41 L. Ed. 725, 17 Sup. Ct. 345; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. Ed. 683, 17 Sup. Ct. 305.

The Constitution of Louisiana classifies the refiners of sugar for the purpose of taxation into those who refine the products of their own plantations, and those who engage in a general refining business, and refine sugars purchased by themselves or put in their hands by others for that purpose, imposing a tax only upon the latter class. To entitle a party to the exemption it must appear (1) that he is a farmer or a planter; (2) that he grinds the cane as well as refines the sugar and molasses; (3) that he refines his own sugar and molasses, meaning thereby the product of his own plantation. Whether he may also refine the sugar of others may be open to question; although by its express terms the act does not apply to planters who granulate syrup for other planters during the rolling season. The discrimination is obviously intended as an encouragement to agriculture, and does not



deny to persons and corporations engaged in a general refining business the equal protection of the laws.

Judgment affirmed.<sup>1</sup>

[HARLAN, J., concurred in the result. WHITE, J., took no part in the decision.]

<sup>1</sup> Accord: *Williams v. Fears*, 179 U. S. 270, 21 Sup. Ct. 128, 45 L. Ed. 186 (1900) (tax only on those hiring laborers to work out of state); *Cook v. Marshall Co.*, 196 U. S. 261, 25 Sup. Ct. 233, 49 L. Ed. 471 (1905) (cigarette dealers selling by wholesale to customers out of state exempted from tax); *Savannah, etc., Ry. v. Savannah*, 198 U. S. 392, 25 Sup. Ct. 690, 49 L. Ed. 1097 (1905) (street and steam railways in streets of same city taxed differently); *Metropolitan St. Ry. v. New York*, 199 U. S. 1, 25 Sup. Ct. 705, 50 L. Ed. 65, 4 Ann. Cas. 381 (1905) (surface and subsurface street railways taxed differently—semble); *Cox v. Texas*, 202 U. S. 446, 26 Sup. Ct. 671, 50 L. Ed. 1099 (1906) (tax discrimination in favor of domestic wine in hands of producer or manufacturer); *Bradley v. Richmond*, 227 U. S. 477, 33 Sup. Ct. 318, 57 L. Ed. — (1913) (lenders of money on salaries and furniture taxed differently from other lenders); *Citizens' Tel. Co. v. Fuller*, 229 U. S. 322, 328-330, 33 Sup. Ct. 833, 57 L. Ed. — (1913) (exempting from general ad valorem tax all property of telephone companies having less than \$500 annual gross receipts) (cases).

The greater latitude enjoyed by the legislature in classifying for taxation as compared with classification for regulative purposes appears from a comparison of the principal case with *Connolly v. Union Sewer Pipe Co.*, ante, p. 349 where an Illinois statute forbidding combinations in restraint of trade was held invalid for excepting from its operation farming and stock raising. See *Billings v. Illinois*, post, p. 635; *Cook v. Marshall Co.*, above; *Citizens' Tel. Co. v. Fuller*, above.

A tax is not invalid merely because like objects of taxation are constitutionally exempt under other rules of law. *Brown-Forman Co. v. Kentucky*, 217 U. S. 563, 30 Sup. Ct. 578, 54 L. Ed. 883 (1910). Compare *Dolley v. Abilene Bank*, 179 Fed. 461, 102 C. C. A. 607, 32 L. R. A. (N. S.) 1065 (1910), affirmed 228 U. S. 1, 33 Sup. Ct. 409, 57 L. Ed. — (1913).

In *Quong Wing v. Kirkendall*, 223 U. S. 59, 62-63, 32 Sup. Ct. 192, 193 (56 L. Ed. 350) (1912) a statute taxing hand laundries operated by men or where over two women were employed was upheld; Holmes, J., saying: "The case was argued upon the discrimination between the instrumentalities employed in the same business and that between men and women. One like the former was held bad in *Ke Yot Sang* (D. C.) 75 Fed. 983 (1896) and while the latter was spoken of by the supreme court of the state [39 Mont. 64, 101 Pac. 250 (1909)] as an exemption of one or two women, it is to be observed that in 1900 the census showed more women than men engaged in hand laundry work in that state. Nevertheless we agree with the supreme court of the state so far as these grounds are concerned. A state does not deny the equal protection of the laws merely by adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry. Like the United States, although with more restriction and in less degree, a state may carry out a policy, even a policy with which we might disagree. *McLean v. Arkansas*, 211 U. S. 539, 547, 53 L. Ed. 315, 319, 29 Sup. Ct. 206 (1909); *Armour Packing Co. v. Lacy*, 200 U. S. 226, 235, 50 L. Ed. 451, 456, 26 Sup. Ct. 292 (1906); *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 562, 46 L. Ed. 679, 690, 22 Sup. Ct. 431 (1902). It may make discriminations, if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary, as was illustrated in *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 92, 95, 45 L. Ed. 102, 103, 105, 21 Sup. Ct. 43 (1900); *Williams v. Fears*, 179 U. S. 270, 276, 45 L. Ed. 186, 189, 21 Sup. Ct. 128 (1900); *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 469, 45 L. Ed. 619, 627, 21 Sup. Ct. 423 (1901). It may favor or discourage the liquor traffic or trusts. The criminal law is a whole body of policy on which states may and do differ. If the state sees fit to encourage steam laundries and discourage hand laundries, that is its own

CALIFORNIA v. CENTRAL PACIFIC R. CO. (1888) 127 U. S. 1, 40-42, 8 Sup. Ct. 1073, 32 L. Ed. 150. Mr. Justice BRADLEY (discussing the taxation of corporate franchises):

"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 corpo-

affair. And if, again, it finds a ground of distinction in sex, that is not without precedent. It has been recognized with regard to hours of work. *Muller v. Oregon*, 208 U. S. 412, 52 L. Ed. 551, 28 Sup. Ct. 324, 13 A. & E. Ann. Cas. 957 (1908). It is recognized in the respective rights of husband and wife in land during life, in the inheritance after the death of the spouse. Often it is expressed in the time fixed for coming of age. If Montana deems it advisable to put a lighter burden upon women than upon men with regard to an employment that our people commonly regard as more appropriate for the former, the fourteenth amendment does not interfere by creating a fictitious equality where there is a real difference. The particular points at which that difference shall be emphasized by legislation are largely in the power of the state." [Lamar, J., gave a dissenting opinion.]

DISCRIMINATION IN ASSESSMENT OR COLLECTION OF TAXES.—An habitual or intentional discrimination in valuation or inclusion of property for assessment against certain persons or classes of persons deprives them of the equal protection of the laws, even though they are assessed as the law provides, and though the failure to do the same with favored classes is illegal. *Raymond v. Chicago Traction Co.*, 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757 (1907). But favoring a few individuals, not in pursuance of a general scheme, is not a constitutional ground of complaint for others. *Supervisors v. Stanley*, 105 U. S. 305, 26 L. Ed. 1044 (1881); *Coulter v. L. & N. Ry.*, 196 U. S. 599, 25 Sup. Ct. 342, 49 L. Ed. 615 (1905). Discrimination in assessment or collection of taxes however, against persons who might be separately classified for these purposes, is valid under the fourteenth amendment. *King v. Mullins*, 171 U. S. 404, 435-436, 18 Sup. Ct. 925, 43 L. Ed. 214 (1898); *Florida Cent., etc., Ry. v. Reynolds*, 183 U. S. 471, 22 Sup. Ct. 176, 46 L. Ed. 283 (1902); *Missouri v. Dockery*, 191 U. S. 165, 24 Sup. Ct. 53, 48 L. Ed. 133 (1903).

rate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely. \* \* \*

"The taxation of a corporate franchise, merely as such, unless pursuant to a stipulation in the original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no limitation but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be ten thousand or ten hundred thousand dollars, as the legislature may choose. Or, without any valuation of the franchise at all, the tax may be arbitrarily laid."

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### HORN SILVER MINING CO. v. NEW YORK.

(Supreme Court of United States, 1892. 143 U. S. 305, 12 Sup. Ct. 403, 36 L. Ed. 164.)

[Error to the Supreme Court of New York. The Horn Silver Mining Company was a Utah manufacturing corporation having a capital stock of \$10,000,000. It did business in New York, but most of its property and business were outside of that state. New York taxed all corporations of this class upon their "corporate franchise or business," measuring the tax by a certain percentage upon their entire capital stock. The company resisted New York's attempt to collect this tax, and a decision in favor of the state was affirmed by the Court of Appeals and remanded to the state Supreme Court for enforcement.]

Mr. Justice FIELD. \* \* \* A corporation being the mere creature of the legislature, its rights, privileges, and powers are dependent solely upon the terms of its charter. Its creation (except where the corporation is sole) is the investing of two or more persons with the capacity to act as a single individual, with a common name, and the privilege of succession in its members without dissolution, and with a limited individual liability. The right and privilege, or the franchise, as it may be termed, of being a corporation, is of great value to its members, and is considered as property separate and distinct from the property which the corporation itself may acquire. According to the law of most states, this franchise, or privilege of being a corporation is deemed personal property, and is subject to separate taxation. The right of the states to thus tax it has been recognized by this court and the state courts in instances without number. It was said in *Delaware Railroad Tax*, 18 Wall. 206, 231, 21 L. Ed. 888, that "the state may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed, and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion;"

except, we may add, as that discretion is controlled by the organic law of the state. And, as we there said also, "it is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state. Our only concern is with the validity of the tax. All else lies beyond the domain of our jurisdiction."

The granting of the rights and privileges which constitute the franchises of a corporation being a matter resting entirely within the control of the legislature, to be exercised in its good pleasure, it may be accompanied with any such conditions as the legislature may deem most suitable to the public interests and policy. It may impose as a condition of the grant, as well as also of its continued exercise, the payment of a specific sum to the state each year, or a portion of the profits or gross receipts of the corporation, and may prescribe such mode in which the sum shall be ascertained as may be deemed convenient and just. There is no constitutional inhibition against the legislature adopting any mode to arrive at the sum which it will exact as a condition of the creation of the corporation or of its continued existence. There can be therefore no possible objection to the validity of the tax prescribed by the statute of New York, so far as it relates to its own corporations. Nor can there be any greater objection to a similar tax upon a foreign corporation doing business by its permission within the state. As to a foreign corporation,—and all corporations in states other than the state of its creation are deemed to be foreign corporations,—it can claim a right to do business in another state, to any extent, only subject to the conditions imposed by its laws.

As said in *Paul v. Virginia*, 8 Wall. 168, 181, 19 L. Ed. 357, "the recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states,—a comity which is never extended where the existence of the corporation or the exercise of its powers is prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as, in their judgment, will best promote the public interest. The whole matter rests in their discretion."

This doctrine has been so frequently declared by this court that it must be deemed no longer a matter of discussion, if any question can ever be considered at rest.

Only two exceptions or qualifications have been attached to it in all the numerous adjudications in which the subject has been considered,

since the judgment of this court was announced more than a half century ago in *Bank v. Earle*, 13 Pet. 519. One of these qualifications is that the state cannot exclude from its limits a corporation engaged in interstate or foreign commerce, established by the decision in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 12, 24 L. Ed. 708. The other limitation on the power of the state is where the corporation is in the employ of the general government, —an obvious exception, first stated, we think, by the late Mr. Justice Bradley in *Stockton v. Railroad Co.*, 32 Fed. Rep. 9, 14. As that learned justice said: "If congress should employ a corporation of ship-builders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any state of the Union." And this court, in citing this passage, added, "without the permission and against the prohibition of the state." *Mining Co. v. Pennsylvania*, 125 U. S. 181, 186, 8 Sup. Ct. Rep. 737, 31 L. Ed. 650.

Having the absolute power of excluding the foreign corporation, the state may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient; and it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital. No individual member of the corporation, or the corporation itself, can call in question the validity of any exaction which the state may require for the grant of its privileges. It does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation. The counsel for the appellant objects that the statute of New York is to be treated as a tax law, and not as a license to the corporation for permission to do business in the state. Conceding such to be the case, we do not perceive how it in any respect affects the validity of the tax. However it may be regarded, it is the condition upon which a foreign corporation can do business in the state, and in doing such business it puts itself under the law of the state, however that may be characterized. \* \* \*

It is true, the greater part of the business of the company was done out of the state, and the greater part of its capital was also without it, but the statute of New York does not require that the whole business of a foreign corporation shall be done within the state in order to subject it to the taxing power of the state. It makes, in that respect, no difference between home corporations and foreign corporations, as to the franchise or business of the corporation upon which the tax is levied, provided it does business within the state, as such corporation.

There seems to be a hardship in estimating the amount of the tax upon the corporation, for doing business within the state, according to the amount of its business or capital without the state. That is a matter, however, resting entirely in the control of the state, and not a matter of federal law, and with which, of course, this court can in no way interfere. \* \* \*



The extent of the tax is a matter purely of state regulation, and any interference with it is beyond the jurisdiction of this court. The objection that it operates as a direct interference with interstate commerce we do not think tenable. The tax is not levied upon articles imported, nor is there any impediment to their importation. The products of the mine can be brought into the state, and sold there without taxation, and they can be exhibited there for sale in any office or building obtained for that purpose; the tax is levied only upon the franchise or business of the company.

Judgment affirmed.<sup>1</sup>

[HARLAN, J., dissented.]

<sup>1</sup> Accord: *Home Insurance Co. v. New York*, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1025 (1889) (capital stock consisting of non-taxable United States bonds); *People ex rel. Parke, Davis & Co. v. Roberts*, 171 U. S. 658, 19 Sup. Ct. 58, 43 L. Ed. 323 (1898) (same of non-taxable imports); *People ex rel. U. S. Aluminum Co. v. Knight*, 174 N. Y. 475, 67 N. E. 65, 63 L. R. A. 87 (1903) (same of non-taxable patent rights); *Maine v. Grand Trunk Ry.*, post, p. 1115 (franchise tax measured in part by non-taxable receipts from interstate commerce)—but compare *Galveston, etc., Ry. v. Texas*, post, p. 1118; *Western Union Teleg. Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355 (1910), ante, p. 256, and post, p. 1122.

**METHODS OF TAXING CORPORATIONS.**—"It is well settled by the decisions of this court that the property of shareholders in their shares, and the property of the corporation in its capital stock, are distinct property interests, and, where that is the legislative intent clearly expressed, that both may be taxed. *Van Allen v. Assessors*, 3 Wall. 573, 18 L. Ed. 229; *In re Delaware R. Tax*, 18 Wall. 206, 21 L. Ed. 888; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558. In *Tennessee v. Whitworth*, 117 U. S. 129, 136, 6 Sup. Ct. 645, 647, 29 L. Ed. 830, the chief justice, delivering the opinion of the court, said: 'In corporations four elements of taxable value are sometimes found: (1) Franchises; (2) capital stock in the hands of the corporation; (3) corporate property; and (4) shares of the capital stock in the hands of the individual stockholders. Each of these is, under some circumstances, an appropriate subject of taxation; and it is no doubt within the power of a state, when not restrained by constitutional limitations, to assess taxes upon them in a way to subject the corporation or the stockholders to double taxation.'—*Matthews, J.*, in *New Orleans v. Houston*, 119 U. S. 265, 277, 278, 7 Sup. Ct. 198, 30 L. Ed. 411 (1886).

Of modes in which New York taxes corporations, its courts have said: "There is, first, an organization tax payable to the state, which is imposed but once, and is exacted for the privilege of becoming a corporation. *Tax Law, Laws 1896*, p. 855, c. 908, § 180. Next, there is a tax upon the real estate owned by the corporation in this state, which is assessed the same as if it were owned by an individual. *Id.* pp. 797, 802, c. 908, §§ 3, 11. The personal property of the corporation is not directly taxed, but its capital stock and surplus, after deducting the assessed value of its real estate, and making some other deductions, is assessed at its actual value. *Id.* p. 802, c. 908, § 12. Finally, there is a franchise tax on corporations which is payable annually to the state, 'computed upon the basis of the amount of its capital stock employed within this state.' *Id.* p. 856, c. 908, § 182. This is not a tax upon property, although it is measured by the value of property, but upon the right of a corporation to exist and exercise the powers granted by its charter. These forms of taxation do not all rest upon the same principle. The organization tax is in the nature of a license fee for the right to become a corporation. The tax upon real estate is a direct tax upon real property, and the tax upon capital stock is an indirect tax upon personal property, while the franchise tax is not laid upon property at all, but is imposed upon the corporation for the privilege of carrying on business in this state and exer-

## SOUTHERN RY. CO. v. GREENE.

(Supreme Court of United States, 1910. 216 U. S. 400, 30 Sup. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1217.)

[Error to the Supreme Court of Alabama. The Southern Railway Company was organized as a Virginia corporation in 1894, and in the same year, as required by the existing laws of Alabama, it filed in Alabama a copy of its charter, designated an agent to receive service of process, and paid a \$250 license fee for the privilege of doing business in the state. Thereafter it continued to do business in the state, and lawfully bought and operated there various lines of railroad and the franchises connected therewith, and spent large sums upon said rail-

cising the corporate franchises granted by the state. The distinction between a tax upon the property of a corporation and a franchise tax, although well established and of great importance, is easily overlooked, as we find from our own experience."—Vann, J., in *People ex rel. U. S. Alum., etc., Co. v. Knight*, 174 N. Y. 475, 478, 479, 67 N. E. 65, 63 L. R. A. 87 (1903).

"The general franchise of a corporation is its right to live and do business by the exercise of the corporate powers granted by the state. The general franchise of a street railroad company, for instance, is the special privilege conferred by the state upon a certain number of persons, known as the 'corporators,' to become a street railroad corporation, and to construct and operate a street railroad upon certain conditions. Such a franchise, however, gives the corporation no right to do anything in the public highways without special authority from the state, or some municipal officer or body acting under its authority. When a right of way over a public street is granted to such a corporation, with leave to construct and operate a street railroad thereon, the privilege is known as a 'special franchise,' or the right to do something in the public highway, which, except for the grant, would be a trespass. The statute, which is an amendment of the general tax law, declares, in substance, that the right, authority, or permission to construct, maintain, or operate some structure, intended for public use, 'in, under, above, on or through streets, highways or public places,' such as railroads, gas pipes, water mains, poles and wires for electric, telephone, and telegraph lines, and the like, is a special franchise. For the purpose of taxation, such a franchise is made real estate, and is 'deemed to include the value of the tangible property of a person, copartnership or corporation situated in, upon, under or above any street, highway, public place or public waters in connection with the special franchise and taxed as a part thereof.' Laws 1896, p. 796, c. 908, § 2, cl. 3. This includes nothing but what is in the street, directly or indirectly, and excludes power houses, depots, and all structures without the lines of the street. \* \* \* The Legislature found property scattered all over the state worth nearly two hundred millions of dollars, which was not taxed at all, and had never been taxed. This property consisted wholly of special franchises or privileges given by the state mainly to corporations furnishing to the public transportation, water, light, and other necessities or conveniences of daily life. It had grown rapidly in extent and value during recent years. Its value rested upon the right to use in some manner the public highways of the state; but it was intangible, and doubtless for this reason had never been brought under the taxing power \* \* \* The problem was to place a just and adequate value upon a right capable of valuation, but which was unseen, without form or substance, and, as it were, the mere breath of the Legislature."—Vann, J., in *People ex rel. Metropolitan St. Ry. v. Tax Com'rs*, 174 N. Y. 417, 436-438, 67 N. E. 69, 63 L. R. A. 884, 105 Am. St. Rep. 674 (1903).

The Michigan Supreme Court has said: "For the purpose of the discussion of the question before us, we will treat franchises as of three classes: First,

roads. Until 1907 it paid all ownership, license, and franchise taxes imposed upon it by the state in common with other persons and corporations engaged in a like business. By an act passed in 1907 Alabama required foreign corporations, with certain exceptions, to pay an annual franchise tax of a certain percentage upon the capital actually employed in the state. Foreign corporations were forbidden to do any business in the state, except interstate commerce, or to sue in the state upon contracts made therein, other than those based upon interstate commerce, unless they paid the tax within 60 days after it was due. On a capital of about \$15,000,000 employed in the state, the company's tax amounted to over \$22,000, which it paid under protest and sued to recover from the defendant collector for the state. The state courts denied a recovery and this writ of error was taken.]

the right to organize and exist as a corporation; second, the right to act generally as a corporation; and, third, the special privileges granted to it which are not possessed by the individual under general laws. \* \* \* The first of these is enjoyed by all corporations legally formed, and also by all assuming to be corporations through user. \* \* \* Again, franchises of the second class are incident to all corporations. \* \* \* Every corporation has by implication authority to acquire and dispose of property, and to carry on business as a private person would do, for the purpose for which the corporation is organized. \* \* \* The third class consists of exceptional privileges—usually, if not always, connected with property—which the citizens generally do not enjoy, and these are frequently of much value. To apply what has been said to the relator: Any number of street-railway companies might be organized under the statute, and they would have the right to exist as lawfully constituted corporations, with the corporate capacity to build and operate street railways anywhere in the state. But the right to build would have to be acquired. Until such a corporation should be able to obtain an easement in some highway,—which the statute does not, of itself, effectuate,—its privileges would be of little, if any, value. But when it should have acquired possession of an easement in a designated highway, for the purposes of a street railway, and constructed and put in operation a railway thereon, the easement and railroad would constitute property."—Hooker, J., in *Citizens' St. Ry. v. Common Council*, 125 Mich. 673, 678-680, 85 N. W. 96, 86 N. W. 809, 84 Am. St. Rep. 589 (1901).

In New Jersey: "The franchise that is taxed as property is the privilege enjoyed by a corporation of exercising certain powers derived from the state, whereas the franchise with which we have to do is the right to exist in corporate form, without reference to the powers that, under such form, the company may exercise. \* \* \* In this state we tax each of these so-called franchises. The former, as in the case of the right to own and operate a railroad, is taxed as property having a true value, which it is the duty of the state board to ascertain for the purposes of constitutional assessment. On the other hand, the naked right of existing in corporate form is taxed, as in the case before us, not at its true value, as it would have to be if it were property, but at a sum arbitrarily imposed by the legislature as an annual fee, the amount of which is to be computed by reference to the capital of the company as a criterion. It is, in short, a poll tax levied upon domestic corporations for the right to be. Such a tax is not upon property or assets, and does not in any way concern the nature of the business the company may be authorized to carry on."—Garrison, J., in *Lumberville Bridge Co. v. Assessors*, 55 N. J. Law, 529, 537, 26 Atl. 711, 25 L. R. A. 134 (1893).

See *Central Pac. Ry. v. California*, 162 U. S. 91, 16 Sup. Ct. 766, 40 L. Ed. 903 (1896); *Adams Exp. Co. v. Ohio*, ante, p. 531.

The general topics of taxation of corporate franchises and of corporate capital stock are elaborately treated in 57 L. R. A. 33 ff., note, and in 58 L. R. A. 513 ff., note.

Mr. Justice DAY. \* \* \* The important federal question for our determination in this case is: When a corporation of another state has come into the taxing state, in compliance with its laws, and has there in acquired property of a fixed and permanent nature, upon which it has paid all taxes levied by the state, is it liable to a new and additional franchise tax for the privilege of doing business within the state, which tax is not imposed upon domestic corporations doing business in the state of the same character as that in which the foreign corporation is itself engaged? \* \* \*

The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the state of Alabama within the meaning of the fourteenth amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, other persons in a like situation.

\* \* \* [After reviewing the facts:] We can have no doubt that a corporation thus situated is within the jurisdiction of the state. *Blake v. McClung*, 172 U. S. 239, 43 L. Ed. 432, 19 Sup. Ct. 165.

The argument on the part of the state of Alabama places much weight upon the cases in this court which have sustained the right of the state to exclude a foreign corporation from its borders, and to impose conditions upon the entry of such corporations into the state for the purpose of carrying on business therein. That line of cases has been so amply discussed in the opinions and concurring opinions in the cases of *Western U. Teleg. Co. v. Kansas* and *Pullman Co. v. Kansas*, decided at the present term (216 U. S. 1, 56, 54 L. Ed. 355, 30 Sup. Ct. 190, 232), that any extended discussion of them is superfluous now. It is sufficient for the present purpose to say that we are not dealing with a corporation seeking admission to the state of Alabama, nor with one which has a limited license, which it seeks to renew, to do business in that state; nor with one which has come into the state upon conditions which it has since violated. In the case at bar we have a corporation which has come into and is doing business within the state of Alabama, with the permission of the state, and under the sanction of its laws, and has established therein a business of a permanent character, requiring for its prosecution a large amount of fixed and permanent property, which the foreign corporation has acquired under the permission and sanction of the laws of the state. This feature of the case was dealt with by Mr. Justice Brewer, then a circuit judge, in the case of *Ames v. Union P. R. Co.*, 64 Fed. 165, 177, wherein he said: "It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. Railroads are not like stages or steamboats, which, if furnishing no profit at one place, and under one prescribed rate of transportation, can be taken elsewhere and put to use at other places and under other circumstances. The railroad must

stay, and, as a permanent investment, its value to its owners may not be destroyed. The protection of property implies the protection of its value."

Notwithstanding the ample discussion of the questions involved in the case of the *Western U. Teleg. Co. v. Kansas* and *Pullman Co. v. Kansas*, to which we have already referred, we deem it only fair to the learned counsel for the state of Alabama to notice some of the cases which it is insisted have disposed of the question herein involved, and maintained the right of the state to impose a tax upon a foreign corporation, lawfully within the state, for the privilege of doing business in the state, when no such tax, or one less burdensome, is imposed upon domestic corporations engaged in the same business. The first case referred to is *Ducat v. Chicago*, 10 Wall. 410, 19 L. Ed. 972, in which a tax was sustained upon a foreign insurance company which had come into the state upon complying with certain terms prescribed by the state, and was thereafter subjected to a tax on all their premiums, the statute declaring it unlawful in the companies otherwise to do business in the state. It is sufficient to say of that case that it arose before the fourteenth amendment had become part of the federal Constitution, and that no reference is made in the opinion of the court to the fourteenth amendment, although the case was decided after that amendment went into effect.

In *New York v. Roberts*, 171 U. S. 662, 43 L. Ed. 323, 19 Sup. Ct. 58, a tax was imposed upon the franchises or business of corporations, with certain exceptions, computed upon the amount of capital stock employed within the state. It was pointed out by Mr. Justice Shiras, who delivered the opinion of the court, that the tax was imposed as well for New York corporations as for those of other states, and he said: "So that it is apparent that there is no purpose disclosed in the statute either to distinguish between New York corporations and those of other states, to the detriment of the latter, or to subject property out of the state to taxation."

In *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. Ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. 403, the tax imposed was applicable alike to corporations doing business in New York, whether organized in that state or not; and in the course of the opinion in the case Mr. Justice Field, speaking for the court said: "It does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation."

In *Fire Ass'n of Philadelphia v. New York*, 119 U. S. 110, 30 L. Ed. 342, 7 Sup. Ct. 108, a Pennsylvania corporation which was taxed in the state of New York was subjected to a license fee, which license ran for a period of a year, and it was held that the state had the power to change the conditions of admission to the state, and to impose as a condition of doing business in the state, at any time or for the future, the payment of a new or further tax. Mr. Justice Blatchford, speaking for the court, said: "If it imposes such license fee as a prerequisite for



the future, the foreign corporation, until it pays such license fee, is not admitted within the state, or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given."

We have adverted to these cases with a view of showing that the precise point involved herein is not concluded by any of them. It would not be frank to say that there is not much said in the opinions in those cases which justifies the argument that the power of the state to exclude a foreign corporation, not engaged in interstate commerce, authorizes the imposition of special and peculiar taxation upon such corporations as a condition of doing business within the state. But none of the cases relied upon presents the question under the conditions obtaining in the case at bar. We have here a foreign corporation within a state, in compliance with the laws of the state, which has lawfully acquired a large amount of permanent and valuable property therein, and which is taxed by a discriminating method, not employed as to domestic corporations of the same kind, carrying on a precisely similar business.

As we have already indicated, the discussion of the question herein involved has largely been anticipated in the recent cases from Kansas, involving the right to tax the Western Union Telegraph Company and the Pullman Company. Those cases are the latest declaration of this court upon the subject, and in one aspect of them really involve the determination of the case at bar. In the Western U. Teleg. Case, it was held that a state could not impose a tax upon an interstate commerce corporation as a condition of its right to do domestic business within the state, which tax included within its scope the entire capital of the corporation, without as well as within the borders of the state. The Kansas tax was sought to be sustained as a legal exaction for the privilege of doing domestic business within the state. It was held invalid because it violated the right secured by the Constitution of the United States, giving to Congress the exclusive power to regulate interstate commerce, and because it violated the due-process clause of the federal Constitution in undertaking to make the payment of a tax upon property beyond the borders of the state a condition of doing domestic business within the state. In that case, the fourteenth amendment was directly applied in the due-process feature. In this case, we have an application of the same amendment, asserting the equal protection of the laws.

We therefore reach the conclusion that the corporation plaintiff, under the conditions which we have detailed, is, within the meaning of the fourteenth amendment, a person within the jurisdiction of the state of Alabama, and entitled to be protected against any statute of the state which deprives it of the equal protection of the laws.

It remains to consider the argument made on behalf of the state of Alabama, that the statute is justified as an exercise of the right of classification of the subjects of taxation, which has been held to be entirely consistent with the equal protection of the laws guaranteed by

the fourteenth amendment. It is argued that the imposition of special taxes upon foreign corporations for the privilege of doing business within the state is sufficient to justify such different taxation, because the tax imposed is different, in that the one imposed on the domestic corporation is for the privilege of being a corporation, whereas the one on the foreign corporation is for the privilege of such corporation to do business within the state. While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 155, 165, 41 L. Ed. 666, 668, 671, 17 Sup. Ct. 255; *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*) 183 U. S. 79, 46 L. Ed. 92, 22 Sup. Ct. 30; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 559, 46 L. Ed. 679, 689, 22 Sup. Ct. 431.

It is averred in the complaint, and must be taken as admitted, that there are other corporations of a domestic character in Alabama, carrying on the railroad business in precisely the same way as the plaintiff. It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the state, and the other for the right to be a corporation. The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the state, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars. We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the fourteenth amendment, that such attempted taxation under a statute of the state does violence to the federal Constitution.

Judgment reversed.

[FULLER, C. J., and McKENNA and HOLMES, JJ., dissented. The grounds of their dissent are stated in *Western Union Tel. Co. v. Kansas*, ante, pp. 258-261, and *Pullman Co. v. Kansas*, 216 U. S. 56, 75-77, 30 Sup. Ct. 190, 54 L. Ed. 355 (1910)].

## MAGOUN v. ILLINOIS TRUST &amp; SAVINGS BANK.

(Supreme Court of United States, 1898. 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037.)

[Appeal from United States Circuit Court for Northern District of Illinois. An Illinois statute of 1895 provided for a tax upon all property passing by will or by the intestate laws of the state from any resident decedent, or from any nonresident decedent if the property was within the state. If the property passed to lineal descendants, the tax was 1 per cent. upon any excess above \$20,000; if to collateral heirs, the tax was 2 per cent. upon the excess above \$2,000; and if to other persons, the tax was graded as stated in the opinion below.<sup>1</sup> Magoun was devisee of land in Illinois subject by the above statute to a lien for a tax of over \$5,000, and he filed a bill in equity in the above-named court to enjoin the payment of the tax by the executor, the trust company, or its collection by the Cook county treasurer, and to remove the cloud on the title of the land devised caused by the alleged lien. The court dismissed the bill, and this appeal was taken.]

Mr. Justice McKENNA. Legacy and inheritance taxes are not new in our laws. They have existed in Pennsylvania for over 60 years, and have been enacted in other states. They are not new in the laws of other countries. In *Tennessee v. Alston*, 94 Tenn. 674, 30 S. W. 750, 28 L. R. A. 178, Judge Wilkes gave a short history of them, as follows: "Such taxes were recognized by the Roman law. 1 Gibbon's *Decline and Fall of the Roman Empire*, pp. 163, 164. They were adopted in England in 1780, and have been much extended since that date. Dowell's *History of Taxation in England*, 148; Acts 20 Geo. III, c. 28, 45 Geo. III, c. 28, and 16 & 17 Vict. c. 51; *Green v. Craft*, 2 H. Bl. 30; *Hill v. Atkinson*, 2 Mer. 45. Such taxes are now in force generally in the countries of Europe. Review of Reviews, Feb., 1893. In the United States they were enacted in Pennsylvania in 1826; Maryland, 1844; Delaware, 1869; West Virginia, 1887, and still more recently in Connecticut, New Jersey, Ohio, Maine, Massachusetts, 1891; Tennessee in 1891 (chapter 25,—now repealed by chapter 174,—Acts 1893). They were adopted in North Carolina in 1846, but repealed in 1883; were enacted in Virginia in 1844, repealed in 1855, re-enacted in 1863, and repealed in 1884." Other states have also enacted them,—Minnesota, by constitutional provision.<sup>1</sup>

The constitutionality of the taxes has been declared, and the principles upon which they are based explained, in *U. S. v. Perkins*, 103 U. S. 625, 628, 16 Sup. Ct. 1073, 41 L. Ed. 287; *Strode v. Com.*, 52 Pa. 181; *Eyre v. Jacob*, 14 Grat. 422, 73 Am. Dec. 367; *Schofield v. Lynchburg*, 78 Va. 366; *Maryland v. Dalrymple*, 70 Md. 248, 17

<sup>1</sup> The various federal succession taxes (the earliest in 1797) are reviewed in *Knowlton v. Moore*, 178 U. S. 41, 50-53, 20 Sup. Ct. 747, 44 L. Ed. 969 (1900)

Atl. 82, 3 L. R. A. 372; *Clapp v. Mason*, 94 U. S. 589, 24 L. Ed. 212; *In re Merriam's Estate*, 141 N. Y. 479, 36 N. E. 505; *Maine v. Hamlin*, 86 Me. 495, 30 Atl. 76, 25 L. R. A. 632, 41 Am. St. Rep. 569; *Tennessee v. Alston*, 94 Tenn. 674, 30 S. W. 750, 28 L. R. A. 178; *In re Wilmerding's Estate*, 117 Cal. 281, 49 Pac. 181; *Dos P. Inh. Tax Law*, 20; *Minot v. Winthrop*, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259; *Gelsthorpe v. Furnell*, 20 Mont. 299, 51 Pac. 267, 39 L. R. A. 170. See, also, *Scholey v. Rew*, 23 Wall. 331, 23 L. Ed. 99.

It is not necessary to review these cases, or state at length the reasoning by which they are supported. They are based on two principles: (1) An inheritance tax is not one on property, but one on the succession;<sup>2</sup> (2) the right to take property by devise or descent is the creature of the law, and not a natural right,—a privilege,—and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation.

The second principle was given prominence in the arguments at bar. The appellee claimed that the power of the state could be exerted to the extent of making the state the heir to everybody, and the appellant asserted a natural right of children to inherit. Of the former proposition we are not required to express an opinion. Nor, indeed, of the latter, for appellant conceded that testamentary disposition and inheritance were subject to regulation. However, as pertinent to the subject, decisions of this court may be cited.

*In U. S. v. Fox*, 94 U. S. 315-321, 24 L. Ed. 192, a law of the state of New York confining devises to natural persons and corporations created under its laws was considered, and a devise of land to the United States was held void. The court said: \* \* \* "Statutes of wills, as is justly observed by the court of appeals, are enabling acts, and prior to the statute of 33 Hen. VIII there was no general power at common law to devise lands. The power was opposed to the feudal policy of holding lands inalienable without the consent of the lord. The English statute of wills became a part of the law of New York upon the adoption of her Constitution in 1777, and, with some modification in its language, remains so at this day. Every person must therefore devise his lands in that state within the limitations of the statute, or he cannot devise them at all. His power is bounded by its conditions." \* \* \* [Here follows a quotation from *Mager v.*

<sup>2</sup> A distinction should be observed between the right to *succeed* to property, measured by the amount of the separate legacies and devises, and the right to *transmit* property at death, measured by the total amount of the decedent's estate. Both of these rights may be taxed, and in English and federal practice (during the Civil War) both have been. See *Knowlton v. Moore*, 178 U. S. 41, 48-51, 20 Sup. Ct. 747, 44 L. Ed. 969 (1900). The prevailing American practice at present taxes only the right of succession.

Grima, 8 How. 493, 12 L. Ed. 1168, upholding a Louisiana tax of 10 per cent. on legacies to non-resident aliens.]

In *U. S. v. Perkins*, 163 U. S. 625-631, 16 Sup. Ct. 1073, 41 L. Ed. 287, the inheritance tax law of the state of New York was involved. Mr. Justice Brown, speaking for this court, said: "While the laws of all civilized states recognize in every citizen the absolute right to his own earnings, and the enjoyment of his own property, and the increase thereof, during his life, except so far as the state may require him to contribute his share for public expenses, the right to dispose of his property by will has always been considered purely a creature of statute, and within legislative control. 'By the common law, as it stood in the reign of Henry II, a man's goods were to be divided into three equal parts, of which one went to his heirs or lineal descendants, another to his wife, and a third was at his own disposal; or, if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so, e converso, if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but, if he died without either wife or issue, the whole was at his own disposal.' 2 Bl. Comm. 492. Prior to the statute of wills, enacted in the reign of Henry VIII, the right to a testamentary disposition of the property did not extend to real estate at all, and as to personal estate was limited as above stated. Although these restrictions have long since been abolished in England, and never existed in this country, except in Louisiana, the right of a widow to her dower, and to a share in the personal estate, is ordinarily secured to her by statute. By the Code of Napoleon, gifts of property, whether by acts inter vivos or by will, must not exceed one-half the estate if the testator leave but one child, one-third if he leaves two children, and one-fourth if he leaves three or more. If he have no children, but leaves ancestors, both in the paternal and maternal line, he may give away but one-half of his property, and but three-fourths if he have ancestors in but one line. By the law of Italy, one-half of a testator's property must be distributed equally among all his children. The other half he may leave to his eldest son, or to whomsoever he pleases. Similar restrictions upon the power of a disposition by will are found in the codes of other continental countries, as well as in the state of Louisiana. Though the general consent of the most enlightened nations has from the earliest period recognized a natural right in children to inherit the property of the parents, we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition, or imposing such conditions upon its exercise as it may deem conducive to public good."<sup>3</sup> \* \* \*

This brings us to the law in controversy. The appellant attacks

<sup>3</sup> There are many American dicta to the effect that the right to transmit or succeed to property at death is but a statutory right that might be wholly abrogated by the legislature. These are collected in 9 L. R. A. (N. S.) 121-123, note (1906). There is a vigorous argument to the contrary in *Nunnemacher v.*



both its principles and its provisions—its principles as necessarily arbitrary, and its provisions as causing discriminations and creating inequality in the burdens of taxation. \* \* \* [Here follows a general discussion of the problem of classification for taxation, the purport of which sufficiently appears in the extract from *Billings v. Illinois*, post, p. 635.] There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things. Bearing these considerations in mind, we can solve the questions in controversy.

There are three main classes in the Illinois statute; the first and second being based, respectively, on lineal and collateral relationship to the testator or intestate, and the third being composed of strangers to his blood, and distant relatives. The latter is again divided into four subclasses, dependent upon the amount of the estate received. The first two classes therefore depend on substantial differences; differences which may distinguish them from each other, and them or either of them from the other class; differences, therefore, which "bear a just and proper relation to the attempted classification,"—the rule expressed in *Railroad Co. v. Ellis* [ante, p. 334]. And, if the constituents of each class are affected alike, the rule of equality prescribed by the cases is satisfied. In other words, the law operates "equally and uniformly upon all persons in similar circumstances." \* \* \*

It is \* \* \* the estates which descend or are received which the [Illinois Supreme] Court decides are new property, and which are to pay a tax in proportion to their value. \* \* \* The reasoning of appellant is based on the view that the tax is one on property, instead of one on the succession, as held by the supreme court of the state. Being on the succession, the court further held, as we have seen, that the latter is to be regarded as new property, and the \$20,000 and other property not taxed are not, therefore, exemptions.

In this view, the Illinois court is in harmony with the majority of other courts of the country. We concur in the reasoning. It is true that the amount of the exemption is greater in the Illinois law than in any other, but the right to exempt cannot depend on that. Whether it shall be \$20,000, as in Illinois law, or \$10,000, as in that of Massachusetts, or other amounts as in other laws, must depend upon the judgment of the legislature of each state, and cannot be subject to judicial review. If such review could ascertain the factors of judgment, and could apply them with indisputable wisdom to the different conditions existing, it would be outside of its province to do so. That, manifestly, is a legislative, not a judicial, function. \* \* \*

*State*, 129 Wis. 190, 108 N. W. 627, 9 L. R. A. (N. S.) 121, 9 Ann. Cas. 711 (1906); and also see *Minot v. Winthrop*, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259 (1894).

The provisions of the statute in regard to the tax on legacies to strangers to the blood of an intestate need further comment. These provisions are as follows: "On each and every hundred dollars of the clear market value of all property and at the same rate for any less amount; on all estates of ten thousand dollars and less, three dollars; on all estates of over ten thousand dollars and not exceeding twenty thousand dollars, four dollars; on all estates over twenty thousand dollars and not exceeding fifty thousand dollars, five dollars, and on all estates over fifty thousand dollars, six dollars: provided, that an estate in the above case which may be valued at a less sum than five hundred dollars shall not be subject to any duty or tax."

There are four classes created, and manifestly there is equality between the members of each class. Inequality is only found by comparing the members of one class with those of another. It is illustrated by appellant as follows: One who receives a legacy of \$10,000 pays 3 per cent., or \$300, thus receiving \$9,700 net, while one receiving a legacy of \$10,001 pays 4 per cent. on the whole amount, or \$400.04, thus receiving \$9,600.96, or \$99.04 less than the one whose legacy was actually \$1 less valuable. This method is applied throughout the class.

These, however, are conceded to be extreme illustrations, and we think, therefore, that they furnish no test of the practical operation of the classification. When the legacies differ in substantial extent, if the rate increases, the benefit increases to greater degree.

If there is unsoundness, it must be in the classification. The members of each class are treated alike; that is to say, all who inherit \$10,000 are treated alike,—all who inherit any other sum are treated alike. There is equality, therefore, within the classes. If there is inequality, it must be because the members of a class are arbitrarily made such, and burdened as such, upon no distinctions justifying it. This is claimed. It is said that the tax is not in proportion to the amount, but varies with the amounts arbitrarily fixed, and hence that an inheritance of \$10,000 or less pays 3 per cent., and that one over \$10,000 pays, not 3 per cent. on \$10,000, and an increased percentage on the excess over \$10,000, but an increased percentage on the \$10,000 as well as on the excess; and it is said, as we have seen, that in consequence one who is given a legacy of \$10,001 by the deduction of the tax receives \$99.04 less than one who is given a legacy of \$10,000. But neither case can be said to be contrary to the rule of equality of the fourteenth amendment. That rule does not require, as we have seen, exact equality of taxation. It only requires that the law imposing it shall operate on all alike, under the same circumstances. The tax is not on money; it is on the right to inherit, and hence a condition of inheritance, and it may be graded according to the value of that inheritance. The condition is not arbitrary because it is determined by that value; it is not unequal in operation because it does not levy the same percentage on every dollar,—does not fail to treat "all

alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed." The jurisdiction of courts is fixed by amounts. The right of appeal is. As was said at bar, the congress of the United States has classified the right of suitors to come into the United States courts by amounts. Regarding these alone, there is the same inequality that is urged against classification of the Illinois law. All license laws and all specific taxes have in them an element of inequality. Nevertheless they are universally imposed, and their legality has never been questioned. We think the classification of the Illinois law was in the power of the legislature to make.

Decree affirmed.\*

\*The creation of future interest in property *inter vivos* is subject to legislative regulation and taxation upon the same principles as transfers upon death of the owner. *Keeney v. N. Y.*, 222 U. S. 525, 32 Sup. Ct. 105, 56 L. Ed. 299, 38 L. R. A. (N. S.) 1139 (1912). So the exercise of powers of appointment. *Chanler v. Kelsey*, 205 U. S. 466, 27 Sup. Ct. 550, 51 L. Ed. 882 (1907).

As to the construction of certain clauses in inheritance tax laws, see *Eidman v. Martinez*, 184 U. S. 578, 22 Sup. Ct. 515, 46 L. Ed. 697 (1902).

VALIDITY OF PROGRESSIVE TAXATION.—The validity of progressive inheritance taxation was reaffirmed in *Knowlton v. Moore*, 178 U. S. 41, 109, 110, 20 Sup. Ct. 747, 44 L. Ed. 969 (1900) (federal tax); *White, J.*, saying: "Taxes imposed with reference to the ability of the person upon whom the burden is placed to bear the same have been levied from the foundation of the government. So, also, some authoritative thinkers, and a number of economic writers, contend that a progressive tax is more just and equal than a proportional one. In the absence of constitutional limitation, the question whether it is or is not is legislative and not judicial."

Some states have held progressive inheritance taxes invalid under local constitutional provisions requiring uniformity of taxation. *State v. Ferris*, 53 Ohio St. 314, 41 N. E. 579, 30 L. R. A. 218 (1895); *State v. Gorman*, 40 Minn. 232, 41 N. W. 948, 2 L. R. A. 701 (1889); *State v. Switzler*, 143 Mo. 287, 45 S. W. 245, 40 L. R. A. 280, 65 Am. St. Rep. 653 (1898).

Whether the tax may be made progressive according to the total amount of the decedent's estate, instead of according to the amount of each legacy separately, is not settled. Such a tax has been held invalid in Wisconsin, *Black v. State*, 113 Wis. 205, 89 N. W. 522, 90 Am. St. Rep. 853 (1902); and has been assumed to be valid without consideration of the point in New York, *Matter of Costello*, 189 N. Y. 288, 82 N. E. 139 (1907) (citing earlier cases). The question has been left open by the federal Supreme Court. *Knowlton v. Moore*, 178 U. S. 41, 77, 20 Sup. Ct. 747, 44 L. Ed. 969 (1900).

Progressive income taxes were upheld in *State v. Frear*, 148 Wis. 456, 508, 509, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147 (1912), and in *Alderman v. Wells*, 85 S. C. 507, 67 S. E. 781, 27 L. R. A. (N. S.) 864, 21 Ann. Cas. 193 (1910). In *Clark v. Titusville*, 184 U. S. 329, 22 Sup. Ct. 382, 46 L. Ed. 569 (1902), a tax on sales, the rate *diminishing* as the total sales increased, was upheld.

CLASSIFICATIONS BASED UPON VARIOUS NUMERICAL DIFFERENCES.—The following have been upheld: *Osborne v. Florida*, 33 Fla. 162, 201 ff., 14 South. 588, 25 L. R. A. 120, 39 Am. St. Rep. 99 (1894), affirmed 164 U. S. 630, 17 Sup. Ct. 214, 41 L. Ed. 586 (1897) (amount of tax based on population of place of business); *Toyota v. Hawaii*, 226 U. S. 184, 33 Sup. Ct. 47, 57 L. Ed. — (1913) (same, on amount of business existing in a place); *Metrop. Theatre Co. v. Chicago*, 228 U. S. 61, 33 Sup. Ct. 441, 57 L. Ed. — (1913) (same, on theatre's price of admission); *Flint v. Stone Tracy Co.*, 220 U. S. 107, 165-167, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312 (1911) (federal tax on doing business in corporate form, measured by entire income whether from business or not) [see also *Ficklen v. Shelby Co. Dist.*, post, p. 1138, 12 Sup.

Mr. Justice BREWER, dissenting [as to the progressive feature of the tax]. \* \* \* It seems to be conceded that, if this were a tax upon property, such increase in the rate of taxation could not be sustained; but, being a tax upon the succession it is held that a different rule prevails. \* \* \* [He also denied that a state could confiscate or arbitrarily dispose of property upon its owner's death, and hence could impose absolute conditions upon the privilege of succession.]

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BILLINGS v. ILLINOIS (1903) 188 U. S. 97, 101-104, 23 Sup. Ct. 272, 47 L. Ed. 400, McKENNA, J. (upholding another section of the Illinois tax law considered in *Magoun v. Ill. Trust, etc., Bank, ante*, p. 629, which in substance provided for a succession tax upon life estates where the remainder over went to lineal heirs, but did not tax such estates where the remainder was to other persons):

"Turning to the *Magoun Case*, we find that the objection made to the statute was that it denied to the appellant the equal protection of the laws. \* \* \* We said it was established by cases that classification must be based on some reasonable ground. It could not be a 'mere arbitrary selection.' But what is the test of an arbitrary selection? It is difficult to exhibit it precisely in a general rule. Classification is essentially the same in law as it is in other departments of knowledge or practice. It is the grouping of things in speculation or practice because they 'agree with one another in certain particulars and differ from other things in those same particulars.' Things may have very diverse qualities, and yet be united in a class. They may have very similar qualities, and yet be cast in different classes. Cattle and horses may be considered in a class for some pur-

Ct. 810, 36 L. Ed. 601 (1892)]. In the *Flint Case*, Day, J., said (220 U. S. 165, 166, 31 Sup. Ct. 355, 55 L. Ed. 389, Ann. Cas. 1912B, 1312): "It is contended that measurement of the tax by the net income of the corporation or company received by it from all sources is not only unequal, but so arbitrary and baseless as to fall outside of the authority of the taxing power. But is this so? Conceding the power of Congress to tax the business activities of private corporations, including, as in this case, the privilege of carrying on business in a corporate capacity, the tax must be measured by some standard, and none can be chosen which will operate with absolute justice and equality upon all corporations. Some corporations do a large business upon a small amount of capital; others with a small business may have a large capital. A tax upon the amount of business done might operate as unequally as a measure of excise as it is alleged the measure of income from all sources does. Nor can it be justly said that investments have no real relation to the business transacted by a corporation. The possession of large assets is a business advantage of great value; it may give credit which will result in more economical business methods; it may give a standing which shall facilitate purchases; it may enable the corporation to enlarge the field of its activities and in many ways give it business standing and prestige."

A tax on stores engaged in more than one of several specified groups of businesses, with 15 or more employes, was held invalid in *State v. Ashbrook*, 154 Mo. 375, 55 S. W. 627, 48 L. R. A. 265, 77 Am. St. Rep. 765 (1900).

poses. Their differences are certainly pronounced. Salt and sugar may be associated in a grocer's stock for a grocer's purposes. To confound them in use would be very disappointing. Human beings are essentially alike, yet some individuals may have attributes or relations not possessed by others, which may constitute them a class. But their classification—indeed, all classification—must primarily depend upon purpose—the problem presented. Science will have one purpose, business another, and legislation still another. The latter, of course, on account of the restraints upon the legislature, may not be legal,—may not be within the power of the legislature. To dispute that power, however, is not the same thing as to dispute a classification, and yet that there may be dependence,—more freedom of classification in some instances,—has been indicated by the cases. A state cannot regulate interstate commerce, however accurate its classification of objects may be. On the other hand, the taxing power of a state is one of its most extensive powers. It cannot be exercised upon persons grouped according to their complexions. It can be exercised if they are grouped according to their occupations. A state may regulate or suppress combinations to restrict the sale of products. The power cannot be exerted to forbid combinations among those who buy products, and permit combinations among those who raise or grow products. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679, 22 Sup. Ct. 431. And yet, exercising its taxing power, it has been decided, that a state may make that discrimination. *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 45 L. Ed. 102, 21 Sup. Ct. 43. Other illustrations may be taken from the cases which tend to the same end. If the purpose is within the legal power of the legislature, and the classification made has relation to that purpose (excludes no persons or objects that are affected by the purpose, includes all that are), logically speaking, it will be appropriate; legally speaking, a law based upon it will have equality of operation. And, excluding our right to consider policies or assume legislation, we have many times said that a state in its purposes and in the execution of them must be allowed a wide range of discretion, and that this court will not make itself a harbor in which can be found 'a refuge from ill-advised, unequal, and oppressive' legislation. *Mobile County v. Kimball*, 102 U. S. 691, 26 L. Ed. 238. \* \* \*

"But it is insisted that the classification sustained in the *Magoun Case* related solely to the graduated feature of the tax.' In the case at bar, it is said, the question is 'whether or not the Illinois legislature can discriminate against *constituents of a certain class*, and apply different rules for the taxation of its members. Life tenants constitute but a single class, and the incidents of such an estate, the source thereof, the extent, the dominion over and quality of interest in the tenant, is the same irrespective of the ultimate vesting of the remainder. The tax is not upon the property, but is upon the person succeeding to the property.'



"Undoubtedly, life tenants, regarded simply as persons, may be in legal contemplation the same; estates for life, regarded simply as estates with their attributes also in legal contemplation, may be said to be the same, but that is not all that is to be considered, nor is it determinative. We must regard the power of the state over testate and intestate dispositions of property, its power to create and limit estates, and, as resulting, its power to impose conditions upon their transfer or devolution. It is upon this power that inheritance-tax laws are based, and we said, in the *Magoun Case*, that the power could be exercised by distinguishing between the lineal and collateral relatives of a testator. There the amount of tax depended upon him who immediately received; here the existence of the tax depends upon him who ultimately receives. That can make no difference with the power of the state. No discrimination being exercised in the creation of the class, equality is observed. Crossing the lines of the classes created by the statute, discriminations may be exhibited, but within the classes there is equality."<sup>1</sup>

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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 materially 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 na-

<sup>1</sup> Accord: *Campbell v. California*, 200 U. S. 87, 26 Sup. Ct. 182, 50 L. Ed. 382 (1906) (relatives by marriage preferred to relatives by blood); *Beers v. Glynn*, 211 U. S. 477, 29 Sup. Ct. 186, 53 L. Ed. 290 (1909) (inheritance tax on personalty of non-resident decedent collectible only when decedent also left realty in state).

ture 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 tax-payer without due process of law. \* \* \*

Judgment affirmed.<sup>1</sup>

### SPENCER v. MERCHANT.

(Supreme Court of United States, 1888. 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763.)

[Error to the Supreme Court of New York. Upon an agreed statement of facts between the parties, the question was whether a certain unpaid assessment constituted a valid lien upon land Spencer had agreed to sell to Merchant with a covenant against all incumbrances. The facts regarding the assessment appear in the opinion below. The state Supreme Court upheld the assessment, and its judgment was affirmed and the case remitted to it by the New York Court of Appeals.]

Mr. Justice GRAY. The leading facts of this case are as follows: The original assessment of the expenses of regulating, grading, and preparing the street for travel was laid by commissioners, as directed by section 4 of the statute of 1869, upon all the lands lying within

<sup>1</sup> And so, *Forsyth v. Hammond*, 166 U. S. 506, 518, 17 Sup. Ct. 665, 41 L. Ed. 1095 (1907), by Brewer, J.: "It is for the state to determine its political subdivisions, the number and size of its municipal corporations, and their territorial extent. These are matters of a local nature, in which the nation, as a whole, is not interested, and in which, by the very nature of things, the determination of the state authorities should be accepted as authoritative and controlling."

A few states deny that the legislature can impose city taxes upon agricultural land not really needed for city purposes and not divided into city lots. *Fulton v. Davenport*, 17 Iowa, 404 (1864); *Bradshaw v. Omaha*, 1 Neb. 16. This was formerly the rule in Kentucky, also, but has been changed by the Constitution of 1891. *Board of Councilmen v. Scott*, 101 Ky. 615, 42 S. W. 104 (1897).

The federal Constitution does not prohibit territory outside of a municipal corporation being subjected to its jurisdiction for purposes of taxation, irrespective of benefits therefrom, *Thomas v. Gay*, 169 U. S. 264, 18 Sup. Ct. 340, 42 L. Ed. 740 (1898); although some state or territorial courts have taken a different view, under their local organic laws, *Wells v. Weston*, 22 Mo. 384, 66 Am. Dec. 627 (1856); *Farris v. Vannier*, 6 Dak. 186, 42 N. W. 31, 3 L. R. A. 713 (1889).

CONTROL OF LOCAL TAXATION.—The federal Constitution secures no rights of local self-government to municipalities, which may accordingly be compelled by their legislatures to submit to taxation or the imposition of other pecuniary obligations for public purposes. *New Orleans v. Clark*, 95 U. S. 644, 24 L. Ed. 521 (1877) (validation of void bonds); *Guthrie Nat. Bk. v. Guthrie*, 173 U. S. 528, 19 Sup. Ct. 513, 43 L. Ed. 796 (1899) (discharge of moral obligation); *Williams v. Eggleston*, 170 U. S. 304, 18 Sup. Ct. 617, 42 L. Ed. 1047 (1898) (taking bridge by eminent domain). So also in fields other than taxation. *Worcester v. Street Ry.*, 196 U. S. 539, 25 Sup. Ct. 327, 49 L. Ed. 591 (1905) (altering contracts of city); *Atkin v. Kansas*, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. Ed. 148 (1903) (compulsory eight-hour day on municipal contracts). See, on the general topic, *Opinion of Justices*, ante, p. 123, note.

300 feet on either side of the street, and which, in the judgment of the commissioners, would be benefited by the improvement. After the sums so assessed upon some lots had been paid, the court of appeals of the state declared that assessment void, because the statute (although it made ample provision for notice of and hearing upon the previous assessment for laying out the street under section 3) provided no means by which the landowners might have any notice or opportunity to be heard in regard to the assessment for regulating, grading, and preparing the street for travel under section 4. *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289. The lots, the sums assessed upon which had not been paid, were isolated parcels, not contiguous, and some of them not fronting upon the street. By the statute of 1881, a sum equal to so much of the original assessment as remained unpaid, adding a proportional part of the expenses of making that assessment, and interest since, was ordered by the legislature to be levied and equitably apportioned by the supervisors of the county upon and among these lots, after public notice to all parties interested to appear and be heard upon the question of such apportionment; and that sum was levied and assessed accordingly upon these lots, one of which was owned by the plaintiff. The question submitted to the supreme court of the state was whether this assessment on the plaintiff's lot was valid. \* \* \*

The substance of the former decisions, and the grounds of the judgment sought to be reviewed, can hardly be more compactly or forcibly stated than they have been by Judge Finch in delivering the opinion of the court of appeals, as follows: "The act of 1881 determines absolutely and conclusively the amount of tax to be raised, and the property to be assessed, and upon which it is to be apportioned. Each of these things was within the power of the legislature, whose action cannot be reviewed in the courts upon the ground that it acted unjustly, or without appropriate and adequate reason. *Litchfield v. Vernon*, 41 N. Y. 123, 131; *People v. Brooklyn*, 4 N. Y. 427, 55 Am. Dec. 266; *People v. Flagg*, 46 N. Y. 405; *Horn v. New Lots*, 83 N. Y. 100, 38 Am. Rep. 402; *Cooley, Tax'n*, 450. The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but is not bound to do so, and may settle both questions for itself; and when it does so, its action is necessarily conclusive, and beyond review. Here an improvement has been ordered and made, the expense of which might justly have been imposed upon adjacent property benefited by the change. By the act of 1881, the legislature imposes the unpaid portion of the cost and expense, with the interest thereon, upon that portion of the property benefited which has thus far borne none of the burden. In so doing, it necessarily determines two things, viz., the amount to be realized, and the property specially benefited by the expenditure of that amount. The lands might have been benefited by



the improvement; and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review. The question of special benefit, and the property to which it extends, is of necessity a question of fact; and, when the legislature determines it in a case within its general power, its decision must, of course, be final.

"We can see in the determination reached possible sources of error, and perhaps even of injustice; but we are not at liberty to say that the tax on the property covered by the law of 1881 was imposed without reference to special benefits. The legislature practically determined that the lands described in that act were peculiarly benefited by the improvement to a certain specified amount, which constituted a just proportion of the whole cost and expense; and, while it may be that the process by which the result was reached was not the best attainable, and some other might have been more accurate and just, we cannot for that reason question an enactment within the general legislative power. That power of taxation is unlimited, except that it must be exercised for public purposes. *Weismer v. Douglas*, 64 N. Y. 91, 21 Am. Rep. 586. Certainly if the acts of 1869 and 1870 had never been passed, but the improvement of Atlantic avenue had been ordered, the legislature might have imposed one part or proportion of the cost upon one designated district and the balance upon another. Practically just that was done in this case. In *re Van Antwerp*, 56 N. Y. 261, an assessment for a street improvement had been declared void by reason of failure to procure necessary consents of property owners. The legislature made a reassessment, imposing two-thirds of the expense upon a benefited district, and one-third upon the city at large. The act was held valid as a new assessment, and not an effort to validate a void one. These views furnish also an answer to the objection that the only hearing given to the land-owner relates to the apportionment of the fixed amount among the lots assessed, and none is given as to the aggregate to be collected. No hearing would open the discretion of the legislature, or be of any avail to review or change it. A hearing is given by the act as to the apportionment among the land-owners, which furnishes to them an opportunity to raise all pertinent and available questions, and dispute their liability, or its amount and extent.

"The precise wrong of which complaint is made appears to be that the land-owners now assessed never had opportunity to be heard as to the original apportionment, and find themselves now practically bound by it as between their lots and those of the owners who paid. But that objection becomes a criticism upon the action of the legislature, and the process by which it determined the amount to be raised and the property to be assessed. Unless by special permission, that is a hearing never granted in the process of taxation. The legislature determines expenditures and amounts to be raised for their payment. the whole discussion and all questions of prudence and propriety and

justice being confided to its jurisdiction. It may err, but the courts cannot review its discretion. In this case, it kept within its power when it fixed—First, the amount to be raised to discharge the improvement debt incurred by its direction; and, second, when it designated the lots and property which, in its judgment, by reason of special benefits, should bear the burden; and having the power, we cannot criticise the reasons or manner of its action. The land-owners were given a hearing, and so there was no constitutional objection in that respect. Nor was that hearing illusory. It opened to the land-owner an opportunity to assail the constitutional validity of the act under which alone an apportionment could be made, and that objection failing, it opened the only other possible questions of the mode and amounts of the apportionment itself. We think the act was constitutional." 100 N. Y. 587-589, 3 N. E. 684. The general principles upon which that judgment rests have been affirmed by the decisions of this court.

The power to tax belongs exclusively to the legislative branch of the government. *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. In the words of Chief Justice Chase, condensing what had been said long before by Chief Justice Marshall: "The judicial department cannot prescribe to the legislative department 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." *Bank v. Fenno*, 8 Wall. 533, 548, 19 L. Ed. 482; *McCulloch v. Maryland*, 4 Wheat. 316, 428, 4 L. Ed. 579; *Bank v. Billings*, 4 Pet. 514, 563, 7 L. Ed. 939. See, also, *Kirtland v. Hotchkiss*, 100 U. S. 491, 497, 25 L. Ed. 558. Whether the estimate of the value of land for the purpose of taxation exceeds its true value, this court on writ of error to a state court cannot inquire. *Kelly v. Pittsburgh*, 104 U. S. 78, 80, 26 L. Ed. 658. The legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading, or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion. *Willard v. Presbury*, 14 Wall. 676, 20 L. Ed. 719; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Mobile Co. v. Kimball*, 102 U. S. 691, 703, 704, 26 L. Ed. 238; *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569. If the legislature provides for notice to and hearing of each proprietor at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law. *McMillen v. Anderson*, 95 U. S. 37, 24 L. Ed. 335; *Davidson v. New Orleans*, and *Hagar v. Reclamation Dist.*, above cited. In *Davidson v. New Orleans* it was

held that if the work was one which the state had the authority to do, and to pay for by assessments on the property benefited, objections that the sum raised was exorbitant, and that part of the property assessed was not benefited, presented no question under the fourteenth amendment to the Constitution upon which this court could review the decision of the state court. 96 U. S. 100, 106, 24 L. Ed. 616.

In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the state, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either, like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax, and the class of lands which will receive the benefit, and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners. When the determination of the lands to be benefited is intrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited, and how much.<sup>1</sup> But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited.<sup>2</sup> In determining what lands are benefited by the improvement, the legislature may avail itself of such information as it deems sufficient, either through investigations by its committees, or by adopting as its own the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction. In section 4 of the statute of 1869, the assessment under which was held void in *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289, for want of any provision whatever for notice or hearing, the authority to determine what lands, lying within 300 feet on either side of the street, were actually benefited, was delegated to commissioners. But in the statute

<sup>1</sup> As to differences in this respect between legislative determinations and those of subordinate bodies, see *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 174, 175, 17 Sup. Ct. 56, 41 L. Ed. 369 (1896); *Parsons v. Dist. of Columbia*, 170 U. S. 45, 52, 18 Sup. Ct. 521, 42 L. Ed. 943 (1898); *Wight v. Davidson*, 181 U. S. 371, 384, 385, 21 Sup. Ct. 616, 45 L. Ed. 900 (1901). Compare *Commonwealth v. Sisson*, ante, p. 309, note.

<sup>2</sup> See *Matter of Van Antwerp*, 56 N. Y. 261 (1874), where a local assessment, invalid for failure to obtain certain consents, was reassessed directly by the legislature upon the same property for exactly two-thirds of the previous assessment upon each specific parcel.

of 1881 the legislature itself determined what lands were benefited and should be assessed. By this statute the legislature, in substance and effect, assumed that all the lands within the district defined in the statute of 1869 were benefited in a sum equal to the amount of the original assessment, the expense of levying it, and interest thereon; and determined that the lots upon which no part of that assessment had been paid, and which had therefore as yet borne no share of the burden, were benefited to the extent of a certain portion of this sum. That these lots as a whole had been benefited to this extent was conclusively settled by the legislature. The statute of 1881 afforded to the owners notice and hearing upon the question of the equitable apportionment among them of the sum directed to be levied upon all of them, and thus enabled them to contest the constitutionality of the statute; and that was all the notice and hearing to which they were entitled.

It is objected to the validity of the new assessment, that it included interest upon the unpaid part of the old assessment, and a proportionate part of the expense of levying that assessment. But, as to these items, the case does not substantially differ from what it would have been if a sum equal to the whole of the original assessment, including the expense of levying it, and adding the interest, had been ordered by the statute of 1881 to be levied upon all the lands within the district, allowing to each owner who had already paid his share of the original assessment a credit for the sum so paid by him, with interest from the time of payment.

Judgment affirmed.<sup>3</sup>

[MATTHEWS, J., gave a dissenting opinion, in which HARLAN, J., concurred.]

<sup>3</sup> Within the principle of the two preceding cases the legislature may of course create a municipal corporation solely or chiefly as a taxing district for some specific purpose or purposes. *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 174, 175, 17 Sup. Ct. 56, 41 L. Ed. 369 (1896) (irrigation district); *Williams v. Eggleston*, 170 U. S. 304, 18 Sup. Ct. 617, 42 L. Ed. 1047 (1898) (five towns combined into a bridge district). In the last case, Brewer, J., 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." 170 U. S. 311, 18 Sup. Ct. 619, 42 L. Ed. 1047.

"Unless there be some specific provisions in the state Constitution compelling other action, the state may treat its entire territory as composing but a single taxing district, and deal with all property as within the district and subject to taxation accordingly. There is no magic in county organization, no inherent necessity of dividing the state into small taxing districts."—Brewer, J., in *Mich. Cent. Ry. v. Powers*, 201 U. S. 245, 299, 26 Sup. Ct. 459, 465, 50 L. Ed. 744 (1906).

It is not a constitutional objection save in a very gross or unusual case that the public improvement, for the creation of which a taxing district has been established, will also largely benefit persons and property outside of the district. *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24 (1871) (railroad located chiefly outside of city building it); *Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238 (1880) (improvement of state harbor by one county where located);

PEOPLE *ex rel.* GRIFFIN *v.* MAYOR, ETC., OF BROOKLYN.

(Court of Appeals of New York, 1851. 4 N. Y. 419, 55 Am. Dec. 266.)

[Appeal from the Supreme Court of New York. Under the city charter of Brooklyn, Flushing avenue in that city was graded and paved at an expense of over \$20,000, which was assessed upon the lands benefited by the improvement in proportion to the amount of such benefit. Griffin and others caused the confirmation of the assessment to be removed on certiorari to the Supreme Court, where the assessment was annulled as unconstitutional. This appeal was then taken.]

RUGGLES, J. \* \* \* If there be any sound objection to the assessment as a tax, it must be an objection which applies to the principle on which the tax is apportioned; because the object for which the money was to be raised is, without dispute, one for which taxation by a different rule of apportionment would have been lawful. \* \* \* It must be conceded that the power of taxation and of apportioning taxation, or of assigning to each individual his share of the burden, is vested exclusively in the legislature, unless this power is limited or restrained by some constitutional provision. 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. The people have never ordained that taxation must be limited or regulated by any or either of the rules laid down by the Supreme Court in the case of *People v. Mayor of Brooklyn*, 6 Barb. 209, or in the case now under consideration. They have not ordained that taxation

*Gordon v. Cornes*, 47 N. Y. 608 (1872) (erection of state normal school by village where located). In the last case, it was admitted that it might be invalid. "for instance, if the general expenses of the government of the state, or of one of its municipal divisions, should be levied upon the property of an individual or set of individuals, or perhaps upon a particular district. Cases of this description might be imagined in which an act would fall within the express prohibitions of the Constitution. But to raise the constitutional question would require an extreme case, where no apportionment of the tax with reference to benefit should be attempted, and no discretion on the subject exercised, but one set of individuals or one district should be confessedly and arbitrarily required to pay for benefits conferred upon others who bore no proportion of the burden. No such question arises where a tax is imposed upon a particular locality to aid in a public purpose which the legislature may reasonably regard as a benefit to that locality as well as to the state at large."—47 N. Y. 612, by Rapallo, J.

A special assessment in part payment of a public improvement cannot be levied solely upon such parcels of land as may chance to have been partly taken for such improvement, even though limited to the amount of the benefit to the untaken remainders of such parcels. *Matter of New York*, 190 N. Y. 350, 83 N. E. 299, 16 L. R. A. (N. S.) 335, 13 Ann. Cas. 598 (1907).



shall be general, so as to embrace all persons or all taxable persons within the state, or within any district, or territorial division of the state; nor that it shall or shall not be numerically equal, as in the case of a capitation tax; nor that it must be in the ratio of the value of each man's land, or of his goods, or of both combined; nor that a tax "must be co-extensive with the district, or upon all the property in a district which has the character of and is known to the law as a local sovereignty." Nor have they ordained or forbidden that a tax shall be apportioned according to the benefit which each tax-payer is supposed to receive from the object on which the tax is expended. In all these particulars the power of taxation is unrestrained.

The application of any one of these rules or principles of apportionment, to all cases, would be manifestly oppressive and unjust. Either may be rightfully and wisely applied to the particular exigency to which it is best adapted.

Taxation is sometimes regulated by one of these principles, and sometimes by another; and very often it has been apportioned without reference to locality or to the tax-payer's ability to contribute, or to any proportion between the burden and the benefit. The excise laws, and taxes on carriages and watches, are among the many examples of this description of taxation. Some taxes affect classes of inhabitants only. All duties on imported goods are taxes on the class of consumers. The tax on one imported article falls on a large class of consumers, while the tax on another affects comparatively a few individuals. The duty on one article consumed by one class of inhabitants is twenty per cent of its value; while on another, consumed by a different class, it is forty per cent. The duty on one foreign commodity is laid for the purpose of revenue mainly, without reference to the ability of its consumers to pay; as in the case of the duty on salt. The duty on another is laid for the purpose of encouraging domestic manufactures of the same article; thus compelling the consumer to pay a higher price to one man than he could otherwise have bought the article for, from another. These discriminations may be impolitic, and in some cases unjust; but if the power of taxation upon importations had not been transferred by the people of this state to the federal government, there could have been no pretence for declaring them to be unconstitutional in state legislation.

A property tax for the general purposes of the government, either of the state at large or of a county, city, or other district, is regarded as a just and equitable tax. The reason is obvious. It apportions the burden according to the benefit more nearly than any other inflexible rule of general taxation. A rich man derives more benefit from taxation, in the protection and improvement of his property, than a poor man, and ought therefore to pay more. But the amount of each man's benefit in general taxation cannot be ascertained and estimated with any degree of certainty; and for that reason a property tax is adopted instead of an estimate of benefits. In local taxation, however, for

special purposes, the local benefits may in many cases be seen, traced, and estimated to a reasonable certainty. At least this has been supposed and assumed to be true by the legislature, whose duty it is to prescribe the rules on which taxation is to be apportioned; and whose determination of this matter, being within the scope of its lawful power, is conclusive.

In the case of *People v. Brooklyn*, before referred to, it was said that a tax to be valid must be apportioned "upon principles of just equality," and upon all the property in the same political district; and that this is a fundamental principle of free government, which, although not contained in the Constitution, limits and controls the power of the legislature. This is new and it seems to me to be dangerous doctrine. It clothes the judicial tribunals with the power of trying the validity of a tax by a test neither prescribed nor defined by the Constitution. If by this test we may condemn an assessment apportioned according to the relation between burden and benefit, we may with far better reason condemn a capitation tax on the ground that numerical equality is not just equality; or a general property tax, for a local object, because it compels one portion of the community to pay more than their just share for the benefit of another portion. All discriminations in the taxation of property, and all exemptions from taxation on grounds of public policy, would fall by the application of this test. If this doctrine prevails it places the power of the courts above that of the legislature in a matter affecting not only the vital interests, but the very existence of the government. It assumes that the apportionment of taxation is to be regulated by judicial and not by legislative discretion. It obstructs the exercise of powers which belong to, and are inherent in the legislative department, and restrains the action of that branch of the government in cases in which the Constitution has left it free to act. \* \* \*

But there never was any just foundation for saying that local taxation must necessarily be limited by or co-extensive with any previously established district. It is wrong that a few should be taxed for the benefit of the whole; and it is equally wrong that the whole should be taxed for the benefit of a few. No one town ought to be taxed exclusively for the payment of county expenses; and no county should be taxed for the expenses incurred for the benefit of a single town. The same principle of justice requires that where taxation for any local object benefits only a portion of a city or town, that portion only should bear the burden. There being no constitutional prohibition, the legislature may create a district for that special purpose, or they may tax a class of lands or persons benefited, to be designated by the public agents appointed for that purpose, without reference to town, county, or district lines. General taxation for such local objects is manifestly unjust. It burdens those who are not benefited, and benefits those who are not burdened. This injustice has led to the substitution of street assessments in place of general taxation; and it seems

impossible to deny that in the theory of their apportionment they are far more equitable than general taxation for the purpose they are designed for. \* \* \*

The difference between general taxation and special assessments for local objects requires that they should be distinguished by different names, although both derive their authority from the taxing power. They have always been so distinguished, and it is therefore evident that the word "tax" may be used in a contract, or in a statute, in a sense which would not include a street assessment, or any other local or special taxation within its meaning. Several cases are found in which it has been adjudged to have been so used. But in no case has it been adjudged that street assessments are not made by virtue of the legislative taxing power.<sup>1</sup> If there are expressions to the contrary, in some of the cases, it will be found that they are dicta inapplicable to the point decided; or if applicable, that they were unnecessary to the decision, and not well considered. \* \* \*

Judgment reversed.<sup>2</sup>

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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

<sup>1</sup> Accord: *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 176, 17 Sup. Ct. 56, 41 L. Ed. 369 (1896).

<sup>2</sup> It is usually held that general provisions in state Constitutions requiring equality and uniformity in taxation, or that all property be assessed for taxes, do not apply to local assessments, but only to general taxation. *Dorgan v. Boston*, 12 Allen (Mass.) 223 (1866); *Motz v. Detroit*, 18 Mich. 495 (1866); *Reeves v. Treasurer*, 8 Ohio St. 333 (1859). The same is held as to general tax exemptions. *Ill. Cent. R. R. v. Decatur*, 147 U. S. 190, 13 Sup. Ct. 293, 37 L. Ed. 132 (1893). In Tennessee and South Carolina, however, the Constitutions are interpreted to forbid all local assessments according to benefits. *Reelfoot Lake Dist. v. Dawson*, 97 Tenn. 151, 36 S. W. 1041, 34 L. R. A. 725 (1896); *Mauldin v. Greenville*, 42 S. C. 293, 20 S. E. 842, 27 L. R. A. 284, 46 Am. St. Rep. 723 (1895); *Id.*, 53 S. C. 285, 31 S. E. 252, 43 L. R. A. 101, 69 Am. St. Rep. 855 (1898).

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 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 po-



litical subdivision of the state,<sup>1</sup> 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

<sup>1</sup> The New Jersey courts have defined a political district, to whose boundaries a general tax may be confined, as a division of the state with its inhabitants, organized with the chief design of exercising governmental powers and to the electors of which to some extent is committed the power of local government. *State v. Englewood* 41 N. J. Law, 154 (1879). For an application of this, see *Allison v. Corker*, 67 N. J. Law, 596, 52 Atl. 362, 60 L. R. A. 564 (1902).

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 infringing 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.]<sup>2</sup>

<sup>2</sup> In *Bauman v. Ross*, 167 U. S. 548, 589, 590, 17 Sup. Ct. 966, 42 L. Ed. 270 (1897), a street opening case in the District of Columbia, where one-half the cost thereof was to be assessed on lands benefited (without restriction, however, to the amount of benefits), it was said by Gray, J.: "The legislature, in the exercise of the right of taxation, has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading, or the repair of a street, to be assessed upon the owners of lands benefited thereby. \* \* \* The class of lands to be assessed for the purpose may be either determined by the legislature itself, by defining a territorial district, or by other designation; or it may be left by the legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited. \* \* \* The rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area, or the market value of the lands, or in proportion to the benefits as estimated by commissioners." See, also, *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 176, 177, 17 Sup. Ct. 56, 41 L. Ed. 369 (1896).

In *Parsons v. Dist. of Columbia*, 170 U. S. 45, 52, 18 Sup. Ct. 521, 42 L. Ed. 943 (1898), it was said by Shiras, J.: "When by the act of August 11, 1891, congress enacted that thereafter assessments levied for laying water mains in the District of Columbia should be at the rate of \$1.25 per linear front foot against all lots or land abutting upon the street, road or alley in which a water main shall be laid, such act must be deemed conclusive alike of the question of the necessity of the work, and of the benefits as against abutting property. To open such questions for review by the courts on the petition of any or every property holder would create endless confusion. Where the legislature has submitted these questions for inquiry to a commission, or to

## CITY OF SEATTLE v. KELLEHER.

(Supreme Court of United States, 1901. 195 U. S. 351, 25 Sup. Ct. 44, 49 L. Ed. 232.)

[Appeal from the federal Circuit Court for Washington. Seattle, by city ordinance, directed a certain street to be extended, graded, and planked. At the time, 1890, planking was by the city charter to be paid for out of general taxes. The assessment levied on the abutting owners for the improvement was declared void. Later, Kelleher, a non-resident, bought part of the abutting land without notice of these proceedings. In 1893 a reassessment of the cost of the improvement upon lands benefited was authorized by the legislature, including the cost of the planking, and Kelleher's share amounted to over \$14,000, which was \$5,000 more than it would have been under the law in force when the work was done. The Circuit Court enjoined the enforcement of this assessment.]

Mr. Justice HOLMES. \* \* \* The principles of taxation are not those of contract. A special assessment may be levied upon an ex-

official persons to be appointed under municipal ordinances or regulations, the inquiry becomes in its nature, judicial in such a sense that the property owner is entitled to a hearing, or to notice or an opportunity to be heard."

In *French v. Barber Asphalt Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879 (1901), a city paving tax levied by the front foot, as in *Norwood v. Baker*, without inquiry as to benefits, was upheld; Harlan, White, and McKenna, JJ., dissenting. To the same effect is a series of cases in 181 U. S. 371-404, 21 Sup. Ct. 609, 616-624, 644, 645, 45 L. Ed. 900-925. See, also, *King v. Portland*, 184 U. S. 61, 22 Sup. Ct. 290, 46 L. Ed. 431 (1902); *Seattle v. Kelleher*, 195 U. S. 351, 25 Sup. Ct. 44, 49 L. Ed. 232 (1904); *L. & N. R. R. v. Barber Asphalt Co.*, 197 U. S. 430, 25 Sup. Ct. 466, 49 L. Ed. 819 (1905); and *Martin v. Dist. of Columbia*, 205 U. S. 135, 27 Sup. Ct. 440, 51 L. Ed. 743 (1907). In the last case, where the expense of widening alleys in any square was imposed upon land benefited in that square, Holmes, J., said (205 U. S. 138-140, 27 Sup. Ct. 441, 51 L. Ed. 743): "The law is not a legislative adjudication concerning a particular place and a particular plan, like the one before the court in *Wight v. Davidson*, 181 U. S. 371, 45 L. Ed. 900, 21 Sup. Ct. 616 (1901). It is a general prospective law. The charges in all cases are to be apportioned within the limited taxing district of a square, and therefore it well may happen, it is argued, that they exceed the benefit conferred, in some case of which Congress never thought and upon which it could not have passed. The present is said to be a flagrant instance of that sort. If this be true, perhaps the objection to the act would not be disposed of by the decision in *Louisville & N. R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430, 49 L. Ed. 819, 25 Sup. Ct. 466 (1905). That case dealt with the same objection, to be sure, in point of form, but a very different one in point of substance. The assessment in question there was an assessment for grading and paving, and it was pointed out that a legislature would be warranted in assuming that grading and paving streets in a good-sized city commonly would benefit adjoining land more than it would cost. The chance of the cost being greater than the benefit is slight, and the excess, if any, would be small. These and other considerations were thought to outweigh a merely logical or mathematical possibility on the other side, and to warrant sustaining an old and familiar method of taxation. It was emphasized that there should not be extracted from the very general language of the fourteenth amendment, a system of delusive exactness and merely logical form. But when the chance

ecuted consideration, that is to say, for a public work already done. *Bellows v. Weeks*, 41 Vt. 590, 599, 600; *Mills v. Charleton*, 29 Wis. 400, 413, 9 Am. Rep. 578; *Hall v. Street Com'rs*, 177 Mass. 434, 439, 59 N. E. 68. If this were not so it might be hard to justify reassessments. See *Norwood v. Baker*, 172 U. S. 269, 293, 43 L. Ed. 443, 452, 19 Sup. Ct. 187; *Williams v. Albany*, 122 U. S. 154, 30 L. Ed. 1088, 7 Sup. Ct. 1244. \* \* \* The same answer is sufficient if it be true that when the work was done the cost of planking could not be included in the special assessment. \* \* \* The charge of planking on the general taxes was not a contract with the landowners, and no more prevented a special assessment being authorized for it later than silence of the laws at the same time as to how it should be paid for would have. In either case the legislature could do as it thought best. Of course, it does not matter that this is called a reassessment. A reassessment may be a new assessment. Whatever the legislature could authorize if it were ordering an assessment for the first time it equally could authorize, notwithstanding a previous invalid attempt to assess. The previous attempt left the city free "to take such steps as

of the cost exceeding the benefit grows large, and the amount of the not improvable excess is great, it may not follow that the case last cited will be a precedent. Constitutional rights like others are matters of degree. To illustrate: Under the police power, in its strict sense, a certain limit might be set to the height of buildings without compensation; but to make that limit five feet would require compensation and a taking by eminent domain. So it well might be that a form of assessment that would be valid for paving would not be valid for the more serious expenses involved in the taking of land. Such a distinction was relied on in *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 344, 45 L. Ed. 879, 889, 21 Sup. Ct. 625 (1901), to reconcile the decision in that case with *Norwood v. Baker*, 172 U. S. 269, 43 L. Ed. 443, 19 Sup. Ct. 187 (1898). And yet it is evident that the act of Congress under consideration is very like earlier acts that have been sustained. That passed upon in *Wight v. Davidson*, it is true, dealt with a special tract, and so required the hypothesis of a legislative determination as to the amount of benefit conferred. But the real ground of the decision is shown by the citation (181 U. S. 378, 379, 45 L. Ed. 904, 21 Sup. Ct. 616 (1901)) of *Bauman v. Ross*, 167 U. S. 548, 42 L. Ed. 270, 17 Sup. Ct. 966 (1897), when the same principle was sustained in a general law. 167 U. S. 589, 590, 42 L. Ed. 288, 17 Sup. Ct. 966 (1897). It is true again that in *Bauman v. Ross* the land benefited was to be ascertained by the jury instead of being limited by the statute to a square; but it was none the less possible that the sum charged might exceed the gain. As only half the cost was charged in that case it may be that, on the practical distinction to which we have adverted in connection with *Louisville & N. R. Co. v. Barber Asphalt Paving Co.*, the danger of such an excess was so little that it might be neglected, but the decision was not put on that ground." [The statute was then construed to limit the assessment to actual benefits.]

In *Smith v. Worcester*, 182 Mass. 232, 234, 65 N. E. 40, 41, 59 L. R. A. 728 (1902), it was said by Holmes, C. J.: "Under the recent decisions it may be true that when the Legislature is passing a law of general future application, and when therefore it cannot be supposed to have compared the local benefit with the cost, the only mode in which it can be made certain, apart from the police power, that constitutional rights are preserved, is by limiting each assessment upon an estate to the benefit received by that estate. But when the Legislature has contemplated a certain region and may be supposed to have acted in view of a specific scheme, there is no doubt that within reason-



were within its power to take, either under existing statutes, or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property" in any constitutional way. *Norwood v. Baker*, 172 U. S. 269, 293, 43 L. Ed. 443, 452, 19 Sup. Ct. 187, 196; *McNamee v. Tacoma*, 24 Wash. 591, 64 Pac. 791; *Annie Wright Seminary v. Tacoma*, 23 Wash. 109, 62 Pac. 444.

We think it unnecessary to consider other questions on the part of the case that we have dealt with. We have said enough in our opinion to show that the enforcement of the assessment lien could not be prevented by the original owner. It is urged, however, that a different rule could be applied in favor of one who purchased the land under the circumstances stated above. But the attempt to liken taxation, whether general or special, to the enforcement of a vendor's lien, and thus to introduce the doctrine concerning bona fide purchasers for value, rests on a fallacy similar to that which we have mentioned above, which would deny the right to tax upon an executed consideration. A man cannot get rid of his liability to a tax by buying without

able limits it may determine that the cost of an improvement shall fall upon a designated district and may fix the principles upon which the cost shall be apportioned."

In *Wight v. Davidson*, 181 U. S. 371, 384, 21 Sup. Ct. 616, 45 L. Ed. 900 (1901), it was suggested, *obiter*, that perhaps the fifth amendment did not restrict Congress to the same extent in these matters as the fourteenth amendment did the states.

As to the power of the Legislature or its municipalities to group together in a single assessment distinguishable elements of an improvement or of a system of improvements extending over considerable territory, not every element of which benefits each parcel assessed, see *Sears v. Boston*, 180 Mass. 274, 62 N. E. 397, 62 L. R. A. 144 (1902); *Seattle v. Kelleher*, 195 U. S. 351, 25 Sup. Ct. 44, 49 L. Ed. 232 (1904).

**SIDEWALKS AND STREET CLEANING.**—Almost everywhere the cost of sidewalks may be assessed upon abutting land, without regard to benefits. *Agens v. Newark*, 37 N. J. Law, 415, 423, 18 Am. Rep. 729 (1874); *Van Tassel v. Jersey City*, 37 N. J. Law, 128 (1874) (but not cost of grading for walk, in New Jersey). *Contra*: *Mauldin v. City Council*, 53 S. C. 285, 31 S. E. 252, 43 L. R. A. 101, 69 Am. St. Rep. 855 (1898).

So, also, landowners may be required to keep their walks free of snow and ice at their own expense in most states. *In re Goddard*, 16 Pick. (Mass.) 504, 28 Am. Dec. 259 (1835); *Carthage v. Frederick*, 122 N. Y. 268, 25 N. E. 480, 10 L. R. A. 178, 19 Am. St. Rep. 490 (1890). *Contra*: *Chicago v. O'Brien*, 111 Ill. 532, 53 Am. Rep. 640 (1884).

Street sprinkling and sweeping have been sustained as valid objects for local assessments in some states, *Sears v. Boston*, 173 Mass. 71, 53 N. E. 128, 43 L. R. A. 834 (1899); *Reinken v. Fehring*, 130 Ind. 382, 30 N. E. 114, 15 L. R. A. 624, 30 Am. St. Rep. 247 (1891); and denied to be such in others, *Chicago v. Blair*, 149 Ill. 310, 36 N. E. 829, 24 L. R. A. 412 (1891); *N. Y. Life Ins. Co. v. Prest* (C. C.) 71 Fed. 815 (Mo., 1896). Their amounts, however, must be limited to benefits to the property taxed. *Sears v. Boston*, above.

**REQUIREMENT OF PERSONAL LABOR ON HIGHWAYS.**—This is treated as a personal duty similar in character to that of serving in the militia, and so is not governed by the rules of taxation. See *Toone v. State*, 59 South. 665, 42 L. R. A. (N. S.) 1015 (Ala., 1912); *In re Passler*, ante, p. 157, note. But the compulsory use of animals, wagons, or other property is not included in this duty. *Toone v. State*, above.

notice.<sup>1</sup> See *Tallman v. Janesville*, 17 Wis. 71, 76; *Cooley Tax'n*, (3d Ed.) 527, 528. Indeed, he cannot buy without notice, since the liability is one of the notorious incidents of social life. In this case the road was cut through the plaintiff's land, and, if he had looked, was visible upon the ground. Whether it had been paid for was for him to inquire. The history of what had happened would have suggested that it was not improbable that sooner or later a payment must be made.

Decree reversed.<sup>2</sup>

[HARLAN and BROWN, JJ., dissented.]

<sup>1</sup> Accord: *Citizens' Nat. Bank v. Kentucky*, 217 U. S. 443, 454, 30 Sup. Ct. 332, 54 L. Ed. 832 (1910) (invalidly assessed back taxes on bank stock for seven years reassessed against shares in hands of new purchaser).

<sup>2</sup> Accord: *Mattingly v. Dist. of Columbia*, 97 U. S. 687, 24 L. Ed. 1098 (1878) (ratification of wholly unauthorized assessment). Contra: *Bellevue v. Peacock*, 89 Ky. 495, 12 S. W. 1042, 25 Am. St. Rep. 552 (1890) (ratification of wholly unauthorized assessment); *Martin v. Oskaloosa*, 99 N. W. 557 (Iowa, 1904) (same); *Grand Rapids v. L. S., etc., Ry.*, 130 Mich. 238, 89 N. W. 932, 97 Am. St. Rep. 473 (1902) (same, creating personal liability).

In *First Nat. Bank v. Covington* (C. C.) 103 Fed. 523, 526-528 (1900), holding invalid a Kentucky statute interpreted as imposing retroactively for seven years past a new tax upon bank stock, Evans, J., said: "The court will not attempt to decide that there may not, in extreme cases, be a legitimate statutory enactment imposing a retroactive taxation for previous years upon a class of property not then subject to taxation at all. But it would at least be a rare case, and one which would come extremely near to taking property for public use without just compensation, and might be most dangerous and oppressive, as well as destructive of many other established principles of the law of taxation. If the power to do this exist at all, there is no limit to it; and it might illustrate the subject to consider the result if church property now exempt should, as it lawfully might, be made subject to taxation in the future, and not only so, but retroactively, for 10, or 20, or even 50 years back. Here would be a practical confiscation of such property for public use. Nor does the court mean to deny that where the law in fact imposes taxation upon property, which, however, is overlooked by the assessor, or otherwise omitted from the assessment, or some other step is taken which is faulty, the defects may not be cured by legislation. That curative legislation is admissible in such cases is a well-established doctrine of the courts, but there was in Kentucky no legislation—valid legislation—for taxing national bank shares as such before March 21, 1900; and the act of that date was not passed to validate defective steps taken to levy a lawful tax, but it is legislation which imposes an altogether new tax upon a new subject \* \* \* As the present holders of the complainant's shares may be very different persons from those who held them in previous years, [and] as the present holders may have purchased under the previously existing law, \* \* \* their rights and interests would be injuriously affected by large payments for retroactive taxation."

So, *Matter of Pell*, 171 N. Y. 48, 63 N. E. 789, 57 L. R. A. 540, 89 Am. St. Rep. 791 (1902) (retroactive inheritance tax). Compare *Income Tax Cases*, 148 Wis. 456, 514, 134 N. W. 673, 135 N. W. 164 (1912) (retroactive tax on income of prior six months, and on profits from sales of property bought during three years previous). Retroactive taxation is expressly forbidden by Const. N. C. art. 1, § 32 [*Young v. Henderson*, 76 N. C. 420 (1877)]; and by the general prohibition of retroactive laws in Texas, *State v. Galveston, etc., Ry.*, 100 Tex. 153, 175, 97 S. W. 71 (1906).

Merely irregularities in attempted general taxation, or omissions in enforcement, may be retroactively cured. *Florida, etc., Ry. v. Reynolds*, 183 U. S.

471, 22 Sup. Ct. 176, 46 L. Ed. 283 (1902); *Citizens' Nat. Bank v. Kentucky*, 217 U. S. 443, 30 Sup. Ct. 532, 54 L. Ed. 832 (1910).

**CONFISCATORY TAXATION.**—Though the dictum from *McCulloch v. Maryland*, 4 Wheat. 316, 431 (4 L. Ed. 579) (1819) that "the power to tax involves the power to destroy" has been frequently quoted by courts, it is probable that the due process clauses of our Constitutions forbid taxes so burdensome that their normal and practically inevitable result is prohibition of acts, businesses, or ownerships that could not be directly prohibited on other grounds. See the remarks of Vinje, J., in *Monroe v. Endeiman*, 150 Wis. 621, 625, 626, 138 N. W. 70 (1912) (holding invalid a municipal ordinance, passed under legislative authority to regulate and tax peddlers, which exacted \$25 a day as a license fee): "The ordinance in question must be held to be void on the ground that it is confiscatory. It requires no argument to demonstrate that it is so. A mere statement of the material facts is sufficient. The defendant carried a stock of merchandise of a value not exceeding \$3,000. He was offering this for sale at retail in a city containing 4,500 inhabitants. His daily sales averaged only \$88. His gross profits were 20 per cent. of his sales, and his daily expenses about \$7. The \$25 per diem fees would alone more than consume his gross profits. Tested in another way, it appears that, if he continued in business in Monroe for a year, he would pay in fees over \$7,500 on a stock of merchandise, the average value of which did not exceed \$3,000. Obviously such a tax would confiscate defendant's whole property long before the year expired. Similar ordinances have invariably been held to be confiscatory, and therefore void. *Carrollton v. Bazzette*, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522 (1896); *Ottumwa v. Zekind*, 95 Iowa, 622, 64 N. W. 646, 29 L. R. A. 734, 58 Am. St. Rep. 447 (1895); *Chaddock v. Day*, 75 Mich. 527, 42 N. W. 977, 4 L. R. A. 809, 13 Am. St. Rep. 468 (1889); *Brooks v. Mangin*, 86 Mich. 576, 49 N. W. 633, 24 Am. St. Rep. 137 (1891); *City of Peoria v. Gugenheim*, 61 Ill. App. 374 (1895); *Sipe v. Murphy*, 49 Ohio St. 536, 31 N. E. 884, 17 L. R. A. 184 (1892); *Ex parte Eaglesfield* (D. C.) 180 Fed. 558 (1910). It is true that cases may be found in which it has been held that a calling or business may be entirely prohibited by the imposition of such a tax or regulatory fee as is sufficient to prevent the business from being carried on with profit, but such cases relate to businesses or callings that are more or less injurious to society, and which, therefore, may be entirely suppressed by means of license fees or regulations. The business of the defendant was a lawful one, not injurious, but beneficial to society, and does not fall under the class just mentioned where prohibitory ordinances have been upheld."

Compare *McCray v. U. S.*, 195 U. S. 27, 62-64, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561 (1904), post, at pp. 962-963.

## CHAPTER XII

## EMINENT DOMAIN

## SECTION 1.—NATURE OF POWER

PEOPLE v. ADIRONDACK RAILWAY COMPANY (1899) 160 N. Y. 225, 236-238, 54 N. E. 689, VANN, J.:

"The power of taxation, the police power, and the power of eminent domain underlie the Constitution, and rest upon necessity, because there can be no effective government without them. They are not conferred by the Constitution, but exist because the state exists, and they are essential to its existence. They are not rights reserved, but rights inherent in the state as sovereign. While they may be limited and regulated by the Constitution, they exist independently of it, as a necessary attribute of sovereignty. They belong to the state because it is sovereign, and they are a necessity of government. The state cannot surrender them, because it cannot surrender a sovereign power. It cannot be a state without them. They are as enduring and indestructible as the state itself. Black, Const. Law, § 123; Cooley, Const. Lim. 524; Rand. Em. Dom. 77; Lewis, Em. Dom. § 3; Mills, Em. Dom. § 11. Each is a peculiar power, wholly independent of the others, and not one of them requires the intervention of a court for effective action by the state. In the case of eminent domain, when the state is not itself an actor, compensation for property taken, unless the amount is agreed upon, can be ascertained only through the aid of a court, but otherwise judicial action is unnecessary, except as provided by statute. State Const. art. 1, § 7.

"The power of eminent domain is the right of the state, as sovereign, to take private property for public use upon making just compensation. The state has all the power of eminent domain there is, and all that any sovereign has, subject to the limitations of the Constitution. Although exercised under our first Constitution, it is not mentioned therein, and it is now mentioned only for the purpose of limitation. The language of the revised Constitution is as follows: 'No person \* \* \* shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation;' and 'when private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the state, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law.' Const. art. 1, §§ 6, 7. This

language, which presupposes the existence of the power outside of the Constitution, simply regulates the right to use it. It does not confer the power, but, recognizing its existence, surrounds it with proper limitations. It prescribes no method of action, when the state acts for itself, but marks out certain boundaries, which may not be crossed, even by the state. Within those boundaries, the state, acting through that department which exerts the legislative power, may proceed at will, and the extent, method, and necessity of exercising the power to take private property for public use may not be interfered with by either of the other departments of government. *Garrison v. City of New York*, 21 Wall. 196, 22 L. Ed. 612. All private property, both tangible and intangible, is subject to the right, including that already devoted to a public use, although the latter, as matter of policy rather than of right, is protected and favored by the state to some extent. *People v. Kerr*, 27 N. Y. 188; *In re City of Buffalo*, 68 N. Y. 167. While the state may delegate the power to a subject for a public use, it cannot permanently part with it as to any property under its jurisdiction, but may resume it at will, subject to property rights and the duty of paying therefor. There is no limitation upon the exercise of the power except that the use must be public, compensation must be made, and due process of law observed. *Secombe v. Railroad Co.*, 23 Wall. 108, 23 L. Ed. 67; *In re Fowler*, 53 N. Y. 60, 62.”<sup>1</sup>

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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

<sup>1</sup> “No one doubts the existence in the state governments of the right of eminent domain,—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. *Vattel*, c. 20, § 34; *Bynk.*, lib. 2, c. 15; *Kent’s Com.* 338–340; *Cooley on Const. Lim.* 584 et seq. But it is no more necessary for the exercise of the powers of a state government than it is for the exercise of the conceded powers of the federal government. That government is as sovereign within its sphere as the states are within theirs. True, its sphere is limited. Certain subjects only are committed to it; but its power over those subjects is as full and complete as is the power of the states over the subjects to which their sovereignty extends. The power is not changed by its transfer to another holder.”—*Strong, J.*, in *Kohl v. U. S.*, 91 U. S. 377, 371, 372, 23 L. Ed. 449 (1876).



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 water-works 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 con-

tract 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.<sup>1</sup> \* \* \*

<sup>1</sup> Neither by express statute nor contract may a state or the United States irrevocably surrender any part of its powers of eminent domain, *Hyde Park v. Cemetery Ass'n*, 119 Ill. 111, 7 N. E. 627 (1886); *Matter of First Street*, 66 Mich. 42, 33 N. W. 15 (1887); *In re Twenty-Second Street*, 102 Pa. 108 (1883); *U. S. v. Cooper*, 20 D. C. 104, 117 (1891); nor may a private corporation exercising such powers delegated by the state, *Cornwall v. L. & N. R. R.*, 87 Ky. 72, 7 S. W. 553 (1888). But see *South Park Com'rs v. Ward & Co.*, 248 Ill. 299, 93 N. E. 910, 21 Ann. Cas. 127 (1911), holding, where land has been donated to the public and accepted upon condition that it forever

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.<sup>2</sup>

remain free of buildings for the benefit of abutting owners, that no legislative power exists to condemn this right of an abutting owner. See dissenting opinions, also.

<sup>2</sup> Accord: *Cincinnati v. L. & N. Ry.*, 223 U. S. 390, 32 Sup. Ct. 267, 56 L. Ed. 481 (1912).

EASTERN RAILROAD COMPANY v. BOSTON & M. R. R. (1872) 111 Mass. 125, 130, 131, 15 Am. Rep. 13, COLT, J. (upholding a Massachusetts statute authorizing one railroad company to take for a passenger station land occupied for railroad purposes by another railroad company):

"The authority of the Legislature to grant these privileges to the Eastern Railroad Company is denied on constitutional grounds. It is said that the land in question has already been appropriated to a public use under the provisions of law, and that, in the exercise of the right of eminent domain, the state cannot legally give to one railroad corporation power to take from another the exclusive use of land to be devoted to identically the same public use; that this would be to destroy vested rights and impair the contract contained in its charter. But it has been often declared by this court, that there is no such limitation on the authority of the Legislature. The power of the state to take private property for the public use reaches every description of property within its jurisdiction, even when acquired by grant from the state.<sup>1</sup> It is an inherent element of sovereignty; and from the necessity of the case, and the highest considerations of public welfare, it must continue unimpaired in the state. It is impliedly reserved in every grant. It cannot be abridged so as to bind future legislation. The franchise of a corporation is not exempt. As an incorporeal hereditament, it may be taken, in whole or in part, and with the other property of the corporation devoted to other or similar public uses. The purposes of government would be so far defeated, if any single owner, corporation or individual, could in this respect control its action. It belongs exclusively to the Legislature to determine whether the public benefit to be secured is sufficient to warrant the taking; and this is not a judicial question. The necessity may be left to the adjudication of designated officers or tribunals; but when not so delegated, it may be declared by the Legislature itself. The right itself may be delegated to corporate bodies, public or private; and when the enjoyment of two public rights would to some extent interfere, it is, in the language of Chief Justice Shaw, 'for the Legislature to determine which shall yield, and to what extent, and whether wholly or in part only, to the other; and such question will ordinarily be determined by the Legislature according to their conviction of the greater preponderance of public necessity and convenience.' *Commonwealth v. Essex Co.*, 13 Gray, 239, 247; *Boston Water Power Co. v. Boston & Worcester Railroad Co.*, 23 Pick. 360; *Boston & Lowell Railroad Co. v. Salem & Lowell Railroad Co.*, 2 Gray, 1;

<sup>1</sup> Accord: *Cincinnati v. L. & N. Ry.*, 223 U. S. 390, 400, 32 Sup. Ct. 267, 56 L. Ed. 481 (1912). For a possible qualification of this as respects the taking of money, under certain state Constitutions, see 2 Lewis, *Em. Dom.* (3d Ed.) § 413. Compare *Hammett v. Philadelphia*, 65 Pa. 146, 152, 153, 3 Am. Rep. 615 (1870); *Chry Library v. Bliss*, 151 Mass. 364, 378, 379, 25 N. E. 92, 7 L. R. A. 765 (1890).

Central Bridge Co. v. Lowell, 4 Gray, 474; Hingham & Quincy Bridge Co. v. County of Norfolk, 6 Allen, 353, 360; Haverhill Bridge v. County Commissioners, 103 Mass. 120, 4 Am. Rep. 518. See also New York, Housatonic & Northern Railroad Co. v. Boston, Hartford & Erie Railroad Co., 36 Conn. 196; White River Turnpike Co. v. Vermont Central Railroad Co., 21 Vt. 590; People v. Smith, 21 N. Y. 595, 598."\*

### CHICAGO, B. & Q. R. CO. v. CHICAGO.

(Supreme Court of United States, 1897. 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979.)

[Error to the Supreme Court of Illinois. A street was opened by the city of Chicago across the right of way of the Chicago, Burlington & Quincy Railroad Company, and in the proceeding to ascertain the damages consequent thereon the jury fixed \$1 as just compensation to the company for this use of its right of way. This judgment was affirmed by the state Supreme Court, and this writ of error taken.]

Mr. Justice HARLAN. \* \* \* It is proper now to inquire whether the due process of law enjoined by the fourteenth amendment requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a state.

In Davidson v. New Orleans [96 U. S. 97, 24 L. Ed. 616] it was said that a statute declaring in terms, without more, that the full and exclusive title to a described piece of land belonging to one person should be and is hereby vested in another person, would, if effectual, deprive the former of his property without due process of law, within the meaning of the fourteenth amendment.<sup>1</sup> See, also, Missouri Pac. Ry. Co. v. State, 164 U. S. 403, 417, 17 Sup. Ct. 130, 41 L. Ed. 489. Such an enactment would not receive judicial sanction in any country having a written Constitution distributing the powers of government among three co-ordinate departments, and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such Constitution. It would be treated, not as an exertion of legislative power, but as a sentence,—an act of spoliation. Due protection of the rights of property has been regarded as a vital principle of republican institutions. "Next in degree to the right of personal liberty,"

\* See St. Louis, etc., Ry. v. Hannibal Un. Dep. Co., 125 Mo. 82, 28 S. W. 483 (1894); Long Island W. S. Co. v. Brooklyn, 166 U. S. 685, 693, 694, 17 Sup. Ct. 718, 41 L. Ed. 1165 (1897); U. S. v. Gettysburg Elec. Ry., 160 U. S. 668, 685, 16 Sup. Ct. 427, 40 L. Ed. 576 (1896); Cary Library v. Bliss, 151 Mass. 364, 379, 380, 25 N. E. 92, 7 L. R. A. 765 (1890).

<sup>1</sup> In this case, Miller, J., said: "If private property be taken for public uses without just compensation, it must be remembered that, when the fourteenth amendment was adopted, the provision on that subject, in immediate juxtaposition in the fifth amendment with the one we are construing, was left out, and this was taken." 96 U. S. 105, 24 L. Ed. 616.



Mr. Broom, in his work on Constitutional Law, says, "is that of enjoying private property without undue interference or molestation." Page 228. The requirement that the property shall not be taken for public use without just compensation is but "an affirmation of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen." 2 Story, Const. § 1790; 1 Bl. Comm. 138, 139; Cooley, Const. Lim. \*559; People v. Platt, 17 Johns. (N. Y.) 195, 215, 8 Am. Dec. 382; Bradshaw v. Rogers, 20 Johns. (N. Y.) 103, 106; Petition of Mt. Washington Road Co., 35 N. H. 134, 142; Parham v. Justices of Inferior Court, 9 Ga. 341, 348; Ex parte Martin, 8 Eng. (Ark.) 199, 206, 58 Am. Dec. 321, et seq.; Johnston v. Rankin, 70 N. C. 550, 555.

But if, as this court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law, as enjoined by the fourteenth amendment,<sup>2</sup> it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the state to public use, and without compensation, of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation. Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice. Due process of law, as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation. \* \* \* [Here follow quotations from Fletcher v. Peck, 6 Cranch, 87, 135, 136, 3 L. Ed. 162, and from Loan Ass'n v. Topeka, ante, p. 582.]

<sup>2</sup> "The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the fourteenth article of amendment of the Constitution of the United States. Wilkinson v. Leland, 2 Pet. 627, 658, 7 L. Ed. 542 (1829); Murray v. Hoboken Co., 18 How. 272, 276, 15 L. Ed. 372 (1855); Loan Association v. Topeka, 20 Wall. 655, 22 L. Ed. 455 (1874); Davidson v. New Orleans, 96 U. S. 97, 102, 24 L. Ed. 616 (1877); Cole v. La Grange, 113 U. S. 1, 5 Sup. Ct. 416, 28 L. Ed. 896 (1881); Fallbrook Dist. v. Bradley, 164 U. S. 112, 158, 161, 17 Sup. Ct. 56, 41 L. Ed. 369 (1896); State v. Chicago, M. & St. P. Ry. Co., 36 Minn. 402, 31 N. W. 365 (1887)." — Gray, J., in Mo. Pac. Ry. v. Nebraska, 164 U. S. 403, 417, 17 Sup. Ct. 130, 41 L. Ed. 489 (1896).

In the early case of *Gardner v. Newburgh*, 2 Johns. Ch. 162, 7 Am. Dec. 526, there being no provision in the Constitution of the state of New York on the subject, Chancellor Kent said that it was a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice, that fair compensation be made to the owner of private property taken for public use. In *Sinnickson v. Johnson*, 17 N. J. Law, 129, 145, 34 Am. Dec. 184, it was held to be a settled principle of universal law, reaching back of all constitutional provisions, that the right to compensation was an incident to the exercise of the power of eminent domain; that the one was so inseparably connected with the other that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle; and that the legislature "can no more take private property for public use without just compensation than if this restraining principle were incorporated into, and made part of, its state Constitution."

These cases are referred to with approval in *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 178, 20 L. Ed. 557, and in *Monongahela Nav. Co. v. U. S.*, 148 U. S. 312, 325, 13 Sup. Ct. 622, 626, 37 L. Ed. 463, this court saying in the latter case: "And in this there is a natural equity which commends it to every one. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that, when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."

In *Searl v. School Dist.*, 133 U. S. 553, 562, 10 Sup. Ct. 374, 33 L. Ed. 740, and in *Sweet v. Rechel*, 159 U. S. 380, 398, 16 Sup. Ct. 43, 40 L. Ed. 188, the court said that it was a condition precedent to the exercise of the power of eminent domain that the statute make provision for reasonable compensation to the owner.

In *Scott v. Toledo*, 36 Fed. 385, 395, 396, 1 L. R. A. 688, the late Mr. Justice Jackson, while circuit judge, had occasion to consider this question. After full consideration that able judge said: "Whatever may have been the power of the states on this subject prior to the adoption of the fourteenth amendment to the Constitution, it seems clear that, since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the states cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the owner, and that any attempt so to do, whether done in pursuance of a constitutional provision or legislative enactment, whether done by the legislature itself or under delegated authority by one of the subordinate agencies of the state, and whether done directly, by taking the property of one person and vesting it in another or the public, or indirectly, through the forms of law, by appropriating the property and requir-

ing the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that 'due process of law' required by said amendment. The conclusion of the court on this question is that, since the adoption of the fourteenth amendment, compensation for private property taken for public uses constitutes an essential element in 'due process of law,' and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the federal Constitution." To the same effect are *Henderson v. Railway Co.*, 21 Fed. 359, and *Baker v. Village of Norwood*, 74 Fed. 997. \* \* \*

In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument. \* \* \* [A majority of the court, BREWER, J., dissenting, thought the compensation fixed not clearly unreasonable.]

Judgment affirmed.\*

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AMERICAN PRINT WORKS v. LAWRENCE (1851) 23 N. J. Law, 590, 615, 57 Am. Dec. 420. A New York statute authorized the mayor of a city to order the destruction of property necessary to stay a conflagration. Lawrence, mayor of New York City, ordered the destruction of property owned by the plaintiff, in order to stay the great fire of 1835, and was sued therefor. One of the questions in the case being whether his act was an exercise of the right of eminent domain, RANDOLPH, J., said:

"I think the destruction of the property in question does not come under the right of eminent domain, but under the right of necessity, of self-preservation. The right of eminent domain is a public right; it arises from the laws of society, and is vested in the state or its

\* The federal Constitution and all of the state Constitutions except those of Kansas, New Hampshire, and North Carolina, now contain express prohibitions against the taking of private property for public use without compensation. In Kansas, corporations are thus prohibited. Const. 1859, art. 12, § 4. These provisions are collected in 1 Lewis, *Eminent Domain* (3d Ed.) §§ 15-61. In the states mentioned the same result has been reached by holding, as in the principal case, that the "due process of law" clause covers the matter. *Buckwalter v. School Dist.*, 65 Kan. 603, 606, 607, 70 Pac. 605 (1902); *Opinion of Justices*, 66 N. H. 629, 33 Atl. 1076 (1891); *Staton v. Norfolk & Carolina R. R.*, 111 N. C. 278, 16 S. E. 181, 17 L. R. A. 838 (1892). Similar decisions were rendered under a number of earlier state Constitutions that contained no express prohibition. *Contra* (as to the opening of public roads): *State v. Dawson*, 3 Hill (S. C.) 100 (1836).

grantee, acting under the right and power of the state, and it is the right to take or destroy private property for the use or benefit of the state, or of those acting under and for it. The right of necessity arises under the law of nature; is older than the laws of society or society itself. It is the right of self-defence, of self-preservation, whether applied to persons or to property. It is a private right vested in every individual, and with which the rights of the state or state necessity has nothing to do. Of the right of eminent domain Constitutions take cognizance, and say that 'private property shall not be taken without just compensation,' because it is a public right belonging to the state; but of the right of necessity, Constitutions take no further notice than they do with any other private right, all being left under the regulation of the law and the legislature. A statute is passed to take the land or building or property of an individual for a fortification, a lighthouse, or a railroad: this comes under the right of eminent domain, and the Constitution steps in and requires payment. A right of self-defence, of self-preservation, without regard to the lives or property of others, exists by necessity in every individual placed in certain situations at sea or on land, in the country or in a city; and if the legislature think proper to pass a statute to regulate a portion of that right in a particular city, and instead of leaving its exercise to the blind action of all, make it the duty of certain officers to do the act, does this convert what was before a mere right of necessity in individuals into a public right of eminent domain? If it does, I am at an utter loss to understand the transmutation, and, notwithstanding opinions to the contrary, I do not believe that the statute of New York under consideration has any thing to do with the right of eminent domain, nor have I ascertained that in any particular it is unconstitutional."<sup>1</sup>

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#### ELDRIDGE v. TREZEVANT.

(Supreme Court of United States, 1896. 160 U. S. 452, 16 Sup. Ct. 345, 40 L. Ed. 490.)

[Appeal from the United States Circuit Court for the Western District of Louisiana. Acting under state authority and in virtue of the recommendations of the state board of engineers, Trezevant, a state contractor for the work, was proceeding to construct a large levee across Eldridge's plantation to protect a dangerous and caving river front. The latter's bill for an injunction was dismissed in the above-named court, and this appeal taken. Other facts appear in the opinion below.]

<sup>1</sup> See, also, the remarks of Carpenter, J., in the same case, 23 N. J. Law, at pages 604-607, 57 Am. Dec. 420 (1851); and of Green, C. J., on a prior hearing, 21 N. J. Law, at pages 256-260 (1847).

Mr. Justice SHIRAS. \* \* \* The plaintiff expressly admits, in his bill, that, although the Constitution of the state of Louisiana contains a provision that private property shall not be taken or damaged without adequate and just compensation being first paid, the laws of the state, as interpreted by the supreme court of the state, provide no remedy for cases of proceedings under the levee laws, and that the supreme court of the state has decided that such taking, damage, and destruction of property for the purpose of building a public levee is an exercise of the police power of the state, and *damnum absque injuria*, because the state has a right of servitude or easement over the lands on the shores of navigable rivers for the making and repairing of levees, roads, and other public works. But he contends that as he cannot sue the state for compensation, and as an action at law, if such would lie, would not furnish that just and adequate compensation first paid contemplated by the provision of the state Constitution, he has a right, as a citizen of another state, to invoke, in the Circuit Court of the United States, the protection of the fourteenth amendment of the Constitution of the United States, which provides 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 its laws. \* \* \*

It is important, however, to observe the ground upon which the state legislative and judicial authorities base their action. That ground is found in the doctrine existing in the territory of Louisiana before its purchase by the United States, and continuing to this time,—that lands abutting on the rivers and bayous are subject to a servitude in favor of the public, whereby such portions thereof as are necessary for the purpose of making and repairing public levees may be taken, in pursuance of law, without compensation. This doctrine is said to have been derived from the Code Napoléon. \* \* \*

But whether the servitude in question was derived from French or Spanish sources, or from local and natural causes, we need not inquire, because it is explicitly asserted in the Civil Code of Louisiana (article 665), in the following terms: "Servitudes imposed for the public or common utility relate to the space which is to be left for public use by the adjacent proprietors, on the shores of navigable rivers, and for the making and repairing of levees, roads, and other public or common works. All that relates to this kind of servitude is determined by laws or particular regulations."

In the case of *Zenor v. Parish of Concordia*, 7 La. Ann. 150, where the legislature had enacted that the police jury of a parish exposed to inundation should have plenary power to locate and construct levees, and where such police jury, in pursuance of these powers, had placed and built a levee on the lands of the complainant, greatly to his detriment, it was held that the enactment was valid, and that no liability for damages was caused by a bona fide proceeding under it. The court said: "In this state, so much exposed to ruinous inunda-



tions, the public have the undoubted right, on the shores of the Mississippi river, to the use of the space of ground necessary for the making and repairing of the public levees and roads. Civ. Code, art. 665. It was the condition of the ancient grants of land on the Mississippi river, and sufficient depth was always given to each tract to prevent the exercise of the public rights from proving ruinous to the individual. Speculations and other motives have, in later times, caused the division and sale of some tracts, and entries of others, with large fronts and little depth, in opposition to the general policy of the country. Thus, in the present case, the plaintiff has scarcely any depth, with a large front, in a deep bend, with a curving bank. The policy of the country and the laws of the land, made for the general safety, cannot yield to cases of individual hardship. Those who purchase and own the front on the Mississippi river gain all that is made by alluvion, and lose all that is carried away by abrasion. And those who choose to purchase tracts with little depth, in caving bends, expose themselves, knowingly, to total loss, and must suffer the consequences when they occur. They suffer *damnum absque injuria*."

In *Dubose v. Commissioners*, 11 La. Ann. 165, the plaintiff sued for damages occasioned to his land by the acts of the commissioners in changing the line of the public levee; but the court, citing the provisions of Civ. Code, art. 665, held that "the law concerning the expropriation of private property for public use does not apply to such lands upon the banks of navigable rivers as may be found necessary for levee purposes. The quantity of land to be taken for such purposes presents a question of policy or administration to be decided by the local authorities, whose decision should not be revised by this tribunal, except for the most cogent reasons, and where there has been manifest oppression or injustice." \* \* \*

The first contention of the plaintiff in error is that, as it is admitted that he owns the land in fee through title derived by patent from the United States, without reservation, whatever may have been the conditions of the ancient grants, no such condition attaches to his ownership, and the lands, although bordering on a navigable stream, are as much within the protection of the constitutional principle awarding compensation as other property. In other words, the claim is that the servitude under which are held lands whose titles are derived by grant from Spain or France, or from the state, does not attach to lands whose titles are derived from the United States.

Previous decisions of this court furnish a ready answer to this contention. \* \* \* [Here are discussed various cases holding that the public lands of the United States are subject to the riparian laws of the states in which they are situated.]

These decisions not only dispose of the proposition that lands situated within a state, but whose title is derived from the United States, are entitled to be exempted from local regulations admitted to be applicable to lands held by grant from the state, but also of the

other proposition that the provisions of the fourteenth amendment extend to and override public rights, existing in the form of servitudes or easements, held by the courts of a state to be valid under the Constitution and laws of such state. \* \* \*

Decree affirmed.<sup>1</sup>

[BREWER, J., dissented.]

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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?

I. 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

<sup>1</sup> Compare *Chicago, etc., Ry. v. Illinois*, post, p. 734 (public easement of drainage). See, also, *Campbell v. Race*, 7 Cush. (Mass.) 408, 54 Am. Dec. 728 (1851) (public right to deviate upon land adjoining highway, when latter impassable).

(for streets) shall be vested absolutely in the city of St. Paul in fee-simple." Mun. Code 1884, § 153 (Sp. Laws 1874, p. 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.<sup>1</sup> 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.

<sup>1</sup>The determination of these legislative questions may be delegated to municipalities, public officers, or private corporations which have the power of eminent domain, and may be decided by them without a hearing to owners of property affected. *People v. Smith*, 21 N. Y. 595 (1860); *Boston v. Talbot*, 206 Mass. 82, 90, 91 N. E. 1014 (1910).

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.<sup>2</sup>

<sup>2</sup> Within the same principle, the legislature, in the interest of economy, may provide for taking a fee in any property so damaged by a public improvement that compensation must be made therefor, even though it is intended to dispose of this later. *Boston v. Talbot*, 206 Mass. 82, 90, 91 N. E. 1014 (1910), *Knowlton, C. J.*, saying: "The legislature well might determine that a taking in fee might be necessary in certain cases, in reference to a reasonably economical management of the business in the public interest, even though the use of the fee would not be needed permanently, and might authorize a subsequent sale or leasing of any rights in the property that were no longer devoted to the public use."

See, also, *Dingley v. Boston*, post, p. 688, note (fee taken in low lands raised 18 feet at public expense to promote public health).

In some states the delegation of the power of eminent domain is subject to the implied condition of reasonable necessity for its use, and this is a judicial question. *Tracy v. Elizabethtown, etc., Ry.*, 80 Ky. 259, 265, 266 (1882). And commonly, as a matter of statutory construction, delegated powers of eminent domain are thus limited, both as to amount of land and interest to be taken, unless the contrary intention clearly appears. *Wintusimmett Co. v. Grueby*, 209 Mass. 1, 95 N. E. 293 (1911). Compare *Lynch v. Forbes*, 161 Mass. 302, 37 N. E. 437, 42 Am. St. Rep. 402 (1894); *Sweet v. Rachel*, 159 U. S. 380, 16 Sup. Ct. 43, 40 L. Ed. 188 (1895); *Matter of Union Ferry Co.*, 98 N. Y. 139 (1885); *Matter of City of New York*, 190 N. Y. 350, 357, 358, 83 N. E. 299, 16 L. R. A. (N. S.) 335 (1907).

Some Constitutions, as those of Maine and Vermont, expressly limit the exercise of the power to cases of necessity. Here the courts may have greater powers to determine this question. See *Stearns v. Barre*, 73 Vt. 281, 50 Atl. 1086, 58 L. R. A. 240, 87 Am. St. Rep. 721 (1900); *Const. Me.* (1819) art. 1, § 21; *Const. Vt.* (1793) c. 1, § 2. In Michigan the necessity must be left to a jury or commissioners, *Const. Mich.* (1850) art. 18, § 2; and to a jury in Wisconsin, when a municipality takes property, *Const. Wis.* (1848) art. 11, § 2.

## SECTION 2.—PUBLIC USE

PEOPLE v. SALEM (1870) 20 Mich. 452, 480-483, 4 Am. Rep. 400, COOLEY, J.:

"If we examine the subject critically, we shall find that the most important consideration in the case of eminent domain is the necessity of accomplishing some public good which is otherwise impracticable, and we shall also find that the law does not so much regard the means as the need. The power is much nearer akin to that of the public police than to that of taxation; it goes but a step further, and that step is in the same direction. Every man has an abstract right to the exclusive use of his own property for his own enjoyment in such manner as he shall choose; but if he should choose to create a nuisance upon it, or to do anything which would preclude a reasonable enjoyment of adjacent property, the law would interfere to impose restraints. He is said to own his private lot to the center of the earth, but he would not be allowed to excavate it indefinitely, lest his neighbor's lot should disappear in the excavation. The abstract right to make use of his own property in his own way is compelled to yield to the general comfort and protection of community, and to a proper regard to relative rights in others. The situation of his property may even be such that he is compelled to dispose of it, because the law will not suffer his regular business to be carried on upon it. A needful and lawful species of manufacture may so injuriously affect the health and comfort of the vicinity that it cannot be tolerated in a densely settled neighborhood; and therefore the owner of a lot in that neighborhood will not be allowed to engage in that manufacture upon it, even though it be his regular and legitimate business. The butcher, in the vicinity of whose premises a village has grown up, finds himself compelled to remove his business elsewhere, because his right to make use of his lot as a place for the slaughter of cattle has become inconsistent with the superior right of community to the enjoyment of pure air and the accompanying blessings and comforts. The owner of a lot within the fire limits of a city may be compelled to part with the property because he is unable to erect a brick or stone structure upon it, and the local regulations will not permit one of wood.

"Eminent domain only recognizes and enforces the superior right of the community against the selfishness of individuals in a similar way. Every branch of needful industry has a right to exist, and community has a right to demand that it be permitted to exist, and if for that purpose a peculiar locality already in possession of an individual is essential, the owner's right to undisturbed occupancy must yield to the superior interest of the people. A railroad cannot go around the



farm of every unwilling person, and the business of transporting persons and property for long distances by rail, which has been found so essential to the general enjoyment and welfare could never have existed if it were in the power of any unwilling person to stop the road at his boundary, or to demand unreasonable terms as a condition of passing him. The law interferes in these cases, and regulates the relative rights of the owner and of the community with as strict regard to justice and equity as the circumstances will permit. It does not deprive the owner of his property, but it compels him to dispose of so much of it as is essential on equitable terms. While, therefore, eminent domain establishes no industry, it so regulates the relative rights of all that no individual shall have it in his power to preclude its establishment.

"It is proper, however, to add the remark, that even where the necessity is conceded, I do not understand that the right of eminent domain can be exercised on behalf of private parties or corporations, unless the state in permitting it reserves to itself a right to supervise and control the use by such regulations as shall ensure to the public the benefit promised thereby, and as shall preclude the purpose which the public had in view in authorizing the appropriation being defeated by partiality or unreasonably selfish action on the part of those who only on the ground of public convenience and welfare have been suffered to make the appropriation.

"In the case of *Sadler v. Langham*, 34 Ala. 311, it was held by the Supreme Court of Alabama, that the right of eminent domain might be exercised on behalf of mills which ground grain for toll, and were compelled by law to render impartial service for all, when it could not be for other mills; and the distinction made is a very reasonable one. Except that the necessity is wanting, there would be the same justification for the condemnation of lands for stables for the public draymen of a city, as for a way for a railroad; the like power of regulating the use existing in each case, and the purpose in one being public in precisely the same sense as in the other."<sup>1</sup>

<sup>1</sup> Compare the same judge's conception of a public use for purposes of taxation, in the extract from the same case printed ante, p. 585. See, also, in the same opinion, 20 Mich. at pages 477, 478, 4 Am. Rep. 400.

CONSTITUTIONAL PROVISIONS.—In the present (1913) Constitutions of Alabama, Colorado, Missouri, Oklahoma, South Carolina, Washington, and Wyoming, the taking of private property for private uses is expressly forbidden, with certain exceptions relating to private ways, irrigation, drainage, mining, and milling. In a number of other Constitutions these purposes are declared to be "public uses." The ordinary provision simply forbids private property to be taken for public use without just compensation. For a suggested distinction in meaning between "public use" and "public purpose," see 1 Lewis, Em. Dom. (3d Ed.) §§ 1, 315. The courts commonly use the two phrases interchangeably.

## 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 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 property 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, in-

valid 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 the 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 agricul-



ture 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.<sup>1</sup>

<sup>1</sup> See *Boston & Roxbury Co. v. Newman*, 12 Pick. 467, 23 Am. Dec. 622 (1832); *Hazen v. Essex Co.*, 12 Cush. 475 (1853); *Lowell v. Boston*, ante, pp. 576-579; *Turner v. Nye*, 154 Mass. 579, 28 N. E. 1048, 11 L. R. A. 487 (1891); *Oils Co. v. Ludlow Mfg. Co.*, 186 Mass. 89, 70 N. E. 1000, 104 Am. St. Rep. 563 (1904), affirmed in 201 U. S. 140, 26 Sup. Ct. 353, 50 L. Ed. 696 (1906). The later Massachusetts cases place the decision in the principal case upon other grounds than that of eminent domain. See, also, *Head v. Amoskeag Co.*, ante, p. 525.

## OPINION OF THE JUSTICES.

(Supreme Judicial Court of Massachusetts, 1910. 204 Mass. 607, 91 N. E. 405, 27 L. R. A. [N. S.] 483.)

[Answer to a question of the Massachusetts House of Representatives, reciting the great need in Boston for broad and convenient thoroughfares for commercial purposes and of adequate sites thereon for large commercial buildings; that the commercial and industrial interests of the city and state suffered greatly from the lack thereof; that the city streets were so narrow and crooked, and the abutting land held in such small and irregularly shaped parcels, that only through the power of eminent domain could proper streets be laid out and the abutting estates concentrated in parcels of suitable size and shape for the needs of commerce as now carried on in the principal cities of the world; and asking whether the legislature could give the power to take such land as was reasonably necessary for these purposes, with a view to the resale or lease to private individuals for commercial purposes, under suitable agreements, of the parts abutting on said new streets when laid out.]

OPINION (of all the Justices): The question relates to the proposed laying out of a thoroughfare or street through a part of the city of Boston. The power of the city, by its officers, to lay out and construct a street or thoroughfare in any place within the city, or of any width or mode of construction, if it is found that the public necessity and convenience require it, is undoubted: Rev. Laws, c. 48, § 1; St. 1891, c. 323; St. 1902, c. 521; St. 1904, c. 443.

The question seems to relate particularly to the power of the Legislature to take and use land outside of the proposed thoroughfare, for purposes which have no direct relation to the construction or use of the street for travel. \* \* \* The question is whether such land can be taken with a view to the subsequent use of it by private individuals, under conveyances, leases or agreements which shall embody suitable contracts for the construction on the land of buildings adapted to use in domestic and foreign trade and commerce, and for the use, management and control of the lands and buildings in such manner as to secure and promote such trade and commerce. The proposed legislation to which the enquiry relates, necessarily would contemplate action by the city in the procurement, management and control of land along a street within the city, for no other purpose than to induce and promote a use of it by merchants or traders. It would contemplate a taking of private property in the exercise of the right of eminent domain, and an expenditure of money to pay for it and fit it for occupation.

It is a rule of law universally recognized in this country, that neither of these things can be done unless the taking or expenditure is for a public use. This has been stated so often, and the principles on which

it is founded have been considered so fully, that it is unnecessary to discuss it or to cite authorities. The only question about which there is a possibility of doubt is whether the proposed use of the land outside of the thoroughfare is a public use. It is plain that a use of the property to obtain the possible income or profit that might inure to the city from the ownership and control of it would not be a public use. The city cannot be authorized to take the property of a private owner for such a purpose, nor can the city tax its inhabitants to obtain money for such a use. It could as well tax them to raise money to carry on any other private business with a hope of gain. Such proceedings are entirely outside the functions of a state or of any subdivision of a state. \* \* \* [Here follows a quotation from *Lowell v. Boston*, ante, p. 573, and the citation of various cases from several states affirming a similar doctrine.]

Cases which have sustained statutes on the ground that the use for which the money was to be expended was public are clearly distinguishable from the considerations which are presented hypothetically by this question. An illustration is found in the many decisions holding that cities and towns may be permitted to aid in the construction of railroads. A railroad is a great highway for use by the public. Another illustration is furnished by the decisions that the establishment of irrigation districts under legislative authority, for the improvement of large areas of arid and worthless land is allowable. *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; *Talbot v. Hudson*, 16 Gray, 417, was treated by the court as governed by similar principles.

The decision in *Moore v. Sanford*, 151 Mass. 285, 24 N. E. 323, 7 L. R. A. 151,<sup>1</sup> rests upon the ground that the work done was in a true sense for the promotion of commerce, through its direct and close relation to the improvement of Boston Harbor, in making connections between the great highways used for interstate commerce and the numerous ships that are passing back and forth between Boston and foreign ports. All that was done was held to be fairly incidental to the main purpose of promoting commerce between the United States and distant countries. The improvement of harbors and the construction of public docks, wharves, and possibly of warehouses, to be used under governmental authority as a part of the facilities for the transportation of merchandise in commercial enterprises, and the

<sup>1</sup> The statute here authorized the taking of certain submerged lands, which were to be reclaimed for the improvement of Boston Harbor and resold for railroad and commercial purposes. Similar lands already owned by the state were made more salable by thus extending the scope of the improvement. Devens, J., said (151 Mass. 290, 24 N. E. 321, 7 L. R. A. 151): "Nor \* \* \* should we be willing to say, even if no improvement of Boston Harbor formed a part of the purpose, that the legislature might not properly provide for the reclamation of a large body of lands, such as flats, substantially useless in their original condition, for railroad and commercial purposes, by taking, with proper compensation, such of them as were necessary for the accomplishment of the object."

building of railroads to be used for the same object, may all affect the public so directly as to constitute a public purpose for which money raised by taxation may be expended. \* \* \*

The use of buildings along such a thoroughfare as is proposed presumably would be chiefly for trade, the buying and selling of goods, and perhaps, to some extent, for the business of manufacturing. We do not think this is commerce, in such a sense that money can be raised by taxation for the promotion of it, as it can be raised for the improvement of a harbor or the construction of a railroad. In reference to the interest of the public in it, it stands no differently from other useful kinds of business.

An affirmative answer to this question would make it possible for the city to take the home of a resident near the line of the thoroughfare, or the shop of a humble tradesman, and compel him to give up his property and go elsewhere, for no other reason than that, in the opinion of the authorities of the city, some other use of the land would be more profitable, and therefore would better promote the prosperity of the citizens generally. We know of no case in which the exercise of the right of eminent domain or the expenditure of public money has been justified on such grounds. \* \* \*

Question answered in the negative.<sup>2</sup>

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EVERGREEN CEMETERY ASSOCIATION v. BEECHER (1885) 53 Conn. 551, 552-553, 5 Atl. 353, PARDEE, J. (upholding a demurrer to a complaint filed by plaintiff cemetery association seeking, under statutory authority, to take defendant's land by eminent domain to enlarge its cemetery):

"The safety of the living requires the burial of the dead in proper time and place; and, inasmuch as it may so happen that no individual may be willing to sell land for such use, of necessity there must remain to the public the right to acquire and use it under such regulations as a proper respect for the memory of the dead and the feelings of survivors demands. In order to secure for burial-places during a period extending indefinitely into the future that degree of care universally demanded, the legislature permits associations to exist with power to discharge in behalf and for the benefit of the public the duty of providing, maintaining, and protecting them. The use of land by them

<sup>2</sup> Accord: *Palairt's Appeal*, 67 Pa. 479, 5 Am. Rep. 450 (1871) (act authorizing extinguishment of irredeemable ground rents at expense of present owners of land who wished to do this).

<sup>3</sup> In *Dingley v. Boston*, 100 Mass. 544 (1868), it was held that the city of Boston might be authorized to condemn certain low lands whose undrainable situation made them dangerous to health, to raise their grade about 18 feet, and then to resell them to private parties. The expense and nature of the improvement rendered its undertaking impracticable for separate individual owners. This was approved in *Sweet v. Rechel*, 159 U. S. 380, 16 Sup. Ct. 43, 40 L. Ed. 188 (1895).



for this purpose does not cease to be a public use because they require varying sums for rights to bury in different localities; not even if the cost of the right is the practical exclusion of some. Corporations take land by right of eminent domain primarily for the benefit of the public, incidentally for the benefit of themselves. As a rule, men are not allowed to ride in cars, or pass along turnpikes, or cross toll-bridges, or have grain ground at the mill, without making compensation. One man asks and pays for a single seat in a car; another for a special train; all have rights; each pays in proportion to his use; and some are excluded because of their inability to pay for any use; nevertheless it remains a public use as long as all persons have the same measure of right for the same measure of money.

"But it is a matter of common knowledge that there are many cemeteries which are strictly private; in which the public have not, and cannot acquire, the right to bury. Clearly the proprietors of these cannot take land for such continued private use by right of eminent domain. The complaint alleges that the plaintiff is an association duly organized under the laws of this state for the purpose of establishing a burying-ground; that it now owns one; that it desires to enlarge it; and that such enlargement is necessary and proper. There is no allegation that the land which it desires to take for such enlargement is for the public use in the sense indicated in this opinion."<sup>1</sup>

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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

<sup>1</sup> Accord: *Board of Health v. Van Hoesen*, 57 Mich. 533, 539, 49 N. W. 894, 896 (14 L. R. A. 114) (1891) (cases), in which McGrath, J., said: "To justify the condemnation of lands for a private corporation, not only must the purpose be one in which the public has an interest, but the state must have a voice in the manner in which the public may avail itself of that use. In *Gilmer v. Lime Point*, 18 Cal. 229 (1861), a public use is defined to be a use which concerns the whole community, as distinguished from a particular individual. The use which the public is to have of such property must be fixed and definite. The general public must have a right to a certain definite use of the private property on terms and for charges fixed by law, and the owner of the property must be compelled by law to permit the general public to enjoy it. It will not suffice that the general prosperity of the community is promoted by the taking of private property from the owner, and transferring its title and control to a corporation, to be used by such corporation as its private property, uncontrolled by law as to its use; in other words, a use is private so long as the land is to remain under private ownership and control, and no right to its use or to direct its management is conferred upon the public. In re *Eureka Basin, etc., Co.*, 96 N. Y. 12 (1881)."

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 individual 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 of 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 the 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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HAIRSTON v. DANVILLE & W. RY. CO. (1908) 208 U. S. 598, 606-607, 28 Sup. Ct. 331, 52 L. Ed. 637, 13 Ann. Cas. 1008, Mr. Justice MOODY (upholding the condemnation of land for a spur railroad track leading to a private plant, but incidentally used for car storage):

"When we come to inquire what are public uses for which the right of compulsory taking may be employed, and what are private uses for which the right is forbidden, we find no agreement, either in reasoning or conclusion. The one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question. The determination of this question by the courts has been influenced in the different states by considerations touching the resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-estab-

lished methods and habits of the people. In all these respects conditions vary so much in the states and territories of the Union that different results might well be expected. Some cases illustrative of the tendency of local conditions to affect the judgment of courts are *Hays v. Risher*, 32 Pa. 169; *Boston & R. Mill Corp. v. Newman*, 12 Pick. 467, 23 Am. Dec. 622 (Conf. *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39); *Turner v. Nye*, 154 Mass. 579, 14 L. R. A. 487, 28 N. E. 1048; *Ex parte Bacot*, 36 S. C. 125, 16 L. R. A. 586, 15 S. E. 204; *Dayton Gold & S. Min. Co. v. Seawell*, 11 Nev. 394; *Hand Gold Min. Co. v. Parker*, 59 Ga. 419; *Head v. Amoskeag Mfg. Co.* 113 U. S. 9, 28 L. Ed. 889, 5 Sup. Ct. 441; *Clark v. Nash*, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. 676, 4 Ann. Cas. 1171; *Strickley v. Highland Boy Gold Min. Co.* [200 U. S. 527, 26 Sup. Ct. 301, 50 L. Ed. 581, 4 Ann. Cas. 1174] *supra*; *Otis Co. v. Ludlow Mfg. Co.*, 201 U. S. 140, 50 L. Ed. 696, 26 Sup. Ct. 353.

"The propriety of keeping in view by this court, while enforcing the fourteenth amendment, the diversity of local conditions, and of regarding with great respect the judgments of the state courts upon what should be deemed public uses in that state, is expressed, justified, and acted upon in *Fallbrook Irrig. District v. Bradley*, *Clark v. Nash*, and *Strickley v. Highland Boy Gold Min. Co.*, *ubi supra*. What was said in these cases need not be repeated here. No case is recalled where this court has condemned, as a violation of the fourteenth amendment, a taking upheld by the state court as a taking for public uses in conformity with its laws. In *Missouri P. R. Co. v. Nebraska* [164 U. S. 403, 416, 17 Sup. Ct. 130, 41 L. Ed. 489], *ubi supra*, it was pointed out that the taking in that case was not held by the state court to be for public uses. We must not be understood as saying that cases may not arise where this court would decline to follow the state courts in their determination of the uses for which land could be taken by the right of eminent domain. The cases cited, however, show how greatly we have deferred to the opinions of the state courts on this subject, which so closely concerns the welfare of their people. We have found nothing in the federal Constitution which prevents the condemnation by one person for his individual use of a right of way over the land of another for the construction of an irrigation ditch; of a right of way over the land of another for an aerial bucket line; or of the right to flow the land of another by the erection of a dam. It remains for the future to disclose what cases, if any, of taking for uses which the state Constitution, law, and court approve will be held to be forbidden by the fourteenth amendment to the Constitution of the United States. \* \* \*

"We need not consider whether a condemnation by a railroad, authorized by a state law and approved by the state court, of land for the construction of a spur track to be used solely to transport commodities to the main line and thence to the place of sale and consumption throughout the country, is a violation of the fourteenth amendment.



nor the authorities bearing upon the question whether such a use is public.<sup>1</sup> Here the proposed spur track can be used, and was designed to be used, not only for access to the factory of the tobacco company, but for the storage of cars to be laden or unladen by receivers and shippers of freight, and to relieve the congestion of business which, through the growth of the town, overburdened the limited trackage of the railroad. \* \* \* The uses for which the track was desired are not the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost."<sup>2</sup>

STATE ex rel. TACOMA INDUSTRIAL CO. v. WHITE RIVER POWER CO.

(Supreme Court of Washington, 1905. 39 Wash. 648, 82 Pac. 150, 2 L. R. A. [N. S.] 842, 4 Ann. Cas. 987.)

[Certiorari to review an order of the Peirce county Superior Court. The charter of the White River Power Company, a New Jersey corporation admitted to do business in Washington, authorized it to develop and utilize for commercial purposes the water power of certain streams in the state of Washington; to construct and operate plants for the electric transmission and the furnishing of light, heat, and power for any purpose to individuals, corporations, and municipalities; to store, transport, and sell water, water power and privileges, for any purpose in connection with said streams, and to maintain waterworks; to erect and operate mills, manufactories, and other erections; and to deal in real estate in connection with said business. For the construction of works thus authorized the company filed a petition in the court below to condemn land and property of the Tacoma Company and others. This proceeding was taken after an order in favor of the petitioner. Other facts appear in the opinion.]

RUDKIN, J. \* \* \* At the threshold of the proceeding the respondent is confronted with the objection that it is seeking to take private property for a private use, in violation of section 16, art. 1, of the state Constitution. \* \* \* The section of the Constitution in question declares that "private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural,

<sup>1</sup> See 35 L. R. A. (N. S.) 636 (cases and references). Compare *Towns v. Klamath Co.*, post, p. 701, and *Robinson v. Swope*, post, p. 702, note.

<sup>2</sup> Accord, in addition to the cases cited in this opinion, see *Offield v. N. Y., N. H. & H. R. R.*, 203 U. S. 372, 27 Sup. Ct. 72, 51 L. Ed. 231 (1906) (taking of interest of minority stockholders in railroad by another railroad owning three-fourths of stock); *Spencer v. Seaboard, etc., Ry.*, 137 N. C. 107, 49 S. E. 96 (1904), annotated 1 L. R. A. (N. S.) 615-617. Compare *Matter of Tuthill*, 163 N. Y. 133, 57 N. E. 303, 49 L. R. A. 781, 79 Am. St. Rep. 574 (1900), and *Sutter Co. v. Nicols*, 152 Cal. 688, 93 Pac. 872 (1908), annotated in 15 L. R. A. (N. S.) 616, 14 Ann. Cas. 900.

domestic, or sanitary purposes." The term "public use" when applied to the law of eminent domain is not easily defined. It has often been said that it is more easily defined by negation than otherwise. In determining the question of public use, courts have always been influenced to a greater or less extent by legislative declarations, and by local customs and conditions and local necessities. In the states of Maine, Massachusetts, New Hampshire, Connecticut, New Jersey, Indiana, Iowa, Kansas, Wisconsin, and perhaps others, statutes permitting lands to be taken for the purpose of creating water power for milling and manufacturing purposes have been enacted and enforced, though not always without protest. The Legislature of the state of New York has never authorized the exercise of the right of eminent domain in favor of mills of any kind, and it has been said that "sites for steam engines, hotels, churches, and other public conveniences might as well be taken by the exercise of this extraordinary power." *Hay v. Cohoes Co.*, 3 Barb. (N. Y.) 47. It is safe to say that the courts of that state would not sanction the exercise of the power of eminent domain for any such purpose. *Matter of Tut-hill*, 163 N. Y. 133, 57 N. E. 303, 49 L. R. A. 781, 79 Am. St. Rep. 574. The courts of Michigan and Georgia have denied the right of eminent domain in similar cases. *Ryerson v. Brown*, 35 Mich. 333. 24 Am. Rep. 564; *Loughbridge v. Harris*, 42 Ga. 500. On the other hand, the courts of Alabama and Vermont have held that the right of eminent domain cannot be exercised in favor of gristmills, unless they are public mills, required by law to grind for all in due turn and for regular tolls. *Sadler v. Langham*, 34 Ala. 311; *Tyler v. Beacher*, 44 Vt. 648, 8 Am. Rep. 398.

In *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 5 Sup. Ct. 441, 28 L. Ed. 889, the court upheld the New Hampshire statute, as a regulation of the manner in which the rights of proprietors of land adjacent to a stream may be ascertained and enjoyed with a due regard to the interest of all and the public good, but refused to pass upon the question whether the statute could be upheld as a delegation of the right of eminent domain. The courts of the mining and arid land states have also held that the use of water for mining and irrigation purposes is a public use. The question is not a new one in this court. It was fully considered, in relation to another statute, in the case of *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 63 L. R. A. 820, 99 Am. St. Rep. 964. The court there cites with approval \* \* \* from *Cooley on Constitutional Limitations* (page 652): "Nor could it be of importance that the public would receive incidental benefits, such as usually spring from the improvement of lands or the establishment of prosperous private enterprises. The public use implies a possession, occupation, and enjoyment of the land by the public at large or by public agencies; and a due protection of the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another,

on vague grounds of public benefit, to spring from the more profitable use to which the latter may devote it." And it said: "But from a consideration of all the authorities and from our own views on construction, we are of the opinion that the use under consideration must be either a use by the public, or by some agency which is quasi public, and not simply a use which may incidentally or indirectly promote the public interests or general prosperity of the state." \* \* \*

It will thus be seen that this court repudiated the broad and liberal construction adopted by the New Hampshire and other courts, and committed itself to the more restricted doctrine laid down by Judge Cooley in *Ryerson v. Brown* and in his work on *Constitutional Limitations*, supra. In *Ryerson v. Brown* the court, speaking through Chief Justice Cooley, said: "Whether the use to which the machinery is to be put which is to be operated by the power can be declared a public use, is the question that remains to be considered. If the act were limited in its scope to manufactures which are of local necessity, as gristmills are in a new country not yet penetrated by railroads, the question would be somewhat different from what it is now. But even in such case it would be essential that the statute should require the use to be public in fact; in other words, that it should contain provisions entitling the public to accommodations. A flouring mill in this state may grind exclusively the wheat of Wisconsin, and sell the product exclusively in Europe, and it is manifest that in such a case the proprietor can have no valid claim to the interposition of the law to compel his neighbor to sell a business site to him, any more than could the manufacturer of shoes or the retailer of groceries. Indeed, the two last named would have far higher claims, for they would subserve actual needs, while the former would at most only incidentally benefit the locality by furnishing employment and adding to the local trade." And again: "What, then, is the necessity for the exercise of this extraordinary power in aid of manufacturing corporations? It is certainly not a necessity of the extreme sort, which supports the like authority in aid of railways. A railway cannot run around unreasonable landowners; but no one man and no number of men can prevent the establishment of machine shops or a sawmill by refusing to part with the lands they may happen to own. No particular motive power is indispensable. At the worst, the question presented in any case will be a question of different degrees of convenience or of probable profits. A mill at one spot on a stream may be more profitable than at another; a machine shop at one point may be more cheaply operated by water power than by steam power; but steam is not excluded from any part of the state because of any general conviction that water power is more advantageous or more economical. When the owner of a mill site enters upon the calculation whether he shall improve the site in order to obtain operating power for machinery, or, on the other hand, provide steam machinery, the question that confronts him is not one of

necessity, but of comparative cost, expense of operation, and probable returns."

In *Varner v. Martin*, 21 W. Va. 548,<sup>1</sup> the court holds that before a corporation can exercise the right of eminent domain it must possess each and all of these qualifications: First. The general public must have a definite and fixed use of the property to be condemned; a use independent of the will of the private person or private corporation in whom the title of property when condemned will be vested; a public use, which cannot be defeated by such private owner, but which public use continues to be guarded and controlled by the general public through laws passed by the Legislature. Second. This public use must be clearly a needful one for the public—one which cannot be given up without obvious general loss and inconvenience. Third. It must be impossible, or very difficult, at least, to secure the same public uses and purposes otherwise than by authorizing the condemnation of private property. \* \* \* In *Fallsburg Power & Manufacturing Co. v. Alexander*, 101 Va. 98, 43 S. E. 194, 61 L. R. A. 129, 99 Am. St. Rep. 855, the court of appeals of Virginia approved the rule announced by the Supreme Court of West Virginia, and applied it in a case very similar to the case at bar. The court quoted extensively from the decisions followed by this court in the *Healy Lumber Company Case*, and held that the proposed use was not a public one. Speaking of the company and its objects, in that case, the court said: "It is urged upon us that, although the charter in question does not command the performance of the company's public duties, since it is 'a public service corporation,' the right of public control arises from the grant of the franchise of eminent domain; and when the company undertakes to devote its property and its products to the public use it becomes subject to public regulations. This proposition is unquestionably sound, and sustained by the authorities cited. *Munn v. Illinois*, 98 U. S. 113, 24 L. Ed. 77; *Budd v. People of New York*, 143 U. S. 538, 12 Sup. Ct. 468, 36 L. Ed. 247; *Brass v. North Dakota*, 153 U. S. 391, 14 Sup. Ct. 857, 38 L. Ed. 757; to which many others might be added. But this does not meet the difficulty in this case. The mere recognition of the corporation in its charter as an 'internal improvement company' does not make it so, and bring it within the operation of the general laws of the state governing such companies and controlling their operations. \* \* \* Not only is the public benefit to spring from the use to which the company proposes to devote the property vague, indefinite, and uncertain, but, under the plain language of the charter, the public use of the property, or any use of it by the public, may be gainsaid or denied or withdrawn by the company at its will, since it is authorized to use, not only a part, but the entire product, of the work or works it proposes to establish for its own use and benefit. \* \* \*"

<sup>1</sup> See this strong and well-reasoned case for an exhaustive discussion of the nature of a "public use."

This is equally true of the respondent company. It is not claimed that there is a present demand for the 50,000 electrical horse power. It is not claimed that the respondent has a franchise to enter any of the cities or towns mentioned, or that it will or can obtain one. It does not appear that there are any street or other railways to utilize its product. It is not under contract or obligation to furnish electricity to any person, or for any purpose. Under its articles, it may erect and maintain mills and manufactories and operate the same. For aught that appears, aside from its professions and voluntary promises, it may take the relator's property, generate electricity or not, at will, and use the same for any purpose, public or private, to suit its convenience.<sup>2</sup> \* \* \*

It is further contended by the respondent that the use in question is declared to be public by article 21 of the state Constitution, which reads: "The use of the waters of this state for irrigation, mining and manufacturing purposes shall be deemed a public use." We are not called upon at this time to determine the full import or meaning of this constitutional provision. What we have already said disposes of the question before us. If it was intended by the article in question to extend the right of eminent domain to private manufacturing corporations, or to authorize the taking of private property for a private use, it violates the due process clause of the federal Constitution. A state is powerless, by statute or by constitutional provision, to declare a use public which is essentially and inherently private.<sup>3</sup> \* \* \*

From a full review of all the authorities, we are convinced that the respondent is not a public service corporation, and that the use to which it intends to apply the property it now seeks to acquire is not a public use, within the meaning of the Constitution and laws of this state. We do not mean to say that the right of eminent domain can in no case be extended to a corporation organized for the purpose of generating and transmitting electricity for power and other purposes; but before this can be done, public necessity must require it, and the right of the public to the use and enjoyment of the property must be regulated, guaranteed, and safe-guarded by proper legislation. \* \* \*

Order reversed.

<sup>2</sup> "The use of water power by a manufacturer for his own purposes is a private use and is not on the basis of a sale of power to the public."—Timlin, J., in *Water Power Cases*, 148 Wis. 124, 148, 149, 134 N. W. 330, 339, 38 L. R. A. (N. S.) 526 (1912).

<sup>3</sup> Citing *Kaukauna Water Power Co. v. Green Bay Co.*, 142 U. S. 254, 273, 12 Sup. Ct. 173, 177, 35 L. Ed. 1004 (1891), *Brown, J.*: "It is probably true that it is beyond the competency of the state to appropriate to itself the property of individuals for the sole purpose of creating a water power to be leased for manufacturing purposes." But if water power can be produced as incidental to the maintenance of a dam for some other public purpose, as the improvement of navigation, it may be controlled and sold by the state. *Id.*; *U. S. v. Chandler-Dunbar Co.*, post, p. 726.



BROWN v. GERALD (1905) 100 Me. 351, 362, 370-376, 61 Atl. 785, 70 L. R. A. 472, 109 Am. St. Rep. 526. The Maine legislature chartered a company to generate and sell electricity for lighting, heating, traction, and mechanical purposes. It had contracted to sell its entire output of current derived from its water power plant to a single manufacturing customer, save so much as it might need for supplying electric light customers, of which on account of the location of its line across the fields, it was likely to have few. It was held that the legislature could not give it the power of eminent domain in extending its line to the manufacturing customer; SAVAGE, J., saying:

"We find that the doctrine that public benefit and utility is a justification for the exercise of the right of eminent domain has been asserted more especially in four classes of cases: Those relating to the development of water power for mills under general or special mill or flowage acts; those arising under drainage acts for the reclamation of wet and marshy lands; those relating to the irrigation of arid lands; and those relating to the promotion of mining. Of the mining acts, outside of states whose Constitutions in terms recognize mining as a public use, it may be said that the authorities differ as to the effect of the mere public benefit. *Overman Silver Mining Co. v. Corcoran*, 15 Nev. 147; *Consolidated Channel Co. v. C. P. R. Co.*, 51 Cal. 269. And it was held in *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369, that the irrigation acts of the Western states are sustainable on the ground of a regulation of the common interests of the owners—a doctrine applied elsewhere to drainage acts. \* \* \* [Here follows a careful review of the decisions under the mill acts in various states, particularly Massachusetts, the later decisions in the latter supporting such acts upon other grounds than that of eminent domain. See *Talbot v. Hudson*, ante, p. 683, note.]

"Taking the decided cases generally, we think that the weight of authority does not sustain the doctrine that a public use, such as justifies the taking of private property against the will of the owner, may rest solely upon public benefit, or public interest, or great public utility. \* \* \* And we think there is nothing in the creation and distribution of power for manufacturing enterprises, no matter how great their general utility, which makes it 'alike proper, useful, and needful' for the government to provide for it. They are clearly private enterprises, built up by private capital, for private gain. They are not subject to governmental regulation as public enterprises. Their promoters and owners manage them to suit themselves, so long as they do not interfere with the rights of others. \* \* \*

"It is contended that, granting that the manufacturing uses of the current of electricity proposed to be developed are private, nevertheless the powers granted to this corporation are for public uses. The defendant corporation claims that it is a quasi public corporation,

charged with the performance of public duties, and subject to governmental regulation, and that it possesses the rights of quasi public corporations, among which may be, if a statute authorizes it, the right of eminent domain. It says the uses of property taken by it under the right of eminent domain for the purpose of performing its public duties are public uses. It is generally well settled now that when the Legislature grants to a corporation the right of eminent domain, or public rights, like street rights, for public uses, and the corporation accepts and exercises the grant, it thereby impliedly comes under obligation to the public to perform all those duties in which the public are interested, and to aid in the performance of which the right of eminent domain was granted. It can be compelled to perform them, and at reasonable rates. It subjects itself to public regulation and control, and to forfeiture of its charter for failure to perform. It devotes its property to public use, and in a way the public have acquired an interest in the use of the property. \* \* \*

"But this public character of a corporation does not follow merely because it has accepted a grant of the right of eminent domain, unless it was granted for public uses. For, unless the grant was for public uses, it was unconstitutional and void, and the company by accepting it obtained no rights as a public instrumentality, and came thereby under no obligations to the public. \* \* \*

"Now, we have taken it for granted that some of the ultimate purposes expressed in the defendant corporation's charter are public ones.<sup>1</sup> We repeat that we think that no one would now deny that electric lighting for the public is a public use, and that a corporation engaged in that business may properly be granted the right of eminent domain for that use. And we have no occasion at this time to deny that the right of eminent domain might properly be granted to a corporation to enable it to generate, sell, and distribute electricity for public lighting, though not a lighting company itself. We are now concerned with the right, under eminent domain, to generate, sell, and distribute electricity for power for manufacturing purposes. We suppose that a corporation may be a quasi public one as to electric lighting, for instance, and not as to other, though chartered, purposes,

<sup>1</sup> "But when the Legislature grants the right of eminent domain for several purposes, for some of which the grant would be constitutional, and for others not, with the discretion in the grantee to exercise the right when and where it chooses, within the confines of a large territory, we think it must use that discretion in good faith, and the taking must actually be for the constitutional purpose in order to be valid. And we think, further, that the actual purpose is open to judicial inquiry. Randolph on Eminent Domain, 47. Suppose a company were chartered to do an electric light and a banking business, and had given to it generally the right of eminent domain. Could it condemn a lot for a banking house, under guise of its right to condemn for lighting purposes? And if it should in terms condemn land for lighting purposes, when the real and only purpose was to secure a lot for a banking house, would the public, or the owner of the land taken, be concluded? We think not."—From opinion in principal case, 100 Me. at page 357, 61 Atl. 785, 70 L. R. A. 472, 109 Am. St. Rep. 526.

just as, to use a former illustration, a company may be chartered to build and operate an electric light plant, and to run a bank, or cotton mill, or shoe factory. The question now is, was this defendant a quasi public corporation, as respects creating, selling, and distributing electric power for manufacturing or mechanical purposes? Because, as we have found, that is the use for which this taking is to be made, if at all. We think that the ultimate use of the power is an important consideration. If that use is essentially a private use, in a private business, will it become a public use by merely multiplying the number of persons who may have occasion to use the power? If it would not be a public use to supply power for one mill, would it be such to supply for two mills, or for six, or for twelve? We think not. In each individual case, it would be supplying the power for a private use. If the state cannot take the property of one and give the use of it to another for private use, can it give the use to that other, in order that in the form of electric power he may distribute the use to a dozen others for their private business purposes? We think not. There is no underlying necessity or peculiarity in the business of distributing electric power which requires any such enlargement of the power of eminent domain. There seems to be such a necessity in the cases of all the quasi public corporations which we have mentioned. Railroads and telegraph, telephone, and water companies cannot be built and maintained by individuals for their several use, each one for himself. There is an 'impossibility,' to use Judge Cooley's words, 'of making provisions for them otherwise' than through the power of eminent domain. But every man can, if he wishes, have a mechanical power of his own, either steam, or water, or electric. He can serve himself, without the intervention of the state. Not so conveniently or advantageously, perhaps, as it would be to be served by others. But mere convenience and advantage in private business must yield to the property rights of citizens sacredly guarded by the Constitution. We cannot find any ground for sustaining the defendant's contention, except that of 'public benefit,' or general utility, and we think that is not sufficient.

"There is, however, one other consideration which we deem to be of weight, though perhaps not conclusive, in determining whether the creation and distribution of electric power is a public use. In all the other public uses which have been referred to, the supplying of them to some does not disenable the company to supply to others. The use is not exhausted by using. If the railroad carries one, it is not thereby made less able to carry others. It is simply a matter of more trains. In a telegraphic or telephonic service it is simply a matter of more posts and wires. The capacity is practically unlimited. In water services, the calls in those public services for which the right of eminent domain is given is usually infinitesimal, in comparison with the supply. It is practically the same in electric lighting. The units of service are small ordinarily in comparison with the total capacity for service. It is practicable to serve all the public.

"But a power service is entirely different. By every unit used, the capacity to serve others is by so much exhausted. It cannot be used again. To be useful, power must be constant and steady during all the working hours of the day. Unless the purchaser can be assured of a definite and stable power, it is of little value. What he contracts for another cannot have. Moreover, it is said that the larger the unit the more economical and profitable. Counsel for the defendants argues that the best and cheapest service is obtained with the largest possible units, and, further, that all power contracts must be time contracts. Suppose, as in this case, the first customer agrees to take it all; what is the next customer to do? There is nothing left for him. But has not the company the right to sell it all? And may it not sell it all to the only customer in sight at the time? Must it reserve a part of its product for contingent later customers? And may it not contract for long periods of time? Purchasers will not buy, ordinarily, if they are subject to the necessity of dividing the power with later customers, unless the danger is as remotely contingent as electric lighting seems to be in this case. \* \* \* But the defendant company says it can generate more power for the public, and that it must do so if the public calls for power. No doubt its public duty, if any, is coextensive with those means which the state has given to it to enable it to perform those duties. The state has given to it the use of the water in the Sebasticook river within certain limits to create power. \* \* \* But, suppose it does create more power; the old customer, or the first new one, may take it all. Really the right of the public to be served, under such conditions, in any event, is purely theoretical, and not effectual. \* \* \*

"Our attention has been called to the recent case of Rockingham Light & Power Co. v. Hobbs, 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 581, as an authority directly in point, and fully sustaining the defendant's contentions. \* \* \* The New Hampshire court uses this language: 'The demand for power \* \* \* is of a public character. Like water, electricity exists in nature, in some form or state, and becomes useful as an agency of man's industry only when collected and controlled. It requires a large capital to collect, store, and distribute it for general use. \* \* \* It may happen that the business cannot be inaugurated without the aid of the power of eminent domain for the acquisition of the necessary land, or rights in land. All these considerations tend to show that the use of land for collecting, storing, and distributing electricity, for the purpose of supplying power and heat to all who may desire it, is a public use, similar in character to the use of land for collecting, storing, and distributing water for public needs, a use that is so manifestly public that it has seldom been questioned and never denied.' It is, perhaps, sufficient to say that we are unable to concur in the reasoning of the New Hampshire court, for reasons already fully stated. \* \* \*

"The record of this case shows a vote of the corporation whereby, 'in view of the litigation now pending,' it recognized itself as a quasi public corporation, and pledged itself to the performance of its duties as such in furnishing the public with electric light and power, and to make all extensions necessary to meet the public demand for light and power. We do not think this vote can make any difference. In a constitutional sense, a use cannot be enlarged, it cannot be made any more public, by a vote. The public duties of a quasi public corporation, except so far as directly imposed by statute, arise by implication of law. If a corporation is not a quasi public one, it cannot make itself such by voting to perform the duties of a quasi public corporation. \* \* \*"

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TOWNS v. KLAMATH COUNTY (1898) 33 Or. 225, 232, 233, 53 Pac. 604, BEAN, J. (upholding an Oregon statute authorizing the laying out of a county road upon proceedings taken upon the petition of any person that his residence was not reached by a convenient public road):

"Laws exist in most of the states for the laying out of what are called 'private roads,' or 'roads of public easement'; and these statutes have in some cases been held valid, and in others invalid. The principle to be deduced from the adjudged cases, bearing upon the question, seems to be that if, by a fair construction and operation of the statutes, the road, when laid out, is in fact a public road, for the use of all who may desire to use it, the law is not liable to the charge of unconstitutionality, and is valid, though the road may be laid out on the application, paid for, and kept in repair, by the petitioner, and primarily designed for his benefit; but if such road is to become a

<sup>2</sup> Accord, as to last point discussed: *State v. Superior Court*, 50 Wash. 13, 96 Pac. 519 (1908). See 2 L. R. A. (N. S.) 842, note, and 19 L. R. A. (N. S.) 725, note (both collecting the cases on the use of eminent domain for the purpose of generating electric power from water power).

In *Minnesota Canal Co. v. Koochiching Co.*, 97 Minn. 429, 450, 452, 107 N. W. 405, 5 L. R. A. (N. S.) 638, 7 Ann. Cas. 1182 (1906), it was said (citing cases) that the creation of electric power for public sale was a public use, because it was susceptible of great subdivision and of transportation for long distances, but that the power of eminent domain could not be used to supply water power from the wheels to the public. "A public use does not require that the property be capable of being used by the entire public or by any particular portion thereof, but a use which, by physical conditions, is restricted to a very few persons who must use it within a very restricted area, is not a public use. Water power from the wheels must be used at the wheels, and the actual result, necessarily, is that a very few individuals will use the power for manufacturing purposes to the exclusion of all others. The effect is the creation of a power plant to create water power to sell to a few manufacturers for use in their private business. Under such conditions the willingness of the power company to sell power from the wheels to the general public has only a theoretical value."—By Elliott, J.

Contra: *Jacobs v. Clearview Co.*, 220 Pa. 388, 69 Atl. 870, 21 L. R. A. (N. S.) 410 (1908). As to the use of eminent domain for supplying water directly for power or steam generally, see 21 L. R. A. (N. S.) 410—412.



mere private way, and not open to the public, the law sanctioning it is void. *Lewis, Em. Dom.* § 167; 6 *Am. Law Rev.* 197; *Denham v. Commissioners*, 108 *Mass.* 202; *Latah County v. Peterson*, 3 *Idaho (Hasb.)* 398, 29 *Pac.* 1089, 16 *L. R. A.* 81; *Shaver v. Starrett*, 4 *Ohio St.* 494. Within this principle, the act in question is valid. The road provided for is an open public way, 30 feet in width, which may be traveled by any person who desires to use it. The fact that it may accommodate but a limited portion of the public, or even but a single family, is no objection to the validity of the law providing for its location. The test is whether it is an open public way, or one for the exclusive use and benefit of the petitioner."<sup>1</sup>

MATTER OF NIAGARA FALLS & WHIRLPOOL RY. CO. (1888) 108 *N. Y.* 375, 381, 382, 384-386, 15 *N. E.* 429, *ANDREWS, J.* (holding that the power of eminent domain could not be exercised by a corporation chartered under the general railroad act of the state for the purpose of constructing and operating an electric railway along the water's edge in the gorge of the Niagara river below the falls):

"It is necessary to a just understanding of the question presented to refer to some additional facts disclosed by the evidence. The Niagara river, from the foot of the American falls, flows northerly

<sup>1</sup> See *Varner v. Martin*, 21 *W. Va.* 534 (1883); *Phillips v. Watson*, 63 *Iowa*, 28, 18 *N. W.* 659 (1884); *Sherman v. Buick*, 32 *Cal.* 241, 91 *Am. Dec.* 577 (1867). As to spur railway tracks to private places of business, see *Lewis, Em. Dom.* (3d Ed.) § 264 (collecting cases); *Hairston v. Danville, etc., Ry.*, ante, p. 690.

"In the present law the legislature has declared that the highway to be laid out under it shall be a public highway. It must be public, or it cannot be laid out by eminent domain. To be public, it must not only be nominally open to use by the public, but it must be so located that the public can get onto it at some point. A strip of land lying entirely within the lines of private ownership, upon which the public cannot possibly enter without committing trespass on private property, cannot be held to be a public way."—*Winslow, J.*, in *Wallman v. Connor Co.*, 115 *Wis.* 617, 620, 92 *N. W.* 374 (1902). So *Robinson v. Swope*, 12 *Bush (Ky.)* 21 (1876).

In Kentucky private ways of necessity may be opened by the power of eminent domain: *Cofer, J.*, saying, in *Robinson v. Swope*, 12 *Bush*, 21, 25 (1876): "The public have a right to compel the attendance of any citizen upon the tribunals of justice, either as a witness, juror, or party, and have an interest in his attendance upon elections and the public worship of Almighty God, and because of these rights and interests the public also have a further interest that the citizen shall be provided with a practicable way to a market at which he can buy and sell, and thus provide himself with those things without which he could not discharge his civil and social duties. In view of these considerations and the long acquiescence of the whole people of the state in the enforcement of the statute of 1820, and the amendments to it, and of the Revised Statutes, we have no hesitation in holding that the general assembly may, in the exercise of the right of eminent domain, authorize the establishment of private passways over the lands of others when it is necessary to enable any inhabitant of the state to attend courts, elections, churches, or mills, or to reach an established public highway."

for several miles with a very rapid current, and the river on either side is faced by precipitous cliffs; that on the American side rising from near the edge of the river to a height of from 150 to 200 feet, to the table-land above. The river, from the falls to the point known as 'The Whirlpool,' is interesting, and persons visiting the falls have been enabled, by means of what is known as an 'inclined railway,' to descend from the top of the bank or table-land to the margin of the river. This railway was originally a private enterprise, but is now included in the land taken by the state for a state reservation. The 'Whirlpool' adjoins the lands of De Vaux College. The college has constructed a stairway leading down to the margin of the river at this point for the convenience of visitors, and derives a revenue from its use. The petitioner has located its road along the margin of the river, outside of the cliff, where the space is sufficient between the cliff and the river to permit the track to be laid, and at other points, where the cliff rises with more abruptness from the margin, the location contemplates cutting into the face of the cliff for the roadway. The proposed road does not connect at either end with a highway. It can be reached only by passing over the lands of the state or the lands of private owners. There can be no habitations along the line of the road, and no traffic, or commerce, or business, except in conveying passengers over the road to see the river and the 'Whirlpool,' and returning them again to the point from which they started. The season for visitors at the falls is substantially confined to June, July, August, and September. The proposed road cannot be operated during the winter on account of the piling up of the ice, and, if its operation was practicable in the winter season, it would have nothing to do. It is apparent that the proposed enterprise has been undertaken and is to be carried on for the sole purpose of furnishing sight-seers, during about four months of the year, greater facilities than they now enjoy for seeing the part of Niagara river along which the proposed road is to be constructed. \* \* \*

"The papers, on their face, show that the corporation has undertaken an ordinary railroad enterprise within the purview of the act of 1850, in aid of which the power of eminent domain may be appropriately exercised. But, when we look beyond the formal documents, and the actual business proposed to be conducted is considered, we find that the proposed railroad has no proper termini; that it is not a highway in any just or proper sense; that it cannot, by reason of necessary limitations, perform one part of the duty it has undertaken, viz., the transportation of freight; that, at most, it can be operated but a portion of the year; and that the sole object of its construction is to enable the corporation, for a compensation to be received, to provide for the portion of the public who may visit Niagara Falls better opportunities for seeing the natural attractions of the locality. We feel constrained to say that, in our judgment, this is not a public purpose which justifies the exercise of the high prerogative of sov-

ereignty invoked in aid of this enterprise. The right of the company being challenged on this ground, the court is compelled to consider it, and it is manifest that the inquiry is not precluded because the petitioner has organized itself under the general railroad act, and has assumed in its articles of association the character of an ordinary railroad corporation. What is a public use is incapable of exact definition. The expressions 'public interest' and 'public use' are not synonymous. The establishment of furnaces, mills, and manufactures, the building of churches and hotels, and other similar enterprises, are more or less matters of public concern, and promote, in a general sense, the public welfare. But they lie without the domain of public uses for which private ownership may be displaced by compulsory proceedings. The ground upon which private property may be taken for railroad uses, without the consent of the owner, is primarily that railroads are highways furnishing means of communication between different points, promoting traffic and commerce, facilitating exchanges; in a word, they are improved ways. In every form of government the duty of providing public ways is acknowledged to be a public duty. \* \* \*

"Whatever rule, founded on the adjudged cases, may be formulated on this subject, it cannot, we think, be framed so as to include the present case. The fact that the road of the petitioner may enable the portion of the public who visit Niagara Falls more easily or more fully to gratify their curiosity, or that the road will be public in the sense that all who desire will be entitled to be carried upon it, is not sufficient, we think, in view of the other necessary limitations, to make the enterprise a public one, so as to justify condemnation proceedings. The case does not, we think, differ in principle from an attempt on the part of a private corporation, under color of an act of the legislature, to condemn lands for an inclined railway, or for a circular railway, or for an observatory, to promote the enjoyment or comfort of those who may visit the falls. The state has, under recent legislation, taken lands for a park or public place at Niagara Falls. The taking of lands by municipalities for public parks is recognized as a taking for public use. *Commissioners v. Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70; *In re Mayor, etc.*, 99 N. Y. 569, 2 N. E. 642. They contribute to the health and enjoyment of the people, and are laid out with drives and ways for public use. *Nahant Road*, 11 Allen (Mass.) 530, and *Mount Washington Road*, 35 N. H. 134, were justified on the ground that they were public highways in the ordinary sense, although primarily intended as pleasure drives."<sup>1</sup>

<sup>1</sup> Accord: *Great Falls Power Co. v. Great Falls, etc., R. Co.*, 104 Va. 416, 52 S. E. 172 (1905) (semble—condemnation of park for scenic purposes by electric railway).

## ATTORNEY GENERAL v. WILLIAMS.

(Supreme Judicial Court of Massachusetts, 1899. 174 Mass. 476, 55 N. E. 77.)

[Case reported by Knowlton, J., for the consideration of the court, upon an information, demurrer, pleas, and certain findings of fact. The facts appear in the opinion.]

KNOWLTON, J. This is an information by the attorney general to prevent the erection and maintenance of that portion of a building on Copley Square, in the city of Boston, which is above the limit of height prescribed by St. 1898, c. 452.<sup>1</sup> \* \* \*

The first question raised by the report is whether the statute is constitutional. The streets mentioned in the statute are adjacent to Copley Square. On the case as now presented, we must assume that Copley Square, in the language of the information, "is an open square and a public park, intended for the use, benefit, and health of the public, and is surrounded by buildings devoted to religious, charitable, and educational purposes, some of which contain books, manuscripts, and works of art of great value, many of which are in their nature irreplaceable." Regulations in regard to the height and mode of construction of buildings in cities are often made by legislative enactments, in the exercise of the police power, for the safety, comfort, and convenience of the people, and for the benefit of property owners generally. The right to make such regulations is too well established to be questioned. *Salem v. Maynes*, 123 Mass. 372; *Inhabitants of Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *Sawyer v. Davis*, 136 Mass. 239, 49 Am. Rep. 27. See *Talbot v. Hudson*, 16 Gray, 417. In view of the kind of buildings erected on the streets about Copley Square, and the uses to which some of these buildings are put, it would be hard to say that this statute might not have been passed in the exercise of the police power, as other statutes regulating the erection of buildings in cities are commonly passed. But it differs from most statutes relative to this subject, in providing compensation to persons injured in their property by the limitations which it creates. In this respect it conforms to the constitutional requirements for the taking of property by the right of eminent domain. Looking to all its provisions in connection with the place to which they apply, it seems to have been intended as a taking of rights in property for the benefit of the public who use Copley Square. It adds to the public park rights in light and air, and in the view over adjacent land above the line to which buildings may be erected. These rights are in the nature of an easement created by the statute and annexed to the park.

<sup>1</sup> This act forbade the erection or the completion, on certain streets adjacent to Copley Square, of any building to a height exceeding 90 feet, provided for the payment of damages to owners of uncompleted buildings there, begun before the passage of the act, and provided for compensation to all property owners damaged by the limitations prescribed by the act.

Ample provision is made for compensation to the owners of the servient estates. In all respects the statute is in accordance with the laws regulating the taking of property by right of eminent domain, if the legislature properly could determine that the preservation or improvement of the park in this particular was for a public use.

The uses which should be deemed public in reference to the right of the legislature to compel an individual to part with his property for a compensation, and to authorize or direct taxation to pay for it, are being enlarged and extended with the progress of the people in education and refinement. Many things which a century ago were luxuries, or were altogether unknown, have now become necessities. It is only within a few years that lands have been taken in this country for public parks. Now the right to take land for this purpose is generally recognized and frequently exercised. *Foster v. Commissioners*, 133 Mass. 321; *Shoemaker v. U. S.*, 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170. Many statutes have been passed in this commonwealth allowing taxation for purposes affecting the health, comfort, pleasure, and recreation of the people, and thus conducing to their welfare. In *Kingman v. City of Brockton*, 153 Mass. 255, 26 N. E. 998, 11 L. R. A. 123, the court said, referring to a statute authorizing the raising of money by taxation for the erection of a memorial hall: "The statute \* \* \* may be vindicated on the same ground as statutes authorizing the raising of money for monuments, statues, gates, or arches, celebrations, publication of town histories, parks, roads leading to points of fine scenery, decorations upon public buildings, or other public ornaments or embellishments designed merely to promote the general welfare, either by providing for fresh air, a public recreation, or by educating the public taste, or enforcing sentiments of patriotism or respect for the memory of worthy individuals."<sup>2</sup> The reasonable use of public money for such purposes has been sanctioned by several different statutes, and the constitutional right of the legislature to pass such statutes rests upon sound principles." See, also, *Higginson v. Inhabitants of Nahant*, 11 Allen, 530, and *Hubbard v. Taunton*, 140 Mass. 467, 5 N. E. 157.

In *Olmstead v. Camp*, 33 Conn. 551, 89 Am. Dec. 221, the court, in discussing the line between public and private uses, says: "From the nature of the case, there can be no precise line. The power requires a degree of elasticity, to be capable of meeting new conditions and improvements and the ever-increasing necessities of society. The sole dependence must be on the presumed wisdom of the sovereign authority, supervised, and, in cases of gross error or extreme wrong, controlled, by the dispassionate judgment of the court." The grounds on which public parks are desired are various. They are to be enjoyed by the people who use them. They are expected to minister, not only to the grosser senses, but also to the love of the beautiful in

<sup>2</sup> See *U. S. v. Gettysburg Elec. R. R.*, post, p. 940 (preservation of battle-field).



nature, in the varied forms which the change in seasons brings. Their value is enhanced by such touches of art as help to produce pleasing and satisfactory effects on the emotional and spiritual side of our nature. Their influence should be uplifting, and, in the highest sense, educational. If wisely planned and properly cared for, they promote the mental as well as the physical health of the people. For this reason it has always been deemed proper to expend money in the care and adornment of them, to make them beautiful and enjoyable. Their æsthetic effect never has been thought unworthy of careful consideration by those best qualified to appreciate it. It hardly would be contended that the same reasons which justify the taking of land for a public park do not always justify the expenditure of money to make the park attractive and educational to those whose tastes are being formed, and whose love of beauty is being cultivated. We have already quoted from the information the language in regard to the surroundings of the square. The counsel on both sides referred in argument to the well-known buildings which constitute these surroundings. Trinity Church, the Museum of Fine Arts, the Boston Public Library, the New Old South Church, the Second Church of Boston, and the buildings of the Massachusetts Institute of Technology all face the beholder who stands on Copley Square and looks around him. Some of these buildings are public in the ordinary sense of the word, and some of the corporations which own them have been beneficiaries of the commonwealth on account of their quasi public character, and the public certainly feels an interest in them.

It is argued by the defendants that the legislature, in passing this statute, was seeking to preserve the architectural symmetry of Copley Square. If this is a fact, and if the statute is merely for the benefit of individual property owners, the purpose does not justify the taking of a right in land against the will of the owner. But if the legislature, for the benefit of the public, was seeking to promote the beauty and attractiveness of a public park in the capital of the commonwealth, and to prevent unreasonable encroachments upon the light and air which it had previously received, we cannot say that the lawmaking power might not determine that this was a matter of such public interest as to call for an expenditure of public money, and to justify the taking of private property. While such a determination should not be made without careful consideration, and while the growing tendency towards an enlargement of the field of public expenditure should be jealously watched and carefully held in check, a determination of this kind, once made by the legislature, cannot be lightly set aside. \* \* \*

Demurrer and pleas overruled.<sup>3</sup>

<sup>3</sup> *Contra*: *Farist Steel Co. v. Bridgeport*, 60 Conn. 278, 22 Atl. 561, 13 L. R. A. 590 (1891). Compare *Commonwealth v. Boston Adv. Co.*, 188 Mass. 348, 74 N. E. 601, 69 L. R. A. 817, 108 Am. St. Rep. 494 (1905); *Welch v. Swasey*, 193 Mass. 364, 79 N. E. 745, 118 Am. St. Rep. 523, 23 L. R. A. (N. S.) 1160 (1907), affirmed in 214 U. S. 91, 29 Sup. Ct. 567, 53 L. Ed. 923 (1909).

ALBRIGHT v. SUSSEX COUNTY LAKE & PARK COMMISSION (1904) 71 N. J. Law, 303, 304-308, 57 Atl. 398, 69 L. R. A. 768, 108 Am. St. Rep. 749, 2 Ann. Cas. 48. DIXON, J. (holding invalid a statute authorizing the public acquisition by eminent domain of the right of fishing in certain fresh-water lakes of New Jersey):

"The language of the Constitution does not authorize property to be taken 'for public enjoyment,' or 'for public purposes,' or generally 'for the public.' Its expression is 'for public use,' which implies an idea of utility, of usefulness, not necessarily inherent in the other phrases mentioned. The duty is therefore devolved upon this court to determine whether the object to be subserved by the condemnation of the right to fish in the plaintiff's lake is a public use.

"In order that a use may be public, it is not essential that the whole community should be able directly to participate in it. Thus, a free school for children is for a public use, although only a fraction of the community can attend it. But it is essential that the utility should in a substantial measure concern the public; as, for example, the education of the young concerns the community. The right to be condemned under this statute is merely the right to fish. Such a right is in the ancient legal French called a right 'profit à prendre,' a right so peculiarly for personal enjoyment that it is incapable of being acquired by the general public, either by custom (Cobb v. Davenport, 32 N. J. Law, 369) or by dedication (Id., 33 N. J. Law, 223, 97 Am. Dec. 718; Albright v. Cortright, 64 N. J. Law, 330, 45 Atl. 634, 48 L. R. A. 616, 81 Am. St. Rep. 504). No doubt there is a public right of fishing recognized by municipal law. It exists in the water of the ocean along the coast, and in the arms of the sea as far as the tide ebbs and flows. But this right differs from that now under consideration in several important respects. In the first place, it is a mere incident of the public ownership of the public waters, while the object of the present proceedings is to sever the right of fishing from the title to the lake, and give it an independent existence. If the Legislature had provided for the condemnation of the lake, so as to confer upon the public the right of resorting thereto for all purposes to which it is adapted, the condemnation might then have been supported on the precedents which find a public use in parks, and the right to fish would have passed as an incident of the public title. But under this statute the ownership of the lake is to remain private. In the next place, the natural supply of fish in the public waters is practically inexhaustible if the right to fish therein be subjected to such regulations as will reasonably guard it for the free enjoyment of the general public. But the natural supply of fish in the inland lakes of New Jersey is so small that, if the right to catch fish therein were exercised by persons sufficiently numerous to be deemed the public, the supply would soon come to an end. Lastly, fishing in the public waters has from time immemorial constituted an industry fostered by

law for the supply of the general market, while fishing in these private waters has been and can be only for individual amusement and gain. We think, therefore, that for present purposes there is no substantial resemblance between the common right to fish in public waters and the right now in question. \* \* \*

"The right to be enjoyed under this statute is necessarily the right of each individual who exercises it to abstract from what is designed by the statute to be a common stock such portion as he can secure, and to appropriate that to his own benefit. This is for private, rather than public, advantage. The statute does, indeed, contemplate the acquisition of the common stock by public agents, but they are to acquire it for private benefit. If the common stock thus to be acquired were capable of supplying an unlimited number of persons, then they might be deemed in a constitutional sense the public; but, as already stated, the stock would be quite inadequate for such a demand. The fact that a small supply is tendered free to the first takers does not show that the public can enjoy it.

"But not only does the Constitution require that the property taken should be for the public; it is also necessary that it should be for use. The chief purpose in the enjoyment of the property must be utility. But it cannot be doubted that the main object of the present statute is to furnish a means of amusement or sport to the few persons who have the inclination and leisure for such pastime. The public utility to be subserved by such indulgence is imperceptible. 'The reason of the case' therefore does not seem to warrant the conclusion that the proposed taking is 'for public use.' When we look to 'the settled practice of free governments,' we find no parallel for the present enterprise. There are many instances of the exercise of eminent domain for the purpose of furnishing facilities to be enjoyed by individuals; such are parks, highways, ferries, railways, telegraph and telephone lines, etc. But these differ from the right now under consideration in important respects. First, they are essentially useful; secondly, they are used by great numbers of people; and, thirdly, their use by the individuals abstracts nothing appreciable from the common opportunity of use. There are also some instances of the exercise of the power in order to afford facilities for private enjoyment where it is intended that each individual shall abstract a portion from the common stock. An example appears in the condemnation of water for domestic purposes in populous neighborhoods. But here also marked differences from the present scheme are observable. The end sought is utility of the greatest urgency, and the natural supply is so abundant that private abstraction cannot exhaust it. In all such instances these characteristics will be found in substantial measure to make them of use to the public. We have found no instance of the exercise of the power in order to afford a means of pastime capable of being enjoyed by only a few persons.

"There is another consideration deserving of some weight. The

Constitution requires that on taking private property for public use just compensation should be made to the owner, and this implies that the property taken shall be reasonably capable of just estimation. The lake itself could, no doubt, be fairly appraised, as could, probably, the right of any individual, or of any specified number of individuals, to fish therein. But I know of no criterion by which the right of an unlimited number of persons to spend their time upon the lake for the purpose of catching fish could be valued. It might be that the appraisers would evade the difficulty by awarding to the owner the full value of the lake, but in that case justice would require that the lake itself, and not a mere incidental right in it, should become public property. We think, therefore, that neither in the reason of the case nor in the settled practice of free governments is there legal support for the proposed condemnation."<sup>1</sup> \* \* \*

<sup>1</sup> Accord: *Hartman v. Tresise*, 36 Colo. 146, 84 Pac. 685, 4 L. R. A. (N. S.) 872 (1906) (giving right to trespass in fishing, on payment by each individual of damages done); *New England Trout Club v. Mather*, 68 Vt. 238, 35 Atl. 323, 33 L. R. A. 569 (1895) (same). Compare *State ex rel. Burrows v. Superior Court*, 48 Wash. 277, 283, 93 Pac. 423, 425, 17 L. R. A. (N. S.) 1005, 125 Am. St. Rep. 927 (1908), holding that riparian rights could be condemned separately from the land to which they were appurtenant; *Crow, J.*, saying: "If riparian rights, right of access, right of light and air, and other kindred, intangible rights appurtenant to real estate, are property, they are certainly such property, and such an interest in real estate, as an owner would be entitled to alienate, thereby conveying an easement. If such rights may be conveyed, we see no reason why they may not, under the right of eminent domain, be condemned, when necessary, for public use, without an appropriation of the actual land itself."

In *Brewster v. Rogers Co.*, 169 N. Y. 73, 83, 62 N. E. 164, 58 L. R. A. 495. (1901), holding invalid a statute authorizing the owners of logs to float them down navigable streams in a manner injurious to the riparian land, upon making individual compensation for such injuries as they occurred. *Cullen, J.*, said: "No one would seriously assert that a legislative enactment which authorized A. to enter upon the farm of B. without the latter's consent, whenever he saw fit, for the purpose of play, exercise, or recreation, upon making compensation therefor to B., was constitutional. It would not help the matter if the statute gave every person in the community the same privilege in B.'s farm. The statute would still be unconstitutional. Yet that farm could unquestionably be taken as a park or common, to be enjoyed by the community at large as a place for recreation, amusement, or health. The distinction in principle between the two kinds of legislation lies just here. In the first case the easements sought to be acquired are private, and, though every one might acquire such an easement, still they would remain in their aggregation of the same character as each one was in its severalty; that is to say, merely a number or bundle of private easements. As the easements would be private, the purpose for which they were acquired would be private. In the second case the easement would be in the public, and therefore the purpose for which it is taken public."

## SECTION 3.—TAKING AND INJURING PROPERTY

## EATON v. BOSTON, C. &amp; 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, 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 advertent 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.<sup>1</sup> 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

<sup>1</sup> As to the nature of this right, see *Williams v. Nelson*, 23 Pick. 141, 143, 34 Am. Dec. 45 (1839); *Turner v. Nye*, 154 Mass. 579, 583, 586, 28 N. E. 1048, 14 L. R. A. 487 (1891).



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.<sup>2</sup>

<sup>2</sup> Affirmed, after full consideration, in *Thompson v. Androscoggin Co.*, 54 N. H. 545 (1874). See the comment in *Hyde v. Minn., etc., Ry.*, 29 S. D. 220, 136 N. W. 92, 95-96, 40 L. R. A. (N. S.) 48 (1912). Earlier important cases to the same effect as to flooding land are *Hooker v. New Haven, etc., Co.*, 14

Conn. 146, 36 Am. Dec. 477 (1841); *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 180, 181, 20 L. Ed. 557 (1872), in which Miller, J., said, regarding a flooding of riparian land resulting from works to improve river navigation: "We are not unaware of the numerous cases in the state courts in which the doctrine has been successfully invoked that for a consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers, and other highways, for the public good, there is no redress; and we do not deny that the principle is a sound one, in its proper application, to many injuries to property so originating. And when, in the exercise of our duties here, we shall be called upon to construe other state Constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those states. But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle."

See, also, *O'Connell v. East Tenn. Ry.*, 87 Ga. 246, 13 S. E. 489, 13 L. R. A. 394, 27 Am. St. Rep. 246 (1891) (collecting cases); *Moyer v. N. Y. C.*, etc., R. R., 88 N. Y. 351 (1882). The same doctrine is held where an insufficient public sewer, in times of heavy rain, floods plaintiff's property, *Soifert v. Brooklyn*, 101 N. Y. 136, 4 N. E. 321, 54 Am. Rep. 664 (1886); or where sewage is injuriously discharged upon a private oyster bed under public waters, *Huffnibre v. Brooklyn*, 162 N. Y. 581, 57 N. E. 176, 48 L. R. A. 421 (1900).

But see Earl, J., dissenting, in *Story v. N. Y. Elev. R. R.*, 90 N. Y. 122, 185, 186, 43 Am. Rep. 146 (1882). "Our attention is called to two cases (*Pumpelly v. Green Bay Co.*, 13 Wall. 166, 36 Am. Dec. 477; and *Eaton v. B. C. & M. R. R.*, 51 N. H. 501, 12 Am. Rep. 147), which are supposed to take a new departure in the construction of the constitutional provision we are now considering. They are spoken of in the subsequent case of *Transportation Co. v. Chicago* [99 U. S. 635] as 'the extremest qualification of the doctrine' to be found; they hold that permanent flooding of private property may be regarded as a 'taking,' and thus they may be justified on the ground that there was a physical invasion of the real estate of the private owner and a practical ouster of his possession. We should not be embarrassed by any subtle meaning to be given to the word 'property' in the constitutional provision. The broad meaning sometimes given to it by law writers whose definitions are more apt to confuse than enlighten, or a meaning which can be evolved only by philologists and etymologists, was probably not in the minds of the framers of our Constitution: they must be supposed to have used the word in its ordinary and popular signification, as representing something that can be owned and possessed and taken from one and transferred to another. In popular parlance there is a distinction between taking property and injuring property. If the word is to have the broad meaning given to it by Austin and certain German and French civilians, to whose definitions our attention has been called, then it would include every interference with and injury or damage to land by which its use and enjoyment become less convenient or valuable. Such a sense has never been given to it or countenanced in any decision involving the constitutional provision as to taking private property. If the word is to have such a broad signification, then it was useless to provide in the English Land Clauses Act of 1845, that compensation should be made for land taken not only, but also for land 'injuriously affected,' and in the Constitution and laws of some of the states that compensation shall be made for both land taken and land damaged." See, also, the reasoning in *Talcott v. Des Moines*, 134 Iowa, 113, 126-128, 109 N. W. 311, 12 L. R. A. (N. S.) 696, 120 Am. St. Rep. 419 (1907).

MANIGAULT v. SPRINGS<sup>1</sup> (1905) 199 U. S. 473, 483-486, 26 Sup. Ct. 127, 50 L. Ed. 274. The South Carolina legislature authorized defendants to erect a dam across Kinloch creek (alleged by plaintiff to be a navigable stream) as part of a plan for draining certain lowlands. They were to be liable for all damages to land caused thereby which might be established in any court of competent jurisdiction. Plaintiff sought an injunction on the ground of interference with his right of navigation of Kinloch creek to his lands, and because the backwater of the dam would compel him to raise the dikes about his rice plantation to prevent overflowing. This was denied, Mr. Justice BROWN saying:

"The second assignment of error, that the plaintiff was deprived of his property without compensation, and hence without due process of law, is also unsound. The only allegation of the bill in that connection is that the construction of the dam was not only a destruction of plaintiff's right of navigation and of his access to his lands through Kinloch creek, but has caused the water to fall back to some extent on the plantation on Minim creek, just opposite the mouth of Kinloch, so as to compel the plaintiff to raise his dikes. We do not think the overflow to the minor extent indicated constitutes a taking of property within the meaning of the law, when the damage can be prevented by raising the banks, or that, if the damage stated did in fact result, that it would justify the interposition of a court of equity.

"The question whether the overflow of lands constitutes 'a taking' within the constitutional provision has been discussed in several cases in this court. *Pumpelly v. Green Bay & M. Canal Co.*, 13 Wall. 166. 20 L. Ed. 557; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336; *Gibson v. United States*, 166 U. S. 269, 41 L. Ed. 996, 17 Sup. Ct. 578; *Scranton v. Wheeler*, 179 U. S. 141, 45 L. Ed. 126. 21 Sup. Ct. 48; *Atwater v. Canandaigua*, 124 N. Y. 602, 27 N. E. 385.

"A recent case is that of *United States v. Lynah*, 188 U. S. 445, 47 L. Ed. 539, 23 Sup. Ct. 349, wherein it was held that where the government had placed dams and other obstructions in the Savannah river in such manner as to hinder its natural flow, and to raise the water so as to overflow plaintiff's lands and to cause a total destruction of their value, the proceeding must be regarded as an actual appropriation of the land, and created an obligation upon the government to make compensation for the land. The case was distinguished from that of *Mills v. United States*, 46 Fed. 738, 12 L. R. A. 673, wherein the damage consisted in obliging the plaintiff to raise the levees around his rice fields to prevent the flooding of the fields in high water. 'Obviously,' said the court, in commenting upon that case, 'there was no taking of the plaintiff's lands, but simply an injury

<sup>1</sup> Another part of this case is printed, post, p. 854.

which could be remedied at an expense, as alleged, of \$10,000, and the action was one to recover the amount of this consequential injury. The court rightfully held that it could not be sustained.' A still more recent case is that of *Bedford v. United States*, 192 U. S. 217, 48 L. Ed. 414, 24 Sup. Ct. 238, in which it is held that damages to lands by flooding as a result of revetments erected by the United States along the banks of the Mississippi river to prevent erosion of the banks from natural causes are consequential, and do not constitute a taking of the lands flooded within the meaning of the Constitution.

"We think the rule to be gathered from these cases is that where there is a practical destruction or material impairment of the value of plaintiff's lands, there is a taking which demands compensation; but otherwise where, as in this case, plaintiff is merely put to some extra expense in warding off the consequences of the overflow.

"The damage claimed by the plaintiff in the interruption of access to his lands and the impairment of his right to navigate the creek does not demand separate consideration. We have repeatedly held that where the government of the United States has, for the purposes of improving the navigation of a river, erected piers or other structures by which access to plaintiff's land is rendered more difficult, there is no claim for compensation. *Gibson v. United States*, 166 U. S. 269, 41 L. Ed. 996, 17 Sup. Ct. 578; *Scranton v. Wheeler*, 179 U. S. 141, 45 L. Ed. 126, 21 Sup. Ct. 48. We see no reason why the same principle should not apply to cases where the state legislature, exercising its police power, directs a certain dam to be built, and thereby incidentally impairs access to lands above the dam. In both cases the sovereign is exercising its constitutional right,—in one case in improving the navigation of the river, and in the other, in draining its low lands, and thereby enhancing their value for agricultural purposes. \* \* \*

"In view of the incidental character of the damage probably resulting to plaintiff's land from the erection of this dam, and the careful provision of the act that the defendants shall be liable for such damage, we do not think, at least, in the absence of an allegation that the defendants are financially irresponsible, that a court of equity would be authorized to enjoin the erection until the damages, which, if they exist at all, must be very difficult of ascertainment, shall be paid."

NON-PHYSICAL CONSEQUENTIAL INJURIES DUE TO OPERATION OF LEGISLATION.—In *Legal Tender Cases*, 12 Wall. 457, 551, 20 L. Ed. 287 (1871), Strong, J., said (upholding the federal legal tender laws as applied to prior contracts): "The argument [is] pressed upon us that the legal tender acts were prohibited by the spirit of the fifth amendment, which forbids taking private property for public use without just compensation or due process of law. That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to



inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But who ever supposed that, because of this, a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared? By the act of June 28, 1834, a new regulation of the weight and value of gold coin was adopted, and about six per cent. was taken from the weight of each dollar. The effect of this was that all creditors were subjected to a corresponding loss. The debts then due became solvable with six per cent. less gold than was required to pay them before. The result was thus precisely what it is contended the legal tender acts worked. But was it ever imagined this was taking private property without compensation or without due process of law?"

See, also, *L. & N. Ry. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671 (1911) (life pass issued in settlement of claim against railway invalidated by subsequent law forbidding carriage save for money compensation); *Armour Packing Co. v. U. S.*, 209 U. S. 56, 81-83, 28 Sup. Ct. 428, 52 L. Ed. 681 (1908) (regulations affecting prior contracts for future carriage).

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### 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.<sup>1</sup> The legis-

<sup>1</sup> See the elaborately reasoned case to this effect, *Beseman v. Penn. R. R.*, 50 N. J. Law, 235, 13 Atl. 164 (1888). This doctrine, however, is generally held not to extend to damage due to the location and conduct of specially annoying parts of the railroad business, which are not common to its lines generally, such as engine houses, terminal yards, water hydrants, and so forth. *Baltimore & Potomac R. R. v. Fifth Bap. Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739 (1883); *Pennsylvania R. R. v. Angel*, 41 N. J. Eq. 316, 7 Atl. 432, 56 Am. Rep. 1 (1886); *Chicago G. W. Ry. v. First M. E. Church*, 102 Fed. S5, 42 C. C. A. 178, 50 L. R. A. 488 (1900); *Terminal Co. v. Lelyst*, 114 Tenn. 368, 85 S. W. 881 (1905). But see *Dolan v. Chicago, M. & St. P. R. R.*, 118 Wis. 362, 95 N. W. 385 (1903).

lative 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 par-

ticular 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. In character, it is not unlike numerous other instances to be found in our statutes, where the Legislature has itself fixed, or has authorized municipal or other boards or officers to fix, the places, times, and methods in which occupations may be carried on, or acts done, which would naturally be attended with annoyance to individuals. The example of bells and whistles on locomotive engines has already been mentioned. Reference may also be made to the statutes regulating the use of stationary steam-engines, the places and manner of manufacturing or keeping petroleum, of carrying on other offensive trades and occupations, of storing gunpowder, and of establishing hospitals, stables, and bowling-alleys. \* \* \*

We can have no doubt that the statute by its just construction is in its terms applicable to the present case. \* \* \* Ordinarily, a statute which authorizes a thing to be done, which can be done without creating a nuisance, will not be deemed to authorize a nuisance. \* \* \* But, on the other hand, the authority to do an act must be held to carry with it whatever is naturally incidental to the ordinary and reasonable performance of that act. When the Legislature authorized factory bells to be rung, it must have been contemplated that they would be heard in the neighborhood. That is a natural and inevitable consequence. The Legislature must be deemed to have determined that the benefit is greater than the injury and annoyance; and to have intended to enact that the public must submit to the disturbance, for the sake of the greater advantage that would result from this method of carrying on the business of manufacturing. It must be considered, therefore, in this case, that a legislative sanction has been given to the very act which this court found to create a private nuisance. \* \* \*

[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.<sup>2</sup>

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### PASSAIC v. PATERSON BILL POSTING CO.

(Court of Errors and Appeals of New Jersey, 1905. 72 N. J. Law, 285, 62 Atl. 267, 111 Am. St. Rep. 676, 5 Ann. Cas. 995.)

See ante, p. 400, for a report of this case, with notes.

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### UNITED STATES v. CHANDLER-DUNBAR WATER POWER CO.

(Supreme Court of United States, 1913. 229 U. S. 53, 33 Sup. Ct. 667, 57 L. Ed. —.)

[Error to the federal District Court for the Western District of Michigan. By act of Congress of 1909 (35 Stat. 815, 820, c. 264) it was declared that the ownership in fee of all land north of St. Mary's Falls ship canal, between said canal and the international boundary at

<sup>2</sup> Accord: *Titus v. Boston*, 161 Mass. 209, 36 N. E. 793 (1894) (damage from proximity of city sewer); *Murtha v. Lovewell*, 166 Mass. 391, 44 N. E. 347, 55 Am. St. Rep. 410 (1896) (iron furnace casting sparks and red-hot iron on plaintiff's land); *Levin v. Goodwin*, 191 Mass. 341, 77 N. E. 718, 114 Am. St. Rep. 616 (1906) (noise of bowling alley).

"The general rule is that the legislature may authorize small nuisances without compensation, but not great ones."—Allen, J., in *Bacon v. Boston*, 154 Mass. 100, 102, 28 N. E. 9 (1891).

"To a certain and to an appreciable extent the legislature may alter the law of nuisance, although property is affected."—Holmes, J., in dissenting opinion, *Muhiker v. N. Y. & H. R. R.*, 197 U. S. 544, 576, 25 Sup. Ct. 522, 49 L. Ed. 872 (1905).

Compare *Blanc v. Murray*, 36 La. Ann. 162, 51 Am. Rep. 7 (1884) (inflammatory building dangerous to adjoining property—license held invalid).

"The acts that a legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the state; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large."—*Baltimore & P. R. R. v. Fifth Bap. Church*, 105 U. S. 317, 332, 2 Sup. Ct. 719, 27 L. Ed. 739 (1883), by Field, J. See 1 L. R. A. (N. S.) 49-137, note (collecting authorities).

FENCE LAWS.—In many Western and Southern states statutes have absolved the owners of domestic animals from liability for their trespasses upon unfenced land, even when intentionally allowed to roam at large. These have been held constitutional, except when interpreted to authorize the intentional driving of animals upon unfenced land. See *Buford v. Houtz*, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. Ed. 618 (1890); *Union P. Ry. v. Rollins*, 5 Kan. 167 (1869); *Martin v. Platte Val. Sheep Co.*, 12 Wyo. 432, 76 Pac. 571, 78 Pac. 1093 (1904); *Poindexter v. May*, 98 Va. 143, 34 S. E. 971, 47 L. R. A. 588 (1900); *Bulplt v. Matthews*, 145 Ill. 345, 34 N. E. 525 (1893), 22 L. R. A. 55, and note. Compare *Smith v. Bivens*, 56 Fed. 352 (1893).



Sault Ste. Marie in Michigan, was necessary for the purposes of navigation, and its condemnation was directed. Defendant company, a riparian owner of said land, had erected in the rapids of St. Mary's river, under the circumstances stated in the opinion, the necessary structures to produce a large water power which for 20 years it had been using and selling, and the erection of still larger structures to use the undeveloped power was contemplated when the above act was passed. The court above mentioned, in which the condemnation was conducted, awarded an item of \$550,000 to said defendant on account of its claim, as riparian owner, to the undeveloped water power of the river in excess of the supposed requirements of navigation. All parties took writs of error from this, the United States denying it altogether and the defendant alleging its inadequacy. Other facts appear below.]

Mr. Justice LURTON. \* \* \* The technical title to the beds of the navigable rivers of the United States is either in the states in which the rivers are situated, or in the owners of the land bordering upon such rivers. Whether in one or the other is a question of local law. *Shively v. Bowlby*, 152 U. S. 1, 31, 38 L. Ed. 331, 343, 14 Sup. Ct. 548; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 624, 632, 56 L. Ed. 570, 578, 581, 32 Sup. Ct. 340; *Scott v. Lattig*, 227 U. S. 229, 33 Sup. Ct. 242, 57 L. Ed. —.<sup>1</sup> Upon the admission of the state of Michigan into the Union the bed of the St. Mary's river passed to the state, and under the law of that state the conveyance of a tract of land upon a navigable river carries the title to the middle thread. *Webber v. Pere Marquette Boom Co.*, 62 Mich. 626, 30 N. W. 469; *Scranton v. Wheeler*, 179 U. S. 141, 163, 45 L. Ed. 126, 137, 21 Sup. Ct. 48; *United States v. Chandler-Dunbar Water Power Co.*, 209 U. S. 447, 52 L. Ed. 881, 28 Sup. Ct. 579.

The technical title of the Chandler-Dunbar Company, therefore, includes the bed of the river opposite its upland on the bank to the middle thread of the stream, being the boundary line at that point between the United States and the Dominion of Canada. Over this bed flows about two-thirds of the volume of water constituting the falls and rapids of the St. Mary's river. By reason of that fact, and the ownership of the shore, the company's claim is, that it is the owner of the river and of the inherent power in the falls and rapids, subject only to the public right of navigation. While not denying that this right of navigation is the dominating right, yet the claim is that the United States, in the exercise of the power to regulate commerce, may not exclude the rights of riparian owners to construct in the river

<sup>1</sup> See, also, *St. Anthony Falls Co. v. St. Paul Com'rs*, 16S U. S. 349, 18 Sup. Ct. 157, 42 L. Ed. 497 (1897) (eases). In some states the titles to the beds of navigable streams are treated differently from those to the beds of navigable lakes. *Delaplaine v. C. & N. W. Ry.*, 42 Wis. 214, 24 Am. Rep. 386 (1877). In all, the beds of the Great Lakes are public property. See Gould, *Waters* (3d Ed.) chapter III.

and upon their own submerged lands such appliances as are necessary to control and use the current for commercial purposes, provided only that such structures do not impede or hinder navigation, and that the flow of the stream is not so diminished as to leave less than every possible requirement of navigation, present and future. This claim of a proprietary right in the bed of the river and in the flow of the stream over that bed, to the extent that such flow is in excess of the wants of navigation, constitutes the ground upon which the company asserts that a necessary effect of the act of March 3, 1909, and of the judgment of condemnation in the court below, is a taking from it of a property right or interest of great value, for which, under the fifth amendment, compensation must be made. \* \* \*

This title of the owner of fast land upon the shore of a navigable river to the bed of the river is, at best, a qualified one. It is a title which inheres in the ownership of the shore; and, unless reserved or excluded by implication, passed with it as a shadow follows a substance, although capable of distinct ownership. It is subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, is of no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers. That power of use and control comes from the power to regulate commerce between the states and with foreign nations. It includes navigation and subjects every navigable river to the control of Congress. All means having some positive relation to the end in view which are not forbidden by some other provision of the Constitution are admissible. If, in the judgment of Congress, the use of the bottom of the river is proper for the purpose of placing therein structures in aid of navigation, it is not thereby taking private property for a public use, for the owner's title was in its very nature subject to that use in the interest of public navigation. If its judgment be that structures placed in the river and upon such submerged land are an obstruction or hindrance to the proper use of the river for purposes of navigation, it may require their removal and forbid the use of the bed of the river by the owner in any way which, in its judgment, is injurious to the dominant right of navigation. So, also, it may permit the construction and maintenance of tunnels under or bridges over the river, and may require the removal of every such structure placed there with or without its license, the element of contract out of the way, which it shall require to be removed or altered as an obstruction to navigation. \* \* \* [Here follow quotations from *Gilman v. Philadelphia*, 3 Wall. 713, 724, 18 L. Ed. 96, *Gibson v. U. S.*, 166 U. S. 269, 271, 17 Sup. Ct. 578, 41 L. Ed. 996, and *Scranton v. Wheeler*, supra.]

So unfettered is this control of Congress over navigable streams of the country that its judgment as to whether a construction in or over such a river is or is not an obstacle and a hindrance to naviga-

tion is conclusive. Such judgment and determination is the exercise of legislative power in respect of a subject wholly within its control.

In *Pennsylvania v. Wheeling & B. Bridge Co.*, 18 How. 421, 430. 15 L. Ed. 435, 436, this court, upon the facts in evidence, held that a bridge over the Ohio river, constructed under an act of the state of Virginia, created an obstruction to navigation, and was a nuisance which should be removed. Before the decree was executed, Congress declared the bridge a lawful structure, and not an obstruction. This court thereupon refused to issue a mandate for carrying into effect its own decree, saying: "Although it still may be an obstruction in fact, [it] is not so in contemplation of law." \* \* \*

The conclusion to be drawn is, that the question of whether the proper regulation of navigation of this river at the place in question required that no construction of any kind should be placed or continued in the river by riparian owners, and whether the whole flow of the stream should be conserved for the use and safety of navigation, are questions legislative in character; and when Congress determined, as it did by the act of March 3, 1909, that the whole river between the American bank and the international line, as well as all of the upland north of the present ship canal, throughout its entire length, was "necessary for the purposes of navigation of said waters and the waters connected therewith," that determination was conclusive.

So much of the zone covered by this declaration as consisted of fast land upon the banks of the river, or in islands which were private property, is, of course, to be paid for. But the flow of the stream was in no sense private property, and there is no room for a judicial review of the judgment of Congress that the flow of the river is not in excess of any possible need of navigation, or for a determination that, if in excess, the riparian owners had any private property right in such excess which must be paid for if they have been excluded from the use of the same.

That Congress did not act arbitrarily in determining that "for the purposes of navigation of said waters and the waters connected therewith," the whole flow of the stream should be devoted exclusively to that end, is most evident when we consider the character of this stream and its relation to the whole problem of lake navigation. The river St. Mary's is the only outlet for the waters of Lake Superior. The

<sup>2</sup> Accord (legislatively authorized obstructions in navigable waters, injurious to riparian owner): *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. Ed. 96 (1836) (navigation wholly obstructed by bridge); *Frost v. Wash. Co. Ry.*, 96 Me. 76, 51 Atl. 806, 59 L. R. A. 68 (1901) (same); *Manigault v. Springs*, supra, p. 721 (same, by dam for drainage purposes); *Sallotte v. King Bridge Co.*, 122 Fed. 378, 381-383, 58 C. C. A. 466, 470, 65 L. R. A. 620 (1905) (bridge pier diverting current so as to erode land—citing cases). Lurton, J., saying: "As a riparian proprietor, the plaintiff was subject to all the injury, not amounting to a taking of his land, which might result from the lawful improvement of the navigation of the stream, or the construction of piers, abutments, or bridges, in the exercise of the public rights in and over the stream in respect of such matters."

stretch of water called the falls and rapids of the river is about 3,000 feet long, and from bank to bank has a width of about 4,000 feet. About two-thirds of the volume of the stream flows over the submerged lands of the Chandler-Dunbar Company, the rest over like lands on the Canadian side of the boundary. The fall in the rapids is about 18 feet. This turbulent water, substantially unnavigable without the artificial aid of canals around the stream, constitutes both a tremendous obstacle to navigation and an equally great source of water power, if devoted to commercial purposes. That the wider needs of navigation might not be hindered by the presence in the river of the construction works necessary to use it for the development of water power for commercial uses under private ownership was the judgment and determination of Congress. There was also present in the mind of Congress the necessity of controlling the outflow from Lake Superior, which averages some 64,000 cubic feet per second. That outflow has great influence both upon the water level of Lake Superior and also upon the level of the great system of lakes below, which receive that outflow. A difference of a foot in the level of Lake Superior may influence adversely access to the harbors on that lake. The same fall in the water level of the lower lakes will perceptibly affect access to their ports. This was a matter of international consideration, for Canada, as well as the United States, was interested in the control and regulation of the lake water levels. \* \* \* [Here follow references to prospective negotiations upon the subject with the British government, and to the large expenditures for canals and locks at the point by both Canada and the United States, which were already made inadequate by the increasing commerce, making necessary new canals.]

The upland belonging to the Chandler-Dunbar Company consists of a strip of land some 2,500 feet long and from 50 to 150 feet wide. It borders upon the river on one side, and on the government canal strip on the other. Under permits from the Secretary of War, revocable at will, it placed in the rapids, in connection with its upland facilities, the necessary dams, dykes, and forebays for the purpose of controlling the current and using its power for commercial purposes, and has been for some years engaged in using and selling water power. What it did was by the revocable permission of the Secretary of War, and every such permit or license was revoked by the act of 1909. \* \* \*

It is a little difficult to understand the basis for the claim that in appropriating the upland bordering upon this stretch of water, the government not only takes the land, but also the great water power which potentially exists in the river. The broad claim that the water power of the stream is appurtenant to the bank owned by it, and not dependent upon ownership of the soil over which the river flows, has been advanced. But whether this private right to the use of the flow of the water and flow of the stream be based upon the qualified title which the company had to the bed of the river over which it

flows, or the ownership of land bordering upon the river, is of no prime importance. In neither event can there be said to arise any ownership of the river. Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable.

Whatever substantial private property rights exist in the flow of the stream must come from some right which that company has to construct and maintain such works in the river, such as dams, walls, dykes, etc., essential to the utilization of the power of the stream for commercial purposes. We may put out of view altogether the class of cases which deal with the right of riparian owners upon non-navigable stream to the use and enjoyment of the stream and its waters. The use of the fall of such a stream for the production of power may be a reasonable use consistent with the rights of those above and below. The necessary dam to use the power might completely obstruct the stream, but if the effect was not injurious to the property of those above, or to the equal rights of those below, none could complain, since no public interest would be affected. We may also lay out of consideration the cases cited which deal with the rights of riparian owners upon navigable or non-navigable streams as between each other. Nor need we consider cases cited which deal with the rights of riparian owners under state laws and private or public charters conferring rights. That riparian owners upon public navigable rivers have in addition to the rights common to the public, certain rights to the use and enjoyment of the stream, which are incident to such ownership of the bank, must be conceded. These additional rights are not dependent upon title to the soil over which the river flows, but are incident to ownership upon the bank. Among these rights of use and enjoyment is the right, as against other riparian owners, to have the stream come to them substantially in its natural state, both in quantity and quality. They have also the right of access to deep water, and when not forbidden by public law may construct for this purpose, wharves, docks, and piers in the shallow water of the shore.<sup>3</sup> But every such structure in the water of a navigable river is subordinate to the right of navigation, and subject to the obligation to suffer the consequences of the improvement of navigation, and must be removed if Congress, in the assertion of its power over navigation, shall determine that their continuance is detrimental to the public interest in the navigation of the river. *Gibson v. United States*, 166

<sup>3</sup> The riparian rights appurtenant to land upon public waters are enumerated in 1 Lewis, *Em. Dom.* (3d Ed.) § 100, approved in *Taylor v. Comm.*, 102 Va. 759, 773, 47 S. E. 875, 102 Am. St. Rep. 805 (1904). See, also, *Union Depot, etc., Co. v. Brunswick*, 31 Minn. 297, 301, 17 N. W. 626, 47 Am. Rep. 789 (1883); *Delaplaine v. C. & N. W. Ry.*, 42 Wis. 214, 24 Am. Rep. 386 (1877); *Rumsey v. N. Y., etc., R. R.*, 133 N. Y. 79, 30 N. E. 654, 15 L. R. A. 618, 28 Am. St. Rep. 600 (1892); *Lamprey v. State*, 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541 (1893) (right to accretion and reliction).



U. S. 269, 41 L. Ed. 996, 17 Sup. Ct. 578; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. Ed. 336. It is for Congress to decide what is and what is not an obstruction to navigation. Pennsylvania v. Wheeling & B. Bridge Co., 18 How. 421, 15 L. Ed. 435; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. Ed. 523, 27 Sup. Ct. 367; Philadelphia Co. v. Stimson, 223 U. S. 605, 56 L. Ed. 570, 32 Sup. Ct. 340. \* \* \*

Upon what principle can it be said that, in requiring the removal of the development works which were in the river upon sufferance, Congress has taken private property for public use without compensation? In deciding that a necessity existed for absolute control of the river, at the rapids, Congress has, of course, excluded, until it changes the law, every such construction as a hindrance to its plans and purposes for the betterment of navigation. The qualified title to the bed of the river affords no ground for any claim of a right to construct and maintain therein any structure which Congress has, by the act of 1909, decided in effect to be an obstruction to navigation, and a hindrance to its plans for improvement. That title is absolutely subordinate to the right of navigation, and no right of private property would have been invaded if such submerged lands were occupied by structures in aid of navigation, or kept free from such obstructions in the interest of navigation. *Scranton v. Wheeler*, 179 U. S. 141, 163, 45 L. Ed. 126, 137, 21 Sup. Ct. 48; *Hawkins Point Light-House Case*, 39 Fed. 83. We need not consider whether the entire flow of the river is necessary for the purposes of navigation, or whether there is a surplus which is to be paid for, if the Chandler-Dunbar Company is to be excluded from the commercial use of that surplus. The answer is found in the fact that Congress has determined that the stream from the upland, taken to the international boundary, is necessary for the purposes of navigation. That determination operates to exclude from the river forever the structures necessary for the commercial use of the water power. That it does not deprive the Chandler-Dunbar Company of private property rights follows from the considerations before stated.

It is said that the twelfth section of the act of 1909 authorizes the Secretary of War to lease upon terms agreed upon, any excess of water power which results from the conservation of the flow of the river, and the works which the government may construct. This, it is said, is a taking of private property for commercial uses, and not for the improvement of navigation. But, aside from the exclusive public purpose declared by the eleventh section of the act, the twelfth section declares that the conservation of the flow of the river is "primarily for the purposes of navigation, and incidentally for the purpose of having the water power developed, either for the direct use of the United States, or by lease \* \* \* through the Secretary of War." If the primary purpose is legitimate, we can see no sound objection to leasing any excess of power over the needs of the government. The

practice is not unusual in respect to similar public works constructed by state governments. In *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254, 273, 35 L. Ed. 1004, 1010, 12 Sup. Ct. 173, respecting a Wisconsin act to which this objection was made, the court said: "But if, in the erection of a public dam for a recognized public purpose, there is necessarily produced a surplus of water, which may properly be used for manufacturing purposes, there is no sound reason why the state may not retain to itself the power of controlling or disposing of such water as an incident of its right to make such improvement. Indeed, it might become very necessary to retain the disposition of it in its own hands, in order to preserve at all times a sufficient supply for the purposes of navigation. If the riparian owners were allowed to tap the pond at different places, and draw off the water for their own use, serious consequences might arise, not only in connection with the public demand for the purposes of navigation, but between the riparian owners themselves as to the proper proportion each was entitled to draw,—controversies which could only be avoided by the state reserving to itself the immediate supervision of the entire supply. As there is no need of the surplus running to waste, there was nothing objectionable in permitting the state to let out the use of it to private parties, and thus reimburse itself for the expenses of the improvement." \* \* \*

The conclusion, therefore, is that the court below erred in awarding \$550,000, or any other sum, for the value of what is called "raw water," that is, the present money value of the rapids and falls to the Chandler-Dunbar Company as riparian owners of the shore and appurtenant submerged land. \* \* \*

Judgment reversed.<sup>4</sup>

<sup>4</sup> Accord: *Gibson v. U. S.*, 166 U. S. 269, 17 Sup. Ct. 578, 41 L. Ed. 996 (1897) (riparian access to water cut off by dike); *Scranton v. Wheeler*, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. Ed. 126 (1900) (same by pier); *Bedford v. U. S.*, 192 U. S. 217, 24 Sup. Ct. 238, 48 L. Ed. 414 (1904) (revetment of river bank in aid of navigation causing a continuance of erosion of plaintiffs' land below); *Black River Imp. Co. v. La Crosse Co.*, 54 Wis. 659, 11 N. W. 443, 41 Am. Rep. 66 (1882) (diversion of water to another channel in same river); *Com'rs v. Withers*, 29 Miss. 21, 64 Am. Dec. 126 (1855) (diversion to another stream in same watershed) [see *Beldler v. Sanitary District*, 211 Ill. 628, 657, 71 N. E. 1118, 67 L. R. A. 820 (1904) (diversion to another watershed)]; *Hawkins Point Light House Case (C. C.)* 29 Fed. 77 (1889) (lighthouse obstructing access to stream); *Cohn v. Wausau Boom Co.*, 47 Wis. 314, 2 N. W. 546 (1879) (same by public log boom); *Lewis Oyster Co. v. Briggs*, 229 U. S. 82, 33 Sup. Ct. 679, 57 L. Ed. — (1913) (destruction of private oyster bed by deepening channel); *Jackson v. U. S.*, 230 U. S. 1, 33 Sup. Ct. 1011, 57 L. Ed. — (1913) (levees in aid of navigation causing flooding elsewhere); *Hughee v. U. S.*, 230 U. S. 24, 33 Sup. Ct. 1019, 57 L. Ed. — (1913) (same, due to relocation of levee).

Similarly, although obstructions in a navigable stream, were originally lawfully created, their removal may be compelled without compensation. *West Chicago St. Ry. v. Illinois*, 201 U. S. 506, 26 Sup. Ct. 518, 50 L. Ed. 845 (1906) (obstructing tunnel); *Unon Bridge Co. v. U. S.*, 201 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523 (1907) (obstructing bridge). But if the obstruction (as a lock) is used by the government instead of being merely removed or destroyed,

CHICAGO, B. & O. RY. CO. v. ILLINOIS ex rel. GRIMWOOD (1906) 200 U. S. 561, 581, 582, 586, 587, 590, 591, 594, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175, Mr. Justice HARLAN:

"The concrete case arising upon the petition and the demurrer is this: [Here facts are stated showing that the railway lawfully constructed a bridge for its track across Rob Roy creek, leaving a depth and width of channel sufficient to carry off all of the natural flow of the water; that under statutory authority a state drainage commission has adopted a suitable plan for draining a large body of swamp land into Rob Roy creek, which is the natural drainage outlet for these lands; that the plan requires the channel to be enlarged, and that this cannot be done without removing the foundations of the railway bridge and necessitating the construction of a new bridge with a wider opening for the water.] The company insists that to require it to meet these expenses out of its own funds will be, within the meaning of the Constitution, a *taking* of its property for public use without compensation, and, therefore, without due process of law, as well as a denial to it of the equal protection of the laws. \* \* \*

"This contention cannot, however, be sustained, except upon the theory that the acquisition by the railway company of a right of way

compensation must be made. Monongahela, etc., Co. v. U. S., 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463 (1893). Compare Water Power Cases, 148 Wis. 124, 134 N. W. 330, 38 L. R. A. (N. S.) 526 (1912) (invalid attempt to expropriate owners of water power plants under guise of improving navigation).

As to how far flooding caused by incidents of navigation (as by a jam of logs) must be compensated, see Grand Rapids Co. v. Jarvis, 30 Mich. 308, 316-320 (1874). Of course a non-navigable stream cannot be rendered navigable for public use without compensation. Morgan v. King, 35 N. Y. 454, 91 Am. Dec. 58 (1866).

In Transp. Co. v. Chicago, 99 U. S. 635, 25 L. Ed. 336 (1879) it was held no compensation need be made for temporarily obstructing a riparian owner's access to navigable water by a coffer-dam used in constructing a street tunnel under the Chicago river. "Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking."—Strong, J., 99 U. S. 642, 25 L. Ed. 336. See note, post, p 770, under Omaha, etc., Ry. v. Cable Co.

Is a bridge across a stream, which relieves it of much water traffic, an "improvement of navigation," so that compensation need not be made to the owner of the bed of the stream for placing the abutments therein? See Stockton v. Balt. & O. Ry. (C. C.) 32 Fed. 9, 20 (1887).

COMPENSATION FOR FRANCHISES USED IN CONNECTION WITH PROPERTY TAKEN.—As to the necessity of making compensation for these, see Monongahela, etc., Co. v. United States, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463 (1893), post, p. 955 [but see Lewis Oyster Co. v. Briggs, 229 U. S. 82, 89-90, 33 Sup. Ct. 679, 57 L. Ed. — (1913)]; Newburyport Water Co. v. City, 168 Mass. 541, 47 N. E. 533 (1897); Gloucester Water Co. v. City, 179 Mass. 365, 60 N. E. 977 (1901); Kennebec Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902); Brunswick, etc., Dist. v. Maine Water Co., 99 Me. 371, 59 Atl. 537 (1904).

What is the legal effect of a grant by Congress of the right to bridge a navigable stream, without reserving a right of repeal? See U. S. v. Baltimore & O. R. Co., 229 U. S. 244, 33 Sup. Ct. 850, 57 L. Ed. — (1913).

through the lands in question, and the construction on that right of way of a bridge across Rob Roy creek at the point in question, carried with it a surrender by the state of its power, by appropriate agencies, to provide for such use of that natural water course as might subsequently become necessary or proper for the public interests. If the state could part with such power, held in trust for the public,—which is by no means admitted,—it has not done so in any statute, either by express words or by necessary implication. When the railway company laid the foundations of its bridge in Rob Roy creek, it did so subject to the rights of the public in the use of that water course, and also subject to the possibility that new circumstances and future public necessities might, in the judgment of the state, reasonably require a material change in the methods used in crossing the creek with cars. It may be—and we take it to be true—that the opening under the bridge as originally constructed was sufficient to pass all the water then or now flowing through the creek. But the duty of the company, implied in law, was to maintain an opening under the bridge that would be adequate and effectual for such an increase in the volume of water as might result from lawful, reasonable regulations established by appropriate public authority from time to time for the drainage of lands on either side of the creek. Angell, *Water Courses* (6th Ed.) § 465b, p. 640.

“The supreme court of Illinois said in this case: ‘The right of drainage through a natural water course or a natural water way is a natural easement, appurtenant to the land of every individual through whose land such natural water course runs, and every owner of land along such water course is obliged to take notice of the natural easement possessed by other owners along the same water course.’ Again, in the same case: ‘Where lands are valuable for cultivation, and the country, as this, depends so much upon agriculture, the public welfare demands that the lands shall be drained; and, in the absence of any constitutional provision in relation to such laws they have been sustained, upon high authority, as the exercise of the police power.’ Further: ‘A natural water course, being a natural easement, is placed upon the same ground, in many respects as to the public right, as is a public highway. At the common law, if a railroad or another highway crosses a natural water course or a public highway, such highway or railroad must be so constructed across the existing highway or waterway, and so maintained, that said highway or waterway, as the case may be, shall not only subserve the demands of the public as they exist at the time of crossing the same, but for all future time.

\* \* \* The great weight of authority is, that where there is a natural water way, or where a highway already exists and is crossed by a railroad company under its general license to build a railroad, and without any specific grant by the legislative authority to obstruct the highway or water way, the railroad company is bound to make and

keep its crossing, at its own expense, in such condition as shall meet all the reasonable requirements of the public as the changed conditions and increased use may demand.' \* \* \*

"The recent case of *New Orleans Gaslight Co. v. Drainage Commission*, 197 U. S. 453, 49 L. Ed. 831, 25 Sup. Ct. 471, \* \* \* would seem to be decisive of the question before us. It there appeared that a gas company had acquired an exclusive right to supply gas to the city of New Orleans and its inhabitants through pipes and mains laid in the streets. In the exercise of that right it had laid its pipes in the streets. Subsequently a drainage commission, proceeding under statutory authority, devised a system of drainage for the city, and in the execution of its plans it became necessary to change the location in some places of the mains and pipes laid by the gas company. The contention of that company was that it could not be required, at its own cost, to shift its pipes and mains so as to accommodate the drainage system; that to require it to do so would be a taking of its property for public use without compensation, in violation of the Constitution of the United States. This court said: 'The gas company did not acquire any specific location in the streets; it was content with the general right to use them; and when it located its pipes it was at the risk that they might be, at some future time, disturbed, when the state might require, for a necessary public use, that changes in location be made. \* \* \* There is nothing in the grant to the gas company, even if it could legally be done, undertaking to limit the right of the state to establish a system of drainage in the streets. We think whatever right the gas company acquired was subject, in so far as the location of its pipes was concerned, to such further regulations as might be required in the interest of the public health and welfare.' \* \* \*

"The duty of the company will end when it removes the obstructions which it has placed in the way of enlarging, deepening, and widening of the channel. It follows, upon principles of justice, that while the expense attendant upon the removal of the present bridge and culvert and the timbers and stones placed by the company in the creek, as well as the expense of the erection of any new bridge which the company may elect to construct in order to conform to the plan of the commissioners, should be borne by the railway company, the expense attendant merely upon the removal of soil in order to enlarge, deepen, and widen the channel must be borne by the district."<sup>1</sup>

[HOLMES, WHITE and McKENNA, JJ., dissented from compelling the railroad to pay for the removal of its present bridge, and BREWER, J., dissented upon all points.]

<sup>1</sup> Accord: *Manigault v. Springs*, ante, p. 721 (plaintiff's access to navigation impaired in order to drain lowlands). Compare *Jackson v. U. S.*, 230 U. S. 1, 33 Sup. Ct. 1011, 57 L. Ed. — (1913) (levees in one place causing flooding elsewhere).



CHENANGO BRIDGE CO. v. PAIGE (1880) 83 N. Y. 178, 185, 186, 38 Am. Rep. 407, EARL, J. (holding that a private bridge could be lawfully erected across a navigable fresh-water stream, it not interfering with navigation in fact, nor being prohibited by the legislature):

"The Chenango river is a fresh water stream. It is the private property of the riparian owners. The public, in such streams, have an easement only for navigation and for floating logs and timber. As well said in *Ex parte Jennings*, 6 Cow. 518, 16 Am. Dec. 447: 'The public right is one of passage, and nothing more, as in a common highway. It is called by the cases an easement; and the proprietor has a right to use the land and water of the river in any way not inconsistent with this easement. If he make any erection rendering the passage of boats, etc., inconvenient or unsafe, he is guilty of a nuisance; and this is the only restriction which the law imposes upon him.' And when the case between these two bridge companies was first before this court (26 How. Prac. 124), Judge Smith, in an opinion written by him, said: 'The Chenango river is a fresh water stream, in which the tide does not ebb and flow, and is, therefore, a private river. The riparian proprietors own the bed and banks. As early as 1798 it was declared a public highway, but subject to the public easement for the purpose of navigation. The riparian owners might make such use of it as they pleased; might bridge and dam it, except as prohibited by acts of the legislature, and might cross it with ferries, except as so forbidden.'

"The legislature, except under the power of eminent domain, upon making compensation, can interfere with such streams only for the purpose of regulating, preserving and protecting the public easement. Further than that, it has no more power over these fresh water streams than over other private property. It may make laws for regulating booms, dams, ferries, and bridges, only so far as is necessary to protect and preserve the public easement; and when it goes further, it invades private rights protected under the Constitution. *Canal Com'rs v. People*, 5 Wend. 423, 448; *Penn v. Wheeling & Belmont Bridge Co.*, 18 How. 421, 432, 15 L. Ed. 435; *Morgan v. King*, 35 N. Y. 454, 91 Am. Dec. 58.

"Any person owning the land upon both sides of such a river can maintain a ferry or bridge or dam for his own use, provided he does it so as not to interfere with the public easement, without any authority from the legislature, and even in defiance of a legislative prohibition. In such case he would but be making a proper use of his own property. Such use must, however, be such as not to interfere with the rights of other riparian owners. And there is one more limitation: He cannot, without legislative authority, maintain a bridge

or ferry for public and general use, because public highways and toll bridges and toll ferries are subject to legislative regulation and control."<sup>1</sup>

MINNEAPOLIS MILL COMPANY v. BOARD OF WATER  
COMMISSIONERS OF ST. PAUL.

(Supreme Court of Minnesota, 1894. 56 Minn. 485, 58 N. W. 33.)

COLLINS, J. These cases were tried together in the court below, and, when plaintiffs (appellants here) rested, both actions were dismissed, upon defendant's motion. From orders refusing new trial, appeals were taken. Appellants are corporations created in 1856 by acts of the territorial legislature, and authorized to build and maintain dams in the Mississippi river at the falls of St. Anthony, about 10 miles above St. Paul, for the development of a water power, and for the use and sale of such power. One of these corporations, owning the shore on the east side of the river, erected a dam to the proper point in the river channel, and the other, owning the east shore, built its dam so as to connect the two, thus forming a power which has ever since been maintained and used. In 1883 the legislature authorized the city of St. Paul to purchase, and there was purchased, the property and franchises of a private corporation theretofore engaged in supplying said city with water. A board of water commissioners was created by the same act, and that board, a branch of the city government, is the present respondent. \* \* \*

Under [statutory authority] the respondent duly established a pumping station at Lake Baldwin, a body of water with an area less than a mile square, and by means of its pumps forced water through conduits to the city for public use. The outlet of this lake is Rice creek, and this creek empties into the Mississippi river a few miles above the dams built and maintained by appellants. Claiming that the result of this diversion of water was to greatly diminish the volume which came to the dam, and to materially affect and reduce the water power, appellants brought these actions to restrain and enjoin perpetually the operation of respondent's works at the lake, and the diversion of water therefrom.

Counsel for both parties made lengthy oral arguments, and have filed very full briefs. Many questions have been discussed which we

<sup>1</sup> Accord: *Ex parte Jennings*, 6 Cow. 537, 16 Am. Dec. 447 (1826) (diversion of water to canal); *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393 (1883) (diversion to supply city—citing cases); *Emporia v. Soden*, 25 Kan. 588, 37 Am. Rep. 265 (1881) (same); *Mayor of Baltimore v. Appold*, 42 Md. 442 (1875) (artificially increasing flow of stream); *Platt v. Waterbury*, 72 Conn. 531, 45 Atl. 154, 48 L. R. A. 691, 77 Am. St. Rep. 335 (1900) (pollution by city sewage); *Ballance v. Peoria*, 180 Ill. 29, 54 N. E. 428 (1899) (bridge pier in stream).

do not regard as connected with the case, and hence we need not refer to them. There are a few well-settled principles which we regard as covering and controlling the facts before us, and a statement of these, with a construction of certain parts of the act under which respondent's board was authorized to obtain further and other sources of water supply, will dispose of these appeals.

1. The appellants are riparian owners on a navigable or public stream,<sup>1</sup> and their rights as such owners are subordinate to public uses of the water in the stream. And their rights under their charters are, equally with their rights as riparian owners, subordinate to these public uses.

2. There can be no doubt but that the public, through their representatives, have the right to apply these waters to such public uses without providing for or making compensation to riparian owners.

3. The navigation of the stream is not the only public use to which these public waters may be thus applied. The right to draw from them a supply of water for the ordinary use of cities in their vicinity is such a public use, and has always been so recognized. At the present time it is one of the most important public rights, and is daily growing in importance as population increases. The fact that the cities, through boards of commissioners or officers whose functions are to manage this branch of the municipal government, charge consumers for water used by them, as a means for paying the cost and expenses of maintaining and operating the plant, or that such consumers use the water for their domestic and such other purposes as water is ordinarily furnished by city waterworks, does not affect the real character of the use, or deprive it of its public nature.

4. In thus taking water from navigable streams or lakes for such ordinary public uses, the power of the state is not limited or controlled by the rules which obtain between riparian owners as to the diversion from, and its return to, its natural channels. Once conceding that the taking is for a public use, and the above proposition naturally follows. \* \* \*

Order affirmed.<sup>2</sup>

[GILFILLAN, C. J., did not sit.]

<sup>1</sup> In Minnesota the title to the bed of navigable streams is in the state. *Union Depot, etc., Co. v. Brunswick*, 31 Minn. 297, 17 N. W. 626, 47 Am. Rep. 789 (1883).

<sup>2</sup> Affirmed in 168 U. S. 349, 18 Sup. Ct. 157, 42 L. Ed. 497 (1897). Accord: *Rundle v. Delaware, etc., Co.*, 14 How. 80, 14 L. Ed. 335 (1852) (diversion of water for canal and power); *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 18 N. E. 465, 1 L. R. A. 466 (1888) (same to supply city water); *Auburn v. Union Co.*, 90 Me. 576, 38 Atl. 561, 38 L. R. A. 188 (1897) (same); *Marcus Sayre Co. v. Newark*, 60 N. J. Eq. 361, 45 Atl. 985 (1899) (pollutor by city sewage); *State v. Snaapee Dam Co.*, 70 N. H. 458, 461, 50 Atl. 108, 59 L. R. A. 55 (1900) (lowering lake); *People v. Canal Appraisers*, 33 N. Y. 461 (1865) (diversion for canal), the Mohawk and Hudson rivers in New York being governed by the Dutch civil law, under which their valleys were settled, while other waters in the state are subject to the "common-law" rule of

NEVINS v. PEORIA (1866) 41 Ill. 502, 508-511, 89 Am. Dec. 392, LAWRENCE, J. (holding the city of Peoria, Ill., liable in damages to an owner of land abutting on a street, the grade of which had been so altered by the city as to flood said land with mud and water after each heavy rain and to cause the formation near by of an unhealthful, stagnant pond):

"That a city has absolute control over the grade of its streets, that it can make the grade light or heavy, that it can elevate or lower it at pleasure, and that the owners of adjacent lots cannot call it to account for errors of judgment in these respects, or demand damages because they may incur inconvenience or expense in adjusting the level of their own premises to that of the street, for the purpose of ingress and egress, are propositions not to be denied.<sup>1</sup> The city is the owner of the streets, and the legislature has given it power to grade them. But it has no more power over them than a private individual has over his own land, and it cannot, under the specious plea of public convenience, be permitted to exercise that dominion to the injury of another's property in a mode that would render a private individual responsible in damages, without being responsible itself. Neither state nor municipal government can take private property for public use without due compensation, and this benign provision of our Constitution is to be applied by the courts whenever the property of the citizen is invaded, and without reference to the degree. We can solve more easily and safely questions of this character if we take pains to free our minds from the false notion that a municipality has some indefinable element of sovereign power which takes from the property of the citizen, as against its aggressions, the protection enjoyed against the aggressions of a natural person. Let us see then what are the rights of coterminous land owners as against each other.

"A man cannot do anything upon his own soil, under the plea of ownership, which amounts to a nuisance and works injury to his neighbor, but within that limit he may do whatever his whim may

*Chenango Bridge Co. v. Paige*, ante, p. 737. See *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393 (1883).

INTERFERENCE WITH SURFACE AND UNDERGROUND WATERS.—Causing surface water to flow or collect upon the land of another in a manner actionable between private owners, whether caused by diversion or obstruction, is generally held to be a "taking" within the principle of *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 181, 20 L. Ed. 557 (1871) (quoted ante, p. 719). There are great differences in the law of private rights respecting this, however, in the various states. See 1 Lewis, *Em. Dom.* (3d Ed.) §§ 110-113. Similarly, an interference with underground or percolating waters, actionable between private owners, is not privileged when caused on behalf of the public. See *Forbell v. New York*, 164 N. Y. 522, 58 N. E. 644, 51 L. R. A. 695, 79 Am. St. Rep. 666 (1900); *Erickson v. Crookston Waterworks Co.*, 100 Minn. 481, 111 N. W. 391, 9 L. R. A. (N. S.) 1250, 10 Ann. Cas. 843 (1907) (citing cases).

<sup>1</sup> Important early cases establishing this doctrine were *Cast Plate Mfrs. v. Meredith*, 4 Durnf. & E. 794 (1792); *Callender v. Marsh*, 1 Pick. 418 (1823); *Radcliff's Exors. v. Mayor*, 4 N. Y. 195, 53 Am. Dec. 357 (1850).

dictate. He may excavate to any depth, or raise the surface to any height, and the neighboring owner has no right to complain, because his enjoyment of his own lot is not thereby prejudiced. Even if a building erected by me near the boundary of my lot is injured or endangered by an excavation made by my neighbor in his premises, I cannot complain, because I have no right to the use of his soil for the support of my building. Whether he has a right to excavate in such manner as to cause the soil itself to fall from my lot into his, is a question upon which the authorities are not agreed. Comyn's Dig. Action on the Case for Nuisance, C; 2 Rolle's Ab. Trespass, I, pl. 1; Partridge v. Scott, 3 Mees. & W. 220; Peyton v. Mayor, etc., of London, 9 B. & C. 725; Thurston v. Hancock, 12 Mass. 220, 7 Am. Dec. 57; Wyatt v. Harrison, 3 B. & Ad. 871; Lasala v. Holbrook, 4 Paige (N. Y.) 169, 25 Am. Dec. 524; Radcliff v. Mayor, etc., 4 N. Y. 196, 53 Am. Dec. 357.<sup>2</sup>

"This rule arises from the principle, that one may do what he thinks proper with his own land, and I have no right to build my house in such a situation as to require the land of my neighbor for its support. The same rule applies to corporations. A city owns the streets for the use of the public, and has the right to grade them in any manner the representatives of the public may deem conducive to its interests. It is not liable for errors of judgment, and if in the process of grading it leaves private property many feet below or many feet above the surface of the street, it is free from all claim for damages on this account, for precisely the same reason that a private person is exempt under similar circumstances.

"But suppose my neighbor, in excavating or elevating his lot, turns a stream of water which passes through his ground, so as to cause it to pass through mine. Here the law gives me an action, for, by means of this stream, he has virtually entered upon my premises and deprived me, to that extent, of their use. The difference between this and the other case is palpable. In that case my possession and enjoyment of my lot were not disturbed, except through my own folly in building my house when it would require my neighbor's soil to support it. But in this instance I am prejudiced in the enjoyment of my lot in its natural condition and without any agency of my own. This enjoyment the law secures to me. My neighbor has no more right to send a stream of water through my premises, than he has to come upon them in person and dig a ditch, or deposit upon them a mound of earth. 3 Kent's Com. p. 440. But the law goes further than this. My neighbor has not the right to excavate his soil in such

<sup>2</sup> Though the right of lateral support obtains generally between adjoining private owners, there is a sharp conflict of authority as to its existence against the public in grading streets. See *Stearns v. Richmond*, 88 Va. 902, 14 S. E. 847, 29 Am. St. Rep. 758 (1892); *Talcott v. Des Moines*, 134 Iowa, 113, 109 N. W. 311, 120 Am. St. Rep. 419 (1906); and note (collecting cases) in 12 L. R. A. (N. S.) 696 ff. Most of the later cases favor it.



manner as to create a stagnant and offensive pond, so near my premises as to be a private nuisance by rendering my house unhealthy. He cannot use his property for a purpose that will prevent my enjoyment of mine. 3 Blackst. Com. 217.

"The same law that protects my right of property against invasion by private individuals, must protect it from similar aggression on the part of municipal corporations. A city may elevate or depress its streets, as it thinks proper, but if, in so doing, it turns a stream of mud and water upon the grounds and into the cellars of one of its citizens, or creates in his neighborhood a stagnant pond that brings disease upon his household, upon what ground of reason can it be insisted, that the city should be excused from paying for the injuries it has directly wrought?"<sup>3</sup>

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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

<sup>3</sup> As to public liability for the diversion of surface water, see note to *Minneapolis Mill Co. v. Water Com'rs*, ante, p. 740. Illinois is one of the states following the so-called "civil-law" rule. See Gould, *Waters* (3d Ed.) §§ 265, 266.

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.<sup>1</sup> 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 ac-

<sup>1</sup> "Highways \* \* \* are to be considered as purchased by the public of him who owned the soil, and by the purchase the right is acquired of doing everything with the soil over which the passage goes, which may render it safe and convenient; and he who sells may claim damages, not only on account of the value of the land taken, but for the diminution of the value of the adjoining lots, calculating upon the future probable reduction or elevation of a street or road; and all this is a proper subject for the inquiry of those who are authorized to lay out, or of a jury, if the parties should demand one. And he who purchases lots so situated, for the purpose of building upon them, is bound to consider the contingencies which may belong to them."—Parker, C. J., in *Callender v. Marsh*, 1 Pick. (Mass.) 418, 432, 433 (1823). As to the application of this presumption to the right of lateral support, compare *Talcott v. Des Moines*, 134 Iowa, 113, 129, 109 N. W. 311, 12 L. R. A. (N. S.) 696, 120 Am. St. Rep. 419 (1907), and 1 Lewis, *Em. Dom.* (3d Ed.) § 126. As to the *duty* of such support secured against the abutter by a railroad condemnation, see *Manning v. New Jersey Short Line R. Co.*, 80 N. J. Law, 349, 78 Atl. 200, 32 L. R. A. (N. S.) 155 ff.

cord 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. 732; *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<sup>2</sup> are exceptions), is that so

<sup>2</sup> See *Crawford v. Delaware*, 7 Ohio St. 459 (1857); *Akron v. Chamberlain Co.*, 34 Ohio St. 328, 32 Am. Rep. 367 (1878); *Louisville v. Rolling Mill Co.*, 3 Bush (Ky.) 416, 96 Am. Dec. 243 (1867). See, also, *Hamilton Co. v. Rape*, 101 Tenn. 222, 47 S. W. 416 (1898).

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 regulate 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, permanently 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.*"<sup>3</sup>

<sup>3</sup> The same view is taken of a subway exclusively for rapid transit, even though owned or operated by the city itself, as against the abutting owner of the street fee.

"The subway occupies a part of the street which, although beneath the surface, might, by proper construction and change of grade, be used for ordinary highway purposes, and traveled upon freely, without license or recompense, by persons using their own vehicles or their own methods of transportation. The occupation by the subway and its trains of cars is exclusive, for no one may enter either without payment of fare. Highways are free and open to all the people; the subway is not. Highways are for the exclusive use of none; the subway is for the exclusive use of one. Highways are for travel by means under the exclusive control of the traveler; the subway is for travel by means under the exclusive control of its owner or operator."—*Matter of Rapid Transit R. R. Com'rs*, 197 N. Y. 81, 99, 90 N. E. 456, 461, 8 Ann. Cas. 366 (1909), by Vann, J. And so of the approaches to a public toll bridge owned by a private corporation. *Willamette Iron Works v. Oregon Ry. & Nav. Co.*, 26 Or. 224, 37 Pac. 1016, 29 L. R. A. 88, 46 Am. St. Rep. 620 (1894).

Contra (holding railway embankments and elevated structures in streets to be no taking of abutter's street easements): *Murphy v. Chicago*, 29 Ill. 279, 81 Am. Dec. 307 (1862); *Doane v. Lake St. Ry.*, 165 Ill. 510, 517-518, 46 N. E. 520, 36 L. R. A. 97, 56 Am. St. Rep. 265 (1897); *Garrett v. Lake Roland Ry.*, 79 Md. 277, 29 Atl. 830, 24 L. R. A. 396 (1894). See, also, *Chicago v.*

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.<sup>4</sup> \* \* \*

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 increased. 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

*Rumsey*, 87 Ill. 348 (1877). So, also, of a subway, against abutting owner of fee, *Sears v. Crocker*, 184 Mass. 586, 69 N. E. 327, 100 Am. St. Rep. 577 (1904).

<sup>4</sup> And so *Rauenstein v. N. Y.*, etc., R. R., 136 N. Y. 528, 32 N. E. 1047, 18 L. R. A. 768 (1893). Compare *Buchner v. Chic.*, etc., Ry., 56 Wis. 403, 14 N. W. 273 (1882), 60 Wis. 261, 19 N. W. 56 (1884); *Shealy v. Chic.*, etc., R. R., 72 Wis. 471, 474, 40 N. W. 145 (1888), where abutter owned fee in street.

of his contract with the city, which it had previously made, and upon which he had the right to rely. \* \* \*

Judgment affirmed.<sup>5</sup>

[McKENNA, J., gave a dissenting opinion, in which DAY, J., concurred.]

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FOBES v. ROME, W. & O. R. CO. (1890) 121 N. Y. 505, 512-516, 24 N. E. 919, 8 L. R. A. 453, PECKHAM, J. (holding that an abutting landowner, having no fee in the street, could recover no compensation for damages due to a steam surface railway in the street):

"For many years prior to the decision of the case of Story v. Railroad Co., 90 N. Y. 122, 43 Am. Rep. 146, I think the law was that a duly-incorporated railroad company, having authority from the state to build its road, and laying its tracks and operating its road through and upon the surface of the streets of a city under the protection of a license from such city, took thereby no portion of the property of an individual who owned land adjoining the street, but bounded by its exterior line. The company was therefore not liable to such an owner for any consequential damages to his adjoining property arising from a reasonable use of the street for railroad purposes, not exclusive in its nature, and substantially upon the same grade as the street itself, and leaving the passage across and through the street free and unobstructed for the public use. \* \* \* [Here are stated and discussed Drake v. Hudson River R. R., 7 Barb. 508. and Williams v. N. Y. C. R. R., 16 N. Y. 97, 69 Am. Dec. 651, concerning steam railroads, and Wager v. T. U. R. R., 25 N. Y. 526, and People v. Kerr, 27 N. Y. 188, concerning horse street railways.]

"I think there is no authority in this court which holds that there is any real difference between a railroad operated by horse-power, and one operated by the power of steam, in the streets of the city. If the legislature can authorize the one, it can, under the same circumstances, authorize the other. I refer to railroads on the same grade as the street itself, and where the chief difference lies in the different motive powers which are used.

"In Craig v. Railroad, 39 N. Y. 404, it was held that the owner of a lot on a street, who owned the fee thereof subject only to the public easement for a street, was entitled to compensation for the new and additional burden upon the land so used as a street by the erection of even a horse railroad thereon.<sup>1</sup> In this case, Judge Miller said he

<sup>5</sup> See Bohm v. Met. Elev. Ry., post, p. 779.

<sup>1</sup> In this case Miller, J., said (pages 410, 411): "The use of a railroad, no matter how it is operated, whether by horse or steam power, necessarily includes, to a certain extent, an exclusive occupation of a portion of the highway, for the track of the road, and the running of its cars by the company, and a permanent occupation of the soil. It requires that all other parties shall stand aside, and make way for its progress. This is clearly inconsistent with the legal object and design of a highway, which is entirely open

saw no distinction in the application of the rule between cases of steam and cases of horse power. In *Kellinger v. Railroad Co.*, 50 N. Y. 206, it is held that one who did not own the fee of the street could not recover damages for inconvenience of access to his adjoining lands caused by the lawful erection of a street railroad through the street. By these last two decisions, it is seen that to construct even a horse railroad in a city street is to place a new and additional burden upon the land, the right to do which does not exist by reason of the general right of passage through the street; but, if the adjoining owner of land is not the owner of the fee in the street, and the railroad company has obtained the proper authority, he has no right to compensation for such added burden, nor to complain of such use so long as it is not exclusive or excessive. The same reasoning applies, as we have seen, in the case of a steam surface railroad. Such a use of the streets would be an additional burden upon the land; and, of course, if the adjoining owner had title in fee to the center of the street, subject only to the public easement, he would have a right of action, as held by the *Williams* and other cases, while, if he did not, no such right would exist in his favor merely because it was a steam instead of a horse railroad which was to be constructed. The authority of the law, and the consent of the city, would be enough to authorize the building of either; and the difference between the steam and the horse railroad would not be one of such a nature as to require or permit any difference in the decision of the two cases. If the use of either became unreasonable, excessive, or exclusive, or such as not to leave the passage of the street substantially free and unobstructed, then such excessive, improper, or unreasonable use would be enjoined, and the adjoining owner would be entitled to recover damages sustained by him therefrom in his means of access, etc., to his land. *Mahady v. Railroad Co.*, 91 N. Y. 149, 43 Am. Rep. 661. \* \* \*

"It was not intended in the *Story Case* to overrule or change the law in regard to steam surface railroads."<sup>2</sup>

and free to all, for purposes of locomotive travel and transportation. The enjoyment of the easement in a highway never confers an exclusive right upon any one who may have occasion to use it, while the laying down of rails and the employment of cars is to the detriment and exclusion of all others at the time when the cars are running, and a restraint upon a free, undisturbed, and general public use."

<sup>2</sup> See *Spencer v. Point Pleasant & Ohio R. R.*, 23 W. Va. 406 (1884), for an elaborate discussion of the effect of the abutter's ownership of the fee in the street, when the street is used by a commercial railroad. Many of the older decisions held steam railroads no additional burden on the fee. See 1 Lewis, *Eminent Domain* (3d Ed.) § 154, note 31, collecting cases.



## ADAMS v. CHICAGO, B. &amp; N. R. CO.

(Supreme Court of Minnesota, 1888. 39 Minn. 286, 39 N. W. 629, 1 L. R. A. 493, 12 Am. St. Rep. 644.)

[Appeal by defendant from an order of the Winona county district court refusing a new trial. Plaintiff owns as his residence a lot abutting on the south side of a street in Winona, 70 feet wide. Defendant, under legislative authority, has constructed and operates an ordinary commercial railroad upon the north half of the street in front of plaintiff's lot. Plaintiff's access is not impaired, but his light and air are injuriously affected as a result of operating the railroad in an ordinary and prudent manner. The lower court ordered judgment for plaintiff for damage to the rental value of his premises up to the commencement of the action.]

GILFILLAN, C. J. \* \* \* It is well settled that where there is no taking of, or encroachment on, one's property or property rights by the construction and operating of a railroad, any inconveniences caused by it, as from noises, smoke, cinders, etc., not due to improper construction, or negligence in operating it, furnish no ground of action. \* \* \*

The plaintiff does not claim to own the land in the street which the company has taken for its road, but claims only a right or interest in the nature of an easement in it appurtenant to his lot. \* \* \* The main question in the case is, Has the owner of a lot abutting on a public street a right or interest in the street opposite his lot, as appurtenant to his lot, and independent of his ownership of the soil of the street, and, if so, what is that right or interest? If he has, and the acts of the defendant in constructing and operating its railroad along that part of the street opposite plaintiff's lot prevents or impairs his enjoyment of such right or interest, then he has a right to recover.

We find a great many cases in which is stated, in general terms, the proposition that, although the fee of the street be in the state or municipality, the owner of an abutting lot has, as appurtenant to his lot, an interest or easement in the street in front of it, which is entirely distinct from the interest of the public. *Railroad Co. v. Heisel*, 38 Mich. 62, 31 Am. Rep. 306; *Railroad Co. v. Applegate*, 8 Dana (Ky.) 294, 33 Am. Dec. 497; *Railroad Co. v. Combs*, 10 Bush (Ky.) 382, 19 Am. Rep. 67; *Haynes v. Thomas*, 7 Ind. 38; *Protzman v. Railroad Co.*, 9 Ind. 467, 68 Am. Dec. 650; *Stone v. Railroad Co.*, 68 Ill. 394, 18 Am. Rep. 556; *Tate v. Railroad Co.*, 7 Ind. 479; *Lackland v. Railroad Co.*, 31 Mo. 180; *Railroad Co. v. Cumminsville*, 14 Ohio St. 523; *Railroad Co. v. Lawrence*, 38 Ohio St. 41, 43 Am. Rep. 419; *Crawford v. Village of Delaware*, 7 Ohio St. 459; *Denver v. Bayer*, 7 Colo. 113, 2 Pac. 6; *Rensselaer v. Leopold*, 106 Ind. 29, 5 N. E. 761. In 38 Mich. 62, 31 Am. Rep. 306, the supreme court

states it thus: "Every lot-owner has a peculiar interest in the adjacent street which neither the local nor general public can pretend to claim; a private right in the nature of an incorporeal hereditament, legally attached to his contiguous ground; an incidental title to certain facilities and franchises which is in the nature of property, and which can no more be appropriated against his will than any tangible property of which he may be owner." Although the proposition was apparently stated with care and upon deliberation, it seems to us (and we say it with diffidence, because of the eminent character of that court) that the decision of the case was a departure from the doctrine thus laid down, (and the same may be said of several of the cases referred to.) For where the railroad was laid upon a part of the street opposite the party's lot, of which part he did not own the fee, it denied his right to recover for damages caused to his lot incidental to a proper operating of the railroad, and limited it to cases where the acts of the company, of omission or commission, amounted to a nuisance. As the lot-owner can recover for a private nuisance, committed by the improper operation of a railroad, even on the company's own land, in which he has no interest, (*Railroad Co. v. Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739) it would seem as though, if he is in no better plight in respect to the company's acts in the street, his "peculiar interest," distinct from that of the public, in the street, is of very little value. His title to his interest in the street is precarious, if authority from the state or municipality may justify what would without such authority be a private wrong as to him. None of the cases we have referred to, nor any till we come to what are known as the "Elevated Railway Cases," attempt to define the limits and extent of the right of an abutting lot-owner in the street opposite his lot, where he does not own the fee. That it extends to purposes of ingress and egress to and from his lot is conceded by all. And for this purpose it may extend beyond the part of the street directly in front; for, as we have seen, an action by him will lie for obstructing the street, away from his lot, so as to cut off or materially interfere with his only access to it.

The questions are asked, how does the lot-owner get an easement in the street? \* \* \* In the case of dedication after it has become perfect, the abutting lot-owners are presumed to act with respect to their lots on the faith of it as they are also in case of condemnation. Suppose one buys a piece of land fronting on a public street, or suppose he improves it, say by erecting buildings with reference to use in connection with the street, would it not be a fraud on him to afterwards close the street? Not only do the abutting lot-owners pay for all the advantages which the street may furnish to their lots in the enhanced price of the lots, but, in cases of condemnation, their lots are liable to be, and are usually, specially taxed to pay the whole cost of the land taken; and, whether the street be estab-

lished by dedication or condemnation, the abutting lots are liable to be and are usually specially taxed for the whole cost of putting and keeping it in proper condition for public use. It would be hard to justify the imposition of these taxes on them instead of on the public at large, if their owners have no other interest in or advantage from the street beyond the public at large, or if such interest or advantage is of so precarious a tenure that they may at any time be deprived of it.<sup>1</sup>

It is, however, hardly necessary to inquire how the lot-owner gets his private right in the street; for it is established law that he has a private right, which, as we have stated, all the cases concede extends to the necessity of access. Access to the lot is only one of the direct advantages which the street affords to it. In a city densely peopled and built up, the admission of light and air into buildings is about as important to their proper use and enjoyment as access to them. Light and air are largely got from the open space which the streets afford. What reason can be given for excluding a right to the street for admitting light and air, when the right to it for access is conceded? For mere purposes of access to the lots, a strip 10 or 15 feet wide might be sufficient. Yet everybody knows that a lot fronting on a street 60 or 70 feet wide is more valuable, because of the uses that can be made of it, than though it front on such a narrow strip. Take a case in one of the states where the fee of the streets is in the state or municipality, and of a street 60 feet wide. The abutting lot-owners have paid for the advantages of the street on the basis of that width, either in the enhanced price paid for their lots, or, if the street was established by condemnation in the taxes, they have paid for the land taken. In such a case, if the state or municipality should attempt to cut the street down to a width of 10 or 15 feet, would it be an answer to objections by lot-owners that the diminished width would be sufficient for mere purposes of access to their lots? It would seem as though the question suggests the answer. \* \* \*

The private right in a street is of course subordinate to the public right. The latter right is for use as a public street, and the incidental right to put and keep it in condition for such use, and for no other purpose. Whatever limitation or abridgment of the advantages which the abutting lot is entitled to from the street, may be caused by the exercise of the public right, the owner of the lot must submit to. If putting it to proper street uses causes annoying noises to be made in front of his lot, or the air to be filled with dust and smoke, so as to darken his premises, or pollute the air that passes from the street

<sup>1</sup> As to the origin of abutters' easements in public highways, see, also, *Barnett v. Johnson*, 15 N. J. Eq. 481 (1856) (easement of light and air over public toll-canal); *Dill v. Board of Education*, 47 N. J. Eq. 421, 433 ff., 20 Atl. 739, 10 L. R. A. 276 (1890); *Donahue v. Keystone Gas Co.*, 181 N. Y. 313, 318 ff., 73 N. E. 1108, 70 L. R. A. 761, 106 Am. St. Rep. 549 (1905). There are no abutters' easements over a public railroad right of way. *Kotz v. I. C. R. R.*, 188 Ill. 578, 59 N. E. 240 (1901).

upon them, he has no legal cause of complaint. His right to complain arises when such interruptions to the enjoyment of his private right are caused by a perversion of the street to uses for which it was not intended; by employing it for uses which the public right does not justify. That constructing and operating an ordinary commercial railroad on a street is a perversion of the street to a use for which it was not intended; one not justified by the public right; and which the state or municipality, as representing such right, cannot, as against private rights, authorize,—the decisions of this court are full and explicit. It has always been held here, contrary to the decisions in many of the states, that laying such a railroad upon a public street or highway is the imposition of an additional servitude upon it,—an appropriation of it to a use for which it was not intended. *Carli v. Railway Co.*, 28 Minn. 373, 10 N. W. 205, 41 Am. Rep. 290, and cases cited. Many of the decisions cited, to show that upon a state of facts such as exists in this case the lot-owner can have no right of action, were by courts which hold that the use of a street for an ordinary railroad is a legitimate street use,—one that comes within the uses and purposes for which streets are established. Where that is the rule, inasmuch as the right or interest of the abutting lot-owner is subordinate and subject to the right to devote the street to use for a railroad, as well as for any other proper mode of street travel, of course no cause of action in favor of the lot-owner, whether he owns the fee of the street or not, could grow out of the proper construction and operating of a railroad in the street. For that reason the decisions of such courts can be of no authority here, where a different rule upon the rightfulness of using the street for such a purpose prevails.

The conclusions arrived at are that the owner of a lot abutting on a public street has, independent of the fee in the street, as appurtenant to his lot, an easement in the street in front of his lot to the full width of the street, for admission of light and air to his lot, which easement is subordinate only to the public right. That depriving him of or interfering with his enjoyment of the easement for any public use not a proper street use is a taking of his property within the meaning of the Constitution. That appropriating a public street to the construction and operation of an ordinary commercial railroad upon it is not a proper street use. That where, without his consent and without compensation to him, such a railroad is laid and operated along the portion of the street in front of his lot, so as upon that part of the street to cause smoke, dust, cinders, etc., which darken or pollute the air coming from that part of the street upon his lot, he may recover whatever damages to his lot are caused by so laying and operating such railroad on that part of the street. That the recovery should be limited to the damages caused by operating the railroad in front of plaintiff's lot, and ought not to include any that might have accrued from operating it on other parts of the street, was un-

doubtedly the opinion of the court below when it came to make its findings of fact.<sup>2</sup> \* \* \* [This rule is approved, but a new trial is ordered solely on the question of damage, because the evidence taken did not conform to it.]

[VANDERBURGH, J., gave a short dissenting opinion.]

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DONAHUE v. KEYSTONE GAS CO. (1905) 181 N. Y. 313, 319, 320, 73 N. E. 1108, 70 L. R. A. 761, 106 Am. St. Rep. 549, VANN, J. (holding a gas company liable for negligently injuring trees in front of plaintiff's lot on a street owned in fee by the public):

"The defendant insists with great persistence that it did not injure the plaintiff, because it did not touch his premises or throw anything upon them. Interference with access or with light does not necessarily involve contact with tangible property, yet either is a trespass upon a property right. Why should the law protect the air of an abutting owner from the smoke of a semi-trespasser, and not protect the coolness of the air from injury by an absolute trespasser? If the air is better in the one case, it is in the other, for the difference is in degree only. Upon what principle can pure air be called a property right, and cool air no right at all? \* \* \*

"The [abutter's] easement, as for convenience it may be called, consists in the right to have the street kept open, and includes all the incidental privileges which may fairly be implied from that right. It is the proximity of the street—the situation of the abutting land with reference to an open street—which gives to the abutting owner the special right to the enjoyment and use of whatever is permitted or maintained by the public authorities as a part of the street. These easements are created by operation of law when streets are opened, and they are presumed to be paid for by taking the benefits into account when land is procured for the purpose. \* \* \* If the street is improved so as to be more useful, or ornamented so as to be more beautiful, the public is benefited generally, and the abutter is benefited specially. So long as a hitching post or a shade tree is physically and legally a part of the street, he is entitled to all the special bene-

<sup>2</sup> Contra (not confining abutter's easement to light and air from part of street immediately in front of his premises): *Field v. Barling*, 149 Ill. 556, 37 N. E. 850, 24 L. R. A. 406, 41 Am. St. Rep. 311 (1894); *Townsend v. Epstein*, 93 Md. 537, 49 Atl. 629, 52 L. R. A. 409, 86 Am. St. Rep. 441 (1901). The easement of access is everywhere held to extend far enough from plaintiff's premises to secure reasonable egress to the general street system. *Brakken v. Minn. & St. L. Ry.*, 29 Minn. 41, 11 N. W. 124 (1881). Of course the public must compensate an abutter whose access is destroyed by the vacation of a street, *Borghart v. Cedar Rapids*, 126 Iowa, 313, 101 N. W. 1120, 68 L. R. A. 306 (1905); but the obstruction of a street in one direction, leaving a less convenient egress the other way, is not a taking under the federal Constitution. *Meyer v. Richmond*, 172 U. S. 82, 19 Sup. Ct. 106, 43 L. Ed. 374 (1898). The state decisions are in some conflict. 1 Lewis, Em. Dom. (3d Ed.) §§ 202, 203.



fits which flow therefrom to his lot, free from interference by a wrongdoer, but subject to removal by the municipal government. The easement extends to all parts of the street which enlarge the use and increase the value of the adjacent lot. It is not limited to light, air, and access, but includes all the advantages which spring from the situation of the abutter's land upon the open space of the street. These rights exist whether he owns the fee of the street or not. As they are dependent upon the street, and cannot exist without it, they are a part of it, and thus become 'an integral part of the estate' of the abutting owner, subject to interference by no one except the representatives of the public.

"No adequate reason is given for the attempt to limit the easement to light, air, and access. What distinction, in principle, is there between these benefits, which are incidental to a street, and any other incidental advantage which adds to the value of abutting land? Why should the law extend this protection to the one and withhold it from the other?"<sup>1</sup>

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#### LA CROSSE CITY RY. CO. v. HIGBEE.

(Supreme Court of Wisconsin, 1900. 107 Wis. 389, 83 N. W. 701,  
51 L. R. A. 923.)

[Appeal from an order of the La Crosse county circuit court. Plaintiff, an electric street railway company, placed one of its railroad poles at the outer edge of the sidewalk before defendant's premises. Defendant owned the fee in the street. The pole did not materially interfere with public travel, nor with access to defendant's premises, and no compensation was tendered to defendant. Plaintiff asked an

<sup>1</sup> In *First Nat. Bank v. Tyson*, 133 Ala. 459, 477, 32 South. 114, 59 L. R. A. 399, 91 Am. St. Rep. 46 (1901), the defendant was enjoined from permitting ornamental building columns to project two feet into the street from a lot adjacent to plaintiff's, the court saying, by Haralson, J.: "It is difficult to understand, why an easement of view from every part of a public street, is not, like light and air, a valuable right, of which the owner of a building on the street, ought not to be deprived by an encroachment on the highway by a coterminal or adjacent proprietor. The right of view or prospect, is one implied, like other rights, from the dedication of the street to public uses. As was well said by the learned judge below in respect to this right, 'It seems to be a valuable right appurtenant to the ownership of land abutting on the highway, and to stand upon the same footing, as to reason, with the easement of motion, light and air, and to be inferior to them only in point of convenience or necessity, and that an interference with it is inconsistent with the public right acquired by dedication. The opportunity of attracting customers by a display of goods and signs is valuable, as I have no doubt the streets of any city in the world will demonstrate.'"

And in a later stage of the same case it was said, by Denson, J., in 144 Ala. 457, 468, 39 South. 560, 562 (1905): "Either the right of view by a person from his building, or his right to have the sidewalk remain free of permanent obstructions, so that his building may be in view of pedestrians on the sidewalk, is a substantial, legal right, and an unlawful deprivation of a substantial, legal right necessarily implies injury to the party so deprived."

injunction against defendant's cutting down said pole, and a demurrer thereto was sustained. Plaintiff appealed.]

MARSHALL, J. \* \* \* From what has been said this case is left to turn on whether a street-railroad pole, properly placed, is an additional burden on the fee of the land upon which it is located, within the principle of *Hobart v. Railroad Co.* [27 Wis. 194, 9 Am. Rep. 461]. Such principle, briefly stated, is that a railroad, constructed and operated in the street of a city at grade, so as not to materially interfere with its common use for public travel by ordinary modes, or with private rights of abutting landowners, for the purpose of transporting persons from place to place on such street at their reasonable convenience, is not an additional burden upon the fee thereof.

In *Chicago & N. W. Ry. Co. v. Milwaukee, R. & K. Electric Ry. Co.*, 95 Wis. 561, 70 N. W. 678, 37 L. R. A. 856, 60 Am. St. Rep. 136, the court pointed out the significance of the purpose of a street railway as indicated in the rule under consideration, namely, the carriage of passengers; also the significance of the place where such purpose may be exercised, namely, in city streets; and it was held that a railway having for its purpose the carriage of freight, a commercial railway, is not covered by the *Hobart Case*.

In *Zehren v. Light Co.*, 99 Wis. 83, 74 N. W. 538, 41 L. R. A. 575, 67 Am. St. Rep. 844, the significance of that part of the rule of the *Hobart Case* relative to where a street railway may be constructed was again pointed out and discussed, and it was held that it does not extend to a purely country highway. \* \* \*

It is claimed by appellant that no significance should be given to the fact that in the *Hobart Case* the motive power was obtained by the use of horses, while the contrary is urged by counsel for the respondent. \* \* \* What would be fairly gathered from all that was said on the subject is that the motive power, of itself, is not sufficient to class an electric street railway with an ordinary railroad, as regards its being an added burden upon the fee. That is in line with all or nearly all authority on the subject. *Williams v. Railway Co.* (C. C.) 41 Fed. 556; *Jaynes v. Railway Co.*, 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751; *Louisville Bagging Mfg. Co. v. Central Pass. Ry. Co.*, 95 Ky. 50, 23 S. W. 592, 44 Am. St. Rep. 203; *Roebing v. Railroad Co.*, 58 N. J. Law, 666, 34 Atl. 1090, 33 L. R. A. 129; *Reid v. Railroad Co.*, 94 Va. 117, 26 S. E. 428, 36 L. R. A. 274, 64 Am. St. Rep. 708; *Briggs v. Railroad Co.*, 79 Me. 363, 10 Atl. 47, 1 Am. St. Rep. 316; *Newell v. Railway Co.*, 35 Minn. 112, 27 N. W. 839, 59 Am. Rep. 303; *Nichols v. Railway Co.*, 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371; *Railway Co. v. Mills*, 85 Mich. 634, 48 N. W. 1007; *Booth, St. Ry. Law*, § 80; *Joyce, Electric Law*, §§ 344, 345. \* \* \*

So it follows that, in determining whether a street railroad is an additional burden upon the land already set aside for the public use as a highway, we are to look to the manner of its construction and use, and not to the motive power. The latter may be steam, horse,

electric or compressed air power, and the road and its operation be consistent with the common public use for which the street was originally designed, and not violate private rights; and either may be so used, and the road be so constructed and operated, as to have the opposite effect. Electric railroads constructed in the usual way and operated by the use of the overhead trolley wire supported by cross wires fastened to poles set at the curb lines of the street, or otherwise located so as not to materially interfere with the ordinary common use of the street, belong to the former class, as we shall see later; and that has become so firmly established by the courts that it cannot be considered open to serious question. \* \* \*

When a new mode of using the public streets and highways is adopted, the question arises of whether it violates the rights of the owners of the fee to the streets and is inconsistent with the original design in setting the land aside for a public thoroughfare, keeping in view the fact that such design is presumed to have contemplated the adoption from time to time of improvements in mechanical appliances and their use in aid of travel upon the street,—the keeping abreast with the march of civilization, with the growth of population and consequent increase of travel, so as to adequately satisfy public needs and conveniences. Lands are set aside for public streets and highways, not for the present, with its necessities and modes of use, but for all time, with all the added demands that may be made upon the public ways within the scope of their original design, in the course of natural development that is constantly going on. Subject to that test the traction engine, automobile, and street railways, regardless of the motive power used, are entitled to the use of the street, subject to the necessity for consent by public authority in proper cases, and reasonable police regulations. \* \* \*

On the question of whether the manner in which the road, with its appurtenances, was constructed, affects the right of the defendant to recover for an additional burden upon the fee of the street, we must come down to the simple question of whether the pole, set at the outer edge of the sidewalk on defendant's premises, interferes with access to or egress from his property. We understand from the complaint that the pole was not located so as to interfere with any driveway or other avenue used for passage to or from the street to respondent's property outside of the street line. It merely prevented a person from stepping on or off the sidewalk at the precise point where the pole was located. That is not such an unreasonable interference with private property as to violate the rule that a street railway cannot be so constructed as to interfere with access to abutting property, without the consent of the owner thereof. As well might it be said that the mere fact, that because of the location of the rails in the street one traveling with a vehicle must approach to or go from property abutting thereon at a different angle than he otherwise would, or the fact that he cannot as conveniently use the street in front of

such property for ordinary temporary purposes incident to the occupancy thereof, is a violation of private rights. Interference with access to property, within the meaning of the street-railway cases, means some substantial interference. *Railway Co. v. Mills*, 85 Mich. 634, 48 N. W. 1007; *Joyce, Electric Law*, § 380. A street-railway pole, properly placed at the curb line of a street, no more interferes with access to or egress from property outside of the street line than a lamp post or hitching post or shade tree, and no more interferes with the ordinary use of the street for public travel. \* \* \*

Order reversed.†

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PALMER v. LARCHMONT ELECTRIC CO. (1899) 158 N. Y. 231, 235, 52 N. E. 1092, 43 L. R. A. 672, HAIGHT, J. (holding electric light poles not a burden on the street fee):

"We think the *Eels Case*<sup>1</sup> is clearly distinguishable from that under consideration. In that case ejection was brought to remove the poles of a telegraph and telephone company which were not used in any sense for a street purpose. It is urged that the wires might be used for the purpose of notifying the fire department of a municipality of the breaking out of a fire. Undoubtedly, and so far as they are used for that purpose, it clearly would be for a municipal purpose; but there is a broad distinction between a municipal purpose and a street purpose. The primary object of highways is for the public travel by persons and animals, and by carriages or vehicles used for the transportation of persons and goods, other than by railroads. Sewers drain the surface water from the highways, and thus relieve them from impairment and destruction. In this respect sewers are for a street purpose. In addition, they may drain also the abutting property and houses, and thus tend to promote the public health. In

† Compare *Fobes v. Railroad*, ante, p. 750, and *Jaynes v. Omaha St. Ry.*, 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751 (1898).

The cases upon all phases of an abutter's right to compensation for any kind of a railroad in a street are exhaustively collected in 36 L. R. A. (N. S.) 673-838 (1912).

<sup>1</sup> "The primary law of the highway is motion, and whatever vehicles are used, or whatever method of transmission of intelligence is adopted, the vehicle must move, and the intelligence be transmitted by some moving body, which must pass along the highway, either on or over or perhaps under it; but it cannot permanently appropriate any part of it. \* \* \* The primary or fundamental idea of a highway is that it is a place for uninterrupted passage by men, animals, or vehicles, and a place by which to afford light, air, and access to the property of abutting owners, who, in this respect, enjoy a greater interest in the street than the general public, even though their title to the land stops with the exterior line of the street. It is not a place which can be permanently and exclusively appropriated to the use of any person or corporation, no matter what the business or object of the latter might be."—*Eels v. Amer. Teleph. & Teleg. Co.*, 143 N. Y. 133, 139, 38 N. E. 202, 204, 25 L. R. A. 640 (1894), by Peckham, J., approved in *Krueger v. Wis. Teleph. Co.*, 106 Wis. 96, 107-109, 81 N. W. 1041, 50 L. R. A. 298 (1900) (collecting cases as to telegraph and telephone poles in streets).

this respect they are for a municipal purpose. Water supplied by mains through the highways may be used for cleansing and sprinkling the streets. In this respect it is for a street purpose. It may be used by the abutting owners for cleansing and for domestic purposes, and is also used for the extinguishment of fires. In this respect it is for a municipal purpose. Light is, as we have seen, an aid to the public in the nighttime in traveling upon the highway. It is therefore used for a street purpose.<sup>2</sup> All of the street purposes which we have referred to are clearly incident to the highway, and are deemed within the grant of lands for highway purposes whenever the necessity for these uses arises. Not so with telegraph and telephone wires. They in no way preserve or improve the streets, or aid the public in traveling over them."

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JULIA BUILDING ASS'N. v. BELL TELEPHONE CO. (1885)  
88 Mo. 258, 267-269, 57 Am. Rep. 398, NORTON, J. (holding telephone poles and wires a proper street use against the abutting owner's fee in the street):

"A highway may be said to be nothing but an easement on the land and that the public have no other right in it than the right of passage, with the powers and privileges incident to the right. 'While this rule as to the extent of the interest which the public acquires in highways is strictly true as to highways in the country, it must be taken with some limitation as to the streets of a city or large village. There are certain uses, such as the construction of sewers, the laying of gas and water pipes to which the latter are generally applied. These—called urban servitude—are the necessary incidents of streets in large cities, and are paramount to the rights of the owner in fee. Whether the streets be laid out and opened upon property owned by the corporation, or whether they become public streets by dedication, or by grant, or upon compensation being made to the owner of the fee, they have all the incidents attached to them which are necessary to their full enjoyment as streets; and the corporation has the power to authorize their appropriation to all such uses as are conducive to the public good and do not interfere with their complete and unrestricted use as highways; and in doing so it is not obliged to confine itself to such uses as have already been permitted. As civilization advances new uses may be found expedient.' Angell on Corp. § 312; Thompson on Highways, c. 2, pp. 25-27.

"In 1816 when Sixth street was dedicated by Chouteau and Lucas to the public, St. Louis was a small French village and the necessity

<sup>2</sup> Where the lighting is supplied for private users only, the poles are a burden on the fee. *Callen v. Columbus Edison Co.*, 66 Ohio St. 166, 64 N. E. 141, 58 L. R. A. 782 (1901). Where the same equipment supplies both public and private lighting, see *Carpenter v. Capital Elec. Co.*, 178 Ill. 29, 35-36, 52 N. E. 973, 43 L. R. A. 645, 69 Am. St. Rep. 286 (1899), and *French v. Robb*, 67 N. J. Law, 260, 51 Atl. 509, 57 L. R. A. 956, 91 Am. St. Rep. 433 (1901).



for devoting any part of its streets for the construction of sewers, water and gas pipes did not exist; at that time street horse railroads were unknown and the transmission of messages by means of electricity was not only unknown, but not thought of. But in the advance of civilization and the growth of the village into a large and populous city, public necessity has demanded and required the devotion of many of its streets to the above uses, and hence the laying of tracks of street horse railroads in its streets has been authorized and sanctioned both by legislative and municipal enactment, and it has been held that such use of a street is not an improper use. These streets are required by the public to promote trade and facilitate communications in the daily transactions of business between the citizens of one part of the city with those of another, as well as to accommodate the public at large in these respects. If a citizen living or doing business on one end of Sixth street wishes to communicate with a citizen living and doing business on the other end, or at any intermediate point he is entitled to use the street, either on foot, on horseback, or in a carriage or other vehicle in bearing his message. The defendants in this case propose to use the street by making the telephone poles and wires the messenger to bear such communications instantaneously and with more dispatch than in any of the above methods, or any other known method, of bearing oral communications. Not only would such communications be borne with more dispatch, but, to the extent of the number of communications daily transmitted by it, the street would be relieved of that number of footmen, horsemen, or carriages. If a thousand messages were daily transmitted by means of telephone poles, wires, and other appliances used in telephoning, the street through these means would serve the same purpose which would otherwise require its use either by a thousand footmen, horsemen, or carriages to effectuate the same purpose. In this view of it the erection of telephone poles and wires for transmission of oral messages, so far from imposing a new and additional servitude, would, to the extent of each message transmitted, relieve the street of a servitude or use by a footman, horseman, or carriage.”<sup>1</sup>

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McDEVITT v. PEOPLE'S NATURAL GAS CO. (1894) 160 Pa. 367, 373, 374, 28 Atl. 948, WILLIAMS, J. (permitting natural gas mains to be laid in a city street without compensation to the abutting owner of the street fee):

“Forbes street was a city highway, and subject, like all other streets in a city, to urban servitudes for the benefit of the public. In land taken for a highway in the country, the easement acquired by the public is only for the purposes of a way over the surface. For all other purposes the land may be occupied by the owner, so long as the

<sup>1</sup> See cases accord and contra collected in *Krueger v. Wis. Teleph. Co.*, 106 Wis. 96, 107-109, 81 N. W. 1041, 50 L. R. A. 298 (1900).

public easement is not disturbed. We accordingly held in *Sterling's Appeal*, 111 Pa. 35, 2 Atl. 106, 56 Am. Rep. 246, that the maintenance of a pipe line under such a highway imposed an additional servitude upon the land. It may be a very slight one, but to some extent it abridges the rights of the land-owner in the soil. Our Brother Sterrett said in that case: 'As to streets and alleys in cities and boroughs, there are reasons why a different rule, to some extent, should prevail.' These reasons are obvious. The necessity for drainage, for a water supply, for gas for purposes of lighting, for natural or fuel gas for heat, for subways for telegraph and other wires, and for other urban necessities or conveniences, gives to the municipality a control over the subsurface that the township has not. Property in a city is no less sacred than property in the country. The title of the owner is neither better nor worse because of the location of his land. But its situation may subject it to a greater servitude in favor of the public in a large, compactly built city than would be imposed upon it in the open country. The city has the right to use the streets and alleys, to whatever depth below the surface it may be desirable to go, for sewers, gas and water mains, and any other urban uses. In taking the streets for these necessary or desirable purposes, it is acting, not for its own profit, but for the public good. It is the representative of the inhabitants of the city, considering their health, their family comfort, and their business needs; and every lot-owner shares in the benefits which such an appropriation of the streets and alleys confers. If the city abridges his control over the soil in and under the streets, it compensates him by making him a sharer in the public advantages that result from proper drainage, from an abundant water supply, from the general distribution of gas, and the like. The disturbance of the owner's control over the subsurface of the streets is, in a legal sense, an invasion of his rights, but it is *damnum absque injuria*. He has no right of action against the municipality therefor."<sup>1</sup>

<sup>1</sup> "It has never been doubted that, by authority of the legislature, highways might be used for gas or water pipes, intended for the convenience of the citizens, although the gas or water was conducted thereunder by companies formed for the purpose; or for sewers, whose object was not merely the incidental one of cleansing the streets, but also the drainage of private estates, the rights of which to enter therein were subject to public regulations. *Commonwealth v. Lowell Gas Light Co.*, 12 Allen, 75; *Attorney General v. Metropolitan Railroad*, 125 Mass. 515, 517, 28 Am. Rep. 264; *Boston v. Richardson* [13 Allen, 146].—*Pierce v. Drew*, 136 Mass. 75, 81, 49 Am. Rep. 7 (1883), by Devens, J.

As to differences between the right to use a highway for incidental purposes beneficial to land abutting on it and the right to use it for such purposes beneficial only to distant land, see *Palmer v. Larchmont Co.*, 158 N. Y. 231, 235, 236, 52 N. E. 1092, 43 L. R. A. 672 (1899) (electric light poles); *Baltimore, etc., Co. v. Dubreuil*, 105 Md. 424, 66 Atl. 439, 9 L. R. A. (N. S.) 681 (1907) (water); *Van Brunt v. Flatbush*, 128 N. Y. 50, 27 N. E. 973 (1891) (sewers). Compare *Cheney v. Boston Consol. Gas Co.*, 198 Mass. 356, 84 N. E. 492, 16 L. R. A. (N. S.) 436 (1908).

"It may be that the owners of the fee in highways should not be burdened with sewers, conductors, or wires in which they have no interest or right

NEW ENGLAND TELEPHONE & TELEGRAPH CO. v. BOSTON TERMINAL CO. (1903) 182 Mass. 397, 399, 65 N. E. 835, KNOWLTON, C. J. (holding that corporations which had placed conduits and manholes in a street for the purpose of supplying electricity to the public obtained thereby no property interest in the street which required compensation when the street was vacated):

"In this commonwealth, on the laying out and construction of a highway or public street, the fee of the land remains in the landowner, and the public acquire an easement in the street for travel. This easement is held to include every kind of travel and communication for the movement or transportation of persons or property which is reasonable and proper in the use of a public street. It includes the use of all kinds of vehicles which can be introduced with a reasonable regard for the safety and convenience of the public, and every reasonable means of transportation, transmission, and movement beneath the surface of the ground, as well as upon or above it. Accordingly it has been held that the public easement which is paid for in assessing damages to the owner includes the use of the street for horse cars and electric cars, for wires of telegraph, telephone, and electric lighting companies, and for water pipes, gas pipes, sewers, and such other similar arrangements for communication or transportation as further invention may make desirable. *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *Suburban Light & Power Co. v. Aldermen of Boston*, 153 Mass. 200, 26 N. E. 447, 10 L. R. A. 497; *Attorney General v. Railroad Co.*, 125 Mass. 515, 28 Am. Rep. 264; *Howe v. Railway Co.*, 167 Mass. 46, 44 N. E. 386; *Natick Gaslight Co. v. Inhabitants of Natick*, 175 Mass. 246, 56 N. E. 292. All these agencies have a share in the use of the streets under the rights of the public. A person who walks or drives through a public street does it as one of the public, and not in the exercise of a private right of way. The permanent constructions above referred to are permitted because they are used by the public, or a part of the public, or are held and used in private ownership for the benefit of the public. The rights in the streets which are so exercised or enjoyed are not private rights of property, but are a part of the public rights which are shared in common, although used and enjoyed in different ways by the different members of the public who pass through a street, or whose property is carried through it."<sup>1</sup>

to use, but which are intended for the use of other localities; but sewers, conductors, and lighting wires intended for the use, benefit, and improvement of the highway through which they pass, and of the abutting owners thereon, which promote the comfort and safety of the traveling public, stand upon a different footing, and are no burden upon the fee not intended by the grant for highway purposes."—*Palmer v. Larchmont Co.*, 158 N. Y. 231, 239, 52 N. E. 1092, 1095, 43 L. R. A. 672 (1899), by Haight, J.

<sup>1</sup> Accord: *White v. Blanchard Granite Co.*, 178 Mass. 363, 59 N. E. 1025 (1901) (private horse freight railway); *Sears v. Crocker*, 184 Mass. 586, 69 N. E. 327, 100 Am. St. Rep. 577 (1904) (subway for street cars); *Cheney v.*

## 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

Barker, 198 Mass. 356, 84 N. E. 492, 16 L. R. A. (N. S.) 436 (1908) (gas mains not giving local service). See *Comm. v. Morrison*, 197 Mass. 199, 83 N. E. 415, 14 L. R. A. (N. S.) 194, 125 Am. St. Rep. 338 (1908) (stationary night lunch wagon not allowed).

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*.<sup>1</sup> 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; *Beckett 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.<sup>2</sup>

[DICKEY, C. J., gave a concurring opinion. SCOTT, CRAIG, and SHELDON, JJ., dissented.]

<sup>1</sup> Accord: *Long v. Elberton*, 109 Ga. 28, 34 S. E. 333, 46 L. R. A. 428, 77 Am. St. Rep. 363 (1899) (fall); *Frazer v. Chicago*, 186 Ill. 480, 57 N. E. 1055, 51 L. R. A. 306, 78 Am. St. Rep. 296 (1900) (small-pox hospital); *Van de Vere v. Kansas City*, 107 Mo. 83, 17 S. W. 695, 28 Am. St. Rep. 396 (1891) (fire-glue house); *Lambert v. Norfolk*, 108 Va. 259, 61 S. E. 776, 17 L. R. A. (N. S.) 1061, 128 Am. St. Rep. 945 (1908) (cemetery); *Kotz v. Ill. Cent. R. R.*, 188 Ill. 578, 59 N. E. 240 (1901) (elevation of railroad on private right of way). See *Austin v. Augusta Ter. Ry.*, 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755 (1899), and *Hyde v. Minn., etc., Ry.*, 29 S. D. 220, 136 N. W. 92, 40 L. R. A. (N. S.) 48 (1912) (excellent discussion).

<sup>2</sup> CONSTITUTIONAL PROVISIONS.—The Constitutions of Arkansas, California, Colorado, Georgia, Illinois, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming require compensation for

TIDEWATER RY. CO. v. SHARTZER (1907) 107 Va. 562, 567, 568, 59 S. E. 407, 17 L. R. A. (N. S.) 1053, KEITH, P. (holding a railway liable, under the damage clause of the Virginia Constitution, for annoyance from smoke, noise, dust, cinders, and danger from fire, resulting to lands no part of which were taken):

"Considering the terms of the Constitution and of the statute as they stood prior to 1902, and recognizing that the changes then introduced were designed to enlarge the right to compensation and extend it to cases where, under the old law, compensation was denied, it would seem that the language employed in the existing Constitution and Code [is] not difficult of interpretation, and should be held to embrace and give a remedy for every 'physical injury to property, whether by noise, smoke, gases, vibrations, or otherwise.' Lewis on Em. Dom. § 236.

property "damaged" or "injured" for public use. In Alabama, Kentucky, and Pennsylvania, compensation is similarly required only where the damage is done by "municipal or other corporations or individuals" invested with powers of eminent domain.

"The effect of such provisions is not to authorize compensation in all cases where property may be injured by public works, but only where the enjoyment of some right of the plaintiff in reference to his property is interfered with, and the property thereby rendered less valuable. The test is, would the injury, if caused by a private person without authority of statute, give the plaintiff a cause of action against such person? If so, then he is entitled to compensation notwithstanding the statute which legalizes the damaging work. The constitutional or statutory provision simply prevents the defendant from shielding himself under legislative authority against liability for damages consequent upon the work. Hence, if no part of the plaintiff's land is taken, and no other right of his is disturbed, he cannot have compensation."—Peel v. Atlanta, 85 Ga. 138, 140, 141, 11 S. E. 582, 583, 8 L. R. A. 787 (1890), by Blandford, J. And so Baker v. Boston Elev. Ry., 183 Mass. 178, 183, 184, 66 N. E. 711, 713, by Knowlton, C. J. (under statute entitling abutting owners to recover who are damaged by the maintenance of an elevated street railway): "We are of opinion that noise, such as would constitute a private nuisance to abutting property if it were not authorized, should be treated as causing special and peculiar damages, under this statute, which entitle the landowner to compensation."

**INJURIES DUE TO CHANGES OF STREET GRADE.**—The constitutional "damage clauses" are generally held to cover all such injuries suffered by abutting owners. See the annotations in 36 L. R. A. (N. S.) 1194-1202 (1911). In a few states an exception is made where the grade is officially established for the first time. See Leiper v. Denver, 36 Colo. 110, 85 Pac. 849, 7 L. R. A. (N. S.) 108, 118 Am. St. Rep. 101, 10 Ann. Cas. 847 (1906), and Kentucky and Washington cases cited in 36 L. R. A. (N. S.) 1202.

**INJURIES DUE TO RAILROADS IN STREET.**—As to how far the constitutional "damage clauses" cover these, see 36 L. R. A. (N. S.) 741-749. In Pennsylvania and Missouri these are construed less favorably than elsewhere, as regards abutters affected by the operation of steam railroads in the streets. See Willock v. Beaver Val. Ry., 222 Pa. 590, 72 Atl. 237 (1909); Gaus & Sons Co. v. St. Louis, etc., Ry., 113 Mo. 308, 20 S. W. 658, 18 L. R. A. 339, 35 Am. St. Rep. 706 (1892); De Geofroy v. Merchants' Bridge Ry., 179 Mo. 698, 79 S. W. 386, 64 L. R. A. 959, 101 Am. St. Rep. 524 (1904).

As to how far novel methods of street transportation are within the "damage clauses," see Kipp v. Daly-Davis Copper Co., 41 Mont. 509, 110 Pac. 237, 36 L. R. A. (N. S.) 666, 21 Ann. Cas. 1372 (1910) (cases).

"It is contended on the part of plaintiff in error that 'the proper construction of the clause under consideration is to take away from public service corporations the immunity that they have heretofore enjoyed under legislative sanction, and place them on the same footing with individuals and private corporations. The words "or damaged" mean actionable damages; that is, such damages as would form the basis of an action at common law or under some general statute, such as may be caused by the physical invasion of property or an interference with some right, public or private, appurtenant to the property.'

"To this proposition we cannot give our unqualified assent. A person, natural or artificial, who is asking nothing with respect to his property, is limited in the use of his own property only by the maxim that he must enjoy it in such a manner as not to injure that of another; or, less literally, but more accurately, perhaps, 'so use your own property as not to injure the rights of another.' Broom's Leg. Max. (7th Ed.) p. 364.

"But in the case before us the Tidewater Railway Company was not the owner of the property. It had been unable to acquire what it needed because of its 'inability to agree on terms of purchase with those entitled' to the land it desired, and therefore had invoked the exercise of the power of eminent domain; and the state has seen fit to prescribe upon what terms that power shall be exercised."<sup>1</sup>

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OMAHA HORSE RY. CO. v. CABLE TRAMWAY CO. (1887)  
32 Fed. 727, 734. BREWER, J. (holding, under the damage clause of the Nebraska Constitution, that a horse railway company was entitled to compensation for loss of traffic due to inconvenience of access to its cars, caused by a cable road being placed between its tracks and the sidewalk):

"Whenever a proposed public use causes to property, no part of which is taken, an injury of such a character as, if it accrued when

<sup>1</sup> In *Lambert v. Norfolk*, 108 Va. 259, 268, 61 S. E. 776, 779, 17 L. R. A. (N. S.) 1061, 128 Am. St. Rep. 945 (1908), a recovery was denied for the diminished market value of plaintiff's land due to the proximity of a newly established municipal cemetery; Keith, P., quoting approvingly from *Dillon, Munic. Corp.* § 587d: "This amendment must, as it seems to us, be limited to cases where the corpus of the owner's property itself, or some appurtenant right or easement connected therewith, or by the law annexed thereto, is directly (that is, in general, if not always, physically) affected, and is also specially affected (that is, in a manner not common to the property owner and to the public at large); and such direct and special injury must be such as to deprecate the value of the owner's property."

See, also, *Omaha & N. P. R. R. v. Janacek*, 30 Neb. 276, 46 N. W. 478, 27 Am. St. Rep. 399 (1890); *Lake Erie & W. R. R. v. Scott*, 132 Ill. 429, 24 N. E. 78, 8 L. R. A. 330 (1890); *Ill. Cent. R. R. v. Trustees of Schools*, 212 Ill. 406, 72 N. E. 39 (1904); *L. & N. R. R. v. Hall*, 143 Ky. 497, 136 S. W. 907 (1911); and 17 L. R. A. (N. S.) 1053 (1907) (cases).

a portion of the property was taken, would form a proper element of the damages to the part not taken, there is a damage within the scope and protection of this constitutional provision, and entitling the owner to compensation. Take this illustration: A railroad company condemns a right of way through a farm; the value of the strip of land thus taken is always awarded as damages; so, also, the injury which results to the balance of the farm by reason of the appropriation of the strip taken to the contemplated use; and in this injury is considered the difficulty of passage, the impairment of free access between one part of the farm and the other. The presence of a railroad track, with its moving trains through the middle of a farm, causes both risk and inconvenience in passing from one part of the farm to the other. And this inaccessibility, as we may call it, forms one element of damages. Another illustration of a similar nature: Suppose the owner of a lot in the city builds a store on the rear of that lot, leaving vacant ground between it and the street. If a railroad company condemns a right of way over his vacant ground in front of his store, thus interfering with freedom of access from the street, the same rule of estimating damages would apply, and the inaccessibility would be declared a proper subject for compensation. This principle controls the case at bar. A railroad track, with passing cars between plaintiff's track and the sidewalk, the ordinary passageway of foot passengers, impairs more or less access to plaintiff's cars. It is a direct hindrance and injury to accessibility thereto."<sup>1</sup>

<sup>1</sup> For the proper elements of legal damage, when a public street is opened across a steam railroad's right of way, see *Paris v. Cairo, V. & C. Ry.*, 248 Ill. 213, 93 N. E. 729 (1911); *C., B. & Q. Ry. v. Chicago*, 166 U. S. 226, 251 ff., 17 Sup. Ct. 581, 41 L. Ed. 979 (1897); *Cin., etc., Ry. v. Connersville*, 218 U. S. 336, 31 Sup. Ct. 93, 54 L. Ed. 1060, 20 Ann. Cas. 1206 (1910) (street cut through railway embankment).

TEMPORARY INTERFERENCES WITH PROPERTY.—“It is well settled that inconvenience, expense, or loss of business occasioned to abutting owners by the temporary obstruction of a public street, and the consequent interference with their right of access to their property, made necessary by the construction of a public improvement, gives no cause of action against the municipality. The Constitution provides no remedy for the property owner under such circumstances. Such claim is not damage to property not taken, within the meaning of the Constitution. *Lefkowitz v. City of Chicago*, 238 Ill. 23, 87 N. E. 58 (1908); *Osgood v. City of Chicago*, 154 Ill. 194, 41 N. E. 40 (1894); *Northern Transportation Co. v. City of Chicago*, 99 U. S. 635, 25 L. Ed. 336 (1878).”—*Chicago Flour Co. v. Chicago*, 243 Ill. 268, 271, 90 N. E. 674, 676 (1910), by Dunn, J. See, also, *Transp. Co. v. Chicago*, ante, p. 734, note. And so of entries on land to make preliminary surveys for public improvements. *State v. Seymour*, 35 N. J. Law, 47, 53 (1871); *State v. Simons*, 145 Ala. 95, 40 South. 662 (1906).

## SECTION 4.—COMPENSATION

BANGOR & PISCATAQUIS R. CO. v. McCOMB (1872) 60 Me. 290, 296, 297, KENT, J. (discussing the meaning of the constitutional requirement of "just compensation" when property is taken by eminent domain):

"We are not to forget that the property has been taken without the consent of the owner; that the act overrides the fundamental right of every man to possess, manage and defend his property, and that it is enough thus to seize his estate without making him a pecuniary sufferer. The words selected are significant,—'just compensation.' These words cover more than the mere value of the quantity taken, measured by rods or acres. They intend nothing less than to save the owner from suffering in his property or estate, by reason of this setting aside of his right of property,—as far as compensation in money can go,—under the rules of law applicable to such cases.

"In some cases it is very easy to apply those rules. If it is clear that all of a lot of land, shown to have been worth two thousand dollars, was taken, then that sum would be the extent of the damage. If personal property is taken from the possession of the owner and converted to the use of the public, the value of the thing taken, at the time of the taking, would be the just compensation required. If a man's horse is taken and it goes from his possession, he has no longer any connection with the subsequent use or appropriation of the property. It can no longer affect him in the use or value of his remaining property. But not so with land, unless the whole lot is taken. The land remains unmoved, and in various ways the taking of a part may injure the former owner beyond the mere value of so much land.

"The effect of the location of the part taken, upon the remaining portion, may be such as to render it of very little value. It may leave only small gores, or parts incapable of profitable use. Or it may disfigure the lot, so that it would be worth but little, although the extent of the part remaining might be greater than of the part taken. Another, and often a more serious injury, is in the use to which the land taken is to be appropriated. If for a common highway, the use might be much less injury to the remaining land, than if for a railroad. There are various considerations, applicable to different cases, and to the situation of different lots, which may properly be regarded in determining the just compensation to the owner. The constitutional provision cannot be carried out, in its letter and spirit, by anything short of a just compensation for all the direct damages to the owner of the lot, confined to that lot, occasioned by the taking of his land.



The paramount law intends that such owner, so far as that lot is in question, shall be put in as good a condition, pecuniarily, by a just compensation, as he would have been in if that lot of land had remained entire, as his own property. How much less is that lot, and its erections thereon remaining, worth to the owner, as property to be used or leased or sold the day after the part was taken, to be used for the purpose designed, than the whole lot intact was the day before such taking?"

[The taking being for the purposes of a railroad, it was held proper to include all depreciation of the sale value of the remainder of the tract due to prospective noise, vibration, smoke, and exposure to fire from the operation of the road.]<sup>1</sup>

<sup>1</sup> Accord: *South Buffalo Ry. v. Kirkover*, 176 N. Y. 301, 68 N. E. 366 (1903) (use for which part is taken may enhance damage to remainder).

"The exception to the Massachusetts rule denying damages for quasi nuisances authorized by statute is that some annoyances, which otherwise could not have been recovered for, may enhance the damages allowed, in so far as they are brought nearer to the petitioner's land by the taking of a part of it. The petitioner is 'entitled to recover, not only compensation for the land taken, but also for such injury to his remaining land as is caused by the appropriation of a part of it for the uses for which it is taken,' (*Johnson v. Boston*, 130 Mass. 452, 454 [1881]) not, it will be observed, an arbitrary principle that taking part of a petitioner's land lets in a claim to other damages otherwise not allowable, (compare *Blesch v. Railway Co.*, 48 Wis. 168, 189, 190, 2 N. W. 113 [1879]) but only that so far as increased proximity is the source of the trouble it may be allowed for. The difference between the annoyance just outside the petitioner's original parcel and the same in its intended place is the measure. *Walker v. Railway Co.*, 103 Mass. 10, 4 Am. Rep. 509 (1869). The distinction, if difficult to apply, is logical with reference to matters in the nature of nuisances which would not have been actionable apart from statute, but it must not be carried too far."—*Tatt v. Commonwealth*, 158 Mass. 526, 548, 33 N. E. 1046, 1049 (1893), by Holmes, J. See, also, *Lincoln v. Commonwealth*, 164 Mass. 368, 41 N. E. 489 (1895).

"It is, we think, settled in this state, that a person whose lands are actually taken for the uses of a railroad may recover the value of the lands taken, and for any other injury to his lands not taken, being a part of the tract used, together with that which is taken, and that no deduction can be made from such damage upon the pretext that his injury would have been just as great had the road been constructed in any other place, and just off his land."—*Blesch v. C. & N. W. Ry.*, 48 Wis. 168, 189, 2 N. W. 113, 117 (1880), by Taylor, J.

In *Baker v. Boston Elev. Ry.*, 183 Mass. 178, 185, 66 N. E. 711, 714 (1903), it was held that, under a statute permitting the recovery of damages due to the operation of an elevated railway in the streets of Boston, an abutting owner could recover all damages from noise so great as to amount to a private nuisance, *Knowlton, C. J.*, saying: "In reference to the amount to be recovered, the principle on which the statute is founded seems analogous to the common law in regard to noise as a disturbance to neighboring landowners. In actions at law, so long as the noise is not so excessive as to constitute a private nuisance to the neighboring property, it is treated as permissible, and there is no liability for the effect of it. But when it increases so as to become a private nuisance, its effect is treated as of a different character; and the party injured by it may recover all the damage caused by the nuisance, without attempting to determine how much of the effect is produced by that part of the noise which might have been innocently made, and how much by that part which is in excess of that which is allowable."

SEPARATE TRACTS OF SAME OWNER.—The rule of the principal case does not include damage inflicted by the taking upon distinct and separate tracts of land, other than that a part of which is taken, though owned by the

## BAUMAN v. ROSS.

(Supreme Court of United States, 1897. 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270.)

[Appeals from judgments of the Supreme Court and the Court of Appeals of the District of Columbia modifying a verdict of commissioners in proceedings to condemn land for streets in the District. The proceedings were taken under an act of Congress of March 2, 1893, sections 11 and 15 of which provided in substance that when part only of a tract of land was thus taken the damages to be paid therefor should be reduced by the amount that the remainder of the tract was increased in value by the purpose of the taking, and that the assessment to pay for property thus taken should be charged half upon land benefited by the improvement and half upon the District, making due allowance for the value of benefits deducted from parts of tracts taken as above. Part of a tract of land of one Bauman was sought to be condemned in these proceedings and the award of compensation to him deducted the benefits to the remainder of the tract. The two courts above mentioned held this violated the fifth amendment to the federal Constitution: "Nor shall private property be taken for public use without just compensation."]

Mr. Justice GRAY. \* \* \* The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.

Consequently, when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in it-

same person. As to what are distinct and separate tracts, see *Sharp v. U. S.*, 191 U. S. 341, 24 Sup. Ct. 114, 48 L. Ed. 211 (1903); *Wellington v. B. & M. R. R.*, 164 Mass. 380, 41 N. E. 652 (1895); *Davenport, etc. Ry. v. Sinden*, 111 Ill. App. 75 (1903); *White v. Met. Elev. R. R.*, 154 Ill. 620, 39 N. E. 270 (1894).

SEPARATE INTERESTS IN SAME TRACT.—The owners of such interests are to be compensated separately and may not unite their interests for the purpose of increasing the total amount of damages. *Boston Chamber of Commerce v. Boston*, 195 Mass. 338, 81 N. E. 241 (1907), affirmed in 217 U. S. 189, 103, 30 Sup. Ct. 459, 460, 54 L. Ed. 725 (1910), *Holmes, J.*, saying: "It is true that the mere mode of occupation does not necessarily limit the right of an owner's recovery. *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 408, 25 L. Ed. 206, 208 (1878); *Louisville & N. R. Co. v. Barber Asphalt Pav. Co.*, 197 U. S. 430, 435, 49 L. Ed. 819, 822, 25 Sup. Ct. 466 (1905). But the Constitution does not require a disregard of the mode of ownership,—of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is, What has the owner lost? not, What has the taker gained?"

self of less value than before, the owner is entitled to additional damages on that account. When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened. If, for example, by the widening of a street, the part which lies next the street, being the most valuable part of the land, is taken for the public use, and what was before in the rear becomes the front part, and upon a wider street, and thereby of greater value than the whole was before, it is neither just in itself, nor required by the Constitution, that the owner should be entitled both to receive the full value of the part taken, considered as front land, and to retain the increase in value of the back land, which has been made front land by the same taking.

Of the overwhelming number of decisions in the courts of the several states which support this view, a few of the most important may conveniently be referred to. \* \* \* [Here are discussed cases from Massachusetts, New York, New Jersey, Pennsylvania, and Ohio.]

The rule upon the subject was expressed by Mr. Justice Brewer, when a member of the supreme court of the state of Kansas, as follows: "Outside of any special constitutional or statutory restrictions, the right of the state to take private property for public use, and the corresponding right of the individual to receive compensation for the property thus taken, may be assumed." "But this compensation is secured if the individual receive an amount which, with the direct benefits accruing, will equal the loss sustained by the appropriation. We, of course, exclude the indirect and general benefits which result to the public as a whole, and therefore to the individual as one of the public; for he pays in taxation for his share of such general benefits. But, if the proposed road or other improvement inure to the direct and special benefit of the individual out of whose property a part is taken, he receives something which none else of the public receive, and it is just that this should be taken into account in determining what is compensation. Otherwise, he is favored above the rest, and, instead of simply being made whole, he profits by the appropriation, and the taxes of the others must be increased for his special advantage. Upon general principles, then, and with due regard to right and justice, it should be held that the public may show what direct and special benefits accrue to an individual claiming road damages, and that these special benefits should be applied to the reduction of the damages otherwise shown to have been sustained." *Commissioners v. O'Sullivan*, 17 Kan. 58-60.

The Constitution of the United States contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use; and, for the reasons and upon the authorities above stated, no such prohibition can be implied; and it is therefore within the authority of congress,

in the exercise of the right of eminent domain, to direct that, when part of a parcel of land is appropriated to the public use for a highway in the District of Columbia, the tribunal vested by law with the duty of assessing the compensation or damages due to the owner, whether for the value of the part taken, or for any injury to the rest, shall take into consideration, by way of lessening the whole or either part of the sum due him, any special and direct benefits, capable of present estimate and reasonable computation, caused by the establishment of the highway to the part not taken. \* \* \*

Judgments reversed.<sup>1</sup>

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### Matter of CITY OF NEW YORK.

(Court of Appeals of New York, 1907. 190 N. Y. 350, 83 N. E. 299, 16 L. R. A. (N. S.) 335, 13 Ann. Cas. 598.)

[Appeal from an order of the Appellate Division of the first judicial department, affirming an order of Special Term confirming a report of commissioners in condemnation proceedings taken by New York City to acquire for water-front improvements several pieces of land owned by the Consolidated Gas Company. Parts only of two of these tracts of land were taken, and, while these parts were of substantial value, the benefits that would accrue to the remainder of these tracts from the projected improvements upon the parts taken exceeded in value the lands taken. Under statutory authority, no compensation was allowed for the parts thus taken, and the Gas Company appealed.]

CULLEN, C. J. \* \* \* There is but a single question before us. That is, whether the statutory rule of compensation conforms to the requirement of the Constitution that private property shall not be taken for public use without just compensation. Article 1, § 6. That this is a judicial question was held by the Supreme Court of the United States in *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463, where, in declaring certain provisions of the federal statute as to condemnation unconstitutional and invalid, the court, through Justice Brewer, said: "By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative, question. \* \* \* It does not rest with the public, taking the property, through Congress or the Legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation." Of course, this is true only in one direction; that is to say, that, as the right to exercise the power of eminent domain must proceed from legislative authority, the Legislature may require more liberal compensation than that which would satisfy

<sup>1</sup> See the comment on this case in *Matter of City of New York*, 190 N. Y. 350, 362, 363, 83 N. E. 299, 16 L. R. A. (N. S.) 335, 13 Ann. Cas. 598 (1907).

the constitutional requirement, but it cannot direct that anything less than just compensation shall be made. \* \* \*

The question before us has been the subject of many diverse views in the courts of the various states. Mr. Lewis, in his work on Eminent Domain, thus states the condition of the authorities, dividing them into five classes:<sup>1</sup> (1) States holding that benefits cannot be set off at all (Mississippi). (2) Holding that special benefits may be set off against the remainder, but not against the part taken (Maryland, Nebraska, Tennessee, Virginia, West Virginia, Wisconsin). (3) Holding that benefits both general and special may be set off against the remainder, but not against the part taken (Georgia, Louisiana, Kentucky, Texas). (4) Holding that special benefits may be set off against the part taken and the remainder (Connecticut, Kansas, Maine, Minnesota, Missouri, New Hampshire, North Carolina, Oregon, Pennsylvania, Virginia, District of Columbia). (5) Holding that benefits, both general and special, may be set off against the part taken and the value of the remainder (Alabama, California, Delaware, Illinois, Indiana, New York, Ohio, Oregon, South Carolina). It would be impossible, within the limits of an opinion, to discuss the various decisions cited by the learned author, or to examine in every case the accuracy of his classification. It may be observed, however, that Illinois, whatever may have been the earlier decisions in that state, cannot now be placed in the fifth class, because the later cases hold that the owner must be paid the full value of the land taken in money alone without regard to the benefits he may receive. *Carpenter v. Jennings*, 77 Ill. 250; *Chaplin v. Highway Com'rs*, 129 Ill. 651, 22 N. E. 484; *Schroeder v. City of Joliet*, 189 Ill. 43, 59 N. E. 550, 52 L. R. A. 634. With reference to this state also, I think the author has fallen into error, and that with us the question is still an open one. In the several cases cited by the Supreme Court of the United States in *Bauman v. Ross*, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270, and by Mr. Lewis (*Livingston v. Mayor, etc., of New York*, 8 Wend. [N. Y.] 85, 22 Am. Dec. 622; *In re Furman St.*, 17 Wend. [N. Y.] 649; *People v. Mayor, etc., of Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Genet v. City of Brooklyn*, 99 N. Y. 296, 1 N. E. 777; *Granger v. Syracuse*, 38 How. Prac. [N. Y.] 308; *Rexford v. Knight*, 15 Barb. [N. Y.] 627), with the single exception of *Rexford v. Knight, supra*, the proceedings, the validity of which were attacked, were dual, involving not only an award of compensation for land taken, but an assessment on adjacent property for the cost of the improvement. I cannot find that in any of those cases the owner was awarded anything less than the full value of his land; the attack being made on

<sup>1</sup> A more recent classification by the same writer is in 2 Lewis, *Em. Dom.* (3d Ed.) §§ 687-693. As to the various classes of benefits that land may receive from a public improvement, see *Trinity College v. Hartford*, 32 Conn. 452, 476-478 (1865); *Baker v. Boston Elev. Ry.*, 183 Mass. 178, 182, 66 N. E. 711 (1903); and as to the distinction between general and special benefits, see 2 Lewis, *Em. Dom.* (3d Ed.) §§ 702, 703.



the provision for setting off the assessment against the award. It is the blending of the two powers, that of eminent domain and that of taxation, which has led to the confusion as to the effect of the decisions of this state. \* \* \*

In *Bohm v. Metropolitan Elevated R. Co.*, 129 N. Y. 576, 29 N. E. 802, 14 L. R. A. 344, Judge Peckham said as to the rule of compensation: "Before entering on a discussion of these matters, I think it proper to say that I should hesitate to admit the correctness of the claim made by defendants that where private property is taken by a mere business corporation, as for a public use under the granted power of eminent domain, the Legislature could provide that such property could be paid for by benefits accruing to the landowner's adjacent property consequent upon the taking. This is the case in regard to municipal corporations where land is taken for a public street, or other public and municipal purposes, and, where the benefits arising to the adjacent lands of the owner whose property is taken, may be set off against the value of the land taken. So in the case of property taken by the state for canal or other public purposes, where the owner of the land taken was frequently paid its value by the benefits received to his adjacent land not taken. The principle underlying these cases is, however, the right of the municipality or state to tax the owners of the land left, in order to pay for the land taken, on the ground that they are specially benefited by the taking, and hence should be specially taxed for the payment of the land. The case of *Genet v. City of Brooklyn*, 99 N. Y. 296, 1 N. E. 777, is no authority for a contrary view, for I think it supports that which I have suggested. A mere trading or business corporation has no power of taxation, and the state could not delegate such power to it." This review of the cases shows that there is no controlling decision of the court or of its predecessor, the Court of Errors, on the question presented, and we must determine it on principle.

We will first consider the proceedings as solely in the exercise of the power of eminent domain. It is the settled law of this state that the character and quantity of the estate in lands to be acquired for public use rests wholly in the determination of the Legislature. It may, as in this case it has, authorize the acquisition of the fee in which case there is no right of reversion left in the original owner. \* \* \* [Here are discussed *Heyward v. Mayor of N. Y.*, 7 N. Y. 314 (almshouse), *Brooklyn Park Com. v. Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70 (park), and *Whitney v. N. Y.*, 96 N. Y. 241 (canal), holding that the abandonment of a public purpose for which land has been condemned gives no reversion or right of action to the former owner.]

If, then, under the settled law of this state, land acquired in fee for a public use can be forever diverted from the owner, and there is no obligation to continue the public use for which it was appropriated and no cause of action arises in favor of the landowner for the abandonment of the improvement, how is it possible to assert

that the benefits that result from such an improvement can be considered as compensation for deprivation of the land? With the utmost deference to the opinions of the learned courts of other states and of the United States, it seems to me that the question admits of but one answer. I frankly concede that mere theoretical possibilities of what may occur ought not to control the practical administration of the law, but I have cited three cases that have actually occurred in this state. In the Heyward Case probably no real damage could have occurred to the landowner by the removal of the almshouse, but in the Brooklyn Park Case and in the canal cases injury to the adjacent property by the abandonment of the improvement might have and in all probability did actually occur. In the Brooklyn Park Case the contemplated improvement was abandoned before its prosecution was ever actually commenced. But in that case the landowner had no just cause of complaint because he was paid the full value of his property and subjected to no assessment. In the case of the abandoned canals the landowners certainly lost compensation for their property. It may be further said that, with the exception of the law regulating compensation for canals, I do not now recall any statute of this state, except the one now before us, which has assumed to offset benefits against the value of the land taken in a proceeding strictly in the exercise of the power of eminent domain. A curious result that may arise from such a rule of compensation is found in *Matter of 48th St.*, 19 App. Div. 602, 46 N. Y. Supp. 311. Under the charter provisions regulating street openings in the city of Brooklyn, commissioners of appraisal merely made the award for land taken. The local assessments for benefits were made by the board of assessors, a body of permanent officers. The proceedings, therefore, of eminent domain and of taxation were wholly distinct. The commissioners in making their award deducted supposed benefits. Had the award been allowed to stand, the landowner would have had to pay a double share of the cost of improvement, first, by deduction from his award; and, second, by the assessment laid on his adjacent property by the board of assessors. The Appellate Division of the Supreme Court set aside the action of the commissioners, holding that in such a situation no benefits could be deducted from the awards in the appraisal proceedings; yet, if the true rule of compensation justifies the deduction for benefits, I cannot see why as a matter of strict law the commissioners are not justified in their action, regardless of the inequitable results that would flow from it. I appreciate fully that it is not possible to lay down a fixed rule on this subject which will in every case work exact justice. That benefits may not be set off against consequential damages to the part of the land not taken I do not assert. On the contrary, this would generally accomplish an equitable result (*Newman v. Metropolitan El. Ry. Co.*, 118 N. Y. 618, 23 N. E. 901, 7 L. R. A. 289; *Bohm v. Metr. El. Ry. Co.*, supra), but this much we can hold, and I think we should hold, that in no case

should an award be made for less than the value of the property actually taken by condemnation. In that position the courts of this state will not stand alone, but will have the support of those in the states already enumerated in the first three of Mr. Lewis' classes, and, in addition thereto, the courts of Illinois. \* \* \*

Order reversed.

[It was held that the set-off of benefits against land taken for this improvement could not be justified under the taxing power on account of the accidental and arbitrary mode in which the burden was distributed. See *Spencer v. Merchant*, ante, p. 644 and notes.]

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### BOHM v. METROPOLITAN ELEVATED RY. CO.

(Court of Appeals of New York, 1892. 129 N. Y. 576, 29 N. E. 802, 14 L. R. A. 344.)

[Appeal from a judgment of the New York City General Term of the Superior Court, affirming a judgment for plaintiff entered on trial at Special Term. Plaintiff sued to recover damages alleged to be due to interference with easements of light, air, and access appurtenant to his premises on Second avenue in New York City, caused by defendant's elevated street railroad in that street. Other facts appear in the opinion.]

PECKHAM, J. \* \* \* The plaintiffs own no land in the street. Their ownership of the land is bounded by the exterior lines of the street itself. Hence, when under legislative and municipal authority the railroad structure was built, it was supposed by many there was no liability to abutting owners, because no land of theirs was taken, and any damage they sustained was indirect only, and *damnum absque injuria*. When the courts acquired possession of the question, and it was seen that abutting land, which, before the erection of the road, was worth, for instance, \$10,000, might be reduced to a half or a quarter of that sum in value, or even rendered practically worthless, by reason of the building of the road, it became necessary to ascertain if there were not some principle of law which could be resorted to in order to render those who wrought such damage liable for their work. It has now been decided that, although the land itself was not taken, yet the abutting owner, by reason of his situation, had a kind of property in the public street for the purpose of giving to such land facilities of light, of air, and of access from such street. These rights of obtaining for the adjacent lands facilities of light, etc., were called "easements," and were held to be appurtenant to the land which fronted on the public street. These easements were decided to be property, and protected by the constitution from being taken without just compensation. It was held that the defendants, by the erection of their structure and the operation of their trains, interfered with

the beneficial enjoyment of these easements by the adjacent land-owner, and in law took a portion of them. By this mode of reasoning the difficulty of regarding the whole damage done to the adjacent owner as consequential only, (because none of his property was taken,) and therefore not collectible from the defendants, was overcome. The interference with these easements became a taking of them *pro tanto*, and their value was to be paid for; and, in addition, the damage done the remaining and adjoining land by reason of the taking was also to be paid for, and this damage was in reality the one great injury which owners sustained from the building and operation of the defendants' road. For the purpose of permitting such a recovery, the taking of property had to be shown. The Cases of *Story*, *Lahr*, *Drucker*, *Abendroth*, and *Kane* (the last of which is reported in 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 640, and in which the others are referred to) finally and completely settled these matters.

It seems to me plain from this review of the law that the real injury (if any) suffered by the land-owner in any particular case lies in the effect produced upon his abutting land by the wrongful interference of defendants with these easements of light, air, and access to such land; and where they are interfered with, and, in legal effect, taken to any extent, it is not possible to think of them as of any value in and of themselves, separated from the adjoining land, but their value is to be measured by the injury which such taking inflicts upon the land which is left, and to which they were appurtenant. This is a consequential damage. It is not the light or the air that is valuable, separated from the land adjoining. With regard to the subject under discussion, there is and can be no value in a given quantity of air or space or light in the public street, except as it may be used in connection with and as appurtenant to the abutting land. When a person interferes with such light, air, or access, and takes it, he takes nothing which is alone and intrinsically valuable, but only as its loss affects the adjoining land. This loss, while purely consequential, is nevertheless a liability which the person proposing to take the property is bound to discharge. The rule which the counsel for the plaintiffs contends for is a pure abstraction, and liable in many instances to cause injustice in its application, because it would fly in the face of the actual facts. Easements, he says, are worth exactly the amount which they add to the value of the premises to which they are appurtenant; and no reference to the particular agency by which the taking or interference with such easements has been accomplished should be permitted, even for the purpose of determining the damage that has been thereby caused. The pure abstraction of a curtailment or destruction of the easement must be indulged in, and no effect other than such curtailment or destruction upon the property left is to be regarded. Carrying out this principle, it might appear that a lot on Second avenue, with its easements of light, air, and access unimpaired, would be worth \$5,000. To deprive it in some undefined way

other than by defendants of a portion of such easements equal to the amount taken by the defendants might detract from the value of the lot \$2,500. Therefore \$2,500 is the value of the easement, which the defendants must pay. This is, as I have said, a pure abstraction. No such case exists or can exist. The same property cannot be taken by some other agency and by the defendants at the same time. Adopting the theory of the plaintiffs' counsel, it can be easily seen how, in fact, the injustice imagined might be perpetrated. A plaintiff, after proving that the damage to his property, if the easement had been taken by some process and by some person other than defendants, would upon such hypothesis have been \$2,500, might be met by defendants with proof of the fact that he had sustained no damage whatever, and, on the contrary, by reason of the erection of the road, he had been specially and peculiarly benefited, his property being in actual fact worth 50 or 100 per cent. more than it was before. Would there not be great injustice in awarding to such an owner \$2,500 for damages which in truth he had never suffered? The separate value of light and air, upon the facts existing in all these cases, can, in the nature of things, be nothing but nominal. They must be joined to the land to be of value. \* \* \*

The inquiry whether the land would have been injured if certain circumstances had not occurred, which not only prevented such injury, but enhanced its value, is wholly immaterial. The question is, what, in fact, has been the actual result upon the land remaining? Has its actual market value been decreased by the taking, or has the taking prevented an enhancement in value greater than has actually occurred; and, if so, to what extent? The amount of such decrease in the value of the remaining land, or the amount of the difference between its actual market value and what it would have been worth if the railroad had not taken the other property, is the amount of the damage which the defendants should pay. If, on the contrary, there has been neither decrease in value caused by the railroad, nor any prevention of an increase from the same cause, how can it be truly said that the lot-owner has been injured to the extent of a farthing? The absence of injury may have been the result of the general growth of the city, by reason of which the particular property has grown in value with the rest of the city. It is the fact, not the cause, which is material. Where it appears that the property left has actually advanced in value, unless it can be shown that, but for the act of defendants in taking these easements, it would have grown still more in value, the fact is plain that it has not been damaged. \* \* \*

The defendants are not, however, compelled to base their claims of exemption upon quite so broad a foundation. They say it appears by the uncontradicted evidence that the railroad largely caused the increase in value of all the lands on Second avenue, including the plaintiffs' lots; and, as I have said, the evidence bears out such claim. If this be the fact, how can it be said that the plaintiffs have suffered



damage? There is no shadow of evidence that, if the defendants had not taken this property and built their railroad, the property of the plaintiffs would have been as valuable, or anything like as valuable, as it is. The plaintiffs have in truth been specially benefited by this railroad, although quite a number of others have also participated therein. This special cause is the railroad, and a special benefit may result to many from such special cause. The fact that other property in the vicinity and in the side streets has been more than proportionately increased in value by reason of the existence of the defendants' road is not of the slightest importance upon the question of whether the plaintiffs have been injured by defendants' conduct. \* \* \* It is only necessary for us in this case to decide that, if the property of the plaintiffs have increased in value since the taking of these easements, or a portion of them, and if such increase is largely due to the building and operation of the defendants' road, and if such increase would not have been greater but for the action of defendants, then the plaintiffs have suffered no damage. Whether the increase is common to every other owner in the avenue, and is greater in proportion with some owners of property in the side streets than with the plaintiffs, are matters of no importance. The plaintiffs are not damaged because their neighbors are benefited to an even greater extent than they are by the defendants' road. \* \* \*

Judgment reversed.<sup>1</sup>

[GRAY, J., not voting.]

<sup>1</sup> See *Newman v. Metrop. Elev. Ry.*, 118 N. Y. 618, 23 N. E. 901, 7 L. R. A. 289 (1890). Compare *Becker v. Met. El. Ry.*, 131 N. Y. 509, 30 N. E. 499 (1892). Where the only taking is of the abutter's easements of light, air, and access, no recovery is allowed for elements of damage due to the operation of the railroad, but not affecting these, such as noise, vibration, disturbance of privacy, obstruction of view, etc., *American B. N. Co. v. N. Y. Elev. R. R.*, 129 N. Y. 252, 29 N. E. 302 (1891); *Bischoff v. N. Y. E. R. R.*, 138 N. Y. 257, 33 N. E. 1073 (1893); though these would be recoverable as part of the damage to the remainder of the tract if a part of the land itself were taken, *South Buffalo Ry. v. Kirkover*, 176 N. Y. 301, 68 N. E. 366 (1903). For the elements of damage that do affect these easements, see the above cases in 129 N. Y. and 138 N. Y.

ELEMENTS OF COMPENSATION AND MODES OF VALUATION.—See, for some phases of these, as regards real estate: *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206 (1879); *U. S. v. Chandler-Dunbar Co.*, 229 U. S. 53, 74 ff., 33 Sup. Ct. 667, 57 L. Ed. — (1913); *McGovern v. N. Y. City*, 230 U. S. 363, 33 Sup. Ct. 876, 57 L. Ed. — (1913); *Minu. Rate Cases*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. — (1913); *personalty and fixtures*: *W. Larremore* in 11 Col. L. Rev. 147 (1911); *business and employments* (under special statutes): *Id.* 152-156; *Matter of Ashokan Dam*, N. Y. Dept. Repts. (Adv. Sheets, Jan. 2, 1913) 129; *improvements affixed to realty by taking party before condemnation*: *St. Johnsville v. Smith*, 184 N. Y. 341, 77 N. E. 617, 5 L. R. A. (N. S.) 922, 6 Ann. Cas. 379 (1906); *Norfolk, etc., Ry. v. Consol. Turnpike Co.*, 111 Va. 131, 68 S. E. 346, Ann. Cas. 1912A, 239 (1910); 5 L. R. A. (N. S.) 922, 923, cases and references.

## SWEET v. RECHEL.

(Supreme Court of United States, 1895. 159 U. S. 380, 16 Sup. Ct. 43, 40 L. Ed. 188.)

[Error to United States Circuit Court for Massachusetts. Plaintiff sued to recover from defendant land in Boston held by defendant under a title derived from condemnation proceedings taken by the city of Boston under legislative authority. For the public health the city was empowered to take and raise the grade of certain submerged land privately owned. The city was to file with the county register of deeds a description of the land thus taken, with a statement of the taking, and thereupon title was to vest in the city. Any owner of land so taken who agreed with the city upon his damages was to have them paid forthwith by the city, and any other person interested was authorized within one year from said taking to file a bill in equity to have his damages ascertained by commissioners under judicial direction, and to have an execution against the city for the damages thus ascertained. Plaintiff alleged the invalidity of title derived under this proceeding and took this writ from a judgment in favor of defendant.]

Mr. Justice HARLAN. \* \* \* But must compensation be actually made or tendered in advance of such taking or appropriation? Is it not sufficient, in order to meet the requirements of the Constitution, if adequate provision be made for compensation?

The Constitutions of some of the states expressly require that compensation be first made to the owner before the rights of the public can attach. But neither the Constitution of Massachusetts nor the Constitution of the United States contains any such provision. The former only requires that the owner "shall receive a reasonable compensation"; the latter, that private property shall not be taken for public use "without just compensation." Reasonable compensation and just compensation mean the same thing.

In *Haverhill Bridge Prop'rs v. County Com'rs*, 103 Mass. 120, 124, 4 Am. Rep. 518, the court said: "The duty of paying an adequate compensation for private property taken is inseparable from the exercise of the right of eminent domain. The act granting the power must provide for compensation, and a ready means of ascertaining the amount. Payment need not precede the seizure, but the means for securing indemnity must be such that the owner will be put to no risk or unreasonable delay."

A leading case upon this point is *Connecticut River R. R. v. Franklin Com'rs*, 127 Mass. 50, 52, 56, 34 Am. Rep. 338. That case arose under a statute of Massachusetts authorizing the manager of a railroad owned by the commonwealth to take land for a passenger station to be used by that and other railroads, and providing no other mode of compensation to the owner than that the land should be paid for out of the earnings of the railroad. The statute was held to be void

The court said: "It has long been settled by the decisions of this court, that a statute which undertakes to appropriate private property for a public highway of any kind, without adequate provision for the payment of compensation, is unconstitutional and void, and does not justify an entry on the land of the owner without his consent,"—citing among other cases *Boston & L. R. Corp. v. Salem & L. R. Co.*, 2 Gray, 1, 37. Again: "Statutes taking private property for a public highway, and providing for the ascertaining of the damages, and for payment thereof out of the treasury of the county, town, or city, have often been held to be constitutional. But, in the cases in which it has been so held, the liability to pay the damages rested upon the whole property of the inhabitants of the municipality, and might be enforced by writ of execution or warrant of distress, or by mandamus to compel the levy of a general tax. The rule has not been extended to cases in which only a special fund was charged with the payment of the damages, and the municipality had no power to levy a general tax to pay them." "When," the court said, "private property is taken directly by the commonwealth for the public use, it is not necessary or usual that the commonwealth should be made subject to compulsory process for the collection of the money to be paid by way of compensation. It is sufficient if the statute which authorizes the taking of the property should provide for the assessment of the damages in the ordinary manner, and direct that the damages so assessed be paid out of the treasury of the commonwealth, and authorize the governor to draw his warrant therefor."

Much stress was placed by counsel in that case upon the admitted fact that the earnings of the railroad owned by the commonwealth would probably be sufficient to meet and extinguish all claims for damages for lands taken. But that, the court well said, fell short of the constitutional requirement that the owner of property shall have prompt and certain compensation, without being subjected to undue risk or unreasonable delay.

In the later case of *Brickett v. Haverhill Aqueduct Co.*, 142 Mass. 394, 396, 8 N. E. 119, the language of the court was that "a statute which attempts to authorize the appropriation of private property for public uses, without making adequate provision for compensation, is unconstitutional and void."

In view of these authorities, it is clear that, as the constitution of Massachusetts does not require compensation to be first actually made or tendered before the rights of the public in the property taken or applied become complete, the requirements of that instrument are fully met where the statute makes such provision for reasonable compensation as will be adequate and certain in its results. It is equally clear that an adequate provision is made when the statute, authorizing a public municipal corporation to take private property for public uses, directs the regular ascertainment, without improper delay and in some legal mode, of the damages sustained by the owner, and

gives him an unqualified right to a judgment for the amount of such damages, which can be enforced—that is, collected—by judicial process.

Substantially the same principles have been announced by this court when interpreting the clause of the Constitution of the United States that forbids the taking of private property for public use without just compensation. \* \* \* [Here are discussed *Cherokee Nation v. So. Kan. R. R.*, 135 U. S. 641, 658, 10 Sup. Ct. 965, 34 L. Ed. 295; *Kennedy v. Indianapolis*, 103 U. S. 599, 603, 26 L. Ed. 550; *Baltimore, etc., Co. v. Nesbit*, 10 How. 395, 398, 399, 13 L. Ed. 469; *Bloodgood v. Mohawk, etc., Co.*, 18 Wend. (N. Y.) 9, 17, 18, 31 Am. Dec. 313; *People v. Hayden*, 6 Hill (N. Y.) 359, 361; and *Stacey v. Vt. C. R. R.*, 27 Vt. 39, 44.]

The case now before us differs from all, or nearly all, of those cited by the plaintiffs in this: that in the latter the statute under which the property was taken, either expressly or by necessary implication, made the payment or tender of the compensation awarded to the owner of the property appropriated to public use a condition precedent to the acquisition of title by the party at whose instance the property was taken; whereas, in the present case, the statute vests the title in the city of Boston from at least the time it filed in the office of the registry of deeds a description of the lands taken by it, describing them with as much certainty as is required in a common conveyance of lands, and stating that the same were taken pursuant to the provisions of the statute. As soon as they were so taken, the city, invested from that time with the title, had the right forthwith to raise the grade, and could not throw the property back upon the former owner, or compel him to pay the cost of raising the grade; and the owner became, from the moment the property was taken, absolutely entitled to reasonable compensation, the amount to be ascertained without undue delay, in the mode prescribed, and its payment to be assured, if necessary, by decree against the city, which could be effectively enforced.

We are of opinion that, upon both principle and authority, it was competent for the legislature, in the exercise of the police powers of the commonwealth, and of its power to appropriate private property for public uses, to authorize the city to take the fee in the lands described in the statute, prior to making compensation, and that the provision made for compensating the owner was certain and adequate. \* \* \*

Judgment affirmed.<sup>1</sup>

<sup>1</sup> Accord: *People v. Adirondack Ry.*, 160 N. Y. 225, 54 N. E. 689 (1899). Compare the stricter rules discussed in *Mulligan v. Perth Amboy*, 52 N. J. Law, 132, 134-136, 18 Atl. 670 (1889); and *Cushman v. Smith*, 34 Me. 247 (1852). Where the condemning municipality appears unable to pay by taxation, compare *Keene v. Bristol*, 26 Pa. 46 (1856), and *Matter of Cedar Rapids*, 85 Iowa, 39, 51 N. W. 1142 (1892).

BREWSTER v. ROGERS CO. (1901) 169 N. Y. 73, 80-82, 62 N. E. 164, 58 L. R. A. 495, CULLEN, J. (discussing a statute authorizing certain injuries to riparian lands by persons desiring to float logs down public streams, provided that such persons first file a bond approved by a county judge for \$5,000 to pay for such injuries):

"But the statute cannot be upheld as a constitutional exercise of the power of eminent domain. It was settled early in the history of this state that, where private property is taken for public use, compensation need not necessarily precede the appropriation; but it was also settled that, where payment does not precede appropriation, it must be secure and certain. *Bloodgood v. Railroad Co.*, 18 Wend. (N. Y.) 9, 31 Am. Dec. 313. The responsibility of the state or of one of its municipal corporations or political divisions is deemed sufficient, but a fund to be raised solely from a local assessment district of limited area 'is not a sure and adequate provision, dependent upon "no hazard, casualty, or contingency whatever," such as law and justice require to meet the constitutional requirement.' *Sage v. City of Brooklyn*, 89 N. Y. 189. It is clear, therefore, that the property owner cannot be relegated to the doubtful responsibility or solvency of a private corporation or of an individual. *Bloodgood v. Railroad Co.*, supra. Nor is the statutory direction that the parties seeking to use a river shall first give a bond a sufficient compliance to the constitutional requirement. The statute arbitrarily fixes the amount of the bond at \$5,000 in all cases, regardless of what may be the value of the property rights appropriated or the amount of the damage inflicted, which may far exceed that sum. The application for the approval of the bond is *ex parte*, and no landowner has any opportunity to be heard on the sufficiency of the sureties. But one bond is required, no matter how many owners there may be whose lands and properties are invaded, and, once given, it seems to authorize the indefinite and continued use of the river. No such provision can be regarded as affording adequate security for compensation. The old general railroad act, in cases where the title of the company to any part of its road proves defective, empowered the company, by an order made in condemnation proceedings, to continue in possession of the land upon giving sufficient security. The constitutionality of this provision was upheld by the supreme court. In *re St. Lawrence & A. R. Co.*, 66 Hun, 306, 21 N. Y. Supp. 131. We think the case was properly decided, but it is clearly distinguishable in principle from that before us. There the amount and character of the security were determined in a judicial proceeding in which the landowner appeared and was heard. \* \* \* The security provided by the statute is arbitrary, and no opportunity is afforded the landowner to show that it is inadequate in amount or insufficient in character."<sup>1</sup>

<sup>1</sup> Compare *Powers v. Bears*, 12 Wis. 213, 78 Am. Dec. 733 (1860) (requiring actual compensation in advance from all *private* parties), and *Brickett v.*



Haverhill Aqueduct Co., 142 Mass. 394, 397, 8 N. E. 119; 121 (1886) (permitting taking by private water company subject merely to action for damages), in which Morton, C. J., said: "The question whether the provision for compensation furnished by the statute is an adequate one is a practical question. It seems to us that the remedy which the statute in question furnishes against the corporation, supplemented by the remedies afforded by the general laws, if it refuses to pay the damages assessed, affords to any person whose property is taken or injured by the acts of the corporation a reasonable certainty that he will recover and receive compensation therefor. We are not, therefore, prepared to hold that the statute is unconstitutional, because it does not make adequate provision for compensation."

In *Otis Co. v. Ludlow Mfg. Co.*, 201 U. S. 140, 153, 154, 26 Sup. Ct. 353, 354, 355, 50 L. Ed. 696 (1906), Holmes, J., said (upholding a Massachusetts statute permitting a mill owner to flood upper land subject only to a suit for compensation either in gross or for annual damages): "In considering whether these provisions are sufficient, it is important to know exactly what the upper owner loses by the dam. The state court lays it down that there is no taking under the right of eminent domain. 186 Mass. 95, 104 Am. St. Rep. 563, 70 N. E. 1009 (1904). We assume this to mean what often has been said with regard to the mill acts, that under them no easement or title of any kind is gained in or over the upper land, and that the water could be diked out, *Storm v. Manchaug Co.*, 13 Allen (Mass.) 10, 13 (1866); *Lowell v. Boston*, 111 Mass. 454, 466, 15 Am. Rep. 39 (1873); although the language has not been uniform, and it seems to have been held otherwise when the damages are paid in gross. *Isele v. Arlington Five Cents Sav. Bank*, 135 Mass. 142 (1883). Taking the law to be as stated by the court, it would follow that only the damage physically suffered is to be paid for. When a title is taken, for instance, to the waters of a stream, it is held that the whole value of the title must be paid, although a considerable use may be left in fact to the party aggrieved. *Howe v. Weymouth*, 148 Mass. 605, 20 N. E. 316 (1889); *Imbelscheid v. Old Colony R. Co.*, 171 Mass. 209, 50 N. E. 609 (1898). Floilage under the mill acts seems to be regarded as presenting the converse case. As no title is gained to have the water on the upper land, the dam owner pays only for the harm actually done from time to time. If this is so, somewhat less elaborate provisions might be justified than could be sustained when the title is lost. So far as security goes, looking to the reasonable probabilities in such cases, it would seem to be sufficient. We must bear in mind, as we presume the state court meant to suggest by its citation of the case of *Briekett v. Haverhill Aqueduct Co.*, 142 Mass. 394, 397, 8 N. E. 119 (1886), that,—as was said there in words that need but little change,—if other remedies proved ineffectual, the court would, by proceedings in equity, restrain the defendant from a further use of the water, and, if necessary, order the removal of the dam.' In other words, the right to an injunction, if necessary, is taken into account in Massachusetts, in deciding whether the security for payment is sufficient, even when there is a taking by eminent domain. See also *Atty. Gen. v. Old Colony R. Co.*, 160 Mass. 62, 90, 22 L. R. A. 112, 35 N. E. 252 (1893); *Manigault v. Springs*, 199 U. S. 473, 485, 486, 50 L. Ed. 274, 26 Sup. Ct. 127 (1905). This seems an answer to the objection that, in the state of the business of the courts, a judgment for past damages may not be recorded for several years, that the defendant may be insolvent, the dam inadequate security, and valuable improvements destroyed."

Compare *L. & N. Ry. v. Cent. Stk. Yds.*, 212 U. S. 132, 29 Sup. Ct. 216, 53 L. Ed. 441 (1909); *Water Power Cases*, 118 Wis. 124, 144, 134 N. W. 330, 38 L. R. A. (N. S.) 526 (1912).

PROCEDURE IN ASCERTAINING COMPENSATION.—"By the Constitution of the United States, the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury, but may be intrusted by congress to commissioners appointed by a court or by the executive, or to an inquest consisting of more or fewer men than an ordinary jury. *Custiss v. Turnpike Co.*, 6 Cranch, 233, 3 L. Ed. 209 (1810); *Secombe v. Railroad Co.*, 23 Wall. 108, 117, 118, 23 L. Ed. 67 (1857); *U. S. v. Jones*, 109 U. S. 513, 519, 3 Sup. Ct. 316, 27 L. Ed. 1015 (1883); *Shoemaker v. U. S.*, 147 U. S. 282, 300, 301, 13 Sup. Ct. 361, 37 L. Ed. 170 (1893); *Long Island Water-Supply Co. v. Brooklyn*, 166 U.

## CHAPTER XIII

## RETROACTIVE LAWS IN CIVIL CASES

SECTION 1.—STATE LAWS IMPAIRING OBLIGATIONS OF CONTRACTS<sup>1</sup>

## 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

S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165 (1897).—Bauman v. Ross, 167 U. S. 548, 593, 17 Sup. Ct. 966, 42 L. Ed. 270 (1897), by Gray, J. See, also, People v. Adirondack Ry., 160 N. Y. 225, 236-241, 54 N. E. 689 (1899).

<sup>1</sup> The cases in this section deal exclusively with the effect of that clause of Const. art. I, § 10, par. 1, which provides: "No state shall \* \* \* pass any \* \* \* law impairing the obligation of contracts." As has often been observed, there is no corresponding prohibition upon the federal government, though some federal interferences with contracts may violate other prohibitions.

"The United States cannot any more than a state interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents states from passing laws impairing the obligation of contracts, but equally with the states they are prohibited from depriving persons or corporations of property without due process of law."—Waite, C. J., in Sinking Fund Cases, 99 U. S. 700, 718, 719, 25 L. Ed. 496 (1879). See, as illustrating the constitutional protection afforded contracts as property, Long Island Water Co. v. Brooklyn, ante, p. 661; Houston, etc., Ry. v. Texas, 170 U. S. 243, 261, 18 Sup. Ct. 610, 42 L. Ed. 1023 (1898); Choate v. Trapp, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941 (1912) (Congress cannot repeal exemption from land taxation granted to Indians as part of a contract).

The contract clause of the Constitution was not retroactive. Owings v. Speed, 5 Wheat. 420, 5 L. Ed. 124 (1820).

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 grounds upon which the supreme court of Louisiana gave judgment for the defendants appear by its opinion, which, under the practice of that state, is strictly part of the record. \* \* \* That opinion, as printed in 35 La. Ann. 1111, and in the record before us, shows that the grounds of the judgment were that the right conferred by the legislature of the state upon the Commercial Bank by its charter in 1833, and confirmed to the plaintiff by its charter in 1877, was the exclusive privilege of supplying the city and its inhabitants with water by means of pipes and conduits through the streets and lands of the city; that by the general law of Louisiana, independently of anything in those statutes, riparian or contiguous proprietors had the right of laying pipes to the river to draw the water necessary for their own use, subject to the authority of the state and the city, in the exercise of the police power, to regulate this right, as the public security and the public good might require; that section 18 of the plaintiff's charter had no other object than to secure, beyond the possibility of doubt, this right of the contiguous owners and the control of the municipal authorities; and that the city was authorized to permit the defendant company to lay pipes across the quay and through the streets from the river to its factory, for the purpose of supplying it with water for its own use.

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 in the plaintiff's charter; and in not adjudging that the ordinance of the city council, 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. As was said by Mr. Justice Story, 50 years ago, upon a full review of the earlier decisions, "It is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided in order to have induced the judgment," and "it is not sufficient to show that a question might have arisen or been applicable to the case, unless it is further shown, on the record, that it did arise, and was applied by the state court to the case." *Crowell v. Randell*, 10 Pet. 368, 398, 9 L. Ed. 458. The rule so laid down has been often affirmed, and constantly acted on. *Railroad Co. v. Marshall*, 12 How. 165, 167, 13 L. Ed. 938; *Bridge Prop'r's v. Hoboken Co.*, 1 Wall. 116, 143, 17 L. Ed. 571; *Steines v. Franklin Co.*, 14 Wall. 15, 21, 20 L. Ed. 846. In *Klinger v. Missouri*, 13 Wall. 257, 263, 20 L. Ed. 635, Mr. Justice Bradley declared the rule to be well settled that "where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent ground, and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one.<sup>1</sup> [But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground upon which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the state court based its judgment on the law raising the federal question, and this court will then take jurisdiction."]<sup>2</sup> And in many recent cases under section 709 of the Revised Statutes, this court, speaking by the Chief Justice, has reasserted the rule, that to give it jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that "its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it." *Brown v. Atwell*, 92 U. S. 327, 23 L. Ed. 511; *Bank v. Board*, 98 U. S. 140, 25 L. Ed. 114; *Chouteau v. Gibson*, 111 U. S. 200, 4 Sup. Ct. 340, 28 L. Ed. 400; *Adams Co. v. Railroad Co.*, 112 U. S. 123, 5 Sup. Ct. 77, 28 L. Ed.

<sup>1</sup> The remainder of the paragraph from which this quotation is made is inserted here in brackets.

<sup>2</sup> As to how clearly it must appear that a non-federal ground of decision was present in the case and might possibly have controlled the actual decision, see *St. Louis, etc., Ry. v. McWhirter*, 229 U. S. 265, 276, 33 Sup. Ct. 558, 57 L. Ed. — (1913); *Adams v. Russell*, 229 U. S. 353, 358-361, 32 Sup. Ct. 846, 57 L. Ed. — (1913). See, also, *Osborn v. Bank*, post, p. 1332, note 4.

678; *Railway v. Guthard*, 114 U. S. 133, 5 Sup. Ct. 811, 29 L. Ed. 118.

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.<sup>3</sup> 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 cor-

<sup>3</sup> This is so even though a state court subsequently changes a decision relied upon in the making of a contract. *National, etc., Ass'n v. Brahan*, 193 U. S. 635, 24 Sup. Ct. 532, 48 L. Ed. 823 (1901); *Cross Lake Club v. Louisiana*, 224 U. S. 632, 639, 32 Sup. Ct. 577, 56 L. Ed. 924 (1912) (cases). See, also, *Gelpcke v. Dubuque*, post, p. 1356, note 3.



poration 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 high-ways 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.<sup>4</sup> Leading cases of that class are *Bridge Propr's v. Hloboken 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,"

<sup>4</sup> "In ordinary cases the decision of the highest court of a state with regard to the validity of one of its statutes would be binding upon this court; but, where the question raised is whether a contract has or has not been made, the obligation of which is alleged to have been impaired by legislative action, it is the prerogative of this court, under the Constitution of the United States and the act of congress relating to writs of error to the judgments of state courts, to inquire and judge for itself with regard to the making of such contract, whatever may be the views or decisions of the state courts in relation thereto."—*McGahey v. Virginia*, 135 U. S. 662, 667, 10 Sup. Ct. 972, 34 L. Ed. 304 (1890), by Bradley, J. So in all cases where the interpretation of a state statute forms part of a "federal question." See *Gelpeke v. Dubuque*, note 3, post, p. 1356.

said: "If this were all of the case, we should undoubtedly 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.\*

### 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 Ogden 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*,<sup>1</sup> 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 conceded that

<sup>1</sup> See *Bridge Prop'rs v. Hoboken Co.*, 1 Wall. 116, 17 L. Ed. 571 (1861); *McCullough v. Virginia*, 172 U. S. 102, 116-122, 19 Sup. Ct. 131, 43 L. Ed. 352 (1898), explained in *Yazoo, etc., R. R. v. Adams*, 180 U. S. 41, 47, 48, 21 Sup. Ct. 256, 45 L. Ed. 415 (1901); *Houston, etc., R. R. v. Texas*, 177 U. S. 66, 100, 20 Sup. Ct. 545, 44 L. Ed. 673 (1900); *St. Paul Gas Co. v. St. Paul*, 181 U. S. 142, 21 Sup. Ct. 575, 45 L. Ed. 788 (1901); *Terre Haute, etc., Ry. v. Indiana*, 194 U. S. 579, 24 Sup. Ct. 767, 48 L. Ed. 1124 (1904).

<sup>2</sup> 4 Wheat. 117, 4 L. Ed. 520 (1819), holding invalid all discharges of debtors by insolvency or bankruptcy laws passed *subsequently* to the making of the contracts affected thereby.

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, construction, 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.<sup>2</sup>

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 form-

<sup>2</sup> It is now generally said that the obligation of a contract depends upon the law of the place of making. See *N. W. Ins. Co. v. McCue*, 223 U. S. 244, 246, 247, 32 Sup. Ct. 220, 56 L. Ed. 419, 38 L. R. A. (N. S.) 57 (1912); *Selover v. Walsh*, 226 U. S. 112, 122, 33 Sup. Ct. 69, 57 L. Ed. — (1912). But only the law in force there when the contract was made becomes a constitutionally protected part of the obligation. Subsequent statutes enlarging rights under a prior contract may be validly repealed. *Knights Templar, etc., Co. v. Jarman*, 187 U. S. 197, 208, 23 Sup. Ct. 108, 47 L. Ed. 139 (1902). And any effect produced by a *prior* law of one state upon a contract made in another state is not within the contract clause, which applies only to *subsequent* laws. *Finney v. Nelson*, 183 U. S. 144, 147, 22 Sup. Ct. 52, 46 L. Ed. 125 (1901). But see note 6, below.

ing 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 de-

struction 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<sup>3</sup> 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."<sup>4</sup> 12 Wheat. 339, 6 L. Ed. 606.]

Judgment having been entered in favor of the validity of a certificate of discharge under the state laws in those cases, argued in connection with *Ogden v. Saunders*, where the contract was made between citizens of the state under whose law the discharge was obtained, and in whose courts the certificate was pleaded, the cause was further argued by the same counsel, upon the points reserved, as to the effect of such a discharge in respect to a contract made with a citizen of another state, and where the certificate was pleaded in the courts of another state, or of the United States. \* \* \*

Mr. Justice JOHNSON. I am instructed by the majority of the court finally to dispose of this cause. The present majority is not the same which determined the general question on the constitutionality of state insolvent laws, with reference to the violation of the obligation of contracts. I now stand united with the minority on the former question, and, therefore, feel it due to myself and the community to maintain my consistency.

The question now to be considered is, whether a discharge of a

<sup>3</sup> 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.

<sup>4</sup> Compare *Murray v. Charleston*, 96 U. S. 432, 440, 449, 24 L. Ed. 760 (1878).

debtor under a state insolvent law, would be valid against a creditor or citizen of another state, who has never voluntarily subjected himself to the state laws, otherwise than by the origin of his contract.

As between its own citizens, whatever be the origin of the contract, there is now no question to be made on the effect of such a discharge; nor is it to be questioned that a discharge not valid under the Constitution in the courts of the United States, is equally invalid in the state courts. The question to be considered goes to the invalidity of the discharge altogether, and, therefore, steers clear of that provision in the Constitution which purports to give validity in every state to the records, judicial proceedings, and so forth, of each state. \* \* \*

The question is one partly international, partly constitutional. My opinion on the subject is briefly this: that the provision in the Constitution which gives the power to the general government to establish tribunals of its own in every state, in order that the citizens of other states or sovereignties might therein prosecute their rights under the jurisdiction of the United States, had for its object an harmonious distribution of justice throughout the Union; to confine the states, in the exercise of their judicial sovereignty, to cases between their own citizens; to prevent, in fact, the exercise of that very power over the rights of citizens of other states, which the origin of the contract might be supposed to give to each state; and thus, to obviate that conflictus legum, which has employed the pens of Huberus, and various others, and which any one who studies the subject will plainly perceive it is infinitely more easy to prevent than to adjust.

These conflicts of power and right necessarily arise only after contracts are entered into. Contracts, then, become the appropriate subjects of judicial cognizance; and if the just claims which they give rise to, are violated by arbitrary laws, or if the course of distributive justice be turned aside, or obstructed by legislative interference, it becomes a subject of jealousy, irritation, and national complaint or retaliation.

It is not unimportant to observe, that the Constitution was adopted at the very period when the courts of Great Britain were engaged in adjusting the conflicts of right which arose upon their own bankrupt law, among the subjects of that crown in the several dominions of Scotland, Ireland, and the West Indies. The first case we have on the effect of foreign discharges, that of *Ballantine v. Golding*, 1 Cooke's Bank. Law, 487, occurred in 1783, and the law could hardly be held settled before the case of *Hunter v. Potts*, 4 Term Rep. 182, which was decided in 1791.

Any one who will take the trouble to investigate the subject, will, I think, be satisfied, that although the British courts profess to decide upon a principle of universal law, when adjudicating upon the effect of a foreign discharge, neither the passage in *Vattel*, to which



they constantly refer, nor the practice and doctrines of other nations, will sustain them in the principle to the extent in which they assert it. It was all-important to a great commercial nation, the creditors of all the rest of the world, to maintain the doctrine as one of universal obligation, that the assignment of the bankrupt's effects, under a law of the country of the contract, should carry the interest in his debts, wherever his debtor may reside; and that no foreign discharge of his debtor should operate against debts contracted with the bankrupt in his own country. But I think it perfectly clear that, in the United States, a different doctrine has been established; and, since the power to discharge the bankrupt is asserted on the same principle with the power to assign his debts, that the departure from it in the one instance carries with it a negation of the principle altogether.

It is vain to deny that it is now the established doctrine in England, that the discharge of a bankrupt shall be effectual against contracts of the state that give the discharge, whatsoever be the allegiance or country of the creditor. But I think it equally clear, that this is a rule peculiar to her jurisprudence, and that reciprocity is the general rule of other countries; that the effect given to such discharge is so much a matter of comity, that the states of the European continent, in all cases, reserve the right of deciding whether reciprocity will not operate injuriously upon their own citizens. \* \* \* [Here follows an examination of the American decisions as to the extra-territorial effect to be given to bankruptcy proceedings in a foreign jurisdiction.]

I think it, then, fully established, that in the United States a creditor of the foreign bankrupt may attach the debt due the foreign bankrupt, and apply the money to the satisfaction of his peculiar debt, to the prejudice of the rights of the assignees or other creditors.

I do not here speak of assignees, or rights created, under the bankrupt's own deed; those stand on a different ground, and do not affect this question. I confine myself to assignments, or transfers, resting on the operation of the laws of the country, independent of the bankrupt's deed; to the rights and liabilities of debtor, creditor, bankrupt, and assignees, as created by law.

What is the actual bearing of this right to attach, so generally recognized by our decisions? It imports a general abandonment of the British principles; for, according to their laws, the assignee alone has the power to release the debtor. But the right to attach necessarily implies the right to release the debtor, and that right is here asserted under the laws of a state which is not the state of the contract.

So, also, the creditor of the bankrupt is, by the laws of his country, entitled to no more than a ratable participation in the bankrupt's effects. But the right to attach imports a right to exclusive satisfaction, if the effects so attached should prove adequate to make satisfaction.

The right to attach also imports the right to sue the bankrupt; and who would impute to the bankrupt law of another country, the power

to restrain the citizens of these states in the exercise of their right to go into the tribunals of their own country for the recovery of debts, wherever they may have originated? Yet, universally, after the law takes the bankrupt into its own hands, his creditors are prohibited from suing.

Thus much for the law of this case in an international view. I will consider it with reference to the provisions of the Constitution.

I have said above, that I had no doubt the erection of a distinct tribunal for the resort of citizens of other states, was introduced ex industria, into the Constitution, to prevent, among other evils, the assertion of a power over the rights of the citizens of other states, upon the metaphysical ideas of the British courts on the subject of jurisdiction over contracts. And there was good reason for it; for, upon that principle it is, that a power is asserted over the rights of creditors which involves a mere mockery of justice.

Thus, in the case of *Burrows v. Jamineau* (reported in 2 Strange, and better reported in Mosley, 1, and some other books), the creditor, residing in England, was cited, probably, by a placard on a door-post in Leghorn, to appear there to answer to his debtor; and his debt passed upon by the court, perhaps, without his having ever heard of the institution of legal process to destroy it.

The Scotch, if I remember correctly, attach the summons on the flagstaff, or in the market-place, at the shore, of Leith; and the civil law process by proclamation, or *viis et modis*, is not much better, as the means of subjecting the rights of foreign creditors to their tribunals.

All this mockery of justice, and the jealousies, recriminations, and perhaps retaliations which might grow out of it are avoided, if the power of the states over contracts, after they become the subject exclusively of judicial cognizance, is limited to the controversies of their own citizens.

And it does appear to me almost incontrovertible, that the states cannot proceed one step further without exercising a power incompatible with the acknowledged powers of other states, or of the United States, and with the rights of the citizens of other states.

Every bankrupt or insolvent system in the world must partake of the character of a judicial investigation. Parties whose rights are to be affected, are entitled to a hearing. Hence every system, in common with the particular system now before us, professes to summon the creditors before some tribunal, to show cause against granting a discharge to the bankrupt.<sup>5</sup>

But on what principle can a citizen of another state be forced into the courts of a state for this investigation? The judgment to be passed is to prostrate his rights; and on the subject of these rights

<sup>5</sup> See *Baldwin v. Hale*, 1 Wall. 223, 233, 17 L. Ed. 531 (1863); *Pennyroy v. Neff*, 95 U. S. 714, 24 L. Ed. 565 (1877) (under fourteenth amendment).

the Constitution exempts him from the jurisdiction of the state tribunals, without regard to the place where the contract may originate. In the only tribunal to which he owes allegiance, the state insolvent or bankrupt laws cannot be carried into effect; they have a law of their own on the subject (2 Stats. at Large, 4); and a certificate of discharge under any other law would not be acknowledged as valid even in the courts of the state in which the court of the United States that grants it is held. Where is the reciprocity? Where the reason upon which the state courts can thus exercise a power over the suitors of that court, when that court possesses no such power over the suitors of the state courts?

In fact, the Constitution takes away the only ground upon which this eminent dominion over particular contracts can be claimed, which is that of sovereignty. For the constitutional suitors in the courts of the United States are not only exempted from the necessity of resorting to the state tribunals, but actually cannot be forced into them. If, then, the law of the English courts had ever been practically adopted in this country in the state tribunals, the Constitution has produced such a radical modification of state power over even their own contracts, in the hands of individuals not subject to their jurisdiction, as to furnish ground for excepting the rights of such individuals from the power which the states unquestionably possess over their own contracts, and their own citizens. \* \* \*

And the purport of this adjudication, as I understand it, is, that as between citizens of the same state, a discharge of a bankrupt by the laws of that state is valid as it affects posterior contracts; that as against creditors, citizens of other states, it is invalid as to all contracts.

The propositions which I have endeavored to maintain in the opinion which I have delivered are these:

1. That the power given to the United States to pass bankrupt laws is not exclusive.
2. That the fair and ordinary exercise of that power by the states does not necessarily involve a violation of the obligation of contracts, *multo fortiori* of posterior contracts.
3. But when, in the exercise of that power, the states pass beyond their own limits, and the rights of their own citizens, and act upon the rights of citizens of other states, there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other states, and with the Constitution of the United States.

Judgment affirmed.<sup>o</sup>

[WASHINGTON, THOMPSON, and TRIMBLE, JJ., dissented.]

<sup>o</sup> The doctrine of the second part of *Ogden v. Saunders* has been applied as well to suits in the federal courts of the discharging state, *Boyle v. Zach-*

## 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  $\frac{1}{2}$  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 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.

arie, 6 Pet. 635, 8 L. Ed. 527 (1832); even when the contract alleged to be discharged was made, and expressly performable there, *Baldwin v. Hale*, 1 Wall. 223, 17 L. Ed. 531 (1863). See the acute criticism of this position by Taney, C. J., in *Cook v. Moffat*, 5 How. 295, 309-311, 12 L. Ed. 159 (1847). The Federal Supreme Court has never expressly decided that a contrary holding by a state court of the discharging state would present a federal question. As to this see the observations of Holmes, J., in *Phoenix Nat. Bank v. Bateheller*, 151 Mass. 589, 24 N. E. 917, 8 L. R. A. 644 (1890), and the earlier case of *Scribner v. Fisher*, 2 Gray (Mass.) 43 (1854). A recognition of such a discharge by the state courts of another state has, however, been held invalid by the Supreme Court. *Shaw v. Robbins*, 12 Wheat. 369, note, 6 L. Ed. 660 (1827). But if a citizen of another state voluntarily becomes a party to a bankruptcy proceeding he is bound by the local law relating thereto, including the discharge of the debtor. *Clay v. Smith*, 3 Pet. 411, 7 L. Ed. 723 (1839). With *Ogden v. Saunders* compare *Canada, etc., Ry. v. Gebhard*, 109 U. S. 527, 3 Sup. Ct. 363, 27 L. Ed. 1020 (1883) (Canadian legislative discharge of debts of Canadian corporation held valid in United States against creditors there).

Can a contract made in one state where there is no bankruptcy law be compulsorily discharged under a *prior* law of another state where both parties are resident at the time of discharge? See *Witt v. Follett*, 2 Wend. (N. Y.) 457 (1829) (no); *Lowenberg v. Levine*, 93 Cal. 215, 28 Pac. 911, 16 L. R. A. 159 (1892) (no); *Marsh v. Putnam*, 3 Gray (Mass.) 551 (1854) (yes).

Prior state statutes providing for an equal distribution of an insolvent debtor's property in the state, among such creditors only as will release their claims, are valid against non-resident creditors. *Denny v. Bennett*, 128 U. S. 489, 9 Sup. Ct. 134, 32 L. Ed. 491 (1888). See, also, *Brown v. Smart*, 145 U. S. 454, 12 Sup. Ct. 958, 36 L. Ed. 773 (1892).

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.<sup>1</sup>

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 be-

<sup>1</sup> Accord: *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. 1042, 41 L. Ed. 93 (1896) (subsequent right of redemption from mortgage sale and prohibition of second sale of redeemed property for any balance due on debt).



fore prescribed, would affect its construction. A statute providing that a previous contract of indebtedness 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,<sup>2</sup> 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.<sup>3</sup> The states may abolish it

<sup>2</sup> That, even in the sense of the Constitution, a contract may have an "obligation," though without a judicial remedy, see the elaborate argument in *State v. Young*, 29 Minn. 474, 526-544, 9 N. W. 737 (1881). Compare *R. R. Co. v. Tenn.*, 101 U. S. 337, 25 L. Ed. 900 (1880).

<sup>3</sup> But compare *Gompers v. Buck's Stove Co.*, 221 U. S. 418, 441-443, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874 (1911) (remedial imprisonment for contempt in refusing to obey mandatory injunction).

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."<sup>4</sup>

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

<sup>4</sup> In *Bronson v. Kinzie*, 1 How. 311, 315, 11 L. Ed. 143 (1843), by Taney, C. J. Contra: *Edwards v. Kearzey*, 96 U. S. 595, 603, 604, 24 L. Ed. 793 (1878) (semble), Clifford and Hunt, J.J., dissenting, 96 U. S. 609-611, 24 L. Ed. 793. Most state courts have upheld such exemptions, though retrospective. 4 Rose's Notes on U. S. Reps. 262 (collecting cases).

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.<sup>5</sup>

<sup>5</sup> If through resignation or failure to elect, there are no existing officers empowered to levy the stipulated taxes for the municipality, the federal courts will not appoint officials to do this, unless courts are authorized thereto by state statute, *Heine v. Levee Com'rs*, 19 Wall. 655, 22 L. Ed. 223 (1873); nor, if the taxes have been assessed will they appoint a collector, *Thompson v. Allen Co.*, 115 U. S. 550, 6 Sup. Ct. 140, 29 L. Ed. 472 (1885). So, also, if existing officials choose to go to jail for contempt rather than obey a mandamus, the court can do no more. See *In re Copenhaver (C. C.)* 54 Fed. 660 (1893).

As to how far the benefit of former tax laws persists to creditors when the legislature has abolished a municipality, or erected a new one with the same or different boundaries, see *Mt. Pleasant v. Beckwith*, 100 U. S. 514, 25 L. Ed. 699 (1880); *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197 (1880); *Mobile v. Watson*, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. Ed. 620 (1886); *Graham v. Folsom*, 200 U. S. 248, 26 Sup. Ct. 245, 50 L. Ed. 464 (1906).

ALTERATION OF REMEDIES.—In *Oshkosh Waterworks Co. v. Oshkosh*, 187 U. S. 437, 439, 23 Sup. Ct. 234, 47 L. Ed. 249 (1903), Harlan, J., said: "It is well settled that while, in a general sense, the laws in force at the time a contract is made enter into its obligation, parties have no vested right in the particular remedies or modes of procedure then existing. It is true the legislature may not withdraw all remedies, and thus, in effect, destroy the contract; nor may it impose such new restrictions or conditions as would materially delay or embarrass the enforcement of rights under the contract according to the usual course of justice as established when the contract was made. Neither could be done without impairing the obligation of the contract. But it is equally well settled that the legislature may modify or change existing remedies, or prescribe new modes of procedure, without im-

pairing the obligation of contracts, provided a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract."

As to what changes in details of remedy, such as rules of evidence, statutes of limitation, requirements of registry, etc., may impair substantial rights under contracts, see *McGahay v. Virginia*, 135 U. S. 662, 10 Sup. Ct. 972, 34 L. Ed. 304 (1890) and cases there cited. As to rules of evidence in general, see *Marx v. Hanthorn*, 148 U. S. 172, 181, 182, 13 Sup. Ct. 508, 37 L. Ed. 410 (1893). As to permissible changes, see *Oshkosh W. W. Co. v. Oshkosh*, above (cases); *Reitler v. Harris*, 223 U. S. 437, 32 Sup. Ct. 248, 56 L. Ed. 497 (1912); *Nat. Sur. Co. v. Arch.*, etc., Co., 226 U. S. 276, 33 Sup. Ct. 276, 57 L. Ed. — (1912); *Pitts. Steel Co. v. Balt. Eg. Soc.*, 226 U. S. 455, 33 Sup. Ct. 167, 57 L. Ed. — (1913); *Sup. Ruling of Mystic Circle v. Snyder*, 227 U. S. 497, 33 Sup. Ct. 292, 57 L. Ed. — (1913) (imposing penalty for unsuccessful suit in bad faith on contract).

Existing remedies permitting a suit against a state may be impaired by the state, under the eleventh amendment and the doctrine of *Hans v. Louisiana*, post, p. 1366. See *Beers v. Arkansas*, 20 How. 527, 15 L. Ed. 991 (1857); *Baltzer v. North Carolina*, 161 U. S. 240, 16 Sup. Ct. 500, 40 L. Ed. 684 (1896) (citing cases). But not a contractual right of set-off against a state's suit for taxes. *Virginia Coupon Cases*, 114 U. S. 269-340, 5 Sup. Ct. 903-934, 962-967, 1620, 29 L. Ed. 185-210, 240 (1885), and *Hans v. Louisiana*, post, p. 1371, note 2.

A subsequent law, validating a void contract or giving a *more* efficient remedy upon a prior contract, does not violate the contract clause of the Constitution. *Satterlee v. Matthewson*, 2 Pet. 380, 7 L. Ed. 458 (1829); *Bernheimer v. Converse*, 206 U. S. 516, 530, 27 Sup. Ct. 755, 759, 51 L. Ed. 1163 (1907), in which Day, J., said (upholding a Minnesota statute providing a more effective method of enforcing a stockholder's existing liability to corporation creditors): "Any statute which took away the benefit of such contract or obligation would be void as to the creditor, and any attempt to increase the obligation beyond that incurred by the stockholder would fall within the prohibition of the Constitution. But there was nothing in the laws of Minnesota \* \* \* preventing the legislature from giving additional remedies to make the obligation of the stockholder effectual, so long as his original undertaking was not enlarged. There is a broad distinction between laws impairing the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a contract already made." And so *Brearley School v. Ward*, 201 N. Y. 358, 365, 94 N. E. 1001, 1003, 40 L. R. A. (N. S.) 1215, Ann. Cas. 1912B, 1251 (1911) by *Bartlett, J.*: "The difference between a statute extending exemptions from execution and lessening exemptions from execution is fundamental. \* \* \* If the change be favorable to the creditor, as it must be when exemptions are thereby lessened, it does not impair the obligation of the contract, but, on the contrary, strengthens it."

**FOREIGN REMEDIES.** That part of the obligation of a contract which concerns remedies for its enforcement has no force in other jurisdictions. Suits upon a contract brought elsewhere than in the jurisdiction whose law created its original obligation, are subject to the remedies of the forum. *Bank of U. S. v. Donnally*, 8 Pet. 361, 8 L. Ed. 974 (1834) (statute of limitations); *Chic.*, etc., *Ry. v. Sturm*, 174 U. S. 710, 717, 718, 19 Sup. Ct. 797, 43 L. Ed. 1144 (1899) (exemption laws); *Knights of Pythias v. Meyer*, 198 U. S. 508, 517, 25 Sup. Ct. 754, 49 L. Ed. 1146 (1905) (rules of evidence—semble).

## 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, 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.<sup>1</sup> 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

<sup>1</sup> So *Houston, etc., R. R. v. Texas*, 177 U. S. 66, 98, 99, 20 Sup. Ct. 545, 557, 44 L. Ed. 673 (1900), by Peckham, J. (holding that a state having received its own treasury warrants in satisfaction of debts due it, could not repudiate the settlement even though the warrants had been illegally issued): "Neither party could undo what had been fully executed and completed, and the law therefore implies a contract that neither party will attempt to do so, or, in other words, the law implies a contract that the payments made shall not be thereafter repudiated or denied. Any subsequent statute of the state which repudiated or permitted the repudiation of the payments would impair the obligation of the contract which the law raises from the transaction itself."

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 operation, 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.<sup>2</sup>

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

<sup>2</sup> A contract between two states, though for the benefit of private individuals, is likewise protected. *Green v. Biddle*, 8 Wheat. 1, 92, 5 L. Ed. 547 (1823).

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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## 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

\* So in the opinion of McLean, J. in *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 573, 9 L. Ed. 773 (1837).

The following obligations have been held not contracts within the constitutional prohibition of impairment, because not founded upon assent: Obligation to pay a tort judgment, *Louisiana v. Mayor*, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936 (1883); obligation to pay interest on contract judgment, *Morley v. L. S., etc., Ry.*, 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925 (1892). Likewise the existing law regarding the non-alienability or exemption from execution of property interests created by will or declaration of trust forms no part of a contract creating such interests, and may be changed. *Brearley School v. Ward*, 201 N. Y. 358, 368-371, 94 N. E. 1001, 40 L. R. A. (N. S.) 1215, Ann. Cas. 1912B, 251 (1911) (cases).

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.<sup>1</sup> 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.<sup>2</sup> 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 this 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 college be public property, or if

<sup>1</sup> Charters of municipal corporations are not contracts, *Laramie Co. v. Albany Co.*, 92 U. S. 307, 23 L. Ed. 552 (1875); *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943 (1891); and obligations owed to a city under a contract made by it may be impaired by the legislature so far as they concern governmental matters in which the city acts as a creature of the state, *Worcester v. Street Ry.*, 196 U. S. 539, 25 Sup. Ct. 327, 49 L. Ed. 591 (1905). Nor has a public officer, generally speaking, any contract right to either office or compensation. *Taylor v. Beckham*, 178 U. S. 548, 576, 577, 20 Sup. Ct. 890, 1009, 44 L. Ed. 1187 (1900) (citing cases).

<sup>2</sup> A state may grant a legislative divorce upon any grounds it pleases. "We are clear that marriage is not a contract within the meaning of the prohibition."—*Maynard v. Hill*, 125 U. S. 190, 210, 8 Sup. Ct. 723, 729, 31 L. Ed. 654 (1888), by Field, J. Nor is an inchoate right of dower protected by the contract clause. *Boyd v. Harrison*, 36 Ala. 533, 537 (1860).

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 college, 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 en-



able 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.<sup>3</sup>

[WASHINGTON and STORY, JJ., gave concurring opinions. LIVINGSTON, J., concurred in all the opinions, JOHNSON, J., concurred in Chief Justice MARSHALL's opinion, and DUVAL, J., dissented.]

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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

<sup>3</sup> Though the Dartmouth College Case dealt primarily with the charters of eleemosynary corporations, it has been uniformly accepted since as applicable to the charters of all kinds of private business corporations, which therefore (unless limited by appropriate statutory or constitutional reservations) become irrevocable contracts. This was assumed without discussion in the first subsequent case involving the point. *Providence Bank v. Billings*, 4 Pet. 514, 560, 7 L. Ed. 939 (1830). In *Stone v. Mississippi*, 101 U. S. 811, 816, 25 L. Ed. 1079 (1879), it was said by Waite, C. J.: "It is now too late to contend that any contract which a state actually enters into when granting a charter to a private corporation is not within the protection of the \* \* \* Constitution. \* \* \* The doctrines of *Trustees of Dartmouth College v. Woodward* announced by this court more than 60 years ago have become so imbedded in the jurisprudence of the United States as to make them to all intents and purposes a part of the Constitution itself." And so in *Pearsall v. Gt. Northern Ry.*, 161 U. S. 646, 660, 16 Sup. Ct. 705, 708, 40 L. Ed. 838 (1896), by Brown, J.: "The doctrine of this case has been subjected to more or less criticism by the courts and the profession, but has been reaffirmed and applied so often as to have become firmly established as a canon of American jurisprudence."

It is said that this case has been cited more times by American courts than any other judicial precedent. An excellent independent discussion of the case by Charles Doe, late Chief Justice of New Hampshire, is to be found in 6 *Harv. Law Rev.* 161, 213.

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 indefinite 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.<sup>1</sup> \* \* \*

Judgment reversed.

[TANEY, C. J., gave a concurring opinion. CATRON, DANIEL, and CAMPBELL, JJ., gave dissenting opinions.]<sup>2</sup>

<sup>1</sup> The acceptance of the charter for the objects for which the corporation was created constitutes a sufficient consideration for the charter contract. *Home of Friendless v. Rouse*, 8 Wall. 430, 437, 438, 19 L. Ed. 495 (1869). Where the alleged contract is not contained in an accepted charter or amendment thereof, a consideration and an intention to make the alleged privilege the subject of contract must be strictly shown, *Grand Lodge v. New Orleans*, 166 U. S. 143, 17 Sup. Ct. 523, 41 L. Ed. 951 (1897) (citing cases), mere encouragements and bounties not being sufficient; though doubtless a state might by apt words dispense with the necessity of consideration for its contracts, *Wisconsin, etc., Ry. v. Powers*, 191 U. S. 379, 386, 24 Sup. Ct. 107, 48 L. Ed. 229 (1903).

<sup>2</sup> 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 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."

"The argument against the power of the legislature of a state to alienate beyond the power to resume the right to tax, which was involved in the long contest in which Ohio was defeated in the United States Supreme Court, is a very strong one. It runs to this: A corporate charter is a grant from the crown to individual subjects, and therefore a contract between the king and

BRIDGE PROPRIETORS v. HOBOKEN CO. (1864) 1 Wall. 116, 145, 146, 17 L. Ed. 571, Mr. Justice MILLER (holding that an exclusive franchise for 99 years to maintain toll bridges within certain limits over the Passaic and Hackensack rivers in New Jersey was protected by the Constitution):

“Approaching the merits of the case, the first question that presents itself for solution, is whether the act of 1790, and the agreement made under it by the commissioners with the bridge builders, constitute a contract that no bridge shall be built within the designated limits, but the two which that statute authorized. This we think to be so very clear as not to need argument or illustration. The parties who built the bridges had the positive enactment of the legislature, in the very statute which authorized the contract with them, that no other bridge should be built. They had a grant of tolls on their bridges for ninety-nine years, and the prohibition against the erection of other bridges was the necessary and only means of securing to them the monopoly of those tolls. Without this, they would not have invested their money in building the bridges, which were then much needed, and which could not have been built without some such security for a permanent and sufficient return for the capital so expended. On the faith of this enactment they invested the money necessary to erect the bridges. These acts and promises, on the one side and the other, are wanting in no element necessary to constitute a contract. Such legislative provisions of the states have so often been held to be contracts, that a reference to authorities is superfluous.”<sup>1</sup>

his subjects, the grantees, equally binding upon both. The king may not resume the thing granted; he may not grant the same thing to another. But the taxing power was in parliament, never in the king. The crown could not bargain or grant the taxing power away. And, as every parliament was unrestricted, no parliament could tie the hands of its successors. An American legislature grants charters in the exercise of the royal prerogatives, and it parts with the rights of the crown when it does; but it does not, and cannot, touch the parliamentary powers.”—J. B. G., in 60 L. R. A. 108, note.

<sup>1</sup> Accord (state grants of monopoly): *West River Co. v. Dix*, 6 How. 507, 531, 12 L. Ed. 535 (1848) (bridge—semble); *Richmond R. R. v. Louisa R. R.*, 13 How. 71, 81, 14 L. Ed. 55 (1851) (railroad between two points—assumed); *The Binghamton Bridge*, 3 Wall. 51, 18 L. Ed. 137 (1865) (bridge); *New Orleans Gas Co. v. L. A. Light Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516 (1885) (supplying city gas); *New Orleans Water Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525 (1885) (city water).

So as to state or municipal contracts as to rates of public service companies: *Los Angeles v. City Water Co.*, 177 U. S. 558, 20 Sup. Ct. 736, 41 L. Ed. 886 (1900) (city water); *Detroit v. Detroit, etc., Ry.*, 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592 (1902) (street railway); *Home Telephone Co. v. Los Angeles*, 211 U. S. 265, 273, 29 Sup. Ct. 50, 53 L. Ed. 176 (1908) (telephone—semble).

Irrepealable contracts may be condemned under the state's power of eminent domain. *West River Bridge Co. v. Dix*, 6 How. 507, 12 L. Ed. 535 (1848); *Long Island Water Co. v. Brooklyn*, ante, p. 661.

## 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.<sup>1</sup> No one will question that the interests of the

<sup>1</sup> "The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men. This capacity is always given to such a body. Any privileges which may exempt it

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

from the burdens common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist."—Marshall, C. J., in *Providence Bank v. Billings*, 4 Pet. 514, 562, 7 L. Ed. 939 (1830).

"The principle is this: That all rights which are asserted against the state must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the state; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state. But if there is no ambiguity in the charter, and the powers conferred are plainly marked, and their limits can be readily ascertained, then it is the duty of the court to sustain and uphold it, and to carry out the true meaning and intention of the parties to it. Any other rule of construction would defeat all legislative grants, and overthrow all other contracts."—Davis, J., in *The Binghampton Bridge*, 3 Wall. 51, 75, 18 L. Ed. 137 (1865).

**STRICT CONSTRUCTION OF PUBLIC GRANTS.**—Some typical instances of the operation of the doctrine of strict construction are given below:

An exclusive bridge franchise does not forbid a railway bridge, *Bridge Proprs. v. Hoboken Co.*, 1 Wall. 116, 17 L. Ed. 571 (1864); nor a ferry, *Parrott v. Lawrence*, 2 Dill. 332, Fed. Cas. No. 10,772 (1872).

A grant of the "sole privilege of supplying the city of Mobile with water from Three-Mile Creek" held to be confined to a supply from that creek. *Stein v. Bienville Water Co.*, 141 U. S. 67, 11 Sup. Ct. 892, 35 L. Ed. 622 (1901).

The grant of a franchise to supply a city with water for 30 years, unless the city before that became the owner of the plant, with a proviso that the city should not grant to any other person or corporation any contract or privilege to furnish water to the city during said 30 years, held not to prevent the city itself from building a new plant and furnishing water within said period. *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 26 Sup. Ct. 224, 50 L. Ed. 353 (1906). But a grant of an "exclusive privilege" of supplying water forbids the competition of the city itself. *Vlecksburg v. Vlecksburg Water Co.*, 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102, 6 Ann. Cas. 253 (1906).

Two street railway corporations chartered for 25 years had obtained with the consent of the legislature several 25-year franchises from Chicago for the use of its streets. In 1865 a statute extended the life of the corporations to 99 years and provided that "all contracts, stipulations, licenses, and undertakings \* \* \* as made or amended by and between the said common council and any one or more of the said corporations, respecting \* \* \* railways in or upon the streets \* \* \* of said city shall be \* \* \* continued in force during the life hereof as valid and effectual \* \* \* as if made a part \* \* \* of said several acts [amended hereby]." Held not to

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

extend the street franchises to 99 years. *Blair v. Chicago*, 201 U. S. 400, 462-471, 26 Sup. Ct. 427, 50 L. Ed. 801 (1906).

A charter provision, empowering a railway company "from time to time to fix, regulate, and receive" tolls and charges for transportation, does not exclude state regulation of rates. *R. R. Commission Cases*, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636 (1886); *So. Pac. Co. v. Campbell*, 230 U. S. 537, 33 Sup. Ct. 1027, 57 L. Ed. — (1913) (cases).

The legislature authorized a city to contract for the construction and maintenance of waterworks "at such rates as may be fixed by ordinance and for a period not exceeding 30 years." Held to mean that rates should be fixed by ordinance from time to time, not once for all for the life of the contract. *Freeport Water Co. v. Freeport*, 180 U. S. 587, 21 Sup. Ct. 493, 45 L. Ed. 679 (1901).

An ordinance providing that the grantee "shall charge the following annual water rates" (followed by a schedule) held to be no contract, but a command that might be subsequently altered. *Rogers Park Co. v. Fergus*, 180 U. S. 624, 21 Sup. Ct. 490, 45 L. Ed. 702 (1901).

A charter provision that the capital stock and property of a railroad "shall be exempt from taxation for 10 years after the completion of said road within the limits of this state" held to become operative only after the road's completion. *Viicksburg, etc., Ry. v. Dennis*, 116 U. S. 665, 6 Sup. Ct. 625, 29 L. Ed. 770 (1886).

A charter provision that a banking corporation shall pay "an annual tax of  $\frac{1}{2}$  per cent, on each share of capital stock, which shall be in lieu of all other taxes," held to exempt only shares in the hands of stockholders, not the capital stock, surplus or accumulated profits of the corporation. *Shelby Co. v. Union Bank*, 161 U. S. 149, 16 Sup. Ct. 558, 40 L. Ed. 650 (1896); and not to exempt even stockholders' shares issued after the state had made future issues taxable. *Bank of Commerce v. Tennessee*, 163 U. S. 416, 422-424, 16 Sup. Ct. 1113, 41 L. Ed. 211 (1896).

Exemption from taxation of certain land and buildings thereon so long as it belongs to a certain educational institution does not exempt leasehold interests of lessees of that land from that institution. *Jetton v. University of South*, 208 U. S. 489, 28 Sup. Ct. 375, 52 L. Ed. 584 (1908).

A general exemption of the property of a corporation from taxation is construed to refer only to property necessary for the business of the company. *Ford v. Delta & Pine Land Co.*, 164 U. S. 662, 667, 17 Sup. Ct. 230, 41 L. Ed. 590 (1897) (citing cases). Compare *University v. People*, 99 U. S. 309, 25 L. Ed. 387 (1879). A general tax exemption is usually construed not to exempt from special assessments for local improvements. *Ill. Cent. R. R. v. Decatur*, 147 U. S. 190, 13 Sup. Ct. 293, 37 L. Ed. 132 (1893) (exemption from "all taxes under the laws of this state"); *Ford v. Delta, etc., Co.*, 164 U. S. 662, 670-672, 17 Sup. Ct. 230, 41 L. Ed. 590 (1897). See a long and complete note on contract exemptions from taxation in 60 L. R. A. 33-109 (1898).

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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### ROCHESTER RY. CO. v. ROCHESTER.

(Supreme Court of United States, 1907. 205 U. S. 236, 27 Sup. Ct. 469, 51 L. Ed. 784.)

[Error to New York Supreme Court. The Brighton Railroad was incorporated in 1868 and operated a street railway in Rochester, N. Y. A statute of 1869, adjusting a number of differences between it and the city and assumed to be an irrevocable contract, exempted it from the expense of street pavements. The Rochester Railway Company was incorporated in 1890 under a general law of 1834, and at once leased the Brighton road, and shortly after acquired all of its capital stock under a general statute of 1879, which thereupon vested in the Rochester Company the "estate, property, rights, privileges, and franchises" of the Brighton Company. Thereafter the Rochester Company was assessed and sued for the cost of paving streets occupied by the original Brighton road, the assessment was upheld by the New York Court of Appeals, and the case remanded to the state Supreme Court. This writ of error was then taken. Other facts appear in the opinion.]

Mr. Justice MOODY. \* \* \* This court has frequently had occasion to decide whether an immunity from the exercise of governmental power which has been granted by contract to one has, by legislative authority, been vested in or transferred to another, and in the decisions certain general principles, which control in the determination of the case at bar, have been established. Although the obligations of such a contract are protected by the federal Constitution from impairment by the state, the contract itself is not property, which, as such, can be transferred by the owner to another, because, being personal to him with whom it was made, it is incapable of assignment.



The person with whom the contract is made by the state may continue to enjoy its benefits unmolested as long as he chooses, but there his rights end, and he cannot, by any form of conveyance, transmit the contract or its benefits to a successor. *Morgan v. Louisiana*, 93 U. S. 217, 23 L. Ed. 860; *Wilson v. Gaines*, 103 U. S. 417, 26 L. Ed. 401; *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 27 L. Ed. 922, 3 Sup. Ct. 193; *Pickard v. East Tennessee, V. & G. R. Co.*, 130 U. S. 637, 32 L. Ed. 1051, 9 Sup. Ct. 640; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 39 L. Ed. 567, 15 Sup. Ct. 484; *Norfolk & W. R. Co. v. Pendleton*, 156 U. S. 667, 39 L. Ed. 574, 15 Sup. Ct. 413. But the state, by virtue of the same power which created the original contract of exemption, may either by the same law or by subsequent laws, authorize or direct the transfer of the exemption to a successor in title. In that case the exemption is taken, not by reason of the inherent right of the original holder to assign it, but by the action of the state in authorizing or directing its transfer. As in determining whether a contract of exemption from a governmental power was granted, so in determining whether its transfer to another was authorized or directed, every doubt is resolved in favor of the continuance of the governmental power, and clear and unmistakable evidence of the intent to part with it is required.

Keeping these fundamental principles steadily in mind, we proceed to inquire whether the state of New York has authorized or directed the transfer from the Brighton Railroad to the Rochester Railroad of the contract of exemption. A legislative authorization of the transfer of "the property and franchises" (*Morgan v. Louisiana* and *Pickard v. East Tennessee, V. & G. R. Co.*, *ubi supra*); of "the property" (*Wilson v. Gaines* and *Louisville & N. R. Co. v. Palmes*, *ubi supra*); of "the charter and works" (*Memphis & L. R. R. Co. v. Railroad Com'rs* [*Memphis & L. R. R. Co. v. Berry*] 112 U. S. 609, 28 L. Ed. 837, 5 Sup. Ct. 299); or of "the rights of franchise and property" (*Norfolk & W. R. Co. v. Pendleton*, *ubi supra*),—is not sufficient to include an exemption from the taxing or other power of the state, and it cannot be contended that the word "estate" has any larger meaning.<sup>1</sup> It is, however, argued that the word "privileges" is sufficiently broad to embrace within its meaning such an exemption, and that, when it is added to the other words, the legislative intent to transfer the exemption is clearly manifested, and that the words of the law under consideration, "the estate, property, rights, privileges, and franchises," indicate the purpose to vest in the purchasing corporation every asset of the selling corporation which is of conceivable value. There is authority sustaining this position, which cannot be

<sup>1</sup> Compare *New Jersey v. Wilson*, 7 Cranch, 164, 3 L. Ed. 303 (1812), explained in *Choate v. Trapp*, 224 U. S. 665, 674-677, 32 Sup. Ct. 565, 56 L. Ed. 941 (1912) (tax exemptions granted by United States to Indians are liberally construed). See *Armstrong v. Athens Co.*, 16 Pet. 251, 10 L. Ed. 955 (1842); *Given v. Wright*, 117 U. S. 648, 6 Sup. Ct. 907, 29 L. Ed. 1021 (1886).

set aside without examination. \* \* \* [Here follows a discussion of *Humphrey v. Pegues*, 16 Wall. 244, 21 L. Ed. 326; *Chesapeake & O. R. R. v. Virginia*, 94 U. S. 718, 24 L. Ed. 310; *Central R. R. v. Georgia*, 92 U. S. 665, 23 L. Ed. 757; and *Tennessee v. Whitworth*, 117 U. S. 139, 6 Sup. Ct. 649, 29 L. Ed. 833.]

If the authority of these four cases, supported by some dicta which need not be cited, remained unimpaired, it would justify the opinion that a legislative transfer of the "privileges" of a corporation includes an exemption from the taxing or other governmental power granted by a contract with the state. But other and later cases have essentially modified the rule which may be deduced from them.

In the case of the *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 176, 29 L. Ed. 121, 5 Sup. Ct. 813, it was held that the foreclosure of a mortgage on railroad property under the provisions of a statute which authorized the purchaser under a foreclosure sale to become a corporation, and provided that it should "succeed to all such franchises, rights, and privileges" as were possessed by the mortgagor company, did not vest in the purchasing corporation an immunity from taxation.

In *Pickard v. East Tennessee, V. & G. R. Co.*, 130 U. S. 637, 32 L. Ed. 1051, 9 Sup. Ct. 640, Mr. Justice Field, in delivering the opinion of the court, said: "The later, and, we think, the better, opinion, is that unless other provisions remove all doubt of the intention of the legislature to include the immunity in the term 'privileges' it will not be so construed. It can have its full force by confining it to other grants to the corporation."

In *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 279, 36 L. Ed. 972, 13 Sup. Ct. 72, Mr. Chief Justice Fuller, in delivering the opinion of the court, said, on page 297, L. Ed. page 979, Sup. Ct. page 77: "We do not deny that exemption from taxation may be construed as included in the word 'privileges,' if there are other provisions removing all doubt of the intention of the legislature in that respect."

In *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. Ed. 450, 14 Sup. Ct. 592, Mr. Justice Brown, in delivering the opinion of the court, said: "Whether, under the name 'franchises and privileges,' an immunity from taxation would pass to the new company, may admit of some doubt, in view of the decisions of this court, which, upon this point, are not easy to be reconciled."

These conflicting views were before the court in *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 174, 40 L. Ed. 660, 16 Sup. Ct. 471. The plaintiff in error in that case claimed to have an immunity from taxation by virtue of a provision in its charter granting it "all the rights and privileges" of the De Soto Insurance Company, which had an immunity from taxation. \* \* \* The opinion reviews all the cases, cites the foregoing quotations from the opinions of Mr. Justice Brown, Mr. Justice Field, and of the Chief Justice, and, after saying: "There must be other language than the mere word 'privilege,' or other provisions in the statute removing all doubt as to the intention

of the legislature before the exemption will be admitted," concludes that: "If this were an original question we should have no hesitation in holding that the plaintiff in error did not acquire the exemption from taxation claimed by it, and we think at the present time the weight of authority, as well as the better opinion, is in favor of the same conclusion which we should otherwise reach."

In *Gulf & S. I. R. Co. v. Hewes*, 133 U. S. 66, 46 L. Ed. 86, 22 Sup. Ct. 26, Mr. Justice Brown, in delivering the opinion of the court, said, citing this case as authority: "The better opinion is that a subrogation to the 'rights and privileges' of a former corporation does not include an immunity from taxation."

We think it is now the rule, notwithstanding earlier decisions and dicta to the contrary, that a statute authorizing or directing the grant or transfer of the "privileges" of a corporation which enjoys immunity from taxation or regulation should not be interpreted as including that immunity. We, therefore, conclude that the words "the estate, property, rights, privileges, and franchises" did not embrace within their meaning the immunity from the burden of paving enjoyed by the Brighton Railroad Company. Nor is there anything in this, or any other statute, which tends to show that the legislature used the words with any larger meaning than they would have standing alone. The meaning is not enlarged, as faintly suggested, by the expression in the statute that they are to be held by the successor "fully and entirely, and without change and diminution,"—words of unnecessary emphasis, without which all included in "estate, property, rights, privileges, and franchises" would pass, and with which nothing more could pass. \* \* \* The omission in the statute under consideration of the words "exemptions" or "immunities," either of which would be apt to transfer the immunity claimed,<sup>2</sup> is significant, in view of the fact that each of these words was employed by the legislature about the same time in other statutes dealing with the transfer of corporate property, and raises a doubt of the intention of the legislature, which, in cases of the interpretation of a statute claimed to divest the state of a governmental power, is equivalent to a denial.

The conclusion that the exemption of the Brighton Railroad did not accompany the transfer of its property to the Rochester Railroad is reached by another and entirely independent course of reasoning, based upon a consideration of the law under which the Rochester Railroad was incorporated. That was the general incorporation law of 1884. Every corporation incorporated under it was made "subject to all the liabilities imposed by the act" (§ 1), and directed to keep the street surface about and between its tracks "in permanent repair" (§ 9). \* \* \* Here a corporation deriving its right to exist under the act of 1884 is asserting an exemption from a duty imposed upon it by the law which created it. The authorities are numerous and conclusive

<sup>2</sup> Accord: *Phoenix Ins. Co. v. Tennessee*, 161 U. S. 174, 177-179, 16 Sup. Ct. 471, 40 L. Ed. 660 (1896).

that no corporation can receive, by transfer from another, an exemption from taxation or governmental regulation which is inconsistent with its own charter or with the Constitution or laws of the state then applicable; and this is true, even though, under legislative authority, the exemption is transferred by words which clearly include it.<sup>3</sup> *Trask v. Maguire*, 18 Wall. 391, 21 L. Ed. 938; *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357; *Maine C. R. Co. v. Maine*, 96 U. S. 499, 24 L. Ed. 836; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359, 25 L. Ed. 185; *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 27 L. Ed. 922, 3 Sup. Ct. 193; *Memphis & L. R. R. Co. v. Railroad Com'rs (Memphis & L. R. R. Co. v. Berry)* 112 U. S. 609, 28 L. Ed. 837, 5 Sup. Ct. 299; *St. Louis, I. M. & S. R. Co. v. Berry*, 113 U. S. 465, 28 L. Ed. 1055, 5 Sup. Ct. 529; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. Ed. 450, 14 Sup. Ct. 592; *Norfolk & W. R. Co. v. Pendleton*, 156 U. S. 667, 39 L. Ed. 574, 15 Sup. Ct. 413; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 1, 45 L. Ed. 395, 21 Sup. Ct. 240; *Grand Rapids & I. R. Co. v. Osborn*, 193 U. S. 17, 48 L. Ed. 598, 24 Sup. Ct. 310; *San Antonio Traction Co. v. Altgelt*, 200 U. S. 304, 50 L. Ed. 491, 26 Sup. Ct. 261.

The principle governing these decisions, so plain that it needs no reasoning to support it, is that those who seek and obtain the benefit of a charter of incorporation must take the benefit under the conditions and with the burdens prescribed by the laws then in force, whether written in the Constitution, in general laws, or in the charter itself. The Rochester Railroad, therefore, having accepted its charter under a law which imposed upon it the duty of laying pavements, is bound to perform that duty, even in respect of tracks which, while owned by a predecessor in title, would have been exempt.

The foregoing considerations would be conclusive of the case were it not that the plaintiff in error takes another position, which, if tenable, would avoid the result reached by either course of reasoning. It is insisted that this is not a case of transfer of an exemption; that the rules governing transfer are not applicable here; that the Brighton Railroad has not ceased to exist as a corporation; that it has been merely joined by merger with the Rochester Railroad, which controls it by stock holdings, and operates it by virtue of its franchises; and that, therefore, the Rochester Railroad may claim and enjoy the exemption of the Brighton Railroad in its behalf in respect of its property. In support of this view counsel cite *Tomlinson v. Branch*, 15 Wall. 460, 21 L. Ed. 189; *Central R. & Bkg. Co. v. Georgia*, 92 U. S. 665, 23 L. Ed. 757; *Tennessee v. Whitworth*, *ubi supra*. These cases hold that where corporations are united in such manner that one continues to exist as a corporation, owning and operating its property, by virtue of its own charter, the corporation thus continuing to exist

<sup>3</sup> The same rule applies if the business of an exempt corporation is materially changed, as from insurance to banking. *Memphis Bank v. Tennessee*, 161 U. S. 186, 16 Sup. Ct. 468, 40 L. Ed. 664 (1896).

still holds its immunities and exemptions in respect of the property to which they apply. \* \* \* An examination, however, of the statute under which the union of the two corporations was made, and the transactions by which the union was accomplished, shows that the Brighton Railroad has ceased to exist as a corporation. The Rochester Railroad first took a lease of the Brighton Railroad, apparently for the purpose of bringing itself within the provisions of the act of 1879. Then all the stock of the latter corporation was acquired by exchange of shares of stock of the former corporation. Then a certificate of the transfer of stock was filed with the secretary of state. Thereupon, by operation of the law, the "estate, property, rights, privileges, and franchises" of the Brighton Railroad vested in the Rochester Railroad, to be thereafter controlled by the Rochester Railroad in its own corporate name. The law does not expressly dissolve the selling corporation, but it leaves it without stock, officers, property, or franchises. A corporation without shareholders, without officers to manage its business, without property with which to do business, and without the right lawfully to do business, is dissolved by the operation of the law which brings this condition into existence.<sup>4</sup> *Maine C. R. Co. v. Maine, Keokuk & W. R. Co. v. Missouri, and Yazoo & M. Valley R. Co. v. Adams, ubi supra.*

Judgment affirmed.<sup>5</sup>

[WHITE, J., concurred in the result.]

<sup>4</sup> As to when a consolidation preserves the identity of one or more of the constituent corporations, and when not, see especially *Keokuk, etc., R. R. v. Missouri*, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450 (1894).

<sup>5</sup> Accord: *Covington Turnpike Co. v. Sandford*, 164 U. S. 578, 586-588, 17 Sup. Ct. 198, 41 L. Ed. 560 (1896) (grant of "powers, rights, and capacities" of preceding company does not include an exemption from rate regulation).

Compare *Louisville v. Cumberland Teleph. Co.*, 224 U. S. 649, 661, 32 Sup. Ct. 572, 56 L. Ed. 934 (1912) by Lamar, J. (holding that the street franchises of a telephone company passed under statutory authority to transfer its "property, business assets, and effects"): "While franchises to be are not transferable without express authority, there are other franchises to have, to hold, and to use, which are contractual and proprietary in their nature, and which confer rights and privileges which can be sold wherever the company, as here, has power to dispose of its property. In the present case the Ohio Valley Company was by its charter given authority to mortgage and dispose of franchises. Among those thus held was the right to use the streets in the city for the purpose necessary in conducting a telephone business. Such a street franchise has been called by various names,—an incorporeal hereditament, an interest in land, an easement, a right of way,—but, howsoever designated, it is property. \* \* \* That the street rights, however designated, passed to the Cumberland Company, is the natural and obvious construction of the act. The plant and property of a telephone company are useless when dis severed from the streets, and there would, in effect, have been no property out of which to pay the debts or with which to perform the public duties imposed if the street rights of the constituent companies had not been transferred by the statute to the consolidated company."

In *Owensboro v. Cumberland Teleph. Co.*, 230 U. S. 58, 65, 71, 33 Sup. Ct. 988, 990, 992, 57 L. Ed. — (1913), Lurton, J., said: "That an ordinance granting the right to place and maintain upon the streets of a city poles and wires of such a company is the granting of a property right has been many times decided by this court. \* \* \* As a property right it was assignable, taxable, and alienable. Generally it is an asset of great value to such utility com-



COVINGTON v. KENTUCKY (1899) 173 U. S. 231, 238, 239, 19 Sup. Ct. 383, 43 L. Ed. 679. A Kentucky statute of 1856 provided that all subsequent charters or grants to corporations, or amendments thereof should "be subject to amendment or repeal at the will of the Legislature, unless a contrary intent be therein plainly expressed." By a statute of 1886 the city of Covington was authorized to construct a municipal waterworks, and one section of the act provided that the waterworks property "shall be and remain forever exempt from state, county, and city tax." The Kentucky Constitution of 1891 required the taxation of such property. In an action involving the validity of such taxation of the Covington waterworks property, the court said, by Mr. Justice HARLAN:

"We are of opinion that the exemption from taxation embodied in that act did not tie the hands of the commonwealth of Kentucky, so that it could not, by legislation, withdraw such exemption, and subject the property in question to taxation. The act of 1886 was passed subject to the provision in a general statute of Kentucky, above referred to, that all statutes 'shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed.' If that act in any sense constituted a contract between the city and the commonwealth, the reservation in an existing general statute of the right to amend or repeal it was itself a part of that contract. *Griffin v. Insurance Co.*, 3 Bush (Ky.) 592, 96 Am. Dec. 259. The city accepted the act of 1886, and acquired under it the property taxed subject to that reservation. There was in that act no 'plainly-expressed' intent never to amend or to repeal it. It is true that the legislature said that the reservoirs, machinery, pipes, mains, and appurtenances, with the land upon which they were situated, should be forever exempt from state, county, and city taxes. But such a provision falls short of a plain expression by the legislature that at no time would it exercise the reserved power of amending or repealing the act under which the property was acquired. The utmost that can be said is that it may be inferred from the terms in which the exemption was declared that the legislature had no purpose, at the time the act of 1886 was passed, to withdraw the exemption from taxation;

panies, and a principal basis for credit. The grant by ordinance to an incorporated telephone company, its successors and assigns, of the right to occupy the streets and alleys of a city with its poles and wires for the necessary conduct of a public telephone business, is a grant of a property right in perpetuity, unless limited in duration by the grant itself, or as a consequence of some limitation imposed by the general law of the state, or by the corporate powers of the city making the grant. \* \* \* That a corporation is capable of taking a grant of street rights of longer duration than its own corporate existence is the settled law of this court."

In *Boise Artesian Water Co. v. Boise City*, 230 U. S. 84, 33 Sup. Ct. 997, 57 L. Ed. — (1913), the same was held of a municipal grant to lay water pipes in the streets. See also *Detroit v. Detroit, etc. Ry. Co.*, 184 U. S. 368, 394, 395, 22 Sup. Ct. 410, 46 L. Ed. 592 (1902); *People v. O'Brien*, post, at pp. 848-850.

not that the power reserved would never be exerted, so far as taxation was concerned, if in the judgment of the legislature the public interests required that to be done. The power expressly reserved to amend or repeal a statute should not be frittered away by any construction of subsequent statutes based upon mere inference. Before a statute—particularly one relating to taxation—should be held to be irrevocable, or not subject to amendment, an intent not to repeal or amend must be so directly and unmistakably expressed as to leave no room for doubt; otherwise, the intent is not plainly expressed. It is not so expressed when the existence of the intent arises only from inference or conjecture.

"The views we have expressed as to the power of the legislature under a reservation made by general statute of the right to amend or repeal are supported by many adjudged cases: *Tomlinson v. Jessup*, 15 Wall. 454, 457, 21 L. Ed. 204; *Railroad Co. v. Maine*, 96 U. S. 499, 510, 24 L. Ed. 836; *Railroad Co. v. Georgia*, 98 U. S. 359, 365, 25 L. Ed. 185; *Hoge v. Railroad Co.*, 99 U. S. 348, 353, 25 L. Ed. 303; *Sinking Fund Cases*, 99 U. S. 700, 720, 25 L. Ed. 496; *Greenwood v. Freight Co.*, 105 U. S. 13, 21, 26 L. Ed. 961; *Close v. Cemetery*, 107 U. S. 466, 476, 2 Sup. Ct. 267, 27 L. Ed. 408; *Waterworks Co. v. Schottler*, 110 U. S. 347, 352, 4 Sup. Ct. 48, 28 L. Ed. 173; *Louisville Gas Co. v. Citizens' Gas-Light Co.*, 115 U. S. 683, 696, 6 Sup. Ct. 265, 29 L. Ed. 510; *Gibbs v. Gas Co.*, 130 U. S. 396, 408, 9 Sup. Ct. 553, 32 L. Ed. 979; *Sioux City St. Ry. Co. v. Sioux City*, 138 U. S. 98, 108, 11 Sup. Ct. 226, 34 L. Ed. 898; *Water Co. v. Clark*, 143 U. S. 1, 12, 12 Sup. Ct. 346, 36 L. Ed. 55."<sup>1</sup>

<sup>1</sup> As to what language or circumstances will plainly express such a legislative intent, see *Louisville Gas Co. v. Citizens' Co.*, 115 U. S. 683, 6 Sup. Ct. 265, 29 L. Ed. 510 (1885); *New Jersey v. Yard*, 95 U. S. 104, 24 L. Ed. 352 (1877). The most unqualified reservation of a reserved right to amend or repeal future grants, made by a general or special act of the legislature, of course cannot affect a subsequent irrevocable grant clearly made by the same body. Only a constitutional prohibition can do this. *New Jersey v. Yard*, above.

A state Constitution forbidding irrevocable grants applies even to a grant made in compromise of disputes arising over the terms of an irrevocable grant, the latter made prior to the constitutional prohibition. *Northern Cent. Ry. v. Maryland*, 187 U. S. 258, 23 Sup. Ct. 62, 47 L. Ed. 167 (1902).

The federal courts have no jurisdiction, under the contract clause of the Constitution, to review controversies in state courts over contracts that are revocable. "The whole foundation of our jurisdiction in this class of cases must rest upon a contract which cannot be legally impaired."—*Brown, J.*, in *Gulf, etc., Co. v. Hewes*, 183 U. S. 66, 75, 22 Sup. Ct. 26, 46 L. Ed. 86 (1901).

## GREENWOOD v. FREIGHT CO.

(Supreme Court of United States, 1882. 105 U. S. 13, 26 L. Ed. 961.)

[Appeal from United States Circuit Court for Massachusetts. A Massachusetts statute of 1867 incorporated the Marginal Freight Railroad Company to operate a railroad in the streets of Boston. An existing act of 1831 provided that every act of incorporation passed thereafter should "be subject to amendment, alteration, or repeal, at the pleasure of the legislature." In 1872 the legislature repealed the charter of the Marginal Company and incorporated the Union Company for the same purposes, with a power to take the Marginal Company's track by eminent domain. Greenwood, a stockholder in the Marginal Company, filed a bill in the above-named court against all parties to enjoin action under this latter statute. There was a judgment for defendants upon demurrer, and this writ of error was taken.]

Mr. Justice MILLER. \* \* \* What is the effect of the repeal of the charter of a corporation like this?

One obvious effect of the repeal of a statute is that it no longer exists. Its life is at an end. Whatever force the law may give to transactions into which the corporation entered and which were authorized by the charter while in force, it can originate no new transactions dependent on the power conferred by the charter. If the corporation be a bank, with power to lend money and to issue circulating notes, it can make no new loan nor issue any new notes designed to circulate as money. If the essence of the grant of the charter be to operate a railroad, and to use the streets of the city for that purpose, it can no longer so use the streets of the city, and no longer exercise the franchise of running a railroad in the city. In short, whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the state, is abrogated by the repeal of the law which granted these special rights.

Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal; and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means within their power. The rights of the share-holders of such a corporation, to their interest in its property, are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights. And while we are conscious that no definition, at once comprehensive and satisfactory, can be here laid down of what those rights and powers are that remain to the stock-holders and the creditors of such a corporation after the act of repeal, we are of opinion that the foregoing observations are sufficient for the case before us.

A short reference to the origin of this reservation of the right to repeal charters of corporations may be of service in enabling us to decide upon its office and effect when called into operation by the legislative exercise of the power.

As early as 1806, in the case of *Wales v. Stetson*, 2 Mass. 143, 3 Am. Dec. 39, the Supreme Court of that state made the declaration "that the rights legally vested in all corporations cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation." In *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629, decided in 1819, this court announced principles on the subject of the protection that the charters of private corporations were entitled to claim, under the clause of the federal Constitution against impairing the obligation of contracts, which, though received at the time with some dissatisfaction, have never been overruled in this court. The opinion in that case carried the protection of the constitutional provision somewhat in advance of what had been decided in *Fletcher v. Peck*, 6 Cranch, 87, 3 L. Ed. 162, and the preceding cases, and held that it applied not only to contracts between individuals, and to grants of property made by the state to individuals or to corporations, but that the rights and franchises conferred upon private as distinguished from public corporations by the legislative acts under which their existence was authorized, and the right to exercise the functions conferred upon them by the statute, were, when accepted by the corporators, contracts which the state could not impair.

It became obvious at once that many acts of incorporation which had been passed as laws of a public character, partaking in no general sense of a bargain between the states and the corporations which they created, but which yet conferred private rights, were no longer subject to amendment, alteration, or repeal, except by the consent of the corporate body, and that the general control which the legislatures creating such bodies had previously supposed they had the right to exercise, no longer existed. It was, no doubt, with a view to suggest a method by which the state legislatures could retain in a large measure this important power, without violating the provision of the federal Constitution, that Mr. Justice Story, in his concurring opinion in the *Dartmouth College Case*, suggested that when the legislature was enacting a charter for a corporation, a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation. And he cites with approval the observations we have already quoted from the case of *Wales v. Stetson*, 2 Mass. 143, 3 Am. Dec. 39. It would seem that the states were not slow to avail themselves of this suggestion. \* \* \*

This history of the reservation clause in acts of incorporation supports our proposition, that whatever right, franchise, or power in the

corporation depends for its existence upon the granting clauses of the charter, is lost by its repeal. This view is sustained by the decisions of this court and of other courts on the same question. *Pennsylvania College Cases*, supra; *Tomlinson v. Jessup*, 15 Wall. 454, 21 L. Ed. 204; *Railroad Company v. Maine*, 96 U. S. 499, 24 L. Ed. 836; *Sinking Fund Cases*, 99 Id. 700, 25 L. Ed. 496; *Railroad Company v. Georgia*, 98 Id. 359, 25 L. Ed. 185; *McLaren v. Pennington*, supra [1 *Paige* (N. Y.) 102]; *Erie & N. E. Railroad v. Casey*, supra [26 Pa. 287]; *Miners' Bank v. United States*, 1 G. Greene (Iowa) 553; 2 Kent. Com. 306, 307.

It results from this view of the subject that whatever right remained in the Marginal Company to its rolling-stock, its horses, its harness, its stables, the debts due to it, and the funds on hand, if any, it no longer had the right to run its cars through the streets, or any of the streets, of Boston. It no longer had the right to cumber these streets with a railroad track which it could not use,<sup>1</sup> for these belonged by law, to no person of right, and were vested in defendants only by virtue of the repealed charter. It was, therefore, in the power of the Massachusetts legislature to grant to another corporation, as it did, the authority to operate a street railroad through the same streets and over the same ground previously occupied by the Marginal Company. Whether this action was oppressive or unjust in view of the public good, or whether the legislature was governed by sufficient reason in thus repealing the charter of one company and in chartering another at the same time to perform as part of its functions the duties required of the first, is not, as we have seen, a judicial question in this case.

\* \* \*

Decree affirmed.<sup>2</sup>

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### PEOPLE v. O'BRIEN.

(Court of Appeals of New York, 1888. 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684.)

[Appeals from New York Supreme Court. In 1884 the Broadway Surface Railroad Company was incorporated under a general act, subject to a reserved right of repeal, and became thereby empowered to operate a street railway in New York City when it should obtain authority therefor from that city, which, under the state Constitution,

<sup>1</sup> A street railway company whose franchise has expired or been lawfully repealed can be made to remove its tracks from the public streets. *Detroit United Ry. v. Detroit*, 229 U. S. 39, 33 Sup. Ct. 697, 57 L. Ed. — (1913). And a water company in a similar situation cannot require the city to purchase its plant, instead of erecting a new one for itself. *Denver v. N. Y. Trust Co.*, 229 U. S. 123, 33 Sup. Ct. 657, 57 L. Ed. — (1913).

<sup>2</sup> Whether a general power reserved to amend, alter, or repeal corporate charters shall be exercised or not lies wholly within the discretion of the legislature. *Hamilton Gas Co. v. Hamilton*, 146 U. S. 258, 270, 271, 13 Sup. Ct. 90, 36 L. Ed. 963 (1892); *U. S. v. Union Pac. Ry.*, 160 U. S. 1, 36, 37, 16 Sup. Ct. 190, 40 L. Ed. 319 (1895) (cases).



could be obtained only at the pleasure of the city authorities. In December, 1884, the right to operate a railway upon Broadway was obtained by the company from the city common council in return for a considerable annual payment to the city. As permitted by its charter, the company mortgaged its property and franchises to secure its bondholders, and its bonds and stock were largely invested in by innocent persons, and it became liable to many creditors. Its road was built and operated in 1885, and in 1886 the company was dissolved by an act of the legislature, which also purported to authorize the winding up of the affairs of the company by public authority and the virtual confiscation of its franchise to use the city streets. The ground of this was bribery in obtaining the Broadway franchise from the city. In a suit to which all interested persons were parties, the lower state courts declared invalid the confiscatory part of the repealing act, but upheld other parts of it. Both parts of this decision were appealed from.]

RUGER, C. J. \* \* \* We think the material question for discussion here is whether the franchise to maintain tracks and run cars on Broadway survived the dissolution of the corporation, and, if so, upon whom the right of administering its affairs devolved. \* \* \* The statutes upon which the action is predicated confessedly assume the right and power of the legislature to wrest from the company its franchises, to transfer them to other persons, and bestow their value upon the donees of the state. The statutes contemplate the absolute destruction of the property of the corporation, and the loss of its value to the creditors who have made loans in good faith upon the security of mortgages upon such property; and this action is avowedly prosecuted to accomplish the purposes of the legislation. It is therefore urgently contended by the attorney general that none of the franchises of the corporation survived its dissolution, and that the mortgages previously given thereon, as well as all contracts made with connecting street railroads for the mutual use of their respective roads, fell with the repeal, and could not be enforced. If it could be supposed for a moment that this claim was reasonably supported by authority, or maintainable in logic or reason, it would give grave cause for alarm to all holders of corporate securities. The contention that securities representing a large part of the world's wealth are beyond the reach of the protection which the Constitution gives to property, and are subject to the arbitrary will of successive legislatures, to sanction or destroy at their pleasure or discretion, is a proposition so repugnant to reason and justice, as well as the traditions of the Anglo-Saxon race, in respect to the security of rights of property, that there is little reason to suppose that it will ever receive the sanction of the judiciary; and we desire in unqualified terms to express our disapprobation of such a doctrine. Whatever might have been the intention of the legislature, or even of the framers of our Constitution, in respect to the effect of the power of repeal reserved in acts of incor-

poration upon the property rights of a corporation, such power must still be exercised in subjection to the provisions of the federal Constitution. Considering the power which the state has to terminate the life of corporations organized under its laws, and the authority which its attorney general has by suit to forfeit its franchises for misuse or abuse, and to regulate and restrain corporations in the exercise of their corporate powers, there is little danger to be apprehended from the overgrowth of power or the monopolistic tendencies of such organizations; but, whatever that danger may be, it is trivial in comparison with the wide-spread loss and destruction which would follow a judicial determination that the property invested in corporate securities was beyond the pale of the protection afforded by the fundamental law. It is not, perhaps, strange, in the great variety of cases bearing upon the subject, and the manifold aspects in which questions relating to corporate rights and property have been presented, that dicta couched in general language may be found, giving color to the plaintiff's claim; but we think that there are no reported cases in which the judgment of the court has ever taken either the franchises or property of a corporation from its stockholders and creditors, through the exercise of the reserved power of amendment and repeal, or transferred it to other persons or corporations, without provision made for compensation. \* \* \*

The title to streets in New York is vested in the city, in trust for the people of the state, but under the Constitution and statutes it had authority to convey such title as was necessary for the purpose to corporations desiring to acquire the same for use as a street railroad. The city had authority to limit the estate granted, either as to the extent of its use or the time of its enjoyment, and also had power to grant an interest in public streets for a public use in perpetuity which should be irrevocable. *Yates v. Van De Bogert*, 56 N. Y. 526. \* \* \* When we consider the mode required by the statutes and the Constitution to be pursued in disposing of this franchise, the inference as to its perpetuity seems to be irresistible; for it cannot be supposed that either the legislature or the framers of the Constitution intended to offer for public sale property the title to which was defeasible at the option of the vendor, or that such property could be made the subject of successive sales to different vendees as often as popular caprice might require it to be done. Neither can it be supposed that they contemplated the resumption of property which they had expressly authorized their grantee to mortgage and otherwise dispose of, to the destruction of interests created therein by their consent. We are therefore of the opinion that the Broadway Surface Railroad Company took an estate in perpetuity in Broadway, through its grant from the city, under the authority of the Constitution and the act of the legislature. It is also well settled by authority in this state that such a right constitutes property, within the usual and common

signification of that word. *Railroad Co. v. Kerr*, 72 N. Y. 330; *People v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536.

When we consider the generality with which investments have been made in securities based upon corporate franchises throughout the whole country, the numerous laws adopted in the several states providing for their security and enjoyment, and the extent of litigation conducted in the various courts, state and federal, in which they have been upheld and enforced, there is no question but that, in the view of legislatures, courts, and the public at large, certain corporate franchises have been uniformly regarded as indestructible by legislative authority, and as constituting property in the highest sense of the term. It is, however, earnestly contended for the state that such a franchise is a mere license or privilege, enjoyable during the life of the grantee only, and revocable at the will of the state. We believe this proposition to be not only repugnant to justice and reason, but contrary to the uniform course of authority in this country. The laws of this state have made such interests taxable, inheritable, alienable, subject to levy and sale under execution, to condemnation under the exercise of the right of eminent domain, and invested them with the attributes of property generally. \* \* \*

It may be assumed in this discussion that the authority of the legislature to repeal a charter, if it has expressed its intention to reserve such power in its grant, constitutes a valid reservation. Parties to a contract may lawfully provide for its termination at the election of either party, and it may therefore be conceded that the state had authority to repeal this charter, provided no rights of property were thereby invaded or destroyed. In speaking of the franchises of a corporation, we shall assume that none are assignable except by the special authority of the legislature. We must also be understood as referring only to such franchises as are usually authorized to be transferred by statute, viz., those requiring for their enjoyment the use of corporeal property,—such as railroads, canals, telegraph, gas, water, bridge, and similar companies,—and not to those which are in their nature purely incorporeal and inalienable,—such as the right of corporate life, the exercise of banking, trading, and insurance powers and similar privileges. The franchises last referred to being personal in character, and dependent upon the continued existence of the donee for their lawful exercise, necessarily expire with the extinction of corporate life, unless special provision is otherwise made. *People v. Railroad Co.*, 89 N. Y. 84; *Metz v. Railroad Co.*, 58 N. Y. 61. 17 Am. Rep. 201. \* \* \* It is also to be observed that in none of the provisions for repeal in this state is there anything contained which purports to confer power to take away or destroy property, or annul contracts; and the contention that the property of a dissolved corporation is forfeited, rests wholly upon what is claimed to be the necessary consequence of the extinction of corporate life. We do not think

the dissolution of a corporation works any such effect. It would not naturally seem to have any other operation upon its contracts or property rights than the death of a natural person upon his. *Mumma v. Potomac Co.*, 8 Pet. 285, 8 L. Ed. 945. The power to repeal the charter of a corporation cannot, upon any legal principle, include the power to repeal what is in its nature irrevocable, or to undo what has been lawfully done, under power lawfully conferred. *Butler v. Palmer*, 1 Hill, 335. The authorities seem to be uniform, to the effect that a reservation of the right to repeal enables a legislature to effect a destruction of the corporate life and disable it from continuing its corporate business, (*People v. Railroad Co.*, 70 N. Y. 569; *Philips v. Wickham*, 1 Paige. 590;) and a reservation of the right to alter and amend, confers power to pass all needful laws for the regulation and control of the domestic affairs of a corporation, freed from the restrictions imposed by the federal Constitution upon legislation impairing the obligation of contracts. *Munn v. Illinois*, 94 U. S. 123, 24 L. Ed. 77.

We think no well-considered case has gone further than this, while, in many cases, such power has been expressly held to be limited to the effect stated. \* \* \* [Here follows a discussion of *Fletcher v. Peck*, 6 Cranch, 87, 3 L. Ed. 162; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629; and *Sinking Fund Cases*, 99 U. S. 700, 25 L. Ed. 496. In regard to the last case—one in which Congress under its reserved power had required a federal railroad corporation to maintain a sinking fund in order to secure the future payment of its debts to the United States—the court continues:] The judges dissenting in that case contended that the reserved power could not be construed as authorizing the alteration, violation, or nullification of any of the material provisions of the grant, but should be held to mean simply a reservation of the power to legislate, freed from the restrictions imposed by the constitutional provisions against legislation impairing the obligations of contracts. Mr. Justice Bradley said: "The reserved power in question is simply that of legislation, to alter, amend, or repeal a charter. This is very different from the power to violate or to alter the terms of a contract at will. A reservation of power to violate a contract, or alter it, or impair its obligation, would be repugnant to the contract itself, and void. A proviso repugnant to the granting part of a deed, or to the enacting part of a statute, is void. Interpreted as a reservation of the right to legislate, the reserved power is sustainable on sound principles; but, interpreted as the reservation of the right to violate an executed contract, it is not sustainable." This dissent proceeded upon the ground that the acts of congress under consideration changed some of the essential features of the contract, and were, therefore, void, as being obnoxious to the provisions of the Constitution for the protection of lives, liberty, and property. The majority of the court held, however, that such acts were simply an exercise of the power of congress to regulate the in-

ternal administration of the affairs of a corporation, which, to a certain extent, it was unanimously agreed that it possessed. There was no dispute or disagreement as to the correctness of the rule stated, that the power of amendment and repeal was a restricted power, limited by the provisions of the Constitution. An interpretation conferring the power of violating a contract at will upon one of its parties, under a clause authorizing its amendment or repeal, would seem to be inconsistent with any reasonable notion of the nature of such an instrument, and beyond the power of parties lawfully to create. If it is possible to conceive the idea of a repealable grant, certainly such a grant, accompanied with power to convey or pledge the interest granted, must, on the execution of the power, necessarily preclude a resumption by the grantor of the subject of the grant, or any right of property acquired under it. An express reservation by the legislature of power to take away or destroy property lawfully acquired or created under authority conferred by a charter would necessarily violate the fundamental law, and be void, and it is equally clear that any legislation which authorizes such a result to be accomplished indirectly would be equally ineffectual and void. \* \* \*

We are therefore of the opinion that the Broadway Surface Company took an indefeasible title in the land, necessary to enable it to construct and maintain a street railroad in Broadway, and to run cars thereon for the transportation of freight and passengers which survived its dissolution. \* \* \*

[Other parts of the statute sustained below were also held invalid, and as to these the judgment was reversed. *ANDREWS and EARL, JJ.*, concurred in the result upon grounds consistent with those above given. *PECKHAM and GRAY, JJ.*, did not sit.]<sup>1</sup>

<sup>1</sup> See *Vicksburg v. Waterworks Co.*, 202 U. S. 453, 465, 26 Sup. Ct. 660, 50 L. Ed. 1102, 6 Ann. Cas. 253 (1906). As to the alienability of such franchises and their survival of the original grantee, see also *Owensboro v. Cumberland Teleph. Co.*, ante, p. 841, note; *Detroit v. Detroit, etc. Ry.*, 184 U. S. 368, 394, 395, 22 Sup. Ct. 410, 46 L. Ed. 592 (1902).

As to what changes may constitutionally be made under the reservation of a legislative power to alter or amend corporate charters, see *Sinking Fund Cases*, 99 U. S. 700, 25 L. Ed. 496 (1878); *St. Louis, etc., Ry. v. Paul*, 173 U. S. 404, 19 Sup. Ct. 419, 43 L. Ed. 746 (1899); *Looker v. Maynard*, 179 U. S. 46, 21 Sup. Ct. 21, 45 L. Ed. 79 (1900); *Berea College v. Kentucky*, 211 U. S. 45, 29 Sup. Ct. 33, 53 L. Ed. 81 (1908); *Atty. Gen. v. R. R. Cos.*, 35 Wis. 425 (1874); *Dow v. Northern R. R.*, 67 N. H. 1, 36 Atl. 510 (1887); *Ohio ex rel. v. Neff*, 52 Ohio St. 375, 40 N. E. 720 (1895). In *Looker v. Maynard*, above, *Gray, J.*, said (179 U. S. 52, 21 Sup. Ct. 23, 45 L. Ed. 79, citing cases): "The effect of such a provision, whether contained in an original act of incorporation, or in a Constitution or general law subject to which a charter is accepted, is, at the least, to reserve to the legislature the power to make any alteration or amendment of a charter subject to it, which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to promote the due administration of its affairs."

For the effect of a reservation of a right to "make regulations proper for the conduct" of a steam railroad which is granted a franchise to use city streets,



## AMERICAN SMELTING &amp; REFINING CO. v. COLORADO ex rel. LINDSLEY.

(Supreme Court of United States, 1907. 204 U. S. 103, 27 Sup. Ct. 198, 51 L. Ed. 393, 9 Ann. Cas. 978.)

[Error to Colorado Supreme Court. The defendant company was incorporated in New Jersey in 1899, and in that year it was admitted to do business in Colorado upon complying with a statute of 1897 providing that foreign corporations must file in the office of the secretary of state copies of their charters or certificates of incorporation, and at the same time pay a fee of 15 cents upon each \$1,000 of capital stock exceeding \$50,000, before they could do business in the state; "and such corporations shall be subjected to all the liabilities, restrictions, and duties which are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers." An act of 1901 required foreign corporations to pay \$5 for an official certificate of payment of the above fee. The company paid a fee upon \$65,000,000 of capital stock in 1899, and in 1901 paid an additional fee for increasing it to \$100,000,000. It invested more than \$5,000,000 in a plant in the state. In 1902 a state law required an annual license tax of 2 cents on each \$1,000 of capital stock from domestic corporations, and 4 cents on each \$1,000 from every foreign corporation "as a condition precedent to its right to do any business" in the state. The company refused to pay, and the state sued to forfeit its right to remain in the state. Judgment against the company was affirmed by the state Supreme Court, and this writ of error was taken. Other facts appear in the opinion.]

Mr. Justice PECKHAM. \* \* \* The result of these statutes was that the foreign corporation, upon filing the proper papers and paying the statutory fees and obtaining the certificate to that effect from the secretary of state, obtained the right to enter and do business in Colorado. The act of 1901 did not increase the amount of the exaction for entering and doing business in the state, but simply provided for a certificate, acknowledging payment, from the secretary, and it imposed the payment of a small fee for such certificate. The right obtained was a right to enter the state and do business therein as a corporation. It was also subject by statute to the liabilities, restrictions, and duties which were or might thereafter be imposed upon domestic

see *So. Pac. Co. v. Portland*, 227 U. S. 559, 33 Sup. Ct. 308, 57 L. Ed. — (1913).

As to the amendment of corporate charters by implication from general regulative legislation, see *N. Y., etc., Ry. v. Williams*, ante, p. 531, and notes.

If a corporate grant is the consideration for an executory continuing contract, the state cannot repeal its obligation and leave that of the corporation in force. *Louisville Water Co. v. Clark*, 143 U. S. 1, 12 Sup. Ct. 346, 36 L. Ed. 55 (1892); *Duluth, etc., R. R. v. St. Louis County*, 179 U. S. 302, 21 Sup. Ct. 124, 45 L. Ed. 201 (1900) (for reasons given in *Stearns v. Minnesota*, 179 U. S. 223, 258-262, 21 Sup. Ct. 73, 45 L. Ed. 162).

corporations of like character. Domestic corporations at that time had the right to a corporate existence of twenty years.

These provisions of law, existing when the corporation applied for leave to enter the state, made the payment required, and received its permit, amounted to a contract that the foreign corporation so permitted to come in the state and do business therein, while subjected to all, should not be subjected to any greater, liabilities, restrictions, or duties than then were or thereafter might be imposed upon domestic corporations of like character.

A provision in a statute of this nature subjecting a foreign corporation to all the liabilities, etc., of a domestic one of like character must mean that it shall not be subjected to any greater liabilities than are imposed upon such domestic corporation. The power to impose different liabilities was with the state at the outset. It could make them greater or less than in case of a domestic corporation, or it could make them the same. Having the general power to do as it pleased, when it enacted that the foreign corporation, upon coming in the state, should be subjected to all the liabilities of domestic corporations, it amounted to the same thing as if the statute had said the foreign corporations should be subjected to the same liabilities. In other words the liabilities, restrictions, and duties imposed upon domestic corporations constitute the measure and limit of the liabilities, restrictions, and duties which might thereafter be imposed upon the corporation thus admitted to do business in the state. It was not a mere license to come in the state and do business therein upon payment of a sum named, liable to be revoked or the sum increased at the pleasure of the state, without further limitation. It was a clear contract that the liabilities, etc., should be the same as the domestic corporation, and the same treatment in that regard should be measured out to both. If it were desired to increase the liabilities of the foreign, it could only be done by increasing those of the domestic, corporation at the same time and to the same extent.

Such being the contract, how long was it to last? Only until the state chose to alter it? Or was it to last for some definite time, capable of being ascertained from the terms of the statutes as they then existed? It seems to us that the only limitation imposed is the term for which the corporation would have the right to continue in the state as a corporation. One of the restrictions as to domestic corporations is that which limits their corporate life to twenty years, unless extended as provided by law. The same restriction applies to the foreign corporation. *Iron Silver Min. Co. v. Cowie*, 31 Colo. 450, 72 Pac. 1067. Counsel for the state concedes that the corporation was admitted for a period of twenty years, but subject to the power of the state to tax. During that time, therefore, the contract lasts.<sup>1</sup> This is the only

<sup>1</sup> "Undoubtedly, if the corporation violated the laws of the state properly applicable to it, or if otherwise it gave just cause for its expulsion, it could

legitimate, and we think it is the necessary, implication arising from the statute.

This is not an exemption from taxation, it is simply a limitation of the power to tax beyond the rate of taxation imposed upon a domestic corporation. Instead of such a limitation the act of 1902, already referred to, imposes a tax or fee upon or exacts from the foreign corporation double the amount which is imposed upon or exacted from the domestic one. The latter is granted the right to continue to do business upon the annual payment of 2 cents upon each \$1,000 of its capital stock, while the former must pay 4 cents for the same right. This cannot be done while the right to remain exists. It is a violation of the obligation of an existing valid contract. *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. Ed. 495.

Nor is this a case where the power given by the state Constitution to the general assembly to alter, amend, or annul a charter is applicable. The act does not alter the charter or annul or amend it. It simply increases the taxation which, up to the time of its enactment, had been imposed on all foreign corporations doing business in the state.

A discussion as to the name or nature of the tax imposed by the act of 1902, or the former acts, is wholly unimportant with reference to the view we take of this case. \* \* \*

Whatever be the name or nature of the tax, it must be measured in amount by the same rate as is provided for the domestic institution, and, if the latter is not taxed in that way, neither can the state thus tax the foreign corporation. \* \* \*

Judgment reversed.<sup>2</sup>

[FULLER, C. J., and HARLAN, HOLMES, and MOODY, JJ., dissented.]

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### MANIGAULT v. SPRINGS.

(Supreme Court of United States, 1905. 199 U. S. 473, 26 Sup. Ct. 127, 50 L. Ed. 274.)

[Appeal from United States Circuit Court for South Carolina. Manigault, Springs, and others were adjoining riparian owners on the Santee river at the mouth of Kinloch creek. Springs and others built a dam across the creek, which interfered with Manigault's passage up the creek and his irrigation. In 1898 a contract was made between the parties by which the obstructions were to be removed to give a clear passage up the creek, and the removal was effected. In 1903 the legislature of South Carolina authorized Springs to erect and

not insist upon such a contract as a defense."—Peckham, J., 204 U. S. at p. 111, 27 Sup. Ct. 200, 51 L. Ed. 393, 9 Ann. Cas. 978, in the principal case.

<sup>2</sup> Compare *N. Y., etc., R. R. v. Pa.*, 153 U. S. 628, 14 Sup. Ct. 952, 38 L. Ed. 846 (1894), and *Powers v. Det., etc., Ry.*, 201 U. S. 543, 26 Sup. Ct. 556, 50 L. Ed. 860 (1906), both, however, under irrevocable charters.

maintain a dam across the creek in order to drain the low lands on the Santee river and enhance their values. Manigault applied for an injunction against this in the above-named court. A demurrer to his bill was sustained and this appeal taken. Another portion of the case appears ante, p. 720.]

Mr. Justice BROWN. \* \* \* The main argument was addressed to the question whether the contract of August, 1898, providing for the removal of the obstruction on December 31 and the free ingress and egress through the creek thereafter, was impaired by the act of the general assembly of 1903, permitting the defendants by name to construct and maintain the dam in question.

It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals. Familiar instances of this are where parties enter into contracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the state, prohibiting the establishment or continuance of such traffic; in other words, that parties, by entering into contracts, may not estop the legislature from enacting laws intended for the public good.<sup>1</sup>

While this power is subject to limitations in certain cases, there is wide discretion on the part of the legislature in determining what is and what is not necessary,—a discretion which courts ordinarily will not interfere with. The leading case upon this point is that of *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773, in which a franchise to maintain a ferry between Cambridge and Boston, under which a bridge was subsequently erected, was held to be subject to the power of the legislature to establish a parallel bridge between the same points. In *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079, a charter to a lottery company for twenty-five years was held to be subject to the power of the state to abolish lotteries altogether. Similar cases announcing the same principle are *Boyd v. Alabama*, 94 U. S. 645, 24

<sup>1</sup> "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject-matter."—Holmes, J., in *Hudson Water Co. v. McCarter*, 209 U. S. 349, 357, 28 Sup. Ct. 529, 531, 532, 52 L. Ed. 828, 14 Ann. Cas. 560 (1908). Compare *L. & N. R. R. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671 (1911) (prior contract for life pass over interstate line invalidated by act of Congress requiring cash fares); *Phila., etc. R. R. Co. v. Schubert*, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911 (1912) (prior contracts regulating employers' liability abrogated by federal Employers' Liability Act).

L. Ed. 302; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City, L. S. L. & S. H. Co.*, 111 U. S. 746, 28 L. Ed. 585, 4 Sup. Ct. 652; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.*, 115 U. S. 650, 672, 29 L. Ed. 516, 524, 6 Sup. Ct. 252; *Mugler v. Kansas*, 123 U. S. 623, 665, 31 L. Ed. 205, 211, 8 Sup. Ct. 273; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. 581.<sup>2</sup>

It only remains to consider in connection with this branch of the case, whether the act of the general assembly of 1903 was a proper exercise of the police power of the state. Of this we have no doubt. Although it was not an exercise of that power in its ordinarily accepted sense of protecting the health, lives, and morals of the community, it is defensible in its broader meaning of providing for the general welfare of the people by the reclamation of swampy, overflowed, and infertile lands, and the erection of dams, levees, and dikes for that purpose. We have often held that private interests are subservient to that right, except where property is taken for which compensation must be paid, and must give way to any general scheme for the reclamation or improvement of such lands. \* \* \*

Judgment affirmed.<sup>3</sup>

<sup>2</sup> It will be noticed that the court here does not distinguish two very different classes of cases: One, where contracts that may affect the public interest are made between individuals or corporations; and the other, where the state itself, or an authorized subdivision of it, has contracted about such a matter. Compare the results in *Buffalo East Side R. R. v. Buffalo St. R. R.*, 111 N. Y. 132, 19 N. E. 63, 2 L. R. A. 284 (1888) (contract between companies as to rates), with those in *Detroit v. Det., etc., Ry.*, 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592 (1902) (similar contract between city and company). See, also, *Bedford v. Eastern Bldg. Ass'n*, 181 U. S. 227, 21 Sup. Ct. 597, 45 L. Ed. 834 (1901); *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611, 615, 23 Sup. Ct. 206, 47 L. Ed. 328 (1903). The doctrine of the principal case is perhaps the true ground upon which to rest the retroactive abolition of imprisonment for debt and the exemption from execution of small amounts of personal property. See *Von Hoffman v. Quincy*, ante, p. 805; *Edwards v. Kearzey*, 96 U. S. 595, 609, 24 L. Ed. 793 (1877) by Clifford, J.

<sup>3</sup> Accord: *People v. Hawley*, 3 Mich. 330, 342 (1854) (prohibition law affecting existing contracts for sale of liquor); *Salem v. Maynes*, 123 Mass. 372 (1877) (ordinance forbidding wooden buildings already contracted for in fire district); *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 438, 23 Sup. Ct. 531, 47 L. Ed. 887 (1903) (regulation of water rates affecting existing contracts with consumers); *Portland Ry. Co. v. Oregon Ry. Comm.*, 229 U. S. 397, 412, 33 Sup. Ct. 820, 57 L. Ed. — (1913) (agreement of railroad with predecessor as to rates); *Lyons v. Bost. & L. Ry.*, 181 Mass. 551, 64 N. E. 404 (1902) (forbidding subrogation of insurer to fire claim against railroad provided for in existing policies) [but see *Brit., etc., Co. v. Colo., etc., Ry.*, 52 Colo. 589, 125 Pac. 508, 41 L. R. A. (N. S.) 1202 (1912) (contra)]. See, also, the cases in note 2, above.



BEER CO. v. MASSACHUSETTS (1878) 97 U. S. 25, 32 33, 24 L. Ed. 989, Mr. Justice BRADLEY (after holding that the state's reserved power to regulate and repeal corporate charters enabled it to enforce a prohibition law against a corporation chartered to manufacture malt liquor):

"But there is another question in the case, which, as it seems to us, is equally decisive. The plaintiff in error was incorporated 'for the purpose of manufacturing malt liquors in all their varieties,' it is true; and the right to manufacture, undoubtedly, as the plaintiff's counsel contends, included the incidental right to dispose of the liquors manufactured. But although this right or capacity was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor; nor as exempting the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. 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. All rights are held subject to the police power of the state.

\* \* \*

"The plaintiff in error boldly takes the ground that, being a corporation, it has a right, by contract, to manufacture and sell beer forever, notwithstanding and in spite of any exigencies which may occur in the morals or the health of the community, requiring such manufacture to cease. We do not so understand the rights of the plaintiff. The legislature had no power to confer any such rights. Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *Salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. *Boyd v. Alabama*, 94 U. S. 645, 24 L. Ed. 302."<sup>1</sup> \* \* \*

<sup>1</sup> "We are not prepared to admit that it is competent for one legislature, by any contract with an individual, to restrain the power of a subsequent legislature to legislate for the public welfare, and to that end to suppress any and all practices tending to corrupt the public morals."—Field, J., in *Boyd v. Alabama*, 94 U. S. 645, 650, 24 L. Ed. 302 (1877) (semble).

## FERTILIZING CO. v. HYDE PARK.

(Supreme Court of United States, 1878. 97 U. S. 659, 24 L. Ed. 1036.)

[Error to the Illinois Supreme Court. By special act the Northwestern Fertilizing Company was incorporated in 1867 for 50 years, authorized to establish works to manufacture fertilizer from animal matter in Cook county, Illinois, at any point south of the dividing line between townships 37 and 38. The company established works within the prescribed limits, where the country was swampy, uninhabited, and unpromising for future improvement. Dead animal matter was conveyed there daily from Chicago. The works were within the limits of the village of Hyde Park, which grew rapidly, and the business of the company became an intolerable nuisance to those in the neighborhood. The village by ordinance forbade the conduct therein of offensive businesses and the transportation through it of offensive matter. In 1873 a bill was filed by the company to enjoin the prosecution under this ordinance of persons transporting such matter for the company. The state Supreme Court, on appeal, dismissed the bill, and this writ of error was taken. Other facts appear in the opinion.]

Mr. Justice SWAYNE. \* \* \* The plaintiff in error claims that it is protected by its charter from the enforcement against it of the ordinances complained of, and that its charter is a contract within the meaning of the contract clause of the Constitution of the United States. Whether this is so, is the question to be considered.

The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court. It may be well to cite a few cases by way of illustration. In *Rector, etc., of Christ Church v. County of Philadelphia*, 24 How. 301, 16 L. Ed. 602, in *Tucker v. Ferguson*, 22 Wall. 527, 22 L. Ed. 805, and in *West Wisconsin Railroad Company v. Board of Supervisors*, 93 U. S. 595, 23 L. Ed. 814, property had been expressly exempted for a time from taxation. Taxes were imposed contrary to the terms of the exemption in each case. The corporations objected. This court held that the promised forbearance was only a bounty or gratuity, and that there was no contract. In *Providence Bank v. Billings & Pittman*, 4 Pet. 515, 7 L. Ed. 939, the bank had been incorporated with the powers usually given to such institutions. The charter was silent as to taxation. The legislature imposed taxes. "The power to tax involves the power to destroy." *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579. The bank resisted, and brought the case here for final determination. This

court held that there was no immunity, and that the bank was liable for the taxes as an individual would have been. There is the same silence in the charter here in question as to taxation and as to liability for nuisances. Can exemption be claimed as to one more than the other? Is not the case just cited conclusive as to both?

Continued succession is given to corporations to prevent embarrassment arising from the death of their members. One striking difference between the artificial and a natural person is, that the latter can do any thing not forbidden by law, while the former can do only what is so permitted. Its powers and immunities depend primarily upon the law of its creation. Beyond that it is subject, like individuals, to the will of the law-making power.

If the intent of the legislature touching the point under consideration be sought in the charter and its history, it will be found to be in accordance with the view we have expressed as matter of law. Three days before the charter of the plaintiff in error became a law, the legislature declared that the power of the village as to nuisances should not extend to those engaged in the business to which the charter relates. The subject must have been fully present to the legislative mind when the company's charter was passed. If it were intended the exemption should be inviolable, why was it not put in the company's charter as well as in that of the village? The silence of the former, under the circumstances, is a pregnant fact. In one case it was doubtless known to all concerned that the restriction would be irrevocable, while in the other, that it could be revoked at any time. In the revised village charter of 1869, the exemption was limited to two years from the passage of the act. This was equivalent to declaration that after the lapse of the two years the full power of the village might be applied to the extent found necessary. Corporations in such cases are usually prolific of promises, and the legislature was willing to await the event for the time named.

That a nuisance of a flagrant character existed, as found by the court below, is not controverted. We cannot doubt that the police power of the state was applicable and adequate to give an effectual remedy. That power belonged to the states when the federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases. It rests upon the fundamental principle that every one shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions. The adjudged cases showing its exercise where corporate franchises were involved are numerous.

\* \* \*

In the case before us it does not appear that the factory could not be removed to some other place south of the designated line, where it could be operated, and where offal could be conveyed to it from the city by some other railroad, both without rightful objection. The com-

pany had the choice of any point within the designated limits. In that respect there is no restriction. The charter was a sufficient license until revoked; but we cannot regard it as a contract guaranteeing, in the locality originally selected, exemption for fifty years from the exercise of the police power of the state, however serious the nuisance might become in the future, by reason of the growth of population around it. The owners had no such exemption before they were incorporated, and we think the charter did not give it to them. \* \* \*

Decree affirmed.<sup>1</sup>

[FIELD, J., did not sit in the case; MILLER, J., gave a concurring opinion, solely on the ground the contract entitled the company to no specific location in the prescribed territory; and STRONG, J., gave a dissenting opinion.]

### 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  $\frac{1}{2}$  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

<sup>1</sup> Accord: *New Orleans Gas Co. v. Drainage Commission*, 197 U. S. 453, 25 Sup. Ct. 471, 49 L. Ed. 831 (1905) (company with exclusive franchise to use streets for gas compelled to move pipes to accommodate sewers); *Chic., etc., Ry. v. Illinois*, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Anu. Cas. 1175 (1906) (railway compelled to move bridge and culvert to accommodate increased artificial drainage into creek); *West Chic. R. R. v. Illinois*, 201 U. S. 506, 26 Sup. Ct. 518, 50 L. Ed. 845 (1906) (street railway compelled to lower tunnel under navigable river on account of increased draft of vessels).

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 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 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 bargain 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.<sup>1</sup>

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 govern-

<sup>1</sup> A state legislature cannot bind itself not to issue more bonds, or not to incur further debt. *Board of Liquidation v. McComb*, 92 U. S. 531, 535, 23 L. Ed. 623 (1875) (semble).



ment 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 acceptance 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.<sup>2</sup>

<sup>2</sup> Some earlier state decisions denied that lottery contracts similar to the one in the principal case could be impaired by subsequent legislation. *Kellum v. State*, 66 Ind. at 597 (1879); *Broadbent v. Tuskaloosa Ass'n*, 45 Ala. 170, 172 (1871); *Gregory v. Trustees*, 2 Metc. (Ky.) 589, 598 (1859).

It is generally held that statutes exempting persons from jury or militia duty after a certain period of service as firemen may validly be repealed. *State v. Cantwell*, 142 N. C. 604, 55 S. E. 820 (1906), annotated in 8 L. R. A. (N. S.) 498-500, 9 Ann. Cas. 141. So, also, an exemption based upon prior militia service. *Commonwealth v. Bird*, 12 Mass. 442 (1815). *Contra: Ex parte Goodin*, 67 Mo. 637 (1878) (fireman).

The state can make no binding agreement not to exercise its power of eminent domain. See *Long Island Water Co. v. Brooklyn*, ante, p. 663, note 1.

BUTCHERS' UNION SLAUGHTER-HOUSE, ETC., CO. v.  
CRESCENT CITY, ETC., SLAUGHTER-HOUSE CO.

(Supreme Court of United States, 1883. 111 U. S. 746, 4 Sup. Ct. 652,  
28 L. Ed. 585.)

[Appeal from United States Circuit Court for the Eastern District of Louisiana. In 1869 the Louisiana legislature granted the Crescent City Company exclusive slaughter-house privileges at New Orleans for 25 years, under a statute passed to promote the public health of the city and sustained by the federal Supreme Court in the Slaughter-House Cases, 16 Wall. 36, 21 L. Ed. 394. In 1879 a new state Constitution purported to repeal the monopoly features of all prior state charters except those of railroad companies, and in 1881 the city authorities of New Orleans, under legislative authority, opened the slaughter-house and butchering business there to general competition. The Crescent City Company sought an injunction in the above-named court against the Butchers' Union Company, which was about to enter the business in violation of the former's monopoly. This appeal was taken from the granting of the injunction.]

Mr. Justice MILLER. \* \* \* No one can examine the provisions of the act of 1869 with the knowledge that they were accepted by the Crescent City Company, and so far acted on that a very large amount of money was expended in a vast slaughter-house, and an equally extensive stock-yard and landing-place, and hesitate to pronounce that in form they have all the elements of a contract on sufficient consideration. It admits of as little doubt that the ordinance of the city of New Orleans, under the new Constitution, impaired the supposed obligation imposed by those provisions on the state, by taking away the exclusive right of the company granted to it for twenty-five years, which was to the company the most valuable thing supposed to be secured to it by the statutory contract. We do not think it necessary to spend time in demonstrating either of these propositions. We do not believe they will be controverted.

The appellant, however, insists that, so far as the act of 1869 partakes of the nature of an irrevocable contract, the legislature exceeded its authority, and it had no power to tie the hands of the legislature in the future from legislating on that subject without being bound by the terms of the statute then enacted. This proposition presents the real point in the case.

Let us see clearly what it is. It does not deny the power of that legislature to create a corporation, with power to do the business of landing live-stock and providing a place for slaughtering them in the city. It does not deny the power to locate the place where this shall be done exclusively. It does not deny even the power to give an exclusive right, for the time being, to particular persons or to a corporation to provide this stock-landing and to establish this slaughter-house.

But it does deny the power of that legislature to continue this right so that no future legislature nor even the same body can repeal or modify it, or grant similar privileges to others. It concedes that such a law, so long as it remains on the statute-book as the latest expression of the legislative will, is a valid law, and must be obeyed, which is all that was decided by this court in the Slaughter-House Cases. But it asserts the right of the legislature to repeal such a statute, or to make a new one inconsistent with it, whenever, in the wisdom of such legislature, it is for the good of the public it should be done. Nor does this proposition contravene the established principle that the legislature of a state may make contracts on many subjects which will bind it, and will bind succeeding legislatures for the time the contract has to run, so that its provisions can neither be repealed nor its obligation impaired. The examples are numerous where this has been done and the contract upheld.

The denial of this power, in the present instance, rests upon the ground that the power of the legislature intended to be suspended is one so indispensable to the public welfare that it cannot be bargained away by contract. It is that well-known but undefined power called the police power. We have not found a better definition of it for our present purpose than the extract from Kent's Commentaries in the earlier part of this opinion. "The power to regulate unwholesome trades, slaughter-houses, operations offensive to the senses," there mentioned, points unmistakably to the powers exercised by the act of 1869, and the ordinances of the city under the Constitution of 1879. While we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that, in regard to two subjects so embraced, it cannot, by any contract, limit the exercise of those powers to the prejudice of the general welfare. These are the public health and public morals. The preservation of these is so necessary to the best interests of social organization that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime.

It cannot be permitted that, when the Constitution of a state, the fundamental law of the land, has imposed upon its legislature the duty of guarding, by suitable laws, the health of its citizens, especially in crowded cities, and the protection of their person and property by suppressing and preventing crime, that the power which enables it to perform this duty can be sold, bargained away, under any circumstances, as if it were a mere privilege which the legislator could dispose of at his pleasure. This principle has been asserted and repeated in this court in the last few years in no ambiguous terms. The first time it seems to have been distinctly and clearly presented, was in the case of *Boyd v. Alabama*, 94 U. S. 645, 24 L. Ed. 302. \* \* \* [Here the court considers this case (quoting the dictum printed ante, p. 857, note), *Beer Co. v. Massachusetts*, ante, p. 857, *Stone v. Mis-*

Mississippi, ante, p. 860, and *Fertilizing Co. v. Hyde Park*, ante, p. 858.] \* \* \*

Decree reversed.

[FIELD and BRADLEY, JJ., gave concurring opinions. HARLAN and WOODS, JJ., agreed with the latter. These opinions went on the ground that the legislature, under the fourteenth amendment, could not grant a monopoly of a common employment, where the monopoly feature was only colorably related to the public health.]

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### 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 authority 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.*, ante, p. 829, *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 Court*, 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*, ante, p. 857, *Fertilizing Co. v. Hyde Park*, ante, p. 858, *Stone v. Mississippi*, supra, p. 860, and *Butch. Un. Co. v. Cres. City Co.*, ante, p. 863.]

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 of 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 abandon-

ment 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.<sup>1</sup>

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TEXAS & N. O. R. CO. v. MILLER (1911) 221 U. S. 408, 414, 415, 31 Sup. Ct. 534, 55 L. Ed. 789. The defendant railroad company was incorporated by a Louisiana statute containing a provision exempting the company from liability for the death of any person in its service, even if caused by its negligence. La. Laws 1878, No. 21, § 17, p. 267. A later Louisiana statute conferred upon certain relatives a right of action for the death of a person negligently caused by another. La. Laws 1884, No. 71, p. 94. Suit was brought against defendant in Texas, under this latter statute, for negligently causing the death of an employé in Louisiana. On writ of error, in affirming a judgment for plaintiff, Mr. Justice VAN DEVENTER said:

"The doctrine that a corporate charter is a contract which the Constitution of the United States protects against impairment by subsequent state legislation is ever limited in the area of its operation by the equally well-settled principle that a legislature can neither bargain away the police power nor in any wise withdraw from its successors the power to take appropriate measures to guard the safety, health, and morals of all who may be within their jurisdiction. *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079; *Douglas v. Kentucky*, 168 U

<sup>1</sup> Accord: See cases cited in note to *Bridge Prop'rs v. Hoboken Co.*, ante, p. 829. In *Home Teleph., etc., Co. v. Los Angeles*, 211 U. S. 265, 273, 29 Sup. Ct. 50, 53 L. Ed. 176 (1908), it was said that by contract the governmental power of rate regulation might be suspended "for a definite term, not grossly unreasonable in point of time." Compare *Minneapolis v. Minn. St. Ry.*, 215 U. S. 417, 30 Sup. Ct. 118, 54 L. Ed. 259 (1910) (upholding a 50-year contract for a 5-cent street railway fare).

S. 488, 42 L. Ed. 553, 18 Sup. Ct. 199. In the first of these cases it was said:

“Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *Salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself.”

“The fact that the provision in question was embodied in the statute incorporating the Louisiana company does not suffice to show that it became a part of the charter contract, for obviously nothing became a part of that contract that was not within the contracting power of the legislature. Such of the provisions of the statute as were within that power became both a law and a contract and were within the protection of the contract clause of the Constitution, but such of them as were not within that power became a law only, and were as much subject to amendment or repeal as if they had been embodied in a separate enactment. As was said by this court in *Stone v. Mississippi*, supra: ‘It is to be kept in mind that it is not the charter which is protected, but only any contract the charter may contain.’

“The subject to which the provision in question relates is the civil liability of a railroad company for the death of its employés, resulting from its negligence. That is a matter of public concern, and not of mere private right. It is closely connected with the safety of the employés, and undoubtedly belongs to that class of subjects over which the legislature possesses a regulatory but not a contracting power. Manifestly, therefore, the charter contract did not embrace that provision, and the contract clause of the Constitution did not prevent its repeal.”<sup>1</sup>

<sup>1</sup> Accord: *Minneapolis & St. L. Ry. v. Emmons*, 149 U. S. 364, 367, 368, 13 Sup. Ct. 870, 37 L. Ed. 769 (1893) (railroad required to fence track, despite assumed contract to contrary); *N. Y., etc., R. R. v. Bristol*, 151 U. S. 556, 567, 14 Sup. Ct. 437, 38 L. Ed. 269 (1894) (abolition of grade crossings compelled similarly); *C., B. & Q. R. R. v. Nebraska*, 170 U. S. 57, 72, 18 Sup. Ct. 513, 519, 42 L. Ed. 948 (1898) (repair of viaduct required similarly), *Shiras, J.*, saying: “Usually, where a contract, not contrary to public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms, without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing with matters and things in which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject-matter of the contract is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the legislature when exercised to protect

## GRAND TRUNK WESTERN R. CO. v. SOUTH BEND.

(Supreme Court of United States, 1913. 227 U. S. 544, 33 Sup. Ct. 303, 57 L. Ed. —.)

[Error to the Supreme Court of Indiana. In 1868 the city of South Bend, Indiana, granted to plaintiff company's predecessor the right to lay a double steam railroad track in Division street. A single track was built in 1871, and in 1881 the company condemned a strip 18 feet broad to widen said street for a double track which was then laid for half the permitted distance. In 1901, when the company was preparing to construct the remainder of said double track, then needed by its increasing business, the city repealed its former grant and obstructed the company's proceeding thereunder. The company filed a bill to enjoin such interference, alleging that the location of its freight and passenger stations made a double track on said street particularly necessary, that said street was 82½ feet wide, that there was ample room both for the tracks and for general travel, and that the use of two tracks would offer less obstruction from passing trains than when all travel both ways had to go over one track. The city's demurrer was sustained by the state courts.]

Mr. Justice LAMAR. \* \* \* Undoubtedly the railroad here took no vested interest in the maintenance of the laws or regulations in force when the ordinance was passed in 1868, but the rights acquired were subject to the power of the municipality to pass reasonable regulations necessary to secure the public safety. *Northern P. R. Co. v. Minnesota*, 208 U. S. 583, 52 L. Ed. 630, 28 Sup. Ct. 341. And while the franchise to lay and use a double track was a contract which could not be impaired, yet, as the police power remained efficient and operative, the municipality had ample authority to make regulations necessitating changes of a nature which could not have been compelled if the grant had been from it as a private proprietor. The city could therefore legislate as to crossings, grades, character of rails, rate of speed, giving of signals, and the details of operating track and train, regulating the use of the franchise, and preserving the concurrent rights of the public and the company. And, as in the viaduct cases, it might require these tracks to be lowered or elevated (*Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 42 L. Ed. 948, 18 Sup. Ct. 513); or, the franchise, and not the particular location, being the essence of the contract, the city, under the power to regulate, might compel the company to remove the tracks from the center to the side, or from the side to the center, of the street. *New Orleans Gaslight*

the public safety, health, and morals, and that clause of the federal Constitution which protects contracts from legislative action cannot in every case be successfully invoked. The presumption is that, when such contracts are entered into, it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature."



Co. v. Drainage Commission, 197 U. S. 453, 49 L. Ed. 831, 25 Sup. Ct. 471; Macon Consol. Street R. Co. v. Macon, 112 Ga. 783, 38 S. E. 60; Atlantic & B. R. Co. v. Cordele, 128 Ga. 296, 57 S. E. 493; Snouffer v. Cedar Rapids, 118 Iowa, 288 (5), 92 N. W. 79.

These, however, are examples of the persistence of the power to regulate, and do not sustain the validity of the repealing ordinance of 1901, since it is not regulative of the use, but destructive of the franchise. In every case like this, involving an inquiry as to whether a law is valid, as an exertion of the police power, or void, as impairing the obligation of a contract, the determination must depend on the nature of the contract and the right of government to make it. The difference between the two classes of cases is that which results from the want of authority to barter away the police power, whose continued existence is essential to the well-being of society, and the undoubted right of government to contract as to some matters, and the want of power, when such contract is made, to destroy or impair its obligation. *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.*, 115 U. S. 650, 29 L. Ed. 516, 6 Sup. Ct. 252.

The state, with its plenary control over the streets, had this governmental power to make the grant. There was nothing contrary to public policy in any of its terms, and being valid and innocuous, the police power could not be invoked to abrogate it as a whole or to impair it in part. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 17, 43 L. Ed. 348, 19 Sup. Ct. 77. Tracks laid in a street, under legislative authority, become legalized, and, when used in the customary manner, cannot be treated as unlawful, either in maintenance or operation. As said by this court: "A railway over \* \* \* the streets of the city of Washington may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded." *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 331, 27 L. Ed. 739, 744, 2 Sup. Ct. 719. The inconvenience consequent upon the running of a railroad through a city, under state authority, is not a nuisance in law, but is insuperably connected with the exercise of the franchise granted by the state. If the police power could lay hold of such inconveniences, and make them the basis of the right to repeal such an ordinance, the contract could be abrogated because of the very growth in population and business the railroad was intended to secure.

The power to regulate implies the existence, and not the destruction, of the thing to be controlled. And while the city retained the power to regulate the streets and the use of the franchise, it could neither destroy the public use nor impair the private contract, which, as it contemplated permanent, and not temporary, structures, granted a permanent, and not a revocable, franchise. Both the street and the railroad were arteries of commerce. Both were highways of public

utility, and both were laid out subject to the authority of the state, though the power to regulate the use of the streets has been delegated to the municipality. So that, while the company was itself authorized to select the route between the terminal points named in the charter, it could not use streets without the consent of the city through which the line ran. In determining whether they would grant or refuse that consent the municipal authorities were obliged to balance the present and prospective inconveniences of having trains operated through its streets against the advantage of having the railroad accessible to its citizens. It could have refused its consent, except on terms; it could have forced the road to the outskirts of the town, or could have permitted the company to lay tracks in the more thickly settled parts of the city. When such consent was once given, the condition precedent had been performed, and the street franchise was thereafter held, not from the city, but from the state; which, however, did not confer upon the municipality any authority to withdraw that consent, nor was there any attempt by the council to reserve such power in the ordinance itself.

It is said, however, that even if the city could not prevent the use of the rails already laid, it could repeal so much of the ordinance as related to that part of the street on which the double track had not been actually built. But this was not a grant of several distinct and separate franchises, where the acceptance and use of one did not necessarily execute the contract as to others not connected with the main object of the ordinance, and not at the time directly within the contemplation of the parties. *Pearsall v. Great Northern R. Co.*, 161 U. S. 673, 40 L. Ed. 847, 16 Sup. Ct. 705. This franchise was single and specific; and when accepted and acted upon became binding,—not foot by foot, as the rails were laid, but as an entirety. Here the company not only accepted the ordinance and constructed the road, but, relying on the franchise, acquired from the abutters by purchase or condemnation an 18-foot strip with a view of laying thereon a double track as the increase in business made that necessary. Subsequently it built the double track for a part of the distance, and has not abandoned or forfeited the right to use the balance of the easement when needed for the discharge of its public duties as a carrier. \* \* \*

The defendant relies on *Baltimore v. Baltimore Trust & G. Co.*, 166 U. S. 673, 41 L. Ed. 1160, 17 Sup. Ct. 696, where, however, the facts were materially different. For there the company had a sweeping grant to lay double tracks through many miles of the streets. The city repealed the ordinance so far as it related to a short distance in a crowded part of Lexington street, which, as appears in the original record, varied from 48 to 50 feet in width, the sidewalks being about 11 feet in width and the roadway proper being about 29 feet from curb to curb. With double tracks, there was only 7½ feet from the curb to the nearest rail, and, allowing for the overhanging of the car, this space was not wide enough to permit vans and large wagons to pass.

At some points buggies and narrow vehicles could only pass by running the wheels on the edge of the sidewalk. These facts are wholly different from the situation disclosed by this record, where the sweeping grant conferred the right to lay a single track, but the specific grant "immediately within the contemplation of the parties" (*Pearshall v. Great Northern R. Co.*, 161 U. S. 673, 40 L. Ed. 847, 16 Sup. Ct. 705) was a definite franchise to construct this particular double track between designated points on Division street, which is 82½ feet wide, or 32 feet wider than Lexington street. It is admitted that a double track has been actually used on it for more than twenty years.

The statute and the ordinance in the Baltimore Case were also materially different from those here involved. The court declined to decide whether the council had the power to make an irrevocable contract, it being sufficient to hold that the direction to lay but one track for a short distance on Lexington street did not substantially change the terms of the contract, granting such very broad and general right to lay many miles of double track throughout the city. But, regardless of the construction, there was no impairment, because of the important fact that the legislature of Maryland had ratified the street ordinance on condition that it might at any time be amended or repealed by the city council. \* \* \*

Judgment reversed.<sup>1</sup>

[DAY, J., concurs in the result on the ground that the facts stated in the complaint and admitted by the demurrer raise no presumption that the repeal was the reasonable exercise of the police power, and that nothing else is necessary to be decided. HUGHES and PITNEY, JJ., dissent.]

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### ILLINOIS CENTRAL R. CO. v. ILLINOIS.

(Supreme Court of United States, 1892. 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018.)

[Appeals from the federal Circuit Court for the Northern District of Illinois. In 1869 the Illinois legislature granted to the Illinois Central Railroad Company, its successors and assigns, in fee, all of the state's right and title to the submerged lands under Lake Michigan in the Chicago harbor for a distance of one mile from shore. Over 1,000 acres of land were included, covering all of the present and probable future harbor area at Chicago, the vessel tonnage of which port was equal to that of New York and Boston combined, amounting in 1890 to nearly 9,000,000 tons. The grant was expressly in perpetuity, but

<sup>1</sup> See also *So. Pac. Co. v. Portland*, 227 U. S. 559, 33 Sup. Ct. 308, 57 L. Ed. — (1913) (reserved power to "regulate the conduct" of a steam railroad having a street franchise does not authorize prohibition of hauling freight cars in street).

the fee of the lands was not to be aliened by the company. Other limitations are mentioned in the opinion. In 1873 the legislature repealed the grant. In 1883 bills in equity were filed in the above-named court to determine the rights of the parties in the land thus granted. The repeal was upheld and this appeal taken.]

Mr. Justice FIELD. \* \* \* The act, if valid and operative to the extent claimed, placed under the control of the railroad company nearly the whole of the submerged lands of the harbor, subject only to the limitations that it should not authorize obstructions to the harbor, or impair the public right of navigation, or exclude the legislature from regulating the rates of wharfage or dockage to be charged. With these limitations, the act put it in the power of the company to delay indefinitely the improvement of the harbor, or to construct as many docks, piers, and wharves and other works as it might choose and at such positions in the harbor as might suit its purposes, and permit any kind of business to be conducted thereon, and to lease them out on its own terms for indefinite periods. The inhibition against the technical transfer of the fee of any portion of the submerged lands was of little consequence when it could make a lease for any period, and renew it at its pleasure; and the inhibitions against authorizing obstructions to the harbor and impairing the public right of navigation placed no impediments upon the action of the railroad company which did not previously exist. \* \* \*

The question, therefore, to be considered, is whether the legislature was competent to thus deprive the state of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters; or, in other words, whether the railroad corporation can hold the lands and control the waters by the grant, against any future exercise of power over them by the state.

That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under tide water, by the common law, we have already shown; and that title necessarily carries with it control over the waters above them, whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers,

docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state. But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. \* \* \* The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. \* \* \*

Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the state can be resumed at any time. Undoubtedly there may be expenses incurred in improvements made under such a grant, which the state ought to pay; but, be that as it may, the power to resume the trust whenever the state judges best is, we think, incontrovertible. The position advanced by the railroad company in support of its claim to the ownership of the submerged lands, and the right to the erection of wharves, piers, and docks at its pleasure, or for its business in the harbor of Chicago, would place every harbor in the country at the mercy of a majority of the legislature of the state in which the harbor is situated.

We cannot, it is true, cite any authority, where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of any private corporation. But the decisions are numerous which declare that such property is held by the state, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor, and of the lands under them, is a subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental, and cannot be alienated, except in those instances mentioned, of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining. \* \* \*

[In *Newton v. Commissioners*, 100 U. S. 548, 25 L. Ed. 710, a statute, providing that an Ohio county seat should be permanently established in Canfield, Ohio, upon the fulfillment of certain conditions, was held not to bind subsequent legislatures, even after the conditions had



been fulfilled. "There could be no contract and no irrevocable law upon governmental subjects."<sup>1</sup> After referring to this case, the court continued:] As counsel observe, if this is true doctrine as to the location of a county seat, it is apparent that it must apply with greater force to the control of the soils and beds of navigable waters in the great public harbors held by the people in trust for their common use and of common right, as an incident to their sovereignty. The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it. \* \* \* There can be no irrevocable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it. \* \* \*

Decree affirmed [with certain modifications as to structures already erected by the company and not interfering with navigation].<sup>2</sup>

[SHIRAS, J., with whom concurred GRAY and BROWN, JJ., gave a dissenting opinion. FULLER, C. J., and BLATCHFORD, J., did not sit.]<sup>3</sup>

<sup>1</sup> See, also *Coyle v. Smith*, post, p. 1020.

<sup>2</sup> As to these, see *Illinois v. Ill. C. R. R.*, 184 U. S. 77, 22 Sup. Ct. 300, 46 L. Ed. 440 (1902).

<sup>3</sup> A charter power in a railway company to consolidate with parallel and competing lines may be repealed by the legislature before it has been acted on by the company. "While there is no general reservation clause in the charter of the Louisville & Nashville Company, we think, for the reasons stated in the Pearsall Case [161 U. S. 646, 16 Sup. Ct. 705, 40 L. Ed. 838], that under its police power the people, in their sovereign capacity, or the legislature as their representatives, may deal with the charter of a railway corporation so far as is necessary for the protection of the lives, health, and safety of its passengers or the public, or for the security of property or the conservation of the public interests, provided of course that no vested rights are thereby impaired."—Brown, J., in *L. & N. R. R. Co. v. Kentucky*, 161 U. S. 677, 695, 16 Sup. Ct. 714, 721, 40 L. Ed. 849 (1896). So, also, see *Bank of Commerce v. Tennessee*, 163 U. S. 416, 423-426, 16 Sup. Ct. 1113, 41 L. Ed. 211 (1896).

## SECTION 2.—OTHER RETROACTIVE LAWS

## 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. *Helmere v. Shuter et al.*, 2 Show. 17; *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 477, 485, 5 Am. Dec. 291.<sup>1</sup> 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 im-

<sup>1</sup> "The courts uniformly refuse to give to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature. In *U. S. v. Hebb*, 3 Cranch, 413, 2 L. Ed. 479, this court said that 'words in a statute ought not to have a retrospective operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied;' and such is the settled doctrine of this court. *Murray v. Gibson*, 15 How. 423, 14 L. Ed. 755; *McEwen v. Den*, 24 How. 244, 16 L. Ed. 672; *Harvey v. Tyler*, 2 Wall. 347, 17 L. Ed. 871; *Sohn v. Waterson*, 17 Wall. 599, 21 L. Ed. 737; *Twenty Per Cent. Cases*, 20 Wall. 187, 22 L. Ed. 339."—Harlan, J., in *Chew Heong v. U. S.*, 112 U. S. 536, 559, 5 Sup. Ct. 255, 266, 28 L. Ed. 770 (1884).

parting 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 law *ex post facto*, or one which impairs the obligation of contracts.<sup>2</sup> 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.

<sup>2</sup> "That there exists a general power in the state governments to enact retrospective or retroactive laws, is a point too well settled to admit of question at this day. The only limit upon this power in the states by the federal Constitution, and therefore the only source of cognizance or control with respect to that power existing in this court, is the provision that these retrospective laws shall not be such as are technically *ex post facto*, or such as impair the obligation of contracts. Thus, in the case of *Watson v. Alva*, 8 Pet. 110, 8 L. Ed. 876, the court say: 'It is clear, that this court has no right to pronounce an act of the state legislature void, as contrary to the Constitution of the United States, from the mere fact that it divests antecedent vested rights of property.'—*Daniel, J.*, in *Baltimore, etc., Ry. v. Nesbit*, 10 How. 395, 401, 402, 13 L. Ed. 409 (1850). And so *Peerce v. Kitzmiller*, 19 W. Va. 564, 572, 573 (1882), by *Johnson, P.*: "The states were not inhibited by the Constitution \* \* \* from passing laws divesting vested rights of property unless those rights [were] vested by contract." This was the situation before the fourteenth amendment.

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 neighbouring state of Massachusetts 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.<sup>3</sup> \* \* \*

New trial denied.<sup>4</sup>

[PETERS, J., thought the act unconstitutional, but concurred in the result on other grounds.]

<sup>3</sup> See *Lufkin v. Lufkin*, 182 Mass. 476, 65 N. E. 810 (1902).

<sup>4</sup> 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 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."

See, also, *Hanford, J.*, in *Plummer v. Northern Pac. Ry.*, 152 Fed. 206, 210, 211 (1907): "I hold that a retroactive statute enacted by Congress is not unconstitutional, unless its effect would be a deprivation of life, liberty, or property, contrary to the fifth amendment, and that the taking away of defenses to civil actions based upon rules of law which are purely arbitrary, e. g., the statute of limitations, would not be such a deprivation. *Campbell v. Holt*, 115 U. S. 620-634, 6 Sup. Ct. 209, 29 L. Ed. 483. The plea of contributory negligence as a defense to an action to recover damages for an alleged tortious injury, is an affirmative traverse of the plaintiff's cause of action, similar to a plea of want of consideration as a defense to an action upon an alleged contract, for if it can be established by evidence it disproves the plaintiff's case. Such a defense does not rest upon a mere arbitrary rule exempting a party from legal process to enforce an obligation, but its foundation is in reason and natural justice."

ABROGATION OF FORFEITURES AND PENALTIES.—Rights to forfeitures or penalties, under existing law, which enable a party to recover more than compensation for his actual damages, may be abrogated by retroactive statutes. *Potter v. Sturdivant*, 4 Me. (4 Greenl.) 154 (1826) (penalty for failure to file administrator's inventory); *Oriental Bank v. Freeze*, 18 Me. 109, 36 Am. Dec. 701 (1841) (breach of debtor's surety bond); *Curtis v. Leavitt*, 15 N. Y. 1, 152-156 (1857) (penalty for usury—cases); *Parmelee v. Lawrence*, 44 Ill. 405, 414-415 (1867) (right to have usurious interest, already paid, apply on principal can't be abrogated; otherwise of treble penalty). So, also, of all penalties imposed on behalf of the public, even though a private informer is entitled thereto. His right may be abrogated. *Confiscation Cases*, 7 Wall. 454, 19 L. Ed. 196 (1869); *Dyer v. Ellington*, 126 N. C. 941, 36 S. E. 177 (1900).



## DANFORTH v. GROTON WATER CO.

(Supreme Judicial Court of Massachusetts, 1901. 178 Mass. 472, 59 N. E. 1033, 86 Am. St. Rep. 495.)

[Rehearing of exceptions taken to the dismissal by the Superior Court of Danforth's petitions for a jury to assess his damages due to a taking of certain water rights in November, 1897, by defendant company under statutory authority. Petitioner's right to compensation was conditioned upon his applying first to certain county commissioners for an estimate of damages, and upon his applying for assessment of damages within one year from the taking. The petitions, filed in October, 1898, were dismissed on motion for failure to apply to said commissioners, and by that time the year had expired. On May 4, 1900, the legislature passed the act referred to in the opinion, and on May 17th the above decision of the Superior Court was affirmed by the state Supreme Court in ignorance of the passage of said act. A rehearing was then granted on the question of the effect of that act upon this case.]

HOLMES, C. J. \* \* \* The statute provides that no such petition as the present "now or hereafter pending in the Superior Court \* \* \* shall be dismissed for want of jurisdiction in said court solely on the ground that no previous application for the assessment of such damages had been made to a board of county commissioners." These words seem to us plainly to apply to the present petitions. It is true that the petitions had been ordered to be dismissed, but the orders were made subject to a report to this court, as we have said, and the cases were still pending in the Superior Court. There can be no doubt of the intent of the statute, and the only question is whether it is constitutional with regard to those who, like the respondent, at the time of its passage had a good defense. There certainly is a strong argument that as against parties in the respondent's position the act cannot be sustained.

In *Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. 209, 29 L. Ed. 483, in which it was held by a majority of the court that a repeal of the statute of limitations as to debts already barred violated no rights of the debtor under the fourteenth amendment, Mr. Justice Miller speaks as if the constitutional right relied on were a right to defeat a just debt. But the constitutional right asserted was the same that would be set up if the Legislature should order one citizen to pay a sum of money to another with whom he had been in no previous relations of any kind. Such a repeal requires the property of one person to be given to another when there was no previous enforceable legal obligation to give it. Whether the freedom of the defendant from liability is due to a technicality or to his having had no dealings with the other party, he is equally free, and it would seem logical to say that if the Constitution protects him in one case it protects him in all. With regard to

cases like *Campbell v. Holt*, under the state Constitution the later intimations of this court have been that such a repeal would have no effect. *Bigelow v. Bemis*, 2 Allen, 496, 497; *Prentice v. Dehon*, 10 Allen, 353, 355; *Ball v. Wyeth*, 99 Mass. 338, 339. See, also, *Kinsman v. Cambridge*, 121 Mass. 558; *Rockport v. Walden*, 54 N. H. 167, 20 Am. Rep. 131; *McCracken Co. v. Mercantile Trust Co.*, 84 Ky. 344, 1 S. W. 585; *Cooley, Const. Lim.* (6th Ed.) 448.<sup>1</sup>

Nevertheless in this case, as in others, the prevailing judgment of the profession has revolted at the attempt to place immunities which exist only by reason of some slight technical defect on absolutely the same footing as those which stand on fundamental grounds. Perhaps the reasoning of the cases has not always been as sound as the instinct which directed the decisions. It may be that sometimes it would have been as well not to attempt to make out that the judgment of the court was consistent with constitutional rules, if such rules were to be taken to have the exactness of mathematics. It may be that it would have been better to say definitely that constitutional rules, like those of the common law, end in a penumbra where the Legislature has a certain freedom in fixing the line, as has been recognized with regard to the police power. *Camfield v. U. S.*, 167 U. S. 518, 523, 524, 17 Sup. Ct. 864, 42 L. Ed. 260. But, however that may be, multitudes of cases have recognized the power of the Legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small.

In some such cases there has been at an earlier time an enforceable obligation, in others there never has been one, but in both classes the courts have laid hold of a distinction between the remedy and the substantive right, or have said that "a party has no vested right in a defense based upon an informality not affecting his substantial equities" (*Cooley, Const. Lim.* [6th Ed.] 454), or that "there is no such thing as a vested right to do wrong" (*Foster v. Bank*, 16 Mass. 245, 273, 8 Am. Dec. 135), or have called it curing an irregularity (*Thompson v. Lee Co.*, 3 Wall. 327, 331, 18 L. Ed. 177; *Lane v. Nelson*, 79 Pa. 407; *Randall v. Krieger*, 23 Wall. 137, 23 L. Ed. 124), or have dwelt upon the equities, meaning the moral worth of the claim that was preserved, or by one device or another have prevented a written Constitution from interfering with the power to make small repairs which a Legislature naturally would possess.

In a case which would seem almost stronger than that of a debt barred by the statute of limitations it was held that services of an unlicensed physician which could not be recovered for when rendered

<sup>1</sup> Contra to *Campbell v. Holt*, see the dissenting opinion therein, and *Board of Education v. Blodgett*, 155 Ill. 441, 447, 448, 40 N. E. 1025, 31 L. R. A. 70, 46 Am. St. Rep. 348 (1895) (citing cases); *Flngartner v. Ill. Steel Co.*, 103 Wis. 373, 79 N. W. 433, 74 Am. St. Rep. 871 (1899) (sult in foreign state). See citations of *Campbell v. Holt* in *Rose's U. S. Notes and Supplements*.

were made a good cause of action by a repeal of the statute which created the bar. *Hewitt v. Wilcox*, 1 Metc. 154. So in case of a usurious contract after a repeal of the usury law. *Ewell v. Daggs*, 108 U. S. 143, 2 Sup. Ct. 408, 27 L. Ed. 682.<sup>2</sup>

The constitutional difficulties in the way of the present statute are as small as they well can be. Its effect in saving the petitioners from being barred by the statute of limitations in the respondent's charter is only secondary and accidental. All that it does directly which is open to question is to enact that parties having a case in court shall not be turned out for neglect of what under the circumstances was a naked and useless form. The case is stronger for the petitioners than *Campbell v. Holt* or *Hewitt v. Wilcox*. The respondent had incurred a legal obligation to them which, although not contractual, was voluntary and legal, and which was entitled to the highest protection of the law, as it sprang from the exercise of eminent domain. The petitioners were enforcing the obligation in good faith. There is no especially striking equity in favor of defeating them because of a mistake of procedure, and as the Legislature now has said that they shall not be defeated, we have not much hesitation in yielding to the current of decisions and in accepting its mandate as authoritative in this case.

Motions [to dismiss] overruled.

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DUNBAR v. BOSTON & P. R. CORP. (1902) 181 Mass. 383, 384-386, 63 N. E. 916. A special act for a local improvement in Boston allowed one year for the filing of petitions for damages due to a change of street grades by certain railroad companies. This time having expired in March, 1899, a statute of May 23, 1899, extended the time until January 1, 1900. In upholding the act, HOLMES, C. J., said: "The statute assailed is of general operation, and if valid applies as well to the petitioner, who had unquestioned notice of the change

<sup>2</sup> See the cases cited in this report, upholding in general the legislative power to validate void contracts; *Matthews, J.*, saying (108 U. S. at p. 151, 2 Sup. Ct. 413, 27 L. Ed. 682): "The more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains in fieri, and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract, which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur."

Accord: *Lewis v. McElvain*, 16 Ohio, 347 (1847); *Gibson v. Hibbard*, 13 Mich. 214 (1865); *Berry v. Clary*, 77 Me. 482, 1 Atl. 360 (1885); *Danville v. Pace*, 25 Grat. (66 Va.) 1, 18 Am. Rep. 663 (1874). Compare *N. Y.*, etc., *Ry. v. Van Horn*, 57 N. Y. 473 (1874); *Lowe v. Harris*, 112 N. C. 472, 17 S. E. 539, 22 L. R. A. 379 (1893) (attempted validation of land contract void under statute of frauds).

of grade by the actual completion of the work before the year expired, as to possible cases of persons who might have found their remedy gone before they knew that anything affecting their rights had been done. In such a case, apart from the authorities, it is impossible not to feel the greatest difficulty in sustaining the act. The nature of the difficulty is indicated in *Danforth v. Water Co.*, 178 Mass. 472, 59 N. E. 1033, 86 Am. St. Rep. 495. However much you may disguise or palliate the change by saying that the statute deals only with the remedy, or that a party has no vested right to a merely technical defense, or by adopting any other cloudy phrase that keeps the light from the fact, such legislation does enact that the property of a person previously free from legal liability shall be given to another who before the statute had no legal claim. It is not merely as it was put by the counsel for the defendant, following the cases, that the defense is as valuable and as much entitled to protection as the claim, if that be true, but the effect of the statute by enabling the barred claim to be collected is to allow property of the defendant to be appropriated which before was free. *Woodward v. Railroad Co.*, 180 Mass. 599, 62 N. E. 1051. It is true that the property is not identified until it is seized on execution, but when it is identified by seizure it is taken as truly as land would be if it were allowed to be recovered in a real action notwithstanding the lapse of twenty years.

"In the present case there is not the excuse apparent that the statute cured an earlier injustice, as might be the case where a petitioner had had no actual notice of the loss of any rights until he was too late. It cannot be said in more general terms that a statute of limitations as such embodies an arbitrary or merely technical rule. Prescription and limitation are based on one of the deepest principles of human nature, the working of association with what one actually enjoys for a long time, whatever one's defects of title may be, and of dissociation from that of which one is deprived, whatever may be one's rights. The mind like any other organism gradually shapes itself to what surrounds it, and resents disturbance in the form which its life has assumed. In cases like the present when the period of limitation is short no doubt other but also important elements are predominant,—the desirableness for business reasons of getting a quasi public transaction finished,—but whatever the details, the principle involved is as worthy of respect as any known to the law.

"Nevertheless in *Danforth v. Water Co.*, 178 Mass. 472, 59 N. E. 1033, 86 Am. St. Rep. 495, it was held that a statute was constitutional which removed the bar of an earlier statute under circumstances where, according to the language of the later act and the cases, the lapse of time had destroyed the jurisdiction of the court. *Id.*, 176 Mass. 118, 57 N. E. 351; *Riley v. City of Lowell*, 117 Mass. 76; *City of Cambridge v. Middlesex Co. Com'rs.* *Id.* 79, 83. So, whatever may be said of the reasoning by which the decision was reached, it was held in *Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. 209, 29

L. Ed. 483, that the fourteenth amendment does not prevent the removal of the bar from a personal debt. Without repeating what we have said so recently, it is enough to say that the constitutional provisions allow a certain limited degree of latitude in dealing with cases where remedies have been extinguished by lapse of time when the seeming infraction of right is not very great, and when justice requires relief. It is unnecessary to go so far as *Campbell v. Holt*. But in a case of this kind, where the original time allowed after actual notice was very short and may have seemed to the legislature inadequate, where the extension was granted within little more than two months of the time when it could have been granted without question and not improbably before the transaction as a whole had been finished, where the plaintiff's claim is held to be barred only by a somewhat doubtful inference and where in short we cannot say that the legislature with its larger view of the facts may not have been satisfied that substantial justice required its action, we are not prepared to pronounce the statute unconstitutional in the face of the most authoritative decisions. We regard this case as distinguishable from a wholesale attempt to relieve from the effect of open and adverse possession of land for twenty years, and even as distinguishable from the similar attempt with regard to debts upheld in *Campbell v. Holt*. As yet it is not necessary for us to choose between that decision and the weighty intimations to the contrary in this court and elsewhere." <sup>1</sup>

<sup>1</sup> "By the long and undisturbed possession of tangible property, real or personal, one may acquire a title to it, or ownership, superior in law to that of another, who may be able to prove an antecedent and at one time paramount title. This superior or antecedent title has been lost by the laches of the person holding it, in failing within a reasonable time to assert it effectively; as, by resuming the possession to which he was entitled, or asserting his right by suit in the proper court. What the primary owner has lost by his laches, the other party has gained by continued possession, without question of his right. This is the foundation of the doctrine of *prescription*, a doctrine which, in the English law, is mainly applied to incorporeal hereditaments, but which, in the Roman law, and the codes founded on it, is applied to property of all kinds. \* \* \* Possession has always been a means of acquiring title to property. It was the earliest mode recognized by mankind of the *appropriation* of anything tangible by one person to his own use, to the exclusion of others, and legislators and publicists have always acknowledged its efficacy in confirming or creating title. \* \* \* It may, therefore, very well be held that in an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, that such act deprives the party of his property without due process of law. The reason is that, by the law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this title to plaintiff would be to deprive him of his property without due process of law. But we are of opinion that to remove the bar which the statute of limitations enables a debtor to interpose to prevent the payment of his debt stands on very different ground."—Miller, J., in *Campbell v. Holt*, 115 U. S. 620, 622-624, 6 Sup. Ct. 209, 29 L. Ed. 483 (1885). The court's view as to tangible property is generally followed.

RETROACTIVE CHANGES IN TENURE OF PROPERTY AND IN EXPECTANT INTERESTS.—Existing estates tail may be turned into fees by the legislature.



### STEGER v. TRAVELING MEN'S BUILDING & LOAN ASS'N.

(Supreme Court of Illinois, 1904. 208 Ill. 236, 70 N. E. 236, 100 Am. St. Rep. 225.)

[Appeal from Superior Court of Cook County. On June 18, 1894, Joseph Strozewski and his wife gave a trust deed upon their homestead estate to secure \$3,300 loaned to them by the Traveling Men's Building & Loan Association. This trust deed was invalidly acknowledged before a notary who was an officer and stockholder in said association, and therefore created no lien upon the homestead under the law then in force. On August 2, 1894, a second validly executed trust deed was given by the Strozewskis to one Gilman, trustee, to secure four notes, aggregating \$443, given to contractors in part payment of a building erected on the premises, and two other unsecured notes were also given for work on the building. The payees of these notes knew of the prior trust deed. On October 28, 1895, judgment was recovered on the two latter notes and execution levied upon the homestead. On November 20, 1901, the Building Association began suit to foreclose its trust deed. On July 21, 1902, Steger purchased the judgment and the notes secured by the Gilman trust deed. On May 15, 1903, the legislature enacted a statute curing the defective acknowledgment of the first trust deed. The Superior Court held that this made said deed a first lien and decreed accordingly in the foreclosure suit. Other facts appear in the opinion.]

Mr. Justice CARTWRIGHT. \* \* \* The trust deed securing the building association, when executed, was null and void as to the estate of homestead (Ogden Building & Loan Ass'n v. Mensch [196 Ill. 554, 63 N. E. 1049, 89 Am. St. Rep. 330]), and so remained until the curative act of 1903 took effect. The Gilman trust deed and the judgment are prior liens on the homestead estate, unless that act had a retroactive effect to validate the lien of the building association from

Carroll v. Olmsted, 16 Ohio, 251 (1847); De Mill v. Lockwood, 3 Blatchf. 56, Fed. Cas. No. 3,782 (1853); and a grant in fee by a tenant in tail may be later confirmed by statute, Comstock v. Gay, 51 Conn. 45 (1883). Joint tenancies may be turned into tenancies in common, Head v. Amoskeag Co., ante, p. 526, note 1; or may be sold and the proceeds divided, Richardson v. Monson, 23 Conn. 94 (1854). Compare Sohler v. Mass. Hospital, 3 Cusb. (Mass.) 483 (1849); Brevoort v. Grace, 53 N. Y. 245 (1873); Linsley v. Hubbard, 44 Conn. 109, 26 Am. Rep. 431 (1876).

Interests in property acquired through the marital relation cannot be abrogated, once they have vested. As to when such vesting takes place in respect of various interests, see Hershizer v. Florence, 39 Ohio St. 516 (1883) (estate jure uxoris); Rose v. Rose, 104 Ky. 48, 46 S. W. 524, 41 L. R. A. 353, 84 Am. St. Rep. 430 (1898) (same, and chattels of wife); Westervelt v. Gregg, 12 N. Y. 202, 62 Am. Dec. 160 (1854) (chooses in action of wife); Alexander v. Alexander, 85 Va. 353, 370, 7 S. E. 335, 1 L. R. A. 125 (1888) (same—cases; and curtesy); McNeer v. McNeer, 142 Ill. 388, 32 N. E. 681, 19 L. R. A. 256 (1892) (curtesy); Noel v. Ewing, 9 Ind. 37 (1857) (dower); Randall v. Krieger, 23 Wall. 137, 148, 23 L. Ed. 124 (1875) (dower); Strong v. Clem, 12 Ind. 37, 74 Am. Dec. 200 (1859) (intervening purchasers protected). Cases on all points are collected in 19 L. R. A. 256-259.

the time of the original transaction. The validity of that act is attacked by appellant on several grounds. It is first contended that it is not a law, but a mere legislative direction to the courts to decide and adjudge in a particular manner, and is therefore an invasion of the province of the judicial department. The act provides, \* \* \* [in substance, that all written instruments affecting real estate in the state, wherein a corporation was a party, which have been acknowledged before a proper officer in conformity to the statutes of the state, "shall be adjudged and treated by all courts of this state as legally executed and acknowledged," notwithstanding said officer was at the time an officer or stockholder of such corporation, and all such prior acknowledgments "are hereby legalized."] There is language in the act which, standing alone, might be interpreted as a mandate of the Legislature to decide cases arising prior to the enactment according to the legislative will. The Legislature cannot exercise judicial power, either directly or through a legislative command; but the substance of this act is that acknowledgments taken before an officer or stockholder of a corporation shall be legal and valid, and that acknowledgments so taken before the passage of the act are legalized. That is not an exercise of judicial power, since it does not purport to settle suits or controversies, but only gives effect to acknowledgments in a matter under the legislative control.<sup>1</sup> The Legislature might doubtless have provided by a prior law that an acknowledgment could lawfully be taken before an officer or stockholder of a corporation, and the act goes no further than to bind the mortgagor where the acknowledgment is void by reason of personal disability of the officer to take it. The Legislature may ratify and confirm any act which it might lawfully have authorized in the first instance, where the defect arises out of the neglect of some legal formality and the curative act interferes with no vested rights.<sup>2</sup> *United States Mortgage Co. v. Gross*, 93 Ill. 483. \* \* \*

<sup>1</sup> Accord: *Singer Mfg. Co. v. McCollock* (C. C.) 24 Fed. 667 (1884). *Contra*: *Commonwealth v. Warwick*, 172 Pa. 140, 33 Atl. 373 (1895) (similar language held an exercise of judicial power).

<sup>2</sup> "All acts curing irregularities in legal proceedings necessarily divest vested rights of the parties, by closing the mouths of those who could otherwise avail themselves of such irregularities to escape from the fulfillment of what is a moral obligation; and, but for the irregularity, would be a legal liability. So wherever formal defects in the execution or acknowledgment of deeds, mortgages, or other conveyances, are remedied by legislation, those who might have pleaded and relied on such defects are debarred of that which would otherwise have been a legal vested right. To deny the validity of such laws would be to run the ploughshare through hundreds of titles which are founded and repose in security upon them. Thus an act, curing an irregularity in the entry of a judgment, was held to be within the legitimate province of the legislature in *Underwood v. Lilly*, 10 Serg. & R. (Pa.) 97. The various acts passed at different times, rendering valid defective acknowledgments of deeds by married women, whether merely to bar the right of dower or to convey their own estate in fee simple, so as to make such deeds, which would otherwise be void, good against them and their heirs, have been solemnly decided to be constitutional in *Tate v. Stooltzfoos*, 16 Serg. & R. (Pa.) 35, 16 Am. Dec. 546, and *Mercer v. Watson*, 1 Watts (Pa.) 330. In the case last cited

The third proposition we consider sound, and it is that the act cannot have the effect to deprive appellant of his vested rights, and transfer them to the building association, which would constitute a taking of property without due process of law. Under the law of the land the building association had no lien on the homestead prior to the passage of the curative act of 1903. After the execution of the trust deed securing the building association, Strozewski was still vested with a perfect, unincumbered title to the estate of homestead; and on August 2, 1894, that estate was conveyed to Gilman, in trust to secure the holders of the four notes. The judgment was recovered on two notes given for improving the homestead, and a levy was made on the homestead estate under an execution issued on that judgment. Under the law the judgment was a second lien on the homestead. A mortgage lien and a judgment which is a lien are each vested rights of property, and in this case both had become vested before the passage of this act. It is not within the power of the Legislature to transfer such vested rights from one to another. *Lane v. Soulard*, 15 Ill. 123; *Russell v. Rumsey*, 35 Ill. 362; *Conway v. Cable*, 37 Ill. 82, 87 Am. Dec. 240; *Rose v. Sanderson*, 38 Ill. 247. To make vested prior liens inferior and subsequent to a trust deed which was not a lien when such rights vested would be to transfer property from one to another by legislative enactment. Appellant was purchaser of the securities, pendente lite, and took them subject to all equities existing against them in the hands of his assignors, and subject to any decree which might have been entered against such assignors. Perhaps this would have been the case whether he purchased during the pendency of the suit or before. At any rate, it cannot be denied that he took the liens subject to any equities existing against the original holders. The building association, however, had no equities which could overcome the legal and equitable rights of appellant's assignors. Much of the argument on behalf of appellees relates to such supposed equities treated as synonymous with natural justice, but it must be remembered that, while equity is based upon

the heirs of the wife had recovered the land and remained in possession of it seventeen years; when, after the passage of an act curing the defect, the alienee brought ejectment, and judgment was finally given in his favor."—*Grim v. Weissenberg School Dist.*, 57 Pa. 433, 435, 436, 98 Am. Dec. 237 (1868), by Sharswood, J.

**TRANSFERS AT DEATH.**—Wills, defective either in mode of execution or in legality of disposition of property, may not be validated after the testator's death. *Greenough v. Greenough*, 11 Pa. 489, 51 Am. Dec. 567 (1849) (defective execution); *Alter's Appeal*, 67 Pa. 341, 5 Am. Rep. 433 (1871) (execution of wrong instrument); *Hillyard v. Miller*, 10 Pa. 326 (1849) (creation of void trust); *Southard v. Cent. R. R.*, 26 N. J. Law. 13 (1856) (property not devisable); *State v. Warren*, 28 Md. 338 (1867) (legatee not yet incorporated). Nor may the rules of inheritance be changed after descent cast. *Norman v. Helst*, 5 Watts & S. (Pa.) 171, 40 Am. Dec. 493 (1843); *Rock Hill College v. Jones*, 47 Md. 1 (1877). Of course, where the testator is still living, legislation may validly affect wills previously executed. *Loveren v. Lauprey*, 22 N. H. 434 (1851) (although retroactive laws expressly forbidden). See *Hoffman v. Hoffman*, 26 Ala. 535 (1855) (construction of such statutes).

moral right and natural justice, it is not coextensive with them. Equities are rights which are established and enforced in accordance with the principles of equity jurisprudence under some general principle or acknowledged rule governing courts of equity. 1 Pom. Eq. Jur. 46, 47. The building association did not, by virtue of its loan or its trust deed, acquire any equitable estate in the homestead. No court of equity would think of decreeing an equitable estate in a homestead under a mortgage which in the law did not create any lien. All deeds or instruments of writing for the alienation of a homestead are invalid unless the homestead is released in the manner prescribed by the statute, and, if a mortgage contains no release or waiver of the homestead, a court of equity cannot make the mortgage effectual against such estate. *Stodalka v. Novotny*, 144 Ill. 125, 33 N. E. 534. The lien of the building association was subject to the homestead estate of *Strozewski*, but in the trust deed to *Gilman* the homestead was released and waived, and in such a case the second mortgage is entitled to priority over the first to the extent of \$1,000. *Shaver v. Williams*, 87 Ill. 469; *Eldridge v. Pierce*, 90 Ill. 474. The act can have no effect as against subsequent bona fide purchasers, who cannot be deprived of their property by legislative enactment. The right of a person having a vested interest is secure against any act of the Legislature. *Cooley's Const. Lim.* 378; *Fisher v. Green*, 142 Ill. 80, 31 N. E. 172. It would not be contended that, if *Strozewski* had conveyed the premises to a third person, the Legislature could deprive him of his title by validating the acknowledgment, so that the homestead estate could be appropriated to the payment of the debt to the building association. In the case of *United States Mortgage Co. v. Gross*, supra, it was held competent for the Legislature to validate a mortgage by a curative act, on the ground that the purchaser had no vested right to keep property released from a debt which he was paid for assuming. It would have been inequitable and unjust to permit a purchaser to hold valuable property discharged of a debt which was a large portion of the purchase price, and which he had agreed to pay. There are no such equities in this case. \* \* \*

Decree reversed.<sup>3</sup>

<sup>3</sup> Accord: *Merchants' Bank v. Ballou*, 98 Va. 112, 32 S. E. 481, 44 L. R. A. 306, 81 Am. St. Rep. 715 (1899) (intervening judgment lien).

Contra: *Evans-Snyder-Buel Co. v. McFaddin*, 105 Fed. 293, 44 C. C. A. 494, 58 L. R. A. 900 (1900) (attachment lien and judgment thereunder), affirmed in 185 U. S. 505, 22 Sup. Ct. 758, 46 L. Ed. 1012 (1902). As to attachment liens, see 105 Fed. at 297-299, 44 C. C. A. 494, 58 L. R. A. 900, and cases cited; and as to mechanics' liens, *Wilson v. Simon*, 91 Md. 1, 45 Atl. 1022, 80 Am. St. Rep. 427 (1900) (citing cases).

In *McFaddin v. Evans-Snyder-Buel Co.*, 185 U. S. 505, 511, 22 Sup. Ct. 758, 760, 46 L. Ed. 1012 (1902), *Shiras, J.*, said: "The condition of the [attachment-judgment creditor] is very different from that of a purchaser for a valuable consideration without notice of an alleged prior incumbrance. It cannot be said that they parted with any money or other valuable consideration in reliance upon the disclosures of the registry record. The indebtedness of *Blocker* to them had accrued years before. If the problem were made to turn

SHONK v. BROWN (1869) 61 Pa. 320, 327. Land was devised to a married woman for her separate use, without power to convey during her coverture. Invalidly purporting to act under a married women's property act, the devisee conveyed the land to one Dorrance and died before her husband. An act of the legislature undertook to confirm her deed. Her heirs succeeded in an action of ejectment against the transferee of Dorrance; AGNEW, J., saying:

"Many cases have been cited to prove that this legislation is merely confirmatory and valid, beginning with *Barnet v. Barnet*, 15 Serg. & R. 72, 16 Am. Dec. 516, and ending with *Journey v. Gibson*, 6 P. F. Smith (56 Pa.) 57. The most of them are cases of the defective acknowledgments of deeds of married women. But there is a marked difference between them and this. In all of them there was a power to convey, and only a defect in the mode of its exercise. Here there is absolute want of power to convey in any mode. In ordinary cases a married woman has both the title and the power to convey or to mortgage her estate, but is restricted merely in the manner of its exercise. This is a restriction it is competent for the legislature to remove, for the defect arises merely in the form of the proceeding and not in any want of authority. Those to whom her estate descends, because of the omission of a prescribed form, are really not injured by the validation. It was in her power to cut them off, and in truth and conscience she did so, though she failed at law. They cannot complain, therefore, that the legislature intervenes to do justice. But the case before us is different. Mrs. Atherton had neither the right nor the power during coverture to cut off her heirs. She was forbidden by the law of the gift which the donor impressed upon it to suit his own purposes. Her title was qualified to this extent. Having done an act she had no right to do there was no moral obligation for the legislature to enforce. Her heirs have a right to say: 'This was our grandfather's will. The estate was vested in us because there was no power to prevent it in accordance with his will. The legisla-

upon the equities between the two classes of creditors, the solution would be an easy one. With the legal title to the property in the common debtor, no court of equity would prefer the lien of a mere attachment to that of a prior mortgage given to secure the money advanced to purchase the property. If the attachment creditor had actual knowledge of the existence and nature of the mortgage. And we agree with the circuit court of appeals, that while it is not necessary to enter into the question of the comparative equities of the parties, yet, when the validity of the curative act is to be passed upon, that, in circumstances like those of the present case, the act cannot be justly impugned as depriving the attaching creditor of property within the meaning of the Constitution."

The rights of intervening purchasers for value cannot be cut off by the retroactive validation of prior transactions. *Bolton v. Johns*, 5 Pa. 145, 47 Am. Dec. 404 (1847) (purchaser's notice of prior invalid transaction immaterial); *Meighen v. Strong*, 6 Minn. 177 (Gil. 11), 80 Am. Dec. 441 (1861) (same); *Brinton v. Seevers*, 12 Iowa, 389 (1861).



ture cannot take our estate and vest it in another who bought it with notice on the face of his title that our mother could not convey to him.'"

### LANE v. NELSON.

(Supreme Court of Pennsylvania, 1875. 79 Pa. 407.)

[Error to Court of Common Pleas of Jefferson county. Upon the death of John Nelson, the Orphans' Court of that county ordered his real estate sold to pay his debts, all parties and the court supposing the land to be in that county. Patton bought the land at this sale and his title came to Lane. Some years later it was discovered that the land was in Clearfield county, and Nelson's heirs began an ejectment suit to recover it. While the suit was pending the legislature validated the above sale. The plaintiffs received a verdict, and Lane took this writ of error. Other facts appear in the opinion.]

PAXSON, J. It is settled by a current of authority that the legislature cannot, by an arbitrary edict, take the property of one man and give it to another; and that when it has been attempted to be taken by a judicial proceeding, as a sheriff's sale, which is void for want of jurisdiction, it is not in the power of the legislature to infuse life into that which is dead. *Norman v. Heist*, 5 Watts & S. 171, 40 Am. Dec. 498; *Greenough v. Greenough*, 1 Jones (11 Pa.) 489, 51 Am. Dec. 567; *De Chastellux v. Fairchild*, 3 Harris (15 Pa.) 18, 53 Am. Dec. 570; *Menges v. Dentler*, 9 Casey (33 Pa.) 495, 75 Am. Dec. 616; *Baggs' Appeal*, 7 Wright (43 Pa.) 512, 82 Am. Dec. 583; *Schafer v. Eneu*, 4 P. F. Smith (54 Pa.) 304; *Shonk v. Brown*, 11 P. F. Smith (61 Pa.) 320; *Richards v. Rote*, 18 P. F. Smith (68 Pa.) 248; *Hegarty's Appeal*, 25 P. F. Smith (75 Pa.) 503. To exercise judicial powers is not within the legitimate scope of legislative functions; and when vested rights are divested by acts of that character they will and ought to be judged inoperative, null and void. *Baggs' Appeal*. On the other hand, if an Act of Assembly is strictly within the scope of legislative power, it is not a valid objection that it divests vested rights. \* \* \*

Legislation of the character referred to is no novelty in this state. We have numerous instances in which it has been invoked for a great variety of purposes. In some cases it has been sustained, and in others declared unconstitutional. The boundary line between the domains of authorized and prohibited legislation is not very clearly defined. Acts of Assembly passed at different times to render valid defects in acknowledgment of deeds have been sustained, although the effect of them was to interfere with vested rights. *Tate v. Stooltzfoos*, 16 Serg. & R. 35, 16 Am. Dec. 546; *Mercer v. Watson*, 1 Watts, 330. In like manner Acts of Assembly, to remedy defects in judicial proceedings, have been held to be valid. Thus an act curing an irregu-

larity in the entry of a judgment was held to be within the legitimate province of the legislature. *Underwood v. Lilly*, 10 Serg. & R. 97.<sup>1</sup> In *Bleakney v. Bank of Greencastle*, 17 Serg. & R. 64, 17 Am. Dec. 635, an act validating suits pending was sustained. In *Estep v. Hutchman*, 14 Serg. & R. 435, a private act, authorizing a guardian to convey land sold by the father of his ward and paid for by the purchaser, was sustained. In the case of *Turnpike Company v. Commonwealth*, 2 Watts, 433, the broad principle is asserted that where a right exists, but no remedy to enforce it, it is within the constitutional power of the legislature to provide one. In *Smith v. Merchand's Executors*, 7 Serg. & R. 260, 10 Am. Dec. 465, an act to enable purchasers of defective tax titles to recover back from the county commissioners what they had paid over and above the taxes, was sustained, though the purchaser had no previous title to recover. In *Grim v. Weissenberg School District* [7 P. F. Smith (57 Pa.) 433, 98 Am. Dec. 237] an illegal tax had been collected, under protest; after the party had brought suit to recover it back, an act legalizing the tax was passed, and it was held that the act defeated the cause of action, and was not unconstitutional for the reason that the legislature having the power antecedent to authorize the tax, could cure any irregularity or want of authority in levying it by a retroactive law.

While the legislature may not by a retroactive law render valid judicial proceedings which were utterly void for want of jurisdiction, as in *Richards v. Rote*, before cited, it is equally clear that in cases where the jurisdiction has attached, and there has been a formal defect in the proceedings, where the equity of the party is complete, and all that is wanted is legal form, it is within the recognized power of the legislature to correct such defect and to provide a remedy for the legal right. The Orphans' Court of Jefferson county had jurisdiction in this matter. Having jurisdiction over the accounts of the administrator it had the right to order a conversion of the real estate of the decedent for the payment of his debts. It is true, that as to land lying in Clearfield county, the Orphans' Court of Jefferson county could not consummate the conversion of the real estate in Clearfield county into money without the aid of the Orphans' Court of the latter county. But in this matter the Orphans' Court of Clearfield county is merely ancillary to the Orphans' Court of Jefferson; the latter court is the actor, but it uses the hand of the Orphans' Court of Clearfield to execute its decree. It is an undisputed fact, that at the time of the Or-

<sup>1</sup> Judgments invalid for mere irregularities may be retroactively cured by statute, *Walpole v. Elliott*, 18 Ind. 258, 81 Am. Dec. 358 (1862); *Muncie Bank v. Miller*, 91 Ind. 441 (1883); *Tilton v. Swift & Co.*, 40 Iowa, 78 (1874); but it is commonly said that this may not be done where the court was without jurisdiction, *Richards v. Rote*, 68 Pa. 248 (1871); *Pryor v. Downey*, 50 Cal. 388, 19 Am. Rep. 656 (1875) (cases); *State v. Doherty*, 60 Me. 504 (1872) (criminal proceedings). But see *Mechanics' Bank v. Union Bank*, 22 Wall. 276, 298, 22 L. Ed. 871 (1857); *Simmons v. Hanover*, 23 Pick. (Mass.) 188 (1839). Compare *Meigs v. Roberts*, post, p. 902, note, and comment as to the meaning of "jurisdictional."

phans' Court sale it was not known to the counsel, the parties, or the court, that the land described in the petition was situated wholly in Clearfield county. It was not known until long after the sale had been made and confirmed and the purchase money paid. The purchase money was properly applied to the payment of the decedent's debts. We have here the case of a defect in a judicial proceeding in a case in which the court had jurisdiction, with a complete equitable right in the purchaser at the Orphans' Court sale, but without any legal form or remedy by which such right may be asserted and sustained. The Act of Assembly does no more than provide such legal remedy. It interferes with no man's right. It does not take the property of one person and give it to another. It is true, it does prevent the plaintiffs below from wresting property for which they have paid nothing from the hands of honest holders who have paid full value. The plaintiffs are mere volunteers. It is true, that upon the death of John Nelson, his real estate descended to and vested in his heirs. But it vested in them subject to the payment of his debts. It was sold under the authority of a judicial decree for that purpose; that the proceedings were technically defective, and have been validated by a legislative enactment, works no injustice to any of the heirs-at-law of John Nelson. \* \* \*

Judgment reversed.<sup>2</sup>

[MERCUR, J., dissented.]

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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 per-

<sup>2</sup> Accord: *Menges v. Wertman*, 1 Pa. 218 (1845) (sheriff's deed on mortgage foreclosure to land in next county) [but see *Dale v. Medcalf*, 9 Pa. 108 (1848); *Menges v. Dentler*, 33 Pa. 495, 75 Am. Dec. 616 (1859)]; *Beach v. Walker*, 6 Conn. 190 (1826) (sheriff's conveyance on execution sale, amount of just but illegal fees being added); *Smith v. Callaghan*, 66 Iowa, 552, 24 N. W. 50 (1885) (executor's conveyance under power of sale, without required order of court); *Kearney v. Taylor*, 15 How. 494, 14 L. Ed. 787 (1853) (irregular deed at sale under order of probate court).

See *Finlayson v. Peterson*, 5 N. D. 587, 592, 67 N. W. 953, 33 L. R. A. 532, 57 Am. St. Rep. 584 (1896) (mortgage foreclosure cannot be validated where notice of sale published shortly less than statutory period), *Corliss, J.*, admitting, however, that even a void proceeding, except a judicial proceeding void for want of jurisdiction, could be validated, "if it would be grossly unjust for the person against whom the healing law is directed to insist upon his purely technical rights, destitute of all equity. But the case should be a clear one."

sons 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. \* \* \*

"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.]<sup>1</sup>

<sup>1</sup> Accord (abrogation of right of action by ratification of unauthorized act of governmental agent): *Prize Cases*, 2 Black, 635, 670, 671, 17 L. Ed. 459 (1863); *Mitchell v. Clark*, 110 U. S. 633, 639, 640, 4 Sup. Ct. 170, 312, 28 L. Ed. 279 (1884) (acts of military officers during Civil War); *Tiaco v. Forbes*, 228 U. S. 549, 556, 33 Sup. Ct. 585, 57 L. Ed. — (1913) (deportation of alien from Philippines—cases). Compare *McLeod v. U. S.*, 229 U. S. 416, 33 Sup. Ct. 955, 57 L. Ed. — (1913). In *Mitchell v. Clark*, above, Miller, J., said (110 U. S. page 640, 4 Sup. Ct. 173, 28 L. Ed. 279): "That an act passed after the event, which in effect ratifies what has been done, and declares that no suit shall be sustained against the party acting under color of authority, is valid, so far as Congress could have conferred such authority before, admits of no reasonable doubt. These are ordinary acts of indemnity passed by all governments when the occasion requires it."

In *Ettor v. Tacoma*, 228 U. S. 148, 33 Sup. Ct. 428, 57 L. Ed. — (1913), a city street grade was changed, damaging an abutting owner, while a statute was in force requiring the city to pay such damage. But for such statute there would have been no liability. It was held that the state could not abrogate this liability, once accrued, *Lurton, J.*, saying (228 U. S. pages 154, 156-158, 33 Sup. Ct. 430, 431, 57 L. Ed. —): "The defense of the city, that it was but the agent of the state in improving the highways of the city, and therefore immune, because the state was immune, vanishes in the face of the fact that the state had absolutely coupled authority in the matter with an obligation to make compensation. The city had no authority save that which came from the very act which imposed an obligation. \* \* \* The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act,—a right which was in every sense a property right. Nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation. *Elgin v. Eaton*, 53 Ill. 535, 25 Am. Rep. 412; *Healey v. New Haven*, 49 Conn. 394; *Harrington v. Berkshire*, 22 Pick. (Mass.) 263, 33 Am. Dec. 741; *People ex rel. Fountain v. Westchester County*, 4 Barb. (N. Y.) 64, are cases arising under street or highway statutes. The principle has been applied in reference to rights accruing under a variety of statutes when affected by a subsequent change of the law. *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. 450, 17 L. Ed. 805; *Miller v. Union Mill Co.*, 45 Wash. 199, 88 Pac. 130; *Grey v. Mobile Trade Co.*, 55 Ala. 388, 28 Am. Rep. 729; *Stephens v. Marshall*, 3 Pin. (Wis.) 203; *Gorman v. McArdle*, 67 Hun, 484, 22 N. Y. Supp. 479; *Westervelt v. Gregg*, 12 N. Y. 202, 62 Am. Dec. 160; *Creighton v. Pragg*, 21 Cal. 115; *State Trust Co. v. Kansas City, P. & G. R. Co.*, 115 Fed. 367. \* \* \* In the instant case the action is neither for a tort, nor for a penalty, nor for a forfeiture, but for injury to property, actually accomplished before the repeal of the law under which the street was graded, which required compensation to be made. The right to compensation was a vested property right."

Similarly, an exemption from land taxation, granted to Indians by Congress



for 21 years as part of a contract, cannot be repealed. *Choate v. Trapp*, 221 U. S. 665, 673, 674, 32 Sup. Ct. 565, 568, 56 L. Ed. 941 (1912); *Lamar, J.*, saying: "The provision that the land should be nontaxable was a property right, which Congress undoubtedly had the power to grant. \* \* \* Under the provisions of the fifth amendment there was no more power to deprive him of the exemption than of any other right in the property."

In *Kay v. Penn. Ry.*, 65 Pa. 269, 3 Am. Rep. 628 (1870), it was held that a right of action to recover \$8,000 actual damages suffered through negligent injury could not be retroactively restricted to \$3000. See *Angle v. Chicago, etc., Ry.*, 151 U. S. 1, 19, 14 Sup. Ct. 240, 38 L. Ed. 55, (1894) (right of action for tort of inducing breach of contract is property which legislature may not destroy).

**RETROACTIVE LAWS AFFECTING PENDING SUITS.**—The pendency of suit, or even a judgment therein (a right of appeal or rehearing persisting), does not abridge the legislative power retroactively to affect rights involved. *McFadden v. Evans-Snyder-Buel Co.*, 185 U. S. 505, 511-514, 22 Sup. Ct. 758, 46 L. Ed. 1012 (1902) (validating prior lien—cases); *Retler v. Harris*, 223 U. S. 437, 32 Sup. Ct. 248, 56 L. Ed. 497 (1912) (changing rules of evidence). The eleventh amendment operated retroactively upon all pending suits. *Hollingsworth v. Va.*, 3 Dall. 378, 1 L. Ed. 644 (1798).

**RETROACTIVE LAWS AVOIDING FINAL JUDGMENTS.**—In *Stephens v. Cherokee Nation*, 174 U. S. 445, 478, 19 Sup. Ct. 722, 43 L. Ed. 1041 (1899) [affirmed in *Wallace v. Adams*, 204 U. S. 415, 27 Sup. Ct. 363, 51 L. Ed. 547 (1907)], *Fuller, C. J.*, said (sustaining the allowance by Congress of further appeals from judgments of federal territorial courts which had become final upon questions of citizenship in Indian tribes): "While it is undoubtedly true that legislatures cannot set aside the judgments of courts, compel them to grant new trials, order the discharge of offenders, or direct what steps shall be taken in the progress of a judicial inquiry, the grant of a new remedy by way of review has been often sustained under particular circumstances. *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648; *Sampeyreac v. U. S.*, 7 Pet. 222, 8 L. Ed. 665; *Freeborn v. Smith*, 2 Wall. 160, 17 L. Ed. 922; *Garrison v. City of New York*, 21 Wall. 196, 22 L. Ed. 612; *Freeland v. Williams*, 131 U. S. 405, 9 Sup. Ct. 763, 33 L. Ed. 193; *Board v. Skinkle*, 140 U. S. 334, 11 Sup. Ct. 790, 35 L. Ed. 446. \* \* \* In its enactment congress has not attempted to interfere in any way with the judicial department of the government, nor can the act be properly regarded as destroying any vested right, since the right asserted to be vested is only the exemption of these judgments from review; and the mere expectation of a share in the public lands and moneys of these tribes, if hereafter distributed, if the applicants are admitted to citizenship, cannot be held to amount to such an absolute right of property that the original cause of action, which is citizenship or not, is placed by the judgment of a lower court beyond the power of re-examination by a higher court, though subsequently authorized by general law to exercise jurisdiction."

See all of the cases above cited, especially *Freeland v. Williams*, with which read *Peerce v. Kitzmiller*, 19 W. Va. 564 (1882). The more common view denies this power to the legislature, after the right of appeal from a final judgment has been barred under existing law. *Hill v. Sunderland*, 3 Vt. 507 (1831); *Atkinson v. Dunlap*, 50 Me. 111 (1862); *Griffin's Ex'r v. Cunningham*, 20 Grat. (61 Va.) 31, 50-55 (1870); *Germania Bank v. Suspension Bridge*, 159 N. Y. 362, 54 N. E. 33 (1890); *Merrill v. Sherburne*, ante, p. 54, and notes.

A fortiori, rights fixed by final judgments may not be divested either by legislative fiat or by providing new grounds of action or defence which may be urged at a fresh review or hearing. *Pennsylvania v. Wheeling Bridge Co.*, 18 How. 421, 431, 15 L. Ed. 435 (1855); *Denny v. Matoon*, 2 Allen (Mass.) 361, 376-385, 79 Am. Dec. 784 (1861); *Sparhawk v. Sparhawk*, 116 Mass. 315 (1874); *Re Handley's Estate*, 15 Utah, 212, 49 Pac. 829, 62 Am. St. Rep. 926 (1897); *Merchants' Bank v. Ballou*, 98 Va. 112, 32 S. E. 481, 44 L. R. A. 306, 81 Am. St. Rep. 715 (1899) (cases); *Livingston v. Livingston*, 173 N. Y. 377, 66 N. E. 123, 61 L. R. A. 800, 93 Am. St. Rep. 600 (1903) (cases). See, also, *U. S. v. Aakervik*, 180 Fed. 137, 145-17 (1910) (for cases only). Compare *Freeland v. Williams*, 131 U. S. 405, 9 Sup. Ct. 763, 33 L. Ed. 193 (1889) (state

## PEOPLE v. WISCONSIN CENT. R. CO.

(Supreme Court of Illinois, 1905. 219 Ill. 94, 76 N. E. 80.)

Mr. Chief Justice CARTWRIGHT. At the June term, 1905, the county court of Lake county refused the application of the county collector of said county for a judgment against the property of appellee for a county tax levied on said property, and from that judgment this appeal was prosecuted. At the September session, 1904, the county board attempted to levy a county tax of 75 cents on each \$100 of taxable property according to its assessed valuation, and did not specify the particular purposes for which the tax was levied. Such a levy was not authorized by the statute, and the tax was vitiated by the failure to comply with the law. *Cincinnati, I. & W. Ry. Co. v. People*, 213 Ill. 197, 72 N. E. 774; *Chicago, B. & O. R. Co. v. People*, 213 Ill. 458, 72 N. E. 1105. On February 28, 1905, the Legislature passed an act for the purpose of curing the defect in levies which existed in this and other like cases. *Laws 1905*, p. 359. That act was in force from and after its passage, and the only question in this case is whether it cured the defect. If it was within the power of the Legislature to pass the act, the defect was thereby cured, and the tax validated.

There is no prohibition in our Constitution against the passage of retroactive statutes, and they are not invalid if they do not impair vested rights, or come in conflict with some provision of the Constitution. The general rule is that, where there is no constitutional prohibition, the Legislature may validate, by a curative act, any proceedings which they might have authorized in advance. 8 Cyc. 1083; 26 Am. & Eng. Ency. of Law (2d Ed.) 609. Cases where the power to levy taxes has failed of proper execution through the carelessness of officers or other cause come within that rule. *Cooley, Const. Lim.* (4th Ed.) 462; *Cooley on Taxation*, 229. But while curative acts may heal irregularities, they cannot cure the want of authority to act at all, and the Legislature cannot, by retrospective legislation, confirm what it could not originally have authorized. \* \* \*

The next question is whether the curative act interferes with or destroys any constitutional right of the taxpayer. It is the right of the taxpayer to have an opportunity to be heard before a tax shall be finally adjudged against him, and no tax can be valid without an

Constitution may authorize a review of prior final money judgment and create a new defence previously erroneously denied by state court).

As to what is a final judgment, so that rights under it become vested, see opinions in *Livingston v. Livingston*, 173 N. Y. 377, 66 N. E. 123, 61 L. R. A. 800, 93 Am. St. Rep. 600 (1903) (alimony); *Dunham v. Anders*, 128 N. C. 207, 38 S. E. 822, 83 Am. St. Rep. 608 (1901). The granting of a certificate of naturalization in an uncontested proceeding is not such a judgment, and a retroactive review of it may be provided by statute. *Johannessen v. U. S.*, 225 U. S. 227, 32 Sup. Ct. 613, 56 L. Ed. 1066 (1912). A judgment in ejectment has been thought not final, because not conclusive, *Mercer v. Watson*, 1 Watts (Pa.) 344, 355, 356 (1833); but compare *Menges v. Dentler*, 33 Pa. 495, 75 Am. Dec. 616 (1859).

opportunity for such a hearing. Therefore, it was decided in *Marsh v. Chesnut*, 14 Ill. 223, that the Legislature could not cure by subsequent legislation the failure of an assessor to complete the assessment, and return it to a particular place on or before a certain day. The provision for such a return was to enable the taxpayer to inspect the assessment, and to give him time and opportunity to make application to the county commissioners' court for correction of the assessment. The curative act deprived him of an opportunity to appeal and a hearing, and was void for that reason. The same rule was applied on the same ground in *Billings v. Detten*, 15 Ill. 218; and in *Conway v. Cable*, 37 Ill. 82, 87 Am. Dec. 240, it was held that the Legislature could not, by retrospective enactment, make an invalid tax proceeding valid, and thereby divest an individual of his vested rights. It was there held that a citizen might allow his real estate to pass to a sale, relying upon the want of compliance with the law authorizing the sale, and that his rights thereby acquired could not be affected by subsequent legislation.<sup>1</sup> On the other hand, in *Cowgill v. Long*, 15 Ill. 202, the court held that, although it was essential to the validity of a school tax that it should be certified to the county clerk before the 1st of July, the Legislature had power to pass a special act, declaring that a tax voted on the 20th of July and the act of certifying the tax to the county clerk should be legal and valid and effectual in the law. No vested right was interfered with, and it was considered that the Legislature had the right to remedy the defect while the tax remained uncollected. In the case of *McVeagh v. City of Chicago*, 49 Ill. 318, where a tax on bank shares was not properly assessed by reason of a defective law under which it was attempted, the court decided that the Legislature had power to pass a special law to cure the omission. It is within the power of the Legislature to change the mode for the collection of taxes at any time before they are paid, discharged, or otherwise released. *Hosmer v. People*, 96 Ill. 58. If the Legislature could have provided for the levy of county taxes in the manner in which this tax was levied, and no constitutional right of the taxpayer was invaded, the curative act would be effective to remedy the defect. \* \* \*

As we think that the Legislature might have authorized a levy in this manner, and no vested right of the taxpayer was interfered with, the curative act had the effect to render the tax legal and valid. \* \* \*

Judgment reversed.<sup>2</sup>

<sup>1</sup> The defect in the proceeding here consisted in selling for taxes on credit instead of for cash. 37 Ill. at 83, 87, 88, 87 Am. Dec. 240.

<sup>2</sup> See, also, involving statutes purporting to cure defective tax assessments before sale: *Mattingly v. Dist. of Columbia*, 97 U. S. 687, 24 L. Ed. 1098 (1878); *Northern Pac. R. R. v. Galvin*, 85 Fed. 811 (1898); *Martin v. Oskaloosa*, 99 N. W. 557 (Iowa, 1904) (semble); *Seattle v. Kellher*, ante, p. 655, and notes.

## CROMWELL v. MacLEAN.

(Court of Appeals of New York, 1890. 123 N. Y. 474, 25 N. E. 932.)

[Appeal from judgments of lower courts of the second judicial department of New York. Certain lands in the town of Greenburgh, Westchester county, owned by Edward C. Wilson, a trustee under the will of E. J. Wilson and resident in another town of the county, were for the years 1876 to 1885 assessed for taxes to "Edward J. Wilson, estate," and leasehold interests therein were sold to satisfy said taxes under certain proceedings that passed no legal interest under existing law on account of said defective assessment. In 1887, a statute purported to confirm said sales and to vest title to said leaseholds in conformity thereto. In an action to foreclose a mortgage on said land the question arose of the priority of said leaseholds as against the mortgagee of E. C. Wilson's interest. The lower courts upheld the mortgagee.]

PECKHAM, J. \* \* \* Holding, as we must, that no title or interest in fact passed to the purchaser at these tax sales, and that the original owner therefore still retained his title, the effect of the act in question, if valid, is by legislative fiat to transfer the title of the property of Edward C. Wilson, as trustee, to the lessees under these invalid leases for a hundred or a thousand years as the case may be. Has the legislature of this state the right to take the property of A. and transfer it to B. under the guise of confirming sales made of such land in invitum, but by which no title in fact or in law passed from the owner to the purchaser? The statement of the question should be its best answer. Property thus taken is not taken by due process of law. This is not a case within the principle that persons who take conveyances of land by deed or under legal proceedings, which lack validity by reason of some omission or informality, take a title or right subject to the power of the legislature to cure such errors or defects by acts of retrospective legislation. Where the proceeding is wholly in invitum, and the defect of such a nature that no title has passed, the legislature cannot validate or legalize the proceeding to the extent of itself conveying the title under the form of confirming a sale under which no title passed. See remarks of Bigelow, C. J., in *Denny v. Mattoon*, 2 Allen (Mass.) 361, at 382, 383, 79 Am. Dec. 784. Nor is the legislation in question an exercise of the power to provide rules of evidence, and thus to give a certain effect to a deed or lease as presumptive evidence of the validity of proceedings before its execution. *People v. Turner*, 117 N. Y. 227, 22 N. E. 1022, 15 Am. St. Rep. 498. Nor does it attempt to set up a statute of limitation providing that after the expiration of a certain time it should be conclusively presumed that all proceedings were regular. *People v. Turner*, *supra*; *Ensign v. Barse*, 107 N. Y. 329, 14 N. E. 400, and 15 N. E. 401. It

is none of these, but a plain, naked transfer of title by legislation. Any statute which should make a tax deed or lease immediately upon its execution conclusive evidence of a complete and perfect title, and thus preclude the owner of the original title from showing its invalidity, would probably be void, because it would, in substance, be an unconstitutional transfer, or a confiscation of property, instead of a mere law regulating evidence. I do not refer to cases arising under statutes of limitation, where the owner has some appointed time in which to assert his rights, nor to cases resting on principles of equitable estoppel. *Cooley, Tax'n* (2d Ed.) 297 et seq.

The defendant claims that the act is valid as an exercise of the power to cure defects in assessments and other proceedings for the imposition and collection of taxes. Such curative power is a branch and a part of the legislative power to tax, and must be sustained under it. The legislature undoubtedly has large powers in the way of curing certain defects in proceedings to tax the citizen. In cases where the proceedings have been such that the citizen has had his chance to be heard before the tax was finally imposed, but nevertheless defects have been discovered in such proceedings, if the thing omitted and which constitutes the defect be of such a nature that the legislature might by prior statute have dispensed with it, or if something had been done, or done in a particular way, which the legislature might have made immaterial, the omission or irregular act may be cured by a subsequent statute. This was so stated, and in substantially identical language, in *Ensign v. Barse*, 107 N. Y. 329, 14 N. E. 400, and 15 N. E. 401. Such act might take away from the taxpayer a defense to the further proceedings against him to collect the tax, which he otherwise would have had. *Tift v. City of Buffalo*, 82 N. Y. 204. Yet, even in this case, I think the taxpayer must be given reasonable time in which to pay a tax thus validated or thus imposed by the legislature. \* \* \*

If the proceedings of the taxing power have been so fatally defective on account of a failure to comply with the requirements of the statute that no title to the property of the taxpayer has passed to the purchaser at the tax sale, I do not think there is any correct principle upon which can be based the claim that the taxpayer nevertheless holds his property from that time on at the mercy of the legislature, and subject to its power at any time, so far as he is concerned, to validate and give life and effect to the otherwise void sale. A void sale, the taxpayer has the legal right to regard as no sale, and he has the further right to assume that no proceedings of a legislative character could be taken to transfer his property for the nonpayment of a void tax, without the legislature first legalized the tax where that could be done, or itself imposed the tax, and then in either event gave him an opportunity to pay it before proceeding to sell his land. \* \* \*

If the legislature have designated a certain way in which to make an assessment, although it could easily have designated some other



just as legal, yet the manner designated must, in substance, be carried out, although many of the provisions might have been omitted by the legislature and a constitutional assessment still levied. If any of those provisions of a material nature have been omitted, so that no valid assessment has been made, and no title transferred to the person assuming to purchase at the subsequent tax sale, I am fully persuaded there is no power in the legislature to pass any act, the effect of which shall be to thereby transfer the title of the original owner to the purchaser, to the same extent as if the whole proceedings from assessment to sale had been valid. \* \* \*

Judgment affirmed.<sup>1</sup>

<sup>1</sup> Accord (incurable defects in tax sales): *Forster v. Forster*, 129 Mass. 559 (1880) (notice of sale of undivided interest in land instead of separate interest—less attractive to bidders); *Hall v. Perry*, 72 Mich. 202, 40 N. W. 324 (1888) (wholly unauthorized sale); *Conway v. Cable*, 37 Ill. 82, 87 Am. Dec. 240 (1865) (sale on credit instead of for cash); *Dingey v. Paxton*, 60 Miss. 1038, 1057, 1058 (1883) (void sale cannot be cured at all, semble); *McCord v. Sullivan*, 85 Minn. 344, 347, 348, 88 N. W. 989, 89 Am. St. Rep. 561 (1902) (publication of notice of sale for less than statutory period), *Brown, J.*, saying: "A proper notice of sale in tax proceedings is jurisdictional, and an indispensable prerequisite to the right to make the sale. This brings us to the question of the validity of [the curative act]. Statutes of this character have been before the courts many times, and the statute, as to their validity, is fully discussed in *Cooley*, Const. Lim. 458. It is there laid down as a general rule that 'if the thing wanting or failing to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by a prior statute, then it is not beyond the power of the legislature to dispense with it by a subsequent statute.' This, however, does not authorize the passage of healing statutes curing jurisdictional defects whereby vested rights may be taken away. The legislature might, it is true, have provided a notice different from that required by section 1591, supra; but from that it does not follow that a failure of compliance with such a statute may be cured by subsequent legislation. A partial compliance with the statute as to jurisdictional matters is wholly ineffectual for any purpose, and the proceedings in this case as to the sale stand as though no attempt had been made to sell the property pursuant to the tax judgment at all. As said in the case of *Kipp v. Dawson* [31 Minn. 373, 382, 17 N. W. 961, 18 N. W. 96], the taxpayer is interested in and entitled to have the kind and length of notice provided by law—First, the notice before judgment; and then, second, the notice before sale. He has the right to rely upon the notice being given, to insist upon a strict compliance with the statute, and may invoke a failure in that respect to defeat a title arising in virtue of such proceedings. It is true that the legislature may cure irregularities and defects in tax proceedings, but that irregularities and defects which go to the jurisdiction of the officers to act, and affect the substantial rights of the property owner, cannot be cured by subsequent legislation, is thoroughly settled by authorities."

Compare *Finlayson v. Peterson*, ante, p. 894, note.

In *Meigs v. Roberts*, 162 N. Y. 371, 378, 56 N. E. 838, 76 Am. St. Rep. 322 (1900), *Cullen, J.*, said: "A 'curative act,' in the ordinary sense of that term, is a retrospective law, acting on past cases and existing rights. The power of the legislature to enact such laws is therefore confined within comparatively narrow limits; and they are usually passed to validate irregularities in legal proceedings, or to give effect to contracts between parties which might otherwise fall for failure to comply with technical legal requirements. *Cooley*, Const. Lim. p. 454. A very full enumeration of the cases in which the legislature may properly exercise this power is to be found in *Forster v. Forster*, 129 Mass. 559. But there may be in legal proceedings defects which are not

mere informality or irregularities, but so vital in their character as to be beyond the help of retrospective legislation. Such defects are called "jurisdictional."

As to the confusing use of the word "jurisdictional" commonly made by courts in discussing the validation of tax sales, see Gray, *Lim. on Taxing Power*, §§ 1251-1252a.

The enumeration referred to above, of classes of cases where curative acts were proper, is as follows [in *Forster v. Forster*, 129 Mass. 559, 565, 566 (1880), by Gray, C. J.]: "(1) Cases of statutes confirming sales of land under order of court for an adequate consideration, where there was a want of jurisdiction in the court, or the deed was irregularly made to another person than the actual bidder, or the sale was after the time limited in the license, or the confirming statute was passed upon the petition of all parties having the legal title. *Wilkluson v. Leland*, 2 Pet. 627, 661, 7 L. Ed. 542, and 10 Pet. 294, 9 L. Ed. 430; *Kearney v. Taylor*, 15 How. 494, 14 L. Ed. 787; *Cooper v. Robinson*, 2 Cush. (Mass.) 184, 190; *Sobler v. Massachusetts General Hospital*, 3 Cush. (Mass.) 483. (2) Cases of statutes confirming conveyances by an executor or trustee under a will, where the only objection was to the manner of his previous appointment and giving bond, which might perhaps not be open to be contested in a collateral proceeding, even if no such statute had been passed. *Weed v. Donovan*, 114 Mass. 181; *Bradstreet v. Butterfield*, 129 Mass. 339; *Bassett v. Crafts*, 129 Mass. 513. Such statutes are somewhat analogous to statutes confirming deeds acknowledged before a person acting as a magistrate, whose commission as such had expired, which could not have been questioned collaterally, he being an officer de facto. *Brown v. Lunt*, 37 Me. 423; *Denny v. Mattoon*, 2 Allen (Mass.) 384, 79 Am. Dec. 784; *Sheehan's Case*, 122 Mass. 445, 447, 23 Am. Rep. 374; *Hussey v. Smith*, 99 U. S. 20, 24, 25 L. Ed. 314. (3) Cases of statutes curing defects in the execution of private deeds and instruments, so as to give them effect according to the intention of the parties and the equities of the case. *Randall v. Krieger*, 23 Wall. 137, 23 L. Ed. 124; *Wildes v. Vanvoorhis*, 15 Gray (Mass.) 139; *Denny v. Mattoon*, 2 Allen (Mass.) 377, 378, 383, 79 Am. Dec. 784. (4) Cases of statutes confirming votes of towns for municipal or public purposes, which are within the paramount control of the legislature. *Thompson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177; *Beloit v. Morgan*, 7 Wall. 619, 19 L. Ed. 205; *New Orleans v. Clark*, 95 U. S. 644, 24 L. Ed. 521; *Guilford v. Supervisors of Chenango*, 3 Kernan (13 N. Y.) 143; *Allen v. Archer*, 49 Me. 316; *Freeland v. Hastings*, 10 Allen (Mass.) 570. (5) Cases of statutes confirming informal or irregular assessments of taxes, so that they might be collected in the future, but not undertaking to give force to illegal seizures or sales of property already made. *Mattugly v. District of Columbia*, 97 U. S. 687, 24 L. Ed. 1098; *Grim v. Weissenberg School District*, 57 Pa. 433, 98 Am. Dec. 237; *Hart v. Henderson*, 17 Mich. 218."

In *Ford v. Delta Land Co.*, 43 Fed. 181, 192, 193 (1890), 11 Ill. J., said: "Owners of land are vested with certain constitutional rights of which they cannot be deprived by either legislative enactments or judicial decisions, one of which is that they cannot be deprived of their titles to their lands except by due process of law. It was held by this court on the demurrer in this cause that to deprive the owner of land of his title by reason of the non-payment of taxes thereon these things must concur: First. There must have been a lawful tax imposed by some body of men, or some one having authority to levy it. Second. If the tax was based upon the value of the land, it must have been ascertained by some one authorized by law to assess such value. Third. There must have been a default in the payment of the tax within the time prescribed by law. Fourthly. There must have been a sale and conveyance made by some one authorized to make the same. These are conditions which the legislature can neither dispense with nor cure by subsequent legislation, nor can the want of them be dispensed with or cured by judicial decision. But, under well-recognized rules, any irregularities in these proceedings, which the legislature could have authorized to be done in the first instance, may be cured by subsequent legislation, but not so as to destroy vested rights. This rule is so generally acknowledged that reference to authority is unnecessary. For instance, if the sale was made on a day or in a place which the legislature might have authorized, or for delinquent taxes

## MAGUIAR v. HENRY.

(Court of Appeals of Kentucky, 1886. 84 Ky. 1, 4 Am. St. Rep. 182.)

[Appeal from Louisville Chancery Court. Maguiar brought suit to recover land, alleging that after proper advertisement it was sold for taxes and conveyed to him by the state auditor. The statute under which the land was thus sold provided that, in all suits involving title to land claimed and held under the auditor's tax deed, the person claiming adversely to such deed must prove, to defeat the title conveyed thereby, one of the five things mentioned in the opinion below. A demurrer to Maguiar's petition was sustained.]

HOLT, J. \* \* \* The act imposes upon the owner of land, in order to defeat a tax title, the burden of proving one of five things: Either that the property was not subject to the tax; or that it had been paid; or that the land had not been assessed; or had been redeemed; or that the officer has certified that no taxes were due. It cuts off all other defenses. Three serious questions are presented: First. Can the Legislature shift the burden of proof from the tax claimant to the owner in possession of the property? Second. If so, yet must not the plaintiff allege in his petition the facts essential to support a tax title? Third. Is not the act unconstitutional; at least so far as it undertakes to deprive the owner of material existing defenses? \* \* \*

The legislative power to levy and collect taxes is not arbitrary. The law can not be so framed as to prevent the citizen from inquiring through the courts whether there has been a forbidden assumption of legislative power. For instance, a statute denying to him the right of defense of his property to inquire whether a gross inequality of burden has been imposed, or fraud practiced in the assessment or sale of his property, would be unconstitutional, because it would deprive him of his property without a hearing and without "due process of law." Courts can not thus be deprived of jurisdiction by the Legislature. If so, one co-equal department of the government could at once destroy the other.

Conceding that the burden of proof may be shifted by a legislative act from the plaintiff to the defendant, as we think it may as a mere regulation of the remedy, provided it does not conflict with a vested right,<sup>1</sup> yet it is questionable whether the act now under consideration

for several years made at one time after default in each year, or other such irregularities, these may be cured by subsequent legislation."

Other slightly different enumerations of the essentials of a valid tax sale are made in *McCready v. Sexton*, 29 Iowa, 356, 388, 389, 4 Am. Rep. 214 (1870), and in *In re Douglas*, 41 La. Ann. 765, 767, 6 South. 675 (1889). See *Jones v. Landis Tp.*, 50 N. J. Law, 574, 13 Atl. 251 (1888) (validation of tax sale at illegal hour of day).

<sup>1</sup> "It is competent for the legislature to declare that a tax deed shall be prima facie evidence, not only of the regularity of the sale, but of all prior

does not go farther than this, and require a defendant to make out a cause of action for, or a right in, the plaintiff. If so, it can not be sustained, because this would, in effect, compel the court to hold that a petition sets out a cause of action when it does not. The section of the act under consideration, however, is clearly unconstitutional, because it limits the owner of the property to certain defenses and cuts off others, which may exist and which are material. \* \* \*

Cooley, in his *Constitutional Limitations*, page 368, says: "As to what shall be evidence and who shall assume the burden of proof, [the legislature] is unrestricted so long as its rules are impartial and uniform; but it has no power to establish rules which, under pretense of regulating evidence, altogether precludes a party from exhibiting his rights. A statute making a tax deed conclusive evidence of a complete title, and precluding the original owner from showing its invalidity, would, therefore, be void, as not a law regulating evidence, but an unconstitutional confiscation of property." Vide *Hinman v. Pope*, 1 Gilman (Ill.) 131; *Stoudenmire v. Brown*, 48 Ala. 699.

The Legislature may, by a subsequent statute, cure a mere irregularity in a proceeding, if it could have dispensed with it by a prior statute. If it could have been made immaterial at the outset, it may be made so by a subsequent law. But the Legislature has no power, by a subsequent curative statute, to remedy a jurisdictional defect, or one which goes to the substance of a vested right, and thus cut off a vested defense by the usurpation of judicial power. To do so would be to condemn without hearing, and to refuse a party an existing material right.

A tax deed can no more be declared by statute to be conclusive as to matters essential to jurisdiction than the finding of an indictment by a grand jury could be by legislative act made conclusive of the defendant's guilt. Suppose that the ministerial officer, whose duty it is to collect the tax, fails to advertise the property for sale, or to sell it at the courthouse door, or to sell it publicly, or was interested in the purchase, or fraudulently combines with the purchaser so as to sacrifice the property, is the owner to be deprived by a curative statute of his existing vested defense upon these grounds? If so, then it is "without due process of law," and in violation of "the law of the land." We unhesitatingly conclude that the act in question, so far

proceedings, and of title in the purchaser."—*Marx v. Hanthorn*, 148 U. S. 172, 182, 13 Sup. Ct. 508, 37 L. Ed. 410 (1893), by Shiras, J. So, *Allen v. Armstrong*, 16 Iowa, 508, 513 (1864). As applicable to prior deeds such statutes may validly be either passed or repealed. *People v. Turner*, 117 N. Y. 227, 233, 22 N. E. 1022, 15 Am. St. Rep. 498 (1889) (cases). But see *Roby v. Chicago*, 64 Ill. 447 (1872); *Gage v. Caraher*, 125 Ill. 447, 17 N. E. 777 (1888); *Gardlek v. Chamberlain*, 97 Ill. 620, 636, 637 (1881); discussing the validity of retroactive changes in the burden of proof regarding tax sale proceedings where all records have been destroyed. See *Rich v. Flanders*, opinion of Bell, J., post, p. 914, note.

as it attempts to deprive the owner of a then existing and material defense, is without constitutional warrant. \* \* \*  
Judgment affirmed.<sup>2</sup>

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### CLARK v CLARK.

(Superior Court of Judicature of New Hampshire, 1839. 10 N. H. 380,  
34 Am. Dec. 165.)

[Libel for divorce by a husband against his wife for desertion, grounded upon the terms of a retroactive statute stated in the opinion below.]

PARKER, C. J. \* \* \* The twenty-third article of the Bill of Rights denounces retrospective laws as "highly injurious, oppressive, and unjust," and declares that "no such laws should be made, either for the decision of civil causes, or the punishment of offences."

In *Woart v. Winnick*, 3 N. H. 481, 14 Am. Dec. 384, this court held, that this clause, so far as it applied to civil causes, "was intended to prohibit the making of any law prescribing new rules for the decision of existing causes, so as to change the ground of the action, or the nature of the defence." That was sufficient for the case then under consideration, which was in fact pending when the law then in question was passed. But the considerations there suggested evidently point to a broader application of it than one which would make it operative merely upon actions, or causes, pending in court at the time of the passage of the act. A law may be retrospective in its operation, if it affect an existing cause of action, or an existing right of defence, by taking away or abrogating a perfect existing right, although no suit or legal proceeding then ex-

<sup>2</sup> Accord: *Marx v. Hanthorn*, 148 U. S. 172, 13 Sup. Ct. 508, 37 L. Ed. 410 (1893) (property assessed to wrong person); *Strode v. Washer*, 17 Or. 50, 16 Pac. 926 (1888) (assessment totally invalid); *McCready v. Sexton*, 29 Iowa, 356, 4 Am. Rep. 214 (1870) (general discussion).

Contra: *De Treville v. Smalls*, 98 U. S. 517, 25 L. Ed. 174 (1879) (deeds of land sold for federal taxes conclusive evidence of validity of sale except as to proof of non-liability of property to taxation, prior payment of taxes, or redemption from sale). See, also, *Callanan v. Hurley*, 93 U. S. 387, 23 L. Ed. 931 (1876) (similar Iowa statute).

As regards *prospective* curative acts generally: "Broadly stated, the doctrine is that the legislature may make the tax deed conclusive evidence of compliance with every requirement which the legislature might, originally, in the exercise of its discretion, have dispensed with."—Fenner, J., in *In re Douglas*, 41 La. Ann. 765, 768, 6 South. 675 (1889). So, *McCready v. Sexton*, 29 Iowa, 356, 388-390 (1870); *Nevin v. Bailey*, 62 Miss. 433, 436 (1884).

And, conversely: "If any given step or matter in the exercise of the power (as, for example, the fact of a levy by the proper authority) is so indispensable that without its performance no tax can be raised, then *that* step or matter, whatever it may be, cannot be dispensed with, and with respect to *that* the owner cannot be *concluded* from showing the truth by a mere legislative declaration to that effect."—*Allen v. Armstrong*, 16 Iowa, 508, 513, 514 (1864), by Dillon, J.

As to barring incurable defects by short statutes of limitations, see *Clark v. Clark*, *post*, p. 909, note 4.



ists.<sup>1</sup> Of course it is not intended to deny the right of the legislature to vary the mode of enforcing a remedy; or to provide for the more effectual security of existing rights; or to pass laws which change existing rules, under which rights would be acquired by the lapse of a certain period of time, part of which has already passed. The statute of limitations may be changed by an extension of the time, or by an entire repeal, and affect existing causes of action, which by the existing law would soon be barred. In such cases the right of action is perfect, and no right of defence has accrued from the time already elapsed. But if a right has become vested, and perfect, a law which afterwards annuls or takes it away, is retrospective. Thus a law which should provide that promissory notes made payable on demand should be payable at the expiration of a year, and that no suit should be maintained upon them until the expiration of that time, if applied to existing contracts of that character, would be a retrospective law for the decision of a civil cause, not only in relation to actions then pending upon such contracts, but also as to all notes of that description then in existence. And so of any other law which impairs vested rights acquired by existing laws. *Merrill v. Sherburne*, 1 N. H. 213, 8 Am. Dec. 52. To subject a party to the payment of damages, or to other loss or detriment, upon considerations entirely past, is within the principle. Thus a statute of this state, passed in 1805, made provision, that where there had been peaceable possession and actual improvement of land by virtue of a supposed legal title, under a bonâ fide purchase, for more than six years before the commencement of an action for the recovery of it, the tenant should be entitled to the increased value of the premises by virtue of buildings and improvements, if the demandant recovered. In an action brought in 1807, it was held that the act, applied to a possession existing, and to improvements made, prior to its passage, was a retrospective law, within the clause of the Constitution already cited.<sup>2</sup> *Society v. Wheeler*, 2 Gall. 105, Fed. Cas. No. 13,156.

<sup>1</sup> The legislature may of course waive defences in suits against the state or its subdivisions that it could not abrogate between individuals, because retroactive. *New Orleans v. Clark*, 95 U. S. 644, 24 L. Ed. 521 (1877) (invalid municipal bond issue); *Utter v. Franklin*, 172 U. S. 416, 19 Sup. Ct. 183, 43 L. Ed. 498 (1899) (invalid aid to railroad); *Worcester v. St. Ry.*, 196 U. S. 539, 25 Sup. Ct. 327, 49 L. Ed. 591 (1905) (impairing obligation of contract); *Calhoun v. State*, 21 Wis. 501 (1867) (granting new trial after final judgment). Contra: *County Com'rs v. Rosche*, 50 Ohio St. 103, 33 N. E. 408 (1893) (refunding illegal taxes paid without protest) [but see *N. Y. Ins. Co. v. Board of Com'rs*, 106 Fed. 123, 45 C. C. A. 233 (1901)]. See 27 L. R. A. 696-704 (cases).

As to the retroactive validation of irregular municipal elections under Constitutions forbidding special legislation or requiring such elections to be held "as provided by law," see *Cole v. Dorr*, 80 Kan. 251, 101 Pac. 1016, 22 L. R. A. (N. S.) 534 (1909); *Swartz v. Carlisle*, 237 Pa. 473, 85 Atl. 847 (1912).

<sup>2</sup> Retrospective "betterment laws" were held invalid, without a specific prohibition of retroactive laws, in *Austin v. Stevens*, 24 Me. 520 (1845); *Johnson v. Rowland*, 2 Ky. (Ky. Dec.) 77 (1801); *Wilson v. Red Wing*, 22 Minn. 488 (1876); *Newton v. Thornton*, 3 N. M. (Gild.) 287, 5 Pac. 257 (1885); *Nelson v.*

A statute which attempts to confer authority upon the court to grant a divorce, for matters already past, and which, at the time when they occurred, furnished no ground for a dissolution of the marriage, or for other legal proceedings, is, in our view, clearly a retrospective law, and well entitled to the epithets applied to such laws in the Constitution. On the supposition that the past matter, which is thus made the ground of a divorce, was of a character inconsistent with the perfect obligations of the marriage covenant, and such, therefore, as could not be justified, or even excused, in a court of morals; still, if it was not such as subjected the party, when it took place, to any penalty or punishment; or entitled the other party to any remedy; and, especially, if it was not such as then furnished any ground upon which a dissolution of those obligations could be sought or predicated; it must, by a law making it a ground for a divorce, have a different character and operation bestowed upon it. Its legal character would thereby be changed, and its effect enlarged. That which, if not of itself innocent, was not, when it occurred, such a breach of marital obligations as to warrant an interference with them, would be made operative, not only to release one party from the further obligations of what is generally admitted to be a contract, but would be made the means of depriving the other party of the benefit of those obligations, and of rights of property derived from them. It would subject that party to loss and detriment for past acts, altogether by the retrospective operation of the law which authorized and gave effect to the divorce. Such a law cannot enforce the obligations of the marriage, nor is it a provision relating to the remedy merely; for whatever breach may have occurred, the obligation of the contract still remains, and requires a prospective performance of marital duties. But the principle upon which the law must be founded, would, if admitted, dissolve all marriages at the will of the legislative power.<sup>3</sup>

Desertion for three years, by the husband, coupled with neglect to make suitable provision for the support and maintenance of the wife, where it was in his power so to do, has, for a long period, furnished a sufficient cause for a dissolution of the marriage, in this state. But, under that statute, if the husband had not pecuniary ability, there was no cause for a divorce. The present act makes desertion alone, by either party, for the term of three years, if without sufficient cause and against the consent of the other, a substantive ground of divorce. It is, therefore, a new cause; and that part of the act which attempts

Allen, 1 Yerg. (Tenn.) 360 (1830) (semble). Contra: *Albee v. May*, 2 Paine, 74, Fed. Cas. No. 134 (1834); *Mills v. Geer*, 111 Ga. 275, 36 S. E. 673, 52 L. R. A. 334 (1900) (retrospective laws forbidden). See *Bright v. Boyd*, 1 Story, 478, Fed. Cas. No. 1,875 (1841); *Id.*, 2 Story, 605, Fed. Cas. No. 1,876 (1843), commented on in *Griswold v. Bragg*, 48 Conn. (U. S. Circ.) 577, 580, 581 (1880). Compare *Searl v. School Dist.*, 133 U. S. 553, 10 Sup. Ct. 374, 33 L. Ed. 740 (1890).

<sup>3</sup> Marriages cannot be retroactively validated under the New Hampshire Constitution. *Dunbarton v. Franklin*, 19 N. H. 257 (1848).

to make such desertion, then past, sufficient, must, if enforced, impair vested rights, provided there are any vested rights in the existence of a marriage. We shall not add to the length of this opinion, by attempting to show that such rights exist. \* \* \*

That part of the act which provides for divorces on account of desertion and refusal to cohabit for three years after its passage, is not objectionable, notwithstanding it may operate upon existing marriages. Regulations intended to enforce the obligations of the contract in future, impair no vested rights. The contract of marriage, it is well understood, is subject to them, and all persons may avoid their operation by an adherence to the duties imposed by the contract itself. And we have no doubt that the legislature may so amend the Act that a continuance of a prior desertion, for a period after the passage of the new statute long enough to give a reasonable time for a return, and a resumption of marital duties, shall be a good cause for a dissolution of the marriage.<sup>4</sup>

Libel dismissed.

<sup>4</sup>The period of limitation of actions may be shortened, if a reasonable time for bringing suit be provided after the passage of the act. *Turner v. New York*, 168 U. S. 90, 18 Sup. Ct. 38, 42 L. Ed. 392 (1897) (six months sufficient as against tax deed already recorded for two years). Compare *McGahey v. Virginia*, 135 U. S. 662, 705-708, 10 Sup. Ct. 972, 34 L. Ed. 304 (1890) (what is reasonable time depends on circumstances of each class of cases). See *Bilhn v. Nelson*, 222 U. S. 1, 7, 32 Sup. Ct. 1, 56 L. Ed. 65 (1911) (cases); 1 L. R. A. (N. S.) 528, 529 (cases). Defects in tax sales too vital to be remedied by curative acts (see ante, pp. 900-6) may be barred by short statutes of limitations. "Such a statute will bar any right, however high the source from which it may be deduced, provided that a reasonable time is given a party to enforce his right."—*Meigs v. Roberts*, 162 N. Y. 371, 378, 56 N. E. 838, 76 Am. St. Rep. 322 (1900), by Cullen, J. See, also, *Wallace v. MeEchron*, 176 N. Y. 424, 68 N. E. 663 (1903). As to the validity of such acts in favor of claimants under void tax titles who are not in possession, see *Dingey v. Paxton*, 60 Miss. 1038, 1053-1055 (1883) (citing cases); *Meigs v. Roberts*, above, at pages 379, 380. The same principle applies where the legislature shortens the time within which, under existing law, other rights may be exercised than those of bringing suit. *Butler v. Palmer*, 1 Hill (N. Y.) 324 (1841) (right to redeem from mortgage sale). See *Ochoa v. Hernandez y Morales*, 230 U. S. 139, 33 Sup. Ct. 1033, 57 L. Ed. — (1913) (wholly retroactive statute of limitations by military order is invalid).

EXPRESS CONSTITUTIONAL PROHIBITIONS OF RETROACTIVE LAWS.—The Constitutions of Colorado, Georgia, Missouri, Montana, New Hampshire, Ohio, Tennessee, and Texas contain express prohibitions of retroactive legislation in general; but Ohio excepts curative acts to carry into effect the intentions of parties and officers (article II, § 28), and some of the other states reach the same result by construction, or even go further. *Shields v. Clifton*, etc., Co., 94 Tenn. 123, 28 S. W. 668, 26 L. R. A. 509, 45 Am. St. Rep. 700 (1894); *Mt. Ben. Co. v. Winne*, 20 Mont. 49 Pac. 416 (1897); *Mills v. Geer*, 111 Ga. 275, 36 S. E. 673, 52 L. R. A. 934 (1900) (recovery for value of betterments adixed to land by innocent party wrongfully possessed).

## KENT v. GRAY.

(Supreme Court of New Hampshire, 1873. 53 N. H. 576.)

[Action of debt by Kent, Cossitt, and Rogers against Gray for a statutory penalty. On demurrer it was decided, that the statute authorized a suit by one person only. A statute of 1872, subsequent to the bringing of this action, authorized amendments to existing suits by striking out the names of improper plaintiffs. A motion to strike out the names of two of the plaintiffs was reserved for the court.]

DOE, J. Can the act of 1872 be constitutionally applied to penal suits existing at the time of its passage? In *Rich v. Flanders*, 39 N. H. 304, it was held by a majority of the court that the legislature could, by a general act, remove the common-law disability of parties to testify in pending as well as future suits. The objection to retrospective laws is declared, in article 23 of the Bill of Rights, to be, that they "are highly injurious, oppressive, and unjust." The objection is substantial, not formal,—reasonable, not technical; and the reason of the objection, like the reason of all law, is to be considered in interpretation and administration. The reason of the constitutional prohibition of retrospective legislation is, the material and substantial injury, oppression, and injustice caused by its practical operation.

Taking the prohibition in the reasonable and equitable sense, explicitly announced in the Bill of Rights as a prohibition of the injustice of retrospectively converting right into wrong or wrong into right, and applying it in that sense to the case of *Rich v. Flanders*, it might be argued that, in allowing both parties to testify, there was no such transmutation, but merely a grant of equal rights to both parties by an impartial enlargement of the bounds of competent evidence on each side of the issue, not changing the issue, or the right to be established, or the wrong to be redressed, or the form or substance of the remedy; that giving both parties the additional means of showing the truth, and proving and disproving the right asserted or the wrong complained of, and demonstrating what was right and what was wrong, was neither an injury, nor oppression, nor injustice, in a moral or legal sense, and, therefore, not within the constitutional prohibition; that allowing the parties to testify did not alter the character or effect of competent evidence, but only increased its quantity; that neither party had a vested right in the exclusion of evidence and the suppression of the truth, on the trial of an unaltered issue, upon the determination of which depended the vindication of an unaltered right by an unaltered remedy, or the discharge of the defendant from an unaltered claim, on unaltered grounds, in an unaltered process; \* \* \* that it would be a very different thing if the legislature should undertake to give artificial weight to a certain class of evidence in a pending suit, as by declaring certain proof to be *prima facie* evidence (*Chappell*

v. Purday, 12 M. & W. 303, 306, where Lord Abinger thought the legislature did not intend, by an *ex post facto* law, to give one party to a suit already commenced so great an advantage over his adversary); that it would also be a very different thing if the legislature should undertake, by a disabling act, to render a competent witness incompetent in a pending suit; that it might be injurious, oppressive, and unjust, by a retrospective statute, to deprive a party to a pending suit of the means of showing the truth; [and] that to destroy the competency of a witness might unjustly defeat the party having the burden of proof,—might unjustly defeat either party,—by depriving him of evidence of the truth on which he relied and had a right to rely. \* \* \*

An argument of that kind might be made, in support of the doctrine of *Rich v. Flanders*, on very narrow ground. We are not to be understood as saying that it is only on such a ground that the doctrine of that case can be supported; but it is suggested that, if such a ground can be maintained, it would be sufficient for that case.

In the present case, at the time of the passage of the act of 1872, there were three plaintiffs, and they, jointly constituting the party plaintiff, had no right of action against the defendant, and he was under no liability to them. This state of things the legislature undertook to change, by allowing two of the plaintiffs to withdraw,—a proceeding which, if successfully followed, would, so far as these parties are concerned, change no cause of action into a good cause of action, and operate as a substantial creation of a new suit that could be maintained, in place of an old one that could not. This is going far beyond impartially giving both parties additional means of proof. We see nothing in the doctrine of *Rich v. Flanders* that sustains legislation of this character.

There is much authority for holding, in general terms, that a right to have one's controversies determined by existing rules of evidence is not a vested right; that rules of evidence pertain to the remedies which the state provides for its citizens; that, like other rules affecting the remedy, they must at all times be subject to modification by the legislature; that changes affecting the remedy may lawfully be made applicable to existing causes of action; that the changes are not retrospective, because they are to be applied in future trials, and are not to affect previous trials. *Cooley, Const. Lim.* 367. But general statements of this kind are to be taken with the broad qualification that the changes must not infringe the general principles of justice. Retrospective laws are unconstitutional and void, because they are injurious, oppressive, and unjust. That is the plain and simple rule laid down in the Bill of Rights. And any generalization founded on the distinction between right and remedy, is attended with some danger, because of the difficulty of drawing that distinction so accurately as not to impair the force of the constitutional prohibition. Undoubtedly, a



remedy may be changed, in some sense, and to some extent, without affecting a right,—that is, there may be a change in the remedy that is not injurious, oppressive, and unjust: but it is equally clear that a remedy may be so changed as to affect a right injuriously, oppressively, and unjustly, within the meaning of the prohibition.

A statute is not necessarily just and valid because it affects the remedy. The question is, not whether it affects the remedy, but whether it affects the remedy in a certain sense, and the remedy only. This point is forcibly illustrated in the dissenting opinion of Bell, C. J., in *Rich v. Flanders*, 39 N. H. 347, 348. If a statute, in terms made applicable to pending suits, should provide that no deed should be received in evidence unless the attesting witnesses were fifty years of age at the time of the trial, and if the retrospective character of such a statute were the only objection to its validity, it would not be made valid by the fact that it affected the remedy. It could not be applied to pending suits, or to deeds duly executed before its passage, because it would unjustly affect rights as well as remedies. Legal evidence of title could not be justly destroyed, however strongly the statute might profess to be exclusively aimed at the remedy. The principles of justice, declared by the prohibition of retrospective laws, are not evaded by words, names, and pretences. And when we have merely ascertained that a statute affects the remedy in some sense or other, we have made very little progress in the inquiry whether it affects a right, that is, whether it is unjust on general principles. If a certain change can be made in the remedy, it is because it can be justly made: if a change cannot be made in the right, it is because it cannot be justly made.

A statute abolishing the action of *assumpsit*, and substituting for it the action of debt, might be applied, without injustice, to existing causes of action not in suit; but it could not be constitutionally applied to oppress a plaintiff in a pending suit in *assumpsit*. Having incurred expense in bringing a proper suit, and pursuing a remedy provided by law, it would be unjust to turn him out of court, render a judgment against him for the defendant's costs, and leave him to another remedy, in the pursuit of which he might again be defeated in the same manner by another statute. In one sense, such legislation would affect the remedy only; but, in the constitutional sense, it would be retrospective, injurious, oppressive, and unjust, and, therefore, unconstitutional; and it is not apparent how the constitutional sense, in such a case, would be elucidated by a distinction between a right and a remedy. The injustice would be manifest; and the test given by the bill of rights is, not the distinction between right and remedy, but the distinction between right and wrong. On other subjects, the ground of judicial decision is not ordinarily understood to be so broad as the general principles of justice; but, on this subject of retrospective legislation, those principles are the constitutional ground amply supported

by the authorities. Cooley, Const. Lim. 369-383. It is said that a defendant has no vested right in a defence based upon an informality not affecting his substantial equities, and that formal defects and irregularities may be cured by retrospective legislation. Cooley, Const. Lim. 370, 383. That is merely saying that the whole subject stands on the ground of substantial equity. What are formal and what are substantial defects, in particular cases, may not be an easier problem than the application of the general equitable principle. In whatever form the question is put, it is not easy to lay down a universal rule (any narrower than the general principle), by which such an answer can be readily obtained, in every case, as the principle requires. It is natural that courts, pressed by the difficulty and inconvenience of deciding causes on so broad a principle, and accustomed to the guidance of more limited rules and specific precedents, should seek some path more restricted, sharply defined, and easily followed, than the unbounded expanse of justice. But it may be doubted whether some of the attempts made to lay out such a path have not tended to disseminate contracted and obscure views of the principle on which the constitutional prohibition is based, and to embarrass its operation.

Without undertaking to establish a rule for the disposition of other cases of a different kind, we think the application of the act of 1872 to this case would be an inroad upon the conservative constitutional ideas that have prevailed in this state. In *Woart v. Winnick*, 3 N. H. 473, 481, 482, 14 Am. Dec. 384, it was held that the legislature cannot prescribe new rules for the decision of existing causes, so as to change the ground of the action or the nature of the defence; that it is most manifestly injurious, oppressive, and unjust, that, after an individual has, upon the faith of existing laws, brought his action, or prepared his defence, the legislature should step in, and, without any examination of the circumstances of the cause, arbitrarily repeal the law upon which the action or the defence had been rested. \* \* \* Suppose the general statement, that the nature of the defence cannot be changed, is to be understood with the qualification that the defence is based upon substantial equity, and not upon a mere informality: the defence here is, that the suit is brought by several persons on a joint cause of action which does not exist; that the cause of action, created by the statute, is vested by the statute in the one person who first brings a suit for the penalty; that, as the right of action vests in that one person, it has not vested in these three plaintiffs, Kent, Cossitt, and Rogers, either jointly or severally; that it has not vested in Kent alone, nor in Cossitt alone, nor in Rogers alone, because neither of them alone brought the suit, and there is no fact or fiction, recognized by law, that can, in this suit, confer on either one of them a right of action which is not yet his, and which the law confers only on the one person who brings the suit; that the defendant is not now liable to the plaintiffs, or either of them; and that, to allow two of them to with-

draw, and the other one to prosecute the suit, would render the defendant liable to a person to whom he is not now liable,—would impose upon him a liability that has no existence in law or in fact. Is this a defence of substance and equity, or of form and technicality? The defence of the statute of limitations is, in some cases, inequitable in point of fact; but it was held, in *Woart v. Winnick*, that, as a matter of law, it is a defence which it is inequitable to take away by retroactive legislation. Looking at the origin, nature, and object of the cause of action in a penal suit of this kind, and the method in which it accrues to one person, we are unable to say that the defence in this case is not an equitable one within the meaning and protection of the Bill of Rights. And, giving effect to the prohibition in the sense of it as expounded by the letter and spirit of our numerous decisions, and the general understanding of the legal profession, we are of opinion that the act of 1872 cannot be applied to this suit, and that the amendment desired by the plaintiffs cannot be made.

Motion denied.<sup>1</sup>

<sup>1</sup> In *Rich v. Flanders*, 39 N. H. 304, 316, 317 (1859) Sargent, J., said, quoting in part from *Willard v. Harvey*, 24 N. H. 351 (1852): "The broadest construction of the constitutional rules which forbid retrospective legislation would require that all statutes affecting in any way a civil cause must be so entirely prospective that no new rule could be applied in the decision of a cause which did not exist when the right of action accrued. But a construction so broad as this could not be reasonably held, since the effect would be that no change could be made in the courts or course of justice which would affect the actions or causes of action then existing. The courts have, therefore, everywhere recognized a distinction between statutes affecting rights and those affecting remedies only. The rights of parties cannot be changed by legislation, but no party has a vested right in any particular remedy.' And it was very truly and appropriately said in that decision, that (1) courts may be changed—one may be abolished and another substituted, or the jurisdiction transferred; (2) the process may be changed, as by abolishing arrests for debt; (3) new parties may be authorized to maintain suits, as executors, heirs, assignees, etc.; (4) the action may be changed, as by substituting case for debt or trespass, or proceedings in law for those in equity, or vice versa; (5) new rules of evidence and of practice may be established; and, (6) new final process may be established or substituted, and new modes of executing such process, or of preserving their lien; new exemptions of property, and new modes of relief from imprisonment may be provided; and that a party has no right to complain of any of these things, as violations of the Constitution, so long as the laws leave to him a competent court bound to administer justice to him according to the rights the law gave him, when his right of action or defence became vested, with means and powers to accomplish its duties, and suitable process of which the party may avail himself."

In the same case, Bell, C. J., dissenting, said (pages 347, 348): "But there are many other cases where the rules of evidence cannot be changed without affecting the rights of the parties, and entirely changing the grounds upon which those rights must be decided. Some cases may be stated merely as examples, in illustration of this position, which must be assented to by everybody. One has a promissory note which is outlawed; that is, more than six years have elapsed since it was payable; but the holder has two reliable witnesses to prove that the signer within six years promised to pay it. He has to-day a perfect right of action on the note, and the evidence to sustain it. To-morrow the legislature pass an act that no evidence of a new promise shall take a case out of the statute of limitations, unless it is in

writing and signed by the party. To-morrow, then, his right of action will be gone, because the legislature has deprived him of his proof to support his claim. And yet, in terms, the law affects the evidence merely. A has a deed, valid, when made, by the existing law, but attested by only one subscribing witness. A law is passed that no deed shall be admissible in evidence unless it is attested by two subscribing witnesses. Here his right to his farm is not attacked; nothing is affected, so far as the form is concerned, but the evidence of his title. And yet the owner must lose his farm by the change of the rule of evidence, if such a law is sustained. An action is brought against B, founded on his parol agreement to pay the debt of a third person. He has a perfect defence, because by the statute no action can be supported on such a contract. If the statute should be repealed, parol evidence, upon general principles must be admitted, and his defence is gone if the act can be held consistent with the Constitution. Wills are now required to be attested by three witnesses. A statute requiring the testimony of four witnesses to establish a will would put it out of the power of devisees in most cases to prove their titles. A statute which should make written evidence indispensable to the proof of every contract, would defeat all parol agreements. An act which should make five years actual possession of real estate evidence of a conveyance of it from the owner, would at once change the ownership of a great amount of property, if it could be held to apply to cases where that term had already expired. Such a statute would not, in terms, affect any vested right, nor does it in form apply to anything but the evidence. Instances like these, showing that a change of the rules of evidence does not necessarily operate on the remedy alone, but may go much further, and may, and very often must, operate to give a right or defence which did not exist before, or to take away and destroy defences to which the party was clearly entitled under the previous law, might be multiplied indefinitely."

See *Brearley School v. Ward*, 201 N. Y. 359, 94 N. E. 1001, 40 L. R. A. (N. S.) 1215, Ann. Cas. 1912B, 251 (1911) (law may be changed to give creditors a right to income of trust fund exempt from execution at time of its creation—see cases); *Kennebec Prop'rs v. Laboree*, 2 Me. (2 Greenl.) 275, 291, 292, 11 Am. Dec. 79 (1823); *Tabor v. Ward*, 83 N. C. 291 (1880).

# PART III

## THE FEDERAL GOVERNMENT

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### CHAPTER XIV

#### GENERAL SCOPE OF FEDERAL POWERS

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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 pur-



poses, 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 process 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.<sup>1</sup> 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."<sup>2</sup>

<sup>1</sup> Accord: See cases cited in *Re Loney*, 134 U. S. 372, 10 Sup. Ct. 384, 33 L. Ed. 919 (1890).

<sup>2</sup> See, also, *Martin v. Hunter's Lessee*, 1 Wheat. 304, 324-326, 4 L. Ed. 97 (1816); *Cohens v. Virginia*, 6 Wheat. 264, 413, 414, 5 L. Ed. 257 (1821); *Opinion of Justices*, 14 Gray (Mass.) 614, 616, 617 (1859).

"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

STURGES v. CROWNINSHIELD (1819) 4 Wheat. 122, 192, 193, 195, 196, 4 L. Ed. 529, Mr. Chief Justice MARSHALL (sustaining the power of the states to pass bankruptcy laws in the absence of conflicting congressional legislation):

"It must be recollected that, previous to the formation of the new Constitution, we were divided into independent states, united for some purposes, but, in most respects, sovereign. These states could exercise almost every legislative power, and, among others, that of passing bankrupt laws. When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the states. These powers proceed, not from the people of America, but from the people of the several states; and remain, after the adoption of the Constitution, what they were before, except so far as they may be abridged by that instrument. In some instances, as in making treaties, we find an express prohibition; and this shows the sense of the convention to have been, that the mere grant of a power to Congress did not imply a prohibition on the states to exercise the same power. But it has never been supposed, that this concurrent power of legislation extended to every possible case in which its exercise by the states has not been expressly prohibited. The confusion resulting from such a practice would be endless. The principle laid down by the counsel for the plaintiff, in this respect, is undoubtedly correct. Whenever the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress the subject is as completely taken from the state legislatures, as if they had been expressly forbidden to act on it.

"Is the power to establish uniform laws on the subject of bankruptcies, throughout the United States, of this description? \* \* \* It is obvious that much inconvenience would result from that construction of the Constitution, which should deny to the state legislatures the power of acting on this subject, in consequence of the grant of Congress. It may be thought more convenient that much of it should be regulated by state legislation, and Congress may purposely omit to provide for many cases to which their power extends. It does not appear to be a violent construction of the Constitution, and is certainly a convenient one, to consider the power of the states as existing over such cases as the laws of the Union may not reach. But be this as it may, the power granted to Congress may be exercised or declined as the wisdom of that body shall decide. If, in the opinion of Congress,

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).

uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that state legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states."<sup>1</sup>

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

<sup>1</sup> "The Constitution containing a grant of powers in many instances similar to those already existing in the state governments, and some of these being of vital importance also to state authority and state legislation, it is not to be admitted that a mere grant of such powers in affirmative terms to Congress, does, per se, transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion, that the powers so granted are never exclusive of similar powers existing in the states, unless where the Constitution has expressly in terms given an exclusive power to Congress, or the exercise of a like power is prohibited to the states, or there is a direct repugnancy or incompatibility in the exercise of it by the states. \* \* \* In cases of concurrent authority, where the laws of the states and of the Union are in direct and manifest collision on the same subject, those of the Union, being 'the supreme law of the land,' are of paramount authority, and the state laws, so far, and so far only, as such incompatibility exists, must necessarily yield."—Story, J., concurring, in *Houston v. Moore*, 5 Wheat. 1, 48-50, 5 L. Ed. 19 (1820).

"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."—Swayne, J., in *Gilman v. Philadelphia*, 3 Wall. 713, 730, 18 L. Ed. 96 (1866).

An illustration of class 3, above, is the power to establish a uniform rule of naturalization (article I, § 8, par. 4), which has been held to be exclusively for Congress, owing to the effect of article IV, § 2, par. 1. *Chirac v. Chirac*, 2 Wheat. 259, 4 L. Ed. 234 (1817); *Scott v. Sandford*, 19 How. 393, 417, 15 L. Ed. 691 (1857). See the discussion of concurrent and exclusive powers in the argument of Oakley, of counsel in *Gibbons v. Ogden*, 9 Wheat. 1, 33-44, 6 L. Ed. 23 (1824); and in *Prigg v. Pennsylvania*, 16 Pet. 539, 10 L. Ed. 1060 (1842).

extent of which must be determined by a fair consideration of the instrument by which that change was effected.<sup>1</sup>

"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,

<sup>1</sup> As to the legal status of the colonies (later the states) and of the Continental Congress between 1774 and July 4, 1776, and between the latter date and the completion of the Confederation in 1781, see *Ware v. Hylton*, 3 Dall. 199, 222-225, 231-233, 1 L. Ed. 568 (1796). As to right of secession, see *Texas v. White*, 7 Wall. 700, 724-726, 19 L. Ed. 227 (1869); and as to the legal effect of attempted secession, see *White v. Hart*, 13 Wall. 646, 20 L. Ed. 685 (1872); *Gunn v. Barry*, 15 Wall. 610, 623, 21 L. Ed. 212 (1873); *Keith v. Clark*, 97 U. S. 454, 24 L. Ed. 1071 (1878).

"The people of the United States constitute one nation, under one government. \* \* \* The states disunited might continue to exist. Without the states in union, there could be no such political body as the United States. Both the states and the United States existed before the Constitution. \* \* \* The federal and state governments are in fact but different agents and trustees of the people, constituted with different powers and designated for different purposes."—Chase, C. J., in *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L. Ed. 101 (1869).

"The Union of the states never was a purely artificial and arbitrary relation. It began among the colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests and geographical relations. \* \* \* The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states. When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union and all the guarantees of republican government in the Union, attached at once to the state. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. \* \* \* There was no place for reconsideration, or revocation, except through revolution, or through consent of the states. \* \* \* Texas continued to be a state, and a state of the Union, notwithstanding the transactions [secession and civil war] to which we have referred."—Chase, C. J., in *Texas v. White*, 7 Wall. at pages 724, 725, 19 L. Ed. 227 (1869).

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 recommendation 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 more 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 negated, by the state governments. The Constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.<sup>1</sup>

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

<sup>1</sup> Compare Webster's speech in reply to Hayne, in the Senate, January 26, 27, 1830.

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,<sup>2</sup> 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 inser-

<sup>2</sup> Article II: "Each state retains \* \* \* every power \* \* \* not \* \* \* expressly delegated."

tion 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 embraced 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.<sup>3</sup>

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 government, 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

<sup>3</sup> "A Constitution, establishing a frame of government, declaring fundamental principles, and creating a national sovereignty, and intended to endure for ages and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract."—Gray, J., in *Juilliard v. Greenman*, 110 U. S. 421, 439, 4 Sup. Ct. 122, 28 L. Ed. 204 (1884).

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 have 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.<sup>4</sup>

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,

<sup>4</sup> Compare the ingenious argument to this effect in *Commonwealth v. Morrison*, 2 A. K. Marsh. (Ky.) 75, 80-86 (1819).



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 execu-

tion, 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. 1279.]

Judgment reversed.<sup>5</sup>

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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

<sup>5</sup> During the proceedings of the Philadelphia Convention of 1787 various proposals to give Congress expressly some power to charter corporations were disregarded or negated. See 5 Ell. Deb. 440, 462, 543, 544 (published 1845); and 1 Ell. Deb. 247, 256, 310 (first published 1830). See, also, the comment of Bradley, J., in *Legal Tender Cases*, 12 Wall. 457, 459, 460, 20 L. Ed. 287 (1871).

The conducting of all usual banking operations is of course incidental to the exercise of the powers for which a bank may be chartered. *Fleckner v. U. S. Bank*, 8 Wheat. 338, 5 L. Ed. 631 (1823); *Osborn v. Bank*, 9 Wheat. 738, 760-765, 6 L. Ed. 204 (1824).

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, ir



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 construction 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 country, 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."<sup>1</sup>

[BRADLEY, J., gave a concurring opinion, and CHASE, C. J., and CLIFFORD and FIELD, JJ., gave dissenting opinions. NELSON, J., also dissented.]

<sup>1</sup> 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 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.

JULLIARD v. GREENMAN (1884) 110 U. S. 421, 444, 447-450. 4 Sup. Ct. 122, 28 L. Ed. 204, Mr. Justice GRAY (upholding the issue of legal tender currency in time of peace):

"The power 'to borrow money on the credit of the United States' is the power to raise money for the public use on a pledge of the public credit, and may be exercised to meet either present or anticipated expenses and liabilities of the government. It includes the power to issue, in return for the money borrowed, the obligations of the United States in any appropriate form, of stock, bonds, bills, or notes. \* \* \* The states are forbidden, but Congress is expressly authorized, to coin money. The states are prohibited from emitting bills of credit; but Congress, which is neither expressly authorized nor expressly forbidden to do so, has, as we have already seen, been held to have the power of emitting bills of credit, and of making every provision for their circulation as currency, short of giving them the quality of legal tender for private debts—even by those who have denied its authority to give them this quality.

"It appears to us to follow, as a logical and necessary consequence, that Congress has the power to issue the obligations of the United States in such form, and to impress upon them such qualities as currency for the purchase of merchandise and the payment of debts, as accord with the usage of sovereign governments. The power, as incident to the power of borrowing money and issuing bills or notes of the government for money borrowed, of impressing upon those bills or notes the quality of being a legal tender for the payment of private debts, was a power universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adoption of the Constitution of the United States. The governments of Europe, acting through the monarch or the legislature, according to the distribution of powers under their respective Constitutions, had and have as sovereign a power of issuing paper money as of stamping coin. \* \* \* The power of issuing bills of credit, and making them, at the discretion of the legislature, a tender in payment of private debts, had long been exercised in this country by the several colonies and states; and during the Revolutionary War the states, upon the recommendation of the Congress of the Confederation, had made the bills issued by Congress a legal tender. See *Craig v. Missouri*, 4 Pct. 435, 453, 7 L. Ed. 903; *Briscoe v. Bank of Kentucky*, 11 Pet. 257, 313, 334-336, 9 L. Ed. 709; *Legal Tender Cases*, 12 Wall. 557, 558, 622, 20 L. Ed. 287; *Phillips on American Paper Currency*, *passim*. The exercise of this power not being prohibited to Congress by the Constitution, it is included in the power expressly granted to borrow money on the credit of the United States.

"This position is fortified by the fact that Congress is vested with

the exclusive exercise of the analogous power of coining money<sup>1</sup> and regulating the value of domestic and foreign coin, and also with the paramount power of regulating foreign and interstate commerce. Under the power to borrow money on the credit of the United States, and to issue circulating notes for the money borrowed, its power to define the quality and force of those notes as currency is as broad as the like power over a metallic currency under the power to coin money and to regulate the value thereof. Under the two powers, taken together, Congress is authorized to establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes, as regards the national government or private individuals.<sup>2</sup>

"The power of making the notes of the United States a legal tender in payment of private debts, being included in the power to borrow money and to provide a national currency, is not defeated or restricted by the fact that its exercise may affect the value of private contracts. If, upon a just and fair interpretation of the whole Constitution, a particular power or authority appears to be vested in Congress, it is no constitutional objection to its existence, or to its exercise, that the property or the contracts of individuals may be incidentally affected. \* \* \* So, under the power to coin money and to regulate its value,<sup>3</sup> Congress may (as it did with regard to gold by the Act of June

<sup>1</sup> "It is not doubted that the power to establish a standard of value by which all other values may be measured, or, in other words, to determine what shall be lawful money and a legal tender, is in its nature, and of necessity, a governmental power. It is in all countries exercised by the government. In the United States, so far as it relates to the precious metals, it is vested in Congress by the grant of the power to coin money."—Chase, C. J., in *Hepburn v. Griswold*, 8 Wall. 603, 615, 19 L. Ed. 513 (1870). So, *Baldwin v. Baker*, 121 Mich. 259, 80 N. W. 36 (1899) (silver dollars legal tender).

<sup>2</sup> The legal tender acts did not and perhaps could not make United States notes compulsorily receivable by states for taxes. *Lane County v. Oregon*, 7 Wall. 71, 19 L. Ed. 101 (1869). Nor did they affect specific contracts for the payment of gold and silver coin. *Bronson v. Rodes*, 7 Wall. 229, 19 L. Ed. 141 (1869).

<sup>3</sup> As to the power of Congress "to regulate the value \* \* \* of foreign coin," see *Hadden v. Merritt*, 115 U. S. 25, 5 Sup. Ct. 1169, 29 L. Ed. 333 (1885); and of domestic money, see *Ling Su Fan*, 218 U. S. 302, 31 Sup. Ct. 21, 54 L. Ed. 1049, 30 L. R. A. (N. S.) 1176 (1910).

PROHIBITION AGAINST STATE BILLS OF CREDIT.—Closely connected with the topic of the principal case is the constitutional prohibition against the issue of bills of credit by a state (Const. art. I, § 10, par. 1). This has been liberally construed in favor of the power of the states to issue written promises for their debts payable to bearer on demand and receivable for all public dues, provided they are not actually intended to circulate as money, *Craig v. Missouri*, 4 Pet. 410, 7 L. Ed. 903 (1830); *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185 (1885); *Houston, etc., Ry. v. Texas*, 177 U. S. 66, 20 Sup. Ct. 545, 44 L. Ed. 673 (1900); and it does not forbid the issue of circulating banknotes by a state chartered corporation, even though the state owns all of the stock therein, *Briscoe v. Bank of Kentucky*, 11 Pet. 257, 9 L. Ed. 709 (1837); *Darrington v. Bank of Alabama*, 13 How. 12, 14 L. Ed. 30 (1851).

POWER TO FIX STANDARDS OF WEIGHTS AND MEASURES.—This is given to Congress in the same clause of the Constitution with the power to coin money and regulate its value. The opinion in *Weaver v. Fegely*, 29 Pa. 27, 70



28th, 1834, c. 95, and with regard to silver by the Act of February 28th, 1878, c. 20), issue coins of the same denominations as those already current by law, but of less intrinsic value than those, by reason of containing a less weight of the precious metals, and thereby enable debtors to discharge their debts by the payment of coins of the less real value. A contract to pay a certain sum in money, without any stipulation as to the kind of money in which it shall be paid, may always be satisfied by payment of that sum in any currency which is lawful money at the place and time at which payment is to be made.

\* \* \*

"Congress, as the legislature of a sovereign nation, being expressly empowered by the Constitution, 'to lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States,' and 'to borrow money on the credit of the United States,' and 'to coin money and regulate the value thereof and of foreign coin'; and being clearly authorized, as incidental to the exercise of those great powers, to emit bills of credit, to charter national banks, and to provide a national currency for the whole people, in the form of coin, treasury notes, and national bank bills; and the power to make the notes of the government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution; we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress, consistent with the letter and spirit of the Constitution, and therefore, within the meaning of that instrument, 'necessary and proper for carrying into execution the powers vested by this Constitution in the government of the United States.'

"Such being our conclusion in matter of law, the question whether at any particular time, in war or in peace, the exigency is such, by reason of unusual and pressing demands on the resources of the government, or of the inadequacy of the supply of gold and silver coin to furnish the currency needed for the uses of the government and of the people, that it is, as matter of fact, wise and expedient to resort to this means, is a political question, to be determined by Congress when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the courts."

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

Am. Dec. 151 (1857), that this power may be exercised concurrently by the states until Congress acts, has been commonly accepted. *Caldwell v. Dawson*, 4 Metc. (Ky.) 121 (1862); *Harris v. Rutledge*, 19 Iowa, 388, 87 Am. Dec. 441 (1866); *Higgins v. Cal. Petroleum Co.*, 109 Cal. 304, 41 Pac. 1087 (1895). Contra: *The Miantinomi*, 3 Wall. Jr. 46, 17 Fed. Cas. 254 (1855) (semble).

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.<sup>1</sup> \* \* \*

"[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, independently 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

<sup>1</sup> 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."

tenth amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread 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, further 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 grant-

ing 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."<sup>2</sup>

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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

<sup>2</sup> As to the power of the United States to secure and control the irrigation of national public lands in a state, see *Van Brocklin v. Tennessee*, post, p. 1303, note 1.

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."<sup>1</sup>

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#### Ex parte SIEBOLD.

(Supreme Court of the United States, 1880. 100 U. S. 371, 25 L. Ed. 717.)

[Petition for habeas corpus. An act of Congress, passed in 1871 (Act Feb. 28, c. 99, 16 Stat. 433) and re-enacted in 1873 as section 5515 of the federal Revised Statutes, provided a criminal punishment for officers of elections at which representatives in Congress were voted for, who should violate any duty imposed upon them in regard to such election by any state or federal law. Under a law of Maryland passed in 1876 Siebold and others were appointed judges

<sup>1</sup> As to the rule of compensation to be observed when the United States takes for federal purposes land formerly devoted to state public purposes, see *Nahant v. U. S.*, 136 Fed. 273, 70 C. C. A. 641, 69 L. R. A. 723 (1905). Compare *Stockton v. Baltimore, etc., Ry.*, 32 Fed. 9, 19, 20 (1887). See, also, *Van Brocklin v. Tennessee*, post, p. 1303, note 1, and p. 1305, note 2.

MILITARY POWERS OF THE UNITED STATES.—See Const. art. I, § 8, pars. 11-16. These provisions give the federal government all of the belligerent powers ordinarily exercised by sovereign nations in carrying on war, foreign or domestic, in suppressing public disorder, and in governing military forces. See, in general, as to *belligerent rights*: Prize Cases, 2 Black, 635, 17 L. Ed. 459 (1863) (mode of commencing war); *Miller v. U. S.*, 11 Wall. 268, 20 L. Ed. 135 (1871) (confiscation of enemy's property); *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281 (1866) (power to declare martial law); as to *modes of raising and organizing troops*: *Houston v. Moore*, 5 Wheat. 1, 5 L. Ed. 19 (1820) (state militia); *Martin v. Mott*, 12 Wheat. 19, 6 L. Ed. 537 (1827) (same); *Opinion of Justices*, 14 Gray (Mass.) 614 (1859) (same); *Tyler v. Pomeroy*, 8 Allen (Mass.) 480 (1864) (federal enlistment); *Kneidler v. Lane*, 45 Pa. 238 (1864) (federal draft); and as to the *government of military forces*: *Dynes v. Hoover*, 20 How. 65, 15 L. Ed. 838 (1858); *Reaves v. Ainsworth*, 219 U. S. 296, 31 Sup. Ct. 230, 55 L. Ed. 225 (1911); *Grafton v. U. S.*, 206 U. S. 333, 27 Sup. Ct. 749, 51 L. Ed. 1084, 11 Ann. Cas. 640 (1907).

See, also, *Luther v. Borden*, ante, p. 101, and notes 1-4.

of election, and were later convicted in the federal Circuit Court for Maryland under the above federal statute of having stuffed the ballot box at a congressional election in 1878, in violation of their official duties under the law of Maryland. They then petitioned for this writ to secure their discharge from imprisonment therefor.]

Mr. Justice BRADLEY. \* \* \* The clause of the Constitution under which the power of Congress, as well as that of the state legislatures, to regulate the election of senators and representatives arises, is as follows: "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 place of choosing senators." [Article I, § 4, par. 1.] \* \* \* The state may make regulations on the subject; Congress may make regulations on the same subject, or may alter or add to those already made. The paramount character of those made by Congress has the effect to supersede those made by the state, so far as the two are inconsistent, and no farther. There is no such conflict between them as to prevent their forming a harmonious system perfectly capable of being administered and carried out as such.

As to the supposed conflict that may arise between the officers appointed by the state and national governments for superintending the election, no more insuperable difficulty need arise than in the application of the regulations adopted by each respectively. The regulations of Congress being constitutionally paramount, the duties imposed thereby upon the officers of the United States, so far as they have respect to the same matters, must necessarily be paramount to those to be performed by the officers of the state. If both cannot be performed, the latter are pro tanto superseded and cease to be duties. \* \* \*

As to the supposed incompatibility of independent sanctions and punishments imposed by the two governments, for the enforcement of the duties required of the officers of election, and for their protection in the performance of those duties, the same considerations apply. While the state will retain the power of enforcing such of its own regulations as are not superseded by those adopted by Congress, it cannot be disputed that if Congress has power to make regulations it must have the power to enforce them, not only by punishing the delinquency of officers appointed by the United States, but by restraining and punishing those who attempt to interfere with them in the performance of their duties; and if, as we have shown, Congress may revise existing regulations, and add to or alter the same as far as it deems expedient, there can be as little question that it may impose additional penalties for the prevention of frauds committed by the state officers in the elections, or for their violation of any duty relating thereto, whether arising from the common law or from any other law, state or national. Why not? Penalties for fraud and delinquency

are part of the regulations belonging to the subject. If Congress, by its power to make or alter the regulations, has a general supervisory power over the whole subject, what is there to preclude it from imposing additional sanctions and penalties to prevent such fraud and delinquency?

It is objected that Congress has no power to enforce state laws or to punish state officers, and especially has no power to punish them for violating the laws of their own state. As a general proposition, this is undoubtedly true; but when, in the performance of their functions, state officers are called upon to fulfil duties which they owe to the United States as well as to the state, has the former no means of compelling such fulfilment? Yet that is the case here. It is the duty of the states to elect representatives to Congress. The due and fair election of these representatives is of vital importance to the United States. The government of the United States is no less concerned in the transaction than the state government is. It certainly is not bound to stand by as a passive spectator, when duties are violated and outrageous frauds are committed. It is directly interested in the faithful performance, by the officers of election, of their respective duties. Those duties are owed as well to the United States as to the state. This necessarily follows from the mixed character of the transaction, state and national. A violation of duty is an offence against the United States, for which the offender is justly amenable to that government. No official position can shelter him from this responsibility. In view of the fact that Congress has plenary and paramount jurisdiction over the whole subject, it seems almost absurd to say that an officer who receives or has custody of the ballots given for a representative owes no duty to the national government which Congress can enforce; or that an officer who stuffs the ballot-box cannot be made amenable to the United States.<sup>1</sup> \* \* \*

The objection that the laws and regulations, the violation of which is made punishable by the acts of Congress, are state laws, and have not been adopted by Congress, is no sufficient answer to the power of Congress to impose punishment. It is true that Congress has not deemed it necessary to interfere with the duties of the ordinary officers of election, but has been content to leave them as prescribed by state laws. It has only created additional sanctions for their performance, and provided means of supervision in order more effectually to secure such performance. The imposition of punishment implies a prohibition of the act punished. The state laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress. It simply demands their fulfilment. Content to leave the laws as they are, it is not content with the means provided for their enforcement. It provides additional means for that purpose; and we

<sup>1</sup> For the power of the United States directly to forbid any interference with the right to vote for members of Congress established by state law under Const. art. I, § 2, par. 1, see *Ex parte Yarbrough*, ante, p. 145.

think it is entirely within its constitutional power to do so. It is simply the exercise of the power to make additional regulations. \* \* \*

Another objection made is, that, if Congress can impose penalties for violation of state laws, the officer will be made liable to double punishment for delinquency,—at the suit of the state, and at the suit of the United States. But the answer to this is, that each government punishes for violation of duty to itself only. Where a person owes a duty to two sovereigns, he is amenable to both for its performance; and either may call him to account. Whether punishment inflicted by one can be pleaded in bar to a charge by the other for the same identical act, need not now be decided; although considerable discussion bearing upon the subject has taken place in this court, tending to the conclusion that such a plea cannot be sustained. \* \* \*

The more general reason assigned, to wit, that the nature of sovereignty in such as to preclude the joint co-operation of two sovereigns, even in a matter in which they are mutually concerned, is not, in our judgment, of sufficient force to prevent concurrent and harmonious action on the part of the national and state governments in the election of representatives. It is at most an argument *ab inconveniente*. There is nothing in the Constitution to forbid such co-operation in this case. On the contrary, as already said, we think it clear that the clause of the Constitution relating to the regulation of such elections contemplates such co-operation whenever Congress deems it expedient to interfere merely to alter or add to existing regulations of the state. \* \* \* There are very few subjects, it is true, in which our system of government, complicated as it is, requires or gives room for joint action between the state and national sovereignties. Generally, the powers given by the Constitution to the government of the United States are given over distinct branches of sovereignty from which the state governments, either expressly or by necessary implication, are excluded. But in this case, expressly, and in some others, by implication, as we have seen in the case of pilotage, a concurrent jurisdiction is contemplated, that of the state, however, being subordinate to that of the United States, whereby all question of precedence is eliminated.

In what we have said, it must be remembered that we are dealing only with the subject of elections of representatives to Congress. If for its own convenience a state sees fit to elect state and county officers at the same time and in conjunction with the election of representatives, Congress will not be thereby deprived of the right to make regulations in reference to the latter. \* \* \*

The greatest difficulty in coming to a just conclusion arises from mistaken notions with regard to the relations which subsist between the state and national governments. It seems to be often overlooked that a national Constitution has been adopted in this country. estab-

lishing a real government therein, operating upon persons and territory and things; and which, moreover, is, or should be, as dear to every American citizen as his state government is. Whenever the true conception of the nature of this government is once conceded, no real difficulty will arise in the just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the state governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority. No greater jealousy is required to be exercised towards this government in reference to the preservation of our liberties, than is proper to be exercised towards the state governments. Its powers are limited in number, and clearly defined; and its action within the scope of those powers is restrained by a sufficiently rigid bill of rights for the protection of its citizens from oppression. The true interest of the people of this country requires that both the national and state governments should be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the Constitution. State rights, and the rights of the United States should be equally respected. \* \* \*

It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the states. Here again we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. \* \* \*

This concurrent jurisdiction which the national government necessarily possesses to exercise its powers of sovereignty in all parts of the United States is distinct from that exclusive power which, by the first article of the Constitution, it is authorized to exercise over the District of Columbia, and over those places within a state which are purchased by consent of the legislature thereof, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.<sup>2</sup>

<sup>2</sup> JURISDICTION OVER LAND IN A STATE OWNED BY THE UNITED STATES.— "[It] follows naturally from the language of the Constitution [article I, § 8, par. 17, referred to in the last paragraph of *Ex parte Siebold*, above] that no other legislative power than that of Congress can be exercised over lands, within a state, purchased by the United States, with her consent, for one of the purposes designated, and that such consent, under the Constitution, operates to exclude all other legislative authority. But with reference to lands owned by the United States, acquired by purchase without the consent of the state, or by cessions from other governments, the case is different. \* \* \* Where \* \* \* lands are acquired in any other way by the United States within the limits of a state than by purchase with her consent, they will



There its jurisdiction is absolutely exclusive of that of the state, unless, as is sometimes stipulated, power is given to the latter to serve the ordinary process of its courts in the precinct acquired. \* \* \*

Petition denied.

[CLIFFORD and FIELD, JJ., dissented, the opinion of the latter appearing in *Ex parte Clarke*, 100 U. S. 399, 404-422, 25 L. Ed. 715 (1880). It proceeded in part upon a denial that Congress could delegate to a state any part of its legislative power. As to this, see *United States v. Grimaud*, ante, at p. 124, and note 2.]

hold the land subject to this qualification: That if upon them forts, arsenals, or other public buildings are erected for the uses of the general government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the state as would destroy or impair their effective use for the purposes designed. \* \* \* But, when not used as such instrumentalities, the legislative power of the state over the places acquired will be as full and complete as over any other places within her limits. \* \* \*

"The land constituting the Ft. Leavenworth military reservation was not purchased, but was owned by the United States by cession from France many years before Kansas became a state; and whatever political sovereignty and dominion the United States had over the place comes from the cession of the state since her admission into the Union. It not being a case where exclusive legislative authority is vested by the Constitution of the United States, that cession could be accompanied with such conditions as the state might see fit to annex, not inconsistent with the free and effective use of the fort as a military post. \* \* \*

"We are here met with the objection that the legislature of a state has no power to cede away her jurisdiction and legislative power over any portion of her territory, except as such cession follows under the Constitution from her consent to a purchase by the United States for some one of the purposes mentioned. \* \* \* [Here reference is made to the inability of a state to cede territory to a foreign government without the consent of the United States.] In their relation to the general government, the states of the Union stand in a very different position from that which they hold to foreign governments. Though the jurisdiction and authority of the general government are essentially different from those of the state, they are not those of a different country; and the two, the state and general government, may deal with each other in any way they may deem best to carry out the purposes of the Constitution. It is for the protection and interests of the states, their people and property, as well as for the protection and interests of the people generally of the United States, that forts, arsenals, and other buildings for public uses are constructed within the states; \* \* \* and if, to their more effective use, a cession of legislative authority and political jurisdiction by the state would be desirable, we do not perceive any objection to its grant by the legislature of the state."—*Ft. Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, 537-542, 5 Sup. Ct. 995, 29 L. Ed. 264 (1885) by Field, J. See the cases discussed in the opinion.

For various details of the power of the federal government over its public lands in a state, where no exclusive jurisdiction has been ceded to it, see *Van Brocklin v. Tennessee*, post, p. 1303, note 1.

EXTRATERRITORIAL EFFECT OF FEDERAL LEGISLATION FOR DISTRICT OF COLUMBIA AND TERRITORIES.—As to how far legislation of Congress upon local matters in the District of Columbia or the territories may be enforced in the states, see *Lyons v. Bank of Discount (C. C.)* 154 Fed. 391 (1907) (cases). See, also, *Buckner v. Finley*, post, at p. 1278, note (cases).

LOGAN v. UNITED STATES (1891) 144 U. S. 263, 282-285, 293-295, 12 Sup. Ct. 617, 36 L. Ed. 429, Mr. Justice GRAY (upholding the conviction of Logan and others for violating a federal statute forbidding conspiracies to injure and oppress citizens in the exercise of rights secured to them by the federal Constitution and laws):

"The principal question in this case is whether the right of a citizen of the United States, in the custody of a United States marshal under a lawful commitment to answer for an offense against the United States, to be protected against lawless violence, is a right secured to him by the Constitution or laws of the United States, or whether it is a right which can be vindicated only under the laws of the several states. \* \* \*

"Although the Constitution contains no grant, general or specific, to Congress of the power to provide for the punishment of crimes, except piracies and felonies on the high seas, offenses against the law of nations, treason, and counterfeiting the securities and current coin of the United States, no one doubts the power of Congress to provide for the punishment of all crimes and offenses against the United States, whether committed within one of the states of the Union or within territory over which Congress has plenary and exclusive jurisdiction.

"To accomplish this end, Congress has the right to enact laws for the arrest and commitment of those accused of any such crime or offense, and for holding them in safe custody until indictment and trial; and persons arrested and held pursuant to such laws are in the exclusive custody of the United States, and are not subject to the judicial process or executive warrant of any state. *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169; *Tarble's Case*, 13 Wall. 397, 20 L. Ed. 597; *Robb v. Connolly*, 111 U. S. 624, 4 Sup. Ct. 544, 28 L. Ed. 542. The United States, having the absolute right to hold such prisoners, have an equal duty to protect them, while so held, against assault or injury from any quarter. The existence of that duty on the part of the government necessarily implies a corresponding right of the prisoners to be so protected; and this right of the prisoners is a right secured to them by the Constitution and laws of the United States. \* \* \*

"In the case at bar, \* \* \* while Charles Marlow and five others, citizens of the United States, were in the custody and control of a deputy marshal of the United States \* \* \* to answer to indictments for an offense against the laws of the United States, the plaintiffs in error conspired to injure and oppress them in the free exercise and enjoyment of the right secured to them by the Constitution and laws of the United States, to be protected, while in such custody and control of the deputy marshal, against assault and bodily harm, until they had been discharged by due process of the laws of the United States. \* \* \* If the officers of the United States,

charged with the performance of the duty, in behalf of the United States, of affording that protection and securing that right, neglected or violated their duty, the prisoners were not the less under the shield and panoply of the United States.

"The cases heretofore decided by this court, and cited in behalf of the plaintiffs in error, are in no way inconsistent with these views. \* \* \* [After discussing a number of cases:] The whole scope and effect of this series of decisions is that, while certain fundamental rights, recognized and declared, but not granted or created, in some of the amendments to the Constitution, are thereby guaranteed only against violation or abridgment by the United States or by the states, as the case may be, and cannot therefore be affirmatively enforced by Congress against unlawful acts of individuals, yet that every right created by, arising under, or dependent upon the Constitution of the United States, may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may, in its discretion, deem most eligible and best adapted to attain the object. \* \* \*

"In the case at bar the right in question does not depend upon any of the amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action. Any government which has power to indict, try, and punish for crime, and to arrest the accused, and hold them in safe-keeping until trial, must have the power and the duty to protect against unlawful interference its prisoners so held, as well as its executive and judicial officers charged with keeping and trying them.

"In the very recent Case of Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55 (at October Term, 1889), it was held that, although there was no express act of Congress authorizing the appointment of a deputy marshal or other officer to attend a justice of this court while traveling in his circuit, and to protect him against assault or injury, it was within the power and the duty of the executive department to protect a judge of any of the courts of the United States, when there was just reason to believe that he would be in personal danger while executing the duties of his office; that an assault upon such a judge while in discharge of his official duties was a breach of the peace of the United States, as distinguished from the peace of the state in which the assault took place; and that a deputy marshal of the United States, specially charged with the duty of protecting and guarding a judge of a court of the United States, had imposed upon him the duty of doing whatever might be necessary for that purpose, even to the taking of human life.

"In delivering judgment Mr. Justice Miller \* \* \* said: \* \* \*  
'That there is a peace of the United States; that a man assaulting a

judge of the United States while in the discharge of his duties violates that peace; that in such case the marshal of the United States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the state of California—are questions too clear to need argument to prove them.' 135 U. S. 69, 10 Sup. Ct. 670, 34 L. Ed. 55.<sup>1</sup>

"The United States are bound to protect against lawless violence all persons in their service or custody in the course of the administration of justice. This duty and the correlative right of protection are not limited to the magistrates and officers charged with expounding and executing the laws, but apply, with at least equal force, to those held in custody on accusation of crime, and deprived of all means of self-defense."<sup>2</sup>

SECOND EMPLOYERS' LIABILITY CASES (1912) 223 U. S. 1, 55-58, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, Mr. Justice VAN DEVANTER (upholding a federal statute imposing certain liabilities upon interstate railroads for injuries to their employes. The first part of the case appears post, p.1250):

"We come next to consider whether rights arising under the congressional act may be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion. The first of the cases now before us was begun in one of

<sup>1</sup> In this case Miller, J., also said (at pages 63, 64): "The Constitution, section 3, article 2, declares that the President 'shall take care that the laws be faithfully executed,' and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies. He is declared to be commander-in-chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfil the duty of his great department, expressed in the phrase that 'he shall take care that the laws be faithfully executed.' Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their express terms, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?" [The latter was held to be the correct view.] See, also, *Wells v. Nickles*, 104 U. S. 444, 26 L. Ed. 825 (1882) (executive power to protect public lands).

<sup>2</sup> Accord: *In re Quarles*, 158 U. S. 532, 15 Sup. Ct. 959, 39 L. Ed. 1080 (1895) (right of citizen to inform federal official of violation of federal laws). See *In re Loney*, 134 U. S. 372, 10 Sup. Ct. 384, 33 L. Ed. 949 (1890) (state cannot punish witness for perjury in federal proceeding). Compare *Sexton v. Calif.*, 189 U. S. 319, 23 Sup. Ct. 543, 47 L. Ed. 833 (1903) (state may punish extortion under threat of accusation of federal crime); *Matter of Lamb*, 105 App. Div. 462, 94 N. Y. Supp. 331 (1905) (state may disbar attorney for perjury in federal court of another state).

the superior courts of the state of Connecticut, and, in that case, the supreme court of errors of the state answered the question in the negative. That, however, was not because the ordinary jurisdiction of the superior courts, as defined by the Constitution and laws of the state, was deemed inadequate or not adapted to the adjudication of such a case, but because the supreme court of errors was of opinion (1) that the congressional act impliedly restricts the enforcement of the rights which it creates to the federal courts, and (2) that, if this be not so, the superior courts are at liberty to decline cognizance of actions to enforce rights arising under that act, because (a) the policy manifested by it is not in accord with the policy of the state respecting the liability of employers to employés for injuries received by the latter while in the service of the former, and (b) it would be inconvenient and confusing for the same court, in dealing with cases of the same general class, to apply in some the standards of right established by the congressional act, and in others the different standards recognized by the laws of the state.

"We are quite unable to assent to the view that the enforcement of the rights which the congressional act creates was originally intended to be restricted to the federal courts. \* \* \* Because of some general observations in the opinion of the supreme court of errors, and to the end that the remaining ground of decision advanced therein may be more accurately understood, we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion, and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress, and susceptible of adjudication according to the prevailing rules of procedure. We say 'when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion,' because we are advised by the decisions of the supreme court of errors that the superior courts of the state are courts of general jurisdiction, are empowered to take cognizance of actions to recover for personal injuries and for death, and are accustomed to exercise that jurisdiction, not only in cases where the right of action arose under the laws of that state, but also in cases where it arose in another state, under its laws, and in circumstances in which the laws of Connecticut give no right of recovery, as where the causal negligence was that of a fellow servant.

"The suggestion that the act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted



that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state. As was said by this court in *Clafin v. Houseman*, 93 U. S. 130, 136, 137, 23 L. Ed. 833, 838, 839:

“The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several states, but is a concurrent, and, within its jurisdiction, paramount, sovereignty. \* \* \* If an act of Congress gives a penalty [meaning civil and remedial] to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws. The two together form one system of jurisprudence, which constitutes the law of the land for the state; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. \* \* \* It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by the Chief Justice Taney, in the case of *Ableman v. Booth*, 21 How. 506,<sup>1</sup> 16 L. Ed. 169; and hence the state courts have no power to revise the action of the federal courts, nor the federal the state, except where the federal Constitution or laws are involved. But this is no reason why the state courts should not be open for the prosecution of rights growing out

<sup>1</sup> In this case (1859), at page 516 (denying that a state court could by writ of habeas corpus authorize interference with a person shown to be held in custody by a federal officer under color of federal authority) Taney, C. J., said: “The powers of the general government, and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by landmarks and monuments visible to the eye. And the state of Wisconsin had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other state of the Union, for an offence against the laws of the state in which he was imprisoned.”

So *Tarble's Case*, 13 Wall. 397, 20 L. Ed. 597 (1872). But the United States courts may release on habeas corpus, from the custody of state officers, persons whose alleged offences were committed under federal authority. *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868 (1886). Compare *Robb v. Connolly*, 111 U. S. 624, 4 Sup. Ct. 544, 28 L. Ed. 542 (1884); *Whitten v. Tomlinson*, 160 U. S. 231, 16 Sup. Ct. 297, 40 L. Ed. 406 (1895).

of the laws of the United States, to which their jurisdiction is competent, and not denied.'

"We are not disposed to believe that the exercise of jurisdiction by the state courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication."<sup>2</sup>

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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

<sup>2</sup> Contra: *Martin v. Hunter's Lessee*, 1 Wheat. 304, 330-336, 4 L. Ed. 97 (1816) (semble); *Robertson v. Baldwin*, 165 U. S. 275, 279, 17 Sup. Ct. 326, 41 L. Ed. 715 (1897) (semble). See *Levin v. U. S.*, 128 Fed. 826, 63 C. C. A. 476 (1904); *Galveston, etc., Ry. v. Wallace*, 223 U. S. 481, 490-491, 32 Sup. Ct. 205, 56 L. Ed. 516 (1912).

Where not prohibited by a state, the United States has always made use of state courts, judges, and other officials in various federal administrative proceedings. See *Prigg v. Penn.*, 16 Pet. 539, 10 L. Ed. 1060 (1842) (return of fugitive slaves); *U. S. v. Jones*, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. Ed. 1015 (1883) (eminent domain proceedings); *Robertson v. Baldwin*, 165 U. S. 275, 17 Sup. Ct. 326, 41 L. Ed. 715 (1897) (arrest for federal offences); *Holmgren v. U. S.*, 217 U. S. 509, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778 (1910) (naturalization of aliens).

Sometimes the states have themselves condemned land for federal purposes. *Kohl v. U. S.*, 91 U. S. 367, 373, 23 L. Ed. 449 (1876). See the language of the latter part of the extract from *Ft. Leavenworth R. R. Co. v. Lowe*, printed ante, p. 947, note. In executing the federal draft acts during the Civil War the state governors were required to do various acts and to appoint various federal officers. See *In re Griner*, 16 Wis. 423 (1863); *Matter of Spangler*, 11 Mich. 298 (1863); *Druecker v. Salomon*, 21 Wis. 621, 94 Am. Dec. 571 (1867). See also *Van Brocklin v. Tenn.*, post, p. 1305, last paragraph of note 2.

In *Kentucky v. Dennison*, 24 How. 66, 108, 16 L. Ed. 717 (1861), it was denied, semble, that Congress could impose any duty upon a state officer, as such, and compel its performance.

It was an early practice, generally acquiesced in by the states, for the United States to give to the state courts jurisdiction of suits for the enforcement of the federal revenue laws. See *Kentucky v. Dennison*, 24 How. 66, 108-109, 16 L. Ed. 717 (1861); *Claffin v. Houseman*, 93 U. S. 130, 140, 23 L. Ed. 833 (1876); *U. S. v. Jones*, 109 U. S. 513, 519-520, 3 Sup. Ct. 346, 27 L. Ed. 1015 (1883). Some of the state courts refused to exercise this jurisdiction. *U. S. v. Lathrop*, 17 Johns. (N. Y.) 4 (1819); *Ely v. Peck*, 7 Conn. 239 (1828); and this refusal was approved in *Huntington v. Attrill*, 146 U. S. 657, 672, 13 Sup. Ct. 224, 36 L. Ed. 1123 (1892), upon the ground that one sovereign could not be compelled to enforce the penal laws of another. Compare *Houston v. Moore*, 5 Wheat. 1, 5 L. Ed. 19 (1820), where a state's voluntary enforcement of a federal penalty, by express statute, was upheld.

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.<sup>1</sup> 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."<sup>2</sup>

<sup>1</sup> And so the License Tax Cases, post, p. 1025: "Congress cannot authorize a trade or business within a state in order to tax it."

<sup>2</sup> Accord (federal legislation not within the scope of any granted power): *U. S. v. Reese*, 92 U. S. 214, 23 L. Ed. 563 (1876); *U. S. v. Harris*, 106 U. S. 629, 1 Sup. Ct. 601, 27 L. Ed. 290 (1883); *Civil Rights Cases*, ante, p. 240; *Keller v. U. S.*, post, p. 982.

REGULATION INCIDENTAL TO POWER OF TAXATION.—As incidental to its conceded powers of taxation, the United States has considerable power to regulate the character, size, and appearance of the articles taxed. See *In re Kollock*, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813 (1897) (oleomargarine subject to federal excise tax required to be branded in particular manner); *Felsenheld v. United States*, 186 U. S. 126, 132, 133, 22 Sup. Ct. 740, 40 L. Ed. 1085 (1902) (prohibition against packing in taxed tobacco package any other article, held to forbid inclusion of even a thin paper coupon offering premiums to buyers), *Brewer, J.*, saying:

"It seems to us that, in the rules and regulations for the manufacture and handling of goods which are subjected to an internal revenue tax, Congress

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. \* \* \*

may prescribe any rule or regulation which is not in itself unreasonable; that it is a perfectly reasonable requirement that every package of such goods should contain nothing but the article which is taxed; that in order to make such a regulation constitutional it is not necessary that there be, either expressly or by implication, an exception of those articles or things which by virtue of their minute size or weight do not apparently affect the collection of the tax. Congress may rightfully make the prohibition absolute, and the courts may not draw a line between the foreign substance, which is trifling in size or weight, and that which is of appreciable size and weight, and hold in reference to a particular package the act valid if the size or weight is appreciable, and invalid if it is not.

"Among the regulations prescribed by Congress in its internal revenue legislation are many which are purely arbitrary, or at least the necessity of which for the collection of taxes is not apparent. For instance, Congress has directed (Rev. Stat. 3302) that cigars shall be put up in boxes containing 25, 50, 100, 250, or 500 each. There is no special efficacy in either of these numbers. Boxes containing 15, 30, or 60 cigars would apparently afford just the same facilities for taxation, and yet, can there be a doubt that Congress may make such a rule and compel each manufacturer to abide thereby? It has a right to select, and when it has made a selection, although there may be no special reasons for the specific numbers, and they are in fact arbitrarily selected, it may, for purposes of uniformity, compel compliance with the rule."

"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."<sup>1</sup>

#### 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.

<sup>1</sup> Accord (federal legislation exercising granted powers in a forbidden manner): *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366 (1867); *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746 (1886); *Pollock v. Farmers', etc., Trust Co.*, 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108 (1895); *Rasmussen v. U. S.*, 197 U. S. 516, 25 Sup. Ct. 514, 49 L. Ed. 862 (1905).

As to the necessity of making compensation for franchises destroyed when property is taken by eminent domain, see, also, *U. S. v. Chandler-Duubar Co.*, ante, p. 734, note.

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.<sup>1</sup> 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

<sup>1</sup> "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."—Marshall, C. J., in *Gibbons v. Ogden*, 9 Wheat. 1, 197, 6 L. Ed. 23 (1824).

"The power of Congress to regulate commerce among the states, though plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Constitution."—Harlan, J., in *Lottery Case*, 188 U. S. 321, 362-363, 23 Sup. Ct. 321, 329, 47 L. Ed. 492 (1903).

FEDERAL POLICE POWERS.—As to the "police power" of the United States (incidental to or included within its commercial and other powers) to forbid conduct prejudicial to the public welfare, see *Second Employers' Liability Cases*, ante, p. 328, and note, and post, p. 1250; *Lottery Case*, post, p. 1230; and *Hoke v. U. S.*, post, p. 1234, note.

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.<sup>2</sup>

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#### McCRA Y 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 colored 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.]

<sup>2</sup> As to the possible extent of federal legislation under the postal power, see *Dickey v. Maysville, etc., Road*, 7 Dana (Ky.) 113 (1838); *U. S. v. Bromley*, 12 How. 88, 13 L. Ed. 905 (1851) (cf. *U. S. R. S. §§ 3981-3993* [U. S. Comp. St. 1901, pp. 2712-2716]); *Pensacola Co. v. W. U. Teleg. Co.*, 96 U. S. 1, 10-11, 24 L. Ed. 708 (1878); *Ex parte Jackson*, 96 U. S. 727, 24 L. Ed. 877 (1878). Congress may make it a condition of any periodical publication being admitted to the mails under the low second-class rates that it make public the names of its owners and secured creditors, and that it mark all paid reading matter "advertisement." *Lewis Pub. Co. v. Morgan*, 229 U. S. 288, 33 Sup. Ct. 867, 57 L. Ed. — (1913).

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 constitutional 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. \* \* \* [Here is quoted part of the extract from this case printed post, p. 1309, note, under *Snyder v. Bettman*.] \* \* \*

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 authority 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.<sup>1</sup>

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

<sup>1</sup> Compare *Marshall, C. J.*, in *Gibbons v. Ogden*, 9 Wheat. 1, 199, 6 L. Ed. 23 (1824) (semble): "Congress is not empowered to tax for those purposes which are within the exclusive province of the states;" and the references under *Knowlton v. Moore*, post, p. 1038, note. See *King v. Barger*, 6 Com. L. R. 41 (Australia, 1908) (federal tax on articles manufactured in states, dependent on rate of wages paid therefor, held invalid where federal government without power to regulate wages). But see dissent of *Higgins, J.*, pp. 111-127.

In *Ellis v. United States*, 206 U. S. 246, 255, 256, 27 Sup. Ct. 600, 51 L. Ed. 1047, 11 Ann. Cas. 589 (1907), *Holmes, J.*, said (upholding a statute forbidding contractors to employ laborers upon federal public works more than eight hours a day): "We see no reason to deny to the United States the

## CHAPTER XV

## FOREIGN RELATIONS, INDIANS, AND ALIENS

HAUENSTEIN v. LYNHAM (1880) 100 U. S. 483, 488-490, 25 L. Ed. 628, Mr. Justice SWAYNE (upholding as against the law of Virginia a federal treaty securing to Swiss citizens, heirs of owners of land in the United States, certain rights to the proceeds of a sale thereof):

"The sixth article of the Constitution \* \* \* provides that "all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land." \* \* \* A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a state legislature can stand in its way.' \* \* \* Ware v. Hylton, 3 Dall. 199 [236], 1 L. Ed. 568.

"In *Chirac v. Chirac*, 2 Wheat. 259, 4 L. Ed. 234, it was held by this court that a treaty with France gave to her citizens the right to purchase and hold land in the United States, removed the incapacity of alienage, and placed them in precisely the same situation as if they had been citizens of this country. The state law was hardly adverted to, and seems not to have been considered a factor of any importance in this view of the case. The same doctrine was reaffirmed touching this treaty in *Carneal v. Banks*, 10 Wheat. 181, 6 L. Ed. 297, and with respect to the British treaty of 1794 in *Hughes v. Edwards*, 9

power thus established for the states. Like the states, it may sanction the requirements made of contractors employed upon its public works by penalties in case those requirements are not fulfilled. It would be a strong thing to say that a legislature that had power to forbid or to authorize and enforce a contract had not also the power to make a breach of it criminal; but, however that may be, Congress, as incident to its power to authorize and enforce contracts for public works, may require that they shall be carried out only in a way consistent with its views of public policy, and may punish a departure from that way. It is true that it has not the general power of legislation possessed by the legislatures of the states, and it may be true that the object of this law is of a kind not subject to its general control. But the power that it has over the mode in which contracts with the United States shall be performed cannot be limited by a speculation as to motives. If the motive be conceded, however, the fact that Congress has not general control over the conditions of labor does not make unconstitutional a law otherwise valid, because the purpose of the law is to secure to it certain advantages, so far as the law goes."

Accord: *Sharpless v. Mayor*, ante, at p. 36, and note 2; *Fredericton v. Queen*, 3 Can. S. C. 505, 532-534 (Canada, 1880).

See, also, *Lottery Case*, post, p. 1230, and *Hoke v. U. S.*, post, p. 1234, note. The constitutional arguments for and against the exercise of the federal commercial powers to promote domestic manufactures are briefly presented in 2 Story, *Comm. on Const.* §§ 1077-1095. See also *United States v. Realty Co.*, ante, pp. 604, 605, note (federal power to tax to discharge moral obligation based on law assumed to be unconstitutional).

Wheat, 489, 6 L. Ed. 142. A treaty stipulation may be effectual to protect the land of an alien from forfeiture by escheat under the laws of a state. *Orr v. Hodgeson*, 4 Wheat, 453, 4 L. Ed. 613. By the British treaty of 1794, 'all impediment of alienage was absolutely levelled with the ground despite the laws of the states. It is the direct constitutional question in its fullest conditions. Yet the Supreme Court held that the stipulation was within the constitutional powers of the Union. *Fairfax's Devises v. Hunter's Lessee*, 7 Cranch, 627, 3 L. Ed. 453. See *Ware v. Hylton*, 3 Dall. 242, 1 L. Ed. 568.' 8 Op. Attys. Gen. 417. Mr. Calhoun, after laying down certain exceptions and qualifications which do not affect this case, says: 'Within these limits all questions which may arise between us and other powers, be the subject-matter what it may, fall within the treaty-making power and may be adjusted by it.' *Treatise on the Const. and Gov. of the U. S.* 204.

"If the national government has not the power to do what is done by such treaties, it cannot be done at all, for the states are expressly forbidden to 'enter into any treaty, alliance, or confederation.' Const. art. 1, § 10. \* \* \* We have no doubt that this treaty is within the treaty-making power conferred by the Constitution. And it is our duty to give it full effect."<sup>1</sup>

<sup>1</sup> In *Geofroy v. Riggs*, 133 U. S. 258, 266-267, 10 Sup. Ct. 295, 296, 297, 33 L. Ed. 642 (1890), Field, J., said: "That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised, or inherited, are fitting subjects for such negotiation, and of regulation by mutual stipulations between the two countries. \* \* \* The treaty power, as expressed in the Constitution, is in terms unlimited, except by those restraints which are found in that instrument against the action of the government, or of its departments, and those arising from the nature of the government itself, and of that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. *Railroad Co. v. Lowe*, 114 U. S. 525, 541, 5 Sup. Ct. 995, 29 L. Ed. 264 (1885). But, with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. *Ware v. Hylton*, 3 Dall. 199, 1 L. Ed. 568 (1796); *Chirac v. Chirac*, 2 Wheat, 259, 4 L. Ed. 234 (1817); *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. Ed. 628 (1880); 8 Op. Atty. Gen. 417; *People v. Gerke*, 5 Cal. 381 (1855)."

Accord: *Wyman, Petitioner*, 191 Mass. 276, 77 N. E. 379, 114 Am. St. Rep. 201 (1906) (cases). Compare *Rocca v. Thompson*, 223 U. S. 317, 32 Sup. Ct. 207, 56 L. Ed. 453 (1912). Contra: See *W. E. Mikell* in 57 Am. Law Reg. 435, 528 (1909).

For an account of the procedure by which a portion of Maine was ceded to Great Britain in settlement of the long pending northeastern boundary dispute between the United States and Great Britain, see *Ft. Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, 540-541, 5 Sup. Ct. 995, 29 L. Ed. 264 (1885). Compare the opinion of White, J., in *Downes v. Bidwell*, post, at page 1004, as to the power of the United States to cede "incorporated" territory.

As to when treaties take effect, as regards both the governments concerned and private rights affected thereby, see *Hauser v. Yaker*, 9 Wall. 32, 19 L. Ed. 571 (1870).

HEAD MONEY CASES (1884) 112 U. S. 580, 597-599, 5 Sup. Ct. 247, 28 L. Ed. 798, Mr. Justice MILLER (discussing the validity of an act of Congress imposing upon vessel owners a tax of 50 cents for each alien passenger brought into the United States from foreign ports, which act was assumed to violate provisions of various treaties with foreign nations):

"We are of opinion that, so far as the provisions in that act may be found to be in conflict with any treaty with a foreign nation, they must prevail in all the judicial courts of this country. \* \* \* It is very difficult to understand how any different doctrine can be sustained. A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.<sup>1</sup> But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens.<sup>2</sup> The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that 'this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute. But even in this aspect of the case there is nothing in this law which makes it ir-repealable or unchangeable. The Constitution gives it no superiority over an act of Congress in this respect, which may be repealed or

<sup>1</sup> [Whenever a treaty is violated by a subsequent act of Congress] "the consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance."—Swayne, J., in *The Cherokee Tobacco*, 11 Wall. 616, 621, 20 L. Ed. 227 (1871). So, also, *Whitney v. Robertson*, 124 U. S. 190, 194, 195, 8 Sup. Ct. 456, 21 L. Ed. 386 (1888).

<sup>2</sup> For other cases where a treaty may operate directly without further legislation, see *Baldwin v. Franks*, 120 U. S. 678, 703-705, 7 Sup. Ct. 656, 763, 30 L. Ed. 766 (1887), in opinion of Field, J., dissenting.



modified by an act of a later date.<sup>3</sup> Nor is there anything in its essential character, or in the branches of the government by which the treaty is made, which gives it this superior sanctity. A treaty is made by the President and the Senate. Statutes are made by the President, the Senate, and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate. And such is, in fact, the case in a declaration of war, which must be made by Congress, and which, when made, usually suspends or destroys existing treaties between the nations thus at war. In short, we are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal."<sup>4</sup>

<sup>3</sup> "It is well settled that in case of a conflict between an act of Congress and a treaty—each being equally the supreme law of the land—the one last in date must prevail in the courts."—Harlan, J., in *Hijo v. U. S.*, 194 U. S. 315, 324, 24 Sup. Ct. 727, 729, 48 L. Ed. 994 (1904).

<sup>4</sup> "A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infraterritorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself, without the aid of any legislative provision; but when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department; and the legislature must execute the contract before it can become a rule for the court."—Marshall, C. J., in *Foster v. Nelson*, 2 Pet. 253, 314, 7 L. Ed. 415 (1829). And so *Baldwin v. Franks*, 120 U. S. 678, 702-703, 7 Sup. Ct. 656, 763, 30 L. Ed. 766 (1887), in dissenting opinion of Field, J.

The question of precisely what treaty stipulations require federal legislation to give them domestic enforceability has been much debated between the House of Representatives and the treaty-making branches of the government. See 1 *Butler, Treaty-Making Power of United States*, §§ 285-311, for a brief historical sketch of the matter. It is apparently the preponderant opinion that treaty stipulations requiring the appropriation of money, or the cession of territory, or affecting the exercise of the power of federal taxation, or perhaps requiring the exercise of any governmental power other than that of enforcing and protecting private rights, do not become effective without federal legislation. See 2 *Butler*, *id.* §§ 365-374 (cases). Nor may the treaty power alone "incorporate" ceded territory into the United States. *Downes v. Bidwell*, post, pp. 1003-5.

The existence of a treaty requiring certain legislation for its fulfillment may, however, enable Congress to pass legislation otherwise incompetent to it. See Harlan, J., in *Neely v. Henkel*, 180 U. S. 109, 121, 21 Sup. Ct. 302, 306, 45 L. Ed. 448 (1901): "The power of Congress to make all laws necessary and proper for carrying into execution as well the powers enumerated in section 8 of article I of the Constitution as all others vested in the government of the United States, or in any department or the officers thereof, includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and con-

## UNITED STATES v. ARJONA.

(Supreme Court of the United States, 1887. 120 U. S. 479, 7 Sup. Ct. 628, 30 L. Ed. 728.)

[Certificate of division from the federal Circuit Court for the Southern District of New York. The defendant was indicted under an appropriate federal statute for counterfeiting in the United States bank notes of one of the states of the United States of Columbia. Upon a demurrer thereto, the judges certified a division of opinion as to the constitutionality of said statute.]

Mr. Chief Justice WAITE. \* \* \* Congress has power to make all laws which shall be necessary and proper to carry into execution the powers vested by the Constitution in the government of the United States (article 1, § 8, cl. 18); and the government of the United States has been vested exclusively with the power of representing the nation in all its intercourse with foreign countries. It alone can "regulate commerce with foreign nations" (article 1, § 8, cl. 3); make treaties and appoint ambassadors and other public ministers and consuls (article 2, § 2, cl. 2). A state is expressly prohibited from entering into any "treaty, alliance, or confederation." Article 1, § 10, cl. 1. Thus all official intercourse between a state and foreign nations is prevented, and exclusive authority for that purpose given to the United States. The national government is in this way made responsible to foreign nations for all violations by the United States of their international obligations, and because of this Congress is ex-

sent of the Senate to insert in a treaty with a foreign power." So, *Prigg v. Pennsylvania*, 16 Pet. 539, 619, 10 L. Ed. 1060 (1842); *Baldwin v. Franks*, 120 U. S. 678, 683, 7 Sup. Ct. 656, 763, 30 L. Ed. 766 (1887).

ABROGATION OF TREATIES.—As said in the principal case, any treaty may be abrogated by act of Congress. *Taylor v. Morton*, 2 Curt. 454, 458, 459, Fed. Cas. No. 13,799 (1855); *Chae Chan Ping v. U. S.*, 130 U. S. 581, 600-602, 9 Sup. Ct. 623, 32 L. Ed. 1068 (1889).

"To refuse to execute a treaty, for reasons which approve themselves to the conscientious judgment of the nation, is a matter of the utmost gravity and delicacy; but the power to do so is prerogative, of which no nation can be deprived without deeply affecting its independence. That the people of the United States have deprived their government of this power in any case, I do not believe. That it must reside somewhere and be applicable to all cases, I am convinced. I feel no doubt that it belongs to Congress. That, inasmuch as treaties must continue to operate as part of our municipal law, and be obeyed by the people, applied by the judiciary, and executed by the President, while they continue unrepealed; and inasmuch as the power of repealing these municipal laws must reside somewhere, and no body other than Congress possesses it; then legislative power is applicable to such laws whenever they relate to subjects which the Constitution has placed under that legislative power."—Curtis, J., in *Taylor v. Morton*, above cited, at page 459.

A treaty with an Indian tribe may be repealed by implication from the act admitting as a state the territory in which the treaty privileges were to be exercised. *Ward v. Race Horse*, 163 U. S. 504, 16 Sup. Ct. 1076, 41 L. Ed. 244 (1896) (right to hunt on vacant public lands).

Treaties are not abrogated merely by a violation of them by either party, unless the political authorities of the other party elect so to treat them. *Charlton v. Kelly*, 229 U. S. 449, 33 Sup. Ct. 945, 57 L. Ed. — (1913).

pressly authorized "to define and punish \* \* \* offenses against the law of nations." Article 1, § 8, cl. 10. The law of nations requires every national government to use "due diligence" to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof; and because of this, the obligation of one nation to punish those who, within its own jurisdiction, counterfeit the money of another nation has long been recognized. \* \* \*

This rule was established for the protection of nations in their intercourse with each other. If there were no such intercourse, it would be a matter of no special moment to one nation that its money was counterfeited in another. Its own people could not be defrauded if the false coin did not come among them, and its own sovereignty would not be violated if the counterfeit could not, under any circumstances, be made to take the place of true money. But national intercourse includes commercial intercourse between the people of different nations. It is as much the duty of a nation to protect such an intercourse as it is any other, and that is what Vattel meant when he said: "For the same reason that sovereigns are obliged to protect commerce, they are obliged to support this custom," "namely, exchange, or the traffic of bankers, by means of which a merchant remits immense sums from one end of the world to the other," "by good laws, in which every merchant, whether citizen or foreigner, may find security." \* \* \* Such being the case, it is easy to see that the same principles that developed, when it became necessary, the rule of national conduct which was intended to prevent, as far as might be, the counterfeiting of the money of one nation within the dominion of another, and which, in the opinion of so eminent a publicist as Vattel, could be applied to the foreign exchange of bankers, may, with just propriety, be extended to the protection of this more recent custom among bankers dealing in foreign securities, whether national or corporate, which have been put out under the sanction of public authority at home, and sent abroad as the subjects of trade and commerce. \* \* \*

No nation can be more interested in this question than the United States. Their money is practically composed of treasury notes or certificates issued by themselves, or of bank bills issued by banks created under their authority and subject to their control. Their own securities, and those of the states, the cities, and the public corporations, whose interests abroad they alone have the power to guard against foreign national neglect, are found on sale in the principal money markets of Europe. If these securities, whether national, municipal, or corporate, are forged and counterfeited with impunity at the places where they are sold, it is easy to see that a great wrong will be done to the United States and their people. Any uncertainty about the genuineness of the security necessarily depreciates its value

as a merchantable commodity, and against this international comity requires that national protection shall, as far as possible, be afforded. If there is neglect in that, the United States may, with propriety, call on the proper government to provide for the punishment of such an offense, and thus secure the restraining influences of a fear of the consequences of wrong-doing. \* \* \*

But if the United States can require this of another, that other may require it of them, because international obligations are of necessity reciprocal in their nature. The right, if it exists at all, is given by the law of nations, and what is law for one is, under the same circumstances, law for the other. A right secured by the law of nations to a nation, or its people, is one the United States, as the representatives of this nation, are bound to protect. Consequently, a law which is necessary and proper to afford this protection is one that Congress may enact, because it is one that is needed to carry into execution a power conferred by the Constitution on the government of the United States exclusively. There is no authority in the United States to require the passage and enforcement of such a law by the states. Therefore, the United States must have the power to pass it and enforce it themselves, or be unable to perform a duty which they may owe to another nation, and which the law of nations has imposed on them as part of their international obligations. This, however, does not prevent a state from providing for the punishment of the same thing, for here, as in the case of counterfeiting the coin of the United States, the act may be an offense against the authority of a state as well as that of the United States. \* \* \* [It was held unnecessary for Congress to declare an act to be an offence against the law of nations, if it was so.]

Questions so certified.<sup>1</sup>

<sup>1</sup> Compare *Tennessee v. Davis*, 100 U. S. 257, 280, 25 L. Ed. 648 (1880), by Clifford, J., dissenting.

EXTRADITION OF CRIMINALS.—The foreign extradition of criminals is dealt with in *Criminal Procedure* (see Mikell, *Cas. on Crim. Proced.* 60-71). Regarding the exercise of this power under our federal system, Miller, J., said, in *United States v. Rauscher*, 119 U. S. 407, 411, 412, 414, 7 Sup. Ct. 234, 236, 30 L. Ed. 425 (1886):

"It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the states where their crimes were committed, for trial and punishment. This has been done generally by treaties made by one independent government with another. Prior to these treaties, and apart from them, it may be stated, as the general result of the writers upon international law, that there was no well-defined obligation on one country to deliver up such fugitives to another; and, though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked; and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law.

"Whether, in the United States, in the absence of any treaty on the subject with a foreign nation from whose justice a fugitive may be found in one of the states, and in the absence of any act of Congress upon the subject, a state can, through its own judiciary or executive, surrender him for trial to

WORCESTER v. GEORGIA (1832) 6 Pet. 515, 557-561, 8 L. Ed. 483, Mr. Chief Justice MARSHALL (holding invalid an act of Georgia forbidding any white person to reside within the limits of the Cherokee Indian nation in the state, without a license from Georgia):

"The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the Union. Is this the rightful exercise of power, or is it usurpation?"

"While these states were colonies, this power, in its utmost extent, was admitted to reside in the crown. When our Revolutionary struggle commenced, Congress was composed of an assemblage of deputies acting under specific powers granted by the legislatures, or conventions of the several colonies. It was a great popular movement, not perfectly organized; nor were the respective powers of those who were intrusted with the management of affairs accurately defined. The necessities of our situation produced a general conviction that those measures which concerned all, must be transacted by a body in which the representatives of all were assembled, and which could command the confidence of all: Congress, therefore, was considered as invested with all the powers of war and peace, and Congress dissolved our connection with the mother country, and declared these United Colonies to be independent states. Without any written definition of powers, they employed diplomatic agents to represent the

such foreign nation, is a question which has been under consideration by the courts of this country without any very conclusive result. \* \* \* [Here follow references to Case of Daniel Washburn, 4 Johns. Ch. (N. Y.) 106, 8 Am. Dec. 548 (1819); Short v. Deacon, 10 Serg. & R. (Pa.) 125 (1823); Holmes v. Jennison, 14 Pet. 540, 614, 10 L. Ed. 579 (1840); Ex parte Holmes, 12 Vt. 631 (1840); and People v. Curtis, 50 N. Y. 321, 10 Am. Rep. 483, the last in 1872.]

"The question has not since arisen so as to be decided by this court, but there can be little doubt of the soundness of the opinion of Chief Justice Taney [in *Holmes v. Jennison*, cited above], that the power exercised by the governor of Vermont is a part of the foreign intercourse of this country, which has undoubtedly been conferred upon the federal government; and that it is clearly included in the treaty-making power, and the corresponding power of appointing and receiving ambassadors and other public ministers. There is no necessity for the states to enter upon the relations with foreign nations, which are necessarily implied in the extradition of fugitives from justice found within the limits of the state, as there is none why they should in their own name make demand upon foreign nations for the surrender of such fugitives. At this time of day, and after the repeated examinations which have been made by this court into the powers of the federal government to deal with all such international questions exclusively, it can hardly be admitted that, even in the absence of treaties or acts of Congress on the subject, the extradition of a fugitive from justice can become the subject of negotiation between a state of this Union and a foreign government."

CESSION OF TERRITORY.—Of course a state has no power to cede the possession of or jurisdiction over any part of its territory to a foreign country, without the concurrence of the United States. *Fl. Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 540, 5 Sup. Ct. 995, 29 L. Ed. 264 (1885). See *Geofroy v. Riggs*, ante, p. 965, note.



United States at the several courts of Europe; offered to negotiate treaties with them, and did actually negotiate treaties with France. From the same necessity, and on the same principles, Congress assumed the management of Indian affairs; first in the name of these United Colonies; and, afterwards, in the name of the United States. Early attempts were made at negotiation, and to regulate trade with them. These not proving successful, war was carried on under the direction, and with the forces of the United States, and the efforts to make peace, by treaty, were earnest and incessant. The Confederation found Congress in the exercise of the same powers of peace and war, in our relations with Indian nations, as with those of Europe.

“Such was the state of things when the Confederation was adopted. \* \* \* This instrument also gave the United States in Congress assembled the sole and exclusive right of ‘regulating the trade and managing all the affairs with the Indians, not members of any of the states: provided, that the legislative power of any state within its own limits be not infringed or violated.’ \* \* \* The correct exposition of this article is rendered unnecessary by the adoption of our existing Constitution. That instrument confers on Congress the powers of war and peace, of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power, in the Confederation, are discarded.

“The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term ‘nation,’ so generally applied to them, means ‘a people distinct from others.’ The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words ‘treaty’ and ‘nation’ are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense. \* \* \*

“The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees them-

selves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation, is, by our Constitution and laws, vested in the government of the United States."<sup>1</sup>

[McLEAN, J., gave a concurring opinion. BALDWIN, J., dissented.]

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### UNITED STATES v. KAGAMA.

(Supreme Court of the United States, 1886. 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228.)

[Certificate of division from the federal Circuit Court for California. A federal statute of 1885 punished certain serious crimes by Indians when committed in a territory or against Indians on a reservation in a state. Defendant, an Indian, was indicted thereunder for murdering another Indian upon an Indian reservation in California. Upon a demurrer thereto, the judges certified a division of opinion as to the validity of said statute.]

Mr. Justice MILLER. \* \* \* The above enactment is clearly separable into two distinct definitions of the conditions under which Indians may be punished for the same crimes as defined by the common law. The first of these is where the offence is committed within the limits of a territorial government, whether on or off an Indian reservation. In this class of cases the Indian charged with the crime shall be judged by the laws of the territory on that subject, and tried by its courts. This proposition itself is new in legislation of Congress, which has heretofore only undertaken to punish an Indian who sustains the usual relation to his tribe, and who commits the offence in the Indian country, or on an Indian reservation, in exceptional cases; as where the offence was against the person or property of a white man, or was some violation of the trade and intercourse regulations imposed by Congress on the Indian tribes. It is new, because it now proposes to punish these offences when they are committed by one Indian on the person or property of another.

The second is where the offence is committed by one Indian against the person or property of another, within the limits of a state of the Union, but on an Indian reservation. In this case, of which the state and its tribunals would have jurisdiction if the offence was committed by a white man outside an Indian reservation, the courts of the United States are to exercise jurisdiction as if the offence had been commit-

<sup>1</sup> No act of a state, as by making an Indian one of its citizens and a voter, can affect the federal jurisdiction over tribal Indians. *U. S. v. Holliday*, 3 Wall. 407, 418-420, 18 L. Ed. 182 (1866). But Congress may at any time terminate its special guardianship of Indians and leave them subject to all state and federal laws like other persons. *In re Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848 (1905).

ted at some place within the exclusive jurisdiction of the United States. \* \* \* This is a still further advance, as asserting this jurisdiction over the Indians within the limits of the states of the Union.

Although the offence charged in this indictment was committed within a state and not within a territory, the considerations which are necessary to a solution of the problem in regard to the one must in a large degree affect the other.

The Constitution of the United States is almost silent in regard to the relations of the government which was established by it to the numerous tribes of Indians within its borders. \* \* \* [After referring to the phrase "excluding Indians not taxed," in article I, § 2. par. 3, and in Amendment XIV, apportioning representatives among the states:] The mention of Indians in the Constitution which has received most attention is that found in the clause which gives Congress "power to regulate commerce with foreign nations and among the several states, and with the Indian tribes." \* \* \*

While we are not able to see, in either of these clauses of the Constitution and its amendments, any delegation of power to enact a code of criminal law for the punishment of the worst class of crimes known to civilized life when committed by Indians, there is a suggestion in the manner in which the Indian tribes are introduced into that clause, which may have a bearing on the subject before us. The commerce with foreign nations is distinctly stated as submitted to the control of Congress. Were the Indian tribes foreign nations? If so, they came within the first of the three classes of commerce mentioned, and did not need to be repeated as Indian tribes. Were they nations, in the minds of the framers of the Constitution? If so, the natural phrase would have been "foreign nations and Indian nations," or, in the terseness of language uniformly used by the framers of the instrument, it would naturally have been "foreign and Indian nations." And so in the case of *Cherokee Nation v. State of Georgia*, 5 Pet. 1, 20, 8 L. Ed. 25, brought in the Supreme Court of the United States, under the declaration that the judicial power extends to suits between a state and foreign states, and giving to the Supreme Court original jurisdiction where a state is a party, it was conceded that Georgia as a state came within the clause, but held that the Cherokees were not a state or nation within the meaning of the Constitution, so as to be able to maintain the suit.<sup>1</sup>

But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the government of the United States, or of the states of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived

<sup>1</sup> "They may, more correctly, perhaps, be denominated domestic dependent nations."—*Id.* 17.

from, or exist in, subordination to one or the other of these. The territorial governments owe all their powers to the statutes of the United States conferring on them the powers which they exercise, and which are liable to be withdrawn, modified, or repealed at any time by Congress. What authority the state governments may have to enact criminal laws for the Indians will be presently considered. But this power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the territory and other property of the United States, as from the ownership of the country in which the territories are, and the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else. *Murphy v. Ramsey*, 114 U. S. 15, 44, 5 Sup. Ct. 747, 29 L. Ed. 47. \* \* \* The Indian reservation in the case before us is land bought by the United States from Mexico by the treaty of Guadalupe Hidalgo, and the whole of California, with the allegiance of its inhabitants, many of whom were Indians, was transferred by that treaty to the United States.

The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character. Following the policy of the European governments in the discovery of America towards the Indians who were found here, the colonies before the Revolution and the states and the United States since, have recognized in the Indians a possessory right to the soil over which they roamed and hunted and established occasional villages. But they asserted an ultimate title in the land itself, by which the Indian tribes were forbidden to sell or transfer it to other nations or peoples without the consent of this paramount authority. When a tribe wished to dispose of its land, or any part of it, or the state or the United States wished to purchase it, a treaty with the tribe was the only mode in which this could be done. The United States recognized no right in private persons, or in other nations, to make such a purchase by treaty or otherwise. With the Indians themselves these relations are equally difficult to define. They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the state within whose limits they resided.<sup>2</sup> \* \* \*

<sup>2</sup> A white person or negro adopted into an Indian tribe is not entitled to this privilege of tribal extraterritoriality as against laws of the United States. *U. S. v. Rogers*, 4 How. 567, 11 L. Ed. 1105 (1846); *Alberty v. U. S.*, 162 U. S. 499, 16 Sup. Ct. 864, 40 L. Ed. 1051 (1896).

The private property rights of tribal Indians are protected by the guar-

[After referring to *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. Ed. 25, and *Worcester v. Georgia*, ante, p. 971:] In the opinion in these cases they are spoken of as "wards of the nation," "pupils," as local dependent communities. In this spirit the United States has conducted its relations to them from its organization to this time. But, after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure—to govern them by acts of Congress. This is seen in the Act of March 3, 1871, embodied in section 2079 of the Revised Statutes: "No Indian nation or tribe, within the territory of the United States, shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired." \* \* \*

[In] the act now under consideration \* \* \* Congress has defined a crime committed within the state, and made it punishable in the courts of the United States. But Congress *has* done this, and *can* do it, with regard to all offences relating to matters to which the federal authority extends. Does that authority extend to this case?

It will be seen at once that the nature of the offence (murder) is one which in almost all cases of its commission is punishable by the laws of the states, and within the jurisdiction of their courts. The distinction is claimed to be that the offence under the statute is committed by an Indian, that it is committed on a reservation set apart within the state for residence of the tribe of Indians by the United States, and the fair inference is that the offending Indian shall belong to that or some other tribe. It does not interfere with the process of the state courts within the reservation, nor with the operation of state laws upon white people found there. Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation.

It seems to us that this is within the competency of Congress. These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helpless-

antles of the Constitution against state or federal infringement to the same extent as those of other residents of the United States. *Choate v. Trapp*, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941 (1912) (cases). But the prohibitions of the Constitution designed to control the powers of the national government (like the fifth amendment) have no application to the powers of local self-government exercised by Indian tribes, even though the latter are subject to federal regulation. *Talton v. Mayes*, 163 U. S. 376, 16 Sup. Ct. 986, 41 L. Ed. 196 (1896) (no grand jury for Cherokee nation in Indian Territory).



ness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

In the case of *Worcester v. State of Georgia*, above cited, it was held that, though the Indians had by treaty sold their land within that state, and agreed to remove away, which they had failed to do, the state could not, while they remained on those lands, extend its laws, criminal and civil, over the tribes; that the duty and power to compel their removal was in the United States, and the tribe was under their protection, and could not be subjected to the laws of the state and the process of its courts. The same thing was decided in the case of *Fellows v. Blacksmith & Others*, 19 How. 366, 15 L. Ed. 684. \* \* \*

The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

Questions so certified.<sup>3</sup>

<sup>3</sup> In *Donnelly v. United States*, 228 U. S. 243, 271, 272, 33 Sup. Ct. 449, 459, 57 L. Ed. — (1913), it was held that the United States could punish the murder of an Indian by a white man upon an Indian reservation in a state, although the United States had reserved no exclusive jurisdiction over the reservation and therefore could not have punished crimes between whites thereon [citing *U. S. v. McBratney*, 104 U. S. 621, 26 L. Ed. 869 (1881), and *Draper v. U. S.*, 164 U. S. 240, 17 Sup. Ct. 107, 41 L. Ed. 419 (1896), for the latter proposition]. Pitney, J. said: "Upon full consideration, we are satisfied that offenses committed by or against Indians are not within the principle of the *McBratney* and *Draper* Cases. This was in effect held, as to crimes committed by the Indians, in the *Kagama* Case, 118 U. S. 375, 383, 30 L. Ed. 228, 231, 6 Sup. Ct. 1109, where the constitutionality of the second branch of section 9 of the Act of March 3, 1885 (23 Stat. at L. 385, c. 341), was sustained upon the ground that the Indian tribes are the wards of the nation. This same reason applies—perhaps a fortiori—with respect to crimes committed by white men against the persons or property of the Indian tribes while occupying reservations set apart for the very purpose of segregating them from the whites and others not of Indian blood."

The tribal Indians, with whom the United States has historically dealt as tribes or nations, are not citizens of the United States by birth. See *Wong Kim Ark*, ante, at p. 134

Conferring state and federal citizenship upon tribal Indians by act of Congress does not release them from federal tutelage so long as Congress desires to retain such control. *Tiger v. Western Investment Co.*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738 (1911) (restriction on alienation of Indian land); *U. S. v. Celestine*, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. Ed. 195 (1909) (crimes between Indians on reservation); *Hallowell v. U. S.*, 221 U. S. 317, 31 Sup. Ct. 587, 55 L. Ed. 750 (1911) (bringing liquor into Indian allotment). Compare *Re Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848 (1905). As to the

## FONG YUE TING v. UNITED STATES.

(Supreme Court of the United States, 1893. 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905.)

[Appeals from the federal Circuit Court for the Southern District of New York. A federal statute of 1892 required all Chinese laborers, then lawfully in the United States and entitled to remain, to secure within one year from certain federal officers certificates of residence, and in default thereof enacted that they should be deemed to be unlawfully within the country and should be deported to China or to the country to which they owed allegiance, after certain proceedings before executive officers. Petitioner and others, arrested for deportation for failing to comply with this act, secured writs of habeas corpus, which, upon hearing, were dismissed by said court.]

Mr. Justice GRAY. The general principles of public law which lie at the foundation of these cases are clearly established by previous judgments of this court, and by the authorities therein referred to.

In the recent case of *Nishimura Ekiu v. U. S.*, 142 U. S. 651, 659, 12 Sup. Ct. 336, 35 L. Ed. 1146, the court, in sustaining the action of the executive department, putting in force an act of Congress for the exclusion of aliens, said: "It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate or through statutes enacted by Congress."

The same views were more fully expounded in the earlier case of *Chae Chan Ping v. U. S.*, 130 U. S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068, in which the validity of a former act of Congress, excluding Chinese laborers from the United States, under the circumstances therein stated, was affirmed. In the elaborate opinion delivered by Mr. Justice Field in behalf of the court it was said: "Those laborers are not citizens of the United States; they are aliens. That the government of the United States, through the action of the legislative department, can exclude aliens from its territory, is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It

situation of the civilized Pueblo Indians in territory ceded from Mexico, see *U. S. v. Sandoval* (D. C.) 198 Fed. 539 (1912).

For an excellent discussion of the anomalous situation of the tribal Indians in our legal system, see "A People without Law," in *Thayer, Legal Essays*, 91.

is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power." "The United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory." 130 U. S. 603, 604, 9 Sup. Ct. 629.

It was also said, repeating the language of Mr. Justice Bradley in *Knox v. Lee*, 12 Wall. 457, 555, 20 L. Ed. 287: "The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all of which are forbidden to the state governments." 130 U. S. 605, 9 Sup. Ct. 629. And it was added: "For local interests, the several states of the Union exist; but for international purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." 130 U. S. 606, 9 Sup. Ct. 630.

The court then went on to say: "To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation; and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination, so far as the subjects affected are concerned, is necessarily conclusive upon all its departments and officers. If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases its determination is conclusive upon the judiciary. If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action, it can make complaint to the executive head of our government, or resort to any other measure which, in its judgment, its interests or dignity may demand; and there lies its only remedy. The power of the government to exclude foreigners from the country, whenever, in its judgment, the public interests require

such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments." 130 U. S. 606, 607, 9 Sup. Ct. 631. This statement was supported by many citations from the diplomatic correspondence of successive Secretaries of State, collected in Whart. Int. Law Dig. § 206.

The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country. \* \* \* [Here follow quotations to this effect from various American diplomatic dispatches, from writers on the law of nations, and from British decisions.]

The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare, the question now before the court is whether the manner in which Congress has exercised this right in sections 6 and 7 of the act of 1892 is consistent with the Constitution.

The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control, and to make it effective. The only government of this country which other nations recognize or treat with is the government of the Union, and the only American flag known throughout the world is the flag of the United States.

The Constitution of the United States speaks with no uncertain sound upon this subject. That instrument, established by the people of the United States as the fundamental law of the land, has conferred upon the President the executive power; has made him the commander in chief of the army and navy; has authorized him, by and with the consent of the Senate, to make treaties, and to appoint ambassadors, public ministers, and consuls; and has made it his duty to take care that the laws be faithfully executed. The Constitution has granted to Congress the power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces; and to make all laws necessary and proper for carrying into execution these powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer

thereof. And the several states are expressly forbidden to enter into any treaty, alliance, or confederation; to grant letters of marque and reprisal; to enter into any agreement or compact with another state, or with a foreign power; or to engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

In exercising the great power which the people of the United States, by establishing a written Constitution as the supreme and paramount law, have vested in this court, of determining, whenever the question is properly brought before it, whether the acts of the legislature or of the executive are consistent with the Constitution, it behooves the court to be careful that it does not undertake to pass upon political questions, the final decision of which has been committed by the Constitution to the other departments of the government. \* \* \*

The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.<sup>1</sup> \* \* \* The power to exclude aliens, and the power to expel them, rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power. \* \* \*

By the law of nations, doubtless, aliens residing in a country, with the intention of making it a permanent place of abode, acquire, in one sense, a domicile there; and, while they are permitted by the nation to retain such a residence and domicile, are subject to its laws.

<sup>1</sup> The validity of such proceedings when conducted by executive officers is treated in chapter IX, section 1, ante, pp. 285-290.

For constitutional purposes, an alien seeking admission, "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." *U. S. v. Ju Toy*, 198 U. S. 253, 263, 25 Sup. Ct. 644, 646, 49 L. Ed. 1040 (1905). But the right to exclude or expel aliens by purely administrative proceedings does not include the right to inflict punishment without recourse to the courts, under Const., Amends. V and VI.

"It is urged that the offense of being and remaining unlawfully within the limits of the United States by an alien is a political offense, and is not within the common-law cases triable only by a jury, and that the Constitution does not apply to such a case. \* \* \* We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation. Detention is a usual feature in every case of arrest on a criminal charge, even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense. \* \* \* But when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused."—*Wong Wing v. U. S.*, 163 U. S. 228, 234, 235, 237, 16 Sup. Ct. 977, 41 L. Ed. 140 (1896), by Shiras, J.



and may invoke its protection against other nations. \* \* \* Chinese laborers, therefore, like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility. But they continue to be aliens, having taken no steps towards becoming citizens, and incapable of becoming such under the naturalization laws: and therefore remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever, in its judgment, their removal is necessary or expedient for the public interest. \* \* \*

Judgments affirmed.<sup>2</sup>

[BREWER and FIELD, JJ., and FULLER, C. J., each gave a dissenting opinion.]

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#### KELLER v. UNITED STATES.

(Supreme Court of the United States, 1909. 213 U. S. 138, 29 Sup. Ct. 470, 53 L. Ed. 737, 16 Ann. Cas. 1066.)

[Error to the federal District Court for the Northern District of Illinois. A federal statute (Act Feb. 20, 1907, c. 1134, 34 Stat. 898, 899 [U. S. Comp. St. Supp. 1911, p. 499]) made it a felony for any person to harbor for any immoral purpose any alien female within three years after her entry into the United States, and provided for the deportation of any alien female found practicing prostitution within this period. Defendant had purchased a house of prostitution in Chicago in which there was at the time an alien Hungarian woman within the terms of this statute, and defendant was convicted of knowingly harboring said woman there thereafter.]

Mr. Justice BREWER. \* \* \* It is unnecessary to determine how far Congress may go in legislating with respect to the conduct of an alien while residing here, for there is no charge against one: nor to prescribe the extent of its power in punishing wrongs done to an alien, for there is neither charge nor proof of any such wrong. So far as the statute or the indictment requires, or the testimony shows, she was voluntarily living the life of a prostitute, and was only furnished a place by the defendants to follow her degraded life. While the keeping of a house of ill-fame is offensive to the moral sense, yet that fact must not close the eye to the question whether the power to punish therefor is delegated to Congress or is reserved to the state.

<sup>2</sup> Accord: U. S. v. Williams, 194 U. S. 279, 24 Sup. Ct. 719, 48 L. Ed. 979 (1904) (exclusion of aliens for anarchistic views).

Jurisdiction over such an offense comes within the accepted definition of the police power. Speaking generally, that power is reserved to the states, for there is in the Constitution no grant thereof to Congress. \* \* \* [Here follow quotations from various cases.]

The question is, therefore, whether there is any authority conferred upon Congress by which this particular portion of the statute can be sustained. By section 2 of article 2 of the Constitution, power is given to the President, by and with the advice and consent of the Senate, to make treaties, but there is no suggestion in the record or in the briefs of a treaty with the king of Hungary under which this legislation can be supported.

The general power which exists in the nation to control the coming in or removal of aliens is relied upon, the government stating in its brief these two propositions: "The clause in question should be held valid because it relates to and materially affects the conditions upon which an alien female may be permitted to remain in this country, and the grounds which warrant her exclusion. \* \* \* The validity of the provision in question should be determined from its general effect upon the importation and exclusion of aliens."

But it is sufficient to say that the act charged has no significance in either direction. \* \* \* The act charged is only one included in the great mass of personal dealings with aliens. It is her own character and conduct which determine the question of exclusion or removal. The acts of others may be evidence of her business and character. But it does not follow that Congress has the power to punish those whose acts furnish evidence from which the government may determine the question of her expulsion. Every possible dealing of any citizen with the alien may have more or less induced her coming. But can it be within the power of Congress to control all the dealings of our citizens with resident aliens? If that be possible, the door is open to the assumption by the national government of an almost unlimited body of legislation. By the census of 1900 the population of the United States between the oceans was, in round numbers, 76,000,000. Of these, 10,000,000 were of foreign birth, and 16,000,000 more were of foreign parentage. Doubtless some have become citizens by naturalization, but certainly scattered through the country there are millions of aliens. If the contention of the government be sound, whatever may have been done in the past, however little this field of legislation may have been entered upon, the power of Congress is broad enough to take cognizance of all dealings of citizens with aliens. \* \* \* Although Congress has not largely entered into this field of legislation, it may do so, if it has the power. Then we should be brought face to face with such a change in the internal conditions of this country as was never dreamed of by the framers of the Constitution. While the acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, it is equally

true that prohibitions and limitations upon those powers should also be fairly and reasonably enforced. \* \* \*

Judgment reversed.

Mr. Justice HOLMES [with whom concurred HARLAN and MOODY, JJ.], dissenting: For the purpose of excluding those who unlawfully enter this country Congress has power to retain control over aliens long enough to make sure of the facts. *Japanese Immigrant Case (Yamataya v. Fisher)* 189 U. S. 86, 47 L. Ed. 721, 23 Sup. Ct. 611. To this end it may make their admission conditional for three years. *Pearson v. Williams*, 202 U. S. 281, 50 L. Ed. 1029, 26 Sup. Ct. 608. If the ground of exclusion is their calling, practice of it within a short time after arrival is or may be made evidence of what it was when they came in. \* \* \* And, while a period of three years seems to be long, I am not prepared to say, against the judgment of Congress, that it is too long. \* \* \* I think that Congress may require, as a condition of the right to remain, good behavior for a certain time, in matters deemed by it important to the public welfare, and of a kind that indicates a pre-existing habit that would have excluded the party if it had been known. Therefore I am of opinion that it is within the power of Congress to order the deportation of a woman found practicing prostitution within three years.<sup>1</sup>

If Congress can forbid the entry and order the subsequent deportation of professional prostitutes, it can punish those who co-operate in their fraudulent entry. "If Congress has power to exclude such laborers \* \* \* it has the power to punish any who assist in their introduction." That was a point decided in *Lees v. United States*, 150 U. S. 476, 480, 37 L. Ed. 1150, 1151, 14 Sup. Ct. 163, 164. The same power must exist as to co-operation in an equally unlawful stay. The indictment sets forth the facts that constitute such co-operation, and need not allege the conclusion of law. On the principle of the cases last cited, in order to make its prohibition effective, the law can throw the burden of finding out the fact and date of a prostitute's arrival from another country upon those who harbor her for a purpose that presumably they know, in any event, to be contrary to law. Therefore, while I have admitted that the time fixed seems to me to be long, I can see no other constitutional objection to the act, and, as I have said, I think that that one ought not to prevail.<sup>2</sup>

<sup>1</sup> Accord: *Zakonaite v. Wolf*, 226 U. S. 272, 33 Sup. Ct. 31, 57 L. Ed. — (1912) (under three-year statute); *Low Wah Suey v. Backus*, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165 (1912) (even when alien is wife of an American citizen); *Bugajewitz v. Adams*, 228 U. S. 585, 33 Sup. Ct. 607, 57 L. Ed. — (1913) (same, after repeal of three-year limitation).

<sup>2</sup> See *U. S. v. Davin (D. C.)* 189 Fed. 244 (1911) (operation of statute of 1910 as to harboring alien prostitutes).

## CHAPTER XVI

## TERRITORIES, DEPENDENCIES, AND NEW STATES

## IN RE ROSS.

(Supreme Court of the United States, 1890. 140 U. S. 453, 11 Sup. Ct. 897, 35 L. Ed. 581.)

[Appeal from United States Circuit Court for the Northern District of New York. Petitioner, a seaman, committed a murder on board an American ship in the harbor of Yokohama, Japan, of which he was convicted in 1880 in a trial before the American consular tribunal there, conducted in accordance with federal legislation under a treaty with Japan, but without either a grand or petit jury. In 1890, while serving a life sentence for this crime at Albany, New York, he applied to said court for a writ of habeas corpus for his discharge, alleging the illegality of said conviction. Writ denied and appeal taken.]

Mr. Justice FIELD. \* \* \* The circuit court did not refuse to discharge the petitioner upon any independent conclusion as to the validity of the legislation of Congress establishing the consular tribunal in Japan, and the trial of Americans for offenses committed within the territory of that country, without the indictment of a grand jury, and without a trial by a petit jury, but placed its decision upon the long and uniform acquiescence by the executive, administrative, and legislative departments of the government in the validity of the legislation. \* \* \* The circuit court might have found an additional ground for not calling in question the legislation of Congress in the uniform practice of civilized governments for centuries to provide consular tribunals in other than Christian countries, or to invest their consuls with judicial authority, which is the same thing, for the trial of their own subjects or citizens for offenses committed in those countries, as well as for the settlement of civil disputes between them; and in the uniform recognition, down to the time of the formation of our government, of the fact that the establishment of such tribunals was among the most important subjects for treaty stipulations. This recognition of their importance has continued ever since, though the powers of those tribunals are now more carefully defined than formerly. *Dainese v. Hale*, 91 U. S. 13, 23 L. Ed. 190. \* \* \*

The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other

countries by its officers appointed to reside therein. We do not understand that any question is made by counsel as to its power in this respect. His objection is to the legislation by which such treaties are carried out, contending that, so far as crimes of a felonious character are concerned, the same protection and guaranty against an undue accusation or an unfair trial secured by the Constitution to citizens of the United States at home should be enjoyed by them abroad. In none of the laws which have been passed by Congress to give effect to treaties of the kind has there been any attempt to require indictment by a grand jury before one can be called upon to answer for a public offense of that grade committed in those countries, or to secure a jury on the trial of the offense. Yet the laws on that subject have been passed without objection to their constitutionality. Indeed, objection on that ground was never raised in any quarter, so far as we are informed, until a recent period. It is now, however, earnestly pressed, by counsel for the petitioner, but we do not think it tenable. By the Constitution a government is ordained and established "for the United States of America," and not for countries outside of their limits. The guaranties it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad. *Cook v. U. S.*, 138 U. S. 157, 181, 11 Sup. Ct. 268, 34 L. Ed. 906.

The Constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree; the laws of neither one being obligatory upon the other. The deck of a private American vessel, it is true, is considered, for many purposes, constructively as territory of the United States; yet persons on board of such vessels, whether officers, sailors, or passengers, cannot invoke the protection of the provisions referred to until brought within the actual territorial boundaries of the United States.<sup>1</sup> And, besides, their enforcement abroad in numerous places, where it would be highly important to have consuls invested with judicial authority, would be impracticable from the impossibility of obtaining a competent grand or petit jury. The requirement of such a body to accuse and to try an offender would, in a majority of cases, cause an abandonment of all prosecution. The framers of the Constitution, who were fully aware of the necessity of having judicial authority exercised by our consuls in non-Christian countries, if commercial intercourse was to be had with their people, never could have supposed that all the guaranties

<sup>1</sup> See the quotation from *United States v. Ju Toy*, in note 1 under *Fong Yue Ting v. United States*, ante, p. 981.



in the administration of the law upon criminals at home were to be transferred to such consular establishments, and applied before an American who had committed a felony there could be accused and tried. They must have known that such a requirement would defeat the main purpose of investing the consul with judicial authority. While, therefore, in one aspect the American accused of crime committed in those countries is deprived of the guaranties of the Constitution against unjust accusation and a partial trial, yet in another aspect he is the gainer, in being withdrawn from the procedure of their tribunals, often arbitrary and oppressive, and some times accompanied with extreme cruelty and torture. \* \* \*

The jurisdiction of the consular tribunal \* \* \* is to be exercised and enforced in accordance with the laws of the United States; and of course, in pursuance of them, the accused will have \* \* \* the benefit of all the provisions necessary to secure a fair trial before the consul and his associates. The only complaint of this legislation made by counsel is that \* \* \* it does not require a previous presentment or indictment by a grand jury, and does not give to the accused a petit jury. The want of such clauses, as affecting the validity of the legislation, we have already considered. \* \* \*

Order affirmed.<sup>2</sup>

<sup>2</sup> By the Spanish treaty of 1898, Spain relinquished all sovereignty over Cuba, and the island was temporarily occupied and its civil government administered under American military control, in pursuance of a prior declaration by Congress disclaiming any intention to exercise sovereignty over Cuba except for the pacification thereof. During this period the extradition of American citizens to Cuba for trial there was upheld, Harlan, J., saying in *Neely v. Henkel*, 180 U. S. 109, 122, 21 Sup. Ct. 302, 307, 45 L. Ed. 448 (1901): "It is contended that the act of June 6, 1900, is unconstitutional and void in that it does not secure to the accused, when surrendered to a foreign country for trial in its tribunals, all of the rights, privileges, and immunities that are guaranteed by the Constitution to persons charged with the commission in this country of crime against the United States. Allusion is here made to the provisions of the federal Constitution relating to the writ of *habeas corpus*, bills of attainder, *ex post facto* laws, trial by jury for crimes, and generally to the fundamental guaranties of life, liberty, and property embodied in that instrument. The answer to this suggestion is that those provisions have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country." See the discussion of this case in *Downes v. Bidwell*, post, at p. 1011.

Compare *Talton v. Mayes*, 163 U. S. 376, 16 Sup. Ct. 986, 41 L. Ed. 196 (1896) (prohibitions of fifth amendment not applicable to Indian tribal government in Indian Territory).

## DOWNES v. BIDWELL.

(Supreme Court of the United States, 1901. 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088.)

[Error to the United States Circuit Court for the Southern District of New York. In July, 1898, during the Spanish-American war, Porto Rico was invaded by the United States army and was held thereafter under military government until the passage by Congress on April 12, 1900, of the Foraker act for its civil government, which took effect May 1, 1900. On April 11, 1899, the treaty of peace became effective by which Porto Rico was ceded to the United States by Spain. Under the Foraker act duties upon goods from Porto Rico were collected from Downes in New York, and he brought suit to recover them from the collector of the port. A demurrer to his complaint being sustained, he took this writ.]

Mr. Justice BROWN. \* \* \* In the case of *De Lima v. Bidwell* just decided, 181 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041, we held that, upon the ratification of the treaty of peace with Spain, Porto Rico ceased to be a foreign country, and became a territory of the United States, and that duties were no longer collectible upon merchandise brought from that island. We are now asked to hold that it became a part of the *United States* within that provision of the Constitution which declares that "all duties, imposts, and excises shall be uniform throughout the United States." Article 1, § 8. If Porto Rico be a part of the United States, the Foraker act imposing duties upon its products is unconstitutional, not only by reason of a violation of the uniformity clause, but because by section 9 "vessels bound to or from one state" cannot "be obliged to enter, clear, or pay duties in another."

The case also involves the broader question whether the revenue clauses of the Constitution extend of their own force to our newly acquired territories. The Constitution itself does not answer the question. Its solution must be found in the nature of the government created by that instrument, in the opinion of its contemporaries, in the practical construction put upon it by Congress, and in the decisions of this court. \* \* \*

[After referring to the Articles of Confederation, the Ordinance of 1787, and the Constitution:] It is sufficient to observe in relation to these three fundamental instruments, that it can nowhere be inferred that the territories were considered a part of the United States. The Constitution was created by the people of the *United States*, as a union of *states*, to be governed solely by representatives of the *states*; and even the provision relied upon here, that all duties, imposts, and excises shall be uniform "throughout the United States," is explained by subsequent provisions of the Constitution, that "no tax or duty shall be laid on articles exported from any *state*," and "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." In short, the Constitution deals with *states*, their people, and their representatives.

The thirteenth amendment to the Constitution, prohibiting slavery and involuntary servitude "within the United States, or in any place subject to their jurisdiction," is also significant as showing that there may be places within the jurisdiction of the United States that are no part of the Union. To say that the phraseology of this amendment was due to the fact that it was intended to prohibit slavery in the seceded states, under a possible interpretation that those states were no longer a part of the Union, is to confess the very point in issue, since it involves an admission that, if these states were not a part of the Union, they were still subject to the jurisdiction of the United States.

Upon the other hand, the fourteenth amendment, upon the subject of citizenship, declares only that "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." Here there is a limitation to persons born or naturalized in the United States, which is not extended to persons born in any place "subject to their jurisdiction." \* \* \*

[After referring to the treaty acquiring Louisiana (the pertinent provisions of which are given in the opinion of WHITE, J., following, p. 1006), and to federal statutes in pursuance thereof (Act Oct. 31, 1803, c. 1, 2 Stat. 245, and Act March 26, 1804, c. 38, 2 Stat. 283):] These statutes may be taken as expressing the views of Congress, first, that territory may be lawfully acquired by treaty, with a provision for its ultimate incorporation into the Union; and, second, that a discrimination in favor of certain foreign vessels trading with the ports of a newly acquired territory is no violation of that clause of the Constitution (article 1, § 9) that declares that no preference shall be given to the ports of one state over those of another. It is evident that the constitutionality of this discrimination can only be supported upon the theory that ports of territories are not ports of state within the meaning of the Constitution. \* \* \*

Notwithstanding these provisions for the incorporation of territories into the Union, Congress, not only in organizing the territory of Louisiana by Act of March 26, 1804, but all other territories carved out of this vast inheritance, has assumed that the Constitution did not extend to them of its own force, and has in each case made special provision, either that their legislatures shall pass no law inconsistent with the Constitution of the United States, or that the Constitution or laws of the United States shall be the supreme law of such territories. Finally, in Rev. Stat. § 1891, a general provision was enacted that "the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the

organized territories, and in every territory hereafter organized, as elsewhere within the United States." \* \* \*

The decisions of this court upon this subject have not been altogether harmonious. Some of them are based upon the theory that the Constitution does not apply to the territories without legislation. Other cases, arising from territories where such legislation has been had, contain language which would justify the inference that such legislation was unnecessary, and that the Constitution took effect immediately upon the cession of the territory to the United States. \* \* \*

The earliest case is that of *Hepburn v. Ellzey*, 2 Cranch, 445, 2 L. Ed. 332, in which this court held that, under that clause of the Constitution limiting the jurisdiction of the courts of the United States to controversies between citizens of different *states*, a citizen of the District of Columbia could not maintain an action in the circuit court of the United States. \* \* \*

*Loughborough v. Blake*, 5 Wheat. 317, 5 L. Ed. 98, was an action of trespass or, as appears by the original record, replevin, brought in the circuit court for the District of Columbia to try the right of Congress to impose a direct tax for general purposes on that District. 3 Stat. at L. 216, chap. 60. It was insisted that Congress could act in a double capacity: in one as legislating for the states; in the other as a local legislature for the District of Columbia. In the latter character, it was admitted that the power of levying direct taxes might be exercised, but for District purposes only, as a state legislature might tax for state purposes; but that it could not legislate for the District under art. 1, § 8, giving to Congress the power "to lay and collect taxes, imposts, and excises," which "shall be uniform throughout the United States," inasmuch as the District was no part of the United States. It was held that the grant of this power was a general one without limitation as to place, and consequently extended to all places over which the government extends; and that it extended to the District of Columbia as a constituent part of the United States. \* \* \*

There could be no doubt as to the correctness of this conclusion, so far, at least, as it applied to the District of Columbia. This District had been a part of the states of Maryland and Virginia. It had been subject to the Constitution, and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can never be taken backward. \* \* \* Indeed, it would have been a fanciful construction to hold that territory which had been once a part of the United States ceased to be such by being ceded directly to the federal government.

In delivering the opinion, however, the Chief Justice made certain observations which have occasioned some embarrassment in other cases. "The power," said he, "to lay and collect duties, imposts, and excises may be exercised, and must be exercised, throughout the United States. Does this term designate the whole, or any particular

portion of the American empire? Certainly this question can admit but of one answer. It is the name given to our great Republic which is composed of states and territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania; and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises should be observed in the one than in the other." \* \* \* So far as applicable to the District of Columbia, these observations are entirely sound. So far as they apply to the territories, they were not called for by the exigencies of the case.

In line with *Loughborough v. Blake* is the case of *Callan v. Wilson*, 127 U. S. 540, 32 L. Ed. 223, 8 Sup. Ct. 1301, in which the provisions of the Constitution relating to trial by jury were held to be in force in the District of Columbia. Upon the other hand, in *Geofroy v. Riggs*, 133 U. S. 258, 33 L. Ed. 642, 10 Sup. Ct. 295, the District of Columbia, as a political community, was held to be one of "the states of the Union" within the meaning of that term as used in a consular convention of February 23, 1853, with France. \* \* \* This case may be considered as establishing the principle that, in dealing with foreign sovereignties, the term "United States" has a broader meaning than when used in the Constitution, and includes all territories subject to the jurisdiction of the federal government, wherever located. In its treaties and conventions with foreign nations this government is a unit. \* \* \*

It may be added in this connection, that to put at rest all doubts regarding the applicability of the Constitution to the District of Columbia, Congress by the act of February 21, 1871 (16 Stat. at L. 419. 426, c. 62, § 34), specifically extended the Constitution and laws of the United States to this District. \* \* \*

[After referring to the case of *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 242, holding that admiralty jurisdiction in the territory of Florida might be lawfully exercised by courts whose judges were appointed for terms of four years:] The opinion of Mr. Chief Justice Marshall in this case should be read in connection with article 3, §§ 1 and 2, of the Constitution, vesting "the judicial power of the United States" 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 behavior," etc. \* \* \* He held that the judicial clause of the Constitution, above quoted, did not apply to Florida; that the judges of the superior courts of Florida held their office for four years; that "these courts are not, then, constitutional courts in which the judicial power conferred by the Constitution on the general government can be deposited;" that "they are legislative courts, created in virtue of the general right of sovereignty which exists in the government," or in virtue of the territorial clause of the Constitution; that the jurisdiction with which they are invested is not a part of judicial power



of the Constitution, but is conferred by Congress in the exercise of those general powers which that body possesses over the territories of the United States; and that in legislating for them Congress exercises the combined powers of the general and of a state government. The act of the territorial legislature creating the court in question was held not to be "inconsistent with the laws and Constitution of the United States," and the decree of the circuit court was affirmed.

As the only judicial power vested in Congress is to create courts whose judges shall hold their offices during good behavior, it necessarily follows that, if Congress authorizes the creation of courts and the appointment of judges for a limited time, it must act independently of the Constitution and upon territory which is not part of the United States within the meaning of the Constitution. In delivering his opinion in this case Mr. Chief Justice Marshall made no reference whatever to the prior case of *Loughborough v. Blake*, 5 Wheat. 317, 5 L. Ed. 98, in which he had intimated that the territories were part of the United States. But if they be a part of the United States, it is difficult to see how Congress could create courts in such territories, except under the judicial clause of the Constitution. The power to make needful rules and regulations would certainly not authorize anything inconsistent with the Constitution if it applied to the territories. Certainly no such court could be created within a state, except under the restrictions of the judicial clause. It is sufficient to say that this case has ever since been accepted as authority for the proposition that the judicial clause of the Constitution has no application to courts created in the territories, and that with respect to them Congress has a power wholly unrestricted by it. We must assume as a logical inference from this case that the other powers vested in Congress by the Constitution have no application to these territories, or that the judicial clause is exceptional in that particular. \* \* \* [Here are discussed various cases dealing with the application in the territories of certain of the first eight amendments to the Constitution—*Mormon Church v. U. S.*, 136 U. S. 1, 10 Sup. Ct. 792, 34 L. Ed. 478; *Webster v. Reid*, 11 How. 437, 13 L. Ed. 761; *Reynolds v. U. S.*, 98 U. S. 145, 25 L. Ed. 244; *Springville v. Thomas*, 166 U. S. 707, 17 Sup. Ct. 717, 41 L. Ed. 1172; *Am. Pub. Co. v. Fisher*, 166 U. S. 464, 17 Sup. Ct. 618, 41 L. Ed. 1079; *Thompson v. Utah*, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061; and *Dred Scott v. Sandford*, 19 How. 393, 15 L. Ed. 691—in all but the last of which the constitutional provisions in question had been extended to the territory by act of Congress. In *re Ross*, ante, p. 985, was also referred to.]

To sustain the judgment in the case under consideration, it by no means becomes necessary to show that none of the articles of the Constitution apply to the island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are

operative only "throughout the United States" or among the several states.

Thus, when the Constitution declares that "no bill of attainder or ex post facto law shall be passed," and that "no title of nobility shall be granted by the United States," it goes to the competency of Congress to pass a bill of *that description*. Perhaps the same remark may apply to the first amendment, that "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 to peaceably assemble and to petition the government for a redress of grievances." We do not wish, however, to be understood as expressing an opinion how far the Bill of Rights contained in the first eight amendments is of general and how far of local application.

Upon the other hand, when the Constitution declares that all duties shall be uniform "throughout the United States," it becomes necessary to inquire whether there be any territory over which Congress has jurisdiction which is not a part of the "United States," by which term we understand the *states* whose people *united* to form the Constitution, and such as have since been admitted to the Union upon an equality with them. Not only did the people in adopting the thirteenth amendment thus recognize a distinction between the United States and "any place subject to their jurisdiction," but Congress itself, in the Act of March 27, 1804 (2 Stat. at L. 298, c. 56), providing for the proof of public records, applied the provisions of the act, not only to "every court and office within the United States," but to the "courts and offices of the respective territories of the United States and countries subject to the jurisdiction of the United States." \* \* \* Unless these words are to be rejected as meaningless, we must treat them as a recognition by Congress of the fact that there may be territories subject to the jurisdiction of the United States, which are not *of* the United States. \* \* \*

We are also of opinion that the power to acquire territory by treaty implies, not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the "American empire." There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges and immunities of citizens. If such be their status, the consequences will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions, and modes of life, shall become at once citizens of the United States. In all its treaties hitherto the treaty-

making power has made special provision for this subject; in the cases of Louisiana and Florida, by stipulating that "the inhabitants shall be incorporated into the Union of the United States and admitted as soon as possible \* \* \* to the enjoyment of all the rights, advantages, and immunities of citizens of the United States;" in the case of Mexico, that they should "be incorporated into the Union, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States"; in the case of Alaska, that the inhabitants who remained three years, "with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights," etc.; and in the case of Porto Rico and the Philippines, "that the civil rights and political status of the native inhabitants \* \* \* shall be determined by Congress." In all these cases there is an implied denial of the right of the inhabitants to American citizenship until Congress by further action shall signify its assent thereto. \* \* \*

It is obvious that in the annexation of out-lying and distant possessions grave questions will arise from differences of race, habits, laws, and customs of the people, and from differences of soil, climate, and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians.

We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage (*Minor v. Happersett*, 21 Wall. 162, 22 L. Ed. 627), and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the states to be unnecessary to the proper protection of individuals. \* \* \* We do not desire, however, to anticipate the difficulties which would naturally arise in this connection, but merely to disclaim any intention to hold that the inhabitants of these territories are subject to an unrestrained power on the part of Congress to deal with them upon the theory that they have no rights which it is bound to respect. \* \* \*

In passing upon the questions involved in this and kindred cases, we ought not to overlook the fact that, while the Constitution was intended to establish a permanent form of government for the states which should elect to take advantage of its conditions, and continue for an indefinite future, the vast possibilities of that future could never have entered the minds of its framers. \* \* \* The difficulties of bringing about a union of the states were so great, the objections to it seemed so formidable, that the whole thought of the convention centered upon surmounting these obstacles. The question of territories was dismissed with a single clause, apparently applicable only to the territories then existing, giving Congress the power to govern and dispose of them. \* \* \*

If it be once conceded that we are at liberty to acquire foreign territory, a presumption arises that our power with respect to such territories is the same power which other nations have been accustomed to exercise with respect to territories acquired by them. If, in limiting the power which Congress was to exercise within the United States, it was also intended to limit it with regard to such territories as the people of the United States should thereafter acquire, such limitations should have been expressed. Instead of that, we find the Constitution speaking only to states, except in the territorial clause, which is absolute in its terms, and suggestive of no limitations upon the power of Congress in dealing with them. \* \* \*

Patriotic and intelligent men may differ widely as to the desirableness of this or that acquisition, but this is solely a political question. We can only consider this aspect of the case so far as to say that no construction of the Constitution should be adopted which would prevent Congress from considering each case upon its merits, unless the language of the instrument imperatively demand it. A false step at this time might be fatal to the development of what Chief Justice Marshall called the American empire. Choice in some cases, the natural gravitation of small bodies towards large ones in others, the result of a successful war in still others, may bring about conditions which would render the annexation of distant possessions desirable. If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.

We are therefore of opinion that the island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker act is constitutional, so far as it imposes duties upon im-

ports from such island; and that the plaintiff cannot recover back the duties exacted in this case. \* \* \*

Judgment affirmed.

Mr. Justice WHITE [with whom concurred SHIRAS and McKENNA, JJ., and, "in substance," GRAY, J.]. Mr. Justice BROWN, in announcing the judgment of affirmance, has in his opinion stated his reasons for his concurrence in such judgment. In the result I likewise concur. As, however, the reasons which cause me to do so are different from, if not in conflict with, those expressed in that opinion, if its meaning is by me not misconceived, it becomes my duty to state the convictions which control me. \* \* \* To come to the pivotal contentions which the case involves, let me state and concede the soundness of some principles. [The citation of authorities for each of the eight propositions that follow is omitted.] \* \* \*

First. The government of the United States was born of the Constitution, and all powers which it enjoys or may exercise must be either derived expressly or by implication from that instrument. \* \* \*

Second. Every function of the government being thus derived from the Constitution, it follows that that instrument is everywhere and at all times potential in so far as its provisions are applicable.

Third. Hence it is that wherever a power is given by the Constitution, and there is a limitation imposed on the authority, such restriction operates upon and confines every action on the subject within its constitutional limits.

Fourth. Consequently it is impossible to conceive that, where conditions are brought about to which any particular provision of the Constitution applies, its controlling influence may be frustrated by the action of any or all of the departments of the government. \* \* \*

Fifth. The Constitution has undoubtedly conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States, whether they have been incorporated or not, to give to the inhabitants as respects the local governments such degree of representation as may be conducive to the public well-being, to deprive such territory of representative government if it is considered just to do so, and to change such local governments at discretion.<sup>1</sup> \* \* \* In some adjudged cases the power to locally govern at discretion has been declared to arise as an incident to the right to acquire territory. In others it has been rested upon the clause of section 3, article 4, of the Constitution, which vests Congress with the power to dispose of and make all needful rules and regulations re-

<sup>1</sup> For the early forms of territorial government, see *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. Ed. 659 (1872). See, also, the federal references under *Opinion of Justices*, ante, at pp. 122, 123, note, and *United States v. Grimaud*, ante, p. 124, note 1. Note the distinction between federal governmental powers over territory where the United States is sole sovereign, and those over land in a state owned by the United States, but not ceded by the state. *Ft. Leavenworth R. R. Co. v. Lowe*, ante, p. 946, note.



specting the territory or other property of the United States. But this divergence, if not conflict of opinion, does not imply that the authority of Congress to govern the territories is outside of the Constitution, since in either case the right is founded on the Constitution, although referred to different provisions of that instrument. \* \* \*

Sixth. As Congress in governing the territories is subject to the Constitution, it results that all the limitations of the Constitution which are applicable to Congress in exercising this authority necessarily limit its power on this subject. \* \* \*

Seventh. In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable.

Eighth. As Congress derives its authority to levy local taxes for local purposes within the territories, not from the general grant of power to tax as expressed in the Constitution, it follows that its right to locally tax is not to be measured by the provision empowering Congress "to lay and collect taxes, duties, imposts, and excises," and is not restrained by the requirement of uniformity throughout the United States. But the power just referred to, as well as the qualification of uniformity, restrains Congress from imposing an impost duty on goods coming into the United States from a territory which has been incorporated into and forms a part of the United States. This results because the clause of the Constitution in question does not confer upon Congress power to impose such an impost duty on goods coming from one part of the United States to another part thereof, and such duty, besides, would be repugnant to the requirement of uniformity throughout the United States.

To question the principle above stated on the assumption that the rulings on this subject of Mr. Chief Justice Marshall in *Loughborough v. Blake* were mere dicta seems to me to be entirely inadmissible. \* \* \*

From these conceded propositions it follows that Congress in legislating for Porto Rico was only empowered to act within the Constitution and subject to its applicable limitations, and that every provision of the Constitution which applied to a country situated as was that island was potential in Porto Rico. And the determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States. This is well illustrated by some of the decisions of this court.<sup>2</sup> Some of these decisions hold on the one hand that, growing out of the presumably ephemeral nature of a territorial government, the provisions of the Constitution relating to the life tenure of judges is inapplicable to courts created by Congress,

<sup>2</sup> Citing the cases discussed in the opinion of Brown, J., preceding, and some others of like purport.

even in territories which are incorporated into the United States, and some, on the other hand, decide that the provisions as to common-law juries found in the Constitution are applicable under like conditions; that is to say, although the judge presiding over a jury need not have the constitutional tenure, yet the jury must be in accordance with the Constitution. And the application of the provision of the Constitution relating to juries has been also considered in a different aspect. In *re Ross*, 140 U. S. 453, 461, 462, 463, sub nom. *Ross v. McIntyre*, 35 L. Ed. 581, 585, 11 Sup. Ct. 897. \* \* \*

Albeit, as a general rule, the status of a particular territory has to be taken in view when the applicability of any provision of the Constitution is questioned, it does not follow, when the Constitution has absolutely withheld from the government all power on a given subject, that such an inquiry is necessary. Undoubtedly there are general prohibitions in the Constitution in favor of the liberty and property of the citizen, which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts. In the nature of things, limitations of this character cannot be under any circumstances transcended, because of the complete absence of power. \* \* \*

There is in reason, then, no room in this case to contend that Congress can destroy the liberties of the people of Porto Rico by exercising in their regard powers against freedom and justice which the Constitution has absolutely denied. \* \* \* But as the duty in question was not a local tax, since it was levied in the United States on goods coming from Porto Rico, it follows that, if that island was a part of the United States, the duty was repugnant to the Constitution, since the authority to levy an impost duty conferred by the Constitution on Congress does not, as I have conceded, include the right to lay such a burden on goods coming from one to another part of the United States. And, besides, if Porto Rico was a part of the United States the exaction was repugnant to the uniformity clause.

The sole and only issue, then, is not whether Congress has taxed Porto Rico without representation,—for, whether the tax was local or national, it could have been imposed although Porto Rico had no representative local government and was not represented in Congress.—but is whether the particular tax in question was levied in such form as to cause it to be repugnant to the Constitution. This is to be resolved by answering the inquiry, Had Porto Rico, at the time of the passage of the act in question, been incorporated into and become an integral part of the United States?

On the one hand, it is affirmed that, although Porto Rico had been ceded by the treaty with Spain to the United States, the cession was accompanied by such conditions as prevented that island from becoming an integral part of the United States, at least temporarily and until

Congress had so determined. On the other hand, it is insisted that by the fact of cession to the United States alone, irrespective of any conditions found in the treaty, Porto Rico became a part of the United States and was incorporated into it. It is incompatible with the Constitution, it is argued, for the government of the United States to accept a cession of territory from a foreign country without complete incorporation following as an immediate result, and therefore it is contended that it is immaterial to inquire what were the conditions of the cession, since if there were any which were intended to prevent incorporation they were repugnant to the Constitution and void. The result of the argument is that the government of the United States is absolutely without power to acquire and hold territory as property or as appurtenant to the United States. \* \* \*

It may not be doubted that by the general principles of the law of nations every government which is sovereign within its sphere of action possesses as an inherent attribute the power to acquire territory by discovery, by agreement or treaty, and by conquest. It cannot also be gainsaid that, as a general rule, wherever a government acquires territory as a result of any of the modes above stated, the relation of the territory to the new government is to be determined by the acquiring power in the absence of stipulations upon the subject. \* \* \* [Here follow quotations from Halleck's *International Law*, pp. 126, 76, 814.]

When our forefathers threw off their allegiance to Great Britain and established a republican government, assuredly they deemed that the nation which they called into being was endowed with those general powers to acquire territory which all independent governments in virtue of their sovereignty enjoyed. This is demonstrated by the concluding paragraph of the Declaration of Independence, which reads as follows:

"As free and independent states, they [the United States of America] have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do."

That under the Confederation it was considered that the government of the United States had authority to acquire territory like any other sovereignty is clearly established by the eleventh of the Articles of Confederation.<sup>3</sup>

The decisions of this court leave no room for question that, under the Constitution, the government of the United States, in virtue of its sovereignty, supreme within the sphere of its delegated power, has the full right to acquire territory enjoyed by every other sovereign nation. \* \* \*

<sup>3</sup> This article provided for the admission of Canada to the Confederation (should it consent), but forbade the admission of any other colony save with the assent of nine states.

[After quoting from *Am. Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 242, *U. S. v. Huckabee*, 16 Wall. 414, 21 L. Ed. 457, and *Mormon Church v. U. S.*, 136 U. S. 1, 10 Sup. Ct. 792, 34 L. Ed. 478:] Indeed, it is superfluous to cite authorities establishing the right of the government of the United States to acquire territory, in view of the possession of the Northwest Territory when the Constitution was framed and the cessions to the general government by various states subsequent to the adoption of the Constitution, and in view also of the vast extension of the territory of the United States brought about since the existence of the Constitution by substantially every form of acquisition known to the law of nations. Thus, in part at least, "the title of the United States to Oregon was founded upon original discovery and actual settlement by citizens of the United States, authorized or approved by the government of the United States." *Shively v. Bowlby*, 152 U. S. 50, 38 L. Ed. 349, 14 Sup. Ct. 566. The province of Louisiana was ceded by France in 1803; the Floridas were transferred by Spain in 1819; Texas was admitted into the Union by compact with Congress in 1845; California and New Mexico were acquired by the treaty with Mexico of 1848, and other western territory from Mexico by the treaty of 1853; numerous islands have been brought within the dominion of the United States under the authority of the Act of August 18, 1856, c. 164, usually designated as the Guano islands act, re-enacted in Revised Statutes, §§ 5570-5578; Alaska was ceded by Russia in 1867; Medway island, the western end of the Hawaiian group, 1,200 miles from Honolulu, was acquired in 1867, and \$50,000 was expended in efforts to make it a naval station; on the renewal of a treaty with Hawaii November 9, 1887, Pearl harbor was leased for a permanent naval station; by joint resolution of Congress the Hawaiian islands came under the sovereignty of the United States in 1898; and on April 30, 1900, an act for the government of Hawaii was approved, by which the Hawaiian islands were given the status of an incorporated territory; on May 21, 1890, there was proclaimed by the President an agreement, concluded and signed with Germany and Great Britain, for the joint administration of the Samoan islands (26 Stat. at L. 1497); and on February 16, 1900 (31 Stat. at L. 1878), there was proclaimed a convention between the United States, Germany, and Great Britain, by which Germany and Great Britain renounced in favor of the United States all their rights and claims over and in respect to the island of Tutuilla and all other islands of the Samoan group east of longitude 171° west of Greenwich. And finally the treaty with Spain which terminated the recent war was ratified. \* \* \*

It is insisted, however, conceding the right of the government of the United States to acquire territory, as all such territory when acquired becomes absolutely incorporated into the United States, every provision of the Constitution which would apply under that situation is con-

trolling in such acquired territory. This, however, is but to admit the power to acquire, and immediately to deny its beneficial existence.

The general principle of the law of nations, already stated, is that acquired territory, in the absence of agreement to the contrary, will bear such relation to the acquiring government as may be by it determined. To concede to the government of the United States the right to acquire, and to strip it of all power to protect the birthright of its own citizens and to provide for the well-being of the acquired territory by such enactments as may in view of its condition be essential, is, in effect, to say that the United States is helpless in the family of nations, and does not possess that authority which has at all times been treated as an incident of the right to acquire. Let me illustrate the accuracy of this statement. Take a case of discovery. Citizens of the United States discover an unknown island, peopled with an uncivilized race, yet rich in soil, and valuable to the United States for commercial and strategic reasons. Clearly, by the law of nations, the right to ratify such acquisition and thus to acquire the territory would pertain to the government of the United States. *Johnson v. McIntosh*, 8 Wheat. 543, 595, 5 L. Ed. 681, 694; *Martin v. Waddell*, 16 Pet. 367, 409, 10 L. Ed. 997, 1012; *Jones v. United States*, 137 U. S. 202, 212, 34 L. Ed. 691, 695, 11 Sup. Ct. 80; *Shively v. Bowlby*, 152 U. S. 1, 50, 38 L. Ed. 331, 349, 14 Sup. Ct. 548. Can it be denied that such right could not be practically exercised if the result would be to endow the inhabitants with citizenship of the United States and to subject them, not only to local, but also to an equal proportion of national, taxes, even although the consequence would be to entail ruin on the discovered territory, and to inflict grave detriment on the United States, to arise both from the dislocation of its fiscal system and the immediate bestowal of citizenship on those absolutely unfit to receive it?

The practice of the government has been otherwise. As early as 1856 Congress enacted the Guano islands act, heretofore referred to, which by section 1 provided that when any citizen of the United States shall "discover a deposit of guano on any island, rock, or key not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and shall take peaceable possession thereof, and occupy the same, said island, rock, or key may, at the discretion of the President of the United States, be considered as appertaining to the United States." 11 Stat. at L. 119, c. 164; Rev. Stat. § 5570. Under the act referred to, it was stated in argument, that the government now holds and protects American citizens in the occupation of some seventy islands. The statute came under consideration in *Jones v. United States*, 137 U. S. 202, 34 L. Ed. 691, 11 Sup. Ct. 80, where the question was whether or not the act was valid, and it was decided that the act was a lawful exercise of power, and that islands thus acquired were "appurtenant" to the United States. The court, in the course of the opinion, speaking



through Mr. Justice Gray, said (p. 212, L. Ed. p. 695, Sup. Ct. p. 83): "By the law of nations, recognized by all civilized states, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens or subjects of one nation, in its name and by its authority or with its assent, take and hold actual, continuous, and useful possession (although only for the purpose of carrying on a particular business, such as catching and curing fish or working mines) of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired." \* \* \*

And these considerations concerning discovery are equally applicable to ownership resulting from conquest. A just war is declared, and in its prosecution the territory of the enemy is invaded and occupied. Would not the war, even if waged successfully, be fraught with danger if the effect of occupation was to necessarily incorporate an alien and hostile people into the United States? \* \* \* Yet again. Suppose the United States, in consequence of outrages perpetrated upon its citizens, was obliged to move its armies or send its fleets to obtain redress, and it came to pass that an expensive war resulted and culminated in the occupation of a portion of the territory of the enemy, and that the retention of such territory—an event illustrated by examples in history—could alone enable the United States to recover the pecuniary loss it had suffered. And suppose, further, that to do so would require occupation for an indefinite period, dependent upon whether or not payment was made of the required indemnity. It being true that incorporation must necessarily follow the retention of the territory, it would result that the United States must abandon all hope of recouping itself for the loss suffered by the unjust war, and hence the whole burden would be entailed upon the people of the United States. This would be a necessary consequence, because if the United States did not hold the territory as security for the needed indemnity it could not collect such indemnity, and, on the other hand, if incorporation must follow from holding the territory the uniformity provision of the Constitution would prevent the assessment of the cost of the war solely upon the newly acquired country. In this, as in the case of discovery, the traditions and practices of the government demonstrate the unsoundness of the contention. \* \* \* [Here follow references to federal tariff practices during the Mexican war, *Fleming v. Page*, 9 How. 603, 13 L. Ed. 276, and *Cross v. Harrison*, 16 How. 164, 14 L. Ed. 889.]

This further argument, however, is advanced. Granting that Congress may regulate without incorporating, where the military arm has taken possession of foreign territory, and where there has been or can be no treaty, this does not concern the decision of this case, since there is here involved no regulation, but an actual cession to the United States of territory by treaty. The general rule of the law of nations,

by which the acquiring government fixes the status of acquired territory, it is urged, does not apply to the government of the United States, because it is incompatible with the Constitution that that government should hold territory under a cession and administer it as a dependency without its becoming incorporated. \* \* \*

If the authority by treaty is limited as is suggested, then it will be impossible to terminate a successful war by acquiring territory through a treaty, without immediately incorporating such territory into the United States. Let me, however, eliminate the case of war, and consider the treaty-making power as subserving the purposes of the peaceful evolution of national life. Suppose the necessity of acquiring a naval station or a coaling station on an island inhabited with people utterly unfit for American citizenship and totally incapable of bearing their proportionate burden of the national expense. Could such island, under the rule which is now insisted upon, be taken? Suppose, again, the acquisition of territory for an interoceanic canal, where an inhabited strip of land on either side is essential to the United States for the preservation of the work. Can it be denied that, if the requirements of the Constitution as to taxation are to immediately control, it might be impossible by treaty to accomplish the desired result? \* \* \*

It is said that the spirit of the Constitution excludes the conception of property or dependencies possessed by the United States and which are not so completely incorporated as to be in all respects a part of the United States. \* \* \* But this reasoning is based on political, and not judicial, considerations. \* \* \*

Let me come, however, to a consideration of the express powers which are conferred by the Constitution, to show how unwarranted is the principle of immediate incorporation. \* \* \* If the treaty-making power can absolutely, without the consent of Congress, incorporate territory, and if that power may not insert conditions against incorporation, it must follow that the treaty-making power is endowed by the Constitution with the most unlimited right, susceptible of destroying every other provision of the Constitution; that is, it may wreck our institutions. If the proposition be true, then millions of inhabitants of alien territory, if acquired by treaty, can, without the desire or consent of the people of the United States speaking through Congress, be immediately and irrevocably incorporated into the United States, and the whole structure of the government be overthrown. \* \* \* For, although the House of Representatives might be unwilling to agree to the incorporation of alien races, it would be impotent to prevent its accomplishment, and the express provisions conferring upon Congress the power to regulate commerce, the right to raise revenue,—bills for which, by the Constitution, must originate in the House of Representatives,—and the authority to prescribe uniform naturalization laws, would be in effect set at naught by the treaty-making power. And the consequent result—incorporation—would be beyond all future control of or remedy by the American people, since,

at once and without hope of redress or power of change, incorporation by the treaty would have been brought about. \* \* \*

All the confusion and dangers above indicated, however, it is argued, are more imaginary than real, since, although it be conceded that the treaty-making power has the right by cession to incorporate without the consent of Congress, that body may correct the evil by availing itself of the provision of the Constitution giving to Congress the right to dispose of the territory and other property of the United States. \* \* \* In view, however, of the relations of the territories to the government of the United States at the time of the adoption of the Constitution, and the solemn pledge then existing that they should forever "remain a part of the Confederacy of the United States of America," I cannot resist the belief that the theory that the disposing clause relates as well to a relinquishment or cession of sovereignty as to a mere transfer of rights of property is altogether erroneous. \* \* \*

The reasoning which has sometimes been indulged in by those who asserted that the Constitution was not at all operative in the territories is that, as they were acquired by purchase, the right to buy included the right to sell. This has been met by the proposition that if the country purchased and its inhabitants became incorporated into the United States, it came under the shelter of the Constitution, and no power existed to sell American citizens. In conformity to the principles which I have admitted it is impossible for me to say at one and the same time that territory is an integral part of the United States protected by the Constitution, and yet the safeguards, privileges, rights, and immunities which arise from this situation are so ephemeral in their character that by a mere act of sale they may be destroyed. And applying this reasoning to the provisions of the treaty under consideration, to me it seems indubitable that if the treaty with Spain incorporated all the territory ceded into the United States, it resulted that the millions of people to whom that treaty related were without the consent of the American people as expressed by Congress, and without any hope of relief, indissolubly made a part of our common country. \* \* \*

True, from the exigency of a calamitous war or the necessity of a settlement of boundaries, it may be that citizens of the United States may be expatriated by the action of the treaty-making power, impliedly or expressly ratified by Congress. But the arising of these particular conditions cannot justify the general proposition that territory which is an integral part of the United States may, as a mere act of sale, be disposed of. \* \* \*

The theory as to the treaty-making power upon which the argument which has just been commented upon rests, it is now proposed to be shown, is refuted by the history of the government from the beginning. There has not been a single cession made from the time of the Confederation up to the present day, excluding the recent treaty with

Spain, which has not contained stipulations to the effect that the United States through Congress would either not disincorporate or would incorporate the ceded territory into the United States. \* \* \*

When the various treaties by which foreign territory has been acquired are considered in the light of the circumstances which surrounded them, it becomes to my mind clearly established that the treaty-making power was always deemed to be devoid of authority to incorporate territory into the United States without the assent, express or implied, of Congress, and that no question to the contrary has ever been even mooted. To appreciate this it is essential to bear in mind what the words "United States" signified at the time of the adoption of the Constitution. When by the treaty of peace with Great Britain the independence of the United States was acknowledged, it is unquestioned that all the territory within the boundaries defined in that treaty, whatever may have been the disputes as to title, substantially belonged to particular states. The entire territory was part of the United States, and all the native white inhabitants were citizens of the United States and endowed with the rights and privileges arising from that relation. When, as has already been said, the Northwest Territory was ceded by Virginia, it was expressly stipulated that the rights of the inhabitants in this regard should be respected. The ordinance of 1787, providing for the government of the Northwest Territory, fulfilled this promise on behalf of the Confederation. Without undertaking to reproduce the text of the ordinance, it suffices to say that it contained a bill of rights, a promise of ultimate statehood, and it provided (*italics mine*) that "the said territory and the states which may be formed therein *shall ever remain a part of this Confederacy of the United States of America*, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made, and to all the acts and ordinances of the United States in Congress assembled, conformably thereto." It submitted the inhabitants to a liability for a tax to pay their proportional part of the public debt and the expenses of the government, to be assessed by the rule of apportionment which governed the states of the Confederation. It forbade slavery within the territory, and contained a stipulation that the provisions of the ordinance should ever remain unalterable unless by common consent.

Thus it was that, at the adoption of the Constitution, the United States, as a geographical unit and as a governmental conception both in the international and domestic sense, consisted not only of states, but also of territories, all the native white inhabitants being endowed with citizenship, protected by pledges of a common union, and, except as to political advantages, all enjoying equal rights and freedom, and safeguarded by substantially similar guaranties, all being under the obligation to contribute their proportionate share for the liquidation of the debt and future expenses of the general government. \* \* \*

[After referring to article VI, par. 1, of the Constitution:] My mind refuses to assent to the conclusion that under the Constitution

the provision of the Northwest Territory ordinance making such territory forever a part of the Confederation was not binding on the government of the United States when the Constitution was formed. \* \* \* It cannot, it seems to me, be doubted that the United States continued to be composed of states and territories, all forming an integral part thereof and incorporated therein, as was the case prior to the adoption of the Constitution. \* \* \* [Here follow references to the cessions of territory to the United States by North Carolina and Georgia, under provisions assuring to the inhabitants thereof all of the rights and privileges granted by the Ordinance of 1787, except the prohibition of slavery.]

Thus clearly defined by boundaries, by common citizenship, by like guaranties, stood the United States when the plan of acquiring by purchase from France the province of Louisiana was conceived by President Jefferson. Naturally, the suggestion which arose was the power on the part of the government of the United States, under the Constitution, to incorporate into the United States—a Union then composed, as I have stated, of states and territories—a foreign province inhabited by an alien people, and thus make them partakers in the American commonwealth. \* \* \* [After referring to the instructions given to the American commissioners who negotiated the cession of Louisiana:] Without going into details, it suffices to say that a compliance with the instructions given them would have prevented the negotiators on behalf of the United States from inserting in the treaty any provision looking even to the ultimate incorporation of the acquired territory into the United States. In view of the emergency and exigencies of the negotiations, however, the commissioners were constrained to make such a stipulation, and the treaty provided as follows: "Art. 3. The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess." 8 Stat. at L. 202.

Weighing the provisions just quoted, it is evident they refute the theory of incorporation arising at once from the mere force of a treaty, even although such result be directly contrary to any provisions which a treaty may contain. Mark the language. It expresses a promise: "The inhabitants of the ceded territory *shall be incorporated in the Union of the United States.* \* \* \*" Observe how guardedly the fulfilment of this pledge is postponed until its accomplishment is made possible by the will of the American people, since it is to be executed only "*as soon as possible according to the principles of the federal Constitution.*" If the view now urged be true, this wise circumspection was unnecessary, and, indeed, as I have previously said, the entire



proviso was superfluous, since everything which it assured for the future was immediately and unalterably to arise.

It is said, however, that the treaty for the purchase of Louisiana took for granted that the territory ceded would be immediately incorporated into the United States, and hence the guaranties contained in the treaty related, not to such incorporation, but was a pledge that the ceded territory was to be made a part of the Union as a state. The minutest analysis, however, of the clauses of the treaty, fails to disclose any reference to a promise of statehood, and hence it can only be that the pledges made referred to incorporation into the United States. \* \* \* The argument proceeds upon the theory that the words of the treaty, "shall be incorporated into the Union of the United States," could only have referred to a promise of statehood, since the then existing and incorporated territories were not a part of the Union of the United States, as that Union consisted only of the states. But this has been shown to be unfounded, since the "Union of the United States" was composed of states and territories, both having been embraced within the boundaries fixed by the treaty of peace between Great Britain and the United States which terminated the Revolutionary War, the latter, the territories, embracing districts of country which were ceded by the states to the United States under the express pledge that they should forever remain a part thereof. \* \* \*

To fulfil the stipulations of the treaty so as to cause the ceded territory to become a part of the United States, Mr. Jefferson deemed an amendment to the Constitution to be essential. For this reason the amendment which he formulated declared that the territory ceded was to be "*a part of the United States*, and its white inhabitants shall be citizens, and stand, as to their rights and obligations, on the same footing with other citizens of the United States *in analogous situations.*" \* \* \* This provision of the amendment applied to all of the territory ceded, and therefore brought it all into the United States, and hence placed it in a position where the power of Congress to admit new states would have attached to it. As Mr. Jefferson deemed that every requirement of the treaty would be fulfilled by incorporation, and that it would be unwise to form a new state out of the upper part of the new territory, after thus providing for the complete execution of the treaty by incorporation of all the territory into the United States, he inserted a provision *forbidding Congress from admitting a new state out of a part of the territory.*

With the debates which took place on the subject of the treaty I need not particularly concern myself. Some shared Mr. Jefferson's doubts as to the right of the treaty-making power to incorporate the territory into the United States without an amendment of the Constitution; others deemed that the provision of the treaty was but a promise that Congress would ultimately incorporate as a territory, and, until by the action of Congress this latter result was brought about, full power of legislation to govern as deemed best was vested in Congress.

This latter view prevailed. Mr. Jefferson's proposed amendment to the Constitution, therefore, was never adopted by Congress, and hence was never submitted to the people.

An act was approved on October 31, 1803 (2 Stat. at L. 245, c. 1) "to enable the President of the United States to take possession of the territories ceded by France to the United States by the treaty concluded at Paris on the 30th of April last, and for the temporary government thereof." The provisions of this act were absolutely incompatible with the conception that the territory had been incorporated into the United States by virtue of the cession. \* \* \* On March 26, 1804 (2 Stat. at L. 283, c. 38), an act was passed dividing the "province of Louisiana" into Orleans territory on the south and the district of Louisiana to the north. \* \* \* On March 2, 1805 (2 Stat. at L. 322, c. 23), an act was approved, which, \* \* \* in the first section, provided that the inhabitants of the territory of Orleans "shall be entitled to and enjoy all the rights, privileges, and advantages secured by the said ordinance" (that is, the Ordinance of 1787) "and now enjoyed by the people of the Mississippi territory." As will be remembered, the ordinance of 1787 had been extended to that territory. 1 Stat. at L. 550, c. 28. Thus, strictly in accord with the thought embodied in the amendments contemplated by Mr. Jefferson, citizenship was conferred, and the territory of Orleans was incorporated into the United States to fulfil the requirements of the treaty, by placing it exactly in the position which it would have occupied had it been within the boundaries of the United States as a territory at the time the Constitution was framed. It is pertinent to recall that the treaty contained stipulations giving certain preferences and commercial privileges for a stated period to the vessels of French and Spanish subjects,<sup>4</sup> and that, even after the action of Congress above stated, this condition of the treaty continued to be enforced, thus demonstrating that even after the incorporation of the territory the express provisions conferring a temporary right which the treaty had stipulated for and which Congress had recognized were not destroyed, the effect being that incorporation as to such matter was for the time being in abeyance.

The upper part of the province of Louisiana \* \* \* was created the territory of Missouri on June 4, 1812. 2 Stat. at L. 743, c. 95. By this latter act, though the Ordinance of 1787 was not in express terms extended over the territory,—probably owing to the slavery agitation,—the inhabitants of the territory were accorded substantially all the rights of the inhabitants of the Northwest Territory. Citizen-

<sup>4</sup> Article 7 of the treaty gave preferential commercial privileges in the ports of the territory for twelve years to French and Spanish ships over those of other foreign nations. There were similar provisions in the treaties ceding Florida and the Philippines, and in the Hawaiian treaty a discrimination against those islands. Louisiana was admitted as a state in 1812, three years before the expiration of article 7, above. See the discussion of these provisions in the principal case, 182 U. S. at 253-257, 21 Sup. Ct. 770, 45 L. Ed. 1088.

ship was in effect recognized in the ninth section, while the fourteenth section contained an elaborate declaration of the rights secured to the people of the territory. \* \* \* [Similar provisions and procedure thereunder in the case of the treaty of 1819 ceding Florida are here mentioned.]

The treaty of peace with Mexico departed from the form adopted in the previous treaties concerning Florida and Louisiana, \* \* \* and accomplished the cession *by changing the boundaries of the two countries; in other words, by bringing the acquired territory within the described boundaries of the United States.* The treaty, besides, contained a stipulation for rights of citizenship<sup>5</sup>; in other words, a provision equivalent in terms to those used in the previous treaties to which I have referred. \* \* \* After the ratification of the treaty various laws were enacted by Congress, which in effect treated the territory as acquired by the United States; and the executive officers of the government, conceiving that these acts were an implied or express ratification of the provisions of the treaty by Congress, acted upon the assumption that the provisions of the treaty were thus made operative, and hence incorporation had thus become efficacious. \* \* \* But this did not conflict with the general principles of the law of nations which I have at the outset stated, but enforced it, since the action taken assumed, not that incorporation was brought about by the treaty-making power wholly without the consent of Congress, but only that, as the treaty provided for incorporation in express terms, and Congress had acted without repudiating it, its provisions should be at once enforced.

Without referring in detail to the acquisition from Russia of Alaska, it suffices to say that that treaty also contained provisions for incorporation, and was acted upon exactly in accord with the practical construction applied in the case of the acquisitions from Mexico, as just stated. However, the treaty ceding Alaska contained an express provision excluding from citizenship the uncivilized native tribes, and it has been nowhere contended that this condition of exclusion was inoperative because of the want of power under the Constitution in the treaty-making authority to so provide, which must be the case if the limitation on the treaty-making power, which is here asserted, be well founded. The treaty concerning Alaska, therefore, adds cogency to the conception established by every act of the government from the foundation,—that the condition of a treaty, when expressly or impliedly ratified by Congress, becomes the measure by which the rights arising from the treaty are to be adjusted. \* \* \*

In concluding my appreciation of the history of the government, attention is called to the thirteenth amendment to the Constitution.

<sup>5</sup> For the effect of this stipulation upon the status of the civilized Indians of New Mexico, see *U. S. v. Sandoval* (D. C.) 198 Fed. 539 (1912); with which compare *Elk v. Wilkins*, stated ante, at p. 134.

which to my mind seems to be conclusive. The first section of the amendment, the italics being mine, reads as follows: "Sec. 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.*" Obviously this provision recognized that there may be places subject to the jurisdiction of the United States, but which are not incorporated into it, and hence are not within the United States in the completest sense of those words. \* \* \*

[After quoting from *Amer. Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 242, and *Fleming v. Page*, 9 How. at 614, 13 L. Ed. 276, and discussing *Cross v. Harrison*, 16 How. 164, 14 L. Ed. 889:] It is, then, as I think, indubitably settled \* \* \* that the treaty-making power cannot incorporate territory into the United States without the express or implied assent of Congress, that it may insert in a treaty conditions against immediate incorporation, and that on the other hand, when it has expressed in the treaty the conditions favorable to incorporation they will, if the treaty be not repudiated by Congress, have the force of the law of the land, and therefore by the fulfilment of such conditions cause incorporation to result. \* \* \*

The provisions of the treaty with respect to the status of Porto Rico and its inhabitants are as follows:

"Article II. Spain cedes to the United States the Island of Porto Rico. \* \* \*

"Article IX. \* \* \* The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." \* \* \*

It is to me obvious that the above-quoted provisions of the treaty do not stipulate for incorporation, but, on the contrary, expressly provide that the "civil rights and political status of the native inhabitants of the territories hereby ceded" shall be determined by Congress. When the rights to which this careful provision refers are put in juxtaposition with those which have been deemed essential from the foundation of the government to bring about incorporation, all of which have been previously referred to, I cannot doubt that the express purpose of the treaty was not only to leave the status of the territory to be determined by Congress, but to prevent the treaty from operating to the contrary. Of course, it is evident that the express or implied acquiescence by Congress in a treaty so framed cannot import that a result was brought about which the treaty itself—giving effect to its provisions—could not produce. And, in addition, the provisions of the act by which the duty here in question was imposed, taken as a whole, seem to me plainly to manifest the intention of Congress that, for the present at least, Porto Rico is not to be incorporated into the United States. \* \* \*

The result of what has been said is that while in an international sense Porto Rico was not a foreign country, since it was subject to

the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession. As a necessary consequence, the impost in question assessed on merchandise coming from Porto Rico into the United States after the cession was within the power of Congress, and that body was not, moreover, as to such impost, controlled by the clause requiring that imposts should be uniform throughout the United States; in other words, the provision of the Constitution just referred to was not applicable to Congress in legislating for Porto Rico. \* \* \*

It seems to me it is not open to serious dispute that the military arm of the government of the United States may hold and occupy conquered territory without incorporation for such length of time as may seem appropriate to Congress in the exercise of its discretion. The denial of the right of the civil power to do so would not, therefore, prevent the holding of territory by the United States if it was deemed best by the political department of the government, but would simply necessitate that it should be exercised by the military instead of by the civil power. \* \* \* Quite recently one of the stipulations contained in the treaty with Spain which is now under consideration came under review by this court. By the provision in question Spain relinquished "all claim of sovereignty over and title to Cuba." It was further provided in the treaty as follows: "And as the island is upon the evacuation by Spain to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, and for the protection of life and property."

It cannot, it is submitted, be questioned that, under this provision of the treaty, as long as the occupation of the United States lasts, the benign sovereignty of the United States extends over and dominates the island of Cuba. Likewise, it is not, it seems to me, questionable that the period when that sovereignty is to cease is to be determined by the legislative department of the government of the United States. \* \* \* Considering the provisions of this treaty, and reviewing the pledges of this government extraneous to that instrument, by which the sovereignty of Cuba is to be held by the United States for the benefit of the people of Cuba and for their account to be relinquished to them when the conditions justify its accomplishment, this court unanimously held in *Neely v. Henkel*, 180 U. S. 109, 21 Sup. Ct. 302, 45 L. Ed. 448, that Cuba was not incorporated into the United States, and was a foreign country. It follows from this decision that it is lawful for the United States to take possession of and hold in the exercise of its sovereign power a particular territory, without incorporating it into the United States, if there be obligations of honor and good faith which, although not expressed in the treaty, nevertheless sacredly bind the United States to terminate the dominion and control when, in its political discretion, the situation



is ripe to enable it to do so. \* \* \* This method, then, of dealing with foreign territory, would in any event be available. Thus, the enthralment of the treaty-making power, which would result from holding that no territory could be acquired by treaty of cession without immediate incorporation, would only result in compelling a resort to the subterfuge of relinquishment of sovereignty, and thus indirection would take the place of directness of action,—a course which would be incompatible with the dignity and honor of the government.

[GRAY, J., gave a short concurring opinion; and FULLER, C. J., a dissenting opinion, concurred in by HARLAN, BREWER, and PECKHAM, JJ., proceeding upon the ground that the effect of the treaty and of the Foraker act was to make Porto Rico an organized territory of the United States, in the national taxation of which the rule of uniformity applied. HARLAN, J., gave also a separate opinion.]<sup>6</sup>

<sup>6</sup> Other cases dealing with the applicability or validity of the federal revenue laws in various situations are: *U. S. v. Rice*, 4 Wheat. 246, 4 L. Ed. 562 (1819) (imports into Castine, Maine, during hostile British occupation); *Fleming v. Page*, 9 How. 603, 13 L. Ed. 276 (1850) (imports into United States from Tampico, Mexico, during hostile American occupation); *Cross v. Harrison*, 16 How. 164, 14 L. Ed. 889 (1853) (imports into California after its cession and before congressional legislation); *De Lima v. Bidwell*, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041 (1901) (imports into United States from Porto Rico after its cession and before legislation); *Dooley v. U. S.*, 182 U. S. 222, 21 Sup. Ct. 762, 45 L. Ed. 1074 (1901) (imports from United States into Porto Rico during American military occupation before and after cession, but before legislation); *Dooley v. U. S.*, 183 U. S. 151, 22 Sup. Ct. 62, 43 L. Ed. 128 (1901) (same, after the Foraker act); *Pearcy v. Stranahan*, 205 U. S. 257, 27 Sup. Ct. 545, 51 L. Ed. 793 (1907) (imports from Cuba); *MacLeod v. United States*, 229 U. S. 416, 33 Sup. Ct. 955, 57 L. Ed. — (1913) (imports into Philippine ports in possession of insurgents after cession from Spain).

See, also, *Lincoln v. U. S.*, 197 U. S. 419, 25 Sup. Ct. 455, 49 L. Ed. 816 (1905), *Id.*, 202 U. S. 484, 26 Sup. Ct. 728, 50 L. Ed. 1117 (1906) (effect of Philippine insurrection).

SOVEREIGNTY A POLITICAL QUESTION.—“Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances.”—Gray, J., in *Jones v. U. S.*, 137 U. S. 202, 212, 11 Sup. Ct. 80, 83, 34 L. Ed. 691 (1890) (citing cases). See, also, *Williams v. Suffolk Ins. Co.*, 13 Pet. 415, 10 L. Ed. 226 (1839) (question of foreign sovereignty); *Pearcy v. Stranahan*, 205 U. S. 257, 27 Sup. Ct. 545, 51 L. Ed. 793 (1907) (question of domestic sovereignty); *Phillips v. Payne*, 92 U. S. 130, 23 L. Ed. 649 (1876) (same, between state and United States); *In re Cooper*, 143 U. S. 472, 498–503, 12 Sup. Ct. 453, 36 L. Ed. 232 (1902) (question of federal jurisdiction over Behring sea 60 miles from shore); *U. S. v. Holliday*, 3 Wall. 407, 419, 18 L. Ed. 182 (1866) (question of existence of Indian tribe). Compare *Terlinden v. Ames*, 184 U. S. 270, 22 Sup. Ct. 484, 46 L. Ed. 534 (1902) (effect of formation of German Empire).

DORR v. UNITED STATES (1904) 195 U. S. 138, 142-145, 148, 149, 24 Sup. Ct. 808, 49 L. Ed. 128, 1 Ann. Cas. 697, Mr. Justice DAY (upholding the federal trial of crimes in the Philippines without a jury):

"In every case where Congress undertakes to legislate in the exercise of the power conferred by the Constitution, the question may arise as to how far the exercise of the power is limited by the 'prohibitions' of that instrument. The limitations which are to be applied in any given case involving territorial government must depend upon the relation of the particular territory to the United States, concerning which Congress is exercising the power conferred by the Constitution. That the United States may have territory which is not incorporated into the United States as a body politic, we think was recognized by the framers of the Constitution in enacting the article already considered, giving power over the territories, and is sanctioned by the opinions of the justices concurring in the judgment in *Downes v. Bidwell*, 182 U. S. 244-288, 45 L. Ed. 1088-1106, 21 Sup. Ct. 770.

"Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision that the territory is to be governed under the power existing in Congress to make laws for such territories, and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation.

"For this case the practical question is: Must Congress, in establishing a system for trial of crimes and offenses committed in the Philippine Islands, carry to their people by proper affirmative legislation a system of trial by jury? \* \* \*

"[After holding that the Spanish treaty of cession and congressional legislation thereunder had not incorporated the Philippines into the United States (see *Downes v. Bidwell*, ante, p. 1010), and after referring to Const. art. I, § 2 and to Amend. VI, requiring trials by jury:] "It was said in the *Mankichi Case*,<sup>1</sup> 190 U. S. 197, 47 L. Ed. 1016, 23 Sup. Ct. 787, that when the territory had not been incorporated into the United States these requirements were not limitations upon the power of Congress in providing a government for territory in execution of the powers conferred upon Congress. Opinion of Mr. Justice White, p. 220. \* \* \* In the same case Mr. Justice Brown, in the course of his opinion, said: 'We would even go farther, and say that most, if not all, the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case [right to trial by

<sup>1</sup> *Hawaii v. Mankichi*, a case that arose in the Hawaiian Islands under the annexation act of July 7, 1898, 30 Stat. 750.

jury and presentment by grand jury] are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well being.' \* \* \*

"If the right to trial by jury were a fundamental right which goes wherever the jurisdiction of the United States extends, or if Congress, in framing laws for outlying territory belonging to the United States, was obliged to establish that system by affirmative legislation, it would follow that, no matter what the needs or capacities of the people, trial by jury, and in no other way, must be forthwith established, although the result may be to work injustice and provoke disturbance rather than to aid the orderly administration of justice. If the United States, impelled by its duty or advantage, shall acquire territory peopled by savages, and of which it may dispose or not hold for ultimate admission to statehood, if this doctrine is sound, it must establish there the trial by jury. To state such a proposition demonstrates the impossibility of carrying it into practice. Again, if the United States shall acquire by treaty the cession of territory having an established system of jurisprudence, where jury trials are unknown, but a method of fair and orderly trial prevails under an acceptable and long-established code, the preference of the people must be disregarded, their established customs ignored, and they themselves coerced to accept, in advance of incorporation into the United States, a system of trial unknown to them and unsuited to their needs. We do not think it was intended, in giving power to Congress to make regulations for the territories, to hamper its exercise with this condition.

"We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in article 4, § 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory not made a part of the United States by congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation, and of its own force, carry such right to territory so situated."

[FULLER, C. J., and PECKHAM and BREWER, JJ., concurred, upon the authority of *Hawaii v. Mankichi*, 190 U. S. 197, 23 Sup. Ct. 787, 47 L. Ed. 1016. HARLAN, J., gave a dissenting opinion.]

## RASSMUSSEN v. UNITED STATES.

(Supreme Court of the United States, 1905. 197 U. S. 516, 25 Sup. Ct. 514, 49 L. Ed. 862.)

[Error to the United States District Court for Alaska. Section 171 of the Congressional Code for Alaska (31 Stat. 358) provided that misdemeanors might be tried by juries of six persons. The defendant was tried and convicted by such a jury in spite of his demand for a common-law jury of twelve, and this writ was taken.]

Mr. Justice WHITE. \* \* \* The validity of the provision in question is \* \* \* sought to be sustained upon the proposition that the sixth amendment to the Constitution did not apply to Congress in legislating for Alaska. And this rests upon two contentions, which we proceed separately to consider.

1. *Alaska was not incorporated into the United States, and therefore the sixth amendment did not control Congress in legislating for Alaska.*

If the premise, that is, the status of Alaska, be conceded, the conclusion deduced from it is established by the previous rulings of this court. \* \* \* [Reference is here made to *Downes v. Bidwell*, ante, p. 988, and to *Dorr v. U. S.*, ante, p. 1013.] We are brought, then, to determine whether Alaska has been incorporated into the United States as a part thereof, or is simply held, as the Philippine Islands are held, under the sovereignty of the United States as a possession or dependency. \* \* \*

This brings us to consider the treaty by which Alaska was acquired, and the action of Congress concerning that acquisition, for the purpose of ascertaining whether, within the criteria referred to in *Downes v. Bidwell* and adopted and applied in *Dorr v. United States*, Alaska was incorporated into the United States.

The treaty concerning Alaska, instead of exhibiting, as did the treaty respecting the Philippine Islands, the determination to reserve the question of the status of the acquired territory for ulterior action by Congress, manifested a contrary intention, since it is therein expressly declared, in article 3, that: "The inhabitants of the ceded territory \* \* \* shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and shall be maintained and protected in the free enjoyment of their liberty, property and religion." [15 Stat. at L. 542.]

This declaration, although somewhat changed in phraseology, is the equivalent, as pointed out in *Downes v. Bidwell*, of the formula, employed from the beginning to express the purpose to incorporate acquired territory into the United States,—especially in the absence of other provisions showing an intention to the contrary. And it was doubtless this fact conjoined with the subsequent legislation of Congress which led to the following statement concerning Alaska made in

the opinion of three, if not four, of the judges who concurred in the judgment of affirmance in *Downes v. Bidwell* (p. 335, L. Ed. p. 1125, Sup. Ct. p. 805): "Without referring in detail to the acquisition from Russia of Alaska, it suffices to say that that treaty also contained provisions for incorporation, and was acted upon exactly in accord with the practical construction applied in the case of the acquisition from Mexico, as just stated." \* \* \*

That Congress, shortly following the adoption of the treaty with Russia, clearly contemplated the incorporation of Alaska into the United States as a part thereof, we think plainly results from the Act of July 20, 1868, concerning internal revenue taxation, c. 186, § 107 (15 Stat. at L. 167, U. S. Comp. Stat. 1901, p. 2277), and the Act of July 27, 1868, c. 273, extending the laws of the United States relating to customs, commerce, and navigation over Alaska, and establishing a collection district therein. 15 Stat. at L. 240. And this is fortified by subsequent action of Congress, which it is unnecessary to refer to.

Indeed, both before and since the decision in *Downes v. Bidwell* the status of Alaska as an incorporated territory was and has been recognized by the action and decisions of this court. By the sixth section of the Judiciary Act of March 3, 1891 (26 Stat. at L. 826, c. 517, U. S. Comp. Stat. 1901, pp. 549, 550), it was made the duty of this court to assign the several territories of the United States to particular circuits; and in execution of this law this court, by an order promulgated May 11, 1891, assigned the territory of Alaska to the Ninth judicial circuit. \* \* \* [Here follow references to the *Coquitlam v. U. S.*, 163 U. S. 346, 16 Sup. Ct. 1117, 41 L. Ed. 184, and to *Binns v. U. S.*, 194 U. S. 486, 24 Sup. Ct. 816, 48 L. Ed. 1087.]

It follows, then, from the text of the treaty by which Alaska was acquired, from the action of Congress thereunder, and the reiterated decisions of this court, that the proposition that Alaska is not incorporated into and a part of the United States is devoid of merit. \* \* \*

This brings us to the second proposition, which is—

2. *That even if Alaska was incorporated into the United States, as it was not an organized territory, therefore the provisions of the sixth amendment were not controlling on Congress when legislating for Alaska.* \* \* \*

In our opinion, the unsoundness of the proposition is conclusively established by a long line of decisions.<sup>1</sup> \* \* \*

The argument by which the decisive force of the cases just cited is sought to be escaped is that, as when the cases were decided there was legislation of Congress extending the Constitution to the District of Columbia or to the particular territory to which a case may have related, therefore the decisions must be taken to have proceeded alone upon the statutes, and not upon the inherent application of the provisions of the fifth, sixth, and seventh amendments to the District of

<sup>1</sup> See *Downes v. Bidwell*, ante, at p. 997, note 2.



Columbia or to an incorporated territory. And, upon the assumption that the cases are distinguishable from the present one upon the basis just stated, the argument proceeds to insist that the sixth amendment does not apply to the territory of Alaska, because section 1891 of the Revised Statutes only extends the Constitution to the organized territories, in which, it is urged, Alaska is not embraced.

Whilst the premise as to the existence of legislation declaring the extension of the Constitution to the territories with which the cases were respectively concerned is well founded, the conclusion drawn from that fact is not justified. \* \* \* It is true that, in some of the opinions, both the application of the Constitution and the statutory provisions declaring such application were referred to, but in others no reference to such statutes was made, and the cases proceeded upon a line of reasoning leaving room for no other view than that the conclusion of the court was rested upon the self-operative application of the Constitution. *Springville v. Thomas*, 166 U. S. 707, 41 L. Ed. 1172, 17 Sup. Ct. 717; *Thompson v. Utah*, 170 U. S. 343, 42 L. Ed. 1061, 18 Sup. Ct. 620; *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. Ed. 873, 19 Sup. Ct. 580; *Black v. Jackson*, 177 U. S. 349, 44 L. Ed. 801, 20 Sup. Ct. 648. \* \* \* It follows that the provision of the act of Congress under consideration, depriving persons accused of a misdemeanor in Alaska of a right to trial by a common-law jury, was repugnant to the Constitution and void.

Judgment reversed.

[HARLAN, J., gave a concurring opinion.]

Mr. Justice BROWN, concurring. \* \* \* [After concurring in the result.] The tenor of the opinion, however, is such that I should be doing an injustice to myself if I failed to express my views upon the doctrine of incorporation. My position regarding the applicability of the Constitution to newly acquired territory is contained in the opinion delivered by me in *Downes v. Bidwell*, 182 U. S. 244, 45 L. Ed. 1088, 21 Sup. Ct. 770. It is simply that the Constitution does not apply to territories acquired by treaty until Congress has so declared, and that in the meantime, under its power to regulate the territories, it may deal with them regardless of the Constitution, except so far as concerns the natural rights of their inhabitants to life, liberty, and property. \* \* \*

Congress did undoubtedly provide a permanent civil government for Alaska by the Act of June 6, 1900 (31 Stat. at L. 321, c. 786), but it evidently did not regard the Constitution as extended to it by any previous act, since it provided in section 171 for trials of misdemeanors by a jury of six.

There are so many difficulties connected with the applicability of the Constitution that it has seemed to me that the only true test was whether Congress intended to apply it or not in the particular case. When is a territory incorporated so as to make the Constitution ap-

plicable in all its provisions? That some action on the part of Congress is necessary to extend the Constitution to the territories was settled in *Downes v. Bidwell*, but shall such action be direct, or may it be indirect by way of incorporation? May Congress, in organizing or incorporating a territory, restrict the application of the Constitution to it, or must it give it all? What is an organized as distinguished from an incorporated territory? Does not the acceptance of a cession of territory and the appointment of a civil governor work an incorporation of the territory as territory of the United States? If the acceptance of territory as territory of the United States be not an incorporation, what language is necessary to effect that result?

Apparently, acceptance of the territory is insufficient in the opinion of the court in this case, since the result that Alaska is incorporated into the United States is reached, not through the treaty with Russia, or through the establishment of a civil government there, but from the Act of July 20, 1868, concerning internal revenue taxation, and the Act of July 27, 1868, extending the laws of the United States relating to the customs, commerce, and navigation over Alaska, and establishing a collection district there. Certain other acts are cited, notably the Judiciary Act of March 3, 1891, making it the duty of this court to assign the several territories of the United States to particular circuits. But no mention is made either of the Act of May 17, 1884, providing a civil government for Alaska, or the Act of June 6, 1900, making further provision for a civil government and establishing a complete code of laws. These seem to me the vital acts upon the status of Alaska; yet they are completely ignored in the opinion of the court, and the fact of incorporation is sought to be established by what seem to me remote inferences from immaterial statutes. Indeed, I regard the whole theory of the extension of the Constitution by the incorporation of territory as a new departure in federal jurisprudence, and that the true answer to the question whether the Constitution applies to a territory is to be found in the fact whether Congress has extended the Constitution to it or not.

That the mere act of incorporating territory into the United States does not of its own force carry the Constitution there, regardless of the wishes of Congress, is evident from the case of *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. Ed. 1016, 23 Sup. Ct. 787. \* \* \*

[After referring to the Newlands resolution of July 7, 1898 (30 Stat. 750), annexing the Hawaiian Islands:] While the government provided by this resolution was temporary in its character, and a mere continuance of existing laws, the act itself was as complete an incorporation of the islands as it was possible for language to make it. The resolution declared that "said cession" of the Republic of Hawaii "is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States, and are subject to the sovereign

dominion thereof." In view of this language I do not see how it is possible to escape the conclusion that there was a plain incorporation by Congress of these islands, and an extension of sovereignty over them. Notwithstanding this, however, we held that the conviction of one who, between the date of the Newlands resolution and the date of establishing a civil government, had been tried on information and convicted by a non-unanimous jury, was legal, though not in compliance with the fifth and sixth amendments to the Constitution, upon the ground that the Constitution was not formally extended to them until the territory was organized, June 14, 1900 (31 Stat. at L. 141, c. 339, § 5). This case shows the impossibility of applying the doctrine of incorporation without an accurate definition of the term. Hitherto we have been content to divide our territories into the organized and unorganized; but now we are asked to introduce a new classification of "incorporated" territories, without attempting to define what shall be deemed an incorporation. The word appears to me simply to introduce a new element of confusion, and to be of no practical value. Rev. Stat. § 1891, declaring that the Constitution shall have force and effect within all the organized territories and in every territory hereafter organized, seems to meet the requirements of every case, and to be operative wherever Congress does not in the organization restrict the application of the Constitution in some particular. \* \* \*

I do not dissent from the conclusion of the court in this case, but I do dissent from the proposition that Congress may not deal with territories as it pleases, until it has seen fit to extend the provisions of the Constitution to them, which, once done, in my view, is irrevocable.<sup>2</sup> \* \* \*

<sup>2</sup> The present (1913) status of territory, not a part of any state, over which the United States is sovereign, is apparently as follows: The Hawaiian Islands have been incorporated into the United States by Act April 30, 1900, c. 339, 31 Stat. 141. See *Downes v. Bidwell*, ante, at p. 1000; *Hawaii v. Mankichi*, 190 U. S. 197, 211, 220, 23 Sup. Ct. 787, 47 L. Ed. 1016 (1903). None of the Spanish cessions have become incorporated, though *Porto Rico* has been judicially recognized as possessing the essential characteristics of a completely organized territory. See *New York v. Bingham*, 211 U. S. 468, 476, 29 Sup. Ct. 190, 53 L. Ed. 286 (1909) (right to require rendition of fugitives from justice); *Porto Rico v. Rosaly*, 227 U. S. 270, 273, 274, 33 Sup. Ct. 352, 57 L. Ed. — (1913) (exemption from private suit); *Amerlean Ry. v. Dirdricksen*, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. — (1913) (included in term "territory" in federal safety appliance law). As to the Canal Zone, see the treaty with Panama of February 26, 1904, 33 Stat. 2234, ff.

## COYLE v. SMITH.

(Supreme Court of the United States, 1911. 221 U. S. 559, 31 Sup. Ct. 688, 55 L. Ed. 853.)

[Error to the Supreme Court of Oklahoma. The act of Congress of June 16, 1906 (34 Stat. 267, c. 3335), under which Oklahoma was admitted to the Union, provided (section 2) that the state capital should be temporarily located at Guthrie and should not be changed prior to 1913, and that meanwhile, except so far as necessary, no public money should be appropriated for the erection of capital buildings. Section 22 provided for the irrevocable acceptance of the conditions of the act, by ordinance of the constitutional convention authorized by said act. Such an ordinance was adopted by the convention and ratified separately, along with the new state Constitution, by vote of the people. In 1910 Oklahoma passed an act removing the capital to Oklahoma City and appropriating money for capital buildings. This was upheld by the state supreme court, in a proceeding specially authorized to test its legality.]

Mr. Justice LURTON. \* \* \* The power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen states could now be shorn of such powers by an act of Congress would not be for a moment entertained. The question, then, comes to this: Can a state be placed upon a plane of inequality with its sister states in the Union if the Congress chooses to impose conditions which so operate, at the time of its admission? The argument is, that while Congress may not deprive a state of any power which it *possesses*, it may, as a condition to the admission of a new state, constitutionally restrict its authority, to the extent, at least, of suspending its powers for a definite time in respect to the location of its seat of government. This contention is predicated upon the constitutional power of admitting new states to this Union, and the constitutional duty of guaranteeing to "every state in this Union a republican form of government." The position of counsel for the plaintiff in error is substantially this: That the power of Congress to admit new states, and to determine whether or not its fundamental law is republican in form, are political powers, and as such, uncontrollable by the courts. That Congress may, in the exercise of such power, impose terms and conditions upon the admission of the proposed new state, which, if accepted, will be obligatory, although they operate to deprive the state of powers which it would otherwise possess, and, therefore, not admitted upon "an equal footing with the original states."

The power of Congress in respect to the admission of new states is found in the third section of the fourth article of the Constitution. That provision is that "new states may be admitted by the Congress

into this Union." The only expressed restriction upon this power is that no new state shall be formed within the jurisdiction of any other state, nor by the junction of two or more states, or parts of states, without the consent of such states, as well as of the Congress.

But what is this power? It is not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union. It is, as strongly put by counsel, a "power to admit states." The definition of "a state" is found in the powers possessed by the original states which adopted the Constitution,—a definition emphasized by the terms employed in all subsequent acts of Congress admitting new states into the Union \* \* \* [viz.: That they shall be admitted "on an equal footing with the original states."]

The power is to admit "new states into *this* Union." "This Union" was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new states, enlarged or restricted by the conditions imposed upon new states by its own legislation admitting them into the Union; and, second, that such new states might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission.

The argument that Congress derives from the duty of "guaranteeing to each state in this Union a republican form of government," power to impose restrictions upon a new state which deprive it of equality with other members of the Union, has no merit. It may imply the duty of such new state to provide itself with such state government, and impose upon Congress the duty of seeing that such form is not changed to one anti-republican,—*Minor v. Happersett*, 21 Wall. 162, 174, 22 L. Ed. 627, 630,—but it obviously does not confer power to admit a new state which shall be any less a state than those which compose the Union.

We come now to the question as to whether there is anything in the decisions of this court which sanctions the claim that Congress may, by the imposition of conditions in an enabling act, deprive a new state of any of those attributes essential to its equality in dignity and power with other states. In considering the decisions of this court bearing upon the question, we must distinguish, first, between provisions which are fulfilled by the admission of the state; second, between compacts



or affirmative legislation intended to operate in futuro, which are within the scope of the conceded powers of Congress over the subject; and third, compacts or affirmative legislation which operate to restrict the powers of such new state in respect of matters which would otherwise be exclusively within the sphere of state power.

As to requirements in such enabling acts as relate only to the contents of the Constitution for the proposed new state, little need to be said. The constitutional provision concerning the admission of new states is not a mandate, but a power to be exercised with discretion. From this alone it would follow that Congress may require, under penalty of denying admission, that the organic law of a new state at the time of admission shall be such as to meet its approval. A Constitution thus supervised by Congress would, after all, be a Constitution of a state, and as such subject to alteration and amendment by the state after admission. Its force would be that of a state Constitution and not that of an act of Congress. \* \* \*

It may well happen that Congress should embrace in an enactment introducing a new state into the Union legislation intended as a regulation of commerce among the states, or with Indian tribes situated within the limits of such new state, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new state, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and therefore would not operate to restrict the state's legislative power in respect of any matter which was not plainly within the regulating power of Congress.<sup>1</sup> *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 9, 31 L. Ed. 629, 632, 8 Sup. Ct. 811; *Pollard v. Hagan*, supra [3 How. 212, 11 L. Ed. 565.]

No such question is presented here. The legislation in the Oklahoma enabling act relating to the location of the capital of the state, if construed as forbidding a removal by the state after its admission as a state, is referable to no power granted to Congress over the subject, and if it is to be upheld at all, it must be implied from the power to admit new states. If power to impose such a restriction upon the general and undelegated power of a state be conceded as implied from the power to admit a new state, where is the line to be drawn against restrictions imposed upon new states? The insistence finds no support in the decisions of this court. \* \* \* [Here follow quotations from or references to *Withers v. Buckley*, 20 How. 84, 92, 15 L. Ed. 816; *Escanaba Co. v. Chicago*, 107 U. S. 678, 688, 2 Sup. Ct. 185, 27 L. Ed.

<sup>1</sup> Accord: *Ex parte Webb*, 225 U. S. 603, 690, 691, 32 Sup. Ct. 769, 56 L. Ed. 1248 (1912) (reservation by Congress of power to prohibit interstate liquor traffic with Indian country in Oklahoma).

442;<sup>2</sup> *Ward v. Race Horse*, 163 U. S. 504, 16 Sup. Ct. 1076, 41 L. Ed. 244; *Bolln v. Nebraska*, 176 U. S. 83, 87, 20 Sup. Ct. 287, 44 L. Ed. 382; *Beecher v. Witherby*, 95 U. S. 517, 24 L. Ed. 440.]

The case of the Kansas Indians (*Blue Jacket v. Johnson County*) 5 Wall. 737, 18 L. Ed. 667, involved the power of the state of Kansas to tax lands held by the individual Indians in that state under patents from the United States. The act providing for the admission of Kansas into the Union provided that nothing contained in the Constitution of the state should be construed to "impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians." [12 Stat. at L. 127, c. 20.] It was held that so long as the tribal organization of such Indians was recognized as still existing, such lands were not subject to taxation by the state. The result might be well upheld either as an exertion of the power of Congress over Indian tribes, with whom the United States had treaty relations, or as a contract by which the state had agreed to forego taxation of Indian lands,—a contract quite within the power of a state to make, whether made with the United States for the benefit of its Indian wards, or with a private corporation for the supposed advantages resulting.<sup>3</sup> Certainly the case has no bearing upon a compact by which the general legislative power of the state is to be impaired with reference to a matter pertaining purely to the internal policy of the state. See *Stearns v. Minnesota*, 179 U. S. 223, [244, 245], 45 L. Ed. 162, 21 Sup. Ct. 73. \* \* \*

Has Oklahoma been admitted upon an equal footing with the original states? If she has, she, by virtue of her jurisdictional sovereignty as such a state, may determine for her own people the proper location of the local seat of government. She is not equal in power to them if she cannot. \* \* \* [Here follow quotations from *Texas v. White*, 7 Wall. 700, 725, 19 L. Ed. 227, and from *Lane County v. Oregon*, 7 Wall. 76, 19 L. Ed. 101. See the extract from these cases printed in note 1 to *Gibbons v. Ogden*, ante, at p. 920.] The constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution.

Judgment affirmed.<sup>4</sup>

[McKENNA and HOLMES, JJ., dissented.]

<sup>2</sup> This case denied that the Ordinance of 1787, as a limitation upon the powers of government of the Northwest Territory, continued to have any operative force in the states carved out of that territory, after their admission to the Union. So, also, *Cincinnati v. L. & N. Ry.*, 223 U. S. 390, 401, 32 Sup. Ct. 267, 56 L. Ed. 481 (1912) (cases).

<sup>3</sup> See the cases in chapter XIII, section 1, ante, pp. 825-828.

<sup>4</sup> Accord: *Sproule v. Fredericks*, 69 Miss. 898, 11 South. 472 (1892) (conditional "readmission" of Mississippi after Civil War); *U. S. v. Sandoval* (C.

## CHAPTER XVII

## FEDERAL TAXATION

LICENSE TAX CASES (1867) 5 Wall. 462, 470, 471, 18 L. Ed. 497, Mr. Chief Justice CHASE (upholding certain convictions for violations of federal statutes forbidding persons to sell liquor or lottery tickets without federal "licenses," defendants having done these acts where by state law they were wholly prohibited):

"It was argued for the defendants in error that a license to carry on a particular business gives an authority to carry it on; that the dealings in controversy were parcel of the internal trade of the state in which the defendants resided; that the internal trade of a state is not subject, in any respect, to legislation by Congress, and can neither be licensed nor prohibited by its authority; that licenses for such trade, granted under acts of Congress, must therefore be absolutely null and void; and, consequently, that penalties for carrying on such trade without such license could not be constitutionally imposed. This series of propositions, and the conclusion in which it terminates, depends on the postulate that a license necessarily confers an authority to carry on the licensed business. But do the licenses required by the acts of Congress for selling liquor and lottery tickets confer any authority whatever?

"It is not doubted that where Congress possesses constitutional power to regulate trade or intercourse, it may regulate by means of licenses as well as in other modes; and, in case of such regulation, a license will give to the licensee authority to do whatever is authorized

C.) 198 Fed. 539 (1912) (power to regulate sale of liquor to civilized Pueblo Indians of New Mexico after admission of state).

In *Stearns v. Minnesota*, 179 U. S. 223, 244, 245, 21 Sup. Ct. 73, 81, 45 L. Ed. 162 (1900) a provision in the act admitting Minnesota to the Union was upheld which restricted its legislative power over the federal public lands, Brewer, J., saying: "There may be agreements or compacts attempted to be entered into between two states, or between a state and the nation, in reference to political rights and obligations, and there may be those solely in reference to property belonging to one or the other. That different considerations may underlie the question as to the validity of these two kinds of compacts or agreements is obvious. It has often been said that a state admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations; whereas, on the other hand, a mere agreement in reference to property involves no question of equality of status, but only of the power of a state to deal with the nation or with any other state in reference to such property. The case before us is one involving simply an agreement as to property between a state and the nation."

Ohio (1802), Louisiana (1812), Indiana (1816), and Illinois (1818) were admitted on condition that lands therein sold by the United States should be exempt from all taxes for five years after their sale. See *Van Brocklin v. Tennessee*, 117 U. S. 151, 160-163, 6 Sup. Ct. 670, 29 L. Ed. 845 (1886), post, p. 1303.

by its terms. Thus, Congress having power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes, may, without doubt, provide for granting coasting licenses, licenses to pilots, licenses to trade with the Indians, and any other licenses necessary or proper for the exercise of that great and extensive power; and the same observation is applicable to every other power of Congress, to the exercise of which the granting of licenses may be incident. All such licenses confer authority, and give rights to the licensee.

"But very different considerations apply to the internal commerce or domestic trade of the states. Over this commerce and trade Congress has no power of regulation nor any direct control. This power belongs exclusively to the states. No interference by Congress with the business of citizens transacted within a state is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a state is plainly repugnant to the exclusive power of the state over the same subject. It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications.<sup>1</sup> Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion. But it reaches only existing subjects. Congress cannot authorize a trade or business within a state in order to tax it.

"If, therefore, the licenses under consideration must be regarded as giving authority to carry on the branches of business which they license, it might be difficult, if not impossible, to reconcile the granting of them with the Constitution. But it is not necessary to regard these laws as giving such authority. So far as they relate to trade within state limits, they give none, and can give none. They simply express the purpose of the government not to interfere by penal proceedings with the trade nominally licensed, if the required taxes are paid. The power to tax is not questioned, nor the power to impose penalties for non-payment of taxes. The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing except that the licensee shall be subject to no penalties under national law, if he pays it."

<sup>1</sup> But see *Collector v. Day*, post, p. 1295, and notes, for implied limitation upon the power of federal taxation growing out of the nature of our dual government.

## POLLOCK v. FARMERS' LOAN &amp; TRUST CO.

(Supreme Court of the United States, 1895. 157 U. S. 429, 158 U. S. 601, 15 Sup. Ct. 673, 912, 39 L. Ed. 759, 1108.)

[Appeal from the federal Circuit Court for the Southern District of New York. A federal statute (Act Aug. 27, 1894, c. 349, 28 Stat. 509) imposed a tax of 2 per cent. upon incomes in excess of \$4,000 received by all persons, corporations, or associations (with certain exceptions) in the United States. One Pollock, a stockholder in defendant corporation, filed a bill to enjoin the defendant from paying said tax on the ground of its unconstitutionality, the income of said corporation being derived chiefly from real estate, from municipal bonds, and from corporate bonds and stocks. The bill was dismissed on demurrer and this appeal taken.]

Mr. Chief Justice FULLER. \* \* \* The Constitution provides that representatives and direct taxes shall be apportioned among the several states according to numbers, and that no direct tax shall be laid except according to the enumeration provided for; and also that all duties, imposts, and excises shall be uniform throughout the United States.

The men who framed and adopted that instrument had just emerged from the struggle for independence whose rallying cry had been that "taxation and representation go together." \* \* \* The principle was that the consent of those who were expected to pay it was essential to the validity of any tax.

The states were about, for all national purposes embraced in the Constitution, to become one, united under the same sovereign authority, and governed by the same laws. But as they still retained their jurisdiction over all persons and things within their territorial limits, except where surrendered to the general government or restrained by the Constitution, they were careful to see to it that taxation and representation should go together, so that the sovereignty reserved should not be impaired, and that when Congress, and especially the House of Representatives, where it was specifically provided that all revenue bills must originate, voted a tax upon property, it should be with the consciousness, and under the responsibility, that in so doing the tax so voted would proportionately fall upon the immediate constituents of those who imposed it.

More than this, by the Constitution the states not only gave to the nation the concurrent power to tax persons and property directly, but they surrendered their own power to levy taxes on imports and to regulate commerce. All the thirteen were seaboard states, but they varied in maritime importance, and differences existed between them in population, in wealth, in the character of property and of business interests. Moreover, they looked forward to the coming of new states from the great West into the vast empire of their anticipations. So when the



wealthier states as between themselves and their less favored associates, and all as between themselves and those who were to come, gave up for the common good the great sources of revenue derived through commerce, they did so in reliance on the protection afforded by restrictions on the grant of power.

Thus, in the matter of taxation, the Constitution recognizes the two great classes of direct and indirect taxes, and lays down two rules by which their imposition must be governed, namely, the rule of apportionment as to direct taxes, and the rule of uniformity as to duties, imposts, and excises. The rule of uniformity was not prescribed to the exercise of the power granted by the first paragraph of section 8 to lay and collect taxes, because the rule of apportionment as to taxes had already been laid down in the third paragraph of the second section. \* \* \* And 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, imports, and excises," such a tax, for more than 100 years of national existence, has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue.

The first question to be considered is whether a tax on the rents or income of real estate is a direct tax within the meaning of the Constitution. Ordinarily, all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes. Nevertheless, it may be admitted that, although this definition of direct taxes is *prima facie* correct, and to be applied in the consideration of the question before us, yet the Constitution may bear a different meaning, and that such different meaning must be recognized. But in arriving at any conclusion upon this point we are at liberty to refer to the historical circumstances attending the framing and adoption of the Constitution, as well as the entire frame and scheme of the instrument, and the consequences naturally attendant upon the one construction or the other.

We inquire, therefore, what, at the time the Constitution was framed and adopted, were recognized as direct taxes? What did those who framed and adopted it understand the terms to designate and include? \* \* \* [Here follow references to the then existing state tax laws, to the proceedings in the Philadelphia convention leading up to the compromise by which three-fifths of the slaves were counted in determining representation in Congress and direct taxation was made proportionate to representation, to the debates over the Constitution after it was submitted to the states for ratification, and to the debate in Congress over the carriage tax of 1794—all designed to show the meaning then attributed to "direct taxes."]

In *Hylton v. U. S.* (decided in March, 1796) 3 Dall. 171, 1 L. Ed.

556, this court held the act [taxing carriages] to be constitutional, because not laying a direct tax. \* \* \* Mr. Justice Chase said that he was inclined to think (but of this he did not "give a judicial opinion") that "the direct taxes contemplated by the Constitution are only two, to wit, a capitation or poll tax, simply, without regard to property, profession, or any other circumstance, and a tax on land," and that he doubted "whether a tax, by a general assessment of personal property, within the United States, is included within the term 'direct tax.' \* \* \* It seems to me that a tax on expense is an indirect tax; and I think an annual tax on a carriage for the conveyance of persons is of that kind, because a carriage is a consumable commodity, and such annual tax on it is on the expense of the owner." \* \* \*

Each of the justices, while suggesting doubt whether anything but a capitation or a land tax was a direct tax within the meaning of the Constitution, distinctly avoided expressing an opinion upon that question or laying down a comprehensive definition, but confined his opinion to the case before the court. The general line of observation was obviously influenced by Mr. Hamilton's brief for the government, in which he said: "The following are presumed to be the only direct taxes: Capitation or poll taxes, taxes on lands and buildings, general assessments, whether on the whole property of individuals, or on their whole real or personal estate. All else must, of necessity, be considered as indirect taxes." 7 Hamilton's Works (Lodge's Ed.) 332. \* \* \* [Here follow references to the various federal land and income taxes of 1798, 1813-15, and 1862-70.]

From the foregoing it is apparent (1) that the distinction between direct and indirect taxation was well understood by the framers of the Constitution and those who adopted it; (2) that, under the state systems of taxation, all taxes on real estate or personal property or the rents or income thereof were regarded as direct taxes; (3) that the rules of apportionment and of uniformity were adopted in view of that distinction and those systems; (4) that whether the tax on carriages was direct or indirect was disputed, but the tax was sustained as a tax on the use and an excise; (5) that the original expectation was that the power of direct taxation would be exercised only in extraordinary exigencies; and down to August 15, 1894, this expectation has been realized. \* \* \*

[After a review of various cases upon federal taxation during the Civil War period:] All these cases are distinguishable from that in hand, and this brings us to consider that of *Springer v. U. S.*, 102 U. S. 586, 26 L. Ed. 253, chiefly relied on and urged upon us as decisive. \* \* \* The original record discloses that the income was not derived in any degree from real estate, but was in part professional as attorney at law, and the rest interest on United States bonds. It would seem probable that the court did not feel called upon to advert to the distinction between the latter and the former source of income, as the validity of the tax as to either would sustain the action.

The opinion thus concludes: "Our conclusions are that direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty." While this language is broad enough to cover the interest as well as the professional earnings, the case would have been more significant as a precedent if the distinction had been brought out in the report and commented on in arriving at judgment, for a tax on professional receipts might be treated as an excise or duty, and therefore indirect, when a tax on the income of personalty might be held to be direct. Be this as it may, it is conceded in all these cases, from that of *Hylton* to that of *Springer*, that taxes on land are direct taxes, and in none of them is it determined that taxes on rents or income derived from land are not taxes on land. \* \* \*

As no capitation or other direct tax was to be laid otherwise than in proportion to the population, some other direct tax than a capitation tax (and, it might well enough be argued, some other tax of the same kind as a capitation tax) must be referred to, and it has always been considered that a tax upon real estate *eo nomine*, or upon its owners in respect thereof, is a direct tax, within the meaning of the Constitution. But is there any distinction between the real estate itself or its owners in respect of it and the rents or income of the real estate coming to the owners as the natural and ordinary incident of their ownership? \* \* \*

As, according to the feudal law, the whole beneficial interest in the land consisted in the right to take the rents and profits, the general rule has always been, in the language of *Coke*, that "if a man seised of land in fee by his deed granteth to another the profits of those lands, to have and to hold to him and his heirs, and maketh livery *secundum formam chartæ*, the whole land itself doth pass. For what is the land but the profits thereof?" *Co. Litt.* 45. And that a devise of the rents and profits or of the income of lands passes the land itself both at law and in equity. 1 *Jarm. Wills* (5th Ed.) \*798, and cases cited.

The requirement of the Constitution is that no direct tax shall be laid otherwise than by apportionment. The prohibition is not against direct taxes on land, from which the implication is sought to be drawn that indirect taxes on land would be constitutional, but it is against all direct taxes; and it is admitted that a tax on real estate is a direct tax. Unless, therefore, a tax upon rents or income issuing out of lands is intrinsically so different from a tax on the land itself that it belongs to a wholly different class of taxes, such taxes must be regarded as falling within the same category as a tax on real estate *eo nomine*. The name of the tax is unimportant. The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. An annual tax upon the

annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income. This law taxes the income received from land and the growth or produce of the land. Mr. Justice Paterson observed in *Hylton's Case*, "land, independently of its produce, is of no value," and certainly had no thought that direct taxes were confined to unproductive land.

If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each state. But constitutional provisions cannot be thus evaded. It is the substance, and not the form, which controls, as has indeed been established by repeated decisions of this court. Thus in *Brown v. Maryland*, 12 Wheat. 419, 444, 6 L. Ed. 678, it was held that the tax on the occupation of an importer was the same as a tax on imports, and therefore void. \* \* \* In *Weston v. City Council*, 2 Pet. 449, 7 L. Ed. 481, it was held that a tax on the income of United States securities was a tax on the securities themselves, and equally inadmissible. \* \* \* So in *Dobbins v. Commissioners*, 16 Pet. 435, 10 L. Ed. 1022, it was decided that the income from an official position could not be taxed if the office itself was exempt. In *Almy v. California*, 24 How. 169, 16 L. Ed. 644, it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented. \* \* \* In *Philadelphia & S. S. Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200, and *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311, it was held that a tax on income received from interstate commerce was a tax upon the commerce itself. \* \* \*

Nothing can be clearer than that what the Constitution intended to guard against was the exercise by the general government of the power of directly taxing persons and property within any state through a majority made up from the other states. It is true that the effect of requiring direct taxes to be apportioned among the states in proportion to their population is necessarily that the amount of taxes on the individual taxpayer in a state having the taxable subject-matter to a larger extent in proportion to its population than another state has, would be less than in such other state; but this inequality must be held to have been contemplated, and was manifestly designed to operate to restrain the exercise of the power of direct taxation to extraordinary emergencies, and to prevent an attack upon accumulated property by mere force of numbers. \* \* \*

The acceptance of the rule of apportionment was one of the compromises which made the adoption of the Constitution possible. \* \* \* If, by calling a tax indirect when it is essentially direct, the rule of protection could be frittered away, one of the great landmarks defining the boundary between the nation and the states of which it is composed, would have disappeared, and with it one of the

bulwarks of private rights and private property. We are of opinion that the law in question, so far as it levies a tax on the rents or income of real estate, is in violation of the Constitution, and is invalid. \* \* \*

[The tax upon the income from state and municipal bonds was also held invalid. See *Weston v. Charleston*, and note, post, p. 1284, for the grounds of this. Upon the other points involved the justices were equally divided in opinion, JACKSON, J., being absent.]

Decree reversed in part.

[FIELD, J., gave a concurring opinion, in which he also held that the provisions of Const. art. II, § 1, par. 6, and article III, § 1, against diminishing the salaries of the President and federal judges, forbade a federal income tax upon such salaries. He referred to a letter of TANEY, C. J., to this effect, written in 1863 to the Secretary of the Treasury (printed in 39 L. Ed. 1155, 1156), and to 13 Op. Atty. Gen. 161 (1869). See the principal case, 157 U. S. at 604-607. WHITE and HARLAN, JJ., gave dissenting opinions.]

[Upon a rehearing of the case, JACKSON, J., being present, the following decision was rendered upon the remaining points:]

Mr. Chief Justice FULLER. \* \* \* Our previous decision was confined to the consideration of the validity of the tax on the income from real estate, and on the income from municipal bonds. \* \* \* We are now permitted to broaden the field of inquiry, and to determine to which of the two great classes a tax upon a person's entire income—whether derived from rents or products, or otherwise, of real estate, or from bonds, stocks, or other forms of personal property—belongs; and we are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property, in the manner prescribed, is so different from a tax upon the property itself that it is not a direct, but an indirect tax, in the meaning of the Constitution. \* \* \*

If, in the changes of wealth and population in particular states, apportionment produced inequality, it was an inequality stipulated for, just as the equal representation of the states, however small, in the Senate, was stipulated for. \* \* \* The founders anticipated that the expenditures of the states, their counties, cities, and towns, would chiefly be met by direct taxation on accumulated property, while they expected that those of the federal government would be for the most part met by indirect taxes. And in order that the power of direct taxation by the general government should not be exercised except on necessity, and, when the necessity arose, should be so exercised as to leave the states at liberty to discharge their respective obligations, and should not be so exercised unfairly and discriminatingly, as to particular states or otherwise, by a mere majority vote, possibly of those whose constituents were intentionally not subjected to any part of the burden, the qualified grant was made. \* \* \*

It is said that a tax on the whole income of property is not a direct



tax in the meaning of the Constitution, but a duty, and, as a duty, leviable without apportionment, whether direct or indirect. We do not think so. Direct taxation was not restricted in one breath, and the restriction blown to the winds in another. \* \* \* [After referring to the views of Hamilton and Madison, and to the case of *Hylton v. U. S.*, 3 Dall. 171, 1 L. Ed. 556:] The Constitution prohibits any direct tax, unless in proportion to numbers as ascertained by the census, and, in the light of the circumstances to which we have referred, is it not an evasion of that prohibition to hold that a general unapportioned tax, imposed upon all property owners as a body for or in respect of their property, is not direct, in the meaning of the Constitution, because confined to the income therefrom?

Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the Constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership, and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds?

There can be but one answer, unless the constitutional restriction is to be treated as utterly illusory and futile, and the object of its framers defeated. We find it impossible to hold that a fundamental requisition deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to property and the property itself.

Nor can we perceive any ground why the same reasoning does not apply to capital in personalty held for the purpose of income, or ordinarily yielding income, and to the income therefrom. \* \* \* Personal property of some kind is of general distribution, and so are incomes, though the taxable range thereof might be narrowed through large exemptions. \* \* \*

The stress of the argument is thrown, however, on the assertion that an income tax is not a property tax at all; that it is not a real-estate tax, or a crop tax, or a bond tax; that it is an assessment upon the taxpayer on account of his money-spending power, as shown by his revenue for the year preceding the assessment; that rents received, crops harvested, interest collected, have lost all connection with their origin, and, although once not taxable, have become transmuted, in their new form, into taxable subject-matter,—in other words, that income is taxable, irrespective of the source from whence it is derived. \* \* \* The dissenting justices proceeded, in effect, upon this ground in *Weston v. City of Charleston*, 2 Pet. 449, 7 L. Ed. 481, but the court rejected it. That was a state tax, it is true; but the states have power

to lay income taxes, and, if the source is not open to inquiry, constitutional safeguards might be easily eluded.

We have unanimously held in this case that, so far as this law operates on the receipts from municipal bonds, it cannot be sustained, because it is a tax on the power of the states and on their instrumentalities to borrow money, and consequently repugnant to the Constitution. But if, as contended, the interest, when received, has become merely money in the recipient's pocket, and taxable, as such, without reference to the source from which it came, the question is immaterial whether it could have been originally taxed at all or not. This was admitted by the attorney general, with characteristic candor; and it follows that if the revenue derived from municipal bonds cannot be taxed, because the source cannot be, the same rule applies to revenue from any other source not subject to the tax, and the lack of power to levy any but an apportioned tax on real and personal property equally exists as to the revenue therefrom. Admitting that this act taxes the income of property, irrespective of its source, still we cannot doubt that such a tax is necessarily a direct tax, in the meaning of the Constitution. \* \* \*

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.

Being of opinion that so much of the sections of this law as lays a tax on income from real and personal property is invalid, we are brought to the question of the effect of that conclusion upon these sections as a whole. \* \* \* [It was decided that as by far the largest part of the tax, that on capital, had failed, Congress could not have intended to tax alone the income from occupations and labor, and therefore the whole tax failed. This part of the case appears ante, p. 52.]

Entire decree reversed.<sup>1</sup>

[HARLAN, BROWN, JACKSON and WHITE, JJ., gave dissenting opinions.]

<sup>1</sup> In *Nicol v. Ames*, 173 U. S. 509, 518-521, 19 Sup. Ct. 522, 526, 527, 43 L. Ed. 786 (1899), Peckham, J., said (holding a tax upon sales at business exchanges to be an excise): "It is asserted to be a direct tax, because it is a tax upon the sale of property measured by the value of the thing sold, and such a tax is a direct tax upon the property itself, and therefore subject to the rule of apportionment. Various cases are cited, from *Brown v. Maryland*, 12 Wheat. 419 [6 L. Ed. 678], down to those involving the validity of the income tax (*Pollock v. Trust Co.*, 157 U. S. 429, 15 Sup. Ct. 673 [39 L. Ed. 759]; *Id.*, 158 U. S. 601, 15 Sup. Ct. 912 [39 L. Ed. 1108]), for the purpose of proving the correctness of this proposition. All the cases involved the question whether the taxes to which objection was taken amounted practically to a tax on the property. If this tax is not on the property, or on the sale thereof, then these cases do not apply. We think the tax is, in effect, a duty or ex-

case laid upon the privilege, opportunity, or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act. It is not a tax upon the business itself which is so transacted, but it is a duty upon the facilities made use of, and actually employed, in the transaction of the business, and separate and apart from the business itself. \* \* \* It is also said that the tax is direct because it cannot be added to the price of the thing sold, and therefore ultimately paid by the consumer. In other words, that it is direct because the owner cannot shift the payment of the amount of the tax to some one else. This, however, assumes that the tax is not in the nature of a duty or an excise, but that it is laid directly upon the property sold, which we hold is not the case. It is not laid upon the property at all, nor upon the profits of the sale thereof, nor upon the sale itself, considered separate and apart from the place and the circumstances of the sale. \* \* \* A tax upon the privilege of selling property at the exchange, and of thus using the facilities there offered in accomplishing the sale, differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded."

In *Fairbank v. U. S.*, 181 U. S. 283, 293, 294, 21 Sup. Ct. 648, 652, 45 L. Ed. 862 (1901), a federal stamp tax upon export bills of lading was held a tax on exports. After quoting the latter part of the extract from *Nicol v. Ames* given above, *Brewer, J.*, said: "If it be true that a stamp tax required upon every instrument evidencing a sale is really and practically a tax upon the property sold, it is equally clear that a stamp duty upon foreign bills of lading is a tax upon the articles exported. \* \* \* A bill of lading, \* \* \* or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance and effect, a duty on the article exported." But compare the remarks of *Holmes, J.*, in *New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 158, 159, 27 Sup. Ct. 188, 51 L. Ed. 415, 9 Ann. Cas. 736 (1907), quoted ante, pp. 570, 571. note.

In *Patton v. Brady*, 184 U. S. 608, 618, 619, 22 Sup. Ct. 493, 496, 497, 46 L. Ed. 713 (1902), a tax upon manufactured tobacco in the hands of a dealer, not the manufacturer, was held an excise, and indirect; *Brewer, J.*, saying: "The tax on manufactured tobacco is a tax on an article manufactured for consumption, and imposed at a period intermediate the commencement of manufacture and the final consumption of the article. \* \* \* Counsel in their brief have advanced a very elaborate and ingenious argument to show that this is a direct tax upon property which must be apportioned according to population within the rule laid down in the Income Tax Cases, but, as we have seen, it is not a tax upon property as such, but upon certain kinds of property, having reference to their origin and their intended use."

In *Thomas v. U. S.*, 192 U. S. 363, 370, 371, 24 Sup. Ct. 305, 306, 48 L. Ed. 481 (1904), a stamp tax on sales of certificates of stock was held indirect; *Fuller, C. J.* saying:

"These two classes, taxes so called, and 'duties, imposts, and excises,' apparently embrace all forms of taxation contemplated by the Constitution. \* \* \* There is no occasion to attempt to confine the words duties, imposts, and excises to the limits of precise definition. 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. Taxes of this sort have been repeatedly sustained by this court, and distinguished from direct taxes under the Constitution. \* \* \* *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678, and *Fairbank v. United States*, 181 U. S. 283, 45 L. Ed. 862, 21 Sup. Ct. 648, are not in point. In the one the clause of the Constitution was considered which forbids any state, without the consent of Congress, to 'lay any imposts or duties on imports or exports,' and in the other, that 'no tax or duty shall be laid on articles exported from any state.' The distinction between direct and indirect taxes was not involved in either case. The sale of stocks is a particular business transaction in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property in the form of certificates. The stamp duty is contingent on the happening of the event of sale, and the element of absolute and unavoidable

demand is lacking. As such it falls, as stamp taxes ordinarily do, within the second class of the forms of taxation."

In *Flint v. Stone Tracy Co.*, 220 U. S. 107, 150-152, 162, 165, 31 Sup. Ct. 342, 348, 349, 353, 354, 55 L. Ed. 389, Ann. Cas. 1912B, 1312 (1911), an income tax upon the doing of business under corporate organization was held indirect; Day, J., saying:

"Within the category of indirect taxation \* \* \* 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. \* \* \* 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. [371], 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. \* \* \*

"It is further contended that some of the corporations, notably insurance companies, have large investments in municipal bonds and other nontaxable securities, and in real estate and personal property not used in the business; that therefore the selection of the measure of the income from all sources is void, because it reaches property which is not the subject of taxation,—upon the authority of the Pollock Case, supra. But this argument confuses the measure of the tax upon the privilege with direct taxation of the state or thing taxed. In the Pollock Case, as we have seen, the tax was held unconstitutional because it was in effect a direct tax on the property solely because of its ownership. \* \* \* It is \* \* \* well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is nontaxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part, at least, property which, as such, could not be directly taxed."

For the meaning of "doing business," within the federal corporation tax, see *McCoach v. Minehill, etc., Ry.*, 228 U. S. 255, 33 Sup. Ct. 419, 57 L. Ed. — (1913).

SIXTEENTH AMENDMENT.—On July 12, 1909, Congress proposed the sixteenth amendment to the Constitution, authorizing a federal tax upon incomes from whatever source derived, and on February 25, 1913, it was proclaimed to be in force. It will be observed that this amendment does not qualify the reasoning of the Pollock Case as to direct taxes, save as regards taxes on incomes.

## KNOWLTON v. MOORE.

(Supreme Court of the United States, 1900. 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969.)

[Error to the federal Circuit Court for the Eastern District of New York. The federal War Revenue Act of June 13, 1898, c. 448 (30 Stat. 448, §§ 29, 30 [U. S. Comp. St. 1901, pp. 2307, 2308]), imposed a succession tax upon legacies or distributive shares of personalty passing at death. Upon the death of one Knowlton in Brooklyn, N. Y., this tax thereon was paid under protest and suit was brought against the federal collector to recover the amount paid. This writ was taken from a decision dismissing the suit on demurrer.]

Mr. Justice WHITE. \* \* \* Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes, or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested. \* \* \*

[After interpreting the statute differently from the lower court:] The precise meaning of the law being thus determined, the question whether the tax which it imposes is direct, and hence subject to the requirement of apportionment, arises for consideration. \* \* \* [Reference is here made to *Scholey v. Rew*, 23 Wall. 349, 23 L. Ed. 99, in which a federal succession duty on real estate was upheld.]

The argument is that the decision in *Scholey v. Rew* was overruled in *Pollock v. Farmers' Loan & T. Co.*, 157 U. S. 429, 158 U. S. 601, 39 L. Ed. 759, 1108, 15 Sup. Ct. 673, 912, \* \* \* but there was no intimation in the *Pollock* Case that inheritance taxes—which had been held in *Scholey v. Rew* not to be direct, which had from all time been considered as being imposed, not on property, real or personal, as ordinarily understood, but as being levied on the transmission or receipt of property occasioned by death, and which had from the foundation of the government been treated as a duty or excise—were direct taxes, within the meaning of the Constitution. \* \* \* 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, has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy. \* \* \*

It is argued that death duties cannot be shifted from the one on whom they are first cast by law, and therefore they are direct taxes requiring apportionment. \* \* \* It is true that in the Income Tax Cases the theory of certain economists by which direct and indirect



taxes are classified with reference to the ability to shift the same was adverted to. But this disputable theory was not the basis of the conclusion of the court. The constitutional meaning of the word direct was the matter decided. 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 proposition now relied upon was considered and refuted in *Nicol v. Ames*, 173 U. S. 509, 43 L. Ed. 786, 19 Sup. Ct. 522, where the court said (p. 515, L. Ed. p. 791, Sup. Ct. Rep. p. 525): \* \* \* "As a mere abstract, scientific, or economical problem, a particular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax it might quite plainly appear to be indirect. \* \* \* For the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy."

Concluding, then that the tax under consideration is not direct within the meaning of the Constitution, but, on the contrary, is a duty or excise, we are brought to consider the question of uniformity.

The contention is that because the statute exempts legacies and distributive shares in personal property below \$10,000, because it classifies the rate of tax according to the relationship or absence of the relationship of the taker to the deceased, and provides for a rate progressing by the amount of the legacy or share, therefore the tax is repugnant to that portion of the first clause of section 8 of article 1 of the Constitution, which provides that "duties, imposts, and excises shall be uniform throughout the United States." \* \* \* The two contentions then may be summarized by saying that the one asserts that the Constitution prohibits the levy of any duty, impost, or excise which is not intrinsically equal and uniform in its operations upon individuals, and the other that the power of Congress in levying the taxes in ques-

tion is by the terms of the Constitution restrained only by the requirement that such taxes be geographically uniform. \* \* \* [After an elaborate textual and historical argument upon the question:] By the result, then, of an analysis of the history of the adoption of the Constitution it becomes plain that the words "uniform throughout the United States" do not signify an intrinsic but simply a geographical uniformity. \* \* \*

It is yet further asserted that the tax does not fulfil the requirements of geographical uniformity, for the following reason: As the primary rate of taxation depends upon the degree of relationship or want of relationship to a deceased person, it is argued that it cannot operate with geographical uniformity, inasmuch as testamentary and intestacy laws may differ in every state. It is certain that the same degree of relationship or want of relationship to the deceased, wherever existing, is levied on at the same rate throughout the United States. The tax is hence uniform throughout the United States, despite the fact that different conditions among the states may obtain as to the objects upon which the tax is levied. The proposition in substance assumes that the objects taxed by duties, imposts, and excises must be found in uniform quantities and conditions in the respective states, otherwise the tax levied on them will not be uniform throughout the United States. But what the Constitution commands is the imposition of a tax by the rule of geographical uniformity, not that in order to levy such a tax objects must be selected which exist uniformly in the several states. \* \* \*

Judgment reversed [on interpretation of law only].<sup>1</sup>

[BREWER, J., dissented as to the validity of a progressive tax. HARLAN and McKENNA, JJ., dissented from the interpretation of the statute. PECKHAM, J., took no part in the decision.]

<sup>1</sup> For the relation of the "uniformity" clause to Const. art. 1, § 9. par. 6, forbidding preferences between state ports, see the principal case, 175 U. S. at pp. 103-106. For its possible effect upon the taxation of interstate commerce, see *Dooley v. U. S.*, 183 U. S. 151, 157, 165, 166, 22 Sup. Ct. 62, 43 L. Ed. 128 (1901).

PURPOSES FOR WHICH FEDERAL POWERS OF TAXATION MAY BE USED.—See *McCray v. United States*, ante, p. 959, and notes. For the older arguments as to the meaning of the "general welfare" clause, as expressing the objects that may be furthered by federal taxation or by the appropriation of federal money raised by taxation, see President Monroe, 2 Mess. and Papers of Presidents, 162-173 (May 4, 1822); 1 Story, Comm. on Const. §§ 905-930, 958-991; 2 G. T. Curtis, Const. Hist. of U. S. 592-594 (1896). Compare the present expenditures of the national government on behalf of agriculture, the public health, the geological survey, and various other objects.

CHAPTER XVIII  
REGULATION OF COMMERCE \*

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SECTION 1.—DUTIES ON IMPORTS, EXPORTS, AND  
TONNAGE

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BROWN v. MARYLAND.

(Supreme Court of United States, 1827. 12 Wheat. 419, 6 L. Ed. 678.)

[Error to the Court of Appeals of Maryland. A statute imposed penalties upon all persons selling foreign articles by wholesale who did not take out a \$50 license therefor. Brown was convicted in the Baltimore city court of selling a package of foreign dry goods without a license, and from an affirmance of this conviction this writ was taken.]

Mr. Chief Justice MARSHALL. \* \* \* The plaintiffs in error \* \* \* insist that the act under consideration is repugnant to two provisions in the Constitution of the United States.

1. To that which declares that "no state shall, without the consent of Congress, lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

2. To that which declares that Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

1. The first inquiry is into the extent of the prohibition upon states "to lay any imposts or duties on imports or exports." The counsel for the state of Maryland would confine this prohibition to laws imposing duties on the act of importation or exportation. The counsel for the plaintiffs in error give them a much wider scope.

In performing the delicate and important duty of construing clauses in the Constitution of our country, which involve conflicting powers of the government of the Union, and of the respective states, it is proper to take a view of the literal meaning of the words to be expounded, of their connection with other words, and of the general objects to be accomplished by the prohibitory clause, or by the grant of power. What, then, is the meaning of the words, "imposts, or duties on imports or exports"?

An impost, or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured before the

\*All of the commercial clauses of the Constitution are treated together in this chapter. See Const. art. I, § 8, par. 3; Id. § 9, pars. 5, 6; Id. § 10, pars. 2, 3; art. III, § 2, par. 1 (grant of maritime jurisdiction).

importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before, or on entering the port, does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are "imports"? The lexicons inform us, they are "things imported." If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. "A duty on imports," then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. The succeeding words of the sentence which limit the prohibition, show the extent in which it was understood. The limitation is, "except what may be absolutely necessary for executing its inspection laws." Now, the inspection laws, so far as they act upon articles for exportation, are generally executed on land, before the article is put on board the vessel; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection, then, is a tax which is frequently, if not always paid for service performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the states to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition. \* \* \*

If we quit this narrow view of the subject, and passing from the literal interpretation of the words, look to the objects of the prohibition, we find no reason for withdrawing the act under consideration from its operation. From the vast inequality between the different states of the Confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several states exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives which were deemed sufficient by the statesmen of that day, the general power of taxation, indispensably necessary as it was, and jealous as the states were of any encroachment upon it, was so far abridged as to forbid them to touch imports or exports, with the single exception which has been noticed. Why are they restrained from imposing these duties? Plainly, because, in the general opinion, the interest of all would be best promoted by placing that whole subject under the control of Congress. Whether the prohibition to "lay imposts, or duties on imports or exports," proceeded from an apprehension that the power might be so exercised as to disturb that equality among the states which was generally advantageous, or that harmony between them

which it was desirable to preserve, or to maintain unimpaired our commercial connections with foreign nations, or to confer this source of revenue on the government of the Union, or whatever other motive might have induced the prohibition, it is plain that the object would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed, as by a power to tax it while entering the port. There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. No object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer. It is obvious, that the same power which imposes a light duty, can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. If the tax may be levied in this form by a state, it may be levied to an extent which will defeat the revenue by impost, so far as it is drawn from importations into the particular state. We are told that such wild and irrational abuse of power is not to be apprehended, and is not to be taken into view when discussing its existence. All power may be abused; and if the fear of its abuse is to constitute an argument against its existence, it might be urged against the existence of that which is universally acknowledged, and which is indispensable to the general safety. The states will never be so mad as to destroy their own commerce, or even to lessen it.

We do not dissent from these general propositions. \* \* \* Conceding, to the full extent which is required, that every state would, in its legislation on this subject, provide judiciously for its own interests, it cannot be conceded that each would respect the interests of others. A duty on imports is a tax on the article which is paid by the consumer. The great importing states would thus levy a tax on the non-importing states, which would not be less a tax because their interest would afford ample security against its ever being so heavy as to expel commerce from their ports.<sup>1</sup> This would necessarily produce countervailing measures on the part of those states whose situation was less favorable to importation. For this, among other reasons, the

<sup>1</sup> "The immense amount of foreign products used and consumed in this country are imported, landed, and offered for sale in a few commercial cities, and a very small portion of them are intended or expected to be used in the state in which they are imported. \* \* \* A tax in any shape upon imports is a tax on the consumer, by enhancing the price of the commodity. And if a state is permitted to levy it in any form, it will put it in the power of a maritime importing state to raise a revenue for the support of its own government from citizens of other states, as certainly and effectually as if the tax was laid openly and without disguise as a duty on imports."—Taney, C. J., in License Cases, 5 How. 504, 575, 576, 12 L. Ed. 256 (1847).



whole power of laying duties on imports was, with a single and slight exception, taken from the states. \* \* \*

The counsel for the state of Maryland insists, with great reason, that if the words of the prohibition be taken in their utmost latitude, they will abridge the power of taxation, which all admit to be essential to the states, to an extent which has never yet been suspected, and will deprive them of resources which are necessary to supply revenue, and which they have heretofore been admitted to possess. These words must, therefore, be construed with some limitation; and, if this be admitted, they insist that entering the country is the point of time when the prohibition ceases, and the power of the state to tax commences.

It may be conceded, that the words of the prohibition ought not to be pressed to their utmost extent; that in our complex system, the object of the powers conferred on the government of the Union, and the nature of the often conflicting powers which remain in the states, must always be taken into view, and may aid in expounding the words of any particular clause. But, while we admit that sound principles of construction ought to restrain all courts from carrying the words of the prohibition beyond the object the Constitution is intended to secure; that there must be a point of time when the prohibition ceases, and the power of the state to tax commences; we cannot admit that this point of time is the instant that the articles enter the country. It is we think, obvious that this construction would defeat the prohibition. \* \* \* 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<sup>2</sup> in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution.

The counsel for the plaintiffs in error contend that the importer purchases, by payment of the duty to the United States, a right to dispose of his merchandise, as well as to bring it into the country; and certainly the argument is supported by strong reason, as well as by the practice of nations, including our own. The object of importation is sale; it constitutes the motive for paying the duties; and if the United States possess the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understood to confer it. The practice of the most commercial nations conforms to this idea. Duties, according to that practice, are charged on those articles only which are intended

<sup>2</sup> For early occurrences of the phrase "original package" in New York, Maryland, and Pennsylvania statutes, see Prentice, *Federal Powers over Carriers and Corporations*, 101; *N. Y. Laws, 1787, c. 81*. In 1784 the phrase was "same package." *N. Y. Laws 1784, c. 10*.

for sale or consumption in the country. Thus, sea stores, goods imported and re-exported in the same vessel, goods landed and carried over land for the purpose of being re-exported from some other port, goods forced in by stress of weather, and landed, but not for sale, are exempted from the payment of duties. The whole course of legislation on the subject shows that, in the opinion of the legislature, the right to sell is connected with the payment of duties.

The counsel for the defendant in error have endeavored to illustrate their proposition, that the constitutional prohibition ceases the instant the goods enter the country, by an array of the consequences which they suppose must follow the denial of it. If the importer acquires the right to sell by the payment of duties, he may, they say, exert that right when, where, and as he pleases, and the state cannot regulate it. He may sell by retail, at auction, or as an itinerant pedler. He may introduce articles, as gunpowder, which endanger a city, into the midst of its population; he may introduce articles which endanger the public health, and the power of self-preservation is denied. An importer may bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation.

These objections to the principle, if well founded, would certainly be entitled to serious consideration. But we think they will be found, on examination, not to belong necessarily to the principle, and, consequently, not to prove that it may not be resorted to with safety as a criterion by which to measure the extent of the prohibition. This indictment is against the importer, for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them, or otherwise mixes them with the general property of the state, by breaking up his packages, and travelling with them as an itinerant pedler. In the first case, the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the state. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the state. In the last cases, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer.

So, if he sells by auction. Auctioneers are persons licensed by the state, and if the importer chooses to employ them, he can as little object to paying for this service, as for any other for which he may apply to an officer of the state. The right of sale may very well be annexed to importation, without annexing to it, also, the privilege of using the officers licensed by the state to make sales in a peculiar way. The power to direct the removal of gunpowder is a branch of the po-

lice power, which unquestionably remains, and ought to remain, with the states. If the possessor stores it himself out of town, the removal cannot be a duty on imports, because it contributes nothing to the revenue. If he prefers placing it in a public magazine, it is because he stores it there, in his own opinion, more advantageously than elsewhere. We are not sure that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a state.

The principle, then, for which the plaintiffs in error contend, that the importer acquires a right, not only to bring the articles into the country, but to mix them with the common mass of property, does not interfere with the necessary power of taxation which is acknowledged to reside in the states, to that dangerous extent which the counsel for the defendants in error seem to apprehend. It carries the prohibition in the Constitution no farther than to prevent the states from doing that which it was the great object of the Constitution to prevent.

But if it should be proved, that a duty on the article itself would be repugnant to the Constitution, it is still argued that this is not a tax upon the article, but on the person. The state, it is said, may tax occupations, and this is nothing more. It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true the state may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the state has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not a right to do, because it is prohibited by the Constitution.

In support of the argument that the prohibition ceases the instant the goods are brought into the country, a comparison has been drawn between the opposite words export and import. As, to export, it is said, means only to carry goods out of the country; so, to import, means only to bring them into it. But, suppose we extend this comparison to the two prohibitions. The states are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any state. There is some diversity in language, but none is perceivable in the act which is prohibited. The United States have the same right to tax occupations which is pos-

essed by the states. Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose; would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the Constitution would expose it, by saying that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations? Or, suppose revenue cutters were to be stationed off the coast for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries; would it be received as an excuse for this outrage, were the government to say that exportation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or things imported, ceased the instant they were brought into the country, so the prohibition to tax articles exported ceased when they were carried out of the country?

We think, then, that the act under which the plaintiffs in error were indicted, is repugnant to that article of the Constitution which declares that "no state shall lay any impost or duties on imports or exports." \* \* \*

[The part of the case dealing with the commerce clause is printed post, p. 1062.]

Judgment reversed.<sup>3</sup>

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

<sup>3</sup> The constitutional exemption protects imports from state general property taxes as well as special taxes or excises. *Low v. Austin*, 13 Wall. 29, 20 L. Ed. 517 (1872). But it does not exempt cash receipts from exports from general taxes upon capital invested in business in the state. *New York v. Wells*, 208 U. S. 14, 28 Sup. Ct. 193, 52 L. Ed. 370 (1908). As to when the act of importation is complete, see *Waring v. Mayor*, 8 Wall. 110, 19 L. Ed. 342 (1853).

WHAT ARE IMPORTS AND EXPORTS.—"Imports," within the Constitution, refers only to goods brought from a foreign country, not to goods from another state.

"Whether we look to the terms of the clause of the Constitution in question, or to its relation to the other parts of that instrument, or to the history of its formation and adoption, or to the comments of the eminent men who took part in those transactions, we are forced to the conclusion that no intention existed to prohibit, by *this clause*, the right of one state to tax articles brought into it from another. If we examine for a moment the results of an opposite doctrine, we shall be well satisfied with the wisdom of the Constitution as thus construed.

"The merchant of Chicago who buys his goods in New York and sells at wholesale in the original packages, may have his millions employed in trade for half a lifetime and escape all state, county, and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York. Neither the state nor the city which protects his life and property can make him contribute a dollar to support its government, improve its thoroughfares, or educate its children. The merchant in a town in Massachusetts, who deals only in wholesale, if he purchase his goods in New York, is exempt from taxation. If his neighbor purchase in Boston, he must pay all the taxes which Massachusetts levies with equal justice on the property of all its citizens. These cases are merely mentioned as illustrations. But it is obvious that if articles brought from one state into another are exempt from taxation, even under the limited circumstances laid down in the case of *Brown v. Maryland*, the grossest injustice must prevail, and equality of

## 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 forbidding states from laying a

public burdens in all our large cities is impossible."—*Woodruff v. Parham*, 8 Wall. 123, 136, 137, 19 L. Ed. 382 (1869), by Miller, J. So, *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257 (1885).

Similarly, "exports" refers only to goods going to a foreign country, and not, e. g., to our dependency, Porto Rico. *Dooley v. U. S.*, 183 U. S. 151, 22 Sup. Ct. 62, 43 L. Ed. 128 (1901). Of course "exports" and "imports" refer only to *property*; not to the migration of free persons. *New York v. Comp. Gen. Trans.*, 107 U. S. 59, 2 Sup. Ct. 87, 27 L. Ed. 383 (1883).

TAXES ON EXPORTS.—A federal tax upon bills of lading customarily used in exporting goods is a tax on exports. *Fairbank v. U. S.*, 181 U. S. 283, 21 Sup. Ct. 648, 45 L. Ed. 862 (1901). A federal excise is not a tax on exports as to those articles subject to it which are manufactured for export and later actually exported. *Cornell v. Coyne*, 192 U. S. 418, 24 Sup. Ct. 383, 48 L. Ed. 504 (1904). Federal burdens upon the export trade, other than by taxes, are not forbidden. *Armour Packing Co. v. U. S.*, 209 U. S. 56, 79, 28 Sup. Ct. 428, 52 L. Ed. 681 (1908).



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 discreditable subterfuge, to which this court ought not to lend its countenance.<sup>1</sup> If there be any original package at all in this case we think it is the basket, and not the paper box. \* \* \*

<sup>1</sup> As to the validity of attempts to evade one law by the exercise of rights under another, see *Steamboat Co. v. Livingston*, Hopk. Ch. (N. Y.) 170, 211, 212 (1824); *Shotwell v. Moore*, 129 U. S. 590, 9 Sup. Ct. 362, 32 L. Ed. 827 (1889); *Williams v. Mississippi*, 170 U. S. 213, 222, 18 Sup. Ct. 583, 42 L. Ed. 1012 (1898); *Scottish Insur. Co. v. Bowland*, 196 U. S. 611, 632, 25 Sup. Ct. 345, 49 L. Ed. 619 (1905); and the dissenting opinion in principal case, 179 U. S. at page 383, 21 Sup. Ct. 140, 45 L. Ed. 224.

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.<sup>2</sup>

[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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INMAN S. S. CO. v. TINKER (1877) 94 U. S. 238, 243-245, 24 L. Ed. 118, Mr. Justice SWAYNE (holding invalid a New York statute imposing a fee of 1½ to 3 cents a ton, according to their registered tonnage, upon vessels using the port of New York):

“No state shall, without the consent of Congress, lay any duty of tonnage.”<sup>1</sup> \* \* \*

“Tonnage, in our law, is a vessel’s ‘internal cubical capacity in tons of one hundred cubic feet each, to be ascertained’ in the manner prescribed by Congress. Act of May 6, 1864, c. 83, 13 Stat. pp. 70, 72: Rev. St. U. S. p. 804, § 4153 [U. S. Comp. St. 1901, p. 2812]. ‘Tonnage duties are duties upon vessels in proportion to their capacity.’ Bouv. Law Dict. ‘Tonnage.’ The term was formerly applied to merchandise. Cowel, in his Law Dictionary, published in 1708, thus defines it: ‘Tonnage (tonnagium) is a custom or impost paid to the king for merchandise carried out or brought in ships, or such like vessels, according to a certain rate upon every ton, and of this you may read in the statutes of 12 Edw. IV, c. 3; 6 Hen. VIII, c. 14,’ etc. The vital principle of such a tax or duty is that it is imposed, whatever the subject, solely according to the rule of weight, either as to the capacity to carry, or the actual weight of the thing itself.

<sup>2</sup> Accord: *Cook v. Marshall Co.*, 196 U. S. 261, 25 Sup. Ct. 233, 49 L. Ed. 471 (1905) (cigarettes shipped loose without basket). See *Purity Extract Co. v. Lynch*, 226 U. S. 192, 200, 201, 33 Sup. Ct. 44, 57 L. Ed. — (1912) (bottles in a case), and compare *McDermott v. Wisconsin*, post, p. 1244 (scope of federal regulation not limited by “original package” test).

STATE INSPECTION OF IMPORTS AND EXPORTS.—As to the validity of state inspection laws under Const. art. I, § 10, par. 2, see *Patapsco Guano Co. v. Board of Agric.*, post, p. 1157, and notes.

<sup>1</sup> Const. art. I, § 10, par. 3.

"In this law of the state there are several important points that must not be overlooked. The charge is not exacted for any services rendered or offered to be rendered. If the vessel enter the port and immediately take her departure, or load or unload, or make fast to any wharf, either of these things disjunctively brings her within the act, and makes her liable to the burden prescribed.<sup>2</sup>

"The charge is applied wholly irrespective of the ad valorem principle. If either of the three vessels of the appellant was new and making her first voyage, and another of the same tonnage was making her last trip before being broken up, and the former were of many times the value of the latter, the act would apply the same procrustean rule of both. The rate of payment, and the amount to be paid, would, in both cases, be the same. \* \* \*

"The state, in passing this law imposing a tonnage duty, has exercised a power expressly prohibited to it by the Constitution. In that particular the law is, therefore, void. This view is sustained by the rulings of this court in the State Tonnage Tax Cases, 12 Wall. 204, 20 L. Ed. 370, and Cannon v. New Orleans, 20 Wall. 577, 22 L. Ed. 417. See also Steamship Co. v. Port Wardens, 6 Wall. 31, 18 L. Ed. 749, and Peete v. Morgan, 19 Wall. 581, 22 L. Ed. 201. The tax imposed is not merely a mode of measuring the compensation to be paid. The answer to this suggestion is, that it is exacted where there is nothing to be paid for, and has no reference to any circumstance in this connection but the tonnage of the vessel and the class to which it belongs."<sup>3</sup>

<sup>2</sup> "A duty of tonnage within the meaning of the Constitution is a charge upon a vessel, according to its tonnage, as an instrument of commerce, for entering or leaving a port, or navigating the public waters of the country; and the prohibition was designed to prevent the states from imposing hindrances of this kind to commerce carried on by vessels." —Field, J., in *Huse v. Glover*, 119 U. S. 543, 549, 550, 7 Sup. Ct. 313, 316, 30 L. Ed. 487 (1886). And so *Miller, J.*, in *Cannon v. New Orleans*, 20 Wall. 577, 581, 22 L. Ed. 417 (1874): "A duty or tax \* \* \* to be measured by the capacity of the vessel, and \* \* \* in its essence a contribution claimed for the privilege of arriving and departing from a port of the United States."

<sup>3</sup> Compensation for a vessel's use of various beneficial facilities or services may be measured by tonnage. *Transp. Co. v. Parkersburg*, 107 U. S. 691, 2 Sup. Ct. 732, 27 L. Ed. 584 (1883) (wharfage); *Morgan's S. S. Co. v. Louisiana Board of Health*, 118 U. S. 455, 6 Sup. Ct. 1114, 30 L. Ed. 237 (1886) (quarantine); *Huse v. Glover*, 119 U. S. 543, 7 Sup. Ct. 313, 30 L. Ed. 487 (1886) (river lock and dam).

In *State Tonnage Tax Cases*, 12 Wall. 204, 213, 214, 216-218, 225, 226, 20 L. Ed. 370 (1871), *Clifford, J.*, said (holding invalid an Alabama tax of \$1 a ton assessed upon certain steamboats owned by Alabama citizens and employed exclusively in river commerce within that state):

"Taxes levied by a state upon ships and vessels owned by the citizens of the state as property, based on a valuation of the same as property, are not within the prohibition of the Constitution, but it is equally clear and undeniable that taxes levied by a state upon ships and vessels as instruments of commerce and navigation are within that clause of the instrument which prohibits the states from levying any duty of tonnage, without the consent of Congress; and it makes no difference whether the ships or vessels taxed belong to the citizens of the state which levies the tax or the citizens of another state, as the prohibition is general, withdrawing altogether from the



states the power to lay any duty of tonnage under any circumstances, without the consent of Congress. \* \* \*

"The attempt is made to show that the legislature, in enacting the law imposing the tax, merely referred to the registered tonnage of the steamboats 'as a way or mode to determine and ascertain the tax to be assessed on the steamboats, and to furnish a rule or rate to govern the assessors in the performance of their duties.' Suppose that could be admitted, it would not have much tendency to strengthen the argument for the defendant, as the suggestion concedes what is obvious from the schedule, that the taxes are levied without any regard to the value of the steamboats. \* \* \* Taxes levied under an enactment which directs that a tax shall be imposed on steamboats at the rate of one dollar per ton of the registered tonnage thereof, and that the same shall be assessed and collected at the port where such steamboats are registered, cannot, in the judgment of this court, be held to be a tax on the steamboat as property. On the contrary, the tax is just what the language imports, a duty of tonnage, which is made even plainer when it comes to be considered that the steamboats are not to be taxed at all unless they are 'plying in the navigable waters of the state,' showing to a demonstration that it is as instruments of commerce and not as property that they are required to contribute to the revenues of the state.

"Such a provision is much more clearly within the prohibition in question than the one involved in a recent case decided by this court, in which it was held that a statute of a state enacting that the wardens of a port were entitled to demand and receive, in addition to other fees, the sum of five dollars for every vessel arriving at the port, whether called on to perform any service or not, was both a regulation of commerce and a duty of tonnage, and that as such it was unconstitutional and void. *Steamship Co. v. Port Wardens*, 6 Wall. 34, 18 L. Ed. 749 (1867).

"Speaking of the same prohibition, the Chief Justice said in that case that \* \* \* the prohibition upon the states against levying duties on imports or exports would be ineffectual if it did not also extend to duties on the ships which serve as the vehicles of conveyance, which was doubtless intended by the prohibition of any duty of tonnage. 'It was not only a pro rata tax which was prohibited, but any duty on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty.' \* \* \*

"State authority to tax ships and vessels, it is supposed by the respondent, extends to all cases where the ship or vessel is not employed in foreign commerce or in commerce between ports or places in different states. \* \* \* Such a rule as that assumed by the respondent would incorporate into the Constitution an exception which it does not contain. Had the prohibition in terms applied only to ships and vessels employed in foreign commerce or in commerce among the states, his construction would be right, but courts of justice cannot add any new provision to the fundamental law."

Compare *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 376, 2 Sup. Ct. 257, 266, 27 L. Ed. 419 (1883), by Woods, J. (upholding a license fee upon a ferry keeper of \$100 a year for each ferry boat in use): "The amount of the license fee is not graduated by the tonnage of the ferry boats. \* \* \* This, although not a conclusive circumstance, is one of the tests applied to determine whether a tax is a tax on tonnage or not."

STATE IMPORT DUTIES LEVIED WITH CONSENT OF CONGRESS.—See Const. art. I, § 10, par. 2. Between 1790 and 1823 small import duties were frequently permitted by Congress to be levied at particular ports and the proceeds applied by the states to various local port and quarantine purposes. See, e. g., 1 Stat. 184, 189, 243, 393, 425, 462, 463, 546; 2 Stat. 18, 103, 152, 316, 357, 484, 658, 820; 3 Stat. 125, 683. The federal Wilson act (see *In re Rahrer*, post, p. 1197) now permits the states to levy regulative taxes upon imported liquor in the unsold original packages. *State v. De Bary & Co.*, 130 La. 1090, 1095, 58 South. 892 (1912), affirmed in *De Bary & Co. v. Louisiana*, 227 U. S. 105, 33 Sup. Ct. 239, 57 L. Ed. — (1913).

SECTION 2.—INTERSTATE AND FOREIGN COMMERCE:  
GENERAL CONCEPTIONS

## GIBBONS v. OGDEN.

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

[Appeal<sup>1</sup> from 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<sup>2</sup> between nations, and parts of

<sup>1</sup> This statement in the official report, 9 Wheat, 1, 6 L. Ed. 23, seems erroneous. The statute then in force authorized only writs of error from state courts. 1 Stat. 85, c. 20, § 25; *Verden v. Coleman*, 22 How. 192, 16 L. Ed. 336 (1860). In 6 Curtis, Decis. U. S. Sup. Ct. 1, the procedure is stated as a writ of error.

<sup>2</sup> Must interstate intercourse be conducted for a commercial purpose in order to be "commerce" within the Constitution?

"Commerce \* \* \* comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities."—*Waltou v. Missouri*, 91 U. S. 275, 280, 23 L. Ed. 347 (1875), by Field, J.

"Transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered."—*Hanley*

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 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

v. *K. C. Ry.*, 187 U. S. 617, 619, 23 Sup. Ct. 214, 215 (47 L. Ed. 333) (1903), by Holmes, J.

Referring to travel, largely on foot, over an interstate bridge, it was said in *Covington Bdg. Co. v. Kentucky*, 154 U. S. 204, 218, 219, 14 Sup. Ct. 1087, 1092, 38 L. Ed. 902 (1894), by Brown, J.: "If it be commerce to send goods from \* \* \* Ohio to \* \* \* Kentucky, it is equally such \* \* \* to travel in person from Cincinnati to Covington. \* \* \* The thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool."

In *Francis v. U. S.*, 188 U. S. 375, 377, 23 Sup. Ct. 334, 335, 47 L. Ed. 508 (1903), Holmes, J., said: "The question is suggested whether the carriage of a paper of any sort by its owner or the owner's servant, properly so called, with no view of a later change of possession, can be commerce, even when the carriage is in aid of some business or traffic." See *Hipolite Egg Co. v. United States*, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364 (1911).

See, also, *Adair v. U. S.*, 208 U. S. 161, 176, 177, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764 (1908); *U. S. v. Westman*, 182 Fed. 1017 (1910); and *Hoke v. United States*, post, p. 1234, note 2; the two latter upholding the federal White Slave Act forbidding the transportation of women across a state line for immoral purposes.

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<sup>3</sup> 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

<sup>3</sup> An embargo is constitutional. *U. S. v. Brig William*, 2 Hall, L. J. 255. Fed. Cas. No. 16,700 (1808); *U. S. v. Marigold*, 9 How. 560, 566, 13 L. Ed. 257 (1850) (semble). So *Ling Su Fan v. U. S.*, 218 U. S. 302, 31 Sup. Ct. 21, 54 L. Ed. 1049, 30 L. R. A. (N. S.) 1176 (1910) (prohibiting export of silver coin from Philippines).

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 Baltimore and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore.<sup>4</sup>

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

<sup>4</sup> This probably refers to early federal statutes authorizing a drawback of duties on goods imported at one of these ports, carried overland, and exported at the other. See, e. g., 1 Stat. 686, c. 22, § 79. "Baltimore and Providence" in Marshall's opinion should read "Boston and Providence."

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 exercised 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.<sup>5</sup> \* \* \*

<sup>5</sup> As to the effect of so-called federal "licenses" where Congress is without power to regulate the subject matter, see License Tax Cases, ante, p. 1024.

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.<sup>6</sup>

[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.]

<sup>6</sup> Accord: *Pensacola Telegraph Co. v. W. U. Telegraph Co.*, 96 U. S. 1, 24 L. Ed. 708 (1878) (state telegraph monopoly inconsistent with act of Congress).

COMMERCE WITH INDIAN TRIBES.—See *U. S. v. Holliday*, 3 Wall. 407, 18 L. Ed. 182 (1866); *Dick v. U. S.*, 208 U. S. 340, 28 Sup. Ct. 390, 52 L. Ed. 520 (1908).

"If commerce, or traffic, or intercourse, is carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress, although within the limits of a state. The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of the member of the tribe with whom it is carried on. It is not, however, intended by these remarks to imply that this clause of the Constitution authorizes Congress to regulate any other commerce, originated and ended within the limits of a single state, than commerce with the Indian tribes."—*U. S. v. Holliday*, 3 Wall. at page 418, by Miller, J.

As to how long this federal personal jurisdiction over Indians may continue, see *Re Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848 (1905), and *U. S. v. Celestine*, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. Ed. 195 (1909). As to the status of the Pueblo Indians in New Mexico under the Mexican treaty of cession, see *U. S. v. Sandoval*, 198 Fed. 539 (1912).

COMMERCE BETWEEN STATES AND OTHER DOMESTIC TERRITORY.—See *Stoutenburgh v. Hennick*, 129 U. S. 141, 9 Sup. Ct. 256, 32 L. Ed. 637 (1889) (District of Columbia); *Dooley v. U. S.*, 183 U. S. 151, 22 Sup. Ct. 62, 43 L. Ed. 128 (1901) (Porto Rico); *Hanley v. K. C. Ry.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333 (1903) (Indian Territory), where it was said by Holmes, J.: "It may be assumed that this power of Congress over commerce between Arkansas and the Indian territory is not less than its power over commerce among the states." See, also, *Interstate Commerce Commission v. Humboldt S. S. Co.*, 224 U. S. 474, 32 Sup. Ct. 556, 56 L. Ed. 849 (1912).

COMMERCE BETWEEN TERMINI IN THE SAME STATE BUT PASSING OUTSIDE EN ROUTE.—See *Lord v. Steamship Co.*, 102 U. S. 541, 26 L. Ed. 224 (1881); *Lehigh Valley Ry. v. Pennsylvania*, 145 U. S. 192, 12 Sup. Ct. 806, 36 L. Ed. 672 (1892); *Hanley v. Kansas City, etc., Ry.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333 (1903); *Ewing v. Leavenworth*, 226 U. S. 464, 33 Sup. Ct. 157, 57 L. Ed. — (1913); *U. S. v. Del., etc., Ry.*, 152 Fed. 269 (1907).



BROWN v. MARYLAND (1827) 12 Wheat. 419, 445-449, 6 L. Ed. 678, Mr. Chief Justice MARSHALL (for facts and first part of opinion, see ante, p. 1039):

"2. Is [the Maryland act] also repugnant to that clause in the Constitution which empowers 'Congress to regulate commerce with foreign nations, and among the several states, and with the Indian tribes'?

"The oppressed and degraded state of commerce previous to the adoption of the Constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the states. To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity.

"What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several states? This question was considered in the case of *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. The power is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior. We deem it unnecessary now to reason in support of these propositions. Their truth is proved by facts continually before our eyes, and was, we think, demonstrated, if they could require demonstration, in the case already mentioned.

"If this power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse: one of its most ordinary ingredients is traffic. It is inconceivable, that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with

the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient; as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell.

"If this be admitted, and we think it cannot be denied, what can be the meaning of an act of Congress which authorizes importation, and offers the privilege for sale at a fixed price to every person who chooses to become a purchaser? How is it to be construed, if an intent to deal honestly and fairly, an intent as wise as it is moral, is to enter into the construction? What can be the use of the contract, what does the importer purchase, if he does not purchase the privilege to sell? What would be the language of a foreign government, which should be informed that its merchants, after importing according to law, were forbidden to sell the merchandise imported? What answer would the United States give to the complaints and just reproaches to which such an extraordinary circumstance would expose them? No apology could be received, or even offered. Such a state of things would break up commerce. It will not meet this argument, to say, that this state of things will never be produced; that the good sense of the states is a sufficient security against it. The Constitution has not confided this subject to that good sense. It is placed elsewhere. The question is, where does the power reside? not, how far will it be probably abused? The power claimed by the state is, in its nature, in conflict with that given to Congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence.

"We think, then, that if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable. If the principles we have stated be correct, the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer for selling the article in his character of importer, must be in opposition to the act of Congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation. The distinction between a tax on the thing imported, and on the person of the importer, can have no influence on this part of the subject. It is too obvious for controversy, that they interfere equally with the power to regulate commerce.

"It has been contended that this construction of the power to regulate commerce, as was contended in construing the prohibition to lay duties on imports, would abridge the acknowledged power of a state

to tax its own citizens, or their property within its territory. We admit this power to be sacred; but cannot admit that it may be used so as to obstruct the free course of a power given to Congress. We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed that the powers remaining with the states may be so exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the Constitution has applied it to the often interfering powers of the general and state governments, as a vital principle of perpetual operation. It results necessarily from this principle that the taxing power of the state must have some limits. It cannot reach and restrain the action of the national government within its proper sphere. It cannot reach the administration of justice in the courts of the Union, or the collection of the taxes of the United States, or restrain the operation of any law which Congress may constitutionally pass. It cannot interfere with any regulation of commerce. If the states may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the state from one port to another, for the purpose of re-exportation? The laws of trade authorize this operation, and general convenience requires it. Or what should restrain a state from taxing any article passing through it from one state to another, for the purpose of traffic? or from taxing the transportation of articles passing from the state itself to another state, for commercial purposes? These cases are all within the sovereign power of taxation, but would obviously derange the measures of Congress to regulate commerce, and affect materially the purpose for which that power was given. We deem it unnecessary to press this argument farther, or to give additional illustrations of it, because the subject was taken up, and considered with great attention, in *McCulloch v. State of Maryland*, 4 Wheat. 316, 4 L. Ed. 579, the decision in which case is, we think, entirely applicable to this.

"It may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister state. We do not mean to give any opinion on a tax discriminating between foreign and domestic articles."

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

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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 is 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 execution 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."<sup>1</sup>

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

<sup>1</sup> "Post offices and post roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national government. The powers thus granted are not confined to the instrumentalities of commerce or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. \* \* \* The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of inter-communication, but especially is it so in commercial transactions. \* \* \* It cannot for a moment be doubted that this powerful agency of commerce and inter-communication comes within the controlling power of Congress, certainly as against hostile state legislation. \* \* \* It is not necessary now to inquire whether Congress may assume the telegraph as part of the postal service, and exclude all others from its use."—*Pensacola Telegraph Co. v. Western Union Co.*, 96 U. S. 1, 9, 10, 24 L. Ed. 708 (1878), by Waite, C. J. (holding that Congress may empower interstate telegraph companies to occupy post roads in a state against the will of the state).

"Constitutional provisions do not change, but their operation extends to new matters, as the modes of business and the habits of life of the people vary with each succeeding generation. \* \* \* So is it with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."—Brewer, J., in *In re Debs*, 158 U. S. 564, 591, 15 Sup. Ct. 900, 909, 39 L. Ed. 1092 (1895).

Are all telephones with the usual connections instruments of interstate commerce? *Pomona v. Sunset Tel. Co.*, 224 U. S. 330, 345, 32 Sup. Ct. 477, 56 L. Ed. 788 (1912).



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.<sup>1</sup>

<sup>1</sup> "The facts that the property sold is outside of the state and the seller and buyer foreigners are not enough to make a sale commerce with foreign nations or among the several states."—Hatch v. Reardon, 204 U. S. 152, 162, 27 Sup. Ct. 188, 191, 51 L. Ed. 415, 9 Ann. Cas. 736 (1907), by Holmes, J.

"The plaintiffs in error are brokers who take orders and transmit them to other states for the purchase and sale of grain or cotton upon speculation. They are, in no just sense, common carriers of messages, as are the telegraph companies. For that part of the transactions, merely speculative and followed by no actual delivery, it cannot be fairly contended that such contracts are the subject of interstate commerce; and concerning such of the contracts for purchases for future delivery as result in actual delivery of the grain or cotton, the stipulated facts show that, when the orders transmitted are received in the foreign state, the property is bought in that state and there held for the purchaser. The transaction was thus closed by a contract completed and executed in the foreign state, although the orders were received from another state. When the delivery was upon a contract of sale made by

"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.<sup>2</sup> \* \* \*

"If foreign bills of exchange may thus be the subject of state regulation, much more so may contracts of insurance against loss by fire."<sup>3</sup>

the broker, the seller was at liberty to acquire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one state to the place of delivery in another state. And though it is stipulated that shipments were made from Alabama to the foreign state in some instances, that was not because of any contractual obligation so to do. In neither class of contracts, for sale or purchase, was there necessarily any movement of commodities in interstate traffic because of the contracts made by the brokers."—*Ware v. Mobile Co.*, 209 U. S. 405, 412, 413, 28 Sup. Ct. 526, 529, 52 L. Ed. 855, 14 Ann. Cas. 1031 (1908), by Day, J. (upholding a state tax on sales for future delivery).

<sup>2</sup> Compare Hamilton's National Bank Opinion, Appendix to Federalist (Ford's Ed.) 667.

<sup>3</sup> "That the business of fire insurance is not interstate commerce is decided in *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Liverpool & L. L. & F. Ins. Co. v. Massachusetts*, 10 Wall. 566, 19 L. Ed. 1029; *Philadelphia Fire Ass'n v. New York*, 119 U. S. 110, 30 L. Ed. 342, 7 Sup. Ct. 108. That the business of marine insurance is not interstate commerce is decided in *Hooper v. California*, 155 U. S. 648, 39 L. Ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. 207. In the latter case it is said that the contention that it is 'involves an erroneous conception of what constitutes interstate commerce.' We omit the reasoning by which that is demonstrated, and will only repeat: 'The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against "the perils of the sea."' And we add, or against the uncertainty of man's mortality."—*N. Y. Life Ins. Co. v. Cravens*, 178 U. S. 389, 401, 20 Sup. Ct. 962, 44 L. Ed. 1116 (1900), by McKenna, J., (life insurance).

Likewise, commerce does not include oyster culture, *McCready v. Virginia*, 94 U. S. 301, 24 L. Ed. 248 (1877); sea fishing, *Manchester v. Mass.*, 139 U. S. 240, 11 Sup. Ct. 559, 35 L. Ed. 159 (1891); manufacturing, *U. S. v. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325 (1895); taking sponges, *The Abby Dodge*, 223 U. S. 166, 32 Sup. Ct. 310, 56 L. Ed. 390 (1912); or productive industry generally, *Kidd v. Pearson*, 128 U. S. 1, 20, 21, 9 Sup. Ct. 6, 32 L. Ed. 346 (1888).

"Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade."—*McCready v. Virginia*, above cited, at pages 396, 397, by Waite, C. J.

"Commerce succeeds to manufacture and is not a part of it. \* \* \* Slight reflection will show that if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control."—*U. S. v. Knight Co.*, above cited, at page 16, by Fuller, C. J. So, also, *Kidd v. Pearson*, above cited.

THE DANIEL BALL (1871) 10 Wall. 557, 564-566, 19 L. Ed. 999, Mr. Justice FIELD (upholding the requirement of a federal license for a steamer of 123 tons plying on the Grand river between points in Michigan and so constructed as to be incapable of navigating Lake Michigan):<sup>1</sup>

"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.<sup>2</sup>

"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 reg-

<sup>1</sup> The first part of this case is printed post, p. 1261.

<sup>2</sup> Accord: See *U. S. v. Colo., etc., Ry.*, 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. (N. S.) 167, 13 Ann. Cas. 893 (1907); *Pac. Coast Ry. v. U. S.*, 173 Fed. 448, 98 C. C. A. 31 (1909); *Northern Pac. Ry. v. Washington*, 222 U. S. 370, 32 Sup. Ct. 160, 56 L. Ed. 237 (1912).

ulations 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.<sup>3</sup> 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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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.]

<sup>3</sup> "The regulation of commerce implies as much control, as far-reaching power, over an artificial as over a natural highway. They are simply the means and instrumentalities of commerce, and the power of Congress to regulate commerce carries with it power over all the means and instrumentalities by which commerce is carried on. \* \* \* We are so much accustomed to see artificial highways, such as common roads, turnpike roads, and railroads, constructed under the authority of the states, and the improvement of natural highways carried on by the general government, that at the first it might seem that there was some inherent difference in the power of the national government over them. But the grant of power is the same. \* \* \* The differences between the two are in their origin; nature provides the one, man establishes the other."—*Monongahela Nav. Co. v. United States*, 148 U. S. 312, 342, 13 Sup. Ct. 622, 632, 37 L. Ed. 463 (1893), by Brewer, J.

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 located:] 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[es] 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,<sup>1</sup> 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 can-

<sup>1</sup> Accord: *Kelley v. Rhoads*, 188 U. S. 1, 23 Sup. Ct. 250, 47 L. Ed. 359 (1903) (herd of sheep being driven 500 miles across three states to place of shipment by rail).



not 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 unfavorable 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 it-

self. 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 obvious. 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.<sup>2</sup>

<sup>2</sup> Accord (commodities subject to state taxation): *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 23 Sup. Ct. 266, 47 L. Ed. 394 (1903) (logs held in river to be shipped as needed); *American Steel Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. Ed. 538 (1904) (goods stored after interstate transit and used to fill both interstate and local orders); *General Oil Co. v. Crain*, 209 U. S. 211, 230, 231, 28 Sup. Ct. 475, 482, 52 L. Ed. 754 (1908) (same of oil), in which it was said by McKenna, J.:

"The company was doing business in the state, and its property was receiving the protection of the state. Its oil was not in movement through the state. It had reached the destination of its first shipment, and it was held there, not in necessary delay or accommodation to the means of transportation, as in *State, Detmold, Prosecutor, v. Engle* [34 N. J. Law. 425], but for the business purposes and profit of the company. It was only there for distribution, it is said, to fulfil orders already received. But to do this required that the property be given a locality in the state beyond a mere halting in its transportation. It required storage there,—the maintenance of the means of storage; of putting it in and taking it from storage. \* \* \* This certainly describes a business,—describes a purpose for which the oil is taken from transportation, brought to rest in the state, and for which the protection of the state is necessary,—a purpose outside of the mere transportation of the oil."

*General Oil Co. v. Crain* was followed in *Bacon v. Illinois*, 227 U. S. 504, 33 Sup. Ct. 299, 57 L. Ed. — (1913) (grain removed from car in transit for purpose of inspecting, weighing, grading, and cleaning it), and in *Susquehanna Coal Co. v. Mayor, etc., of South Amboy*, 228 U. S. 665, 33 Sup. Ct. 712, 57 L. Ed. — (1913) (coal stored at point in transit, for purpose of distribution).

INTERSTATE SHIPMENTS ON LOCAL BILLS OF LADING.—The carriage of goods,

## WILLSON v. BLACKBIRD CREEK MARSH CO.

(Supreme Court of United States, 1829. 2 Pet. 245, 7 L. Ed. 412.)

[Error to the High Court of Errors and Appeals of Delaware. Under legislative authority from Delaware the plaintiff company erected a dam across Blackbird creek and banked the creek. Defendants, owners of the sloop "Sally," regularly licensed and enrolled under the navigation laws of the United States, broke the dam, and were sued in trespass for \$20,000 damages. The defendants pleaded that the creek was a navigable tidal water which all citizens might of common right navigate, that said dam was wrongfully erected obstructing navigation, and that in order to pass with their sloop they broke the dam, doing as little damage as possible. Judgment upon demurrer was given against defendants on this plea and was affirmed by the state Court of Appeals. In argument before the federal Supreme Court, counsel for Willson relied upon *Gibbons v. Ogden*, ante, p. 1053, urging that the Delaware statute was inconsistent with Willson's federal coasting license. "If Delaware has no right to restrain particular vessels from using her navigable streams, she cannot stop the navigation of those streams."]

Mr. Chief Justice MARSHALL. \* \* \* [After holding that the record showed the necessary jurisdictional facts:] The jurisdiction of the court being established, the more doubtful question is to be considered, whether the act incorporating the Blackbird Creek Marsh Company is repugnant to the Constitution, so far as it authorizes a dam across the creek. The plea states the creek to be navigable, in the nature of a highway, through which the tide ebbs and flows.

The act of Assembly by which the plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks, passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those

that have been started in a regular course of transportation to a point outside of the state of origin of the shipment, is subject to federal and not to state rate regulation, regardless of whether it takes place, in whole or in part, upon local or interstate bills of lading. See *So. Pac. T. Co. v. I. C. Commis.*, post, p. 1236; *Ohio R. Commis. v. Worthington*, post, p. 1171, note 2; *Texas, etc., Ry. v. Sabine Tram Co.*, 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. — (1913); *La. R. Commis. v. Tex. & Pac. Ry.*, 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. —. Compare *Gulf, etc., Ry. v. Texas*, post, p. 1171, note; and see *New York ex rel. Pa. Ry. v. Knight*, post, p. 1127 (taxation of business of ear-rlage).

The federal Anti-Trust Act applies to a local terminal railroad delivering shipments at the end of their interstate journey, though without any through bill of lading. *United States v. Union Stock Yd. & T. Co.*, 226 U. S. 286, 33 Sup. Ct. 83, 57 L. Ed. — (1912).

which are reserved to the states. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance.

The counsel for the plaintiffs in error insist that it comes in conflict with the power of the United States "to regulate commerce with foreign nations and among the several states." If Congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern states; we should feel not much difficulty in saying that a state law coming in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several states; a power which has not been so exercised as to affect the question.

We do not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject.

Judgment affirmed.<sup>1</sup>

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### LICENSE CASES.

(Supreme Court of United States, 1847. 5 How. 504, 12 L. Ed. 256.)

[Error to the Supreme Courts of Massachusetts and Rhode Island, and to the Superior Court of New Hampshire, in the cases of *Thurlow v. Massachusetts*, *Fletcher v. Rhode Island*, and *Peirce v. New Hampshire*. In each, the state court had affirmed the validity of statutes requiring licenses for the sale of liquor, even though brought into the state from other states or foreign countries. Other facts appear

<sup>1</sup> "The only question in the case [*Gibbons v. Ogden*] was whether all vessels enrolled and licensed by Congress had not the right to pass over the same waters as freely as the vessels of the monopolists. The court said they had. \* \* \* But the court did not say that an obstruction placed in the water, which renders navigation inconvenient or hazardous, is a violation of the act for licensing and enrolling coasting vessels, or in conflict with it. \* \* \* The result of those two cases [*Gibbons v. Ogden* and *Willson v. Blackbird Creek Co.*] is this: The act of Congress gives to vessels enrolled and licensed under it the right to navigate the public waters wherever they find them navigable. \* \* \* But this act of Congress has no application to an obstruction created by a dam across the navigable water, and, without further legislation by Congress, the law of Delaware which authorized the dam was constitutional and valid."—Taney, C. J., dissenting, in *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518, 585, 586, 14 L. Ed. 249 (1851).



in the opinion below. In the federal Supreme Court there was no opinion of the court, but one by each of six justices for himself.]

Mr. Chief Justice TANEY. \* \* \* The judgments of the respective state courts are severally affirmed. The justices of this court do not, however, altogether agree in the principles upon which these cases are decided, and I therefore proceed to state the grounds upon which I concur in affirming the judgments. \* \* \* [The Massachusetts and Rhode Island statutes were upheld on the ground that no question of a sale in original packages was involved.]

I now come to the New Hampshire case, in which a different principle is involved,—the question, however, arising under the same clause in the Constitution, and depending on its construction. The law of New Hampshire prohibits the sale of distilled spirits, in any quantity, without a license from the selectmen of the town in which the party resides. The plaintiffs in error, who were merchants in Dover, in New Hampshire, purchased a barrel of gin in Boston, brought it to Dover, and sold it in the cask in which it was imported, without a license from the selectmen of the town. For this sale they were indicted, convicted, and fined, under the law above mentioned.

The power to regulate commerce among the several states is granted to Congress in the same clause, and by the same words, as the power to regulate commerce with foreign nations, and is coextensive with it. And, according to the doctrine in *Brown v. Maryland* [12 Wheat. 419, 6 L. Ed. 678], the article in question, at the time of the sale, was subject to the legislation of Congress. The present case, however, differs from *Brown v. State of Maryland* in this,—that the former was one arising out of commerce with foreign nations, which Congress had regulated by law; whereas the present is a case of commerce between two states, in relation to which Congress has not exercised its power. \* \* \* This case differs also from the cases of Massachusetts and Rhode Island; because, in these two cases, the laws of the states operated upon the articles after they had passed beyond the limits of foreign commerce, and consequently were beyond the control and power of Congress. But the law of New Hampshire acts directly upon an import from one state to another, while in the hands of the importer for sale, and is therefore a regulation of commerce, acting upon the article while it is within the admitted jurisdiction of the general government, and subject to its control and regulation. \* \* \*

It is well known that upon this subject a difference of opinion has existed, and still exists, among the members of this court. But with every respect for the opinion of my brethren with whom I do not agree, it appears to me to be very clear, that the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the states. The controlling and supreme power over commerce with foreign nations and the several states is undoubtedly conferred upon Congress. Yet, in my judgment,

the state may, nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress. Such evidently, I think, was the construction which the Constitution universally received at the time of its adoption, as appears from the legislation of Congress and of the several states; and a careful examination of the decisions of this court will show, that, so far from sanctioning the opposite doctrine, they recognize and maintain the power of the states.

The language in which the grant of power to the general government is made, certainly furnishes no warrant for a different construction, and there is no prohibition to the states. Neither can it be inferred by comparing the provision upon this subject with those that relate to other powers granted by the Constitution to the general government. On the contrary, in many instances, after the grant is made, the Constitution proceeds to prohibit the exercise of the same power by the states in express terms; in some cases absolutely, in others without the consent of Congress. And if it was intended to forbid the states from making any regulations of commerce, it is difficult to account for the omission to prohibit it, when that prohibition has been so carefully and distinctly inserted in relation to other powers, where the action of the state over the same subject was intended to be entirely excluded. But if, as I think, the framers of the Constitution (knowing that a multitude of minor regulations must be necessary, which Congress amid its great concerns could never find time to consider and provide) intended merely to make the power of the federal government supreme upon this subject over that of the states, then the omission of any prohibition is accounted for, and is consistent with the whole instrument. \* \* \*

I have said that the legislation of Congress and the states has conformed to this construction from the foundation of the government. This is sufficiently exemplified in the laws in relation to pilots and pilotage, and the health and quarantine laws. \* \* \* [Here follow references to various state laws upon these subjects.] Now, so far as these laws interfere with shipping, navigation, or foreign commerce, or impose burdens upon either of them, they are unquestionably regulations of commerce. Yet, as I have already said, the power has been continually exercised by the states, has been continually recognized by Congress ever since the adoption of the Constitution, and constantly affirmed and supported by this court whenever the subject came before it. \* \* \* [Here follows a discussion of *Gibbons v. Ogden*, ante, p. 1053, and of *Willson v. Blackbird Creek Co.*, ante, p. 1075, in the course of which occurs the passage printed ante, p. 323.]

Upon the whole, therefore, the law of New Hampshire is, in my judgment, a valid one. For, although the gin sold was an import from another state, and Congress have clearly the power to regulate such

importations, under the grant of power to regulate commerce among the several states, yet, as Congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the state as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the state may suppose to be its interest or duty to pursue.

Judgments affirmed.

[CATRON, WOODBURY, McLEAN, GRIER, and DANIEL, JJ., gave concurring opinions, which differed chiefly as to whether the state statutes here should be classified as regulations of commerce, or not. NELSON, J., concurred with TANEY and CATRON, JJ.; and WAYNE and MCKINLEY, JJ., apparently concurred generally.]<sup>1</sup>

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### 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 de-

<sup>1</sup> It was said later that a majority of the judges in the principal case thought the power of Congress not exclusive. See *Passenger Cases*, 7 How. 283, 470, 559, 12 L. Ed. 702 (1849). This case held invalid a state statute taxing persons coming from foreign countries, as inconsistent with the Constitution, and with certain acts of Congress and federal treaties. A majority of the court refused to affirm that the power of Congress was exclusive. Four judges dissented from the decision. See, also, *Mayor of N. Y. v. Milln*, 11 Pet. 102, 9 L. Ed. 648 (1837).

mand, 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. Enter-

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

Judgment affirmed.<sup>1</sup>

[McLEAN and WAYNE, JJ., dissented, and DANIEL, J., concurred for other reasons.]

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### SECTION 3.—STATE LEGISLATION DISCRIMINATING AGAINST NATIONAL COMMERCE

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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 li-

<sup>1</sup> The rule established by this case was earlier suggested by Webster as counsel in *Gilbous v. Ogden*, 9 Wheat. 9-14, 6 L. Ed. 23 (1824). See, also, *Woodbury, J.*, in *License Cases*, 5 How. at 624, 625, 12 L. Ed. 256 (1847), and in *Passenger Cases*, 7 How. at 559-561, 12 L. Ed. 702 (1849).

Most of the subsequent cases in which state pilotage laws have been upheld, except where inconsistent with federal statutes, are cited in *Anderson v. Pac. S. S. Co.*, 225 U. S. 187, 195, 201, 32 Sup. Ct. 626, 56 L. Ed. 1047 (1912). Other cases are *Thompson v. Darden*, 198 U. S. 310, 25 Sup. Ct. 660, 49 L. Ed. 1064 (1905); *Leech v. La.*, 214 U. S. 175, 29 Sup. Ct. 552, 53 L. Ed. 956 (1909).

censes 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. \* \* \*

[After discussing *Brown v. Maryland*, ante, p. 1039, and p. 1062:] 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.<sup>1</sup>

MINNESOTA v. BARBER (1890) 136 U. S. 313, 321-323, 10 Sup. Ct. 862, 34 L. Ed. 455, Mr. Justice HARLAN (holding invalid the Minnesota statute stated below):

"It may be the opinion of some that the presence of disease in animals, at the time of their being slaughtered, cannot be determined by inspection of the meat taken from them; but we are not aware that such is the view universally, or even generally, entertained. But if, as alleged, the inspection of fresh beef, veal, mutton, lamb, or pork will not necessarily show whether the animal from which it was taken was diseased when slaughtered, it would not follow that a statute like the one before us is within the constitutional power of the state to enact. On the contrary, the enactment of a similar statute by each one of the states composing the Union would result in the destruction of commerce among the several states, so far as such commerce is involved in the transportation from one part of the country to another of animal meats designed for human food, and entirely free from disease. A careful examination of the Minnesota act will place this construction of it beyond question.

"The first section prohibits the sale of any fresh beef, veal, mutton, lamb, or pork for human food, except as provided in that act. The second and third sections provide that all cattle, sheep, and swine to be slaughtered for human food within the respective jurisdictions of

<sup>1</sup> Accord (as to various discriminatory pecuniary exactions): *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. Ed. 1015 (1878) (auction duties); *Guy v. Baltimore*, 100 U. S. 434, 25 L. Ed. 743 (1880) (wharfage fees); *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. 454, 29 L. Ed. 691 (1886) (liquor licenses); *Darnell & Son v. Memphis*, 208 U. S. 113, 28 Sup. Ct. 247, 52 L. Ed. 413 (1908) (property tax); *Com. v. Caldwell*, 190 Mass. 355, 76 N. E. 955, 112 Am. St. Rep. 334, 5 Anu. Cas. 879 (1906) (license required for peddling products of foreign countries only). See *Robbins v. Shelby Tax Dist.*, post, p. 1132.

"None of [the] cases sustain the doctrine that an occupation can be taxed if the tax is so specialized as to operate as a discriminative burden against the introduction and sale of the products of another state, or against the citizens of another state."—Bradley, J., in *Walling v. Michigan*, 116 U. S. 446, 461, 6 Sup. Ct. 454, 460, 29 L. Ed. 691 (1886).

"Excise taxes levied by a state upon commodities not produced to any considerable extent by the citizens of the state may, perhaps, be so excessive and unjust in respect to the citizens of the other states as to violate [the commerce clause] of the Constitution, even though Congress has not legislated upon that precise subject."—Clifford, J., in *Ward v. Maryland*, 12 Wall. 418, 429, 20 L. Ed. 449 (1871). See the dissenting opinion of Nelson, J., in *Woodruff v. Parham*, 8 Wall. 123, 145-147, 19 L. Ed. 382 (1869) as to the validity of such taxes. Compare the argument of "virtual discrimination" denied as to pilotage regulations in *Thompson v. Darden*, 198 U. S. 310, 25 Sup. Ct. 660, 49 L. Ed. 1064 (1905).



the inspectors, shall be inspected by the proper local inspector appointed in Minnesota, within twenty-four hours before the animals are slaughtered, and that a certificate shall be made by such inspector, showing (if such be the fact) that the animals, when slaughtered, were found healthy and in suitable condition to be slaughtered for human food. The fourth section makes it a misdemeanor, punishable by fine or imprisonment, for any one to sell, expose, or offer for sale, for human food, in the state, any fresh beef, veal, mutton, lamb, or pork, not taken from an animal inspected and 'certified before slaughter, by the proper local inspector' appointed under that act. As the inspection must take place within the twenty-four hours immediately before the slaughtering, the act, by its necessary operation, excludes from the Minnesota market, practically, all fresh beef, veal, mutton, lamb, or pork—in whatever form, and although entirely sound, healthy, and fit for human food—taken from animals slaughtered in other states; and directly tends to restrict the slaughtering of animals, whose meat is to be sold in Minnesota for human food, to those engaged in such business in that state. This must be so, because the time, expense, and labor of sending animals from points outside of Minnesota to points in that state to be there inspected, and bringing them back, after inspection, to be slaughtered at the place from which they were sent—the slaughtering to take place within twenty-four hours after inspection, else the certificate of inspection becomes of no value—will be so great as to amount to an absolute prohibition upon sales, in Minnesota, of meat from animals not slaughtered within its limits. When to this is added the fact that the statute, by its necessary operation, prohibits the sale, in the state, of fresh beef, veal, mutton, lamb, or pork, from animals that may have been inspected carefully and thoroughly in the state where they were slaughtered, and before they were slaughtered, no doubt can remain as to its effect upon commerce among the several states. It will not do to say—certainly no judicial tribunal can, with propriety, assume—that the people of Minnesota may not, with due regard to their health, rely upon inspections in other states of animals there slaughtered for purposes of human food. If the object of the statute had been to deny altogether to the citizens of other states the privilege of selling, within the limits of Minnesota, for human food, any fresh beef, veal, mutton, lamb, or pork, from animals slaughtered outside of that state, and to compel the people of Minnesota, wishing to buy such meats, either to purchase those taken from animals inspected and slaughtered in the state, or to incur the cost of purchasing them, when desired for their own domestic use, at points beyond the state, that object is attained by the act in question. Our duty to maintain the Constitution will not permit us to shut our eyes to these obvious and necessary results of the Minnesota statute. If this legislation does not make such discrimination against the prod

ucts and business of other states in favor of the products and business of Minnesota as interferes with and burdens commerce among the several states, it would be difficult to enact legislation that would have that result."<sup>1</sup>

REYMANN BREWING CO. v. BRISTER (1900) 179 U. S. 445, 451-454, 21 Sup. Ct. 201, 45 L. Ed. 269, Mr. Justice SHIRAS (upholding an Ohio statute taxing each place where intoxicating liquors were sold for other than mechanical, medical, or sacramental purposes, \$350 yearly, except sales made at the manufactory by the manufacturer in quantities of one gallon or over):

"The effect of this is claimed to be that the domestic manufacturer may sell liquor, in quantities of one gallon or more, at the place of manufacture without being subjected to the tax, and that thus he has an advantage over the foreign manufacturer, who can only sell, in Ohio, at some other place than the place of manufacture, and is thereby subjected to the tax. In other words, while the domestic manufacturer must pay the tax if he sells at other places than the place of manufacture, yet as he is declared not to be within the act in selling at the place of manufacture in quantities not less than one gallon at any one time, such a provision operates as an illegal dis-

<sup>1</sup> Accord (as to various discriminatory regulations): *Brimmer v. Rehman*, 138 U. S. 78, 11 Sup. Ct. 213, 34 L. Ed. 862 (1891) (inspection of meat); *Voight v. Wright*, 141 U. S. 62, 11 Sup. Ct. 855, 35 L. Ed. 638 (1891) (inspection of flour); *Scott v. Donald*, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. Ed. 632 (1897) (liquor selling); *West v. Kansas Nat. Gas Co.*, 221 U. S. 229, 261, 262, 31 Sup. Ct. 564, 573, 574, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193 (1911) (right of eminent domain and use of state highways forbidden to foreign corporations engaged in interstate piping of gas, while permitted to domestic corporations engaged in intrastate gas business), by McKenna, J.:

"The power of the state of Oklahoma over highways is much discussed by appellant and appellees; the appellant contending for a power practically absolute, as exercised under the statute, making the highways impassable barriers to the pipe lines of appellees. The appellees contend for a more modified and limited right in the state, one not extending beyond an easement of public passage, subject, therefore, to certain rights in the abutting owners, which rights can be transferred; and further contend that even if the power of the state be not so limited, it cannot be exercised to discriminate against interstate commerce.

"The rights of abutting owners we will not discuss, nor the rights derived from them by appellees, except to say that whatever rights they had, they conveyed to appellees, and against them there is no necessity of resorting to the exercise of eminent domain. We place our decision on the character and purpose of the Oklahoma statute. The state, as we have seen, grants the use of the highways to domestic corporations engaged in intrastate transportation of natural gas, giving such corporations even the right to the longitudinal use of the highways. It denies to appellees the lesser right to pass under them or over them, notwithstanding it is conceded in the pleadings that the greater use given to domestic corporations is no obstruction to them. This discrimination is beyond the power of the state to make. As said by the circuit court of appeals in the eighth circuit, no state can by action or inaction prevent, unreasonably burden, discriminate against, or directly regulate, interstate commerce or the right to carry it on. And in all of these inhibited particulars the statute of Oklahoma offends."

crimination against the foreign competitor, who must necessarily sell at places other than the place of manufacture.

"Under this provision, the manufacturers, whether within or without the state, may sell at the manufactory and ship to any part of the state of Ohio, and the incidental disadvantage that the foreign manufacturer is under that if, instead of selling at the place of his plant, he wishes to establish a place within the state of Ohio, he is obliged to pay the tax, does not appear to arise out of any intention on the part of the state legislature to make a hostile discrimination against foreign manufacturers. If an Ohio corporation or copartnership should establish its place of manufacture in another state it would be subjected to the tax if it sold intoxicating liquor at a place within the state of Ohio; and if a foreign corporation should manufacture at a place within Ohio, it would sell its product, in quantities not less than one gallon, without being subjected to the tax.

"In exempting sales in quantities exceeding one gallon at the place of manufacture, and in imposing the tax upon such sales when made at places elsewhere, the legislature of Ohio was, in the exercise of its police power, aiming to restrict the evils of saloons, or places where liquors are drunk. By imposing the tax upon the latter, the law, to some extent, is calculated to lessen an acknowledged source of vice and disorder.

"The supreme court of the state of Ohio, in construing the statute in question, has clearly pointed out the reasons that actuated the legislature in distinguishing between places where the liquors are manufactured and those where liquors are sold to be drunk on the premises. Thus in the case of *Adler v. Whitbeck*, 44 Ohio St. 574, 9 N. E. 682, that court said: 'It was for the legislature to determine the form of the traffic that required to be regulated as a source of evil. It has in a measure drawn a line between a distillery and a brewery on the one hand and a saloon on the other. There is nothing unreal in the distinction. It is known by all men, and in one respect probably too well by many men. And unless absolute prohibition is resorted to no more practical distinction could be made.'"<sup>1</sup>

<sup>1</sup> Compare *Cox v. Texas*, 202 U. S. 446, 26 Sup. Ct. 671, 50 L. Ed. 1099 (1906).

In *New Mexico v. Denver, etc., Ry.*, 203 U. S. 38, 54, 27 Sup. Ct. 1, 5, 51 L. Ed. 78 (1906), a statute was upheld forbidding the shipment out of the territory by common carriers of any hides whose brands had not been officially inspected, the object sought being the prevention of the theft of hides. Day, J., said:

"It is argued that this act lays a special burden upon interstate commerce, because, under the law, hides not offered for transportation are not required to be inspected after thirty days in slaughterhouses and not at all outside of slaughterhouses. But legislation is not void because it meets the exigencies of a particular situation. Other statutory provisions apply to property remaining in the territory, where possibly it may be found and identified. When shipped beyond the limits of the territory the means of reaching it are beyond

## SECTION 4.—NON-DISCRIMINATORY STATE TAXATION

## I. TAXES AFFECTING TRANSPORTATION OR COMMUNICATION

## CASE OF THE STATE FREIGHT TAX.

(Supreme Court of United States, 1873. 15 Wall. 232, 21 L. Ed. 146.)

[Error to the Supreme Court of Pennsylvania, which had upheld a statute, the details of which are given in the opinion below, taxing the carriage of freight in the state from two to five cents a ton, according to its character.]

Mr. Justice STRONG. \* \* \* The case presents the question whether the statute in question—so far as it imposes a tax upon freight taken up within the state and carried out of it, or taken up outside the state and delivered within it, or, in different words, upon all freight other than that taken up and delivered within the state—is not repugnant to the provision of the Constitution of the United States which ordains “that Congress shall have power to regulate commerce with foreign nations and among the several states.” \* \* \*

Before proceeding, however, to a consideration of the direct question whether the statute is in direct conflict with any provision of the Constitution of the United States, it is necessary to have a clear apprehension of the subject and the nature of the tax imposed by it. It has repeatedly been held that the constitutionality, or unconstitutionality of a state tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid. \* \* \*

Upon what, then, is the tax imposed by the Act of August 25th, 1864, to be considered as laid? Where does the substantial burden rest? Very plainly it was not intended to be, nor is it in fact, a tax upon the franchise of the carrying companies, or upon their property,

local control, and it is the purpose of §§ 3 and 4 of the act of 1901 to preserve within the territory a record of the brands identifying the property and naming the purchaser or shipper. Certainly we cannot judicially say that there can be no valid reason for making the inspection in question apply only to hides offered for transportation beyond the territory, and that for that reason the tax is an arbitrary discrimination against interstate traffic.”

Accord: *Turner v. Maryland*, 107 U. S. 38, 2 Sup. Ct. 44, 27 L. Ed. 370 (1883) (inspection required only of tobacco to be shipped out of state, with view to enhancing reputation of tobacco grown there); *Cooley v. Board of Wardens*, 12 How. 299, 13 L. Ed. 996 (1851) (vessels in local coal trade exempted from compulsory half-pilotage fees) [now changed by federal statute—*Sprague v. Thompson*, 118 U. S. 96, 6 Sup. Ct. 588, 30 L. Ed. 115 (1886)].

A purely incidental discrimination against interstate commerce, as by a municipality specifying a kind of pavement that can be supplied only from non-interstate sources, is of course valid. *Field v. Barber Asphalt Co.*, 194 U. S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142 (1904).

or upon their business measured by the number of tons of freight carried. On the contrary, it is expressly laid upon the freight carried. The companies are required to pay to the state treasurer for the use of the commonwealth, "on each two thousand pounds of freight so carried," a tax at the specified rates. And this tax is not proportioned to the business done in transportation. It is the same whether the freight be moved one mile or three hundred. If freight be put upon a road and carried at all, tax is to be paid upon it, the amount of the tax being determined by the character of the freight. And when it is observed that the act provides "where the same freight shall be carried over and upon different but continuous lines, said freight shall be chargeable with tax as if it had been carried upon one line, and the whole tax shall be paid by such one of said companies as the state treasurer may select and notify thereof," no room is left for doubt. This provision demonstrates that the tax has no reference to the business of the companies. In the case of connected lines thousands of tons may be carried over the line of one company without any liability of that company to pay the tax. The state treasurer is to decide which of several shall pay the whole. There is still another provision in the act which shows that the burden of the tax was not intended to be imposed upon the companies designated by it, neither upon their franchises, their property, or their business. The provision is as follows: "Corporations whose lines of improvements are used by others for the transportation of freight, and whose only earnings arise from tolls charged for such use, are authorized to add the tax hereby imposed to said tolls, and to collect the same therewith." Evidently this contemplates a liability for the tax beyond that of the company required to pay it into the treasury, and it authorizes the burden to be laid upon the freight carried, in exemption of the corporation owning the roadway. It carries the tax over and beyond the carrier to the thing carried. Improvement companies, not themselves authorized to act as carriers, but having only power to construct and maintain roadways, charging tolls for the use thereof, are generally limited by their charters in the rates of toll they are allowed to charge. Hence the right to increase the tolls to the extent of the tax was given them in order that the tax might come from the freight transported, and not from the treasury of the companies. It required no such grant to companies which not only own their roadway, but have the right to transport thereon. Though the tolls they may exact are limited, their charges for carriage are not. They can, therefore, add the tax to the charge for transportation without further authority. In view of these provisions of the statute it is impossible to escape from the conviction that the burden of the tax rests upon the freight transported, or upon the consignor or consignee of the freight (imposed because the freight is transported), and that the company authorized to collect the tax and required to pay it into the state treasury is, in effect, only a tax-gatherer. \* \* \*



Considering it, then, as manifest that the tax demanded by the act is imposed, not upon the company, but upon the freight carried, and because carried, we proceed to inquire whether, so far as it affects commodities transported through the state, or from points without the state to points within it, or from points within the state to points without it, the act is a regulation of interstate commerce. Beyond all question the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one state to another was the prominent idea in the minds of the framers of the Constitution, when to Congress was committed the power to regulate commerce among the several states. A power to prevent embarrassing restrictions by any state was the thing desired. The power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations. It would be absurd to suppose that the transmission of the subjects of trade from the state to the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade either with foreign nations or among the states. In his work on the Constitution, § 1057, Judge Story asserts that the sense in which the word commerce is used in that instrument includes not only traffic, but intercourse and navigation. And in the Passenger Cases, 7 How. 416, 12 L. Ed. 702, it was said: "Commerce consists in selling the superfluity, in purchasing articles of necessity, as well productions as manufactures, in buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight." Nor does it make any difference whether this interchange of commodities is by land or by water. In either case the bringing of the goods from the seller to the buyer is commerce. Among the states it must have been principally by land when the Constitution was adopted.

Then, why is not a tax upon freight transported from state to state a regulation of interstate transportation, and, therefore, a regulation of commerce among the states? Is it not prescribing a rule for the transporter, by which he is to be controlled in bringing the subjects of commerce into the state, and in taking them out? The present case is the best possible illustration. The Legislature of Pennsylvania has in effect declared that every ton of freight taken up within the state and carried out, or taken up in other states and brought within her limits, shall pay a specified tax. The payment of that tax is a condition upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other states would be rendered impossible. The same power that may impose a tax of two cents per ton upon coal carried out of the state, may impose one of five dollars. Such an imposition, whether large or small, is a restraint of the priv-

ilege or right to have the subjects of commerce pass freely from one state to another without being obstructed by the intervention of state lines. It would hardly be maintained, we think, that had the state established custom-houses on her borders, wherever a railroad or canal comes to the state line, and demanded at these houses a duty for allowing merchandise to enter or to leave the state upon one of those railroads or canals, such an imposition would not have been a regulation of commerce with her sister states. Yet it is difficult to see any substantial difference between the supposed case and the one we have in hand. The goods of no citizen of New York, New Jersey, Ohio, or of any other state, may be placed upon a canal, railroad, or steamboat within the state for transportation any distance, either into or out of the state, without being subjected to the burden. Nor can it make any difference that the legislative purpose was to raise money for the support of the state government, and not to regulate transportation. It is not the purpose of the law, but its effect, which we are now considering. Nor is it at all material that the tax is levied upon all freight, as well that which is wholly internal as that embarked in interstate trade. We are not at this moment inquiring further than whether taxing goods carried because they are carried is a regulation of carriage. The state may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the state. Nor is a rule prescribed for carriage of goods through, out of, or into a state any the less a regulation of transportation because the same rule may be applied to carriage which is wholly internal. Doubtless a state may regulate its internal commerce as it pleases. If a state chooses to exact conditions for allowing the passage or carriage of persons or freight through it into another state, the nature of the exaction is not changed by adding to it similar conditions for allowing transportation wholly within the state. \* \* \*

If, then, this is a tax upon freight carried between states, and a tax because of its transportation, and if such a tax is in effect a regulation of interstate commerce, the conclusion seems to be inevitable that it is in conflict with the Constitution of the United States. \* \* \* The rule has been asserted with great clearness, that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress. *Cooley v. Port Wardens*, 12 How. 299, 13 L. Ed. 996; *Gilman v. Philadelphia* [3 Wall. 713, 18 L. Ed. 96]; *Crandall v. State of Nevada*, 6 Wall. 42, 18 L. Ed. 745. Surely transportation of passengers or merchandise through a state, or from one state to another, is of this nature. It is of national importance that over that subject there should be but one regulating power, for if one state can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and

thus commercial intercourse between states remote from each other may be destroyed. The produce of Western states may thus be effectually excluded from Eastern markets, for though it might bear the imposition of a single tax, it would be crushed under the load of many. It was to guard against the possibility of such commercial embarrassments, no doubt, that the power of regulating commerce among the states was conferred upon the federal government. \* \* \*

Merchandise is the subject of commerce. Transportation is essential to commerce; and every burden laid upon it is pro tanto a restriction. Whatever, therefore, may be the true doctrine respecting the exclusiveness of the power vested in Congress to regulate commerce among the states, we regard it as established that no state can impose a tax upon freight transported from state to state, or upon the transporter because of such transportation. \* \* \*

Judgment reversed.<sup>1</sup>

[SWAYNE, J., gave a short dissenting opinion with which DAVIS, J., concurred.]

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#### RAILROAD CO. v. MARYLAND.

(Supreme Court of United States, 1875. 21 Wall. 456, 22 L. Ed. 678.)

[Error to the Court of Appeals of Maryland. Maryland granted to the Baltimore & Ohio Railroad Company a charter to construct and operate a railroad between Washington and Baltimore for passengers and freight, the passenger fare for the entire distance not to exceed \$2.50 and shorter distances in proportion. The company was to pay to the state every six months one-fifth of the gross passenger receipts from the road. After paying this for many years, the company finally disputed the validity of this stipulation and discontinued payments. The state brought suit for these payments due from 1860 to 1870, and a judgment in its favor was affirmed by the state Court of Appeals.]

Mr. Justice BRADLEY. \* \* \* Commerce on land between the different states is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the state and federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the

<sup>1</sup> Accord: *W. U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067 (1882). In the *Passenger Cases*, 7 How. 253, 12 L. Ed. 702 (1849), taxes imposed by New York and Massachusetts upon masters of vessels, for each person brought into the state from other states or abroad, were held invalid under the commerce clause. So, *Henderson v. Mayor of N. Y.*, 92 U. S. 259, 23 L. Ed. 513 (1876); *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. Ed. 550 (1876).

In *Crandall v. Nevada*, post, p. 1307, a state tax of \$1 upon every person leaving Nevada by any common carrier, to be paid by the carrier, was held to violate various rights of United States citizens implied from other parts of the Constitution, but the majority of the court expressly refused to rest the decision upon the commerce clause.

Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that state interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land. This, when the Constitution was adopted, was entirely performed on common roads, and in vehicles drawn by animal power. No one at that day imagined that the roads and bridges of the country (except when the latter crossed navigable streams) were not entirely subject, both as to their construction, repair, and management, to state regulation and control. They were all made either by the states or under their authority. The power of the state to impose or authorize such tolls, as it saw fit, was unquestioned. No one then supposed that the wagons of the country, which were the vehicles of this commerce, or the horses by which they were drawn, were subject to national regulation. The movement of persons and merchandise, so long as it was as free to one person as to another, to the citizens of other states as to the citizens of the state in which it was performed, was not regarded as unconstitutionally restricted and trammelled by tolls exacted on bridges or turnpikes, whether belonging to the state or to private persons. And when, in process of time, canals were constructed, no amount of tolls which was exacted thereon by the state or the companies that owned them, was ever regarded as an infringement of the Constitution. When constructed by the state itself, they might be the source of revenues largely exceeding the outlay without exciting even the question of constitutionality. So when, by the improvements and discoveries of mechanical science, railroads came to be built and furnished with all the apparatus of rapid and all-absorbing transportation, no one imagined that the state, if itself owner of the work, might not exact any amount whatever of toll or fare or freight, or authorize its citizens or corporations, if owners, to do the same. Had the state built the road in question it might, to this day, unchallenged and unchallengeable, have charged two dollars and fifty cents for carrying a passenger between Baltimore and Washington. So might the railroad company, under authority from the state, if it saw fit to do so. These are positions which must be conceded. No one has ever doubted them.

This unlimited right of the state to charge, or to authorize others to charge, toll, freight, or fare for transportation on its roads, canals, and railroads, arises from the simple fact that they are its own works, or constructed under its authority. It gives them being. It has a right to exact compensation for their use. It has a discretion as to the

amount of that compensation. That discretion is a legislative—a sovereign—discretion, and in its very nature is unrestricted and uncontrolled. The security of the public against any abuse of this discretion resides in the responsibility to the public of those who, for the time being, are officially invested with it. In this respect it is like all other legislative power when not controlled by specific constitutional provisions, and the courts cannot presume that it will be exercised detrimentally.

So long, therefore, as it is conceded (as it seems to us it must be) that the power to charge for transportation, and the amount of the charge, are absolutely within the control of the state, how can it matter what is done with the money, whether it goes to the state or to the stockholders of a private corporation? As before said, the state could have built the road itself and charged any rate it chose, and could thus have filled the coffers of its treasury without being questioned therefor. How does the case differ, in a constitutional point of view, when it authorizes its private citizens to build the road and reserves for its own use a portion of the earnings? We are unable to see any distinction between the two cases. In our judgment there is no solid distinction. If the state, as a consideration of the franchise, had stipulated that it should have all the passenger money, and that the corporation should have only the freight for the transportation of merchandise, and the corporation had agreed to those terms, it would have been the same thing. It is simply the exercise by the state of absolute control over its own property and prerogatives.

The exercise of power on the part of a state is very different from the imposition of a tax or duty upon the movements or operations of commerce between the states. Such an imposition, whether relating to persons or goods, we have decided the states cannot make, because it would be a regulation of commerce between the states in a matter in which uniformity is essential to the rights of all, and, therefore, requiring the exclusive legislation of Congress. *Crandall v. Nevada*, 6 Wall. 42, 18 L. Ed. 745; *Case of Freight Tax*, 15 Wall. 232, 279, 21 L. Ed. 146. It is a tax because of the transportation, and is, therefore, virtually a tax on the transportation, and not in any sense a compensation therefor, or for the franchises enjoyed by the corporation that performs it.

It is often difficult to draw the line between the power of the state and the prohibitions of the Constitution. Whilst it is commonly said that the state has absolute control over the corporations of its own creation, and may impose upon them such conditions as it pleases; and like control over its own territory, highways, and bridges, and may impose such exactions for their use as it sees fit; on the other hand, it is conceded that it cannot regulate or impede interstate commerce, nor discriminate between its own citizens and those of other states prejudicially to the latter. The problem is to reconcile the two propositions; and as the latter arises from the provisions of the Constitution of the



United States, and is, therefore, paramount, the question is practically reduced to this: What amounts to a regulation of commerce between the states, or to a discrimination against the citizens of other states? This is often difficult to determine. In view, however, of the very plenary powers which a state has always been conceded to have over its own territory, its highways, its franchises, and its corporations, we cannot regard the stipulation in question as amounting to either of these unconstitutional acts. It is not within the category of such acts. It may, incidentally, affect transportation, it is true; but so does every burden or tax imposed on corporations or persons engaged in that business. Such burdens, however, are imposed *diverso intuitu*, and in the exercise of an undoubted power. The state is conceded to possess the power to tax its corporations; and yet every tax imposed on a carrier corporation affects more or less the charges it is compelled to make upon its customers. So, the state has an undoubted power to exact a bonus for the grant of a franchise, payable in advance or in futuro; and yet that bonus will necessarily affect the charge upon the public which the donee of the franchise will be obliged to impose. The stipulated payment in this case, indeed, is nothing more nor less than a bonus; and so long as the rates of transportation are entirely discretionary with the states, such a stipulation is clearly within their reserved powers. \* \* \*

Judgment affirmed.<sup>1</sup>

[MILLER, J., dissented in a brief opinion.]

<sup>1</sup> Accord: *State v. Ill. Cent. R. Co.*, 246 Ill. 188, 205-221, 92 N. E. 814 (1910) (exaction of 7 per cent. of railroad gross receipts from all business as compensation for grant of franchise). See article by J. P. Hall, 2 Ill. L. Rev. 21 (1907).

In *Ashley v. Ryan*, 153 U. S. 436, 440-443, 446, 14 Sup. Ct. 865, 866, 38 L. Ed. 773 (1894), Ohio required, as a condition precedent to the incorporation or consolidation of corporations under the laws of that state, the payment of a small percentage of the total capital stock of the proposed corporation or consolidation. This was held a valid exaction for the consolidation of a number of railroad corporations of various states, whose united lines formed a highway for interstate commerce, Mr. Justice White saying:

"The rights thus sought [those of Ohio corporations] could only be acquired by the grant of the state of Ohio, and depended for their existence upon the provisions of its laws. Without that state's consent, they could not have been procured. \* \* \* As it was within the discretion of the state to withhold or grant the privilege of exercising corporate existence, it was, as a necessary result, also within its power to impose whatever conditions it might deem fit as prerequisite to corporate life. \* \* \*

"That the right to be a state corporation depends solely upon the grace of the state, and is not a right inherent in the parties, is settled. \* \* \* [Here follows a quotation from *California v. Cent. Pac. Ry.*, ante, p. 618, concerning the nature of a corporate franchise.] In *Home Ins. Co. v. New York*, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1025 (1890) through Mr. Justice Field, we said: 'The right or privilege to be a corporation, or to do business as such body, \* \* \* is a right or privilege by which several individuals may unite themselves under a common name, and act as a single person, with a succession of members, without dissolution or suspension of business, and with a limited individual liability. The granting of such right or privilege rests entirely within the discretion of the state.' \* \* \* The power of corporations of other states to become corporations, or to constitute themselves a consolidated corporation under the Ohio statutes, and thus avail of the rights

## GLOUCESTER FERRY CO. v. PENNSYLVANIA.

(Supreme Court of United States, 1885. 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158.)

[Error to the Supreme Court of Pennsylvania. The Gloucester Ferry Company was incorporated in New Jersey with a capital stock of \$50,000, and was engaged solely in ferrying passengers and freight across the Delaware river between New Jersey and Philadelphia. Its only physical property permanently located in Pennsylvania was the landing wharf leased by it in Philadelphia. Its boats were all registered at Camden, N. J., and never remained in Pennsylvania except to discharge and receive passengers and freight. Under a Pennsylvania statute taxing all corporations doing business in the state, the ferry company was taxed upon the value of all its capital stock, and a judgment for these taxes was affirmed by the state court.]

Mr. Justice FIELD. The supreme court of the state, in giving its decision, stated that the single question presented for consideration was whether the company did business within the state of Pennsylvania during the period for which the taxes were imposed; and it held that it did do business there, because it landed and received pas-

given thereby, is as completely dependent on the will of that state as is the power of its individual citizens to become a corporate body, or the power of corporations of its own creation to consolidate under its laws. *Bank v. Earle* [13 Pet. 519, 10 L. Ed. 274 (1839)] supra; *Insurance Co. v. French* [18 How. 404, 15 L. Ed. 451 (1855)] supra; *Paul v. Virginia*, 8 Wall. 168, 181, 19 L. Ed. 357 (1869). \* \* \*

"It follows from these principles that a state, in granting a corporate privilege to its own citizens, or, what is equivalent thereto, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws, may impose such conditions as it deems proper, and that the acceptance of the franchise in either case implies a submission to the conditions without which the franchise could not have been obtained. \* \* \*

"The question here is not the power of the state of Ohio to lay a charge on interstate commerce, or to prevent a foreign corporation from engaging in interstate commerce within its confines, but simply the right of the state to determine upon what conditions its laws as to the consolidation of corporations may be availed of. Considering, as we do, that the payment of the charge was a condition imposed by the state of Ohio upon the taking of corporate being or the exercise of corporate franchises, the right to which depended solely on the will of that state, and hence that liability for the charge was entirely optional, we conclude that the exaction constituted no tax upon interstate commerce, or the right to carry on the same, or the instruments thereof."

May a state refuse to permit the use of its highways, either for crossing or passage, to all pipelines for natural gas, even though engaged in interstate commerce? See *Haskell v. Cowham*, 187 Fed. 403, 109 C. C. A. 235 (1913) (cases); *West v. Kansas Nat. Gas Co.*, 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716 (1911), annotated in 35 L. R. A. (N. S.) 1195-1198. Compare *Western Union Co. v. Richmond*, 224 U. S. 160, 32 Sup. Ct. 449, 56 L. Ed. 710 (1912) (cases), discussing the effect of the federal statute of 1866 [14 Stat. 221, c. 230, U. S. Comp. St. 1901, p. 3579], authorizing telegraph companies to maintain lines over the post roads of the United States. See, also, *Western U. Co. v. Penn. Ry.*, 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Ed. 312, 1 Anu. Cas. 517 (1904); *Williams v. Talladega*, 226 U. S. 464, 33 Sup. Ct. 116, 57 L. Ed. — (1912).

sengers and freight at its wharf in Philadelphia, observing that its whole income was derived from the transportation of freight and passengers from its wharf at Gloucester to its wharf at Philadelphia, and from its wharf at Philadelphia to its wharf at Gloucester; that at each of these points its main business, namely, the receipt and landing of freight and passengers, was transacted; that for such business it was dependent as much upon the one place as upon the other; that, as it could hold the wharf at Gloucester, which it owned in fee, only by purchase by virtue of the statutory will of the legislature of New Jersey, so it could hold by lease the one in Philadelphia only by the implied consent of the legislature of the commonwealth; and that, therefore, it "was dependent equally, not only for its business, but its power to do that business, upon both states, and might therefore be taxed by both." 98 Pa. 105, 116.'

As to the first reason thus expressed, it may be answered that the business of landing and receiving passengers and freight at the wharf in Philadelphia is a necessary incident to, indeed is a part of, their transportation across the Delaware river from New Jersey. Without it that transportation would be impossible. Transportation implies the taking up of persons or property at some point and putting them down at another. A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the two states involved in such transportation.

It matters not that the transportation is made in ferry-boats which pass between the states every hour of the day. The means of transportation of persons and freight between the states does not change the character of the business as one of commerce, nor does the time within which the distance between the states may be traversed. Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free, and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of them, which are local and limited in their nature or sphere of operation, the states may prescribe regulations until Congress intervenes and assumes control of them, yet, when they are national in their character, and require uniformity of regulation affecting alike all the states, the power of Congress is exclusive. Necessarily that power alone can prescribe regulations which are to govern the whole country. And it needs no argument to show that the commerce with

foreign nations and between the states, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by state legislation. Otherwise, there would be no protection against conflicting regulations of different states, each legislating in favor of its own citizens and products, and against those of other states. It was from apprehension of such conflicting and discriminating state legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the states was vested in Congress. Nor does it make any difference whether such commerce is carried on by individuals or by corporations. \* \* \*

As the second reason given for the decision below, that the company could not lease its wharf in Philadelphia except by the implied consent of the legislature of the commonwealth, and thus is dependent upon the commonwealth to do its business, and therefore can be taxed there, it may be answered that no foreign or interstate commerce can be carried on with the citizens of a state without the use of a wharf, or other place within its limits on which passengers and freight can be landed and received, and the existence of power in a state to impose a tax upon the capital of all corporations engaged in foreign or interstate commerce for the use of such places would be inconsistent with and entirely subversive of the power vested in Congress over such commerce. Nearly all the lines of steam-ships and of sailing vessels between the United States and England, France, Germany, and other countries of Europe, and between the United States and South America, are owned by corporations; and if by reason of landing or receiving passengers and freight at wharves, or other places in a state, they can be taxed by the state on their capital stock, on the ground that they are thereby doing business within her limits, the taxes which may be imposed may embarrass, impede, and even destroy such commerce with the citizens of the state. If such a tax can be levied at all, its amount will rest in the discretion of the state. It is idle to say that the interests of the state would prevent oppressive taxation. Those engaged in foreign and interstate commerce are not bound to trust to its moderation in that respect; they require security. And they may rely on the power of Congress to prevent any interference by the state until the act of commerce, the transportation of passengers and freight, is completed. \* \* \*

It is true that the property of corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to state taxation, provided, always, it be within the jurisdiction of the state. \* \* \* [Here is reviewed *Pennsylvania v. Standard Oil Co.*, 101 Pa. 119, holding that a tax upon the property or capital stock of a foreign corporation could be levied only upon such part of its property or capital stock as was employed

in the state.] Under this decision there is no property held by the Gloucester Ferry Company which can be the subject of taxation in Pennsylvania, except the lease of the wharf in that state. Whether that wharf is taxed to the owner or to the lessee it matters not, for no question here is involved in such taxation. It is admitted that it could be taxed by the state according to its appraised value. The ferry-boats of the company are registered at the port of Camden, in New Jersey, and according to the decisions in *Hayes v. Pacific Mail S. S. Co.* [17 How. 596, 15 L. Ed. 254] and in *Morgan v. Parham* [16 Wall. 471, 21 L. Ed. 303], they can be taxed only at their home port.<sup>1</sup> \* \* \*

Receiving and landing passengers and freight is incident to their transportation. Without both there could be no such thing as their transportation across the river Delaware. The transportation, as to passengers, is not completed until, as said in the *Henderson Case* [92 U. S. 259, 23 L. Ed. 543], they are disembarked at the pier of the city to which they are carried; and as to freight, until it is landed upon such pier. And all restraints by exactions in the form of taxes upon such transportation, or upon acts necessary to its completion, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the states. The cases where a tax or toll upon vessels is allowed to meet the expenses incurred in improving the navigation of waters traversed by them, as by the removal of rocks, the construction of dams and locks to increase the depth of water and thus extend the line of navigation, or the construction of canals around falls, rest upon a different principle. The tax in such cases is considered merely as compensation for the additional facilities thus provided in the navigation of the waters.<sup>2</sup> *Kellogg v. Union Co.*, 12 Conn. 7; *Thames Bank v. Lovell*, 18 Conn. 500, 46 Am. Dec. 332; *McReynolds v. Smallhouse*, 8 Bush (Ky.) 447.

Upon similar grounds, what are termed harbor dues or port charges, exacted by the state from vessels in its harbors, or from their owners, for other than sanitary purposes, are sustained. We say for other than sanitary purposes, for the power to prescribe regulations to protect the health of the community, and prevent the spread of disease, is

<sup>1</sup> As to the situs for property taxation, under various circumstances, of vessels employed on navigable interstate waters, see *So. Pac. Co. v. Kentucky*, ante, p. 543, note, and cases there cited.

<sup>2</sup> Accord (compensation for the use or proffer of various facilities beneficial to the user): *Cooley v. Board of Wardens*, 12 How. 299, 13 L. Ed. 996 (1851) (half-pilotage fees); *Packet Co. v. St. Louis*, 100 U. S. 430, 25 L. Ed. 688 (1880) (wharfage fees); *Huse v. Glover*, 119 U. S. 513, 7 Sup. Ct. 313, 30 L. Ed. 48 (1886) (tolls for use of lock and dam); *Morgan's S. S. Co. v. La. Board of Health*, 118 U. S. 455, 6 Sup. Ct. 1114, 30 L. Ed. 237 (1886) (quarantine charges); *Lindsay, etc., Co. v. Mullen*, 176 U. S. 126, 20 Sup. Ct. 325, 41 L. Ed. 400 (1900) (log boom lien). So as to rentals charged by state municipality for the use of public highways, by an interstate telegraph line. *St. Louis v. W. U. Teleg. Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380 (1893); *West. Union Co. v. Richmond*, 224 U. S. 160, 32 Sup. Ct. 449, 56 L. Ed. 710 (1912). Compare *Harman v. Chicago*, 147 U. S. 396, 13 Sup. Ct. 306, 37 L. Ed. 216 (1893).



incident to all local municipal authority, however much such regulations may interfere with the movements of commerce. But, independently of such measures, the state may prescribe regulations for the government of vessels while in its harbors; it may provide for their anchorage or mooring, so as to prevent confusion and collision; it may designate the wharves at which they shall discharge and receive their passengers and cargoes, and require their removal from the wharves when not thus engaged, so as to make room for other vessels; it may appoint officers to see that the regulations are carried out, and impose penalties for refusing to obey the directions of such officers; and it may impose a tax upon vessels sufficient to meet the expenses attendant upon the execution of the regulations. The authority for establishing regulations of this character is found in the right and duty of the supreme power of the state to provide for the safety, convenient use, and undisturbed enjoyment of property within its limits; and charges incurred in enforcing the regulations may properly be considered as compensation for the facilities thus furnished to the vessels.<sup>3</sup> *Vanderbilt v. Adams*, 7 Cow. (N. Y.) 351. Should such regulations interfere with the exercise of the commercial power of Congress, they may at any time be superseded by its action. \* \* \*

The power of the states to regulate matters of internal police includes the establishment of ferries as well as the construction of roads and bridges. In *Gibbons v. Ogden* [9 Wheat. 1, 6 L. Ed. 23], Chief Justice Marshall said that laws respecting ferries, as well as inspection laws, quarantine laws, health laws, and laws regulating the internal commerce of the states, are component parts of an immense mass of legislation, embracing everything within the limits of a state not surrendered to the general government; but in this language he plainly refers to ferries entirely within the state, and not to ferries transporting passengers and freight between the states and a foreign country; for the power vested in Congress, he says, comprehends every species of commercial intercourse between the United States and foreign countries. \* \* \* Ferries between one of the states and a foreign country cannot be deemed, therefore, beyond the control of Congress under the commercial power. \* \* \* Congress has passed various laws respecting such international and interstate ferries, the validity of which is not open to question. \* \* \*

It is true that from the earliest period in the history of the government the states have authorized and regulated ferries, not only over waters entirely within their limits, but over waters separating them; and it may be conceded that in many respects the states can more advantageously manage such interstate ferries than the general govern-

<sup>3</sup> Accord (reasonable charges for cost of governmental supervision made necessary by character of business): *Atl. & Pac. Co. v. Phila.*, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. Ed. 995 (1903) (supervision of telegraph wires); and the quarantine and pilotage cases in note 2, above. Compare *Postal Tel. Co. v. New Hope*, 192 U. S. 55, 24 Sup. Ct. 204, 48 L. Ed. 338 (1904).

ment; and that the privilege of keeping a ferry, with a right to take toll for passengers and freight, is a franchise grantable by the state, to be exercised within such limits and under such regulations as may be required for the safety, comfort, and convenience of the public. Still, the fact remains that such a ferry is a means, and a necessary means, of commercial intercourse between the states bordering on their dividing waters, and it must, therefore, be conducted without the imposition by the states of taxes or other burdens upon the commerce between them. Freedom from such imposition does not, of course, imply exemption from reasonable charges, as compensation for the carriage of persons in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption. Reasonable charges for the use of property, either on water or land, are not an interference with the freedom of transportation between the states, secured under the commercial power of Congress. *Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. Ed. 377; *Packet Co. v. St. Louis*, 100 U. S. 423, 25 L. Ed. 688; *Vicksburg v. Tobin*, 100 U. S. 430; *Packet Co. v. Catlettsburg*, 105 U. S. 559, 26 L. Ed. 1169; *Parkersburg & O. R. Transp. Co. v. Parkersburg*, 107 U. S. 691, 2 Sup. Ct. 732, 27 L. Ed. 584. That freedom implies exemption from charges other than such as are imposed by way of compensation for the use of the property employed, or for facilities afforded for its use, or as ordinary taxes upon the value of the property. How conflicting legislation of the two states on the subject of ferries on waters dividing them is to be met and treated, is not a question before us for consideration. Pennsylvania has never attempted to exercise its power of establishing and regulating ferries across the Delaware river. Any one, so far as her laws are concerned, is free, as we are informed, to establish such ferries as he may choose. No license fee is exacted from ferry-keepers. She merely exercises the right to designate the places of landing, as she does the places of landing for all vessels engaged in commerce. The question, therefore, respecting the tax in the present case, is not complicated by any action of that state concerning ferries. However great her power, no legislation on her part can impose a tax on that portion of interstate commerce which is involved in the transportation of persons and freight, whatever be the instrumentality by which it is carried on. \* \* \*

Judgment reversed.\*

\* Compare *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 2 Sup. Ct. 257, 27 L. Ed. 419 (1882). See *Conway v. Taylor*, post, p. 1144, and notes.

## PHILADELPHIA &amp; 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  $\frac{8}{10}$  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 trans-

portation, 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. \* \* \* [Here follow quotations from *Brown v. Maryland*, ante, p. 1063.] The application of this reasoning to the case in hand is obvious. 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, ante, p. 1090:] 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  $\frac{3}{4}$  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 prop-

erty in the country, which, it was said, are conceded in *Brown v. Maryland* 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. 1083.] 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 ship-owner, 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. \* \* \* [After stating and quoting from the case of *Gloucester Ferry Co. v. Pennsylvania*, ante, p. 1098:] 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 cor-



porations 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.<sup>1</sup>

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LELOUP v. PORT OF MOBILE (1888) 127 U. S. 640, 644-648, 8 Sup. Ct. 1383, 32 L. Ed. 311, Mr. Justice BRADLEY (holding invalid an ordinance of Mobile, Alabama, imposing upon telegraph companies doing business in the city an annual license tax of \$225):

"In approaching the question thus presented, it is proper to note that the license tax in question is purely a tax on the privilege of doing the business in which the telegraph company was engaged. By the laws of Alabama in force at the time this tax was imposed, the telegraph company was required, in addition, to pay taxes to the state, county, and port of Mobile, on its poles, wires, fixtures, and other

<sup>1</sup> Where a state tax on gross receipts from both internal and interstate commerce can be construed as separable, the tax on the internal receipts will be sustained. *Ratterman v. W. U. Teleg. Co.*, 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. Ed. 229 (1888). Compare *Okla. v. Wells, Fargo & Co.*, 223 U. S. 298, 32 Sup. Ct. 218, 56 L. Ed. 445 (1912). A tax expressly confined to the gross receipts from internal transportation is of course valid, though the company be also engaged in interstate transportation. *Pac. Exp. Co. v. Selbert*, 142 U. S. 339, 12 Sup. Ct. 250, 35 L. Ed. 1035 (1892).

Where both termini of the transit are in the taxing state, though the goods pass outside en route, a part of the gross receipts therefrom may be taxed that is proportional to the mileage in the state. *Lehigh Val. Ry. v. Pennsylvania*, 145 U. S. 192, 12 Sup. Ct. 806, 36 L. Ed. 672 (1892); *United States Exp. Co. v. Minn.*, 223 U. S. 335, 32 Sup. Ct. 211, 56 L. Ed. 459 (1912); or a flat privilege tax may be exacted for doing any business of this character. *Ewing v. Leavenworth*, 226 U. S. 464, 33 Sup. Ct. 157, 57 L. Ed. — (1913) (\$50 yearly tax on express business).

The lessor of a railroad within a state, which the lessee uses largely for interstate transportation, may be taxed by the state upon the rentals and tolls received from the lessee as compensation for the lease. *N. Y., etc. Ry. v. Pennsylvania*, 158 U. S. 431, 15 Sup. Ct. 896, 39 L. Ed. 1043 (1895).

property, at the same rate and to the same extent as other corporations and individuals were required to do. Besides the tax on tangible property, they were also required to pay a tax of three-quarters of 1 per cent. on their gross receipts within the state. The question is squarely presented to us, therefore, whether a state, as a condition of doing business within its jurisdiction, may exact a license tax from a telegraph company, a large part of whose business is the transmission of messages from one state to another and between the United States and foreign countries, and which is invested with the powers and privileges conferred by the act of Congress passed July 24, 1866, and other acts incorporated in title 45 of the Revised Statutes? Can a state prohibit such a company from doing such a business within its jurisdiction, unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies, and prohibit the transaction of such business altogether. We are not prepared to say that this can be done. Ordinary occupations are taxed in various ways, and, in most cases, legitimately taxed. But we fail to see how a state can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business is a tax on the occupation; and a tax on the occupation of doing a business is surely a tax on the business. Now, we have decided that communication by telegraph is commerce, as well as in the nature of postal service, and, if carried on between different states, it is commerce among the several states, and directly within the power of regulation conferred upon Congress, and free from the control of state regulations, except such as are strictly of a police character. \* \* \* [Citing and discussing *Pensacola Teleg. Co. v. W. U. Teleg. Co.*, 96 U. S. 1, 24 L. Ed. 708, and *W. U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067.]

"In the present case, it is true, the tax is not laid upon individual messages, but it is laid on the occupation, or the business of sending such messages. It comes plainly within the principle of the decisions lately made by this court in *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694, and *Steamship Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200. It is parallel with the case of *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678. That was a tax on an occupation, and this court held that it was equivalent to a tax on the business carried on (the importation of goods from foreign countries), and even equivalent to a tax on the imports themselves, and therefore contrary to the clause of the Constitution which prohibits the states from laying any duty on imports. \* \* \* [Here follows a quotation from *Almy v. California*, 24 How. 169, 173, 16 L. Ed. 644, applying *Brown v. Maryland*.]

"But it is urged that a portion of the telegraph company's business is internal to the state of Alabama, and therefore taxable by the

state. But that fact does not remove the difficulty. The tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company. The state court relies upon the case of *Osborne v. Mobile*, 16 Wall. 479, 21 L. Ed. 470, which brought up for consideration an ordinance of the city, requiring every express company, or railroad company doing business in that city, and having a business extending beyond the limits of the state, to pay an annual license of \$500; if the business was confined within the limits of the state, the license fee was only \$100; if confined within the city, it was \$50; subject in each case to a penalty for neglect or refusal to pay the charge. This court held that the ordinance was not unconstitutional. This was in December term, 1872. In view of the course of decisions which have been made since that time, it is very certain that such an ordinance would now be regarded as repugnant to the power conferred upon Congress to regulate commerce among the several states. A great number and variety of cases involving the commercial power of Congress have been brought to the attention of this court during the past 15 years which have frequently made it necessary to re-examine the whole subject with care; and the result has sometimes been that, in order to give full and fair effect to the different clauses of the Constitution, the court has felt constrained to recur to the fundamental principles stated and illustrated with so much clearness and force by Chief Justice Marshall and other members of the court in former times, and to modify in some degree certain dicta and decisions that have occasionally been made in the intervening period. This is always done, however, with great caution, and an anxious desire to place the final conclusion reached upon the fairest and most just construction of the Constitution in all its parts. In our opinion, such a construction of the Constitution leads to the conclusion that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."<sup>1</sup>

<sup>1</sup> Accord: *McCall v. California*, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. Ed. 391 (1890) (license tax on business of soliciting in California interstate traffic for a railroad between Chicago and New York); *Norfolk, etc., Ry. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. Ed. 391 (1890) (similar case); *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649 (1891) (license tax on interstate express company).

## 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.<sup>1</sup>

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PULLMAN'S PALACE CAR CO. v. PENNSYLVANIA (1891)  
141 U. S. 18, 22, 23, 25, 26, 29, 11 Sup. Ct. 876, 35 L. Ed. 613.  
Mr. Justice GRAY (upholding a Pennsylvania statute taxing the Pullman Company, a foreign corporation, upon a proportion of its capital stock ascertained as stated in the opinion below):

"It is \* \* \* well settled that there is nothing in the Constitution or laws of the United States which prevents a state from taxing personal property employed in interstate or foreign commerce like other personal property within its jurisdiction. \* \* \*

"Much reliance is placed by the plaintiff in error upon the cases in which this court has decided that citizens or corporations of one state cannot be taxed by another state for a license or privilege to carry on interstate or foreign commerce within its limits. But in each of those cases the tax was not upon the property employed in the business, but upon the right to carry on the business at all, and was therefore held to impose a direct burden upon the commerce itself. \* \* \* For the same reason, a tax upon the gross receipts derived from the transportation of passengers and goods between one state and other states or foreign nations has been held to be invalid. \* \* \*

"The tax now in question is not a license tax or a privilege tax; it is not a tax on business or occupation; it is not a tax on or because of the transportation or the right of transit of persons or property through the state to other states or countries. The tax is imposed equally on corporations doing business within the state, whether domestic or foreign, and whether engaged in interstate commerce or not. The tax on the capital of the corporation on account of its property within the state is, in substance and effect, a tax on that property. *Ferry Co. v. Pennsylvania*, 114 U. S. 196, 209, 5 Sup. Ct. 826, 29 L. Ed. 158; *Telegraph Co. v. Attorney General*, 125 U. S. 530, 552, 8 Sup. Ct. 961, 31 L. Ed. 790. This is not only admitted, but insisted on, by the plaintiff in error.

"The cars of this company within the state of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the state; and the state has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continu-

<sup>1</sup> Accord: *Postal Teleg. Co. v. Charleston*, 153 U. S. 692, 14 Sup. Ct. 1004, 38 L. Ed. 871 (1894); *Osborne v. Florida*, 164 U. S. 650, 17 Sup. Ct. 214, 41 L. Ed. 586 (1897); *Pullman Co. v. Adams*, 189 U. S. 420, 23 Sup. Ct. 494, 47 L. Ed. 877 (1903).

ously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania, it could not be doubted that the state could tax them, like other property within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the state boundary, they cross that boundary in going out and coming back, cannot affect the power of the state to levy a tax upon them. The state, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicile, could tax the specific cars which at a given moment were within its borders. The route over which the cars travel extending beyond the limits of the state, particular cars may not remain within the state; but the company has at all times substantially the same number of cars within the state, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact, that the company continuously, throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about 100 cars within the state.

"The mode which the state of Pennsylvania adopted to ascertain the proportion of the company's property upon which it should be taxed in that state was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to the whole number of miles in that and other states over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the states through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more. The validity of this mode of apportioning such a tax is sustained by several decisions of this court in cases which came up from the circuit courts of the United States, and in which, therefore, the jurisdiction of this court extended to the determination of the whole case, and was not limited, as upon writs of error to the state courts, to questions under the Constitution and laws of the United States. \* \* \* [State R. R. Tax Cases, 92 U. S. 575, 23 L. Ed. 663, *W. U. Teleg. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790, and *Marye v. Balt. & O. Ry.*, 127 U. S. 117, 8 Sup. Ct. 1037, 32 L. Ed. 94, are here cited and discussed.]

"For these reasons, and upon these authorities, the court is of opinion that the tax in question is constitutional and valid."<sup>1</sup>

[BROWN, J., took no part in the decision. BRADLEY, J., gave a dissenting opinion, in which concurred FIELD and HARLAN, JJ.]

<sup>1</sup> As to valid methods of taxing tangible property (like cars) constantly passing in and out of a state, see *New York ex rel. v. Miller*, ante, p. 541, and notes.

A fair proportion of the intangible values created by a business consisting wholly or partly of interstate commerce may be taxed by an ad valorem property tax in each state where such business is carried on. To fix this, the uni-

## MAINE v. GRAND TRUNK RY. CO.

(Supreme Court of United States, 1891. 142 U. S. 217, 12 Sup. Ct. 121, 163, 35 L. Ed. 994.)

[Error to the United States Circuit Court for Maine. The Atlantic & St. Lawrence Ry. Co. was chartered by Maine and built a railroad from Portland to a point in Vermont, a distance of about 150 miles, of which about 83 miles were in Maine. In 1853 the rights and privileges of this company were, by legislative permission, leased to the Grand Trunk Ry., a Canadian corporation, which thereafter operated the road. In 1881 a Maine statute required from every person operating a railroad in the state an annual excise tax for the privilege of exercising its franchises in the state. This tax was measured by a certain percentage of the gross receipts of such railroads,

fied value of the entire business as a going concern may be ascertained, and then the proportion of this assignable to the taxing state may be determined by any fair method. See *Adams Exp. Co. v. Ohio*, ante, p. 551, and notes. In *Cleveland, etc., Ry. v. Backus*, 154 U. S. 439, 445-447, 14 Sup. Ct. 1122, 38 L. Ed. 1041 (1894), Brewer, J., said:

"The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put, and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. . . .

"Take, for illustration, property whose sole use is for purposes of interstate commerce; such as a bridge over the Ohio between the states of Kentucky and Ohio. From that springs its entire value. Can it be that it is on that account entirely relieved from the burden of state taxation? Will it be said that the taxation must be based simply on the cost, when never was it held that the cost of a thing is the test of its value? Suppose there be two bridges over the Ohio, the cost of the construction of each being the same,—one between Cincinnati and Newport, and another 20 miles below, and where there is nothing but a small village on either shore. The value of the one will, manifestly, be greater than that of the other, and that excess of value will spring solely from the larger use of the one than of the other. Must an assessing board in either state, assessing that portion of the bridge within the state for purposes of taxation, eliminate all of the value which flows from the use, and place the assessment at only the sum remaining? It is a practical impossibility. Either the property must be declared wholly exempt from state taxation, or taxed at its value, irrespective of the causes and uses which have brought about such value.

"And the uniform ruling of this court—a ruling demanded by the harmonious relations between the states and the national government—has affirmed that the full discharge of no duty intrusted to the latter restrains the former from the exercise of the power of equal taxation upon all private property within its territorial limits. All that has been decided is that beyond the taxation of property, according to the rule of ordinary property taxation, no state shall attempt to impose the added burden of a license or other tax for the privilege of using, constructing, or operating any bridge, or other instrumentality of interstate commerce, or for the carrying on of such commerce. It is enough for the state that it finds within its borders property which is of a certain value. What has caused that value is immaterial. It is protected by state laws, and the rule of all property taxation is the rule of value; and by that rule property engaged in interstate commerce is controlled the same as property engaged in commerce within the state."

progressively increasing with the average gross receipts per mile up to a maximum of  $3\frac{1}{4}$  per cent.; and railroads lying partly without the state paid only upon such part of their gross receipts as was proportional to the mileage within the state. Maine sued the Grand Trunk Company for the amount of this tax due from the operation of the line of the Atlantic & St. Lawrence Company, and the suit was removed to the state federal court, which gave judgment for the defendant.]

Mr. Justice FIELD. The tax, for the collection of which this action is brought, is an excise tax upon the defendant corporation for the privilege of exercising its franchises within the state of Maine. It is so declared in the statute which imposes it; and that a tax of this character is within the power of the state to levy, there can be no question. The designation does not always indicate merely an inland imposition or duty on the consumption of commodities, but often denotes an impost for a license to pursue certain callings, or to deal in special commodities, or to exercise particular franchises. It is used more frequently, in this country, in the latter sense than in any other. The privilege of exercising the franchises of a corporation within a state is generally one of value, and often of great value, and the subject of earnest contention. It is natural, therefore, that the corporation should be made to bear some proportion of the burdens of government. As the granting of the privilege rests entirely in the discretion of the state, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the state, in its judgment, may deem most conducive to its interests or policy. It may require the payment into its treasury, each year, of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts of the present or past years. The character of the tax, or its validity, is not determined by the mode adopted in fixing its amount for any specific period, or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation is open to the consideration of the state in determining what may be justly exacted for the privilege. The rule of apportioning the charge to the receipts of the business would seem to be eminently reasonable, and likely to produce the most satisfactory results, both to the state and the corporation taxed.

The court below held that the imposition of the taxes was a regulation of commerce, interstate and foreign, and therefore in conflict with the exclusive power of Congress in that respect; and on that ground alone it ordered judgment for the defendant. This ruling was founded upon the assumption that a reference by the statute to the transportation receipts, and to a certain percentage of the same, in determining the amount of the excise tax, was in effect the imposition of the tax upon such receipts, and therefore an inter-



ference with interstate and foreign commerce. But a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied; and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the railroad company, or any regulation of commerce which consists in such transportation. If the amount ascertained were specifically imposed as the tax, no objection to its validity would be pretended. And if the inquiry of the state as to the value of the privilege were limited to receipts of certain past years, instead of the year in which the tax is collected, it is conceded that the validity of the tax would not be affected; and if not, we do not see how a reference to the results of any other year could affect its character. There is no levy by the statute on the receipts themselves, either in form or fact. They constitute, as said above, simply the means of ascertaining the value of the privilege conferred. \* \* \* [Here *Home Ins. Co. v. New York*, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1025, is discussed.]

The case of *Steamship Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200, in no way conflicts with this decision. That was the case of a tax, in terms, upon the gross receipts of a steamship company, incorporated under the laws of the state, derived from the transportation of persons and property between different states and to and from foreign countries. Such tax was held, without any dissent, to be a regulation of interstate and foreign commerce, and therefore invalid. We do not question the correctness of that decision, nor do the views we hold in this case in any way qualify or impair it.

Judgment reversed.<sup>1</sup>

[BRADLEY, J., gave a dissenting opinion, in which concurred HARLAN, LAMAR, and BROWN, JJ.]

<sup>1</sup> In *Postal Teleg. Co. v. Adams*, 155 U. S. 688, 696-698, 700, 15 Sup. Ct. 268, 360, 39 L. Ed. 311 (1895) Mississippi imposed upon telegraph companies a "privilege tax" of \$1 a mile for wires operated by them in the state, "in lieu of all other state, county, and municipal taxes." The tax under this statute amounted to considerably less than would an ad valorem tax under the general revenue laws of the state, and was upheld against the objection of a foreign corporation doing a general telegraph business in the state; Fuller, C. J., saying:

"Property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a state, and may take the form of a tax for the privilege of exercising its franchises within the state, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose protection it conducts its

## GALVESTON, H. &amp; 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 operations, while interstate commerce is not in itself subjected to restraint or impediment. \* \* \*

"Doubtless no state could add to the taxation of property according to the rule of ordinary property taxation the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce, or for the carrying on of such commerce; but the value of property results from the use to which it is put, and varies with the profitableness of that use, and 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. *Railroad Co. v. Backus*, 154 U. S. 439, 445, 14 Sup. Ct. 1122, 38 L. Ed. 1041. \* \* \*

"In the case at bar the supreme court, in its examination of the liability of plaintiff in error for the taxes in question, said: 'It will be thus seen at once that this is a tax imposed upon a telegraph company, in lieu of all others, as a privilege tax, and its amount is graduated according to the amount and value of the property measured by miles. It is to be noticed that it is in lieu of all other taxes, state, county, municipal. The reasonableness of the imposition appears in the record, as shown by the second count of the declaration and its exhibits, whereby the appellant seems to be burdened in this way with a tax much less than that which would be produced if its property had been subjected to a single ad valorem tax.' This exposition of the statute brings it within the rule where ad valorem taxes are compounded or commuted for a just equivalent, determined by reference to the amount and value of the property. Being thus brought within the rule, the tax becomes substantially a mere tax on property, and not one imposed on the privilege of doing interstate business. The substance, and not the shadow, determines the validity of the exercise of the power."

[Brewer and Harlan, JJ., dissented.]

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 the 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 judg-

ment 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.<sup>1</sup>

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

<sup>1</sup> Accord: *Oklahoma v. Wells Fargo & Co.*, 223 U. S. 298, 32 Sup. Ct. 328, 56 L. Ed. 445 (1912).

In *United States Express Co. v. Minnesota*, 223 U. S. 335, 342-348, 32 Sup. Ct. 211, 56 L. Ed. 459 (1912), a Minnesota tax of 6 per cent. upon the gross receipts of express companies for transportation within the state was upheld, even when construed to include that portion of the receipts from interstate carriage attributable to the part of the journey performed in Minnesota, Day, J., saying:

"It is thoroughly well settled in this court that state laws may not burden interstate commerce. As one form of burden may exist in taxing the conduct of interstate commerce, such taxation has been uniformly condemned. \* \* \* [Citing cases.] While we have no disposition to detract from the authority of these decisions, this court has had also to consider and determine the effect of statutes which undertake to measure a tax within the legitimate power of the state by receipts which came in part from business of an interstate character. In that class of cases a distinction was drawn between laws burdening interstate commerce, and laws where the measure of a legitimate tax consists in part of the avails or income from the conduct of such commerce. \* \* \*

"The difficulty has been, and is, to distinguish between legitimate attempts to exert the taxing power of the state and those laws which, though in the guise of taxation, impose real burdens upon interstate commerce as such. This difficulty was recognized in *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 52 L. Ed. 1031, 28 Sup. Ct. 638, wherein the possible differences between the decisions in *Philadelphia, & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. Ed. 1200, 1 *Interst. Com. Rep.* 308, 7 Sup. Ct. 118, and *Maine v. Grand Trunk R. Co.* [ante, p. 1115], were commented upon and examined. \* \* \*

"Appreciating the difficulty emphasized in the *Galveston Case* of drawing the line between taxes that burden interstate commerce and those whereby the legislature is simply undertaking to impose a property tax within its legitimate power, measured in part by the income from interstate commerce transactions, how does the present case stand? The supreme court of Minnesota construed the tax to be a property tax, measured by the gross earnings within the state, which, under their construction of the tax, included the earnings here in question. That court held that the statute was part of a system long in force in Minnesota, passed under the authority of the state Constitution, and was intended to afford a means of valuing the property of express companies within the state. While the determination that the tax is a property tax measured by gross receipts is not binding upon this court, we are not prepared to say that this conclusion is not well founded, in view of the provisions and purposes of the law.

"The statute itself provides that the assessments under it 'shall be in lieu of all taxes upon its property.' In other words, this is the only mode prescribed in Minnesota for exercising the recognized authority of the state to tax the property of express companies as going concerns within its jurisdiction. If not taxed by this method, the property is not taxed at all. \* \* \*

"The tax in the present case is not like those held invalid in the *Galves-*



## WESTERN UNION TELEGRAPH CO. v. KANSAS.

(Supreme Court of United States, 1910. 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355.)

[See ante, p. 256, for the facts of this case.]

Mr. Justice HARLAN. \* \* \* [After discussing *McCall v. California*, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. Ed. 391; *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649; *Gloucester Ferry Co. v. Pennsylvania*, ante, p. 1098; *Phila. S. S. Co. v. Pennsylvania*, ante, p. 1104; *Leloup v. Mobile*, ante, p. 1107; *Galveston, etc., Ry. v. Texas*, ante, p. 1118; and *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719:] We are aware of no decision by this court holding that a state may, by any device or in any way, whether by a license tax in the form of a "fee," or otherwise, burden the interstate business of a corporation of another state, although the state may tax the corporation's property regularly or permanently located within its limits, where the ascertainment of the amount assessed is made "dependent in fact on the value of its property situated within the state." *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 688, 696, 39 L. Ed. 311, 315, 5 Interst. Com. Rep. 1, 15 Sup. Ct. 268, 360; *Leloup v. Mobile*, 127 U. S. 640, 649, 32 L. Ed. 311, 314, 2 Interst. Com. Rep. 134, 8 Sup. Ct. 1383. On the contrary, it is to be deduced from the adjudged cases that a corporation of one state, authorized by its charter to engage in lawful commerce among the states, may not be prevented by another state from coming into its limits for all the legitimate purposes of such commerce. It may go into the state without obtaining a license from it for the purposes of its interstate business, and without liability to taxation there *on account of such business*.

But it is said that none of the authorities cited are pertinent to the present case, because the state expressly disclaims any purpose by the statute in question to obstruct or embarrass interstate commerce, but seeks only to prevent the telegraph company from entering the field of domestic business in Kansas without its consent, and without con-

ton Case and the Oklahoma Case [cited at the beginning of this note, above], being in addition to other state taxation reaching the property of all kinds of the express company. The tax to be collected in part from the earnings of interstate commerce was part of a scheme of taxation seeking to reach the value of the property of such companies in the state, measured by the receipts from business done within the state. The statute was not aimed exclusively at the avails of interstate commerce (*Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, supra), but, as in the Maine Case, was an attempt to measure the amount of tax within the admitted power of the state by income derived, in part, from the conduct of interstate commerce. The property of express companies, being much of it of an intangible character, is difficult to reach and properly assess for taxation. \* \* \* [After quoting from *Postal Teleg. Co. v. Adams*, the second paragraph of this case printed ante, p. 1118, note:] We think the tax here in question comes within this principle."

See, also, *McHenry v. Alford*, 168 U. S. 651, 18 Sup. Ct. 242, 42 L. Ed. 614 (1898) (tax on railroad gross receipts in lieu of all taxes on right of way and land grant); and article by J. P. Hall, 2 Ill. L. Rev. 21 (1907).

forming to the requirements of its statute. But the disavowal by the state of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute, as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. Such is an established rule of constitutional construction, as the adjudged cases abundantly show. \* \* \*

Looking, then, at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the making of the payment by the telegraph company, as a charter fee, of a given per cent of its *authorized capital* representing, as that capital clearly does, *all* of its business and property, both within and *outside of the state* a *condition* of its right to do local business in Kansas, is, in its essence, not simply a tax for the privilege of doing local business in the state, but a burden and tax on the company's interstate business and on its property located or used outside of the state. The express words of the statute leave no doubt as to what is the *basis* on which the fee specified in the state statute rests. That fee, plainly, is not based on such of the company's capital stock as represented in its local business and property in Kansas. The requirement is a given per cent of the company's authorized capital; that is, all its capital, wherever or however employed, whether in the United States or in foreign countries, and whatever may be the extent of its lines in Kansas as compared with its lines outside of that state. What part of the fee exacted is to be attributed to the company's domestic business in Kansas and what part to interstate business, the state has not chosen to ascertain and declare in the statute. It strikes at the company's entire business, wherever conducted, and its property, wherever located, and, in terms, makes it a *condition* of the telegraph company's right to transact purely local business in Kansas that it shall contribute, for the benefit of the state school fund, a given per cent of its whole authorized capital, representing all of its property and all its business and interests everywhere. \* \* \*

The exaction, as a condition of the privilege of continuing to do or doing local business in Kansas, that the telegraph company shall pay a *given per cent of its authorized capital stock*, is, for every practical purpose, a tax both on the company's local business in Kansas; and on its interstate business, or on the privilege of doing interstate business; for the statute, by its necessary operation, will accomplish precisely the result that would have been accomplished had it been made, *in express words*, a condition of doing local business, that the telegraph com-

pany should submit to taxation upon both its interstate *and* intrastate business and upon its interests and property everywhere, as represented by its capital stock. \* \* \*

It is important here to observe—indeed, the contrary could not be asserted—that the telegraph company lawfully entered Kansas, with the consent of both the territory and state, for the purposes of its business of every kind, long before, and was legally there when, the Bush act was passed. The state concedes its right to continue in such business in Kansas, if it will comply with the statute in question, and pay the fee demanded; and only because of such refusal it seeks the aid of the court to oust the company from the state, so far as local business is concerned, unless it shall, by paying such fee, contribute—that is the proper word—a given per cent of all its capital for the support of the schools of the state. The state knows that the telegraph company, in order to accommodate the general public and make its telegraphic system effective, must do all kinds of telegraphic business. Yet, it seeks to enforce a regulation requiring the company by paying the “fee” in question to assent to its interstate business being burdened and its property outside of Kansas being taxed in order that it may continue to conduct a business concededly beneficial to the public,—a right lawfully acquired from the United States when Kansas was a territory, and exercised consistently with the statutes of the state for many years after Kansas was admitted as a state of the Union.

But it is said to be well settled that a state, in the exercise of its reserved powers, may prescribe the *terms* on which a foreign corporation, whatever the nature of its business, may enter and do business within its limits. It is true that, in many cases, the *general* rule has been laid down that a state may, if it chooses to do so, exclude foreign corporations from its limits, or impose such terms and conditions on their doing business in the state as, in its judgment, may be consistent with the interests of the people. But those were cases in which the particular foreign corporation before the court was engaged in ordinary business, and not directly or regularly in interstate or foreign commerce. \* \* \*

Whatever may be the extent of the state’s authority over intrastate business, was it competent for the state to require that the telegraph company,—which surely had the right to enter and remain in the state for interstate business,—as a *condition* of its right to continue doing domestic business in Kansas, should pay, in the form of a fee, a specified per cent of its capital stock representing the interests, property, and operations of the company not only in Kansas, but throughout the United States and foreign countries? Is such a regulation consistent with the power of Congress to regulate commerce among the states, or with rights growing out of such commerce, and secured by the Constitution of the United States? Can the state, in this way, relieve its own treasury from the burden of supporting its public schools, and put that burden, in whole or in part, upon the interstate

business and property of foreign corporations? Can such a regulation be deemed constitutional any more than one requiring [of] the company, as a condition of its doing intrastate business, that it should surrender its right, for instance, to invoke the protection of the Constitution when it is proposed to deprive it of its property without due process of law, or to deny it the equal protection of the laws? \* \* \* If a domestic corporation engaged in the business of soliciting orders for goods manufactured, sold, and delivered in a state should, in addition, solicit orders for goods manufactured in and to be brought from another state for delivery, could the former state make it a *condition* of the right to engage in local business within its limits that the corporation pay a given per cent of *all* fees or commissions received by it in its business, interstate and domestic? There can be but one answer to this question, namely, that such a condition would operate as a direct burden on interstate commerce, and therefore would be unconstitutional and void. Consistently with the Constitution no court could, by any form of decree, recognize or give effect to or enforce such a condition.<sup>1</sup>

We repeat that the statutory requirement that the telegraph company shall, as a condition of its right to engage in local business in Kansas, first pay into the state school fund a given per cent of its authorized capital, representing all its business and property everywhere, is a burden on the company's interstate commerce and its privilege to engage in that commerce, in that it makes both such commerce, as conducted by the company, and its property outside of the state, contribute to the support of the state's schools. Such is the necessary effect of the statute, and that result cannot be avoided or concealed by calling the exaction of such a per cent of its capital stock a "fee" for the privilege of doing local business. To hold otherwise, is to allow form to control substance. It is easy to be seen that if every state should pass a statute similar to that enacted by Kansas, not only the freedom of interstate commerce would be destroyed, the decisions of this court nullified, and the business of the country thrown into confusion, but each state would continue to meet its own local expenses not only by exactions that directly burdened such commerce, but by taxation upon property situated beyond its limits. We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done, or can generally be better and more economically done, by such interstate companies rather than by domestic companies organized to conduct only local business. It is of the last importance that the freedom of interstate commerce shall not be trammled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States.

\* \* \*

<sup>1</sup> But see *Ficklen v. Shelby Co. Dist.*, post, p. 1138.

[After discussing and distinguishing *Osborne v. Florida*, 164 U. S. 650, 17 Sup. Ct. 214, 41 L. Ed. 586; *Pullman Co. v. Adams*, 189 U. S. 420, 23 Sup. Ct. 494, 47 L. Ed. 877; *Allen v. Pullman's Co.*, ante, p. 1110; and *Security Co. v. Prewitt*, ante, p. 254:] The vital difference between the Prewitt Case and the one now before us is that the business of the insurance company, involved in the former case, was not, as this court has often adjudged, interstate commerce, while the business of the telegraph company was primarily and mainly that of interstate commerce. A decision, such as was rendered in the Prewitt Case, that a state could, with or without reason, and without violating the Constitution, revoke its permit to a foreign *insurance* company to do business of a domestic character within its limits, cannot be cited as authority for the proposition, upon which the Kansas statute rests, that a state may prescribe such regulations as to corporations of other states engaged in both interstate and local business, as will require [of] them, as a condition of their doing local business, that they shall contribute a given amount, out of their capital stock, representing all their business, interstate and domestic, wherever done, and all their property, wherever located, in or outside of the state, for the support of the state's schools. The Prewitt Case by no means recognized any uncontrollable power in a state to prohibit all foreign corporations, in whatever business engaged, from doing business within its limits. On the contrary, this court said in that very case that "a state has the right to prohibit a foreign corporation from doing business within its borders, *unless such prohibition is so conditioned as to violate some provision of the federal Constitution*,"—citing various adjudged authorities, among them the case of *Hooper v. California*, 155 U. S. 648, 652, 653, 39 L. Ed. 297, 298, 300, 5 Interst. Com. Rep. 610, 15 Sup. Ct. 207. In the latter case the court recognized, as long settled, the general principle that the right of a foreign corporation to engage in business within the state depended solely on the will of such state. But it took especial care to say that the interstate business of a foreign corporation was a business of an exceptional character, and was protected by the Constitution against interference by state authority. \* \* \* The court did not intend by its judgment in the Prewitt Case to recognize the right of Kentucky, by any regulation as to foreign insurance companies, to burden interstate commerce or to tax property located and used without its limits. \* \* \*

Judgment reversed.<sup>2</sup>

<sup>2</sup> See, also, *Pullman Co. v. Kansas*, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378 (1910); *Ludwig v. W. U. Teleg. Co.*, 216 U. S. 146, 30 Sup. Ct. 280, 54 L. Ed. 423 (1910); *So. Ry. v. Greene*, 216 U. S. 400, 30 Sup. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247 (1910); *Atchison, etc., Ry. v. O'Connor*, 223 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050 (1912).

May a flat rate license tax upon the internal business of a telegraph company doing also interstate business be so high as to be invalid, within the



[WHITE, J., gave a concurring opinion, most of which is printed ante, pp. 256-258.]

HOLMES, J., dissenting [with whom concurred FULLER, C. J., McKENNA, J., and (before his death) PECKHAM, J.]: See his opinion, ante, pp. 258-261.

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NEW YORK *ex rel.* PENNSYLVANIA R. CO. *v.* KNIGHT (1904) 192 U. S. 21, 26, 27, 24 Sup. Ct. 202, 203, 48 L. Ed. 325, Mr. Justice BREWER (upholding a franchise tax imposed upon the Pennsylvania Railroad Company for conducting a cab business in New York City entirely for the benefit of its interstate passengers leaving and arriving in the city):

"It is true that a passenger over the Pennsylvania Railroad to the city of New York does not, in one sense, fully complete his journey when he reaches the ferry landing on the New York side, but only when he is delivered at his temporary or permanent stopping place in the city. Looking at it from this standpoint, the company's cab service is simply one element in a continuous interstate transportation, and as such would be excluded from state, and be subject to national, control. The state may not tax for the privilege of doing an interstate commerce business. *Atlantic & P. Teleg. Co. v. Philadelphia*, 190 U. S. 160, 47 L. Ed. 995, 23 Sup. Ct. 817. On the other hand, the cab service is exclusively rendered within the limits of the city. It is contracted and paid for independently of any contract or payment for strictly interstate transportation. The party receiving it owes no legal duty of crossing the state line.

"Undoubtedly, a single act of carriage or transportation wholly within a state may be part of a continuous interstate carriage or transportation. Goods shipped from Albany to Philadelphia may be carried by the New York Central Railroad only within the limits of New York, and yet that service is in interstate carriage. By reason thereof the nation regulates that carriage, including the part performed by the New York company. But it does not follow therefrom that the New York company is wholly relieved from state regulation and state taxation, for a part of its work is carriage and transportation begun and ended within the state. So the Pennsylvania company, which is engaged largely in interstate transportation, is amenable to state regulation and state taxation as to any of its service which is wholly performed within the state, and not as a part of interstate transportation. Wherever a separation in fact exists between transportation service wholly within the state and that between

doctrine of the principal case? See *Williams v. Talladega*, 226 U. S. 404, 416, 417, 33 Sup. Ct. 116, 57 L. Ed. — (1912).

In *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657 (1900), a foreign corporation doing both internal and interstate business was deprived of the right to continue the former for violation of conditions upon which it was admitted to the state.

the states, a like separation may be recognized between the control of the state and that of the nation. *Osborne v. Florida*, 164 U. S. 650, 41 L. Ed. 586, 17 Sup. Ct. 214; *Pullman Co. v. Adams*, 189 U. S. 420, 47 L. Ed. 877, 23 Sup. Ct. 494. \* \* \*

[After quoting from *Coe v. Errol*, ante, p. 1070:] "As shown in the opinion from which we have just quoted, many things have more or less close relation to interstate commerce which are not properly to be regarded as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed? We are of opinion that the cab service is an independent local service, preliminary or subsequent to any interstate transportation."

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*WILLIAMS v. FEARS* (1900) 179 U. S. 270, 276-278, 21 Sup. Ct. 128, 130, 131, 45 L. Ed. 186, Mr. Chief Justice FULLER (upholding a Georgia tax of \$500 a year upon each emigrant agent for each county in which the business was conducted):

"The real question is, Does this law amount to a regulation of commerce among the states? To answer that question in the affirmative is to hold that the emigrant agent is engaged in such commerce, and that this tax is a restriction thereon. In *Mobile County v. Kimball*, 102 U. S. 702, 26 L. Ed. 241, Mr. Justice Field, delivering the opinion of the court, said: 'Commerce with foreign nations and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.' Broad as is the import of the word 'commerce' as used in the Constitution, this definition is quite comprehensive enough for our purposes here.

"These agents were engaged in hiring laborers in Georgia to be employed beyond the limits of the state. Of course, transportation must eventually take place as the result of such contracts, but it does not follow that the emigrant agent was engaged in transportation, or that the tax on his occupation was levied on transportation.

"In *McCall v. California*, 136 U. S. 104, 34 L. Ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. 881, we held that the agency of a line of railroad between Chicago and New York, established in San Francisco for the purpose of inducing passengers going from San Francisco to New York to take that line at Chicago, but not engaged in selling tickets for the route, or receiving or paying out money on account of it, was an agency engaged in interstate commerce. But there the business was directly connected with interstate commerce,

and consisted wholly in carrying it on. The agent was the agent of the transportation company, and he was acting solely in its interests. So in *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. Ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. 958, it was ruled that a tax imposed by a state on a corporation engaged in the business of interstate commerce, as described, for the privilege of keeping an office in the state, was a tax on commerce among the states.

"On the other hand, it was held in *Nathan v. Louisiana*, 8 How. 73, 12 L. Ed. 992, that a broker dealing in foreign bills of exchange was not engaged in commerce, but in supplying an instrument of commerce, and that a state tax on all money or exchange brokers was not void as to him as a regulation of commerce. In *Paul v. Virginia*, 8 Wall. 168, 183, 19 L. Ed. 357, 361, it was decided that issuing a policy of insurance was not a transaction of commerce. \* \* \*

"Again, in *Hooper v. California*, 155 U. S. 648, 655, 39 L. Ed. 297, 300, 5 Inters. Com. Rep. 610, 15 Sup. Ct. 207, Mr. Justice White there adverts to the real distinction on which the general rule and its exceptions are based, 'and which consists in the difference between interstate commerce or an instrumentality thereof on the one side, and the mere incidents which may attend the carrying on of such commerce on the other. This distinction has always been carefully observed, and is clearly defined by the authorities cited. If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states, and would exclude state control over many contracts purely domestic in their nature.'

"The imposition of this tax falls within the distinction stated. These labor contracts were not in themselves subjects of traffic between the states, nor was the business of hiring laborers so immediately connected with interstate transportation or interstate traffic that it could be correctly said that those who followed it were engaged in interstate commerce, or that the tax on that occupation constituted a burden on such commerce."<sup>1</sup> \* \* \*

[HARLAN, J., dissented.]

<sup>1</sup> Compare *Hopkins v. United States*, post, p. 1216, and notes.

**MODE OF COLLECTING STATE TAX FROM PERSONS ENGAGED IN INTERSTATE OR FOREIGN COMMERCE.**—Even when the property or business of those engaged in interstate commerce may be validly taxed by the state, the payment of the tax cannot be made a condition precedent to the right to engage in such commerce, nor enforced by an injunction against continuing such commerce. *Western Union Co. v. Massachusetts*, 125 U. S. 530, 554, 5 Sup. Ct. 961, 31 L. Ed. 790 (1888); *Postal Teleg. Co. v. Adams*, ante, p. 1117, note 1.

"If a resort to a judicial proceeding to collect it [the tax] is deemed expedient, there remains to the court all the ordinary means of enforcing its judgment—executions, sequestration, and any other appropriate remedy in chancery."—*West. Union Co. v. Massachusetts*, above cited, by Miller, J.

So also as to certain regulative conditions precedent, see *Internat. Text-Book Co. v. Hagg*, post, p. 1116, and notes.

## II. TAXES AFFECTING SALES

BROWN v. HOUSTON (1885) 114 U. S. 622, 632-634, 5 Sup. Ct. 1091, 1096, 1097, 29 L. Ed. 257, Mr. Justice BRADLEY (upholding a Louisiana ad valorem property tax upon a certain lot of coal floated from Pennsylvania to Louisiana in flatboats and held by the consignees for sale in the original flatboat packages upon arrival in Louisiana, part being sold for export and part for domestic use):

"The question arises whether the assessment of the tax in question amounted to any interference with, or restriction upon, the free introduction of the plaintiffs' coal from the state of Pennsylvania into the state of Louisiana, and the free disposal of the same in commerce in the latter state; in other words, whether the tax amounted to a regulation of, or restriction upon, commerce among the states, or only to an exercise of local administration under the general taxing power, which, though it may incidentally affect the subjects of commerce, is entirely within the power of the state until Congress shall see fit to interfere and make express regulations on the subject.

"As to the character and mode of the assessment, little need be added to what has already been said. It was not a tax imposed upon the coal as a foreign product, or as the product of another state than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed while it was in a state of transit through that state to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day. It had become a part of the general mass of property in the state, and as such it was taxed for the current year (1880), as all other property in the city of New Orleans was taxed. Under the law, it could not be taxed again until the following year. It was subjected to no discrimination in favor of goods which were the product of Louisiana, or goods which were the property of citizens of Louisiana. It was treated in exactly the same manner as such goods were treated.

"It cannot be seriously contended, at least in the absence of any congressional legislation to the contrary, that all goods which are the product of other states are to be free from taxation in the state to which they may be carried for use or sale. Take the city of New York, for example. When the assessor of taxes goes his round, must he omit from his list of taxables all goods which have come into the city from the factories of New England and New Jersey, or from the pastures and grain-fields of the West? If he must, what will be left for taxation? And how is he to distinguish between those goods which are taxable and those which are not? With the exception of goods imported from foreign countries, still in the original packages, and

goods in transit<sup>1</sup> to some other place, why may he not assess all property alike that may be found in the city, being there for the purpose of remaining there till used or sold, and constituting part of the great mass of its commercial capital: provided always that the assessment will be a general one, and made without discrimination between goods the product of New York, and goods the product of other states? Of course the assessment should be a general one, and not discriminative between goods of different states. The taxing of goods coming from other states, as such, or by reason of their so coming, would be a discriminating tax against them as imports, and would be a regulation of interstate commerce, inconsistent with that perfect freedom of trade which Congress has seen fit should remain undisturbed. But if, after their arrival in the state,—that being their place of destination for use or trade,—if, after this, they are subjected to a general tax laid alike on all property within the city, we fail to see how such a taxing can be deemed a regulation of commerce which would have the objectionable effect referred to.

“We do not mean to say that if a tax collector should be stationed at every ferry and railroad depot in the city of New York, charged with the duty of collecting a tax on every wagon-load or car-load of produce and merchandise brought into the city, that it would not be a regulation of, and restraint upon, interstate commerce, so far as the tax should be imposed on articles brought from other states. We think it would be, and that it would be an encroachment upon the exclusive powers of Congress. It would be very different from the tax laid on auction sales of all property indiscriminately, as in the case of *Woodruff v. Parham* [8 Wall. 123, 19 L. Ed. 382], which had no relation to the movement of goods from one state to another. It would be very different from a tax laid, as in the present case, on property which had reached its destination, and had become part of the general mass of property of the city, and which was only taxed as a part of that general mass in common with all other property in the city, and in precisely the same manner.

“When Congress shall see fit to make a regulation on the subject of property transported from one state to another, which may have the effect to give it a temporary exemption from taxation in the state to which it is transported, it will be time enough to consider any conflict that may arise between such regulation and the general taxing laws of the state.”<sup>2</sup>

<sup>1</sup> Goods in transit from state to state or to a foreign country cease meanwhile to be subject to the property taxes of any state, even though the owner be domiciled therein. *Bacon v. Illinois*, 227 U. S. 504, 33 Sup. Ct. 299, 57 L. Ed. — (1913). Compare *Southern Pac. Co. v. Kentucky*, ante, p. 543, note (taxation of vessels similarly in transit).

<sup>2</sup> Accord: *Pittsburg, etc., Coal Co. v. Bates*, 156 U. S. 577, 15 Sup. Ct. 415, 59 L. Ed. 538 (1895); *Banker Bros. Co. v. Pennsylvania*, post, p. 1142; and cases under *Coe v. Errol*, ante, p. 1074, note 2. Similarly state taxes upon peddlers who carry with them for sale goods from other states are valid,



## 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 exclusive 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.

whether imposed for purposes of revenue, *Machine Co. v. Gage*, 100 U. S. 676, 25 L. Ed. 754 (1880); or primarily as a regulative measure, *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430 (1895).

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

Judgment reversed.<sup>1</sup>

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

<sup>1</sup> Accord: *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 368 (1888); *Brennan v. Titusville*, 153 U. S. 280, 14 Sup. Ct. 829, 38 L. Ed. 719 (1894) (tax confined to drummers selling directly to consumers); and the cases digested below.

In *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336 (1903), the North Carolina agent of a Chicago portrait company took local orders for pictures and frames to be supplied from Chicago. The frames and pictures were packed separately for convenience, shipped to the local agent, put together by him, and then delivered by him to the purchasers. No part of this transaction was held to be taxable by North Carolina.

In *Norfolk & W. Ry. v. Sims*, 191 U. S. 441, 447, 24 Sup. Ct. 151, 152, 48 L. Ed. 254 (1903) a sewing machine was ordered by a customer in North Carolina from a dealer in Chicago and was sent C. O. D. by freight to her. It was held that North Carolina could not require a license for any part of this transaction, Brown, J., saying:

"While it may be entirely true that the property in the thing sold does not pass under a C. O. D. consignment until delivery of the goods and payment to the carrier, and hence it may be said that the sale is not completed until then, yet, as matter of fact, the bargain is made, and the contract of sale completed as such, when the order is received in Chicago, and the machine shipped in pursuance thereof. A sale really consists of two separate and distinct elements: First, a contract of sale, which is completed when the offer is made and accepted; and, second, a delivery of the property which may precede, be accompanied by, or follow, the payment of the price, as may have been agreed upon between the parties. The substance of the sale is the agreement to sell, and its acceptance. That possession shall be retained until payment of the price may or may not have been a part of the original bargain, but in substance it is a mere method of collection, and we have never understood that a license could be imposed upon this transaction except in connection with the prior agreement to sell."

In *Rearick v. Pennsylvania*, 203 U. S. 507, 511, 512, 27 Sup. Ct. 159, 160, 51 L. Ed. 295 (1906) the facts were similar to those in *Caldwell v. North Carolina*, stated above, except that a part of the goods (brooms) ordered by several persons were packed together for convenience of shipment, and then the packages were broken by the local agent before delivery. The buyer had the right to reject the goods if not according to sample. The state where delivery took place was still held disabled to tax the transaction, Holmes, J., saying:

"A ground relied upon by the prosecution \* \* \* was that the goods, or at least this part of them, were not in the original packages when delivered. \* \* \* In other words, it was contended that the brooms, before they were sold, had become mingled with, or part of, the common mass of goods in the state, and so subject to the local law. But the doctrine as to original packages primarily concerns the right to sell within the prohibiting or taxing state goods coming into it from outside. When the goods have been sold be-

FICKLEN v. SHELBY COUNTY TAXING DISTRICT (1892) 145 U. S. 1, 20-24, 12 Sup. Ct. 810, 811-813, 36 L. Ed. 601, Mr. Chief Justice FULLER (upholding a Tennessee tax upon commission dealers of \$50 a year and 10 cents upon each \$100 of their capital, or, if without capital, 2½ per cent. of their gross yearly commissions, for the payment of which latter sum a bond was required in advance. Complainants paid the \$50 tax and gave the bond, but at the end of the year refused to pay the 2½ per cent., because all of their business for the year had consisted of the negotiation of interstate sales for non-resident principals):

"In the case at bar the complainants were established and did business in the taxing district as general merchandise brokers, and were taxed as such. \* \* \* For the year 1887 they paid the \$50 tax charged, gave bond to report their gross commissions at the end of the year, and thereupon received, and throughout the entire year held, a general unrestricted license to do business as such brokers. They were thereby authorized to do any and all kinds of commission business, and became liable to pay the privilege tax in question, which was fixed in part and in part graduated according to the amount of capital invested in the business, or, if no capital were invested, by the amount of commissions received. Although their principals happened during 1887, as to the one party, to be wholly nonresident, and as to the other, largely such, this fact might have been otherwise then and afterwards, as their business was not confined to transactions for nonresidents.

fore arrival the limitations that still may be found to the power of the state will be due, generally, at least, to other reasons, and we shall consider whether the limitations may not exist, irrespective of that doctrine, in some cases where there is no executed sale. Hence the prosecution, whatever its assumption on the point last mentioned, sought to show that there was no sale until the goods were delivered and the cash paid for them. \* \* \*

"'Commerce among the several states' is a practical conception, not drawn from the 'witty diversities' ([Yaites v. Gough] Yelv. 33) of the law of sales. Swift & Co. v. United States, 196 U. S. 375, 398, 399, 49 L. Ed. 518, 525, 526, 25 Sup. Ct. 276. The brooms were specifically appropriated to specific contracts, in a practical, if not in a technical, sense. Under such circumstances it is plain that, wherever might have been the title, the transport of the brooms for the purpose of fulfilling the contracts was protected commerce."

Dozier v. Alabama, 218 U. S. 124, 30 Sup. Ct. 649, 54 L. Ed. 965, 28 L. R. A. (N. S.) 264 (1910) was like the Caldwell Case, stated above, except that the original contract gave the buyer an option to take a frame at "factory prices" when the picture ordered was delivered. It was held that the state where the buyer lived could not tax the delivery of the frame, if the option were exercised.

In the most recent (1913) case upon the subject, it was held that a state could not impose a license tax upon a traveling solicitor of sales of stoves, to be shipped in from another state, even as a regulative police measure to protect citizens of the state against itinerant and irresponsible salesmen. Crenshaw v. Arkansas, 227 U. S. 389, 33 Sup. Ct. 294, 57 L. Ed. — (1913), distinguishing Emert v. Missouri, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430 (1895) (similar legislation upheld against peddlers carrying goods for sale). See the opinion below, in Crenshaw v. State, 95 Ark. 464, 130 S. W. 569 (1910).

"In the Case of Robbins [ante, p. 1132] the tax was held, in effect, not to be a tax on Robbins, but on his principals, while here the tax was clearly levied upon complainants in respect of the general commission business they conducted, and their property engaged therein, or their profits realized therefrom.

"No doubt can be entertained of the right of a state legislature to tax trades, professions, and occupations, in the absence of inhibition in the state Constitution in that regard, and where a resident citizen engages in general business subject to a particular tax, the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and nonresident merchants of goods situated in another state does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution.

\* \* \* Here the tax was not laid on the occupation or business of carrying on interstate commerce, or exacted as a condition of doing any particular commission business, and complainants voluntarily subjected themselves thereto in order to do a general business.

\* \* \*

"In *Maine v. Railway Co.*, 142 U. S. 217, 12 Sup. Ct. 121, 163, 35 L. Ed. 994, we decided that a state statute which required every corporation, person, or association operating a railroad within the state to pay an annual tax for the privilege of exercising its franchise therein, to be determined by the amount of its gross transportation receipts, and further provided that, when applied to a railroad lying partly within and partly without a state, or to one operated as a part of a line or system extending beyond the state, the tax should be equal to the proportion of the gross receipts in the state, to be ascertained in the manner provided by the statute, did not conflict with the Constitution of the United States. It was held that the reference by the statute to the transportation receipts, and to a certain percentage of the same, in determining the amount of the excise tax, was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied. In this respect the tax was unlike that levied in *Philadelphia & Southern S. S. Co. v. Pennsylvania*, supra, where the specific gross receipts for transportation were taxed as such,—taxed 'not only because they are money, or its value, but because they were received for transportation.'

"Since a railroad company engaged in interstate commerce is liable to pay an excise tax according to the value of the business done in the state, ascertained as above stated, it is difficult to see why a citizen doing a general business at the place of his domicile should escape payment of his share of the burdens of municipal government because the amount of his tax is arrived at by reference to his profits. This tax is not on the goods, nor on the proceeds of the goods, nor is it a tax on nonresident merchants; and, if it can be said to affect

interstate commerce in any way, it is incidentally, and so remotely as not to amount to a regulation of such commerce.

"We presume it would not be doubted that if the complainants had been taxed on capital invested in the business, such taxation would not have been obnoxious to constitutional objection, but, because they had no capital invested, the tax was ascertained by reference to the amount of their commissions, which, when received, were no less their property than their capital would have been. We agree with the supreme court of the state that the complainants, having taken out licenses under the law in question to do a general commission business, and having given bond to report their commissions during the year, and to pay the required percentage thereon, could not, when they applied for similar licenses for the ensuing year, resort to the courts because the municipal authorities refused to issue such licenses without the payment of the stipulated tax. What position they would have occupied if they had not undertaken to do a general commission business, and had taken out no licenses therefor, but had simply transacted business for nonresident principals, is an entirely different question, which does not arise upon this record."<sup>1</sup>

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

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KEHRER v. STEWART (1905) 197 U. S. 60, 64, 65, 67-69, 25 Sup. Ct. 403-406, 49 L. Ed. 663, Mr. Justice BROWN (upholding a Georgia license tax of \$200 upon agents of packing houses doing business in each county in the state):

"Nelson Morris & Co., citizens of Illinois, were engaged, in the city of Chicago, in the business of packing meats for sale and consumption, and also had a place of business in Atlanta, Georgia, where they sold their products at wholesale. \* \* \* The firm \* \* \* took orders, which were transmitted and filled at Chicago, the meats sent to Atlanta, and there distributed in pursuance of such orders. Certain meats were also shipped from Chicago to Atlanta without a previous sale or contract to sell. These were stored in the Atlanta house of the firm in the original packages, and were kept and held for sale, in the ordinary course of trade, as domestic business. \* \* \* It was [by the Georgia supreme court] held that the tax, so far as applied to meats sold in Chicago, and shipped to the petitioner in Georgia for distribution, could not be supported; but that so far as the petitioner was engaged in the business of selling di-

<sup>1</sup> Where brokers neither do nor hold themselves out as doing any local business whatever, but confine themselves entirely to soliciting orders for principals resident in other states, they are not subject to the tax in the principal case. *Stockard v. Morgan*, 185 U. S. 27, 22 Sup. Ct. 576, 46 L. Ed. 785 (1902).

rectly to customers in Atlanta, he was engaged in carrying on an independent business as a wholesale dealer, and was liable to the tax.

"This decision was correct. In carrying on the domestic business, petitioner was indistinguishable from the ordinary butcher, who slaughters cattle and sells their carcasses, and in principle it made no difference that the cattle were slaughtered in Chicago and their carcasses sent to Atlanta for sale and consumption in the ordinary course of trade. Upon arrival there they became a part of the taxable property of the state. It made no difference whence they came and to whom they were ultimately sold, or whether the domestic and interstate business were carried on in the same or different buildings. In this particular the case is covered by that of *Brown v. Houston*, 114 U. S. 622, 29 L. Ed. 257, 5 Sup. Ct. Rep. 1091. \* \* \*

"The only difficulty in this case arises from the fact that the tax is laid not in terms upon the domestic business, nor upon the gross receipts or profits which might be apportioned between interstate and domestic business, but is a gross sum imposed upon the managing agent of packing houses, regardless of the fact that the greater portion of the business may be interstate in its character. This contingency, however, is met by the case of *Osborne v. Florida*, 164 U. S. 650, 41 L. Ed. 586, 17 Sup. Ct. 214, wherein a license tax imposed upon express companies doing business in Florida had been construed by the supreme court of that state as applying solely to business of the company done within the state, and not to its interstate business. Accepting this construction of the state statute as in reality part of the statute itself, we held that it did not in any way violate the federal Constitution. The statute was sustained, notwithstanding the fact that 95 per cent. of the business was interstate in its character, and only 5 per cent. consisted of carrying goods and freight between points within the state of Florida. \* \* \*

"So, in the case under consideration, it was expressly held by the supreme court of Georgia that that part of the *Nelson Morris & Co.*'s business which consisted in shipping goods to Atlanta to fill orders previously received, the goods being delivered in accordance with such orders, was interstate commerce, not subject to taxation within the state, and that, so far as applied to that business, the tax was void. Accepting this construction of the supreme court, we think the act, so far as applied to domestic business, is valid. The record does not show what proportion of such business is interstate and what proportion is domestic, although it is conceded that most of the business is interstate in its character. If the amount of domestic business were purely nominal, as, for instance, if the consignee of a shipment made in Chicago, upon an order filled there, refused the goods shipped, and the only way of disposing of them was by sales at Atlanta, this might be held to be strictly incidental to an interstate business, and in reality a part of it, as we held in *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. Ed. 649, 11 Sup. Ct. 851; but if the



agent carried on a definite, though a minor, part of his business in the state by the sales of meat there, he would not escape the payment of the tax, since the greater or less magnitude of the business cuts no figure in the imposition of the tax. There could be no doubt whatever that, if the agent carried on his interstate and domestic business in two distinct establishments, one would be subject and the other would not be subject to the tax, and in our view it makes no difference that the two branches of business are carried on in the same establishment. The burden of proof was clearly upon the plaintiff to show that the domestic business was a mere incident to the interstate business.”<sup>1</sup>

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BANKER BROTHERS CO. v. PENNSYLVANIA (1911) 222 U. S. 210, 212-214, 32 Sup. Ct. 38, 39, 56 L. Ed. 168, Mr. Justice LAMAR:

“The Banker Brothers Company, a corporation doing business in Pittsburg, was charged, as retail vendors, with a tax of 1 per cent. on \$351,000 on sales of automobiles to persons in Pennsylvania, under a statute of that state. It denied liability on the ground that the sales were interstate transactions. \* \* \*

“It appears that the George N. Pierce Company was engaged in the business of manufacturing automobiles in Buffalo, and in 1905 made a contract by which it agreed ‘to build for and sell automobiles to Banker Brothers Company at 20 per cent. less than list prices. Deliveries to be f. o. b. Buffalo as soon as practicable after order for deliveries are received. Payments to be made in cash.’ The Banker Brothers Company kept no machines in stock except those used for demonstration, and were allowed to sell only within a restricted territory on terms stipulated by the manufacturer. The purchaser of the machine was to pay at least 10 per cent. when he signed a printed form addressed to Banker Brothers Company, requesting it ‘to enter my order for ——— motor car, for which I agree to pay the list price, f. o. b. factory, as follows: \$—— upon signing this order, and the balance upon delivery of the car to me.’

“The name of the Pierce Company did not appear anywhere on this printed form furnished by it, but when the Banker Brothers Company accepted the order, it remitted the cash to the Pierce Company. If the latter accepted the order, it agreed thereupon to make the automobile and ship it, drawing on Banker Brothers Company for the balance of the list price, less 20 per cent., with bill of lading attached. The Banker Brothers Company, on paying the draft, took up the bill of lading, received from the carrier an automobile which, though shipped in interstate commerce, had become at rest in the state of Pennsylvania. Banker Brothers Company had the title, and

<sup>1</sup> Accord: *Armour Packing Co. v. Lacy*, 200 U. S. 226, 26 Sup. Ct. 232, 56 L. Ed. 451 (1906).

delivered it to the buyer on his paying the balance of the purchase money. \* \* \*

"It is contended that Banker Brothers Company were agents and the Pierce Company an undisclosed principal. It is urged that the sale was an interstate transaction between the manufacturer and the purchaser, with Banker Brothers Company merely acting as an agent which looked after the delivery of the machine and collected the purchase price. \* \* \* As between Banker Brothers Company and the Pittsburg purchaser, there can be no doubt that it occupied the position of vendor. As such it was bound by its contract to him, and under the duty of paying to the state a tax on the sale.

"The name of the Pierce Company was not mentioned in the order signed by the purchaser. Had there been a breach of its terms he would have had a cause of action against the Banker Brothers Company, with whom alone he dealt. If he had failed to complete the purchase, the Pierce Company would have no right to sue him on the contract. The fact that he was liable for the freight by virtue of the agreement to 'pay the list price f. o. b. factory' did not convert it into a sale by the manufacturer at the factory; neither was that result accomplished because, with the machine, Banker Brothers Company also delivered to the buyer in Pittsburg a warranty from the manufacturer direct.

"These were mere incidents of the intrastate contract of sale between Banker Brothers Company and the purchaser in Pittsburg, who was not concerned with the question as to how the machine was acquired by his vendor, or whether that company bought it from another dealer in the same city, or from the manufacturer in New York. The contract was made in Pennsylvania, and was there to be performed by the delivery of the automobile and the payment of the balance of the purchase price. See *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 48 L. Ed. 538, 24 Sup. Ct. 365; *American Exp. Co. v. Iowa*, 196 U. S. 146, 49 L. Ed. 423, 25 Sup. Ct. 182. The court properly held it was not an interstate transaction, but taxable under the laws of Pennsylvania."

**TAXES INCIDENTALLY AFFECTING INTERSTATE SALES.**—A stamp tax upon all sales made at business exchanges is valid, though part of the commodities there sold are at the time in course of interstate transit. *Broadnax v. Missouri*, 219 U. S. 285, 31 Sup. Ct. 238, 55 L. Ed. 219 (1911). See, also, *Hatch v. Reardon*, 204 U. S. 152, 27 Sup. Ct. 188, 51 L. Ed. 415, 9 Ann. Cas. 736 (1907) (tax on transfers of stock); *Ware & Leland v. Mobile County*, 209 U. S. 405, 28 Sup. Ct. 526, 52 L. Ed. 855, 14 Ann. Cas. 1031 (1908) (tax on trading in futures, ante, p. 1067, note).

## SECTION 5.—NON-DISCRIMINATORY STATE REGULATION

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CONWAY v. TAYLOR'S EX'R (1862) 1 Black, 603, 629, 631-635, 17 L. Ed. 191, Mr. Justice SWAYNE (affirming a Kentucky decree enjoining Conway from invading plaintiff's exclusive franchise of ferrying from Newport, Ky., across the Ohio river to Ohio, although Conway's steamboat "Commodore" had a federal coasting license):

"It is objected by the appellants, that no such ferry franchise exists as was sought to be protected by this decree, because it was granted under the laws of Kentucky, and did not embrace a landing on the Ohio shore. It is insisted that such a franchise, when confined to one shore, is a nullity, and that the concurrent action of both states is necessary to give it validity. Under the laws of Kentucky a ferry franchise is grantable only to riparian owners. The franchise in this instance was granted in pursuance of those laws. Any riparian ownership, or right of landing, or legal sanction of any kind beyond the jurisdiction of that state, is not required by her laws. \* \* \*

"The franchise is confined to the transit from the shore of the state. The same rights which she claims for herself she concedes to others. She has thrown no obstacle in the way of the transit from the states lying upon the other side of the Ohio and Mississippi. She has left that to be wholly regulated by their ferry laws. We have heard of no hostile legislation, and of no complaints, by any of those states. It was shown in the argument at bar that similar laws exist in most, if not all, the states bordering upon those streams. They exist in other states of the Union bounded by navigable waters.

"Very few adjudged cases have been brought to our notice in which the ferry rights they authorize to be granted have been challenged; none in which they have been held to be invalid. A ferry franchise is as much property as a rent or any other incorporeal hereditament, or chattels, or realty. It is clothed with the same sanctity and entitled to the same protection as other property. \* \* \*

"Lastly, it is urged that the Commodore having been enrolled under the laws of the United States, and licensed under those laws for the coasting trade, the decree violates the rights which the enrollment and license gave to the appellants in respect of that trade by obstructing the free navigation of the Ohio. \* \* \*

"We do not so understand the decree. \* \* \* That the appellants had the right after as before the injunction, in the prosecution of the carrying and coasting trade, and of ordinary commercial navigation, to transport 'persons and property' from the Kentucky shore, no one, we apprehend, will deny. The limitation is the line which protects the ferry rights of the appellees. Those rights give them no

monopoly, under 'all circumstances,' of all commercial transportation from the Kentucky shore. They have no right to exclude or restrain those there prosecuting the business of commerce in good faith, without the regularity or purposes of ferry trips,<sup>1</sup> and seeking in nowise to interfere with the enjoyment of their franchise. \* \* \* The Commodore was run openly and avowedly as a ferryboat; that was her business. The injunction as to her and her business was correct. \* \* \*

"Rights of commerce give no authority to their possessor to invade the rights of property. He cannot use a bridge, a canal, or a railroad without paying the fixed rate of compensation. He cannot use a warehouse or vehicle of transportation belonging to another without the owner's consent. No more can he invade the ferry franchise of another without authority from the holder. The vitality of such a franchise lies in its exclusiveness. The moment the right becomes common, the franchise ceases to exist. We have shown that it is property, and, as such, rests upon the same principle which lies at the foundation of all other property.

"Undoubtedly, the states, in conferring ferry rights, may pass laws so infringing the commercial power of the nation that it would be the duty of this court to annul or control them. 13 How. 519, 14 L. Ed. 249, Wheeling Bridge Case. The function is one of extreme delicacy, and only to be performed where the infraction is clear. The ferry laws in question in this case are not of that character. We find nothing in them transcending the legitimate exercise of the legislative power of the state. \* \* \* There has been now nearly three-quarters of a century of practical interpretation of the Constitution. During all that time, as before the Constitution had its birth, the states have exercised the power to establish and regulate ferries; Congress never. We have sought in vain for any act of Congress which involves the exercise of this power. That the authority lies within the scope of 'that immense mass' of undelegated powers which 'are reserved to the states respectively,' we think too clear to admit of doubt.

"We place our judgment wholly upon that ground."<sup>2</sup>

<sup>1</sup> See *Starlin v. New York*, 115 U. S. 248, 250, 254, 257, 258, 6 Sup. Ct. 28, 20 L. Ed. 388 (1885) as to frequency of trips that distinguish "ferrying" from "coasting."

<sup>2</sup> In *St. Clair County v. Interstate Transfer Co.*, 192 U. S. 454, 466, 470, 24 Sup. Ct. 300, 304, 305, 48 L. Ed. 518 (1904), the requirement of an Illinois license for a Mississippi river railroad car ferry was held invalid. After discussing the leading cases upon state ferry regulations, *Fanning v. Gregoire*, 16 How. 524, 534, 14 L. Ed. 1043 (1853); *Coway v. Taylor*, above; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962 (1894); *Wiggins Ferry Co. v. E. St. Louis*, 107 U. S. 365, 2 Sup. Ct. 257, 27 L. Ed. 419 (1883); and *Gloucester Ferry Co. v. Pennsylvania*, ante, p. 1098, White, J., said:

"Conceding, arguendo, that the police power of a state extends to the establishment, regulation, and licensing of ferries on a navigable stream, being the boundary between two states, none of the cases justify the proposition that such power embraces transportation by water across such a river which does not constitute a ferry in a strict technical sense. In that sense 'a ferry

INTERNATIONAL TEXT-BOOK CO. v. PIGG (1910) 217 U. S. 91, 108-112, 30 Sup. Ct. 481, 54 L. Ed. 678, 24 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103, Mr. Justice HARLAN (for facts and dissenting judges, see ante, pp. 1064-1066):

"Was it competent for the state to prescribe, as a condition of the right of the Text-Book Company to do interstate business in Kansas, such as was transacted with Pigg, that it should prepare, deliver, and file with the secretary of state the statement mentioned in § 1283? The above question must be answered in the negative upon the authority of former adjudications by this court. A case in point is *Crutcher v. Kentucky*, 141 U. S. 47, 56, 57, 35 L. Ed. 649, 652, 11 Sup. Ct. 851, 853, 854, often referred to and never qualified by any subsequent decision. That case arose under a statute of Kentucky regulating agencies of foreign express companies. The statute required, as a condition of the right of the agent of an express company not incorporated by the laws of Kentucky, to do business in that commonwealth, [it] to take out a license from the state auditor, and to make and file in the auditor's office a statement showing that the company had an actual capital of a given amount, either in cash or in safe investments, exclusive of costs. These requirements were held by this court to be in violation of the Constitution of the United States in their application to foreign corporations engaged in interstate commerce.

"The court said: 'If the subject was one which appertained to the jurisdiction of the state legislature, it may be that the requirements and conditions of doing business within the state would be promotive of the public good. It is clear, however, that it would be a regulation of interstate commerce in its application to corporations or associations engaged in that business; and that is a subject which belongs to the jurisdiction of the national, and not the state, legislature. Congress would undoubtedly have the right to exact from associations of that kind any guaranties it might deem necessary for the public security, and for the faithful transaction of business; and as it is within the province of Congress, it is to be presumed that Congress has done, or will do, all that is necessary and proper in that regard. Besides, it is

is a continuation of the highway from one side of the water over which it passes to the other, and is for transportation of passengers or of travelers with their teams and vehicles and such other property as they may carry or have with them.' \* \* \*

"Because we have, arguendo, rested our conclusion in this case upon the assumption that the respective states have the power to regulate ferries over navigable rivers constituting boundaries between states, we must not be understood as deciding that that doctrine, which undoubtedly finds support in the opinions announced in *Fanning v. Gregoire* and *Conway v. Taylor*, has not been modified by the rule subsequently laid down in the *Gloucester Ferry* and the *Covington Bridge* Cases. As this case has not required us to enter into those considerations we have not done so."

See, also, *N. Y. Central, etc., Ry. v. Hudson Co.*, 227 U. S. 248, 33 Sup. Ct. 269, 57 L. Ed. — (1913) (can state regulate interstate ferry rates, in absence of federal action?).



not to be presumed that the state of its origin has neglected to require from any such corporation proper guaranties as to capital and other securities necessary for the public safety. If a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other states, it would not be within the province of the state legislature *to exact conditions on which they should carry on their business, nor to require them to take out a license therefor.* To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject.' \* \* \*

"Further, in the same case: 'We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business (which is to carry goods between different states), does also some local business by carrying goods from one point to another within the state of Kentucky. This is, probably, quite as much for the accommodation of the people of that state as for the advantage of the company. But whether so or not, it does not obviate the objection that the regulation as to license *and capital stock* are imposed *as conditions on the company's carrying on the business of interstate commerce,* which was manifestly the principal object of its organization. *These regulations are clearly a burden and a restriction upon that commerce.* Whether intended as such or not, they operate as such.' \* \* \*

"In this connection it is to be observed that by the statute the doors of Kansas courts are closed against the Text-Book Company, unless it *first* obtains from the secretary of state a certificate showing that the 'statement' mentioned in § 1283 has been properly made. In other words, although the Text-Book Company may have a valid contract with a citizen of Kansas, one directly arising out of and connected with its interstate business, the statute denies its right to invoke the authority of a Kansas court to enforce its provisions unless it does what we hold it was not, under the Constitution, bound to do; namely, make, deliver, and file with the secretary of state the statement required by § 1283. If the state could, under any circumstances, legally forbid its courts from taking jurisdiction of a suit brought by a corporation of another state, engaged in interstate business, upon a valid contract arising out of such business, and made with it by a citizen of Kansas, it could not impose on the company, as *a condition of its authority to carry on its interstate business in Kansas,* that it shall make, deliver, and file that statement with the secretary of state, and obtain his certificate that it had been properly made. This court in *Chambers v. Baltimore & O. R. Co.,* 207 U. S. 142, 148, 52 L. Ed. 143, 146. 28

Sup. Ct. 34, \* \* \* said: \* \* \* "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship." \* \* \*

"It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business. But such a burden is imposed when the corporation of another state, lawfully engaged in interstate commerce, is required, as a condition of its right to prosecute its business in Kansas, to make and file a statement setting forth certain facts which the state, confessedly, could not control by legislation."<sup>1</sup>

[The court held that, as a matter of statutory construction, the condition precedent to suing in the Kansas courts failed with the condition precedent to doing business in the state, not being intended to be separately enforced.]

### 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.

<sup>1</sup> Accord: *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137 (1885) (semble); *Buck Stove Co. v. Vickers*, 226 U. S. 205, 33 Sup. Ct. 41, 57 L. Ed. — (1912). So, requiring payment of state taxes, as a condition of engaging in interstate commerce, see ante, p. 1129, note. See, also, *Sinnot v. Davenport*, 22 How. 227, 16 L. Ed. 243 (1859) (condition inconsistent with federal coasting license); *Pensacola Teleg. Co. v. W. U. Teleg. Co.*, 96 U. S. 1, 24 L. Ed. 708 (1878) (state monopoly inconsistent with federal statute).

"The only limitation upon this power of the state to exclude a foreign corporation from doing business within its limits or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce being in the federal government, is not to be restricted by state authority."—Field, J., in *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, 190, 8 Sup. Ct. 737, 741, 31 L. Ed. 650 (1888). See, also, *Hooper v. California*, 155 U. S. 648, 652, 653, 15 Sup. Ct. 207, 39 L. Ed. 297 (1895).

STATE LICENSE FOR BUSINESS INCIDENTAL TO NATIONAL COMMERCE.—See *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 470, 21 Sup. Ct. 423, 45 L. Ed. 619 (1901) (license for grain warehouse).

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. Whenever "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.* [ante, p. 1075.] \* \* \* 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 larger 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.<sup>1</sup>

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

<sup>1</sup> Accord: *The Passaic Bridges*, 3 Wall. 782, append. 16 L. Ed. 799 (1857) (bridge); *Pound v. Turck*, 95 U. S. 459, 24 L. Ed. 525 (1878) (dam); *Co. of Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238 (1881) (harbor improvements); *Escanaba Co. v. Chicago*, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. Ed. 442 (1883) (bridge); *Willamette Bdg. Co. v. Hatch*, 125 U. S. 1, 8 Sup. Ct. 811, 31 L. Ed. 629 (1888) (bridge); *Manigault v. Springs*, 199 U. S. 473, 26 Sup. Ct. 127, 50 L. Ed. 274 (1905) (dam); *No. Shore Co. v. Nicomen Co.*, 212 U. S. 406, 29 Sup. Ct. 355, 53 L. Ed. 574 (1909) (log boom).

By acts of Congress in 1890 (26 Stat. 426, 454) and in 1899 (30 Stat. 1121, 1151 [U. S. Comp. St. 1901, p. 3540]) the erection of obstructions in navigable waters of the United States is forbidden, unless authorized by the Secretary of War. For the construction of these acts see *Leovy v. U. S.*, 177 U. S. 621, 20 Sup. Ct. 797, 44 L. Ed. 914 (1900); *U. S. v. Bellingham Boom Co.*, 176 U. S. 211, 20 Sup. Ct. 343, 44 L. Ed. 437 (1900); *Montgomery v. Portland*, 190 U. S. 89, 23 Sup. Ct. 735, 47 L. Ed. 965 (1903); and the cases cited therein.

Provisions in acts of Congress admitting states to the Union, that their navigable waters shall be common highways and forever free to all United States citizens, do not forbid *physical* obstructions but only *political* regulations that would hamper commerce. *Willamette Bdg. Co. v. Hatch*, 125 U. S. 1, 8 Sup. Ct. 811, 31 L. Ed. 629 (1888).

That Congress has established a port of entry or improved navigation upon a stream does not sufficiently indicate its will that the state shall not obstruct navigation below these points. *The Passaic Bridges*, 3 Wall. 782, append. 16 L. Ed. 799 (1857); *Escanaba Co. v. Chicago*, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. Ed. 442 (1883); *Willamette Bridge Case*, above cited.

In *Pennsylvania v. Wheeling, etc.*, Bridge Co., 13 How. 518, 14 L. Ed. 249 (1852), the state of Pennsylvania was granted an injunction in the federal courts against the maintenance, under the authority of the state of Virginia, of a bridge across the Ohio river at Wheeling, of such height that at high water it did not permit the passage of the tall chimneys of steamers from Pittsburgh. In *Willamette Bdg. Co. v. Hatch*, 125 U. S. 1, 15, 16, 8 Sup. Ct. 811, 818, 819, 31 L. Ed. 629 (1888), this case was explained as follows by Bradley, J.:

"In that case this court had original jurisdiction in consequence of a state being a party; and the complainant, the state of Pennsylvania, was entitled to invoke, and the court had power to apply, any law applicable to the case, whether state law, federal law, or international law. The bridge had been authorized by the legislature of Virginia, whose jurisdiction extended across the whole river Ohio. But Virginia, in consenting to the erection of Kentucky into a state, had entered into a compact with regard to the free navigation of the Ohio,\* confirmed by the act of Congress admitting Kentucky into the Union, which the court held to be violated by authorizing the bridge to be constructed in the manner it was; and the bridge, so constructed, injuriously affected a supra-riparian state (Pennsylvania) bordering on the river, contrary to international law.

"Mr. Justice Grier, in the *Passaic Bridge Cases*, disposes of the *Wheeling Bridge Case* as follows: "This legislation of Virginia being pleaded as a bar to further action of the court in the case, necessarily raised these questions: Could Virginia license or authorize a nuisance on a public river, flowing, which rose in Pennsylvania, and passed along the border of Virginia, and which, by compact between the states, was declared to be "free and common to all the citizens of the United States"? If Virginia could authorize any obstruction at all to the channel navigation, she could stop it altogether, and

\*See Mr. Stanton's argument, 13 How. 523, 14 L. Ed. 249; 1 *Biorea's Laws U. S.* p. 675, art. 7—Rep.



## SMITH v. ST. LOUIS &amp; 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 dis-

divert the whole commerce of that great river from the state of Pennsylvania, and compel it to seek its outlet by the railroads and other public improvements of Virginia. If she had the sovereign right over this boundary river claimed by her, there would be no measure to her power. She would have the same right to stop its navigation altogether as to stop it ten days in a year. If the plea was admitted, Virginia could make Wheeling the head of navigation on the Ohio, and Kentucky might do the same at Louisville, having the same right over the whole river which Virginia can claim. This plea, therefore, presented not only a great question of international law, but whether rights secured to the people of the United States, by compact made before the Constitution, were held at the mercy or caprice of every or any of the states to which the river was a boundary. The decision of the court denied this right."

After the decree in the *Wheeling Bridge Case*, Congress legalized the bridge. See the same case in 18 How. 421, 15 L. Ed. 435 (1855). So also *The Clinton Bridge*, 10 Wall. 454, 19 L. Ed. 969 (1870).

cretion 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.<sup>1</sup> 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.

<sup>1</sup>"A state \* \* \* may exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases."—*Railroad Co. v. Husen*, 95 U. S. 465, 471, 24 L. Ed. 527 (1878) by Strong, J. (semble). So *Plundey v. Massachusetts*, 155 U. S. 461, 478, 15 Sup. Ct. 151, 39 L. Ed. 223 (1901); *Moore v. Illinois*, 14 How. 13, 14 L. Ed. 306 (1852) (fugitive slaves—semble). So as regards protective measures not amounting to exclusion. *Mayor v. Miln*, 11 Pet. 102, 142, 9 L. Ed. 648 (1837); *Passenger Cases*, 7 How. 283, 410, 12 L. Ed. 702 (1849). In *Compagnie Francaise, etc., v. La. Bd. of Health*, 186 U. S. 380, 22 Sup. Ct. 811, 46 L. Ed. 1209 (1902), a state regulation was upheld excluding healthy persons, whether from within or without the state, from districts infested with contagious or infectious disease.

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, be-

tween 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, splenic 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 splenic fever, and that it is contagious and infectious and of the most virulent character."

Judgment affirmed.<sup>2</sup>

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

<sup>2</sup> Accord: *Rasmussen v. Idaho*, 181 U. S. 198, 21 Sup. Ct. 594, 45 L. Ed. 820 (1901). See *Louisiana v. Texas*, 176 U. S. 1, 21, 20 Sup. Ct. 251, 44 L. Ed. 347 (1900). Of course inspection, as a condition of the admission of suspected animals, is valid. *Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108 (1902); *Ashell v. Kansas*, 209 U. S. 251, 28 Sup. Ct. 485, 52 L. Ed. 778, 14 Ann. Cas. 1101 (1908).

In *Morgan's S. S. Co. v. La. Board of Health*, 118 U. S. 455, 463-467, 6 Sup. Ct. 1114, 1118, 1119, 30 L. Ed. 237 (1886), Miller, J., said (upholding a vessel quarantine at New Orleans):

"Is the law under consideration void as a regulation of commerce? Undoubtedly it is, in some sense, a regulation of commerce. It arrests a vessel on a voyage which may have been a long one. It may affect commerce among the states when the vessel is coming from some other state of the Union than Louisiana, and it may affect commerce with foreign nations when the vessel arrested comes from a foreign port. This interruption of the voyage may be



## PATAPSCO GUANO CO. v. NORTH CAROLINA BOARD OF AGRICULTURE.

(Supreme Court of United States, 1898. 171 U. S. 345, 18 Sup. Ct. 862, 43 L. Ed. 191.)

[Appeal from the United States Circuit Court for the Eastern District of North Carolina. A statute required every package of fertilizer sold or offered for sale in the state to have printed upon it certain facts about its manufacture and composition, and to bear a tag furnished by the state reciting that all inspection charges upon it had been paid. Samples of all fertilizers offered for sale in the state were to be sent to the department of agriculture, which was charged with the du-

for days or for weeks. It extends to the vessel, the cargo, the officers and seamen, and the passengers. In so far as it provides a rule by which this power is exercised, it cannot be denied that it regulates commerce. We do not think it necessary to enter into the inquiry whether, notwithstanding this, it is to be classed among those police powers which were retained by the states as exclusively their own, and therefore not ceded to Congress; for while it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, even where such powers are so exercised as to come within the domain of federal authority as defined by the Constitution, the latter must prevail. *Gibbons v. Ogden*, 9 Wheat. 210, 6 L. Ed. 23 (1824); *Henderson v. The Mayor*, 92 U. S. 272, 23 L. Ed. 543 (1876); *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 861, 6 Sup. Ct. 252, 29 L. Ed. 516 (1885).

"But it may be conceded that whenever Congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a national board of health, or to local boards, as may be found expedient, all state laws on the subject will be abrogated, at least so far as the two are inconsistent; but until this is done, the laws of the state on the subject are valid. \* \* \* Quarantine laws belong to that class of state legislation which, whether passed with intent to regulate commerce or not, must be admitted to have that effect, and which are valid until displaced or contravened by some legislation of Congress. The matter is one in which the rules that should govern it may, in many respects, be different in different localities, and for that reason be better understood and more wisely established by the local authorities. The practice which should control a quarantine station on the Mississippi river, a hundred miles from the sea, may be widely and wisely different from that which is best for the harbor of New York. In this respect the case falls within the principle which governed the cases of *Willson v. Blackbird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412 (1829); *Cooley v. Board of Wardens*, 12 How. 299, 13 L. Ed. 996 (1851); *Gilman v. Philadelphia*, 3 Wall. 727, 18 L. Ed. 96 (1866); *Pound v. Treck*, 95 U. S. 462, 24 L. Ed. 525 (1878); *Hall v. De Cuir*, 1d. 488, 24 L. Ed. 547 (1878); *Packet Co. v. Callettsburg*, 105 U. S. 562, 26 L. Ed. 1169 (1882); *Parkersburg & O. R. Transp. Co. v. Parkersburg*, 107 U. S. 702, 2 Sup. Ct. 732, 27 L. Ed. 584 (1883); *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. Ed. 442 (1883). \* \* \*

"It is said that the charge to the vessel for the officer's service in examining her is not a necessary part of quarantine system. It has always been held to be a part in all other countries, and in all quarantine stations in the United States. No reason is perceived for selecting this item from the general system, and calling it a regulation of commerce, while the remainder is not. If the arrest of the vessel, the detention of its passengers, the cleansing process it is ordered to go through with, are less important as regulations of commerce than the exaction of the examination fee, it is not easily to be seen. We think the proposition untenable."

ty of inspecting them to enforce the law, and to defray the expenses of this 25 cents a ton was charged on all fertilizer delivered to agents, dealers, or consumers in the state. In 1891 the receipts from this were \$33,000 and in 1892 about \$24,000. The actual cost of inspection in these years was less than \$17,000 yearly. Plaintiff company sought an injunction against the collection of this tax on fertilizers from other states, and the Circuit Court dismissed his bill.<sup>1</sup>

Mr. Chief Justice FULLER. \* \* \* The second clause of section 10 of article 1 of the Constitution reads: "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 control of the Congress." The words "imports" and "exports," as therein used, have been held to apply only to articles imported from or exported to foreign countries. *Woodruff v. Parham*, 8 Wall. 123, 19 L. Ed. 382; *Pittsburgh Coal Co. v. Louisiana*, 156 U. S. 590, 600, 15 Sup. Ct. 459, 39 L. Ed. 544.

The clause recognized that the inspection of such articles may be required by the states, and that they may lay duties on them to pay the expense of such inspections; but as it would be difficult, if not impossible, to determine the necessary amount with exactness, and to remove any inducement to excess, it was provided that any surplus should be paid to the United States. As such laws are subject to the revision and control of Congress, it has been suggested that whether inspection charges are excessive or not might be for Congress to determine, and not the courts, which would also be so where inspection laws operate on interstate as well as foreign commerce. *Neilson v. Garza*, 2 Woods, 287, Fed. Cas. No. 10,091; *Turner v. Maryland*, 107 U. S. 38, 2 Sup. Ct. 44, 27 L. Ed. 370.

Considered as an inspection law and as not open to attack as in contravention of that clause, the questions still remain whether an inspection law can operate on importations as well as exportations, and whether in this instance the charge was so excessive as to deprive the act of its character as an inspection law or as a legitimate exercise of protective governmental power, and make it a mere revenue law obnoxious to the objection of being an unlawful interference with interstate commerce. Counsel for plaintiff in error insists that this result is deducible from the legislation of North Carolina making appropriations from the funds of the department of agriculture received from the charge on fertilizers or fertilizing materials, as also from the evidence submitted on the hearing. \* \* \*

It does not appear to us that evidence tending to show that money

<sup>1</sup> Statement of facts partly taken from the case in the Circuit Court, 52 Fed. 690.

collected from this source was applied to other than the purposes for which it was received should be entered into on this inquiry into the validity of the act. If the receipts are found to average largely more than enough to pay the expenses, the presumption would be that the legislature would moderate the charge.<sup>2</sup> But treating the question whether the charge of 25 cents per ton was shown to be so excessive as to demonstrate a purpose other than that which the law declared as a judicial question, we are satisfied that, comparing the receipts from this charge with the necessary expenses,—such as the cost of analyses, the salaries of inspectors, the cost of tags, express charges, miscellaneous expenses of the department in this connection, and so on,—we cannot conclude that the charge is so seriously in excess of what is necessary for the objects designed to be effected as to justify the imputation of bad faith, and change the character of the act.

Inspection laws are not in themselves regulations of commerce, and, while their object frequently is to improve the quality of articles produced by the labor of a country and fit them for exportation, yet they are quite as often aimed at fitting them, or determining their fitness, for domestic use, and, in so doing, protecting the citizen from fraud. Necessarily, in the latter aspect, such laws are applicable to articles imported into, as well as to articles produced within, a state.

Clause 2 of section 10 expressly allows the state to collect from imports as well as exports the amounts necessary for executing its inspection laws; and Chief Justice Marshall expressed the opinion in *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678, that imported as well as exported articles were subject to inspection. The observations of Mr. Justice Bradley, on circuit, in *Neilson v. Garza*, are quite apposite on this and other points under discussion, and may profitably be quoted. That case involved the validity of a law of the state of Texas, providing for the inspection of hides, and Mr. Justice Bradley said:

“If the state law of Texas which is complained of is really an inspection law, it is valid and binding, unless it interferes with the power of Congress to regulate commerce; and, if it does thus interfere, it may still be valid and binding until revised and altered by Congress. The right to make inspection laws is not granted to Congress, but is reserved to the states; but it is subject to the paramount right of Congress to regulate commerce with foreign nations, and among the several states; and if any state, as a means of carrying out and executing its inspection laws, imposes any duty or impost on imports or exports, such impost or duty is void if it exceeds what is absolutely necessary for executing such inspection laws. How the question whether a duty is excessive or not is to be decided may be doubtful. As that question is passed upon by the state legislature when the duty is im-

<sup>2</sup> Accord: *Red “C” Oil Co. v. Board of Agric.*, 222 U. S. 380, 393-394, 32 Sup. Ct. 152, 56 L. Ed. 240 (1912).

posed, it would hardly be seemly to submit it to the consideration of a jury in every case that arises. This might give rise to great diversity of judgment, the result of which would be to make the law constitutional one day, and in one case, and unconstitutional another day, in another case. As the article of the Constitution which prescribes the limit goes on to provide that 'all such laws shall be subject to the revision and control of Congress,' it seems to me that Congress is the proper tribunal to decide the question whether a charge or duty is or is not excessive. If, therefore, the fee allowed in this case by the state law is to be regarded as in effect an impost or duty on imports or exports, still, if the law is really an inspection law, the duty must stand until Congress shall see fit to alter it.

"Then we are brought back to the question whether the law is really an inspection law. If it is, we cannot interfere with it on account of supposed excessiveness of fees. If it is not, the exaction is clearly unconstitutional and void, being an unauthorized interference with the free importation of goods. The complainant contends that it is not an inspection law; that inspection laws only apply legitimately to the domestic products of the country, intended for exportation; and that no inspection is actually required in this particular case, but a mere examination to see if the hides are marked, and who imported them, etc.,—duties which belong to the entry of goods, and not their inspection.

"No doubt the primary and most usual object of inspection is to prepare goods for exportation, in order to preserve the credit of our exports in foreign markets. Chief Justice Marshall, in *Gibbons v. Ogden*, says: '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.' 9 Wheat. 203, 6 L. Ed. 23; *Story, Const. § 1017*. But in *Brown v. Maryland* he adds, speaking of the time when inspection takes place: 'Inspection laws, so far as they act upon articles for exportation, are generally executed on land before the article is put on board a vessel; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection is a tax which is frequently, if not always, paid for service performed on land.' 12 Wheat. 419, 6 L. Ed. 678; *Story, Const. § 1017*. So that, according to Chief Justice Marshall, imported as well as exported goods may be subject to inspection; and they may be inspected as well to fit them for domestic use as for exportation." \* \* \*

Whenever inspection laws act on the subject before it becomes an article of commerce, they are confessedly valid, and also when, although operating on articles brought from one state into another, they provide for inspection in the exercise of that power of self-protection commonly called the "police power." No doubt can be entertained of this where the inspection is manifestly intended, and calculated in good faith, to protect the public health, the public morals,

or the public safety. *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455. And it has now been determined that this is so if the object of the inspection is the prevention of imposition on the public generally. \* \* \* [Here is stated *Plumley v. Massachusetts*, post, p. 1202.]

Where the subject is of wide importance to the community, the consequences of fraudulent practices generally injurious, and the suppression of such frauds matter of public concern, it is within the protective power of the state to intervene. Laws providing for the inspection and grading of flour, the inspection and regulation of weights and measures, the weighing of coal on public scales, and the like, are all competent exercises of that power, and it is not perceived why the prevention of deception in the adulteration of fertilizers does not fall within its scope.<sup>3</sup>

It is apparent that there is no article entering into common use in many of the states, and particularly the Southern states, the inspection of which is so necessary for the protection of those citizens engaged in agricultural operations, as commercial fertilizers. Certain ingredients, as ammonia or nitrogen, phosphoric acid, and potash, make up the larger part of the value of these fertilizers; and, without the aid of scientific analysis, the amount of these ingredients cannot be ascertained, nor whether the fertilizer sold is of a uniform grade. The average farmer was compelled, without an analysis, to depend on his sense of smell, or his success or failure during the previous year with the same brand or name, to determine the relative amounts of the essential ingredients, and the value of the materials. To protect agricultural interests against spurious and low-grade fertilizers was the object of this law, which simply imposed the actual cost of inspection, necessarily varying with the agricultural condition of the various years. \* \* \*

The act of January 21, 1891, must be regarded, then, as an act providing for the inspection of fertilizers and fertilizing materials in order to prevent the practice of imposition on the people of the state, and the charge of 25 cents per ton as intended merely to defray the cost of such inspection. It being competent for the state to pass laws of this character, does the requirement of inspection and payment of its cost bring the act into collision with the commercial power vested in Congress? Clearly, this cannot be so as to foreign commerce, for clause 2 of section 10 of article 1 expressly recognizes the validity of state inspection laws, and allows the collection of the amounts necessary for their execution; and we think the same principle must ap-

<sup>3</sup> Accord: *Pittsburg, etc., Coal Co. v. Louisiana*, 156 U. S. 590, 15 Sup. Ct. 459, 39 L. Ed. 544 (1895) (gauging of coal barges); *New Mexico v. Denver & R. G. Ry.*, 203 U. S. 38, 27 Sup. Ct. 1, 51 L. Ed. 78 (1906) (inspection of branded hides before shipment out of state, to prevent theft); *Savage v. Jones*, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182 (1912) (determination of constituents of prepared cattle foods).



ply to interstate commerce. In any view, the effect on that commerce is indirect and incidental, and "the Constitution of the United States does not secure to any one the privilege of defrauding the public."

Decree affirmed.<sup>4</sup>

[HARLAN and WHITE, JJ., dissented.]

<sup>4</sup> "The law being otherwise valid, the amount of the inspection fee is not a judicial question; it rests with the legislature to fix the amount, and it can only present a valid objection when it is shown that it is so unreasonable and disproportionate to the services rendered as to attack the good faith of the law."—*New Mexico v. D. & R. G. Ry.*, 203 U. S. 38, 55, 27 Sup. Ct. 1, 51 L. Ed. 78 (1906), by Day, J. So Red "C" Oil Co. v. Board of Agric., 222 U. S. 380, 393, 32 Sup. Ct. 152, 56 L. Ed. 240 (1912); *Savage v. Jones*, 225 U. S. 501, 528, 529, 32 Sup. Ct. 715, 56 L. Ed. 1182 (1912).

And so, as regards bona fide wharfage charges. "And being wharfage, and nothing else, if the charges are unreasonable remedy must be sought by invoking the laws of the state. \* \* \* If the charges are sanctioned by them, then, as before stated, it is for Congress and not for the United States courts to regulate the matter and provide a proper remedy."—*Ouachita Packet Co. v. Aiken*, 121 U. S. 444, 449, 450, 7 Sup. Ct. 907, 30 L. Ed. 976 (1887), by Bradley, J.

In *Turner v. Maryland*, 107 U. S. 38, 55, 2 Sup. Ct. 44, 27 L. Ed. 370 (1883), upholding a statute forbidding domestic tobacco to be shipped out of the state except in packages of certain sizes, marked and inspected in certain ways, Blatchford, J., said: "Recognized elements of inspection laws have always been quality of the article, form, capacity, dimensions, and weight of package, mode of putting up, and marking and branding of various kinds, all these matters being supervised by a public officer having authority to pass or not pass the article as lawful merchandise, as it did or did not answer the prescribed requirements. It has never been regarded as necessary, and it is manifestly not necessary that all of these elements should coexist in order to make a valid inspection law. Quality alone may be the subject of inspection, without other requirement, or the inspection may be made to extend to all of the above matters. When all are prescribed, and then inspection as to quality is dropped out, leaving the rest in force, it cannot be said to be a necessary legal conclusion that the law has ceased to be an inspection law."

In *People v. Compag. Gen. Trans.*, 107 U. S. 59, 61, 62, 2 Sup. Ct. 87, 27 L. Ed. 383 (1883), declaring invalid a New York statute, Miller, J., said:

"What laws may be properly classed as inspection laws, under this provision of the Constitution, must be determined largely by the nature of the inspection laws of the states at the time the Constitution was framed. In the opinion of this court in the case of *Turner v. Maryland* [107 U. S.] 51-54, 2 Sup. Ct. 44, 27 L. Ed. 370, delivered by Mr. Justice Blatchford contemporaneously with the one in the present case, an elaborate examination of those statutes, many of which are cited, is to be found, and similar citations are found in a foot-note to the report of *Gibbons v. Ogden*, 9 Wheat. 119, 6 L. Ed. 23. We feel quite safe in saying that neither at the time of the formation of the Constitution nor since has any inspection law included anything but personal property as a subject of its operation. Nor has it ever been held that the words 'imports and exports' are used in that instrument as applicable to free human beings by any competent judicial authority. \* \* \*

"In addition to what is said above, it is apparent that the object of these New York enactments goes far beyond any correct view of the purpose of an inspection law. The commissioners are 'to inspect all persons arriving from any foreign country to ascertain who among them are habitual criminals or pauper lunatics, idiots or imbeciles, \* \* \* or orphan persons, without means or capacity to support themselves, and subject to become a public charge.' It may safely be said that these are matters incapable of being satisfactorily ascertained by inspection. What is an inspection? Something which can be accomplished by looking at or weighing or measuring the thing to be inspected, or applying to it at once some crucial test. When testimony

## HALL v. DE CUIR.

(Supreme Court of United States, 1878. 95 U. S. 485, 24 L. Ed. 547.)

[Error to the Supreme Court of Louisiana. Benson owned a steamboat having a United States coasting license and plying between ports in Mississippi and Louisiana on the Mississippi river. He was sued for an alleged violation of the Louisiana statute mentioned in the opinion below, in that he refused to the plaintiff, a colored woman, accommodations in a cabin especially reserved for white persons. Plaintiff was traveling between points in Louisiana only. Plaintiff recovered damages, and Hall, Benson's administratrix, took this writ of error.]

Mr. Chief Justice WAITE. For the purposes of this case, we must treat the Act of Louisiana of February 23, 1869, as requiring those en-

or evidence is to be taken and examined, it is not inspection in any sense whatever. Another section provides for the custody, the support, and the treatment for disease of these persons, and the transportation of criminals. Are these inspection laws? Is the ascertainment of a guilt of a crime to be made by inspection? In fact, these statutes differ from those heretofore held void only in calling them in their caption 'inspection laws,' and in providing for payment of any surplus, after the support of paupers, criminals, and diseased persons, into the treasury of the United States—a surplus which, in this enlarged view of what are the expenses of an inspection law, it is safe to say will never exist.

"A state cannot make a law designed to raise money to support paupers, to detect or prevent crime, to guard against disease, and to cure the sick, an inspection law, within the constitutional meaning of that word, by calling it so in the title."

Compare *Vance v. Vandercook Co.* (No. 1) 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100 (1898) (holding invalid the requirement of a rather burdensome preliminary inspection of *samples* of liquor as a condition precedent to its shipment into the state for the consignee's own use—the later shipment not being inspected); and *Foster v. Master, etc.*, of New Orleans, 94 U. S. 246, 24 L. Ed. 122 (1877) (holding invalid a statutory monopoly of the right of making surveys of damaged goods on incoming vessels and granting certificates for their sale). In the *Vance* Case it was suggested that the state's power of inspecting articles shipped into it for use only was more restricted than if they were intended for sale. *Id.*, at page 456.

In *Minnesota v. Barber*, ante, p. 1086, holding invalid the inspection law there stated, Harlan, J., said (136 U. S. at pages 326, 328, 10 Sup. Ct. 862, 866, 34 L. Ed. 455):

"A statute may upon its face apply equally to the people of all the states, and yet be a regulation of interstate commerce which a state may not establish. A burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting such statute. *Robbins v. Shelby Taxing-Dist.*, 120 U. S. 489, 497, 7 Sup. Ct. 592, 30 L. Ed. 694; *Case of the State Freight Tax*, 15 Wall. 232, 21 L. Ed. 146. The people of Minnesota have as much right to protection against the enactments of that state interfering with the freedom of commerce among the states as have the people of other states. \* \* \* A law providing for the inspection of animals whose meats are designed for human food cannot be regarded as a rightful exertion of the police powers of the state, if the inspection prescribed is of such a character, or is burdened with such conditions, as will prevent altogether the introduction into the state of sound meats, the product of animals slaughtered in other states."

gaged in interstate commerce to give all persons traveling in that state, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color. Such was the construction given to that act in the courts below, and it is conclusive upon us as the construction of a state law by the state courts. It is with this provision of the statute alone that we have to deal. We have nothing whatever to do with it as a regulation of internal commerce, or as affecting anything else than commerce among the states. \* \* \*

[After referring to state regulation of public warehouses, dams, bridges, turnpikes, and ferries:] By such statutes the states regulate, as a matter of domestic concern, the instruments of commerce situated wholly within their own jurisdictions, and over which they have exclusive governmental control, except when employed in foreign or interstate commerce. As they can only be used in the state, their regulation for all purposes may properly be assumed by the state, until Congress acts in reference to their foreign or interstate relations. When Congress does act, the state laws are superseded only to the extent that they affect commerce outside the state as it comes within the state. \* \* \* [Reference is here made to state health, inspection, and pilotage laws.]

But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within. While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the state, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the state must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced.

It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different states, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. 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 incon-

venience 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. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be. If this statute can be enforced against those engaged in interstate commerce, it may be as well against those engaged in foreign; and the master of a ship clearing from New Orleans for Liverpool, having passengers on board, would be compelled to carry all, white and colored, in the same cabin, during his passage down the river, or be subject to an action for damages, "exemplary as well as actual," by any one who felt himself aggrieved because he had been excluded on account of his color.

This power of regulation may be exercised without legislation as well as with it. By refraining from action, Congress, in effect, adopts as its own regulations those which the common law or the civil law, where that prevails, has provided for the government of such business, and those which the states, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the Constitution. In fact, congressional legislation is only necessary to cure defects in existing laws, as they are discovered, and to adapt such laws to new developments of trade. As was said by Mr. Justice Field, speaking for the court in *Welton v. State of Missouri*, 91 U. S. 282, 23 L. Ed. 347: "Inaction [by Congress] \* \* \* is equivalent to a declaration that interstate commerce shall remain free and untrammelled." Applying that principle to the circumstances of this case, congressional inaction left Benson at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana or without, as seemed to him most for the interest of all concerned. The statute under which this suit is brought, as construed by the state court, seeks to take away from him that power so long as he is within Louisiana; and while recognizing to the fullest extent the principle which sustains a statute, unless its unconstitutionality is clearly established, we think this statute, to the extent that it requires those engaged in the transportation of passengers among the states to carry

colored passengers in Louisiana in the same cabin with whites, is unconstitutional and void. If the public good require such legislation, it must come from Congress, and not from the states. \* \* \*

Judgment reversed.<sup>1</sup>

[CLIFFORD, J., gave a concurring opinion.]

### 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.

<sup>1</sup> Similar statutes applicable to intrastate railroad transportation have been upheld. *Ches. & O. Ry. v. Kentucky*, 179 U. S. 388, 21 Sup. Ct. 101, 45 L. Ed. 244 (1900) (citing earlier cases). Of such a statute *Brewer, J.*, in *Louisville, etc., Ry. v. Mississippi*, 133 U. S. 587, 591, 10 Sup. Ct. 348, 349, 33 L. Ed. 784 (1890), said: "Its provisions are fully complied with when to trains within the state is attached a separate car for colored passengers."

In *Chiles v. Ches. & O. Ry.*, 218 U. S. 71, 30 Sup. Ct. 667, 54 L. Ed. 936, 20 Ann. Cas. 980 (1910), it was held that a railway might by its own regulations separate the races even in interstate transportation. Nor has the federal Supreme Court yet (1913) held that a state might not require this of ordinary day-coach passengers in such transportation. Compare the reasoning in *Plessy v. Ferguson*, ante, p. 367.



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.<sup>1</sup> \* \* \*

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 per-

<sup>1</sup> Accord: *Louisville, etc., Ry. v. Kentucky*, 183 U. S. 503, 22 Sup. Ct. 95, 46 L. Ed. 298 (1902). But domestic rates must be fixed solely with reference to the expenses and receipts of domestic business. *Smyth v. Ames*, 169 U. S. 460, 540-542, 18 Sup. Ct. 418, 42 L. Ed. 819 (1898); *Minnesota Rate Cases*, ante, at p. 499.

sons 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 transportation. 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 that part of this case printed ante, at p. 1164, pointing out that the Louisiana law necessarily affected the conduct of the carrier's business outside of the state as well as in it.]

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.<sup>2</sup>

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

<sup>2</sup> In *Hanley v. Kansas, etc., Ry.*, 187 U. S. 617, 620, 23 Sup. Ct. 214, 47 L. Ed. 333 (1903) Arkansas was denied the power to regulate rates between two points in the state, where an intermediate part of the journey was performed in Indian Territory or Texas, *Holmes, J.*, saying:

"The transportation of these goods certainly went outside of Arkansas, and we are of opinion that in its aspect of commerce it was not confined within the state. Suppose that the Indian territory were a state, and should try to regulate such traffic, what would stop it? Certainly not the fiction that the commerce was confined to Arkansas. If it could not interfere the only reason would be that this was commerce among the states. But if this commerce would have that character as against the state supposed to have been formed out of the Indian territory, it would have it equally as against the state of Arkansas. If one could not regulate it the other could not.

"No one contends that the regulation could be split up according to the jurisdiction of state or territory over the track, or that both state and territory may regulate the whole rate. There can be but one rate, fixed by one authority, whether that authority be Arkansas or Congress. *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. Ed. 244, 1 Interst. Com. Rep. 31, 7 Sup. Ct. 4; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 38 L. Ed. 962, 4 Interst. Com. Rep. 649, 14 Sup. Ct. 1087; *Hall v. De Cuir*, 95 U. S. 485, 24 L. Ed. 547. But it would be more logical to allow a division according to the jurisdiction over the track than to declare that the subject for regulation is indivisible, yet that the indivisibility does not depend upon the commerce being under the authority of Congress, but upon a fiction which attributes it wholly to Arkansas, although that fiction is quite beyond the power of Arkansas to enforce."

So also when the intermediate carriage is performed at sea. *Pacific S. S. Co. v. Ry. Com'rs (C. C.)* 18 Fed. 10, 9 Sawy. 253 (1883). Such carriage may be regulated by the United States, in either case. *Lord v. S. S. Co.*, 102 U. S. 541, 26 L. Ed. 224 (1881) (limitation of liability); *U. S. v. Del. L. & W. Ry.* (C. C.) 152 Fed. 269 (1907) (prohibition of rebates).

In *Ohio R. R. Commission v. Worthington*, 225 U. S. 101, 108, 109, 32 Sup. Ct. 653, 56 L. Ed. 1004 (1912) coal was shipped in Ohio from an Ohio mine to Huron, an Ohio port on Lake Erie, and there loaded and trimmed into vessels bound for upper lake ports outside of Ohio. A single rate was made for transporting to Huron, loading, and trimming into the vessels, and Ohio sought to regulate this. This rate was different from that for coal sent to Huron and not put on vessels for shipment. The Ohio regulation was held invalid, irrespective of conflict with any authority of the Interstate Commerce Commission, *Day, J.*, saying:

"By every fair test the transportation of this coal from the mine to the upper lake ports is an interstate carriage, intended by the parties to be such, and the rate fixed by the commission, which is in controversy here, is applicable alone to coal which is thus, from the beginning to the end of its transportation, in interstate carriage, and such rate is intended to and does cover an integral part of that carriage, the transportation from the mine to the Lake Erie port, the placing upon the vessel, and the trimming or distributing in the hold, if required, so that the vessel may complete such interstate carriage."

See *So. Pac. T. So. v. Interst. Com. Commis.*, post, p. 1236; and compare *Gulf, etc., Ry. v. Texas*, 201 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540 (1907) (interstate shipment to Texarkana, Tex., by a shipper who intended from the first to reship from there to Goldthwaite, Tex. Five days after arrival in



COVINGTON & C. BRIDGE CO. v. KENTUCKY (1894) 154 U. S. 204, 218, 220-222, 14 Sup. Ct. 1087, 1092, 38 L. Ed. 962, Mr. Justice BROWN (holding invalid a Kentucky statute fixing maximum rates for a toll bridge across the Ohio river between Kentucky and Ohio, and requiring the issue of tickets good in either direction):

"If \* \* \* interstate commerce means simply commerce between the states, it must apply to all commerce which crosses the state line, regardless of the distance from which it comes or to which it is bound, before or after crossing such state line; in other words, if it be commerce to send goods from Cincinnati, in Ohio, to Lexington, in Kentucky, it is equally such to send goods or to travel in person from Cincinnati to Covington. And, while the reasons which influenced this court to hold in the Wabash Case that Illinois could not fix rates between Peoria and New York may not impress the mind so strongly when applied to fixing the rates of toll upon a bridge or ferry, the principle is identically the same; and, at least in the absence of mutual or reciprocal legislation between the two states, it is impossible for either to fix a tariff of charges.

\* \* \* "An attempt is made to distinguish a bridge from a ferry-boat, and to argue that, while the latter is an instrument of interstate commerce, the former is not. Both are, however, vehicles of such commerce, and the fact that one is movable and the other is a fixture makes no difference in the application of the rule. 'Commerce' was

Texarkana, he did reship to Goldthwaite, and rate upon latter shipment was held subject to state regulation). See cases in note to *Coe v. Errol*, ante, at p. 1075.

A state cannot forbid a carrier to charge more for internal transportation than is charged by it for similar interstate transportation for a greater distance over the same route. *L. & N. Ry. v. Eubank*, 184 U. S. 27, 43, 22 Sup. Ct. 277, 283, 46 L. Ed. 416 (1902), Peckham, J., saying: "In the case at bar the state claims only to regulate its local rates by the standard of the interstate rate, and says the former shall be no higher than the latter, but the direct effect of that provision is, as we have seen, to regulate the interstate rate, for to do any interstate business at the local rate is impossible, and if so, it must give up its interstate business or else reduce the local rate in proportion. That very result is a hindrance to, an interference with, and a regulation of, commerce between the states, carried on, though it may be, by only a single company."

May a state, either by contract or as a condition of granting a franchise, prescribe, limit, or otherwise control interstate transportation rates? See *Railroad Co. v. Maryland*, ante, p. 1094. Whatever control may be thus gained, however, is subject to federal regulation. *State v. Western & A. Ry.*, 138 Ga. 835, 76 S. E. 577 (1912).

A state may forbid its railroads to acquire or to consolidate with parallel and competing lines, even though engaged largely in interstate commerce. *L. & N. Ry. v. Kentucky*, 161 U. S. 677, 701-703, 16 Sup. Ct. 714, 40 L. Ed. 849 (1896).

STATE REGULATION OF RATES FOR SERVICES INCIDENTAL TO NATIONAL COMMERCE.—In the absence of congressional legislation the rates for such services may be regulated by the states. *Munn v. Illinois*, 94 U. S. 113, 135, 24 L. Ed. 77 (1877) (grain warehouses); *Ouachita, etc., Co. v. Aiken*, 121 U. S. 444, 7 Sup. Ct. 307, 30 L. Ed. 976 (1887) (wharfage); *Morgan S. S. Co. v. La.*, 118 U. S. 455, 6 Sup. Ct. 1114, 30 L. Ed. 237 (1886) (quarantine); *Patapsco Co. v. North Carolina*, ante, p. 1157 (inspection).

defined in *Gibbons v. Ogden*, 9 Wheat. 1, 189, 6 L. Ed. 23, to be 'intercourse,' and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool. While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across a river. A tax laid upon those who do the business of common carriers upon a certain bridge is as much a tax upon the commerce of that bridge as if the owner of the bridge were himself a common carrier. \* \* \*

[Here the question is mooted whether, within the doctrine of *Conway v. Taylor*, ante, p. 1144, a state may regulate interstate ferry charges in the absence of federal action.]<sup>1</sup>

"It is clear that the state of Kentucky, by the statute in question, attempts to reach out and secure for itself a right to prescribe a rate of toll applicable, not only to persons crossing from Kentucky to Ohio, but from Ohio to Kentucky; a right which practically nullifies the corresponding right of Ohio to fix tolls from her own state. \* \* \* It may be for the interest of Kentucky to add to its own population by encouraging residents of Cincinnati to purchase homes in Covington, and to do this by fixing the tolls at such a rate as to induce citizens of Ohio to reside within her borders. It might be equally for the interest of Ohio to prescribe a higher rate of toll to induce her citizens to remain and fix their homes within their own state, and, as persons living in one state and doing business in another would necessarily have to cross the bridge at least twice a day, the rates of toll might become a serious question to them.

"Congress, and Congress alone, possesses the requisite power to harmonize such differences, and to enact a uniform scale of charges which will be operative in both directions. The authority of the state, so frequently recognized by this court, to fix tolls for the use of wharves, piers, elevators, and improved channels of navigation, has always been limited to such as were exclusively within the territory of a single state, thus affecting interstate commerce but incidentally, and cannot be extended to structures connecting two states without involving a liability of controversies of a serious nature. For instance, suppose the agent of the bridge company in Cincinnati should refuse to recognize tickets sold upon the Kentucky side, enabling the person holding the ticket to pass from Ohio to Kentucky, it would be a mere *brutum fulmen* to attempt to punish such agent under the laws of Kentucky. Or, suppose the state of Ohio should authorize such agent to refuse a passage to persons coming from Kentucky who had

<sup>1</sup> See *New York, etc., R. Co. v. Hudson County*, 227 U. S. 218, 33 Sup. Ct. 269, 57 L. Ed. — (1913) (leaving same question open).

not paid the toll required by the Ohio statute; or that Kentucky should enact that all persons crossing from Kentucky to Ohio should be entitled to a free passage, and thus attempt to throw the whole burden upon persons crossing in the opposite direction. It might be an advantage to one state to make the charge for foot passengers very low, and the charge for merchandise very high, and for the other side to adopt a converse system. One scale of charges might be advantageous to Kentucky in this instance, where the larger city is upon the north side of the river, while a wholly different system might be to her advantage at Louisville, where the larger city is upon the south side.

"We do not wish to be understood as saying that, in the absence of congressional legislation or mutual legislation of the two states, the company has the right to fix tolls at its own discretion. There is always an implied understanding with reference to these structures that the charges shall be reasonable, and the question of reasonableness must be settled, as other questions of a judicial nature are settled, by the evidence in the particular case. As was said in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 217, 5 Sup. Ct. 826, 29 L. Ed. 158: 'Freedom from such imposition does not of course imply exemption from reasonable charges, as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption. Reasonable charges for the use of property, either on water or land, are not an interference with the freedom of transportation between the states secured under the commercial power of Congress.' Nor are we to be understood as passing upon the question whether, in the absence of legislation by Congress, the states may by reciprocal action fix upon a tariff which shall be operative upon both sides of the river."<sup>2</sup>

[FULLER, C. J., and FIELD, GRAY, and WHITE, JJ., concurred on other grounds.]

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MINNESOTA RATE CASES (1913) 230 U. S. 352, 382, 383, 394, 395, 416, 417, 432, 433, 33 Sup. Ct. 729, 733, 738, 747, 748, 753, 754, 57 L. Ed. —, Mr. Justice HUGHES (upholding certain intrastate railroad rates fixed by Minnesota—see other facts, ante, p. 499, and in opinion below):

"The state line of Minnesota on the east and west runs between cities which are in close proximity. Superior, Wisconsin, and Duluth, Minnesota, are side by side at the extremity of Lake Superior. Opposite one another, on the western boundary of the state, lie Grand Forks, North Dakota, and East Grand Forks, Minnesota; Fargo, North Dakota, and Moorhead, Minnesota; and Wahpeton, North Da-

<sup>2</sup> See *Hanley v. Kansas, etc., Ry.*, 187 U. S. 617, 620, 23 Sup. Ct. 214, 47 L. Ed. 333 (1903), ante, p. 1171, note.

kota, and Breckenridge, Minnesota. The cities in each pair ship and receive, to and from the same localities, the same kinds of freight. The railroad companies have always put each on a parity with the other in the matter of rates, and if there were a substantial difference it would cause serious injury to the commerce of the city having the higher rate. If the Northern Pacific Company failed to maintain as low rates on traffic in and out of Superior as on that to and from Duluth, its power to transact interstate business between Superior and points in Minnesota would be seriously impaired and the value of its property in Superior would be depreciated. \* \* \*

[After reciting the 20 to 25 per cent. reduction of local rates within the state to the above-mentioned Minnesota points; the consequent enforced similar reduction by the railroads of rates from Minnesota points to the competing cities in neighboring states in order to prevent the practical destruction of this part of the interstate business of these cities and of the railroads; the necessity of continuing these reductions on west from one jobbing center to another, through Fargo and Bismarck in North Dakota and Billings and Butte in Montana, in order to maintain the relative commercial positions of these cities in their respective localities; and the consequent loss of interstate revenue to the railroads:]

"The situation is not peculiar to Minnesota. \* \* \* A scheme of state rates framed to avoid discrimination between localities within the state, and to provide an harmonious system for intrastate transportation throughout the state, naturally would embrace those places within the state which are on or near the state's boundaries; and when these are included in a general reduction of intrastate rates, there is, of course, a change in the relation of rates as theretofore existing to points adjacent to, but across, the state line. \* \* \* Many other places throughout the country which might be mentioned, present substantially the same conditions as those here appearing with respect to localities on the boundaries of Minnesota. It is also a matter of common knowledge that competition takes but little account of state lines, and in every part of the land competitive districts embrace points in different states. \* \* \*

[After referring to various cases holding that the states may regulate their internal railroad rates (see *Munn v. Illinois*, ante, p. 479, and notes), and to the *Wabash Case*, ante, p. 1166:] "It has never been doubted that the state could, if it saw fit, build its own highways, canals and railroads. *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456, 470, 471, 22 L. Ed. 678, 683, 684. It could build railroads traversing the entire state, and thus join its border cities and commercial centers by new highways of internal intercourse, to be always available upon reasonable terms. Such provision for local traffic might indeed alter relative advantages in competition, and, by virtue of economic forces, those engaged in interstate trade and transportation might find it necessary to make readjustments extending from market to market

through a wide sphere of influence; but such action of the state would not for that reason be regarded as creating a direct restraint upon interstate commerce, and as thus transcending the state power.

"Similarly, the authority of the state to prescribe what shall be reasonable charges of common carriers for interstate transportation, unless it be limited by the exertion of the constitutional power of Congress, is state-wide. As a power appropriate to the territorial jurisdiction of the state, it is not confined to a part of the state, but extends throughout the state,—to its cities adjacent to its boundaries as well as to those in the interior of the state. To say that this power exists, but that it may be exercised only in prescribing rates that are on an equal or higher basis than those that are fixed by the carrier for interstate transportation, is to maintain the power in name while denying it in fact. It is to assert that the exercise of the legislative judgment in determining what shall be the carrier's charge for the intrastate service is itself subject to the carrier's will. But this state-wide authority controls the carrier, and is not controlled by it; and the idea that the power of the states to fix reasonable rates for its internal traffic is limited by the mere action of the carrier in laying an interstate rate to places across the state's border is foreign to our jurisprudence.

"If this authority of the state be restricted, it must be by virtue of the paramount power of Congress over interstate commerce and its instruments; and, in view of the nature of the subject, a limitation may not be implied because of a dormant federal power; that is, one which has not been exerted, but can only be found in the actual exercise of federal control in such measure as to exclude this action by the state which otherwise would clearly be within its province. \* \* \* [It was denied that the Interstate Commerce Act, at least in the absence of action by the Commission,<sup>1</sup> operated to forbid any state regulation of internal rates.] \* \* \*

"The interblending of operations in the conduct of interstate and local business by interstate carriers is strongly pressed upon our attention. It is urged that the same right of way, terminals, rails, bridges, and stations are provided for both classes of traffic; that the proportion of each sort of business varies from year to year, and, indeed, from day to day; that no division of the plant, no apportionment of it between interstate and local traffic, can be made to-day, which will hold tomorrow; that terminals, facilities, and connections in one state aid the carrier's entire business, and are an element of value with respect to the whole property and the business in other states; that securities are issued against the entire line of the carrier and cannot be divided by states; that tariffs should be made with a view to all the traffic of the road, and should be fair as between through and short-haul business; and that, in substance, no regulation of rates can be

<sup>1</sup> As to the Commission's control of intrastate rates improperly discriminating against interstate traffic, see *Texas & Pac. Ry. v. United States*, 205 Fed. 380 (1913).



just which does not take into consideration the whole field of the carrier's operations, irrespective of state lines. The force of these contentions is emphasized in these cases, and in others of like nature, by the extreme difficulty and intricacy of the calculations which must be made in the effort to establish a segregation of intrastate business for the purpose of determining the return to which the carrier is properly entitled therefrom.

"But these considerations are for the practical judgment of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce. If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments, the measure of the regulation it should supply."<sup>2</sup>

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WESTERN UNION TELEGRAPH CO. v. CALL PUB. CO. (1901) 181 U. S. 92, 99-102, 21 Sup. Ct. 561, 564, 565, 45 L. Ed. 765, Mr. Justice BREWER (affirming a decision of the Supreme Court of Nebraska awarding damages against defendant telegraph company for illegal discrimination in charges for interstate service):

"Common carriers, whether engaged in interstate commerce or in that wholly within the state, are performing a public service. They are endowed by the state with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this, all individuals have equal rights both in respect to service and charges. Of course, such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. There is no cast iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and, even when based upon difference of service, must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination. To affirm that a condition of things exists under which common carriers anywhere in the country, engaged in any form of transportation, are relieved from the burdens of these obligations, is a proposition which, to say the least is startling. And yet, as we have seen, that is precisely the

<sup>2</sup> See the argument contrary to the principal case by the lower court in the same case, *Shepard v. No. Pac. Ry.*, 184 Fed. 765, 770-799 (1911).

contention of the telegraph company. It contends that there is no federal common law, and that such has been the ruling of this court; there was no federal statute law at the time applicable to this case, and, as the matter is interstate commerce, wholly removed from state jurisdiction, the conclusion is reached that there is no controlling law, and the question of rates is left entirely to the judgment or whim of the telegraph company. \* \* \*

"Reference is also made to opinions in which it has been stated that there is no federal common law different and distinct from the common law existing in the several states. Thus, in *Smith v. Alabama*, 124 U. S. 465, 31 L. Ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. 564, it was said by Mr. Justice Matthews, speaking for the court:

"There is no common law of the United States in the sense of a national customary law distinct from the common law of England as adopted by the several states, each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. *Wheaton v. Peters*, 8 Pet. 591, 8 L. Ed. 1055.<sup>1</sup> A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular state. This arises from the circumstance that the courts of the United States, in cases within their jurisdiction where they are called upon to administer the law of the state in which they sit, or by which the transaction is governed, exercise an independent, though concurrent, jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, where the common law prevailing in the state of New York in reference to the liability of common carriers for negligence received a different interpretation from that placed upon it by the judicial tribunals of the state; but the law as applied is none the less the law of that state.' P. 478, L. Ed. 512, Inters. Com. Rep. 808, Sup. Ct. 569.

"Properly understood, no exceptions can be taken to declarations of this kind. There is no body of federal common law separate and distinct from the common law existing in the several states, in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several

<sup>1</sup> Accord: *U. S. v. Hudson*, 7 Cranch, 32, 3 L. Ed. 259 (1812) (criminal law—semble); *Chicago, etc., Ry. v. Solan*, 169 U. S. 133, 136, 137, 18 Sup. Ct. 289, 42 L. Ed. 688 (1898) (contract exemption of carrier from negligence); *Willamette Bridge Co. v. Hatch*, 125 U. S. 1, 8, 8 Sup. Ct. 811, 815, 31 L. Ed. 629 (1888), *Bradley, J.*, saying: "There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the states. Such obstructions and nuisances are offenses against the laws of the states within which the navigable waters lie, and may be indicted or prohibited as such; but they are not offenses against United States laws which do not exist; and none such exist except what are to be found on the statute book." See *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518, 564, 14 L. Ed. 249 (1852).

states. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress.

"What is the common law? \* \* \* In Black's Law Dictionary, page 232, it is thus defined: 'As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England.'

"Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that to be found in the statutes of Congress? We are clearly of opinion that this cannot be so, and that the principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by congressional enactment."<sup>2</sup>

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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

<sup>2</sup> Accord: *Mo. Pac. Ry. v. Larabee Co.*, 211 U. S. 612, 29 Sup. Ct. 214, 53 L. Ed. 352 (1909) (discrimination in transferring cars). See *Transportation Co. v. Parkersburg*, 107 U. S. 691, 700, 2 Sup. Ct. 732, 27 L. Ed. 584 (1883). In *W. U. Teleg. Co. v. Com. Milling Co.*, 218 U. S. 406, 416, 417, 31 Sup. Ct. 59, 62, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815 (1910), the court, by McKenna, J., denied (semble) that a state common law rule could have a validity denied to a similar statute:

"We cannot concede such effect to the common law and deny it to a statute. Both are rules of conduct proceeding from the supreme power of the state. That one is unwritten and the other written can make no difference in their validity or effect. The common law did not become a part of the laws of the states of its own vigor. It has been adopted by constitutional provision, by statute or decision, and, we may say in passing, is not the same in all particulars in all the states. But, however adopted, it expresses the policy of the state for the time being only, and is subject to change by the power that adopted it. How, then, can it have an efficacy that the statute changing it does not possess?"

See also *St. L., etc., Ry. v. Arkansas*, 217 U. S. 136, 30 Sup. Ct. 476, 54 L. Ed. 698, 29 L. R. A. (N. S.) 802 (1910), holding invalid a statutory prescription of a railroad's duty to furnish cars, said by the state court to be merely declaratory of the state common law.

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."<sup>1</sup>

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

<sup>1</sup> Accord (in addition to the cases cited in the above opinion): *Nashville, etc., Ry. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352 (1888) (railway operatives required to show freedom from color-blindness); *Chicago, etc., Ry. v. Arkansas*, 219 U. S. 453, 465, 466, 31 Sup. Ct. 275, 55 L. Ed. 290 (1911) (three brakemen required on freight trains of over 25 cars), Harlan, J., saying:

"Beyond doubt, passengers on interstate carriers while within Arkansas are as fully entitled to the benefits of valid local laws enacted for the public safety as are citizens of the state. \* \* \* The statute here involved, \* \* \* upon its face, must be taken as not directed against interstate commerce, but as having been enacted in aid, not in obstruction, of such commerce, and for the protection of those engaged in such commerce. Under the evidence, there is admittedly some room for controversy as to whether the statute is or was necessary; but it cannot be said that it is so unreasonable as to justify the court in adjudging that it is merely an arbitrary exercise of power, and not germane to the objects which evidently the state legislature had in view. It is a means employed by the state to accomplish an object which it is entitled to accomplish, and such means, even if deemed unwise, are not to be condemned or disregarded by the courts, if they have a real relation to that object."

Compare *Hall v. De Cuir*, ante, p. 1163.

In *N. Y., etc., Ry. v. New York*, 165 U. S. 628, 632, 633, 17 Sup. Ct. 418, 420, 41 L. Ed. 853 (1897), Harlan, J., said (upholding as to interstate traffic, within the state, a New York statute forbidding the heating of passenger cars by stoves):

"Counsel for the railroad suggests that a conflict between state regulations in respect of the heating of passenger cars used in interstate commerce would make safe and rapid transportation impossible; that to stop an express train on its trip from New York to Boston at the Connecticut line in order that passengers may leave the cars heated as required by New York, and get into other cars heated in a different mode in conformity with the laws of Connecticut, and then at the Massachusetts line to get into cars heated by still another mode as required by the laws of that commonwealth, would be a hardship on travel that could not be endured. These possible inconveniences cannot affect the question of power in each state to make such reasonable regulations for the safety of passengers on interstate trains as in its judgment, all things considered, is appropriate and effective. Inconveniences of this character cannot be avoided so long as each state has plenary authority within its territorial limits to provide for the safety of the public according to its own views of necessity and public policy, and so long as Congress deems it wise not to establish regulations on the subject that would displace any inconsistent regulations of the states covering the same ground."



WESTERN UNION TELEGRAPH CO. v. COMMERCIAL  
MILLING CO.

(Supreme Court of United States, 1910. 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. [N. S.] 220, 21 Ann. Cas. 815.)

[Error to the Supreme Court of Michigan. Plaintiff sent by defendant telegraph company at Detroit, Michigan, a commercial message to be transmitted to Kansas City, Missouri. Defendant sent it promptly as far as Chicago, but never delivered it in Kansas City. A printed condition of the contract under which defendant sent the message limited plaintiff's damages for its non-delivery to 50 times its cost. A Michigan statute forbade telegraph companies to limit their liability for damages due to negligent non-delivery of messages. Plaintiff recovered damages in excess of the stipulated amount, and one division of the state Supreme Court affirmed this.]

Mr. Justice McKENNA. \* \* \* "The contract," it was said [by the state court], "was made in the state, is single, involves in its performance service of defendant within and without this state for a single charge." The service was not performed, and for the breach of the common-law and contract duty the milling company has brought suit, it was said, and that the telegraph company seeks to avoid liability by the stipulation on the back of the message. To this defense it was answered:

"By the law of the state, the stipulation is of no force or effect. \* \* \* Undoubtedly, it was the application of a local law to the contract. But the local law does not attempt to state, measure, or define any duty of defendant, or to establish, define, or fix the consequences of its miscarriage. The liability of defendant is established without reference to the statute. It is when it asks to be discharged therefrom, by giving effect to the stipulation, that the local law becomes, if at all, effective. These considerations answer those objections which are based upon the notion that the local law has been given extraterritorial effect, and they require, also, that this case and *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 30 L. Ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. 1126, shall be distinguished."

*Western U. Teleg. Co. v. Pendleton* leaves nothing to be said upon the principles relating to interstate telegraphic messages and the limitations upon the states of power to regulate them. \* \* \* [An Indiana statute that prescribed the mode in which telegraph companies should deliver, even outside of the state, messages sent from within, was in this case held invalid as applied to the delivery of such a message in Iowa in accordance with Iowa law but not as prescribed by the Indiana statute.] Of the correctness of that conclusion there cannot be any controversy, but there is a manifest difference between the statute of Indiana and the statute of Michigan and their purposes and effects. The former imposed affirmative duties, and regulated the

performance of the business of the telegraph company. It besides ignored the requirements or regulations of another state, made its laws paramount to the laws of another state, gave an action for damages against the permission of such laws for acts done within its jurisdiction. Such a statute was plainly a regulation of interstate commerce, and exhibited in a conspicuous degree the evils of such interference by a state, and the necessity of one uniform plan of regulation. The statute of Michigan has no such objectionable qualities. It imposes no additional duty. It gives sanction only to an inherent duty. It declares that in the performance of a service public in its nature, that it is a policy of the state that there shall be no contract against negligence. The prohibition of the statute, therefore, entails no burden. It permits no release from that duty in the public service which men in their intercourse must observe,—the duty of observing the degree of care and vigilance which the circumstances justly demand, to avoid injury to another.

We have seen that one division of the supreme court of the state was of the view that if the prohibition rested on the common law, its validity could not be questioned. We cannot concede such effect to the common law and deny it to a statute. [Here follows the passage quoted ante, p. 1179, note.] It is to the laws, whether part of the common law or found in the statutes of the state, that we look for the validity and extent of a contract between persons. They constitute its obligation. How far this principle is limited by the commerce clause of the Constitution of the United States may be illustrated by several cases cognate to the one at bar.

In *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. Ed. 688, 18 Sup. Ct. 289, \* \* \* [an Iowa statute forbade railways to limit their common law liability. Solan was injured in Iowa by defendant's negligence, while being transported to Chicago in charge of cattle, under a contract limiting the railway's liability to \$500. He sued for \$10,000.] The company alleged that the stipulation was part of the consideration for the transportation, that it related exclusively to interstate commerce, that it was valid at common law, and that the statute of Iowa was void and unconstitutional, "as being an attempt to regulate and limit contracts relating to interstate commerce." The contentions were rejected. The court said: \* \* \*

"The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. \* \* \* The statute now in question, so far as it concerns liability for injuries happening within the state of Iowa,—which is the only matter presented for decision in this case,—clearly comes within the same principles. It is in no just sense a regulation of commerce. It does not undertake to impose any tax upon the company, or to restrict the persons or things to be carried, or to regulate the rate of tolls, fares, or freight. Its whole object and effect are to make it

more sure that railroad companies shall perform the duty resting upon them by virtue of their employment as common carriers to use the utmost care and diligence in the transportation of passengers and goods."

*Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. Ed. 268, 24 Sup. Ct. 132, may be cited as pertinent. It determined the validity of the common law of Pennsylvania, which prohibited the common carrier from limiting his liability for his own negligence, though the property was shipped from New York to a town in Pennsylvania, under a bill of lading which contained a clause limiting the carrier's liability to a stipulated value in consideration of the rate paid, the shipper having been offered a bill of lading without such limitation on payment of a higher rate. The court quoted at length from the *Solan Case*, and concluded as follows:

"We can see no difference in the application of the principle based upon the manner in which the state requires this degree of care and responsibility, whether enacted into a statute or resulting from the rules of law enforced in the state courts. The state has a right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, a contract to the contrary notwithstanding."

There is a difference between that case and this,—indeed some contrast. In that case a contract was made in New York which limited the liability of the carrier, the limitation being in accordance with the laws of that state; it was disregarded in Pennsylvania, where the act of negligence occurred, and the law of the latter enforced. In this case the contract limiting liability was made in Michigan, the negligent act occurred in another state, and yet the limitation, it is insisted, is void. In other words, in that case the law of the state was disregarded; in this case it is sought to be enforced. These, however, are but incidental contrasts, in no way affecting the basic principle of the cases, which was that the laws passed upon were exercises of the police power of the states in aid of interstate commerce, and, although incidentally affecting it, did not burden it.

*Western U. Teleg. Co. v. James*, 162 U. S. 650, 40 L. Ed. 1105, 16 Sup. Ct. 934, is a strong example of the same distinctions. A statute of Georgia which required telegraph companies having wires wholly or partly within the state to receive despatches, transmit and deliver them with due diligence, under the penalty of \$100, was sustained as a valid exercise of the power of the state in relation to messages by telegraph from points outside of and directed to some point within the state. It will be observed that this case in some particulars exhibits a contrast to *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 30 L. Ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. 1126, and yet they are entirely reconcilable, having a common principle. In the latter case the law passed on clearly transcended the power of the

state, because it directly regulated interstate commerce, as we have already shown. In the James Case the power of the state was exercised in aid of commerce. In the latter case prior cases were reviewed, and the principle determining the validity of the respective statutes was declared to be whether they could be "fully carried out and obeyed without in any manner affecting the conduct of the company with regard to the performance of its duties in other states."<sup>1</sup> \* \* \*

And there can be liability to the sender of the message as well as to him who is to receive it. The telegraph company in the case at bar surely owed the obligation to the milling company to not only transmit the message, but to deliver it. For the failure of the latter it sought to limit its responsibility,—to make the measure of its default not the full and natural consequence of the breach of its obligation, but the mere price of the service, relieving itself, to some extent, even from the performance of its duty; a duty, we may say, if performed or omitted, may have consequence beyond the damage in the particular instance. This the statute of the state, expressing the policy of the state, declares shall not be. For the reasons stated we think that this may be done, and that it is not an illegal interference with interstate commerce. \* \* \*

Judgment affirmed.<sup>2</sup>

[HOLMES, J., dissented.]

<sup>1</sup> Accord: *W. U. Teleg. Co. v. Crovo*, 220 U. S. 364, 31 Sup. Ct. 399, 55 L. Ed. 498 (1911) (state from which interstate message is sent may penalize default in sending).

<sup>2</sup> A state may regulate the *form* in which a contract shall be made, even though its subject-matter be interstate commerce. *Richmond, etc., Ry. v. Patterson Co.*, 169 U. S. 311, 18 Sup. Ct. 335, 42 L. Ed. 759 (1898) (carrier deemed to assume obligation for safe carriage over connecting lines, unless exempted by written contract); *Mo., K. & T. Ry. v. McCann*, 174 U. S. 580, 19 Sup. Ct. 755, 43 L. Ed. 1093 (1899) (same, unless exemption made in certain part of bill of lading). In the first case, White, J., said (169 U. S. at page 314):

"The distinction between a law which forbids a contract to be made and one which simply requires the contract when made to be embodied in a particular form is obvious. \* \* \* It is, of course, elementary that where the object of a contract is the transportation of articles of commerce from one state to another that no power is left in the states to burden or forbid it; but this does not imply that, because such want of power obtains, there is also no authority on the part of the several states to create rules of evidence governing the form in which such contracts when entered into within their borders may be made, at least until Congress, by general legislation, has undertaken to govern the subject."

But a state cannot forbid contracts exempting carriers from liability for injury to interstate shipments due to the negligence of connecting carriers, nor can such exemptions be burdened with onerous conditions. *Cent. of Ga. Ry. v. Murphey*, 196 U. S. 194, 25 Sup. Ct. 218, 49 L. Ed. 444, 2 Ann. Cas. 514 (1905).

HOUSTON & T. C. R. CO. v. MAYES (1906) 201 U. S. 321, 328 331, 26 Sup. Ct. 491, 50 L. Ed. 772, Mr. Justice BROWN (holding invalid, as applied to interstate commerce, a Texas statute imposing upon railroads a penalty of \$25 a day for delay in furnishing each car demanded in writing by shippers, with reciprocal penalties upon shippers for delay in loading or unloading cars):

"As the power to build and operate railways, and to acquire land by condemnation, usually rests upon state authority, the legislatures may annex such conditions as they please with regard to *intrastate* transportation, and such other rules regarding *interstate* commerce as are not inconsistent with the general right of such commerce to be free and unobstructed. \* \* \*

"While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers, and to regulate the general subject of speed, length, and frequency of stops, for the heating, lighting, and ventilation of passenger cars, the furnishing of food and water to cattle and other live stock, we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the state, and amounts to a burden upon interstate commerce. It makes no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other states, or in other places within the same state. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts, or other unavoidable consequences of heavy weather. \* \* \* We think that in its practical operation it is likely to work a great injustice to the roads, and to impose heavy penalties for trivial, unintentional, and accidental violations of its provisions, when no damages could actually have resulted to the shippers. \* \* \*

"While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where, by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise, which good management and a desire to fulfil all its legal requirements cannot provide for, and against which the statute in question makes no allowance. Although it may be admitted that the statute is not far from the line of proper police regulation, we think that sufficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate powers of the legislature."

[WHITE, J., took no part in the decision. FULLER, C. J., and HARLAN and MCKENNA, JJ., dissented.]



Accord (where the regulation of acts done in the course of interstate commerce, though to be performed within the regulating state, imposed unreasonable burdens): *McNeill v. Southern Ry.*, 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142 (1906) (requiring delivery of interstate shipments on private sidings); *St. Louis, etc., Ry. v. Arkansas*, 217 U. S. 136, 30 Sup. Ct. 476, 54 L. Ed. 698, 29 L. R. A. (N. S.) 802 (1910) (requiring cars for local shipments to be furnished on demand, when compliance therewith would cripple interstate service).

In general, state regulation of such acts, where not unduly onerous, is valid. *R. R. Co. v. Fuller*, 17 Wall. 560, 21 L. Ed. 710 (1873) (requiring posting of interstate railroad rates and forbidding charges in excess thereof); *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166 (1896) (forbidding Sunday freight trains, except for preservation of stock); *Wis., etc., Ry. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194 (1900) (requiring intersecting railways to make track connections); *Mobile, etc., Ry. v. Mississippi*, 210 U. S. 187, 28 Sup. Ct. 650, 52 L. Ed. 1016 (1908) (enforcing agreement to broaden and operate a section of narrow-gauge railroad); *Mo. Pac. Ry. v. Larabee Mills*, 211 U. S. 612, 29 Sup. Ct. 214, 53 L. Ed. 352 (1909) (compelling equality of car service between shippers). See also the telegraph cases cited in *W. U. Teleg. Co. v. Com. Co.*, ante, p. 1182.

**STATE REGULATION OF STOPPAGE OF INTERSTATE TRAINS.**—Railroads may be required to furnish adequate transportation facilities at each station, and if they do not supply this by local trains a sufficient number of interstate trains must be stopped there. *L. S. & M. S. Ry. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702 (1899); *Mo. Pac. Ry. v. Kansas*, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472 (1910). Trains whose runs are entirely within the state may be compelled to stop at all county seats, regardless of the fact that they carry mail and interstate passengers who are transferred to interstate trains at junction points. *Gladson v. Minnesota*, 166 U. S. 427, 17 Sup. Ct. 627, 41 L. Ed. 1064 (1897). But interstate trains may not be compelled to stop at county seats or junction points, provided a sufficient local and connecting service is supplied by local trains. *Ill. C. Ry. v. Illinois*, 163 U. S. 142, 16 Sup. Ct. 1096, 41 L. Ed. 107 (1896); *Cleveland, etc., Ry. v. Illinois*, 177 U. S. 514, 20 Sup. Ct. 722, 44 L. Ed. 868 (1900); *Mississippi R. Com. v. I. C. Ry.*, 203 U. S. 335, 27 Sup. Ct. 90, 51 L. Ed. 209 (1906); *Atlantic C. Line v. Wharton*, 207 U. S. 328, 28 Sup. Ct. 121, 52 L. Ed. 230 (1907); *Hendon v. Chicago, etc., Ry.*, 218 U. S. 135, 30 Sup. Ct. 633, 54 L. Ed. 970 (1910).

**STATE REGULATION OF EXTENT AND ENFORCEMENT OF LIABILITY FOR INJURIES.**—For injuries resulting from acts done within its limits, though in the course of interstate commerce, a state may ordinarily regulate the extent of liability and its mode of enforcement. *Martin v. Pittsburg, etc., Ry.*, 203 U. S. 284, 27 Sup. Ct. 100, 51 L. Ed. 184, 8 Ann. Cas. 87 (1906) (injury to railway postal clerk); *Mo. Pac. Ry. v. Castle*, 224 U. S. 541, 32 Sup. Ct. 606, 56 L. Ed. 875 (1912) (abolition of defences of fellow service and contributory negligence); *Atlantic C. L. Ry. v. Mazursky*, 216 U. S. 122, 30 Sup. Ct. 378, 54 L. Ed. 411 (1910) (penalty for carrier's failure promptly to pay claims for damaged freight).

**STATE REGULATIONS INCIDENTALLY OR REMOTELY AFFECTING NATIONAL COMMERCE.**—Holding these valid, see *Diamond Glue Co. v. U. S. Co.*, 187 U. S. 611, 23 Sup. Ct. 206, 47 L. Ed. 328 (1903); *Davis v. Cleveland, etc., Ry.*, 217 U. S. 157, 30 Sup. Ct. 463, 54 L. Ed. 708, 27 L. R. A. (N. S.) 823, 18 Ann. Cas. 907 (1910) (foreign attachment of empty cars); *Martin v. West*, 222 U. S. 191, 197, 198, 32 Sup. Ct. 42, 56 L. Ed. 159, 36 L. R. A. (N. S.) 592 (1911) (attachment of vessel for non-maritime tort); *Standard Oil Co. v. Tennessee*, 217 U. S. 413, 30 Sup. Ct. 513, 54 L. Ed. 817 (1910) (punishing A. for inducing B. to break interstate contracts); *Engel v. O'Malley*, 219 U. S. 128, 31 Sup. Ct. 190, 55 L. Ed. 128 (1911).

**RELATION OF STATE POLICE POWERS IN GENERAL TO FEDERAL COMMERCIAL POWERS.**—See as to this the cases ante, pp. 323-327.

## BOWMAN v. CHICAGO &amp; N. W. RY. CO.

(Supreme Court of United States, 1888. 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700.)

[Error to the United States Circuit Court for the Northern District of Illinois. An Iowa statute, as part of a system of general prohibition, forbade carriers to bring intoxicating liquor into the state for Iowa consignees not duly authorized to sell the same. Plaintiffs, partners doing business in Iowa, sued the defendant Illinois corporation for refusing to accept 5,000 barrels of beer offered at Chicago to be carried to plaintiffs in Iowa. Defendant set up the Iowa statute as a defence, plaintiffs not being duly authorized by Iowa to sell liquor there. Plaintiffs' demurrer was overruled and judgment given for defendant.]

Mr. Justice MATTHEWS. \* \* \* [After examining the Iowa statute and granting that it was enacted in good faith to protect the health and morals of Iowa people and to preserve peace and good order in the state; and after reviewing the opinions in *The License Cases*, ante, p. 1076:] From this analysis it is apparent that the question presented in this case was not decided in the *License Cases*. The point in judgment in them was strictly confined to the right of the states to prohibit the sale of intoxicating liquor after it had been brought within their territorial limits. The right to bring it within the states was not questioned; and the reasoning which justified the right to prohibit sales admitted, by implication, the right to introduce intoxicating liquor, as merchandise, from foreign countries, or from other states of the Union, free from the control of the several states, and subject to the exclusive power of Congress over commerce.

It cannot be doubted that the law of Iowa now under examination, regarded as a rule for the transportation of merchandise, operates as a regulation of commerce among the states. \* \* \* Mr. Justice Curtis in the case of *Cooley v. Board of Wardens*, 12 How. 299, 13 L. Ed. 996, \* \* \* speaking of commerce with foreign nations, said (page 319): "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." It was therefore held, in that case, that the laws of the several states concerning pilotage, although in their nature regulations of foreign commerce, were, in the absence of legislation on the same subject by Congress, valid exercises of power. The subject was local, and not national, and was likely to be 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; and to this it may be added that it was a subject imperatively demanding positive regulation. The absence of legislation on the subject, therefore, by Congress, was evidence of its opinion that the matter might be best regulated by local authority, and proof of its intention that local regulations might be made.

It may be argued, however, that aside from such regulations as these, which are purely local, the inference to be drawn from the absence of legislation by Congress on the subject excludes state legislation affecting commerce with foreign nations more strongly than that affecting commerce among the states. Laws which concern the exterior relations of the United States with other nations and governments are general in their nature, and should proceed exclusively from the legislative authority of the nation. The organization of our state and federal system of government is such that the people of the several states can have no relations with foreign powers in respect to commerce, or any other subject, except through the government of the United States, and its laws and treaties. *Henderson v. Mayor of New York*, 92 U. S. 259, 273, 23 L. Ed. 543. The same necessity, perhaps, does not exist equally in reference to commerce among the states. The power conferred upon Congress to regulate commerce among the states is indeed contained in the same clause of the Constitution which confers upon it power to regulate commerce with foreign nations. The grant is conceived in the same terms, and the two powers are undoubtedly of the same class and character, and equally extensive. The actual exercise of its power over either subject is equally and necessarily exclusive of that of the states, and paramount over all the powers of the states; so that state legislation, however legitimate in its origin or object, when it conflicts with the positive legislation of Congress, or its intention, reasonably implied from its silence, in respect to the subject of commerce of both kinds must fail. And yet, in respect to commerce among the states, it may be, for the reason already assigned, that the same inference is not always to be drawn from the absence of congressional legislation, as might be in the case of commerce with foreign nations. The question, therefore, may be still considered in each case as it arises, whether the fact that Congress has failed in the particular instance to provide by law a regulation of commerce among the states is conclusive of its intention that the subject shall be free from all positive regulation, or that, until it positively interferes, such commerce may be left to be freely dealt with by the respective states. \* \* \*

[After referring to *The State Freight Tax*, ante, p. 1090:] If the state has not power to tax freight and passengers passing through it, or to or from it, from or into another state, much less would it have the power directly to regulate such transportation, or to forbid it altogether. If, in the present case, the law of Iowa operated upon all merchandise sought to be brought from another state into its limits, there could be no doubt that it would be a regulation of commerce among

the states, and repugnant to the Constitution of the United States. In point of fact, however, it applies only to one class of articles of a particular kind, and prohibits their introduction into the state upon special grounds. It remains for us to consider whether those grounds are sufficient to justify it as an exception from the rule which would govern if they did not exist. \* \* \*

The law of the state of Iowa under consideration, while it professes to regulate the conduct of carriers engaged in transportation within the limits of that state, nevertheless materially affects, if allowed to operate, the conduct of such carriers, both as respects their rights and obligations, in every other state into or through which they pass, in the prosecution of their business of interstate transportation. In the present case, the defendant is sued as a common carrier in the state of Illinois, and the breach of duty alleged against it is a violation of the law of that state in refusing to receive and transport goods which, as a common carrier, by that law, it was bound to accept and carry. It interposes as a defense a law of the state of Iowa which forbids the delivery of such goods within that state. Has the law of Iowa any extraterritorial force which does not belong to the law of the state of Illinois? If the law of Iowa forbids the delivery, and the law of Illinois requires the transportation, which of the two shall prevail? How can the former make void the latter? In view of this necessary operation of the law of Iowa, if it be valid, the language of this court in the case of *Hall v. De Cuir*, 95 U. S. 485, 488, 24 L. Ed. 547, is exactly in point. \* \* \* [Here follows a quotation from this case printed ante, p. 1164, showing how the Louisiana law affected the carrier's business outside of the state also.]

It is impossible to justify this statute of Iowa by classifying it as an inspection law. \* \* \* It has never been regarded as within the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature, and the injurious consequences of its use or abuse.

For similar reasons the statute of Iowa under consideration cannot be regarded as a regulation of quarantine, or a sanitary provision for the purpose of protecting the physical health of the community, or a law to prevent the introduction into the state of disease, contagious, infectious, or otherwise. Doubtless, the states have power to provide by law suitable measures to prevent the introduction into the states of articles of trade which, on account of their existing condition, would bring in and spread disease, pestilence, and death; such as rags or other substances infected with the germs of yellow fever, or the virus of small-pox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption. Such articles are not merchantable. They are not legitimate subjects of trade and commerce. They may be rightly outlawed, as intrinsically and directly the immediate sources

and causes of destruction to human health and life. The self-protecting power of each state, therefore, may be rightfully exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution. \* \* \* [Here follow quotations from the License Cases, 5 How. 504, 599-601, 12 L. Ed. 256, and from several of the cases discussed in *Smith v. St. L.*, etc., Ry., ante, p. 1152.]

Can it be supposed that, by omitting any express declarations on the subject, Congress has intended to submit to the several states the decision of the question in each locality of what shall and what shall not be articles of traffic in the interstate commerce of the country? If so, it has left to each state, according to its own caprice and arbitrary will, to discriminate for or against every article grown, produced, manufactured, or sold in any state, and sought to be introduced as an article of commerce into any other. If the state of Iowa may prohibit the importation of intoxicating liquors from all other states, it may also include tobacco, or any other article, the use or abuse of which it may deem deleterious. It may not choose, even, to be governed by considerations growing out of the health, comfort, or peace of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures, or arts of any description, and prevent the introduction and sale within its limits of any or of all articles that it may select as coming into competition with those which it seeks to protect. The police power of the state would extend to such cases, as well as to those in which it was sought to legislate in behalf of the health, peace, and morals of the people. In view of the commercial anarchy and confusion that would result from the diverse exertions of power by the several states of the Union, it cannot be supposed that the Constitution or Congress has intended to limit the freedom of commercial intercourse among the people of the several states. \* \* \*

The statute of Iowa \* \* \* is not an exercise of the jurisdiction of the state over persons and property within its limits; on the contrary, it is an attempt to exert that jurisdiction over persons and property within the limits of other states. It seeks to prohibit and stop their passage and importation into its own limits, and is designed as a regulation for the conduct of commerce before the merchandise is brought to its border. \* \* \* It may be said, however, that the right of the state to restrict or prohibit sales of intoxicating liquor within its limits, conceded to exist as a part of its police power, implies the right to prohibit its importation, because the latter is necessary to the effectual exercise of the former. The argument is that a prohibition of the sale cannot be made effective except by preventing the introduction of the subject of the sale: that, if its entrance into the state is permitted, the traffic in it cannot be suppressed. But the right to prohibit sales, so far as conceded to the states, arises only after the act of transportation has terminated, because the sales which the state



may forbid are of things within its jurisdiction. Its power over them does not begin to operate until they are brought within the territorial limits which circumscribe it. It might be very convenient and useful, in the execution of the policy of prohibition within the state, to extend the powers of the state beyond its territorial limits. But such extra-territorial powers cannot be assumed upon such an implication. On the contrary, the nature of the case contradicts their existence; for, if they belong to one state, they belong to all, and cannot be exercised severally and independently. The attempt would necessarily produce that conflict and confusion which it was the very purpose of the Constitution, by its delegations of national power, to prevent.

It is easier to think that the right of importation from abroad, and of transportation from one state to another, includes, by necessary implication, the right of the importer to sell in unbroken packages at the place where the transit terminates; for the very purpose and motive of that branch of commerce which consists in transportation is that other and consequent act of commerce which consists in the sale and exchange of the commodities transported. Such, indeed, was the point decided in the case of *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678, as to foreign commerce, with the express statement, in the opinion of Chief Justice Marshall, that the conclusion would be the same in a case of commerce among the states. But it is not necessary now to express any opinion upon the point, because that question does not arise in the present case. The precise line which divides the transaction, so far as it belongs to foreign or interstate commerce, from the internal and domestic commerce of the state, we are not now called upon to delineate. It is enough to say that the power to regulate or forbid the sale of a commodity, after it has been brought into the state, does not carry with it the right and power to prevent its introduction by transportation from another state.

Judgment reversed.<sup>1</sup>

[FIELD, J., gave a concurring opinion, and HARLAN, J., a dissenting one, in which concurred WAITE, C. J., and GRAY, J. LAMAR, J., took no part in the decision.]

<sup>1</sup> Accord: *Adams Exp. Co. v. Kentucky*, 214 U. S. 218, 29 Sup. Ct. 633, 53 L. Ed. 972 (1909) (state cannot forbid interstate shipment and delivery of intoxicating liquor to a known habitual inebriate).

In *Groves v. Slaughter*, 15 Pet. 449, 10 L. Ed. 800 (1841) it was said that a slave-holding state could forbid the introduction into it for sale of slaves from other states.

POWER OF STATE TO FORBID EXPORTATION OF ITS PRODUCTS.—In *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793 (1896), it was held that, inasmuch as a state had full control over the killing and ownership of wild game within it, it could permit this on condition that game killed should not be shipped out of the state. In *Hudson Water Co. v. McCarter*, 209 U. S. 349, 28 Sup. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560 (1908) it was held that a state might forbid the transportation out of the state, by pipes or ditches, of waters from its important streams. See extract, ante, p. 524, note, and same case in state court below, 70 N. J. Eq. 695, 65 Atl. 489 (1906). In *West v. Kansas Gas Co.*, 221 U. S. 229, 255, 256, 31 Sup. Ct. 564, 571, 55 L. Ed.

## LEISY v. HARDIN.

(Supreme Court of United States, 1890. 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 125.)

[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 dis-

716, 35 L. R. A. (N. S.) 1193 (1911) this doctrine was held inapplicable to natural gas, McKenna, J., saying (Holmes, Lurton, and Hughes, JJ., dissenting):

"Gas, when reduced to possession, is a commodity; it belongs to the owner of the land; and, when reduced to possession, is his individual property, subject to sale by him, and may be a subject of intrastate commerce and interstate commerce. The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial,—the business welfare of the state, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a state would confine them to the inhabitants of the state. If the states have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out.

"To what consequences does such power tend? If one state has it, all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that 'in matters of foreign and interstate commerce there are no state lines.' In such commerce, instead of the states, a new power appears and a new welfare,—a welfare which transcends that of any state. But rather let us say it is constituted of the welfare of all of the states, and that of each state is made the greater by a division of its resources, natural and created, with every other state, and those of every other state with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward, it must be done by the authority of another instrumentality than a court."

See also, as to the extent of private rights over gas and oil, *Ohio Oil Co. v. Indiana*, ante, p. 521. As to how far state regulations affecting commodities during production and before they become articles of commerce may condition their subsequent entry into interstate commerce, see *Turner v. Maryland*, 107 U. S. 38, 58, 2 Sup. Ct. 44, 27 L. Ed. 370 (1883); *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346 (1888).

position 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 untrammelled. *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. \* \* \* [Here follows a discussion of this case, ante, p. 1188, and of the License Cases, ante, p. 1076.]

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, the more important 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.<sup>1</sup>

[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.

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#### 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 whiskey, part of a

<sup>1</sup> Accord: *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49 (1898) (oleomargarine); *Collins v. New Hampshire*, 171 U. S. 30, 18 Sup. Ct. 768, 43 L. Ed. 60 (1898) (oleomargarine required to be colored pink); *Austin v. Tennessee*, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224 (1900) (cigarettes—semble).

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 commodities, 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 untrammelled; 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 dis-

cretion 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.<sup>1</sup> 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 Congress 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

<sup>1</sup> As to congressional power to *postpone* this time, see *McDermott v. Wisconsin*, post. p. 1244.

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.<sup>2</sup>

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

<sup>2</sup> In *Rhodes v. Iowa*, 170 U. S. 412, 424, 426, 18 Sup. Ct. 664, 668, 42 L. Ed. 1088 (1898), the Wilson Act was held inapplicable to an interstate shipment of liquor until after delivery to the consignee, White, J., saying (Gray, Harlan, and Brown, JJ., dissenting):

"While it is true that the right to sell free from state interference interstate commerce merchandise was held in *Leisy v. Hardin* to be an essential incident to interstate commerce, it was yet but an incident, as the contract of sale within a state in its nature was usually subject to the control of the legislative authority of the state. On the other hand, the right to contract for the transportation of merchandise from one state into or across another involved interstate commerce in its fundamental aspect, and imported in its very essence a relation which necessarily must be governed by laws apart from the laws of the several states, since it embraced a contract which must come under the laws of more than one state. The purpose of Congress to submit the incidental power to sell to the dominion of state authority should not, without the clearest implication, be held to imply the purpose of subjecting to state laws a contract which, in its very object and nature, was not susceptible of such regulation even if the constitutional right to do so existed, as to which no opinion is expressed." \* \* \* [Here follows a quotation from the *Bowman Case*, printed ante, p. 1190, laying stress upon the extra-territorial effect of the Iowa law there questioned.]

"We think that, interpreting the statute by the light of all its provisions, it was not intended to and did not cause the power of the state to attach to an interstate commerce shipment while the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee; and of course this conclusion renders it entirely unnecessary to consider whether, if the act of Congress had submitted the right to make interstate commerce shipments to state control, it would be repugnant to the Constitution."

*Rhodes v. Iowa* was followed in *Am. Exp. Co. v. Iowa*, 196 U. S. 133, 25 Sup. Ct. 182, 49 L. Ed. 417 (1905) (C. O. D. shipment); *Adams Exp. Co. v. Kentucky*, 206 U. S. 129, 27 Sup. Ct. 606, 51 L. Ed. 987 (1907) (same, where consignee had not ordered liquor and carrier held it for him a few days before he paid charges); *Heymann v. So. Ry.*, 203 U. S. 270, 27 Sup. Ct. 104, 51 L. Ed. 178, 7 Ann. Cas. 1130 (1906) (where carrier warehoused liquor before delivery); *L. & N. Ry. v. Cook Brewing Co.*, 223 U. S. 70, 32 Sup. Ct. 189, 56 L. Ed. 355 (1912).

Some of the practices permitted under the above decisions are now forbidden by 35 Stat. 1136, 1137, c. 321, §§ 238-240 (U. S. Comp. St. Supp. 1911, p. 1662) (1909), or by the "Webb Act" of March 1, 1913 (37 Stat. 699, c. 90). The Wilson Act has in substance been enacted into section 113 of the Australian Constitution of 1900. See *Fox v. Robbins*, 8 Com. L. Rep. 115, 124, 125 (1909).

In *Scott v. Donald*, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. Ed. 632 (1897), it was held that the Wilson Act gave the states no power to discriminate against the sale of liquor from other states, and in *Vance v. Vandercook Co.* (No. 1), 170 U. S. 438, 462, 18 Sup. Ct. 674, 42 L. Ed. 1100 (1898), three judges thought Congress powerless to do this. The same case held that the Wilson Act permitted South Carolina to make a state monopoly of the sale of liquor in the state, individuals being free to ship it in for their own uses. The state police power authorized by the act may be exercised by means of taxation. *Pabst Co. v. Crenshaw*, 198 U. S. 17, 25 Sup. Ct. 552, 49 L. Ed. 925 (1905); *Phillips v. Mobile*, 208 U. S. 472, 28 Sup. Ct. 370, 52 L. Ed. 578 (1908); or by requiring licenses for the sale of liquor on interstate boats, while within the state.



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 artificially 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 oleomargarine 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? \* \* \*

Poppiano v. Speed, 199 U. S. 501, 26 Sup. Ct. 138, 50 L. Ed. 288 (1905); and even as regards first sales of imported liquor in the original packages, *De Bary & Co. v. Louisiana*, 227 U. S. 108, 33 Sup. Ct. 239, 57 L. Ed. — (1913), affirming 130 La. 1090, 1095, 58 South. 892 (1912).

[After discussing *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527; *Minnesota v. Barber*, ante, p. 1086; 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 afflict-

ed 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."<sup>1</sup>

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 ei-

<sup>1</sup> Accord: *Crossman v. Lurman*, 192 U. S. 189, 24 Sup. Ct. 234, 48 L. Ed. 401 (1904) (artificially colored coffee beans); *New York v. Hesterberg*, 211 U. S. 31, 43, 29 Sup. Ct. 10, 53 L. Ed. 75 (1908) (possession or sale of game during closed season), by Day, J.: "Owing to the likelihood of fraud and deceit in the handling of such game, the possession of game of the classes named is likewise prohibited [during the closed season], whether it is killed within or without the state."

Compare Opinion of the Justices, 211 Mass. 605, 98 N. E. 334, Ann. Cas. 1913B, 815 (1912), holding that a state cannot compel prison-made goods from other states to be so labeled when offered for sale, even though it makes a similar requirement of its own goods; and *People v. Hawkins*, 157 N. Y. 1, 51 N. E. 257, 42 L. R. A. 490, 68 Am. St. Rep. 736 (1898) (same). Compare *People ex rel. v. Raynes*, 136 App. Div. 417, 120 N. Y. Supp. 1053 (1910), affirmed in 198 N. Y. 622, 92 N. E. 1097.

ther 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.'"

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DELAMATER v. SOUTH DAKOTA (1907) 205 U. S. 93, 99-102, 104, 27 Sup. Ct. 447, 51 L. Ed. 724, 10 Ann. Cas. 733, Mr. Justice WHITE (upholding a state statute imposing an annual license charge upon the business of soliciting sales of liquor within the state in less than five gallon lots by traveling salesmen, as applied to the solicitation of orders for liquor to be shipped into the state from outside):

"[The Wilson Act] manifested the conviction of Congress that control by the states over the traffic of dealing in liquor within their borders was of such importance that it was wise to adopt a special regulation of interstate commerce on the subject. When, then, for the carrying out of this purpose, the regulation expressly provided that intoxicating liquors coming into a state should be as completely under the control of a state as if the liquor had been manufactured therein, it would be, we think, a disregard of the purposes of Congress to hold that the owner of intoxicating liquors in one state can, by virtue of the commerce clause, go himself or send his agent into such other state, there, in defiance of the law of the state, to carry on the business of soliciting proposals for the purchase of intoxicating liquors. \* \* \*

"Decisions of this court interpreting the Wilson Act have held that that law did not authorize state power to attach to liquor shipped from one state into another before its arrival and delivery within the state to which destined. From this it is insisted, as none of the liquor

covered by the proposals in this case had arrived and been delivered within South Dakota, the power of the state did not attach to the carrying on of the business of soliciting proposals, for, until the liquor arrived in the state, there was nothing on which the state authority could operate. But this is simply to misapprehend and misapply the cases and to misconceive the nature of the act done in the carrying on the business of soliciting proposals. The rulings in the previous cases to the effect that, under the Wilson Act, state authority did not extend over liquor shipped from one state into another until arrival and delivery to the consignee at the point of destination, were but a recognition of the fact that Congress did not intend, in adopting the Wilson Act, even if it lawfully could have done so, to authorize one state to exert its authority in another state by preventing the delivery of liquor embraced by transactions made in such other state.

"The proposition here relied on is widely different, since it is that, despite the Wilson Act, the state of South Dakota was without power to regulate or control the business carried on in South Dakota of soliciting proposals for the purchase of liquors, because the proposals related to liquor situated in another state. But the business of soliciting proposals in South Dakota was one which that state had a right to regulate, wholly irrespective of when or where it was contemplated the proposals would be accepted or whence the liquor which they embraced was to be shipped. Of course, if the owner of the liquor in another state had a right to ship the same into South Dakota as an article of interstate commerce, and, as such, there sell the same in the original packages, irrespective of the laws of South Dakota, it would follow that the right to carry on the business of soliciting in South Dakota was an incident to the right to ship and sell, which could not be burdened without directly affecting interstate commerce. But, as by the Wilson Act, the power of South Dakota attached to intoxicating liquors, when shipped into that state from another state, after delivery, but before the sale in the original package, so as to authorize South Dakota to regulate or forbid such sale, it follows that the regulation by South Dakota of the business carried on within its borders of soliciting proposals to purchase intoxicating liquors, even though such liquors were situated in other states, cannot be held to be repugnant to the commerce clause of the Constitution, because directly or indirectly burdening the right to sell in South Dakota,—a right which, by virtue of the Wilson Act, did not exist." \* \* \*

[After referring to *Vance v. Vandercook Co.*, 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100:] "It having been thus settled that under the Wilson Act a resident of one state had the right to contract for liquors in another state and receive the liquors in the state of his residence for his own use, therefore, it is insisted, the agent or traveling salesman of a nonresident dealer in intoxicating liquors



had the right to go into South Dakota and there carry on the business of soliciting from residents of that state orders for liquor, to be consummated by acceptance of the proposals by the nonresident dealer. The premise is sound, but the error lies in the deduction, since it ignores the broad distinction between the want of power of a state to prevent a resident from ordering from another state liquor for his own use, and the plenary authority of a state to forbid the carrying on within its borders of the business of soliciting orders for intoxicating liquors situated in another state, even although such orders may only contemplate a contract to result from final acceptance in the state where the liquor is situated. The distinction between the two is not only obvious, but has been foreclosed by a previous decision of this court." \* \* \*

[After discussing *Nutting v. Massachusetts*, 183 U. S. 553, 22 Sup. Ct. 238, 46 L. Ed. 324, holding that a state could prohibit the soliciting in it by agents of foreign insurance companies of proposals for contracts of insurance to be accepted outside, though it could not forbid a resident himself to send such proposals out of the state for acceptance, *Allgeyer v. Louisiana*, ante, p. 232:] "The ruling thus made is particularly pertinent to the subject of intoxicating liquors and the power of the state in respect thereto. As we have seen, the right of the states to prohibit the sale of liquor within their respective jurisdictions in and by virtue of the regulation of commerce embodied in the Wilson Act is absolutely applicable to liquor shipped from one state into another, after delivery, and before the sale in the original package. It follows that the authority of the states, so far as the sale of intoxicating liquors within their borders is concerned, is just as complete as is their right to regulate within their jurisdiction the making of contracts of insurance. It hence must be that the authority of the states to forbid agents of nonresident liquor dealers from coming within their borders to solicit contracts for the purchase of intoxicating liquors which otherwise the citizen of the state 'would not have thought of making' must be as complete and efficacious as is such authority in relation to contracts of insurance, especially in view of the conceptions of public order and social well-being which it may be assumed lie at the foundation of regulations concerning the traffic in liquor."

[FULLER, C. J., dissented.]

## SECTION 6.—POWER OF CONGRESS

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SHERLOCK v. ALLING (1876) 93 U. S. 99, 103, 104, 23 L. Ed. 819, Mr. Justice FIELD:

"It is true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and interstate commerce, the persons engaged in it, and the instruments by which it is carried on. And legislation has largely dealt, so far as commerce by water is concerned, with the instruments of that commerce. It has embraced the whole subject of navigation, prescribed what shall constitute American vessels, and by whom they shall be navigated; how they shall be registered or enrolled and licensed; to what tonnage, hospital, and other dues they shall be subjected; what rules they shall obey in passing each other; and what provision their owners shall make for the health, safety, and comfort of their crews. Since steam has been applied to the propulsion of vessels, legislation has embraced an infinite variety of further details, to guard against accident and consequent loss of life. The power to prescribe these and similar regulations necessarily involves the right to declare the liability which shall follow their infraction. Whatever, therefore, Congress determines, either as to a regulation or the liability for its infringement, is exclusive of state authority."<sup>1</sup>

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GLOUCESTER FERRY CO. v. PENNSYLVANIA (1885) 114 U. S. 196, 215, 5 Sup. Ct. 826, 29 L. Ed. 158, Mr. Justice FIELD (quoting with approval from Cooley, Constitutional Limitations, 732):

"It is not doubted that Congress has the power to go beyond the general regulations of commerce which it is accustomed to establish, and to descend to the most minute directions if it shall be deemed advisable, and that to whatever extent ground shall be covered by those directions, the exercise of state power is excluded. Congress may establish police regulations as well as the states, confining their operations to the subjects over which it is given control by the Constitution; but as the general police power can better be exercised

<sup>1</sup> In *U. S. v. Coombs*, 12 Pet. 72, 9 L. Ed. 1004 (1838), it was held that Congress could make it a crime, under the commerce clause, to steal or destroy (even when above high-water mark) any property from a vessel in distress or wrecked in any place within the federal admiralty jurisdiction. "Locality is attached to the ship or vessel and not to the property plundered." *Id.*, at page 79.

under the provisions of the local authority, and mischiefs are not likely to spring therefrom so long as the power to arrest collision resides in the national Congress, the regulations which are made by Congress do not often exclude the establishment of others by the state covering very many particulars."

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TRADE-MARK CASES (1879) 100 U. S. 82, 93, 95-99, 25 L. Ed. 550, Mr. Justice MILLER (holding invalid a federal statute regulating generally the registration and wrongful use of trade-marks):

"As the property in trade-marks and the right to their exclusive use rest on the laws of the states, and, like the great body of the rights of person and of property, depend on them for security and protection, the power of Congress to legislate on the subject, to establish the conditions on which these rights shall be enjoyed and exercised, the period of their duration, and the legal remedies for their enforcement, if such power exist at all, must be found in the Constitution of the United States, which is the source of all the powers that Congress can lawfully exercise. \* \* \* The argument is that the use of a trade-mark—that which alone gives it any value—is to identify a particular class or quality of goods as the manufacture, produce, or property of the person who puts them in the general market for sale; that the sale of the article so distinguished is commerce; that the trade-mark is, therefore, a useful and valuable aid or instrument of commerce, and its regulation by virtue of the [commerce] clause belongs to Congress, and that the act in question is a lawful exercise of this power.

"Every species of property which is the subject of commerce, or which is used or even essential in commerce, is not brought by this clause within the control of Congress. The barrels and casks, the bottles and boxes in which alone certain articles of commerce are kept for safety and by which their contents are transferred from the seller to the buyer, do not thereby become subjects of congressional legislation more than other property. \* \* \* The question, therefore, whether the trade-mark bears such a relation to commerce in general terms as to bring it within congressional control, when used or applied to the classes of commerce which fall within that control, is one which, in the present case, we propose to leave undecided. \* \* \* While bearing in mind the liberal construction, that commerce with foreign nations means commerce between citizens of the United States and citizens and subjects of foreign nations, and commerce among the states means commerce between the individual citizens of different states, there still remains a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same state, is beyond the control of Congress.

"When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several states, or with the Indian tribes. If not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same state, it is obviously the exercise of a power not confided to Congress. \* \* \* It is manifest that no such distinction is found in the act, but that its broad purpose was to establish a universal system of trade-mark registration, for the benefit of all who had already used a trade-mark, or who wished to adopt one in the future, without regard to the character of the trade to which it was to be applied or the residence of the owner, with the solitary exception that those who resided in foreign countries which extended no such privileges to us were excluded from them here.

"It has been suggested that if Congress has the power to regulate trade-marks used in commerce with foreign nations and among the several states, these statutes shall be held valid in that class of cases, if no further. To this there are two objections: First, the indictments in these cases do not show that the trade-marks which are wrongfully used were trade-marks used in that kind of commerce. Secondly, while it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body. This precise point was decided in *United States v. Reese*, 92 U. S. 214, 23 L. Ed. 563. \* \* \* If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the Act of Congress, and in others under State law."<sup>1</sup>

<sup>1</sup> Accord: *Ill. C. Ry. v. McKendree*, 203 U. S. 514, 27 Sup. Ct. 153, 51 L. Ed. 298 (1906) (quarantine regulation applicable to all commerce); *Howard v. I. C. Ry.*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297 (1908) (employers' liability act applicable to all employees of interstate railroad). Compare *El Paso, etc., Ry. v. Gutierrez*, 215 U. S. 87, 30 Sup. Ct. 21, 54 L. Ed. 106 (1909) (separable provisions).

In 1905 Congress passed a general act for the registration and protection of trade-marks used in foreign, interstate, and Indian commerce. 33 Stat. 724. c. 592 (U. S. Comp. St. Supp. 1911, p. 1459).

## In re DEBS.

(Supreme Court of United States, 1895. 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092.)

[Petition for writ of habeas corpus by Debs and others, imprisoned for contempt of court in disobeying orders of the federal Circuit Court for the Northern District of Illinois issued during the Chicago railway strike of 1894, forbidding further obstruction of trains engaged in interstate commerce or in carrying the mails. Other facts appear in the opinion.]

Mr. Justice BREWER. The case presented by the bill is this: The United States, finding that the interstate transportation of persons and property, as well as the carriage of the mails, is forcibly obstructed, and that a combination and conspiracy exists to subject the control of such transportation to the will of the conspirators, applied to one of their courts, sitting as a court of equity, for an injunction to restrain such obstruction and prevent carrying into effect such conspiracy. Two questions of importance are presented: First. Are the relations of the general government to interstate commerce and the transportation of the mails such as authorize a direct interference to prevent a forcible obstruction thereof? Second. If authority exists, as authority in governmental affairs implies both power and duty, has a court of equity jurisdiction to issue an injunction in aid of the performance of such duty? \* \* \*

As, under the Constitution, power over interstate commerce and the transportation of the mails is vested in the national government, and Congress, by virtue of such grant, has assumed actual and direct control, it follows that the national government may prevent any unlawful and forcible interference therewith. But how shall this be accomplished? Doubtless, it is within the competency of Congress to prescribe by legislation that any interferences with these matters shall be offenses against the United States, and prosecuted and punished by indictment in the proper courts. But is that the only remedy? Have the vast interests of the nation in interstate commerce, and in the transportation of the mails, no other protection than lies in the possible punishment of those who interfere with it? To ask the question is to answer it. By article 3, § 2, cl. 3, of the federal Constitution, it is provided: "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 crime shall have been committed." If all the inhabitants of a state, or even a great body of them, should combine to obstruct interstate commerce or the transportation of the mails, prosecutions for such offenses had in such a community would be doomed in advance to failure. And if the certainty of such failure was known, and the national government had no other way to en-



force the freedom of interstate commerce and the transportation of the mails than by prosecution and punishment for interference therewith, the whole interests of the nation in these respects would be at the absolute mercy of a portion of the inhabitants of that single state.

But there is no such impotency in the national government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights intrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation, to compel obedience to its laws.

But, passing to the second question, is there no other alternative than the use of force on the part of the executive authorities whenever obstructions arise to the freedom of interstate commerce or the transportation of the mails? Is the army the only instrument by which rights of the public can be enforced, and the peace of the nation preserved? Grant that any public nuisance may be forcibly abated, either at the instance of the authorities, or by any individual suffering private damage therefrom. The existence of this right of forcible abatement is not inconsistent with, nor does it destroy, the right of appeal, in an orderly way, to the courts for a judicial determination, and an exercise of their powers, by writ of injunction and otherwise, to accomplish the same result. \* \* \*

Neither can it be doubted that the government has such an interest in the subject-matter as enables it to appear as party plaintiff in this suit. It is said that equity only interferes for the protection of property, and that the government has no property interest. A sufficient reply is that the United States have a property in the mails, the protection of which was one of the purposes of this bill. \* \* \* We do not care to place our decision upon this ground alone. Every government, intrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all and to prevent the wrongdoing of one, resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court. \* \* \* [Here are discussed *U. S. v. San Jacinto Co.*, 125 U. S. 273, 8 Sup. Ct. 850, 31 L. Ed. 747, and *U. S. v. Amer. Bell Tel. Co.*, 128 U. S. 315, 9 Sup. Ct. 90, 32 L. Ed. 450.]

It is obvious from these decisions that while it is not the province of the government to interfere in any mere matter of private contro-

versy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are intrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties.

The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control. \* \* \* Indeed, the obstruction of a highway is a public nuisance (4 Bl. Comm. 167), and a public nuisance has always been held subject to abatement at the instance of the government. \* \* \*

It is said that the jurisdiction heretofore exercised by the national government over highways has been in respect to waterways,—the natural highways of the country,—and not over artificial highways, such as railroads; but the occasion for the exercise by Congress of its jurisdiction over the latter is of recent date. Perhaps the first act in the course of such legislation is that heretofore referred to, of June 15, 1866; but the basis upon which rests its jurisdiction over artificial highways is the same as that which supports it over the natural highways. Both spring from the power to regulate commerce. The national government has no separate dominion over a river within the limits of a state; its jurisdiction there is like that over land within the same state. Its control over the river is simply by virtue of the fact that it is one of the highways of interstate and international commerce. \* \* \* The fact that in recent years interstate commerce has come to be carried on mainly by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision, or abridged the power of Congress over such commerce. On the contrary, the same fullness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other. \* \* \*

Petition denied.<sup>1</sup>

<sup>1</sup> As to the power of the United States to enforce in its own courts various federal private rights, on behalf of the beneficiaries thereof, see *Heckman v. United States*, post, p. 1404, note.

LUXTON v. NORTH RIVER BRIDGE CO. (1894) 153 U. S. 525, 529, 530, 533, 534, 14 Sup. Ct. 891, 38 L. Ed. 803, 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,<sup>1</sup> 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

<sup>1</sup> For cases dealing with various phases of the compact between the United States and Ohio, Virginia, Maryland, and Pennsylvania, under which this road was constructed, see *Achison v. Huddleson*, 12 How. 293, 13 L. Ed. 993 (1851), and the cases there cited.

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 territories, 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."<sup>2</sup>

<sup>2</sup> Accord: *Wilson v. Shaw*, 204 U. S. 24, 27 Sup. Ct. 233, 51 L. Ed. 351 (1907) (construction of Panama Canal by United States—semble).

FEDERAL CONTROL OF NAVIGABLE WATERS OF UNITED STATES.—The paramount power of Congress over the physical condition of navigable waters of the United States has been frequently asserted, whether by forbidding obstructions in them, *U. S. v. Bellingham Boom Co.*, 176 U. S. 211, 20 Sup. Ct. 343, 44 L. Ed. 427 (1900), even when previously authorized by a state. Union

HOPKINS v. UNITED STATES (1898) 171 U. S. 578, 590-596, 601-603, 19 Sup. Ct. 40, 43 L. Ed. 290, Mr. Justice PECKHAM (upholding as not violating the federal Anti-Trust law<sup>1</sup> the rules of the Kansas City Livestock Exchange, fixing the charges to be made by its members for selling cattle on commission, and forbidding members to send out prepaid telegraphic market reports, or to employ more than three solicitors of business, or to do business with persons violating the rules of the Exchange):

"The selling of an article at its destination, which has been sent from another state, while it may be regarded as an interstate sale, and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce; and a combination in regard to the amount to be charged for such service is not, therefore, a combination in restraint of that trade or commerce. \* \* \*

"The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate. \* \* \* Many agreements suggest themselves which relate only to facilities furnished commerce, or else touch it only in an indirect way, while possibly enhancing the cost of transacting the business, and which at the same time we would not think of as agreements in restraint of interstate trade or commerce. They are agree-

Bridge Co. v. U. S., 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523 (1907); by itself improving them, Gibson v. U. S., 166 U. S. 269, 17 Sup. Ct. 578, 41 L. Ed. 996 (1897); Scranton v. Wheeler, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. Ed. 126 (1900); by itself obstructing them, So. Car. v. Georgia, 93 U. S. 4, 23 L. Ed. 782 (1876); or by legalizing their obstruction even against state law, Pennsylvania v. Wheeling Bridge Co., 18 How. 421, 15 L. Ed. 435 (1856); or by exercising the power of eminent domain for their benefit, Monongahela, etc., Co. v. U. S., 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463 (1893); U. S. v. Chandler-Dunbar Co., ante, p. 726.

"Its bed may vary and its banks may change, but \* \* \* the public right of navigation follows the stream and the authority of Congress goes with it."—Hughes, J., in *Phila. Co. v. Stimson*, 223 U. S. 605, 634, 635, 32 Sup. Ct. 340, 56 L. Ed. 570 (1912).

"It is for Congress to determine when it will exert its power to regulate interstate commerce. Its mere silence or inaction when individuals or corporations, under the authority of a state, place unreasonable obstructions in the waterways of the United States, cannot have the effect to cast upon the government an obligation not to exert its constitutional power to regulate interstate commerce except subject to the condition that compensation be made or secured to the individuals or corporation who may be incidentally affected by the exercise of such power."—Harlan, J., in *Union Bridge Co. v. U. S.*, 204 U. S. 364, 400, 401, 27 Sup. Ct. 367, 51 L. Ed. 523 (1907).

As to how far private riparian property rights are subordinate to the federal control of navigable waters, see *United States v. Chandler-Dunbar Co.*, ante, p. 726, and notes; *Monongahela, etc., Co. v. United States*, ante, p. 955; *Lewis Oyster Co. v. Briggs*, 229 U. S. 82, 33 Sup. Ct. 679, 57 L. Ed. — (1913); and *United States v. Balt. & O. R. Co.*, 229 U. S. 244, 33 Sup. Ct. 850, 57 L. Ed. — (1913).

<sup>1</sup>The substance of this act is given in the statement of facts in *Northern Securities Co. v. U. S.*, post, p. 1220.



ments which in their effect operate in furtherance and in aid of commerce, by providing for it facilities, conveniences, privileges, or services, but which do not directly relate to charges for its transportation, nor to any other form of interstate commerce. To hold all such agreements void would, in our judgment, improperly extend the act to matters which are not of an interstate commercial nature.

"It is not difficult to imagine agreements of the character above indicated. For example, cattle, when transported long distances by rail, require rest, food, and water. To give them these accommodations, it is necessary to take them from the car, and put them in pens or other places for their safe reception. Would an agreement among the landowners along the line not to lease their lands for less than a certain sum be a contract within the statute, as being in restraint of interstate trade or commerce? Would it be such a contract, even if the lands, or some of them, were necessary for use in furnishing the cattle with suitable accommodations? Would an agreement between the dealers in corn at some station along the line of the road not to sell it below a certain price be covered by the act, because the cattle must have corn for food? Or would an agreement among the men not to perform the service of watering the cattle for less than a certain compensation come within the restriction of the statute? Suppose the railroad company which transports the cattle itself furnishes the facilities, and that its charges for transportation are enhanced because of an agreement among the landowners along the line not to lease their lands to the company for such purposes for less than a named sum; could it be successfully contended that the agreement of the landowners among themselves would be a violation of the act, as being in restraint of interstate trade or commerce? Would an agreement between builders of cattle cars not to build them under a certain price be void because the effect might be to increase the price of transportation of cattle between the states? Would an agreement among dealers in horse blankets not to sell them for less than a certain price be open to the charge of a violation of the act because horse blankets are necessary to put on horses to be sent long journeys by rail, and by reason of the agreement the expense of sending the horses from one state to another for a market might be thereby enhanced? Would an agreement among cattle drivers not to drive the cattle after their arrival at the railroad depot at their place of destination, to the cattle yards where sold, for less than a minimum sum, come within the statute? Would an agreement among themselves by locomotive engineers, firemen, or trainmen engaged in the service of an interstate railroad not to work for less than a certain named compensation be illegal because the cost of transporting interstate freight would be thereby enhanced? Agreements similar to these might be indefinitely suggested.

"In our opinion, all these queries should be answered in the negative. The indirect effect of the agreements mentioned might be to en-

hance the cost of marketing the cattle, but the agreements themselves would not necessarily for that reason be in restraint of interstate trade or commerce. As their effect is either indirect, or else they relate to charges for the use of facilities furnished, the agreements instanced would be valid, provided the charges agreed upon were reasonable.

\* \* \* It is possible that exorbitant charges for the use of these facilities might have similar effect as a burden on commerce that a charge upon commerce itself might have. In a case like that the remedy would probably be forthcoming. \* \* \* But whether the charges are or are not exorbitant is a question primarily of local law, at least in the absence of any superior or paramount law providing for reasonable charges. *Parkersburg & O. R. Transp. Co. v. City of Parkersburg*, 107 U. S. 691, 2 Sup. Ct. 732, 27 L. Ed. 584. This case does not involve that question.

"If charges of the nature described do not amount to a regulation of interstate trade or commerce because they touch it only in an indirect and remote way, or else because they are in the nature of compensation for the use of property or privileges as a mere facility for that commerce, it would for a like reason seem clear that agreements relating to the amounts of such charges among those who furnish the privileges or facilities are not in restraint of that kind of trade. \* \* \*

[After holding that a voluntary agreement among business men not to send prepaid telegrams for certain purposes was not a burden upon interstate commerce by telegraph<sup>2</sup>:] "We do not think it can be properly said that the agents of the defendants whom they send out to solicit the various owners of stock to consign the cattle to one of the defendants for sale are thereby themselves engaged in interstate commerce. \* \* \* The position of the solicitors is entirely different from that of drummers who are traveling through the several states for the purpose of getting orders for the purchase of property. \* \* \* The solicitors for these defendants have no property or goods for sale, and their only duty is to ask or induce those who own the property to agree that when they send it to market for sale they will consign it to the solicitor's principal, so that he may perform such services as may be necessary to sell the stock for them, and account to them for the proceeds thereof. Unlike the drummer, who contracts in one state for the sale of goods which are in another, and which are to be thereafter delivered in the state in which the contract is made, the solicitor in this case has no goods or samples of goods, and negotiates no sales, and merely seeks to exact a promise from the owner of property that when he does wish to sell he will consign to and sell the property through the solicitor's principal. There is no interstate commerce in that business. \* \* \* The solicitors do not solicit transportation of the cattle. \* \* \* The transportation would take

<sup>2</sup> See *Board of Trade v. Christie Co.*, 198 U. S. 236, 252, 25 Sup. Ct. 637, 49 L. Ed. 1031 (1905).

place any way, and the cattle be consigned for sale by some one of the defendants, or by others engaged in the business. \* \* \*

"The complainants have failed to show the defendants guilty of any violations of the act of Congress, because it does not appear that the defendants are engaged in interstate commerce, or that any agreements or contracts made by them, and relating to the conduct of their business, are in restraint of any such commerce. Whether they refused to transact business which is not interstate commerce, except with those who are members of the exchange, and whether such refusal is justifiable or not, are questions not open for discussion here."<sup>a</sup>

[HARLAN, J., dissented. MCKENNA, J., took no part in the decision.]

<sup>a</sup> Accord: *Anderson v. U. S.*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300 (1898) (agreement among members of a livestock exchange, buying for themselves at stockyards cattle from other states, not to do business with non-members or with those who do business with non-members—any one obeying its rules being at liberty to join the exchange and prices not being fixed).

"The formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade. We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer, or merchant of an additional farm, manufactory, or shop, or the withdrawal from business of any farmer, merchant, or manufacturer, restrained commerce or trade, within any legal definition of that term; and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the *Trans-Missouri Case* [166 U. S. at 329, 17 Sup. Ct. 540, 41 L. Ed. 1007] as a contract not within the meaning of the act, and it was said that such a contract was collateral to the main contract of sale, and was entered into for the purpose of enhancing the price at which the vendor sells his business."—*U. S. v. Joint Traffic Ass'n*, 171 U. S. 505, 567-568, 19 Sup. Ct. 25, 31, 43 L. Ed. 259 (1898) by Peckham, J. So *Cincinnati, etc., Co. v. Bay*, 200 U. S. 179, 26 Sup. Ct. 208, 50 L. Ed. 428 (1906). Compare *Shawnee Compress Co. v. Anderson*, 209 U. S. 423, 28 Sup. Ct. 572, 52 L. Ed. 865 (1908). See *U. S. v. Knight Company*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325 (1895) (act not constitutionally applicable to monopolies of manufacturing alone).

As to how far the act applies to combinations in regard to patented articles, see *Bement v. Nat. Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058 (1902); *Standard Sanitary Co. v. U. S.*, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. — (1912); *U. S. v. Wiuslow*, 227 U. S. 202, 33 Sup. Ct. 253, 57 L. Ed. — (1913); *Virtue v. Creamery Package Co.*, 227 U. S. 8, 33 Sup. Ct. 202, 57 L. Ed. — (1913). Compare *Henry v. A. B. Dick Co.*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645 (1912); *Bauer & Cle v. O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. — (1913).

## 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 re-*

*straint 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 lawfully 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.<sup>1</sup>

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

<sup>1</sup> In an omitted portion of his opinion (193 U. S. at 354), 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."

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. 1053:] "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.]<sup>2</sup>

<sup>2</sup> Accord with majority opinion (corporate ownership of stock in other corporations, stifling the interstate competition of the latter): *Standard Oil Co. v. U. S.*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, *Ann. Cas.* 1912D, 734 (1911) (interstate trade); *U. S. v. Am. Tobacco Co.*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663 (1911) (same); *U. S. v. Terminal Ry.*, 224 U. S. 383, 32 Sup. Ct. 507, 56 L. Ed. 810 (1912) (interstate railroad terminals); *U. S. v. Union Pac. Ry.*, 226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. — (1912) (railway corporation owning 46 per cent. of stock of railway partially competing with it) [see also s. c., 226 U. S. 470, 33 Sup. Ct. 162, 57 L. Ed. —].

In *Swift & Co. v. U. S.*, 196 U. S. 375, 394, 396, 398-400, 25 Sup. Ct. 276, 278, 279, 280, 49 L. Ed. 518 (1905), the act was held to be violated by a combination of persons engaged in buying live stock at the principal stockyards, converting the cattle into fresh meat at their plants there, and shipping the meat to other states for sale, controlling about  $\frac{2}{10}$  of this commerce, Holmes, J., said:

"The bill \* \* \* charges a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live-stock markets of the different states, to bid up prices for a few days in order to induce the cattle men to send their stock to the stockyards, to fix prices at which they will sell, and to that end to restrict shipments of meat when necessary, to establish a uniform rule of credit to dealers, and to keep a black list, to make uniform and improper charges for cartage, and finally to get less than lawful rates from the railroads, to the exclusion of competitors. \* \* \*

"The scheme as a whole seems to us to be within reach of the law. \* \* \* It is suggested that the several acts charged are lawful, and that intent can

make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. *Aikens v. Wisconsin*, 195 U. S. 194, 206, 25 Sup. Ct. 3, 49 L. Ed. 154 (1904). \* \* \*

"Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce. What we say is true at least of such a purchase by residents in another state from that of the seller and of the cattle. And we need not trouble ourselves at this time as to whether the statute could be escaped by any arrangement as to the place where the sale in point of law is consummated. \* \* \*

"It should be added that the cattle in the stockyard are not at rest even to the extent that was held sufficient to warrant taxation in *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 48 L. Ed. 538, 24 Sup. Ct. 365 (1904). But it may be that the question of taxation does not depend upon whether the article taxed may or may not be said to be in the course of commerce between the states, but depends upon whether the tax so far affects that commerce as to amount to a regulation of it. \* \* \* But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the states." \* \* \* [All of the specific acts and devices alleged in the bill were enjoined, so far as connected with interstate commerce.]

Accord (series of contracts and intrastate sales designed to affect interstate commerce): *U. S. v. Reading Co.*, 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. — (1912).

As to how general an injunction against such acts may properly be, see the *Swift Case*, above, at pp. 306, 401, and N. Y., etc., *Ry. v. Interst. Com. Com.*, 200 U. S. 361, 404, 26 Sup. Ct. 272, 50 L. Ed. 515 (1906).

A company having a factory in one state, from which it ships goods to its own warehouses in other states and there makes local sales, is engaged in interstate commerce within the act. *Standard Sanitary Co. v. U. S.*, 226 U. S. 20, 50, 51, 33 Sup. Ct. 9, 57 L. Ed. — (1912) (combination of enameled ware manufacturers, licensed to use a patent process subject to conditions fixing prices and restricting output).

CASES INTERPRETING FEDERAL ANTI-TRUST ACT.—Other combinations held illegal under the statute have been: *Railroad rate agreements*: *U. S. v. Trans-Missouri Frt. Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007 (1897) (even though rates fixed are reasonable); *U. S. v. Joint Traffic Ass'n*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259 (1898) (same); *connecting carrier agreements*: *U. S. v. Pacific & Arctic Ry. & Nav. Co.*, 228 U. S. 87, 33 Sup. Ct. 443, 57 L. Ed. — (1913) (object being to monopolize traffic by refusing through connections to independent carriers); *trading agreements*: *Addyston Pipe Co. v. U. S.*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136 (1899) (restriction of competitive bidding to supply iron pipe); *Montague & Co. v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 605 (1904) (agreement of certain manufacturers and dealers in tile and mantel business to deal only with each other); *Continental Wall Paper Co. v. Lewis Voight Co.*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486 (1909) (selling agency of manufacturer's combination exacting exclusive price-fixing agreement from jobbers); *Dr. Miles Medical Co. v. John D. Park Co.*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502 (1911) (proprietary medicine manufacturer fixing price of sales by dealers); *trades union boycott* against dealers handling plaintiff's hats: *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815 (1908); *speculative corner*: *U. S. v. Patten*, 226 U. S. 525, 33 Sup. Ct. 141, 57 L. Ed. — (1913) (combination of speculators to "corner" the raw cotton supply of the United States and hence artificially to raise prices to be paid for cotton in interstate trade).

The act does not forbid a combination of businesses which do not naturally compete with each other but which contribute to a common result, *U. S. v. Winslow*, 227 U. S. 202, 33 Sup. Ct. 253, 57 L. Ed. — (1913) (combination of owners of three groups of shoe machinery, each group doing different part of



UNITED STATES v. AMERICAN TOBACCO CO. (1911) 221 U. S. 106, 175-177, 179-184, 31 Sup. Ct. 632, 646, 647, 648-650, 55 L. Ed. 663, Mr. Chief Justice WHITE (upholding a decree for the dissolution of a combination controlling the tobacco business in violation of the federal Anti-Trust law):

"If the Anti-Trust law is applicable to the entire situation here presented, and is adequate to afford complete relief for the evils which the United States insists that situation presents, it can only be because that law will be given a more comprehensive application than has been affixed to it in any previous decision. This will be the case because the undisputed facts as we have stated them involve questions as to the operation of the Anti-Trust law not hitherto presented in any case. Thus, even if the ownership of stock by the American Tobacco Company in the accessory and subsidiary companies, and the ownership of stock in any of those companies among themselves, were held, as was decided in the Standard Oil Company Case, to be a violation of the act, and all relations resulting from such stock ownership were therefore set aside, the question would yet remain whether the principal defendant, the American Tobacco Company, and the five accessory defendants, even when divested of their stock ownership in other corporations, by virtue of the power which they would continue to possess, even although thus stripped, would amount to a violation of both the 1st and 2d sections<sup>1</sup> of the act. Again, if it were held that the corporation, the existence whereof was due to a combination between such companies and other companies, was a violation of the act, the question would remain whether such of the companies as did not owe their existence and power to combinations, but whose power alone arose from the exercise of the right to acquire and own property, would be amenable to the prohibitions of the act. Yet further: Even if this proposition was held in the affirmative, the question would remain whether the principal defendant, the American Tobacco Company, when stripped of its stock ownership, would be, in and of itself within the prohibitions of the act, although that company was organized and took being before the Anti-Trust Act was passed. Still further, the question would yet remain whether particular corporations which, when bereft of the power which they possessed as resulting from stock ownership, although they were not inherently possessed

work of shoe manufacturing); and of course the acts of separate persons, not acting concertedly, do not constitute a "combination," even though the united result be injurious to a plaintiff's interstate business. *Virtue v. Creamery Package Co.*, 227 U. S. 8, 33 Sup. Ct. 202, 57 L. Ed. —.

AUSTRALIAN ANTI-TRUST ACT.—For the interpretation of the Australian act (modeled upon the United States act, with the addition of the significant qualification that the forbidden combination or monopoly must be "to the detriment of the public"), see the elaborate and important case of *King v. Associated Northern Collieries*, 14 Com. L. Rep. 387 (1911).

<sup>1</sup> For the substance of these sections, see *Northern Securities Co. v. U. S.*, ante, p. 1220.

of a sufficient residuum of power to cause them to be, in and of themselves, either a restraint of trade or a monopolization or an attempt to monopolize, should nevertheless be restrained because of their intimate connection and association with other corporations found to be within the prohibitions of the act. \* \* \*

"Construing the act by the rule of the letter which kills would necessarily operate to take out of the reach of the act some of the accessory and many subsidiary corporations, the existence of which depends not at all upon combination or agreement or contract, but upon mere purchases of property.

"Applying the rule of reason to the construction of the statute, it was held in the Standard Oil Case [221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734] that, as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-Trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. In other words, it was held not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable, but that the duty to interpret, which inevitably arose from the general character of the term 'restraint of trade,' required that the words 'restraint of trade' should be given a meaning which would not destroy the individual right to contract, and render difficult, if not impossible, any movement of trade in the channels of interstate commerce,—the free movement of which it was the purpose of the statute to protect.

\* \* \* As a result of the reasonable construction which was affixed to the statute, it was pointed out that the generic designation of the 1st and 2d sections of the law, when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed. That is to say, it was held that, in view of the general language of the statute and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape, by any indirection, the prohibitions of the statute.

"Considering, then, the undisputed facts which we have previously stated, it remains only to determine whether they establish that the acts, contracts, agreements, combinations, etc., which were assailed,

were of such an unusual and wrongful character as to bring them within the prohibitions of the law. \* \* \*

"We think the conclusion of wrongful purpose and illegal combination is overwhelmingly established by the following considerations: (a) By the fact that the very first organization or combination was impelled by a previously existing fierce trade war, evidently inspired by one or more of the minds which brought about and became parties to that combination. (b) Because, immediately after that combination and the increase of capital which followed, the acts which ensued justify the inference that the intention existed to use the power of the combination as a vantage ground to further monopolize the trade in tobacco by means of trade conflicts designed to injure others, either by driving competitors out of the business or compelling them to become parties to a combination,—a purpose whose execution was illustrated by the plug war which ensued and its results, by the snuff war which followed and its results, and by the conflict which immediately followed the entry of the combination in England, and the division of the world's business by the two foreign contracts which ensued. (c) By the ever-present manifestation which is exhibited of a conscious wrongdoing by the form in which the various transactions were embodied from the beginning, ever changing, but ever in substance the same. Now the organization of a new company, now the control exerted by the taking of stock in one or another or in several, so as to obscure the result actually attained, nevertheless uniform, in their manifestations of the purpose to restrain others and to monopolize and retain power in the hands of the few who, it would seem, from the beginning, contemplated the mastery of the trade which practically followed. (d) By the gradual absorption of control over all the elements essential to the successful manufacture of tobacco products, and placing such control in the hands of seemingly independent corporations serving as perpetual barriers to the entry of others into the tobacco trade. (e) By persistent expenditure of millions upon millions of dollars in buying out plants, not for the purpose of utilizing them, but in order to close them up and render them useless for the purposes of trade. (f) By the constantly recurring stipulations, whose legality, isolatedly viewed, we are not considering, by which numbers of persons, whether manufacturers, stockholders, or employees, were required to bind themselves, generally for long periods, not to compete in the future.

"Indeed, when the results of the undisputed proof which we have stated are fully apprehended, and the wrongful acts which they exhibit are considered, there comes inevitably to the mind the conviction that it was the danger which it was deemed would arise to individual liberty and the public well-being from acts like those which this record exhibits, which led the legislative mind to conceive and to enact the Anti-Trust Act. The assailed combination in all its aspects—that is to say, whether it be looked at from the point of view of stock owner-

ship or from the standpoint of the principal corporation and the accessory or subsidiary corporations, viewed independently, including the foreign corporations in so far as by the contracts made by them they became co-operators in the combination—comes within the prohibitions of the 1st and 2d sections of the Anti-Trust Act.”<sup>2</sup>

[Mr. Justice HARLAN dissented from the application of the “rule of reason” in interpreting the Anti-Trust law.]

### 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

<sup>2</sup> “It is not contended that the unification of the terminal facilities of a great city where many railroad systems center is, under all circumstances and conditions, a combination in restraint of trade or commerce. Whether it is a facility in aid of interstate commerce or an unreasonable restraint, forbidden by the act of Congress, as construed and applied by this court in the cases of *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, 31 Sup. Ct. 502, Ann. Cas. 1912D, 734, and *United States v. American Tobacco Co.*, 221 U. S. 106, 55 L. Ed. 663, 31 Sup. Ct. 632, will depend upon the intent to be inferred from the extent of the control thereby secured over instrumentalities which such commerce is under compulsion to use, the method by which such control has been brought about, and the manner in which that control has been exerted.”—*U. S. v. Terminal Ry.*, 224 U. S. 383, 394, 395, 32 Sup. Ct. 507, 56 L. Ed. 810 (1912), by Lurton, J. For other applications of the “rule of reason” as applied to various agreements, see *U. S. v. Reading Co.*, 226 U. S. 324, 369 ff., 33 Sup. Ct. 90, 57 L. Ed. — (1912); *U. S. v. Pac. & Arctic Co.*, 228 U. S. 87, 104, 33 Sup. Ct. 443, 57 L. Ed. — (1913). For the “rule of reason” under the Australian Anti-Trust Act, see *King v. Associated Northern Collieries*, 14 Com. L. Rep. 387, 397, 462-476, 534-536, 541-548, 650-655 (1911).

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. 1053; *Pensacola Tel. Co. v. W. U. Tel. Co.*, ante, p. 1066, note; *Covington Bridge Co. v. Kentucky*, ante, p. 1172; and *Hanley v. K. C. Ry.*, ante, p. 1171, note.]

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 opinion, 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 Con-



gress, 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 instrument 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 country 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*, ante, p. 1197,—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.<sup>1</sup> 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

<sup>1</sup> See *Monongahela Navig. Co. v. United States*, ante, p. 955.

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

Judgment affirmed.<sup>2</sup>

<sup>2</sup> Accord: *U. S. v. Popper*, 98 Fed. 423 (1899) (prohibiting interstate carriage of articles designed to prevent conception); *Hoke v. U. S.*, 227 U. S. 308, 320-323, 33 Sup. Ct. 281-283, 57 L. Ed. — (1913) (upholding the federal "White Slave Act" [36 Stat. 824, c. 395, U. S. Comp. St. Supp. 1911, p. 1343], forbidding transporting or assisting to transport any woman from one state or territory to another for any immoral purpose), *McKenna, J.*, saying:

"A person may move or be moved in interstate commerce. \* \* \* What the act condemns is transportation obtained or aided, or transportation induced, in interstate commerce, for the immoral purposes mentioned. But an objection is made and urged with earnestness. It is said that it is the right and privilege of a person to move between states, and that such being the right, another cannot be made guilty of the crime of inducing or assisting or aiding in the exercise of it, and 'that the motive or intention of the passenger, either before beginning the journey, or during or after completing it, is not a matter of interstate commerce.' The contentions confound things important to be distinguished. It urges a right exercised in morality to sustain a right to be exercised in immorality. \* \* \*

"Plaintiffs in error admit that the states may control the immoralities of its citizens. Indeed, this is their chief insistence; and they especially condemn the act under review as a subterfuge and an attempt to interfere with the police power of the states to regulate the morals of their citizens, and assert that it is in consequence an invasion of the reserved powers of the states. There is unquestionably a control in the states over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime. It is a control, however, which can be exercised only within the jurisdiction of the states, but there is a domain which the states cannot reach and over which Congress alone has power; and if such power be exerted to control what the states cannot, it is an argument for—not against—its legality. Its exertion does not encroach upon the jurisdiction of the states. \* \* \*

"Our dual form of government has its perplexities, state and nation having different spheres of jurisdiction, as we have said; but it must be kept in mind that we are one people; and the powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. This is the effect of the decisions; and surely, if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and, more insistently, of girls. This is the aim of the law, expressed in broad generalization; and motives are made of determining consequence. Motives executed by actions may make it the concern of government to exert its powers. \* \* \*

"Of course it will be said that women are not articles of merchandise, but this does not affect the analogy of the cases; the substance of the con-

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. \* \* \*

gressional power is the same, only the manner of its exercise must be accommodated to the difference in its objects. It is misleading to say that men and women have rights. Their rights cannot fortify or sanction their wrongs; and if they employ interstate transportation as a facility of their wrongs, it may be forbidden to them to the extent of the act of July 25, 1910, and we need go no farther in the present case."

FEDERAL AUTHORITY OVER FOREIGN COMMERCE.—Of the power to regulate commerce with foreign nations, it was said in *Buttfield v. Stranahan*, 192 U. S. 470, 492, 493, 24 Sup. Ct. 349, 354 (48 L. Ed. 525) (1904), by White, J.:

"Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo statutes, but indirectly, as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude merchandise at discretion. This is illustrated by statutory provisions which have been in force for more than fifty years, regulating the degree of strength of drugs, medicines, and chemicals entitled to admission into the United States and excluding such as did not equal the standards adopted. 9 Stat. at L. 237, c. 70; Rev. Stat. § 2933, U. S. Comp. Stat. 1901, p. 1936. \* \* \* We entertain no doubt that it was competent for Congress, by statute, under the power to regulate foreign commerce, to establish standards and provide that no right should exist to import teas from foreign countries into the United States, unless such teas should be equal to the standards.

"As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution."

So also, *Oceanic Nav. Co. v. Stranahan*, 214 U. S. 320, 29 Sup. Ct. 671, 53 L. Ed. 1013 (1909) (exclusion of aliens); *The Abby Dodge*, 223 U. S. 166, 32 Sup. Ct. 310, 56 L. Ed. 390 (1912) (excluding deep sea sponges taken by divers—a conservation measure).

Foreign commerce may of course be regulated by taxation, as by a protective tariff or by duties on immigrants, even when the purpose of the law is not revenue. *Head Money Cases*, 112 U. S. 580, 5 Sup. Ct. 247, 28 L. Ed. 798 (1884).

HALE v. HENKEL (1906) 201 U. S. 43, 74, 75, 26 Sup. Ct. 370, 50 L. Ed. 652, Mr. Justice BROWN (upholding the right of the United States in a proceeding under the federal Anti-Trust law to compel the production before a federal grand jury of books and documents of a state corporation whose suspected violation of said law was being investigated with a view to its indictment):

See the part of this case printed ante, at pp. 190, 191, beginning "Upon the other hand" (p. 190, bottom), and ending "over the state corporations" (p. 191, end second paragraph).<sup>1</sup>

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SOUTHERN PACIFIC TERMINAL CO. v. INTERSTATE  
COMMERCE COMMISSION.

(Supreme Court of United States, 1911. 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310.)

[Appeals from United States Circuit Court for Southern District of Texas. The appellant Terminal Company, a Texas corporation, was organized in 1901 to construct and maintain, under certain legislation of Texas, public piers and terminal facilities for the use of the Southern Pacific Systems upon certain land in Galveston. It gave an exclusive lease of one of its piers to one Young, who used it as a place to manufacture into meal, for export, cotton-seed cake shipped to him there, whereby he undersold his competitors who had to pay the Terminal Company wharfage charges for the use of its piers and were afforded no facilities for manufacturing there. The Southern Pacific Systems consisted of a number of separate railroad and steamship corporations and the Terminal Company, 99 per cent. of the stock in each being owned by the Southern Pacific Company, a Kentucky corporation. The Terminal Company owned no rolling stock nor interest in any other corporation, issued no bills of lading, and did only a wharfage business under a published schedule of rates. Export shipments on through bills of lading included these wharfage charges in the freight rates. The Interstate Commerce Commission ordered the discontinuance of the exclusive arrangement between Young and the Terminal Company, as a discrimination against other shippers. Bills in equity to enjoin this order were dismissed, and these appeals taken, on the grounds, among others, that the Terminal Company was not a common carrier and that Young's commerce was purely foreign, to which cases the Interstate Commerce Act (24 Stat. 379, c. 104, U. S. Comp. St. 1901, p. 3154) by its terms did not extend.]

Mr. Justice McKENNA. \* \* \* We assume that the wharves in the pending case are the instruments of a common carrier. \* \* \*

<sup>1</sup> Approved in *Interstate Com. Comm. v. Goodrich Transit Co.*, 224 U. S. 194, 215, 32 Sup. Ct. 436, 56 L. Ed. 729 (1912).



The terminal company was incorporated to execute the purposes expressed in the act of the legislature of the state of Texas, that is, to construct terminal facilities for the Southern Pacific Railroad & Steamship Systems, and to accommodate the export and import traffic at Galveston; and, necessarily, as instrumentalities of such traffic, wharves and piers are as essential as steamships and railroads, and are, in fact, as they were intended to be by the charter of their authorization, parts of a system. The only track facilities for movement of cars to or from the ships, from or to the tracks of the Southern Pacific Railway, are on the terminal company's lands, and are owned by it. \* \* \*

Another and important fact is the control of the properties by the Southern Pacific Company through stock ownership. There is a separation of the companies if we regard only their charters; there is a union of them if we regard their control and operation through the Southern Pacific Company. This control and operation are the important facts to shippers. It is of no consequence that by mere charter declaration the terminal company is a wharfage company, or the Southern Pacific a holding company. Verbal declarations cannot alter the facts. The control and operation [by] the Southern Pacific Company of the railroads and the terminal company have united them into a system of which all are necessary parts, the terminal company as well as the railroad companies. \* \* \* And surely a system so constituted and used as an instrument of interstate commerce may not escape regulation as such because one of its constituents is a wharfage company and its dominating power a holding company. As was well said by the Interstate Commerce Commission, "a corporation such as this terminal company, which has 'competing lines,' should not be permitted to defeat the jurisdiction of this Commission by showing that it is not in fact owned by any railroad company. \* \* \* The terminal company is part and parcel of the system engaged in the transportation of commerce, and to the extent that such commerce is interstate the Commission has jurisdiction to supervise and control it within statutory limits. To hold otherwise would in effect permit carriers generally, through the organization of separate corporations, to exempt all of their terminals from our regulating authority." \* \* \*

In opposition to these views appellants urge the legal individuality of the different railroads and the terminal company, and cite cases which establish, it is contended, that stock ownership simply or through a holding company does not identify them. We are not concerned to combat the proposition. The record does not present a case of stock ownership merely, or of a holding company which was content to hold. It presents a case, as we have already said, of one actively managing and uniting the railroads and the terminal company into an organized system. And it is with the system that the law must deal, not with its elements. Such elements may, indeed, be regarded from some standpoints as legal entities; may have, in a sense,

separate corporate operation; but they are directed by the same paramount and combining power and made single by it. In all transactions it is treated as single. In the ordinance of the city of Galveston, in the act of the legislature of the state of 1899, and in public circulars and in the lease of Young, it is the system which is dealt with, and not its separate links. And, we have seen, the terminal facilities which the terminal company was authorized to maintain were for the system, not for the corporate elements considered separately. \* \* \*

The last contention advanced is that "the order of the Commission transcends its jurisdiction, in that it regulates commerce purely state and intrastate, and also purely foreign commerce, neither of which is subject to its authority."

In support of this contention it is insisted that the evidence shows the following facts: The cake and meal purchased by Young are bought by him in Texas, Oklahoma, Louisiana, and Arkansas, but chiefly in Texas, and shipped to him on bills of lading and way bills, showing the point of origin in those states and the destination at Galveston. The purchases are made for export, there being no consumption of the products at Galveston. His sales to foreign countries are sometimes for immediate and sometimes for future delivery, irrespective of whether he has the product on hand at Galveston. At times he has it on hand. At times, therefore, orders must be filled from cake to be purchased in the interior or then in transit to him. When the cake reaches Galveston it is ground into meal and sacked by Young, and for the meal thus ground and such meal as has been brought to his customers he takes out ships' bills of lading made to his order.

This evidence establishes, appellants contend, that the transit of the cake and meal is absolutely ended at the leased premises at Galveston, and that it is "a final point of concentration and manufacture, the cotton-seed cake being there manufactured into meal and sacked for export." But this does not distinguish between the meal and the cake, nor between the meal that is purchased at points outside of Texas and directly exported, from that so purchased and manufactured on the wharves of the terminal company. Nor does it take account of the fact that the wharves were intended for shipping facilities, a means of transition from land carriage to water carriage. It is manifest, as we have said, that to make the wharves manufacturing or concentrating points for one shipper, and not for all, is to give that shipper a preference. And, being a preference, the traffic necessarily comes under the jurisdiction of the Interstate Commerce Commission. In other words, the manufacture or concentration on the wharves of the terminal company are but incidents, under the circumstances presented by the record, in the transshipment of the products in export trade, and their regulation is within the power of the Interstate Commerce Commission. To hold otherwise would be to disregard, as the Commission said, the substance of things, and make evasions of the act of Congress quite easy. It makes no difference, therefore, that the shipments of

the products were not made on through bills of lading, or whether their initial point was Galveston or some other place in Texas. They were all destined for export and by their delivery to the Galveston, Harrisburg & San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the terminal company being a part of the railway for such purpose. The case, therefore, comes under *Coe v. Errol*, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. 475, where it is said that goods are in interstate, and necessarily as well in foreign, commerce when they have "actually started in the course of transportation to another state or been delivered to a carrier for transportation." In *Gulf, C. & S. F. R. Co. v. Texas*, 204 U. S. 403, 51 L. Ed. 540, 27 Sup. Ct. 360, the facts are different, and the case is not apposite.

Decree affirmed.<sup>1</sup>

<sup>1</sup> In *Interstate Com. Comm. v. Ill. C. Ry.*, 215 U. S. 452, 472-474, 30 Sup. Ct. 155, 161, 54 L. Ed. 280 (1910) it was held that the federal Commission might regulate the distribution to coal mines of the fuel cars of an interstate railway, in times of car shortage, in order to prevent preferences, *White, J.*, saying:

"When coal is received from the tippie of a coal mine into coal cars by a railway company, and the coal is intended for its own use and is transported by it, it is said there is no consignor, no consignee, and no freight to be paid, and therefore, although there may be transportation, there is no shipment, and hence no commerce. \* \* \* When the erroneous assumption upon which the proposition must rest is considered, its unsoundness is readily demonstrable. That assumption is this: that commerce, in the constitutional sense, only embraces shipment in a technical sense, and does not, therefore, extend to carriers engaged in interstate commerce, certainly in so far as so engaged, and the instrumentalities by which such commerce is carried on,—a doctrine the unsoundness of which has been apparent ever since the decision in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, and which has not since been open to question. It may not be doubted that the equipment of a railroad company engaged in interstate commerce, included in which are its coal cars, are instruments of such commerce. From this it necessarily follows that such cars are embraced within the governmental power of regulation, which extends, in time of car shortage, to compelling a just and equal distribution, and the prevention of an unjust and discriminatory one."

**INTERSTATE COMMERCE ACT.**—After the decision in *Wabash, etc., Ry. v. Illinois*, ante, p. 1166, Congress in 1887 enacted the Interstate Commerce Act (24 Stat. 379, c. 104, U. S. Comp. St. 1901, p. 3154) creating a Commission upon which was conferred important regulative powers over interstate transportation by railroad. In 1898 the Secretary of the Interior was authorized to regulate railroad rates in Alaska (30 Stat. 409, c. 299, U. S. Comp. St. 1901, p. 1412). "At that time it had been held in the Maximum Rate Cases (162 U. S. 184, 40 L. Ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. 700; 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. 896, and 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. 45), that Congress had not conferred upon the Interstate Commerce Commission the legislative power to prescribe rates, either maximum, minimum, or absolute. The power to prescribe a rate was conferred by the amendment of June 29, 1906 [34 Stat. 584, c. 3591, U. S. Comp. St. Supp. 1911, p. 1288], and that amendment extended the provisions of the act for the first time to intraterritorial commerce. The amendment made the act completely comprehensive of the whole subject, and entirely superseded the minor authority which had been conferred upon the Secretary of the Interior."—[McKenna, *J.*, in *Interstate Com. Comm. v. Humboldt S. S. Co.*, 224 U. S. 474, 483, 484, 32 Sup. Ct. 556, 558, 559, 56 L. Ed. 849 (1912).] Pipe lines (except water and gas), express companies, and sleeping car companies were brought within the act by the latter amendment.

Among the more important constitutional cases decided under the act and

## INTERSTATE COMMERCE COMMISSION v. GOODRICH TRANSIT CO.

(Supreme Court of United States, 1912. 224 U. S. 194, 32 Sup. Ct. 436, 56 L. Ed. 729.)

[Appeals from United States Commerce Court. The federal Interstate Commerce Act as amended in 1906 (34 Stat. 584, c. 3591, U. S. Comp. St. Supp. 1911, p. 1288) applied to carriers engaged in interstate transportation partly by rail and partly by water, when both were used under an arrangement for continuous carriage. The Goodrich Transit Company, a carrier by water upon the Great Lakes, deriving less than 20 per cent. of its gross revenue from joint rail and water interstate business, and the White Star Line, a similar carrier deriving less than 1 per cent. of its gross revenue from this source, obtained from the federal Commerce Court injunctions against orders of the Interstate Commerce Commission calling for reports and prescribing rules of accounting under § 20 of the above act, in so far as such orders extended beyond their said joint interstate business. Other facts appear in the opinion below.]

Mr. Justice DAY. \* \* \* As to annual reports, the power conferred in § 20 of the act extends to all common carriers subject to the provisions of the act. The Commission is vested with authority to prescribe the manner in which such reports shall be made, and to require specific answers to all questions as to which the Commission may need information. \* \* \*

The form of report adopted by the Commission required a showing as to the corporate organization of each carrier by water subject to the act, the companies owned by it, and the parties or companies controlling it; as to the financial condition of the carrier, the cost of its real property and equipment, its capital stock and other stock and

its amendments are *Interstate Com. Comm. v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. Ed. 1047 (1894) (power to compel testimony); *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819 (1896) (same); *N. Y., etc., Ry. v. I. C. Comm.*, 200 U. S. 361, 26 Sup. Ct. 272, 50 L. Ed. 515 (1906) (carrier's own property subject to public rates of carriage); *U. S. v. Del. & H. Co.*, 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836 (1909) (forbidding transportation of carrier's own commodities); *U. S. v. Lehigh Val. Ry.*, 220 U. S. 257, 31 Sup. Ct. 387, 55 L. Ed. 458 (1911) (same—indirect ownership); *Atlantic C. L. Ry. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7 (1911) (making initial carrier liable for injury to freight); *L. & N. Ry. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671 (1911) (invalidating prior bona fide life pass given in settlement of damage claim).

As to the application of the act to various kinds of transportation, see *New York Cent. R. Co. v. Hudson County*, 227 U. S. 248, 33 Sup. Ct. 269, 57 L. Ed. — (1913) (ferries); *Omaha & Council Bluffs St. Ry. v. I. C. Comm.*, 230 U. S. 324, 33 Sup. Ct. 890, 57 L. Ed. — (1913) (street railways); *Texas & N. O. R. Co. v. Sabine Tram Co.*, 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. — (1913) (interstate shipments on local bills of lading—cases); *Texas & Pac. Ry. v. U. S.*, 205 Fed. 350 (1913) (intrastate rates discriminating against interstate traffic, whether fixed by carrier or state)—compare *Minnesota Rate Cases*, ante, p. 1174.

securities owned by it, together with all special funds and current assets and liabilities, as well as its funded indebtedness, with collateral security covering same; and as to finances with respect to the operations of the carrier for the current year, giving the revenue of the company and its source, whether from transportation, and what kind, or from outside operations, and all expenses, detailed, with a statement as to the net income or deficit from the various sources, and the report contains a profit and loss account and a general balance sheet. The report further requires certain statistical information, as follows: The routes of the carrier and their mileage; a general description of the equipment owned, leased, or chartered by the carrier; the amount of traffic, both passenger and freight, and mileage and revenue statistics, together with a separation of freight into the quantity of the various products transported, showing also whether originating on the carrier's line or received from a connecting line; and a general description of any separate business carried on by the carrier. But such report is no broader than the annual report of such carriers, as prescribed by the act, for § 20 provides that:

"Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the accidents to passengers, employees, and other persons, and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same, as the Commission may require."

As to the accounts, the statute permits the Commission, in its discretion, for the purpose of enabling it the better to carry out the purposes of the act, to prescribe a period of time within which such common carriers shall have a uniform system of accounts and the manner in which such accounts shall be kept. The Commission may, the statute further provides, in its discretion, prescribe the forms of all accounts, records, and memoranda to be kept by the common carriers, to which accounts the Commission shall have access. And the act makes it unlawful for the carriers to keep any accounts, records, or memoranda other than those prescribed by the Commission.

We think this section contains ample authority for the Commission to require a system of accounting as provided in its orders, and



a report in the form shown to have been required by the order of the Commission. It is true that the accounts required to be kept are general in their nature, and embrace business other than such as is necessary to the discharge of the duties required in carrying passengers and freight in interstate commerce by joint arrangement between the railroad and the water carrier, but the Commission is charged under the law with the supervision of such rates as to their reasonableness, and with the general duty of making reports to Congress which might require a knowledge of the business of the carrier beyond that which is strictly of the character mentioned. If the Commission is to successfully perform its duties in respect to reasonable rates, undue discriminations, and favoritism, it must be informed as to the business of the carriers by a system of accounting which will not permit the possible concealment of forbidden practices in accounts which it is not permitted to see, and concerning which it can require no information. It is a mistake to suppose that the requiring of information concerning the business methods of such corporations, as shown in its accounts, is a regulation of business not within the jurisdiction of the Commission, as seems to be argued for the complainants. The object of requiring such accounts to be kept in a uniform way, and to be open to the inspection of the Commission, is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the act, that it may properly regulate such matters as are really within its jurisdiction. Further, the requiring of information concerning a business is not regulation of that business. The necessity of keeping such accounts has been developed in the reports of the Commission, and has been the subject of great consideration. It caused the employment of those skilled in such matters, and has resulted in the adoption of a general form of accounting which will enable the Commission to examine into the affairs of the corporations, with a view to discharging its duties of regulation concerning them. \* \* \*

The learned commerce court was of the opinion that the Commission might require accounts and reports, so far as the business of the water carriers with reference to joint rates by rail and water under a common arrangement was concerned, and remanded the cases to the Commission for revision of their orders upon that basis. But it is argued for the Commission, and it seems to us, with great force, that it would be impracticable to make such separation in any system of accounting. It is a matter of general knowledge, of which we may take judicial notice, that traffic of all kinds is conducted upon the same ship and passage. A boat may leave a lake port carrying passengers and freight destined for ports within the state and for ports beyond the state, and as a part of the freight for carriage embrace some carried under the terms of joint arrangements made with connecting railroad carriers. How would it be practicable to sepa-

rate the items of expense entailed in the carriage of these various classes? It is done upon one boat, with one set of officers and crew, and must, in the nature of things, be under one general bill of expense,—at least, it would seem impracticable to separate it into its items, so as to show the expense of that which it is contended is alone within the terms of the act, as construed by the carriers.<sup>1</sup>

We think the act should be given a practical construction, and one which will enable the Commission to perform the duties required of it by Congress; and, conceding for this purpose that the regulating power of the Commission is limited, so far as rates are concerned, to joint rates of the character named in § 1, it is still essential that, to enable the Commission to perform its required duties, even with respect to such rates, and to make reports to Congress of the business of carriers subject to the terms of the act, it should be informed as to the matters contained in the report. Congress, in § 20, has authorized the Commission to inquire as to the business which the carrier does, and to require the keeping of uniform accounts, in order that the Commission may know just how the business is carried on, with a view to regulating that which is confessedly within its power. \* \* \*

As to one of the corporations, it is said that its business includes not only the carriage of passengers and freight, but that it owns and operates in connection therewith certain amusement parks. The report in controversy, as to business other than commerce, requires a general description of such outside operations, and also a statement of the income from and the expenses of the same. As we have said, if the Commission is to be informed of the business of the corporation, so far as its bookkeeping and reports are concerned, it must have full knowledge and full disclosures thereof, in order that it may ascertain whether forbidden practices and discriminations are concealed, even unintentionally, in certain accounts, and whether charges of expense are made against one part of a business which ought to be made against another.

Bookkeeping, it is said, is not interstate commerce. True, it is not. But bookkeeping may and ought to show how a business which, in part, at least, is interstate commerce, is carried on, in order that the Commission, charged with the duty of making reasonable rates and prohibiting unfair and unreasonable ones, may know the nature and extent of the business of the corporation, the cost of its interstate transactions, and otherwise to inform itself so as to enable it to properly regulate the matters which are within its authority. \* \* \*

Judgment reversed.

[LURTON and LAMAR, JJ., dissented.]

<sup>1</sup> But compare *Minnesota Rate Cases*, ante, at pp. 502, 503.

## McDERMOTT v. WISCONSIN.

(Supreme Court of United States, 1913. 228 U. S. 115, 33 Sup. Ct. 431, 57 L. Ed. —.)

[Error to the Supreme Court of Wisconsin. A Wisconsin statute required all "corn syrup" offered for sale in the state, if containing over 75 per cent. of glucose, to be labeled "Glucose flavored with," etc., and forbade any other label indicating a saccharine substance. Under the federal Food and Drugs Act (34 Stat. 768, c. 3915, U. S. Comp. St. Supp. 1911, p. 1354) this commodity in interstate commerce was lawfully labeled "Corn Syrup." McDermott, a retail merchant in Wisconsin, bought and received from Chicago, in a wooden box, twelve half-gallon cans of said corn syrup, labeled only as required by the federal law, took the cans from the box, and placed them on his shelves for retail sale. For this, he was convicted in the Dane county Circuit Court of violating the state statute, and the conviction was affirmed by the state Supreme Court.]

Mr. Justice DAY. \* \* \* It is insisted that the federal Food and Drugs Act, passed under the authority of the Constitution, has taken possession of this field or regulation, and that the state act is a wrongful interference with the exclusive power of Congress over interstate commerce. \* \* \*

Congress \* \* \* has the right not only to pass laws which shall regulate legitimate commerce among the states and with foreign nations, but has full power to keep the channels of such commerce free from the transportation of illicit or harmful articles, to make such as are injurious to the public health outlaws of such commerce, and to bar them from the facilities and privileges thereof. \* \* \* The Food and Drugs Act was passed by Congress \* \* \* to prevent the facilities of such commerce being used to enable such articles to be transported throughout the country from their place of manufacture to the people who consume and use them. \* \* \*

Section 2 of the act provides that "the introduction into any state or territory or the District of Columbia from any other state or territory or the District of Columbia \* \* \* of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited." \* \* \* [Here follows a statement of the penal clause of the act and references to §§ 7 and 8 of it, defining "adulterated" and "misbranded."]

That the word "package," or its equivalent expression, as used by Congress in §§ 7 and 8 in defining what shall constitute adulteration and what shall constitute misbranding within the meaning of the act, clearly refers to the immediate container of the article which is intended for consumption by the public, there can be no question. \* \* \* Within the limitations of its right to regulate interstate commerce, Congress manifestly is aiming at the contents of the pack-

age as it shall reach the consumer, for whose protection the act was primarily passed, and it is the branding upon the package which contains the article intended for consumption itself which is the subject-matter of regulation. Limiting the requirements of the act as to adulteration and misbranding simply to the outside wrapping or box containing the packages intended to be purchased by the consumer, so that the importer, by removing and destroying such covering, could prevent the operation of the law on the imported article yet unsold, would render the act nugatory and its provisions wholly inadequate to accomplish the purposes for which it was passed. \* \* \*

When delivered for shipment and when received through the channels of interstate commerce, the cans in question bore brands or labels which were supposed to comply with the requirements of the act of Congress. \* \* \* The label upon the unsold article is, in the one case, the evidence of the shipper that he has complied with the act of Congress, while in the other, by its misleading and false character, it furnishes the proof upon which the federal authorities depend to reach and punish the shipper and to condemn the goods. \* \* \*

While in this situation, the goods being unsold, as a condition of their legitimate sale within the state, and also of their being in the possession of the importer for the purpose of sale and of being exposed and offered for sale by him, the Wisconsin statute provides that they shall bear the label required by the state law and none other (which represents a saccharine substance, as do the labels in these cases). In others words, it is essential to a legal exercise of possession of and traffic in such goods under the state law that labels which presumably meet with the requirements of the federal law, and for the determination of the correctness of which Congress has provided efficient means, shall be removed from the packages before the first sale by the importer. In this connection it might be noted that, as a practical matter, at least, the first time the opportunity of inspection by the federal authorities arises in cases like the present is when the goods, after having been manufactured, put up in package form and boxed in one state, and having been transported in interstate commerce, arrive at their destination, are delivered to the consignee, unboxed, and placed by him upon the shelves of his store for sale. Conceding to the state the authority to make regulations consistent with the federal law for the further protection of its citizens against impure and misbranded food and drugs,<sup>1</sup> we think to permit such regulation as is embodied in this statute is to permit a state to

<sup>1</sup> As to the kind of additional regulations competent to the states under the federal act considered in the principal case, see *Savage v. Jones*, 225 U. S. 501 (1912) (packages of feeding stuff for animals required to bear tag stating weight, trade-name, name and location of manufacturer, and a guaranteed analysis of composition); *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 32 Sup. Ct. 784, 56 L. Ed. 1197 (1912) (similar statute).

discredit and burden legitimate federal regulations of interstate commerce, to destroy rights arising out of the federal statute which have accrued both to the government and the shipper, and to impair the effect of a federal law which has been enacted under the Constitutional power of Congress over the subject.

To require the removal or destruction before the goods are sold of the evidence which Congress has by the Food and Drugs Act, as we shall see, provided may be examined to determine the compliance or noncompliance with the regulations of the federal law, is beyond the power of the state. The Wisconsin act which permits the sale of articles subject to the regulations of interstate commerce only upon condition that they contain the exclusive labels required by the statute is an act in excess of its legitimate power.

It is insisted, however, that, since at the time when the state act undertook to regulate the branding of these goods, namely, when in the possession of the plaintiffs in error, and held upon their shelves for sale, the cans had been removed from the boxes in which they were shipped in interstate commerce, they had therefore passed beyond the jurisdiction of Congress, and their regulation was exclusively a matter for state legislation. This assertion is based upon the original-package doctrine as it is said to have been laid down in the former decisions in this court. \* \* \* [Here follows a quotation from *Brown v. Maryland*, ante, at p. 1042, in which the term "original package" was used.]

That doctrine has been many times applied in the decisions of this court in defining the line of demarcation which shall separate the federal from the state authority where the sovereign power of the nation or state is involved in dealing with property. And where it has been found necessary to decide the boundary of federal authority, it has been generally held that, where goods prepared and packed for shipment in interstate commerce are transported in such commerce, and delivered to the consignee, and the package by him separated into its component parts, the power of federal regulation has ceased and that of the state may be asserted. [Citing cases.] In the view, however, which we take of this case, it is unnecessary to enter upon any extended consideration of the nature and scope of the principles involved in determining what is an original package. For, \* \* \* keeping within its constitutional limitations of authority, Congress may determine for itself the character of the means necessary to make its purpose effectual, in preventing the shipment in interstate commerce of articles of a harmful character, and to this end may provide the means of inspection, examination, and seizure necessary to enforce the prohibitions of the act, and when § 2 has been violated, the federal authority, in enforcing either § 2 or § 10, may follow the adulterated or misbranded article at least to the shelf of the importer. \* \* \*



[Referring to § 10 of the act:] To make the provisions of the act effectual, Congress has provided not only for the seizure of the goods while being actually transported in interstate commerce, but has also provided for such seizure after such transportation and while the goods remain "unloaded, unsold, or in original unbroken packages." The opportunity for inspection en route may be very inadequate. The real opportunity of government inspection may only arise when, as in the present case, the goods as packed have been removed from the outside box in which they were shipped, and remain, as the act provides, "unsold." It is enough, by the terms of the act, if the articles are *unsold*, whether in original packages or not. \* \* \*

The doctrine of original package had its origin in the opinion of Chief Justice Marshall in *Brown v. Maryland*, already referred to. It was intended to protect the importer in the right to sell the imported goods which was the real object and purpose of importation. To determine the time when an article passes out of the interstate into state jurisdiction for the purpose of taxation is entirely different from deciding when an article which has violated a federal prohibition becomes immune. The doctrine was not intended to limit the right of Congress, now asserted, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles, and to choose appropriate means to that end. The legislative means provided in the federal law for its own enforcement may not be thwarted by state legislation having a direct effect to impair the efficient exercise of such means.

Judgment reversed.<sup>2</sup>

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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,

<sup>2</sup> See also, *Hipolite Egg Co. v. United States*, 220 U. S. 45, 31 Sup. Ct. 361, 55 L. Ed. 364 (1911) (Food and Drugs Act applies to articles shipped from state to state by owner for his own use in manufacturing food for sale, at least where latter is not to be labeled under the act).

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 employees, 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."<sup>1</sup>

<sup>1</sup> The obligation imposed by the federal Safety Appliance law is an absolute one, not discharged by the mere exercise of due care to observe it. *St. Louis, etc., Ry. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061 (1908); *C. B. & Q. Ry. v. U. S.*, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582 (1911).

Every railroad that transports goods upon any part of a continuous inter-

state journey is within the act, even though its part of all carriage is wholly within a state, upon local bills of lading, and though no cars can be received from other roads on account of differences in gauge. *U. S. v. Colo., etc., Ry.*, 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. (N. S.) 167, 13 Ann. Cas. 893 (1907); *Pac. Coast Ry. v. U. S.*, 173 Fed. 448, 98 C. C. A. 31 (1909). *Contra: U. S. v. Geddes*, 131 Fed. 452, 65 C. C. A. 320 (1904).

The original act of 1893 was limited in its application to cars "used in moving interstate traffic." As to what constituted this, see *Johnson v. So. Pac. Ry.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363 (1904); *Delk v. St. L. & F. Ry.*, 220 U. S. 580, 31 Sup. Ct. 617, 55 L. Ed. 590 (1911).

**FEDERAL HOURS OF SERVICE ACT.**—This Act of 1907 (34 Stat. 1415, c. 2939. U. S. Comp. St. Supp. 1911, p. 1321) limits the hours of labor of employes of railroads engaged in interstate transportation who are actually engaged in or connected with the movement of any train. In *Balt. & O. Ry. v. Int. Com. Comm.*, 221 U. S. 612, 618, 619, 31 Sup. Ct. 621, 55 L. Ed. 878 (1911) this was upheld, *Hughes, J.*, saying:

"The argument, undoubtedly, involves the consideration that the interstate and intrastate operations of interstate carriers are so interwoven that it is utterly impracticable for them to divide their employes in such manner that the duties of those who are engaged in connection with interstate commerce shall be confined to that commerce exclusively. And thus, many employes who have to do with the movement of trains in interstate transportation are, by virtue of practical necessity, also employed in intrastate transportation.

"This consideration, however, lends no support to the contention that the statute is invalid. For there cannot be denied to Congress the effective exercise of its constitutional authority. By virtue of its power to regulate interstate and foreign commerce, Congress may enact laws for the safeguarding of the persons and property that are transported in that commerce, and of those who are employed in transporting them. *Johnson v. Southern P. Co.*, 196 U. S. 1, 49 L. Ed. 363, 25 Sup. Ct. 158; *Adair v. United States*, 208 U. S. 177, 178, 52 L. Ed. 443, 444, 28 Sup. Ct. 277, 13 Ann. Cas. 764; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. Ed. 1061, 28 Sup. Ct. 616; *Chicago, B. & Q. R. Co. v. United States*, decided May 15, 1911 [220 U. S. 559, 55 L. Ed. 582, 31 Sup. Ct. 612]. The fundamental question here is whether a restriction upon the hours of labor of employes who are connected with the movement of trains in interstate transportation is comprehended within this sphere of authorized legislation. This question admits of but one answer. The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitably to provide for the safety of employes and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train dispatchers, telegraphers, and other persons embraced within the class defined by the act. And in imposing restrictions having reasonable relation to this end there is no interference with liberty of contract as guaranteed by the Constitution. *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. Ed. 328, 31 Sup. Ct. 259.

"If, then, it be assumed, as it must be, that, in the furtherance of its purpose, Congress can limit the hours of labor of employes engaged in interstate transportation, it follows that this power cannot be defeated either by prolonging the period of service through other requirements of the carriers, or by the commanding of duties relating to interstate and intrastate operations."

And in *Nor. Pac. Ry. v. Washington*, 222 U. S. 370, 375, 32 Sup. Ct. 160, 56 L. Ed. 237 (1912), *White, C. J.*, applying the same act, said:

"The train, although moving from one point to another in the state of Washington, was hauling merchandise from points outside of the state, destined to points within the state, and from points within the state to points in British Columbia, as well as in carrying merchandise which had originated outside of the state, and was in transit through the state to a foreign destination. This transportation was interstate commerce, and the train was an interstate train, despite the fact that it may also have been carrying some local freight.

## 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 employees, 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 employees 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 defences of fellow service, contributory negligence, and assumed risk were abrogated or modified, as indicated 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

In view of the unity and indivisibility of the service of the train crew and the paramount character of the authority of Congress to regulate commerce, the act of Congress was exclusively controlling."

As to the scope of the liability imposed for injuries occurring to employees during any period of over-time under this act see *St. Louis, etc., Ry. v. McWhirter*, 229 U. S. 265, 33 Sup. Ct. 858, 57 L. Ed. — (1913).

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 employees.

6. The duties of common carriers in respect of the safety of their employees, 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 commerce. 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 employes.



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 employees 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,<sup>1</sup> have no tendency to promote the safety of the employees, or to advance the commerce in which they are engaged; (2) because the liability imposed for injuries sustained by one employee through the negligence of another, although confined to instances where the injured employee is engaged in interstate commerce, is not confined to instances where both employees are so engaged. \* \* \*

Briefly stated, the departures from the common law made by the portions of the act against which the first objection is leveled are these: (a) The rule that the negligence of one employee resulting in injury to another was not to be attributed to their common employer is displaced by a rule imposing upon the employer responsibility for such an injury, as was done at common law when the injured person was not an employee; (b) the rule exonerating an employer from liability for injury sustained by an employee through the concurring negligence of the employer and the employee is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributes to the injury, and in other instances is displaced by the rule of comparative negligence, whereby the exoneration is only from a proportional part of the damages corresponding to the amount of negligence attributable to the employee; (c) the rule that an employee was deemed to assume the risk of injury, even if due to an employer's negligence, where the employee voluntarily entered or remained in the service with an actual or presumed knowledge of the conditions out of which the risk arose, is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributed to the injury; and (d) the rule denying a right of action for the death of one person, caused by the wrongful act or neglect of another, is displaced by a rule vesting such a right of action in the personal representatives of the deceased, for the benefit of designated relatives.

<sup>1</sup> 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." As to the mode of applying the latter rule, see *Norfolk, etc., Ry. v. Earnest*, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. Ed. — (1913).

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 employees and to advance 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 employee through the negligence of another, where all are engaged in interstate commerce, that power does not embrace instances where the negligent employee 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 employees 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 employee engaged in intrastate commerce; for such negligence, when operating injuriously upon an employee engaged in interstate commerce, has the same effect upon that commerce as if the negligent employee were also engaged therein.<sup>2</sup> \* \* \*

<sup>2</sup> Accord: *Watson v. St. Louis, etc., Ry.*, 169 Fed. 942 (1909) (well reasoned opinion); *Pedersen v. Delaware, etc., R. Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. — (1913).

[Here follows the extract printed ante, p. 328; and the one printed ante, p. 950.]

Judgments affirmed or reversed accordingly.<sup>8</sup>

<sup>8</sup>The first federal Employers' Liability Act was held inoperative in the states because its benefits were interpreted by a majority of the court as not confined to employees actually engaged in interstate commerce, but included all employees of interstate carriers whatever their occupations. *Employers' Liability Cases*, 207 U. S. 463, 498, 499, 502, 503, 28 Sup. Ct. 141, 145, 147, 52 L. Ed. 297 (1908), White, J., saying:

"Without stopping to consider the numerous instances, where, although a common carrier is engaged in interstate commerce, such carrier may, in the nature of things, also transact business not interstate commerce, although such local business may indirectly be related to interstate commerce, a few illustrations showing the operation of the statute as to matters wholly independent of interstate commerce will serve to make clear the extent of the power which is exerted by the statute. Take a railroad engaged in interstate commerce, having a purely local branch operated wholly within a state. Take again the same road having shops for repairs, and, it may be, for construction work, as well as a large accounting and clerical force, and having, it may be, storage elevators and warehouses, not to suggest, besides, the possibility of its being engaged in other independent enterprises. Take a telegraph company engaged in the transmission of interstate and local messages. Take an express company engaged in local as well as in interstate business. Take a trolley line moving wholly within a state as to a large part of its business, and yet, as to the remainder, crossing the state line. \* \* \*

"It remains only to consider the contention \* \* \* that the act is constitutional although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that, because one engages in interstate commerce, he thereby endows Congress with power not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the states as to all conceivable matters which, from the beginning, have been, and must continue to be, under their control so long as the Constitution endures."

The act was held valid, however, as to carriers in the District of Columbia and the territories. *El Paso, etc., Ry. v. Gutierrez*, 215 U. S. 87, 30 Sup. Ct. 21, 54 L. Ed. 106 (1909).

In *Pedersen v. Del., Lack. & W. Ry.*, 229 U. S. 146, 151, 152, 154, 155, 33 Sup. Ct. 648, 649, 650, 57 L. Ed. — (1913), the question was discussed, when an employee of a carrier was engaged in interstate commerce, within the second act. Plaintiff, while carrying bolts from a tool car to a railroad bridge, to be used a few hours later in repairing the bridge, was negligently injured by an intrastate passenger train on the same road. It was held he could recover under the act, *Van Devanter, J.*, saying:

"Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars; and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. \* \* \* The work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements, and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an er-

aneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? \* \* \* Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such.

"True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce.

"The point is made that the plaintiff was not, at the time of his injury, engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce."

Lamar, J. (with whom concurred Holmes and Lurton, JJ.) dissented, saying: "When Congress itself limits the operation of the statute to persons injured while employed in interstate commerce, the statute does not extend to its incidents, and is confined to transportation. It does not include manufacturing, building, repairing, for they are not commerce, whether performed by a private person, a railroad, or its agents. It is conceded that a line must be drawn between those employees of the carrier who are employed in commerce and those engaged in other departments of its business. It must be drawn so as to take in, on one side, those engaged in transportation, which is commerce; otherwise there is no logical reason why it should not include every agent of the company; for there is no other test by which to determine when he must sue under the state statute and when under the act of Congress; for if a man on his way to repair a bridge is engaged in interstate commerce, then the man in the shop who made the bolts to be used in repairing the bridge is likewise so engaged. If they are, then the man who paid them their wages, and the bookkeeper who entered those payments in the accounts, are similarly engaged. For they are all employed by the carrier, and the work of each contributes to its success in hauling freight and passengers."

See, also, *St. Louis, etc., Ry. v. Seale*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. — (1913) (act includes employee who takes numbers of, labels, and seals up cars in freight yard); *Lamphere v. Oregon, etc., Co.*, 193 Fed. 248 (1911), reversed in 196 Fed. 336, 16 C. C. A. 156 (1912); and cases cited in both opinions.

The present federal act has superseded all state legislation prescribing the liability of carriers for injuries to their employees while engaged in interstate commerce, and if the federal act affords no remedy for such an injury, none exists anywhere. *Michigan Cent. Ry. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. — (1913). The first act, being invalid as to the affirmative regulation intended by Congress, likewise failed to indicate an intention to deprive the states of power over any part of its subject-matter. *Chicago, etc., Ry. v. Hackett*, 228 U. S. 559, 566, 567, 33 Sup. Ct. 581, 57 L. Ed. — (1913).

The federal act forbids any contracting out of it between employer and employees, and invalidates all existing contracts providing a different remedy for injured employees. *Philadelphia, etc., Ry. v. Schubert*, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911 (1912).

ADAIR v. UNITED STATES (1908) 208 U. S. 161, 176, 178-180, 188, 189, 190, 191, 28 Sup. Ct. 277, 281-283, 286, 287, 52 L. Ed. 436, 13 Ann. Cas. 764, Mr. Justice HARLAN (see p. 473, ante, for the facts of this case):

[After holding that the statute violated the fifth amendment—ante pp. 474, 475:] “But it is suggested that the authority to make it a crime for an agent or officer of an interstate carrier, having authority in the premises from his principal, to discharge an employee from service to such carrier, simply because of his membership in a labor organization, can be referred to the power of Congress to regulate interstate commerce, without regard to any question of personal liberty or right of property arising under the fifth amendment. This suggestion can have no bearing in the present discussion unless the statute, in the particular just stated, is, within the meaning of the Constitution, a regulation of commerce among the states. \* \* \*

“Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the states, must have some real or substantial relation to or connection with the commerce regulated. But what possible legal or logical connection is there between an employee’s membership in a labor organization and the carrying on of interstate commerce? Such relation to a labor organization cannot have, *in itself* and in the eye of the law, any bearing upon the commerce with which the employee is connected by his labor and services. Labor associations, we assume, are organized for the general purpose of improving or bettering the conditions and conserving the interests of its members as wage-earners,—an object entirely legitimate and to be commended rather than condemned. But surely those associations, as labor organizations, have nothing to do with interstate commerce, as such. One who engages in the service of an interstate carrier will, it must be assumed, faithfully perform his duty, whether he be a member or not a member of a labor organization. His fitness for the position in which he labors and his diligence in the discharge of his duties cannot, in law or sound reason, depend in any degree upon his being or not being a member of a labor organization. It cannot be assumed that his fitness is assured, or his diligence increased, by such membership, or that he is less fit or less diligent because of his not being a member of such an organization. It is the employee as a man, and not as a member of a labor organization, who labors in the service of an interstate carrier.

“Will it be said that the provision in question had its origin in the apprehension, on the part of Congress, that, if it did not show more consideration for members of labor organizations than for wage-earners who were not members of such organizations, or if it did not insert in the statute some such provision as the one here in question, members of labor organizations would, by illegal or violent measures,



interrupt or impair the freedom of commerce among the states? We will not indulge in any such conjectures, nor make them, in whole or in part, the basis of our decision. We could not do so consistently with the respect due to a co-ordinate department of the government. We could not do so without imputing to Congress the purpose to accord to one class of wage-earners privileges withheld from another class of wage-earners, engaged, it may be, in the same kind of labor and serving the same employer. Nor will we assume, in our consideration of this case, that members of labor organizations will, in any considerable numbers, resort to illegal methods for accomplishing any particular object they have in view.

"Looking alone at the words of the statute for the purpose of ascertaining its scope and effect, and of determining its validity, we hold that there is no such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employee because of such membership on his part. If such a power exists in Congress it is difficult to perceive why it might not, by absolute regulation, require interstate carriers, under penalties, to employ, in the conduct of its interstate business, *only* members of labor organizations, or *only* those who are *not* members of such organizations,—a power which could not be recognized as existing under the Constitution of the United States. No such rule of criminal liability as that to which we have referred can be regarded as, in any just sense, a regulation of interstate commerce." \* \* \*

[MOODY, J., took no part in the decision of the case.]

Mr. Justice McKENNA, dissenting:

"Counsel makes a great deal of the difference between direct and indirect effect upon interstate commerce, and assert that § 10 is an indirect regulation at best, and not within the power of Congress to enact. Many cases are cited, which, it is insisted, sustain the contention. I cannot take time to review the cases. I have already alluded to the contention, and it is enough to say that it gives too much isolation to § 10. The section is part of the means to secure and make effective the scheme of arbitration set forth in the statute. The contention, besides, is completely answered by *Howard v. Illinois C. R. Co.* [207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297]. In that case, as we have seen, the power of Congress was exercised to establish a rule of liability of a carrier to his employees for personal injuries received in his service. It is manifest that the kind or extent of such liability is neither traffic nor intercourse, the transit of persons nor the carrying of things. Indeed, such liability may have wider application than to carriers. It may exist in a factory; it may exist on a farm; and, in both places, or in commerce, its direct influence might be hard to find or describe. And yet this court did not hesitate to pronounce it to be within the power of Congress to establish. 'The

primary object,' it was said in *Johnson v. Southern P. Co.*, 196 U. S. 1, 49 L. Ed. 363, 25 Sup. Ct. 158, of the Safety Appliance Act, 'was to promote *the public welfare* by securing the safety of employees and travelers.' The rule of liability for injuries is even more roundabout in its influence on commerce, and as much so as the prohibition of § 10. To contend otherwise seems to me to be an oversight of the proportion of things. A provision of law which will prevent, or tend to prevent, the stoppage of every wheel in every car of an entire railroad system, certainly has as direct influence on interstate commerce as the way in which one car may be coupled to another, or the rule of liability for personal injuries to an employee." \* \* \*

Mr. Justice HOLMES, dissenting:

"I also think that the statute is constitutional, and, but for the decision of my brethren, I should have felt pretty clear about it.

"As we all know, there are special labor unions of men engaged in the service of carriers. These unions exercise a direct influence upon the employment of labor in that business, upon the terms of such employment, and upon the business itself. Their very existence is directed specifically to the business, and their connection with it is, at least, as intimate and important as that of safety couplers, and, I should think, as the liability of master to servant,—matters which, it is admitted, Congress might regulate, so far as they concern commerce among the states. I suppose that it hardly would be denied that some of the relations of railroads with unions of railroad employees are closely enough connected with commerce to justify legislation by Congress. If so, legislation to prevent the exclusion of such unions from employment is sufficiently near.

"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 remainder of the opinion, upon this point, appears ante, p. 477.]<sup>1</sup>

<sup>1</sup> In *Patterson v. The Eudora*, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002 (1903), it was held that Congress could forbid the payment of advance wages to any seaman shipping at our ports upon any vessel, foreign or domestic, engaged in interstate or foreign commerce.

Compare *Federated, etc., Ry. Ass'n v. New So. Wales Ry. Ass'n*, 4 Com. L. Rep. 488, 544, 545 (Australia, 1906) (discussing limitations of federal government in regulating wages and terms of engagement of persons employed in interstate railway traffic on state-owned railways).

## NORTHERN PAC. RY. CO. v. WASHINGTON.

(Supreme Court of United States, 1912. 222 U. S. 370, 32 Sup. Ct. 160, 56 L. Ed. 237.)

[Error to the Supreme Court of Washington. On March 4, 1907 (34 Stat. 1415, c. 2939, U. S. Comp. St. Supp. 1911, p. 1321), was approved the federal Hours of Service Act, regulating the hours of labor of interstate railroad employees engaged in moving trains. The act provided it should take effect one year after its passage. On June 12, 1907 (Laws 1907, c. 20) a law of the state of Washington became effective, regulating the hours of service of railway employees in the state. The state courts upheld the award of a penalty against defendant company for violating the state law in July, 1907, in moving a local train carrying some interstate freight, on the ground the federal law was not yet operative.]

Mr. Chief Justice WHITE. \* \* \* Conceding the paramount power of Congress, the operative force of the state law was solely maintained over the interstate commerce in question because of the provision of the act of Congress providing that it should not take effect until one year after its passage. As a result, the act was treated as not existing until the expiration of a year from its passage. \* \* \*

But we are of opinion that this view is not compatible with the paramount authority of Congress over interstate commerce. It is elementary, and such is the doctrine announced by the cases to which the court below referred, that the right of a state to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject, or manifests its purpose to call into play its exclusive power. This being the conceded premise upon which alone the state law could have been made applicable, it results that as the enactment by Congress of the law in question was an assertion of its power, by the fact alone of such manifestation that subject was at once removed from the sphere of the operation of the authority of the state. To admit the fundamental principle and yet to reason that because Congress chose to make its prohibitions take effect only after a year, the matter with which Congress dealt remained subject to state power, is to cause the act of Congress to destroy itself; that is, to give effect to the will of Congress as embodied in the postponing provision for the purpose of overriding and rendering ineffective the expression of the will of Congress to bring the subject within its control,—a manifestation arising from the mere fact of the enactment of the statute. \* \* \*

But if we pass these considerations and consider the issue before us as one requiring merely an interpretation of the statute, we are of opinion that it becomes manifest that it would cause the statute to destroy itself to give to the clause postponing its operation for one

year the meaning which must be affixed to it in order to hold that, during the year of postponement, state police laws applied. In the first place, no conceivable reason has been, or we think can be, suggested for the postponing provision, if it was contemplated that the prohibitions of state laws should apply in the meantime. This is true because if it be that it was contemplated that the subject dealt with should be controlled during the year by state laws, the postponement of the prohibitions of the act could accomplish no possible purpose. This is well illustrated by this case, where, by the ruling below, a state regulation substantially similar to that contained in the act of Congress is made applicable. In the second place, the obvious suggestion is that the purpose of Congress in giving time was to enable the necessary adjustments to be made by the railroads to meet the new conditions created by the act,—a purpose which would of course be frustrated by giving to the provision as to postponement a significance which would destroy the very reason which caused it to be enacted. Finally, the convictions which arise from the fact of the postponement are made plain by a report on the bill, made to the House of Representatives by the Committee on Interstate and Foreign Commerce, wherein it was said (Report No. 7641, dated February 16, 1907, p. 6):

“Owing to the probable necessity of changing in some instances division points, entailing the removal of employees, and to permit ample time to readjust themselves to the requirements of the law, it is not to become operative for one year after its approval.”

Judgment reversed.<sup>1</sup>

<sup>1</sup> In *Southern Ry. v. Reid*, 222 U. S. 424, 436, 437, 32 Sup. Ct. 140, 142, 56 L. Ed. 257 (1912), McKenna, J., said:

“It is well settled that if the state and Congress have a concurrent power, that of the state is superseded when the power of Congress is exercised. The question occurs: To what extent and how directly must it be exercised to have such effect? It was decided in *Missouri P. R. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, 53 L. Ed. 352, 29 Sup. Ct. 214, that the mere creation of the Interstate Commerce Commission and the grant to it of a large measure of control over interstate commerce does not, in the absence of action by it, change the rule that Congress by nonaction leaves power in the states over merely incidental matters. ‘In other words,’ and we quote from the opinion, ‘the mere grant by Congress to the Commission of certain national powers in respect to interstate commerce does not of itself, and in the absence of action by the Commission, interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens. \* \* \* Until specific action by Congress or the Commission, the control of the state over those incidental matters remains undisturbed.’ The duty which was enforced in the state court was the duty of a railroad company engaged in interstate commerce to afford equal local switching service to its shippers, notwithstanding the cars concerning which the service was claimed were eventually to be engaged in interstate commerce. This duty was declared to be a common-law duty which the state might, ‘at least, in the absence of congressional action, compel a carrier to discharge.’

“The principle of that case, therefore, requires us to find specific action either by Congress in the interstate commerce act, or by the Commission, covering the matters which the statute of North Carolina attempts to regulate.”

Recent instances where rights under state laws have been held to be superseded by federal regulations are: *Texas & Pac. Ry. v. Abilene Oil Co.*, 204

## SECTION 7.—FEDERAL MARITIME AUTHORITY \*

THE DANIEL BALL (1871) 10 Wall. 557, 563, 564, 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):

"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

U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075 (1907) (recovery of improper charge from carrier); *Robinson v. B. & O. Ry.*, 222 U. S. 506, 32 Sup. Ct. 114, 56 L. Ed. 288 (1912) (same); *So. Ry. v. Reid*, above cited (penalty for delay in shipment); *Baltimore & O. Ry. v. U. S.*, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292 (1910) (car discrimination). See also *Michigan Cent. Ry. v. Vreeland*, ante, p. 1255, note. Compare *L. & N. Ry. v. Cook Co.*, 223 U. S. 70, 32 Sup. Ct. 189, 56 L. Ed. 355 (1912), and *Galveston, etc., Ry. v. Wallace*, 223 U. S. 481, 32 Sup. Ct. 205, 56 L. Ed. 516 (1912).

POWER OF CONGRESS OVER COMMERCE WITH INDIAN TRIBES.—Federal control over this commerce, though conducted wholly within the borders of a single state, is as complete as the control over commerce that is interstate or foreign. See the note, ante, p. 1061, under *Gibbons v. Ogden*; *Ex parte Webb*, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. Ed. 1248 (1912) (cases); and *United States v. Wright*, 229 U. S. 226, 33 Sup. Ct. 630, 57 L. Ed. — (1913) (cases).

\*Some of the cases in this section logically belong under Jurisdiction of Federal Courts, Chapter XX, section 1, post, but they are placed here for reasons of convenience on account of their intimate connection with the federal substantive power over maritime matters.



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.'"<sup>1</sup>

[The remainder of this case is printed ante, p. 1069.]

<sup>1</sup> Canals, constructed by a state wholly within its borders, constitute navigable waters of the United States if connecting with such waters, and are subject to the federal admiralty jurisdiction. *Ex parte Boyer*, 109 U. S. 629, 3 Sup. Ct. 434, 27 L. Ed. 1056 (1884); *The Robert W. Parsons*, 191 U. S. 17, 24 Sup. Ct. 8, 48 L. Ed. 73 (1903) (Erie canal).

In *The Montello*, 20 Wall. 430, 440-443, 22 L. Ed. 391 (1874), Davis, J., said (holding the Fox river a navigable water of the United States):

"It is true, without the improvements by locks, canals, and dams, Fox river, through its entire length, could not be navigated by steamboats or sail vessels, but it is equally true that it formed, in connection with the Wisconsin, one of the earliest and most important channels of communication between the Upper Mississippi and the lakes. \* \* \* In more modern times, and since the settlement of the country, and before the improvements resulting in an unbroken navigation were undertaken, a large interstate commerce has been successfully carried on through this channel. This was done by means of Durham boats, which were vessels from seventy to one hundred feet in length, with twelve feet beam, and drew when loaded two to two and one-half feet of water. These boats, propelled by animal power, were able to navigate the entire length of Fox river, with the aid of a few portages, and would readily carry a very considerable tonnage. \* \* \*

"The true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation. If this were so, the public would be deprived of the use of many of the large rivers of the country over which rafts of lumber of great value are constantly taken to market. It would be a narrow rule to hold that in

SHERLOCK v. ALLING (1876) 93 U. S. 99, 101-104, 23 L. Ed. 819, Mr. Justice FIELD (upholding an Indiana statute imposing liability for tortious death, as applied to the owner of a vessel whose negligent management caused the death of a passenger in a collision on the Ohio river within Indiana):

"It is contended that the statute of Indiana creates a new liability, and could not, therefore, be applied to cases where the injuries complained of were caused by marine torts, without interfering with the exclusive regulation of commerce vested in Congress. The position of the defendants, as we understand it, is, that as by both the common and maritime law the right of action for personal torts dies with the person injured, the statute which allows actions for such torts, when resulting in the death of the person injured, to be brought by the personal representatives of the deceased, enlarges the liability of parties of such torts, and that such enlarged liability, if applied to cases of marine torts, would constitute a new burden upon commerce. \* \* \*

"In the present case \* \* \* [the Indiana] statute imposes no tax, prescribes no duty, and in no respect interferes with any regulations for the navigation and use of vessels. It only declares a general

this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river. It is not, however, as Chief Justice Shaw said, 'every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.' ([Rowe v. Granite Bridge Corporation] 21 Pick. [Mass.] 344.) \* \* \*

"Indeed, there are but few of our fresh-water rivers which did not originally present serious obstructions to an uninterrupted navigation. In some cases, like the Fox river, they may be so great while they last as to prevent the use of the best instrumentalities for carrying on commerce, but the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so the river is navigable in fact, although its navigation may be encompassed, with difficulties by reason of natural barriers, such as rapids and sand-bars."

For various practical illustrations of these tests, see *St. Anthony Co. v. Commrs.*, 168 U. S. 349, 359, 18 Sup. Ct. 157, 42 L. Ed. 497 (1897); *U. S. v. Rio Grande Co.*, 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136 (1899); *Leovy v. U. S.*, 177 U. S. 621, 20 Sup. Ct. 797, 44 L. Ed. 914 (1900).

For certain distinctions sometimes taken in various state decisions and statutes between streams that are navigable and those that are "floatable" (for rafts or logs), see *Veazle v. Dwinel*, 50 Me. 479 (1862); *Gwaltney v. Scottish Timber Co.*, 111 N. C. 547, 16 S. E. 692 (1892) (elting cases).

"The law, as settled by a long line of decisions in this state, is that streams of sufficient capacity to float logs to market are navigable."—*Cassoday, J.*, in *Falls Mfg. Co. v. Oconto Imp. Co.*, 87 Wis. 134, 149, 58 N. W. 237 (1894). Compare *Schulte v. Warren*, 218 Ill. 108, 119, 75 N. E. 783, 13 L. R. A. (N. S.) 745 (1905), contra.

principle respecting the liability of all persons within the jurisdiction of the state for torts resulting in the death of parties injured. And in the application of the principle it makes no difference where the injury complained of occurred in the state, whether on land or on water. \* \* \*

"With reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the state govern. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the state to which the vessels belong; and it may be said, generally, that the legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit. In our judgment, the statute of Indiana falls under this class. Until Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, we are of opinion that the statute of Indiana applies, giving a right of action in such cases to the personal representatives of the deceased, and that, as thus applied, it constitutes no encroachment upon the commercial power of Congress."

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#### In re GARNETT.

(Supreme Court of United States, 1891. 141 U. S. 1, 11 Sup. Ct. 840, 35 L. Ed. 631.)

[Petition for a writ of prohibition to be directed to the federal District Court of the Eastern Division of the Southern District of Georgia. A federal statute limited the liability of the owners of American vessels for certain losses to the value of their interest in the vessel and cargo. One Lawton, owner of a vessel plying in inland navigation upon the Savannah river between Georgia and South Carolina, was sued by Garnett and others in a Georgia court for the loss of goods by fire upon his vessel; and Lawton filed a libel in the aforesaid federal court to obtain the benefit of the limited liability law. A demurrer to the libel having been overruled, this petition was brought, alleging the invalidity of the law, as applied to such a vessel, engaged chiefly in internal commerce.]

Mr. Justice BRADLEY. \* \* \* It is unnecessary to invoke the power given to Congress to regulate commerce with foreign nations, and among the several states, in order to find authority to pass the law in question. The act of Congress which limits the liability of ship-owners was passed in amendment of the maritime law of the country, and the power to make such amendments is coextensive with that law.

It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends. The subject has frequently been up for consideration by this court for many years past, and but one view has been expressed. It was gone over so fully, however, in the late case of *Butler v. Steamship Co.*, 130 U. S. 527, 9 Sup. Ct. 612, 32 Sup. Ct. 1017, that we cannot do better than to quote a single passage from the opinion of the court in that case. We there said:

"The law of limited liability, as we have frequently had occasion to assert, was enacted by Congress as a part of the maritime law of this country, and therefore it is coextensive, in its operation, with the whole territorial domain of that law. *Norwich Co. v. Wright*, 13 Wall. 104, 127, 20 L. Ed. 585; *The Lottawanna*, 21 Wall. 558, 577, 22 L. Ed. 654; *The Scotland*, 105 U. S. 24, 29, 31, 26 L. Ed. 1001; *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 593, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038. In *The Lottawanna* we said: 'It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed.' Page 577. \* \* \*

"In *The Scotland* this language was used: 'But it is enough to say that the rule of limited responsibility is now our maritime rule. It is the rule by which, through the act of Congress, we have announced that we propose to administer justice in maritime cases.' Page 31. Again, in the same case (page 29), we said: 'But, while the rule adopted by Congress is the same as the rule of the general maritime law, its efficacy as a rule depends upon the statute, and not upon any inherent force of the maritime law. As explained in *The Lottawanna*, the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country; and this particular rule of the maritime law had never been adopted in this country until it was enacted by statute. Therefore, while it is now a part of our maritime law, it is, nevertheless, statute law.' \* \* \*

"These quotations are believed to express the general, if not unanimous, views of the members of this court for nearly twenty years past; and they leave us in no doubt that, while the general maritime law, with slight modifications, is accepted as law in this country, it is sub-

<sup>1</sup> The opinion from which this quotation is made continues: "The scope of the maritime law, and that of commercial regulation, are not coterminous. It is true, but the latter embraces much the largest portion of ground covered by the former. Under it, Congress has regulated the registry, enrollment, license, and nationality of ships and vessels; the method of recording bills of sale and mortgages thereon; the rights and duties of seamen; the limitations of the responsibility of shipowners for the negligence and misconduct of their captains and crews; and many other things of a character truly maritime."

See also *White's Bank v. Smith*, 7 Wall. 646, 655, 656, 19 L. Ed. 211 (1869).

ject to such amendments as Congress may see fit to adopt. One of the modifications of the maritime law, as received here, was a rejection of the law of limited liability. We have rectified that. Congress has restored that article to our maritime code. We cannot doubt its power to do this. As the Constitution extends the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction,' and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature, and not in the state legislatures. It is true, we have held, that the boundaries and limits of the admiralty and maritime jurisdiction are matters of judicial cognizance, and cannot be affected or controlled by legislation, whether state or national. Chief Justice Taney, in *The St. Lawrence*, 1 Black, 522, 526, 527, 17 L. Ed. 180; *The Lottawanna*, 21 Wall. 558, 575, 576, 22 L. Ed. 654. But within these boundaries and limits the law itself is that which has always been received as maritime law in this country, with such amendments and modifications as Congress may from time to time have adopted. It being clear, then, that the law of limited liability of ship-owners is a part of our maritime code, the extent of its territorial operation (as before intimated) cannot be doubtful. It is necessarily coextensive with that of the general admiralty and maritime jurisdiction, and that by the settled law of this country extends wherever public navigation extends,—on the sea and the great inland lakes, and the navigable waters connecting therewith. *Waring v. Clarke*, 5 How. 441, 12 L. Ed. 226; *The Genesee Chief v. Fitzhugh*, 12 How. 443, 13 L. Ed. 1058; *Jackson v. The Magnolia*, 20 How. 296, 15 L. Ed. 909; *The Commerce*, 1 Black, 574, 17 L. Ed. 107." Pages 575-577. \* \* \*

The admiralty and maritime jurisdiction granted to the federal government by the Constitution of the United States is not limited to tide-waters, but extends to all public navigable lakes and rivers. In some of the cases it was held distinctly that this jurisdiction does not depend on the question of foreign or interstate commerce, but also exists where the voyage or contract, if maritime in character, is made and to be performed wholly within a single state. Mr. Justice Clifford, in the opinion of the court in *The Belfast* [7 Wall. 624, 19 L. Ed. 266], said: "Principal subjects of admiralty jurisdiction are maritime contracts and maritime torts, including captures *jure belli*, and seizures on water for municipal and revenue forfeitures. (1) Contracts, claims, or service, purely maritime and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty. (2) Torts or injuries committed on navigable waters, of a civil nature, are also cognizable in the admiralty courts. Jurisdiction in the former case depends upon the nature of the contract, but in the latter depends entirely upon locality. \* \* \* Navigable rivers, which empty into the sea, or into the bays and gulfs which form a part of the sea, are but arms of the sea, and are as much within the admiralty and mari-



time jurisdiction of the United States as the sea itself. Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but it cannot be made to depend upon the power of Congress to regulate commerce, as conferred in the Constitution. They are entirely distinct things, having no necessary connection with one another, and are conferred, in the Constitution, by separate and distinct grants."

*Jackson v. The Magnolia* [20 How. 296, 15 L. Ed. 909] was a case of collision between two steamboats on the Alabama river, far above tide-water, and within the jurisdiction of a county. A libel in admiralty was filed by one of the parties in the district court of the United States, which was dismissed on the ground of want of jurisdiction. This court reversed the decree and maintained the admiralty jurisdiction. Mr. Justice Grier, delivering the opinion of the court, said:

"Before the adoption of the present Constitution, each state, in the exercise of its sovereign power, had its own court of admiralty, having jurisdiction over the harbors, creeks, inlets, and public navigable waters connected with the sea. This jurisdiction was exercised not only over rivers, creeks, and inlets, which were boundaries to or passed through other states, but also where they were wholly within the state. Such a distinction was unknown, nor (as it appears from the decision of this court in the case of *Waring v. Clarke*, 5 How. 441, 12 L. Ed. 226) had these courts been driven from the exercise of jurisdiction over torts committed on navigable water within the body of a county, by the jealousy of the common-law courts. When, therefore, the exercise of admiralty and maritime jurisdiction over its public rivers, ports, and havens was surrendered by each state to the government of the United States, without an exception as to subjects or places, this court cannot interpolate one into the Constitution, or introduce an arbitrary distinction which has no foundation in reason or precedent." \* \* \*

Writ denied.<sup>2</sup>

<sup>2</sup> The tidal test of the locality of admiralty jurisdiction was early adopted in this country, following English precedents. *The Thomas Jefferson*, 10 Wheat. 428, 6 L. Ed. 358 (1825). This was overruled in *The Genesee Chief*, 12 How. 413, 13 L. Ed. 1058 (1851), and the test of actual navigability was laid down. The federal courts also finally took a more enlarged view of the subject-matter of the jurisdiction than did the English decisions between 1600-1800 and the early federal decisions. *Ins. Co. v. Dunham*, 11 Wall. 1, 20 L. Ed. 90 (1871). A good brief history of the fluctuations of doctrine in these matters is given in *The Lottawanna*, 21 Wall. 558, 583-589, 22 L. Ed. 654 (1875). In *De Lovio v. Boit*, 2 Gall. 398, Fed. Cas. No. 3,776 (1815) is an elaborate history of the English admiralty jurisdiction by Mr. Justice Story.

In *The Robert W. Parsons*, 191 U. S. 17, 30, 32, 33, 24 Sup. Ct. S. 12, 13, 48 L. Ed. 73 (1903), *Brown, J.*, said (holding canal boats drawn by horses to be "vessels" within the meaning of admiralty law): "In fact, neither size, form, equipment, nor means of propulsion are determinative factors upon the question of jurisdiction, which regards only the purpose for which the craft was constructed, and the business in which it is engaged. \* \* \* The modern law of England and America rules out of the admiralty jurisdiction all vessels propelled by oars, simply because they are the smallest class and beneath the dignity of a court of admiralty; but long within the historic period, and for

## WORKMAN v. MAYOR, ETC., OF THE CITY OF NEW YORK.

(Supreme Court of United States, 1900. 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314.)

[Certiorari to the United States Circuit Court of Appeals for the Second Circuit. A steam fire-boat owned by the city of New York, while engaged in extinguishing a fire, negligently struck and damaged a British vessel owned by Workman and moored at a dock in New York City. Workman filed an admiralty suit in personam against the city and others, in the federal District Court, and there obtained a decree for damages against the city. This was reversed in the Circuit Court of Appeals upon the ground that, by the local unwritten municipal law of New York state, a city was not liable for the negligence of the members of its fire department, who were discharging general governmental functions not relating to the exercise of the city's purely corporate powers.]

Mr. Justice WHITE. \* \* \* In examining the question whether the local law of New York must prevail, though in conflict with the maritime law, it must be borne in mind that the issue is not—as was the case in *Detroit v. Osborne* (1890) 135 U. S. 492, 34 L. Ed. 260, 10 Sup. Ct. 1012,—whether the local law governs as to a controversy arising in the courts of common law or of equity of the United States, but, Does the local law, if in conflict with the maritime law, control a court of admiralty of the United States in the administration of maritime rights and duties, although judicial power with respect to such subjects has been expressly conferred by the Constitution (art. 3, § 2) upon the courts of the United States?

The proposition, then, which we must first consider may be thus stated: Although by the maritime law the duty rests upon courts of admiralty to afford redress for every injury to person or property where the subject-matter is within the cognizance of such courts, and when the wrongdoer is amenable to process, nevertheless the admiralty courts must deny all relief whenever redress for a wrong would not be afforded by the local law of a particular state or the course of decisions therein. \* \* \*

If it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts can be overthrown by

at least seven hundred years, the triremes and quadriremes of the Greek and Roman navies were the largest and most powerful vessels afloat."

FEDERAL ADMIRALTY JURISDICTION OVER FOREIGN WATERS.—The federal jurisdiction, both judicial and legislative, extends to American vessels not only while upon the high seas but also while upon navigable waters within the territorial jurisdiction of foreign nations. *Panama R. Co. v. Napier Shipping Co.*, 166 U. S. 280, 17 Sup. Ct. 572, 41 L. Ed. 1004 (1897) (civil tort in foreign waters); *United States v. Rodgers*, 150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071 (1893) (federal statutory crime in foreign waters).

conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one state and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing to-day and another thing to-morrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent. \* \* \*

[After adverting to the injustice of the alleged local rule of law exempting the municipality, the court quotes from Lord Chancellor Cranworth, in *Mersey Docks, etc., v. Gibbs*, L. R. 1 H. L. 122:] "It would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports, if they sustain damage by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not; such a distinction arising, not from any visible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by whom the docks are managed."

And still later, in deciding the case of *Currie v. McKnight* [1897] A. C. 97, the House of Lords declared that while the admiralty law as known in England differs from the common law of England, and the common law of Scotland differs from the common law of England, because they were derived from divergent sources, yet the admiralty laws were derived both by Scotland and England from the same source, and "it would be strange as well as in the highest degree inconvenient if a different maritime law prevailed in two different parts of the same island."

Potential, however, as may be these arguments, predicated on the inherent injustice of the doctrine contended for, and the serious inconvenience which must result from an attempt to apply it, we are not thereby relieved from considering the question in a more fundamental aspect. In doing so, it becomes manifest that the decisions of this court overthrow the assumption that the local law or decisions of a state can deprive of all rights to relief, in a case where redress is afforded by the maritime law, and is sought to be availed of in a cause of action maritime in its nature and depending in a court of admiralty of the United States.

In *The Key City* (1872) 14 Wall. 653, 660, sub nom. *Young v. The Key City*, 20 L. Ed. 896, 898, it was held that federal courts of admiralty were not governed by state statutes of limitation in the enforcement of maritime liens. In *The Lottawanna* (1875) 21 Wall. 558, 22 L. Ed. 654, \* \* \* speaking through Mr. Justice Bradley, the court said (pp. 572, 573, 574, L. Ed. p. 661):

"Whilst it is true that the great mass of maritime law is the same

in all commercial countries, yet, in each country, peculiarities exist either as to some of the rules or in the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where it comes in contact with or shades off into the local or municipal law of the particular country, and affects only its own merchants or people in their relations to each other. \* \* \*

"That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted,<sup>1</sup> was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' \* \* \*

"One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states." \* \* \*

True, it is well settled that in certain cases where a lien is given by a state statute, the admiralty courts will enforce rights so conferred when not in absolute conflict with the admiralty law. *The Lottawanna* (1875) 21 Wall. 558, sub nom. *Rodd v. Heartt*, 22 L. Ed. 654. Moreover, it has been decided that although at the time of the adoption of the Constitution, in courts of admiralty as in courts of common law, a cause of action for a personal injury abated by the death of the injured party, nevertheless, when, by a state statute, a right of recovery in such a case was conferred, the admiralty courts would recognize and administer the appropriate relief. *The Albert Dumois* (1900) 177 U. S. 257-259, 44 L. Ed. 761, 20 Sup. Ct. 595, and cases cited. But such cases afford no foundation for the proposition that state laws or decisions can deprive an individual of a right of recovery for a maritime wrong which, under the general principles of the admiralty law, he undoubtedly possessed, and can destroy the symmetry and efficiency of that law by engrafting therein a principle which violates the imperative command of such law that admiralty courts must administer redress for every maritime wrong in every case where they have jurisdictional power over the person by whom the wrong has been committed. The cases in question, on the contrary, but illustrate the alacrity with which admiralty courts adopt statutes granting the right to relief where otherwise it could not be administered by a maritime court, and they hence do not support the contention that

<sup>1</sup> As to the scope of the admiralty jurisdiction in the colonial courts, see *Waring v. Clarke*, 5 How. 441, 454 ff., 12 L. Ed. 226 (1847); *The Lottawanna*, 21 Wall. 558, 599-601, 22 L. Ed. 654 (1875).

there is a want of power in admiralty courts to give redress in every case within their jurisdiction where the duty to do so is imposed by the maritime law. \* \* \*

It being then settled that the local decisions of one or more states cannot, as a matter of authority, abrogate the maritime law, we are brought to consider whether, under the maritime law, the city of New York was liable for the injury inflicted by the fire-boat. \* \* \* [Under the maritime law the city was held liable.]

Decree of District Court affirmed.<sup>2</sup>

[GRAY, BREWER, SHIRAS, and PECKHAM, JJ., dissented in an opinion by GRAY, upon the ground that the maritime law imposed no such liability upon cities.]

THE ROANOKE (1903) 189 U. S. 185, 193-199, 23 Sup. Ct. 491, 47 L. Ed. 770, Mr. Justice BROWN (holding invalid the statute of Washington discussed below):

"The following propositions may be considered as settled:

"1. That by the maritime law, as administered in England and in this country, a lien is given for necessaries furnished a foreign vessel upon the credit of such vessel; \* \* \* and that in this particular the several states of this Union are treated as foreign to each other. \* \* \*

"2. That no such lien is given for necessaries furnished in the home port of the vessel or in the port in which the vessel is owned, registered, enrolled, or licensed, and the remedy in such case, though enforceable in the admiralty, is in personam only. \* \* \*

"3. That it is competent for the states to create liens for necessaries furnished to domestic vessels, and that such liens will be enforced by the courts of admiralty under their general jurisdiction over the subject of necessaries.<sup>1</sup> \* \* \*

<sup>2</sup> For the distinction between maritime and non-maritime torts, see *Martin v. West*, 222 U. S. 191, 196, 197, 32 Sup. Ct. 42, 56 L. Ed. 159, 36 L. R. A. (N. S.) 592 (1911) (cases).

<sup>1</sup> "The fundamental reasons on which these propositions rest may be summed up thus: The admiralty and maritime jurisdiction is conferred on the courts of the United States by the Constitution, and cannot be enlarged or restricted by the legislation of a state. No state legislation, therefore, can bring within the admiralty jurisdiction of the national courts a subject not maritime in its nature. But when a right, maritime in its nature, and to be enforced by process in the nature of admiralty process, has been given by the statute of a state, the admiralty courts of the United States have jurisdiction, and exclusive jurisdiction, to enforce that right according to their own rules of procedure."—Gray, J., in *The J. E. Rumbell*, 148 U. S. 1, 12, 13, 13 Sup. Ct. 498, 37 L. Ed. 345 (1893). See also *The Glide*, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. Ed. 296 (1897).

"Wherever any lien is given by a state statute for a cause of action cognizable in admiralty, either in rem or in personam, proceedings in rem to enforce such lien are within the exclusive jurisdiction of the admiralty courts.

"But the converse of this proposition is equally true, that if a lien upon a vessel be created for a claim over which a court of admiralty has no juris-



"The question involved in this case, however, is whether the states may create such liens as against foreign vessels (vessels owned in other states or countries), and under such circumstances as would not authorize a lien under the general maritime law. The question is one of very considerable importance, as it involves the power of each state, which a vessel may visit in the course of a long voyage, to impose liens under wholly different circumstances and upon wholly different conditions. \* \* \*

"The injustice of permitting such claims to be set up is plainly apparent. The master is the agent of the vessel and its owner in more than the ordinary sense. During the voyage he is in fact the alter ego of his principal. He is intrusted with an uncontrolled authority to provide for the crew, and for the preservation and repair of the ship. He engages the cargoes, receives the freight, hires and pays his crew, and is intrusted, perhaps for years, with the command and disposition of the vessel. With full authority to bind the vessel, his position is such that it is almost impossible for him to acquaint himself with the laws of each individual state he may visit, and he has a right to suppose that the general maritime law applies to him and his ship, wherever she may go, unhampered by laws which are mainly intended for local application, or for domestic vessels. Local laws, such as the one under consideration, ordinarily protect the ship by requiring notice of the claim to be filed in some public office, limiting the time to a few weeks or months within which the laborer or subcontractor may proceed against her, requiring notice to be given of the claim, before the contractor himself has been paid, and limiting his recovery to the amount remaining unpaid at the time such notice is received. The

diction in any form, such lien may be enforced in the courts of the state. Thus, as the admiralty jurisdiction does not extend to a contract for building a vessel, or to work done or materials furnished in its construction,—The *Jefferson* (*People's Ferry Co. v. Beers*, 20 How. 393, 15 L. Ed. 961); The *Capitol* (*Roach v. Chapman*, 22 How. 129, 16 L. Ed. 294),—we held in *Edwards v. Elliott*, 21 Wall. 532, 22 L. Ed. 487, that, in respect to such contracts, it was competent for the states to enact such laws as their legislatures might deem just and expedient, and to provide for their enforcement in rem. \* \* \*

"The true distinction between such proceedings as are and such as are not invasions of the exclusive admiralty jurisdiction is this: If the cause of action be one cognizable in admiralty, and the suit be in rem against the thing itself, though a motion be also issued to the owner, the proceeding is essentially one in admiralty. If, upon the other hand, the cause of action be not one of which a court of admiralty has jurisdiction, or if the suit be in personam against an individual defendant, with an auxiliary attachment against a particular thing, or against the property of the defendant in general, it is essentially a proceeding according to the course of the common law, and within the saving clause of the statute (§ 563) of a common-law remedy."—*Brown, J.*, in *Knapp, etc., Co. v. McCaffrey*, 177 U. S. 638, 642, 643, 648, 20 Sup. Ct. 824, 44 L. Ed. 921 (1900). See this case also for the distinction between actions in rem and in personam in admiralty, and for the meaning of the statutory phrase "saving to snitors \* \* \* the right of a common-law remedy."

A lien upon vessels, both foreign and domestic, for non-maritime suits in personam at law or in equity in the state courts is valid. *Martin v. West*, 222 U. S. 191, 198, 32 Sup. Ct. 42, 56 L. Ed. 159, 36 L. R. A. (N. S.) 592 (1911) (non-maritime tort).

statute of Washington, however, provides for an absolute lien upon the ship for work done or material furnished at the request of the contractor or subcontractor, and makes no provision for the protection of the owner in case the contractor has been paid the full amount of his bill before notice of the claim of the subcontractor is received. The finding in this case is that the contractor, who had agreed, in consonance with the usual course of business, to make the repairs upon this vessel, had been paid in full by the claimant. The injustice of holding the ship under the circumstances is plainly manifest.

"Not only is the statute in question obnoxious to the general maritime law in declaring every contractor and subcontractor an agent of the owner, but it establishes a new order of priority in payment of liens, abolishes the ancient and equitable rule regarding 'stale claims,' and permits the assertion of a lien at any time within three years, regardless of the fact that the vessel may have been sold to a bona fide purchaser, not only without notice of the claim, but without the possibility of informing himself by a resort to the public records. It also gives, or at least creates the presumption of, a lien, though the materials be furnished upon the order of the owner in person. \* \* \* [Here are cited, against the validity of the statute, *The Chusan*, 2 Story, 455, Fed. Cas. No. 2,717, and *The Lyndhurst* (D. C.) 48 Fed. 839.]

"While no case involving this precise question seems to have arisen in this court, we have several times had occasion to hold that where Congress has dealt with a subject within its exclusive power, or where such exclusive power is given to the federal courts, as in cases of admiralty and maritime jurisdiction, it is not competent for states to invade that domain of legislation, and enact laws which in any way trench upon the power of the federal government. Cases arising in other branches of the law furnish apt analogies. The principle is stated in a nutshell by Chief Justice Marshall in *Sturges v. Crowninshield*, 4 Wheat. 122, 193, 4 L. Ed. 529, 548: \* \* \* 'That whenever the terms in which a power is granted to Congress, or the nature of the power, required that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act on it.' \* \* \* [Here are cited some instances of state laws attempting invalidly to regulate commerce or national banks.]

"Bearing in mind that exclusive jurisdiction of all admiralty and maritime cases is vested by the Constitution in the federal courts, which are thereby made judges of the scope of such jurisdiction, subject, of course, to congressional legislation, the statute of the state of Washington, in so far as it attempts to control the administration of the maritime law by creating and superadding conditions for the benefit of a particular class of creditors, and thereby depriving the owners of vessels of defenses to which they would otherwise have been en-

titled, is an unlawful interference with that jurisdiction, and to that extent is unconstitutional and void."<sup>2</sup>

[HARLAN, J., concurred in the result.]

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OLD DOMINION S. S. CO. v. GILMORE.

(Supreme Court of United States, 1907. 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264.)

[Certiorari to the federal Circuit Court of Appeals for the Second Circuit. A Delaware statute, assumed to apply to torts at sea as well as on land, gave a cause of action for the unlawful or negligent death of any person. In a negligent collision on the high seas between vessels owned by two Delaware corporations several persons were killed, and in a proceeding, under a federal statute, to limit the liability of the owner of one of them, these death claims were allowed in the federal District Court for the Southern District of New York, and the decree was affirmed by the Circuit Court of Appeals.]

Mr. Justice HOLMES. \* \* \* Apart from the subordination of the state of Delaware to the Constitution of the United States, there is no doubt that it would have had power to make its statute applicable to this case. When so applied, the statute governs the reciprocal liabilities of two corporations, existing only by virtue of the laws of Delaware, and permanently within its jurisdiction, for the consequences of conduct set in motion by them there, operating outside the territory of the state, it is true, but within no other territorial jurisdiction. If confined to corporations, the state would have power to enforce its law to the extent of their property in every case. But the same authority would exist as to citizens domiciled within the state, even when personally on the high seas, and not only could be enforced by the state in case of their return, which their domicile by its very meaning promised, but, in proper cases, would be recognized in other jurisdictions by the courts of other states. In short, the bare fact of the parties being outside the territory, in a place belonging to no other sovereign, would not limit the authority of the state, as accepted by civilized theory. No one doubts the power of England or France to govern their own ships upon the high seas.

The first question, then, is narrowed to whether there is anything in the structure of the national government and under the Constitution of the United States that takes away or qualifies the authority that otherwise Delaware would possess,—a question that seems to have been considered doubtful in *Butler v. Boston & S. S. S. Co.*,

<sup>2</sup> Accord: *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345 (1893) (state statute cannot give local mortgage a preference over maritime lien—semble). See the cases cited in *Workman v. New York*, 179 U. S. 552, 586, 21 Sup. Ct. 212, 45 L. Ed. 314 (1900).

130 U. S. 527, 558,<sup>1</sup> 32 L. Ed. 1017, 1024, 9 Sup. Ct. 612. It has two branches: First, whether the state law is valid for any purpose; and, next, whether, if valid, it will be applied in the admiralty. We will take them up in order.

The power of Congress to legislate upon the subject has been derived both from the power to regulate commerce and from the clause in the Constitution extending the judicial power to "all cases of admiralty and maritime jurisdiction." Art. 3, § 2. 130 U. S. 557, 9 Sup. Ct. 612, 32 L. Ed. 1017. The doubt in this case arises as to the power of the states where Congress has remained silent.

That doubt, however, cannot be serious. The grant of admiralty jurisdiction, followed and construed by the judiciary act of 1789 [1 Stat. at L. 77, chap. 20, § 9], "saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it" (Rev. Stat. § 563, cl. 8, U. S. Comp. Stat. 1901, p. 457), leaves open the common-law jurisdiction of the state courts over torts committed at sea. This, we believe, always has been admitted. *Martin v. Hunter*, 1 Wheat. 304, 337, 4 L. Ed. 97, 105; *The Hine v. Trevor* (*The Ad. Hine v. Trevor*) 4 Wall. 555, 571, 18 L. Ed. 451, 456; *Leon v. Galceran*, 11 Wall. 185, 20 L. Ed. 74; *Manchester v. Massachusetts*, 139 U. S. 240, 262, 35 L. Ed. 159, 166, 11 Sup. Ct. 559. And as the state courts in their decisions would follow their own notions about the law and might change them from time to time, it would be strange if the state might not make changes by its other mouthpiece, the legislature. The same argument that deduces the legislative power of Congress from the jurisdiction of the national courts, tends to establish the legislative power of the state where Congress has not acted. Accordingly, it has been held that a statute giving damages for death caused by a tort might be enforced in a state court, although the tort was committed at sea. *American S. B. Co. v. Chace*, 16 Wall. 522, 21 L. Ed. 369. So far as the objection to the state law is founded on the admiralty clause in the Constitution, it would seem not to matter whether the accident happened near shore or in mid-ocean, notwithstanding some expressions of doubt. The same conclusion was reached in *McDonald v. Mallory*, 77 N. Y. 546, 33 Am. Rep. 664, where the death occurred on the high seas. *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819, reinforces *Chace's Case*, and answers any argument based on the power of Congress over commerce. \* \* \*

We pass to the other branch of the first question,—whether the state law, being valid, will be applied in the admiralty. Being valid,

<sup>1</sup> "It might be a much more serious question whether a state law can have force to create a liability in a maritime case at all, within the dominion of the admiralty and maritime jurisdiction, where neither the general maritime law nor an act of Congress has created such a liability."—Bradley, J., in *Butler v. Boston & S. S. Co.*, 130 U. S. 527, 558, 9 Sup. Ct. 612, 32 L. Ed. 1017 (1889).

it created an obligatio,—a personal liability of the owner of the Hamilton to the claimants. *Slater v. Mexican Nat. R. Co.*, 194 U. S. 120, 126, 48 L. Ed. 900, 902, 24 Sup. Ct. 581. This, of course, the admiralty would not disregard, but would respect the right when brought before it in any legitimate way. *Ex parte McNiel*, 13 Wall. 236, 243, 20 L. Ed. 624, 626. It might not give a proceeding in rem, since the statute does not purport to create a lien. It might give a proceeding in personam. *The Corsair (Barton v. Brown)* 145 U. S. 335, 347, 36 L. Ed. 727, 731, 12 Sup. Ct. 949. If it gave the latter, the result would not be, as suggested, to create different laws for different districts. The liability would be recognized in all. Nor would there be produced any lamentable lack of uniformity. Courts constantly enforce rights arising from and depending upon other laws than those governing the local transactions of the jurisdiction in which they sit. But we are not concerned with these considerations. In this case the statutes of the United States have enabled the owner to transfer its liability to a fund and to the exclusive jurisdiction of the admiralty, and it has done so. That fund is being distributed. In such circumstances all claims to which the admiralty does not deny existence must be recognized, whether admiralty liens or not. This is not only a general principle (*Andrews v. Wall*, 3 How. 568, 573, 11 L. Ed. 729, 731; *The J. E. Rumbell*, 148 U. S. 1, 15, 37 L. Ed. 345, 348, 13 Sup. Ct. 498; admiralty rule 43; *The Galam*, 2 Moore, P. C. C. N. S. 216, 236), but is the result of the statute which provides for, as well as limits, the liability, and allows it to be proved against the fund (*The Albert Dunois*, 177 U. S. 240, 260, 44 L. Ed. 751, 762, 20 Sup. Ct. 595). \* \* \*

We are of opinion that all the claimants are entitled to the full benefits of a statute "granting the right to relief where otherwise it could not be administered by a maritime court." *Workman v. New York*, 179 U. S. 552, 563, 45 L. Ed. 314, 321, 21 Sup. Ct. 212.

Decree affirmed.



## CHAPTER XIX

## INTERGOVERNMENTAL RELATIONS

SECTION 1.—BETWEEN STATES—BETWEEN STATES  
AND OTHER DOMESTIC TERRITORY

BUCKNER v. FINLEY (1829) 2 Pet. 586, 590, 591, 7 L. Ed. 528, Mr. Justice WASHINGTON (holding a bill of exchange drawn in Maryland upon a drawee in Louisiana to be a foreign bill):

“Sir William Blackstone, in his Commentaries (vol. 2, p. 467) distinguishes inland from foreign bills, by defining the former as bills drawn by a merchant residing abroad, upon his correspondent in England, or vice versa; and the latter, as those drawn by one person on another, when both drawer and drawee reside within the same kingdom. \* \* \*

“Applying this definition to the political character of the several states of this Union in relation to each other, we are all clearly of opinion that bills drawn in one of these states, upon persons living in any other of them, partake of the character of foreign bills and ought to be so treated. For all national purposes, embraced by the federal Constitution, the states and the citizens thereof are one, united under the same sovereign authority and governed by the same laws. In all other respects, the states are necessarily foreign to and independent of each other, their Constitutions and forms of government being, although republican, altogether different, as are their laws and institutions. This sentiment was expressed with great force by the president of the Court of Appeals of Virginia, in the case of *Warder v. Arell*, 2 Wash. 298, 1 Am. Dec. 488, where he states that, in cases of contracts, the laws of a foreign country where the contract was made must govern; and then adds as follows: ‘The same principle applies, though with no greater force, to the different states of America; for, though they form a confederated government, yet the several states retain their individual sovereignties, and, with respect to their municipal regulations, are to each other foreign.’”<sup>1</sup>

<sup>1</sup> Accord: *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. Ed. 274 (1839) (corporations of one state are foreign in the others). See *O. & Miss. Ry. v. Wheeler*, 1 Black, 286, 17 L. Ed. 130 (1862).

Each state may tax the obligations of other states held within its jurisdiction, *Bonaparte v. Appeal Tax Court*, 104 U. S. 592, 26 L. Ed. 845 (1882); or franchises granted by other states and exercised within it, *W. U. Teleg. Co.*

v. Missouri, 190 U. S. 412, 23 Sup. Ct. 730, 47 L. Ed. 1116 (1903). Compare *Weston v. Charleston*, post, p. 1284; *California v. Cent. Pac. Ry.*, post, p. 1311.

CONSTITUTIONAL PROVISIONS GOVERNING RELATIONS BETWEEN THE STATES.—The discussion of the privileges and immunities secured to citizens of each state in other states by Const. art. IV, § 2, par. 1, logically belongs here, but for reasons of convenience it has been treated in Chapter VII, ante, as part of the historic development of our fundamental constitutional guaranties.

The "full faith and credit" clause (article IV, § 1) belongs more appropriately to the subject of Conflict of Laws, and so is not treated in this collection of cases. Similarly, the topic of the interstate rendition of fugitives from justice (article IV, § 2, par. 2) is left to Criminal Procedure; and the provision regarding the interstate rendition of fugitives from service or labor (article IV, § 2, par. 3) is now happily obsolete (unless perhaps it be still applicable to soldiers or sailors—see *Robertson v. Baldwin*, ante, p. 154). As to its former scope, see *Prigg v. Pennsylvania*, 16 Pet. 539, 10 L. Ed. 1060 (1842).

Suits between states are treated in Chapter XX, § 4, post, where are discussed the existence and enforceability of a variety of quasi-international obligations between states.

There remains under this section heading the clause (article I, § 10, par. 3) forbidding a state, without the consent of Congress, to enter into any agreement or compact with another state. This refers only to agreements having a substantial tendency to increase the political power or influence of the states concerned. *Virginia v. Tennessee*, 148 U. S. 503, 13 Sup. Ct. 728, 37 L. Ed. 537 (1893). See, also, *Green v. Biddle*, 8 Wheat. 1, 85-87, 5 L. Ed. 547 (1823); *Stearns v. Minnesota*, ante, p. 1024, note.

Here may also be mooted the question whether a state may, either by independent action or in accordance with interstate agreement, exercise its powers of eminent domain over property within its borders, on behalf of another state. See *Trombley v. Humphrey*, 23 Mich. 471, 9 Am. Rep. 94 (1871); *Kohl v. U. S.*, 91 U. S. 367, 373, 374, 23 L. Ed. 449 (1876); *Gilmer v. Lime Point*, 18 Cal. 229, 252, 253 (1861); *Columbus Water Co. v. Long*, 121 Ala. 245, 25 South. 702 (1898); *Randolph, Em. Dom.* § 29; *C. F. Randolph* in 2 Col. L. Rev. 376-384; *C. N. Gregory* in 21 Harv. L. Rev. 23.

RELATIONS BETWEEN THE STATES AND OTHER DOMESTIC TERRITORY.—The full governmental powers possessed by the United States in the territories and District of Columbia [see *Downes v. Bidwell*, ante, at pages 996, 997] includes, owing to the nature of our federal system, a measure of control of the relations between these divisions and the states that is doubtless at least as wide as the federal control of relations between the states themselves. See, for instance, *Embrey v. Palmer*, 107 U. S. 3, 2 Sup. Ct. 25, 27 L. Ed. 346 (1883) (states required to give full faith and credit to public acts, records, and judicial proceedings of territories and District of Columbia); *Atchison, etc., Ry. v. Sowers*, 213 U. S. 55, 29 Sup. Ct. 397, 53 L. Ed. 695 (1909) (same); *New York ex rel. Kopel v. Bingham*, 211 U. S. 468, 29 Sup. Ct. 190, 53 L. Ed. 286 (1909) (states required to deliver up territorial fugitives from justice); *Hanley v. K. C. Ry.*, 157 U. S. 617, 619, 23 Sup. Ct. 214, 47 L. Ed. 333 (1903) (regulation of commerce crossing territorial lines); *Gibbons v. Ogden*, ante, p. 1061, note (same); *Grether v. Wright*, 75 Fed. 742, 23 C. C. A. 498 (1896) (District of Columbia bonds exempted from state taxation); *Lyons v. Bank of Discount* (C. C.) 154 Fed. 391 (1907) (general discussion — cases).

## SECTION 2.—BETWEEN STATES AND UNITED STATES

## 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, pp. 921-30. 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 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 legitimate 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 exe-



cution 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 fur-

nished 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 between 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.<sup>1</sup>

### WESTON v. CITY COUNCIL OF CHARLESTON.

(Supreme Court of United States, 1829. 2 Pet. 449, 7 L. Ed. 481.)

[Error to the Constitutional Court of South Carolina. A Charleston city ordinance of 1823 taxed certain moneyed personal estate, including United States bonds ("stock"), one-fourth of one per cent. A prohibition restraining said taxation upon United States bonds, granted by the local Court of Common Pleas, was reversed by the state Constitutional Court and this writ was taken.]

Mr. Chief Justice MARSHALL. \* \* \* Is the stock issued for loans made to the government of the United States liable to be taxed by states and corporations?

Congress has power "to borrow money on the credit of the United States." The stock it issues is the evidence of a debt created by the exercise of this power. The tax in question is a tax upon the contract subsisting between the government and the individual. It bears

<sup>1</sup> Accord: *Osborn v. Bank of U. S.*, 9 Wheat. 738, 6 L. Ed. 204 (1824) (same point re-argued). So also of any state tax on the business of a private contractor done for the United States, *Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067 (1882); *Williams v. Talladega*, 226 U. S. 404, 417-419, 33 Sup. Ct. 116, 57 L. Ed. — (1912); or of laws attempting to exclude from a state any corporation employed by the United States, *Pembina Co. v. Pennsylvania*, ante, at page 252.

In Canada banks chartered by the Dominion government have been held taxable by the provincial governments. *Bank of Toronto v. Lambe*, 12 A. C. 575 (1887). In Australia the principle of *McCulloch v. Maryland* has been held applicable to the relations between the Commonwealth and the state governments. *D'Emden v. Pedder*, 1 Com. L. R. 91 (1904) (state tax on federal officer's receipt for salary); *Deakin v. Webb*, 1 Com. L. R. 585 (1904) (state income tax on federal officer's salary), affirmed in *Baxter v. Com'rs*, 4 Com. L. R. 1087 (1907) [despite contrary opinion of Privy Council on appeal from a state court in *Webb v. Outrim* (1907) A. C. 81], and an appeal to the Privy Council denied in *Flint v. Webb*, 4 Com. L. R. 1178 (1907); *Com. v. N. S. Wales*, 3 Com. L. R. 807 (1906) (state tax on deed of land to Commonwealth).

directly upon that contract, while subsisting and in full force. The power operates upon the contract the instant it is framed, and must imply a right to affect that contract. If the states and corporations throughout the Union possess the power to tax a contract for the loan of money, what shall arrest this principle in its application to every other contract? What measure can government adopt which will not be exposed to its influence?

But it is unnecessary to pursue this principle through its diversified application to all the contracts, and to the various operations of government. No one can be selected which is of more vital interest to the community than this of borrowing money on the credit of the United States. No power has been conferred by the American people on their government, the free and unburdened exercise of which more deeply affects every member of our republic. In war, when the honor, the safety, the independence of the nation are to be defended, when all its resources are to be strained to the utmost, credit must be brought in aid of taxation, and the abundant revenue of peace and prosperity must be anticipated to supply the exigencies, the urgent demands of the moment. The people, for objects the most important which can occur in the progress of nations, have empowered their government to make these anticipations, "to borrow money on the credit of the United States." Can anything be more dangerous, or more injurious, than the admission of a principle which authorizes every state and every corporation in the Union which possesses the right of taxation, to burden the exercise of this power at their discretion?

If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the state or corporation which imposes it, which the will of each state and corporation may prescribe. A power which is given by the whole American people for their common good, which is to be exercised at the most critical periods for the most important purposes, on the free exercise of which the interests certainly, perhaps the liberty of the whole may depend; may be burdened, impeded, if not arrested, by any of the organized parts of the confederacy.

In a society formed like ours, with one supreme government for national purposes, and numerous state governments for other purposes, in many respects independent, and in the uncontrolled exercise of many important powers, occasional interferences ought not to surprise us. The power of taxation is one of the most essential to a state, and one of the most extensive in its operation. The attempt to maintain a rule which shall limit its exercise, is undoubtedly among the most delicate and difficult duties which can devolve on those whose province it is to expound the supreme law of the land in its application to the cases of individuals. This duty has more than once devolved on this court. In the performance of it we have considered it as a

necessary consequence from the supremacy of the government of the whole, that its action in the exercise of its legitimate powers, should be free and unembarrassed by any conflicting powers in the possession of its parts; that the powers of a state cannot rightfully be so exercised as to impede and obstruct the free course of those measures which the government of the states united may rightfully adopt.

This subject was brought before the court in the case of *McCulloch v. State of Maryland*, 4 Wheat. 316, 4 L. Ed. 579, when it was thoroughly argued and deliberately considered. \* \* \* The court said in that case, that "the states have no power by taxation, or otherwise, to 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."

We retain the opinions which were then expressed. A contract made by the government in the exercise of its power, to borrow money on the credit of the United States, is undoubtedly independent of the will of any state in which the individual who lends may reside, and is undoubtedly an operation essential to the important objects for which the government was created. It ought, therefore, on the principles settled in the case of *McCulloch v. State of Maryland*, to be exempt from state taxation, and consequently from being taxed by corporations deriving their power from states.

It is admitted that the power of the government to borrow money cannot be directly opposed, and that any law directly obstructing its operation would be void; but a distinction is taken between direct opposition and those measures which may consequentially affect it; that is, that a law prohibiting loans to the United States would be void, but a tax on them to any amount is allowable. It is, we think, impossible not to perceive the intimate connection which exists between these two modes of acting on the subject.

It is not the want of original power in an independent sovereign state, to prohibit loans to a foreign government, which restrains the legislature from direct opposition to those made by the United States. The restraint is imposed by our Constitution. The American people have conferred the power of borrowing money on their government, and by making that government supreme, have shielded its action, in the exercise of this power, from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised. The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely.



It is admitted by the counsel for the defendants, that the power to tax stock must affect the terms on which loans will be made; but this objection, it is said, has no more weight when urged against the application of an acknowledged power to government stock, than if urged against its application to lands sold by the United States. The distinction is, we think, apparent. When lands are sold, no connection remains between the purchaser and the government. The lands purchased become a part of the mass of property in the country with no implied exemption from common burdens. All lands are derived from the general or particular government, and all lands are subject to taxation. Lands sold are in the condition of money borrowed and repaid. Its liability to taxation in any form it may then assume is not questioned. The connection between the borrower and the lender is dissolved. It is no burden on loans, it is no impediment to the power of borrowing, that the money, when repaid, loses its exemption from taxation. But a tax upon debts due from the government, stands, we think, on very different principles from a tax on lands which the government has sold. \* \* \*

It has been supposed that a tax on stock comes within the exceptions stated in the case of *McCulloch v. State of Maryland*. We do not think so. The Bank of the United States is an instrument essential to the fiscal operations of the government, and the power which might be exercised to its destruction was denied. But property acquired by that corporation in a state was supposed to be placed in the same condition with property acquired by an individual. The tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution. \* \* \*

Judgment reversed.<sup>1</sup>

[JOHNSON and THOMPSON, JJ., gave dissenting opinions.]

<sup>1</sup> Accord: *The Banks v. The Mayor*, 7 Wall. 16, 19 L. Ed. 57 (1869) (United States certificates of indebtedness not payable immediately); *Bank v. Supervisors*, 7 Wall. 26, 19 L. Ed. 60 (1869) (legal tender notes, exempted by Congress); *Grether v. Wright*, 75 Fed. 742, 23 C. C. A. 498 (1896) (District of Columbia bonds exempted by Congress). United States notes and certificates, payable on demand and circulating as money, are now subject to state taxation (Act Aug. 13, 1894, c. 281, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2395]); as are government checks and warrants, *Hibernia Society v. San Francisco*, 200 U. S. 310, 26 Sup. Ct. 265, 50 L. Ed. 495, 4 Ann. Cas. 934 (1906).

Conversely, the United States cannot levy an income tax upon the interest from state or municipal securities. *Pollock v. Farmers' L. & T. Co.*, 157 U. S. 429, 583-586, 15 Sup. Ct. 673, 39 L. Ed. 1108 (1895) (all judges concurring); nor compel the states to receive federal legal tender notes in payment of state taxes, *Lane Co. v. Oregon*, 7 Wall. 71, 19 L. Ed. 101 (1869) (semble).

HOME SAVINGS BANK v. DES MOINES (1907) 205 U. S. 503, 514-519, 27 Sup. Ct. 571, 51 L. Ed. 901, Mr. Justice Moody (holding, under an Iowa tax law assessing shares of stock of state banks to the banks and not to the individual stockholders, that the value of United States bonds owned by the banks must be deducted from said assessment):

[After referring to *Weston v. Charleston*, ante, p. 1284:] "From that time no one has questioned the immunity of national securities from state taxation. It may well be doubted whether Congress has the power to confer upon the state the right to tax obligations of the United States.<sup>1</sup> However this may be, Congress has never yet attempted to confer such a right. \* \* \* That the tax upon the property of a bank in which United States securities are included is beyond the power of the state, and, what perhaps is of lesser moment, within the prohibition of the statutory law, hardly needs to be proved by authority. But the authority is clear and conclusive. \* \* \* [Here are stated *Bank of Commerce v. New York*, 2 Black, 620, 17 L. Ed. 451, and *Bank Tax Case*, 2 Wall. 200, 17 L. Ed. 793.]

"The case at bar cannot be distinguished in principle from these cases. In the first case the tax was on the capital stock at its actual value; in the second case on the amount of the capital stock and the surplus earnings; and, in the case at bar, on the shares of the stock, taking into account the capital, surplus, and undivided earnings. It would be difficult for the most ingenious mind and the most accomplished pen to state any distinction between these three laws, except in the manner by which they all sought the same end,—the taxation of the property of the bank. \* \* \*

"It is, however, contended that although these cases have not been overruled, distinctions have been drawn in later cases which are applicable here. \* \* \* These cases relate to the right of the state to tax at their full value shares of stock as the property of the shareholders. Although the states may not, in any form, levy a tax upon United States securities, they may tax, as the property of their owners, the shares of banks and other corporations whose assets consist in whole or in part of such securities, and, in valuing the shares for the purposes of taxation, is not necessary to deduct the value of the national securities held by the corporation whose shares are taxed. \* \* \*

"This distinction, now settled beyond dispute, was mentioned in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, where, in the opinion of Chief Justice Marshall declaring a tax upon the circulation of a branch bank of the United States beyond the power of the state

<sup>1</sup> But see *Chaplin v. Comm'r*, 12 Com. L. R. 375 (Australia, 1911) (Commonwealth may authorize state taxation of federal salaries; previously held invalid without such authority).

of Maryland, it was said that the opinion did not extend '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.' The distinction appears, however, to have been first made the basis of a decision in *Van Allen v. Assessors* (Churchill v. Utica), 3 Wall. 573, 18 L. Ed. 229, \* \* \* [arising under a federal statute of 1864 permitting state taxation of the shares of national banks. This tax was upheld, even when all of the capital of the bank was invested in non-taxable United States securities], a majority of the court \* \* \* saying by Mr. Justice Nelson:

"The tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and, within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. \* \* \* The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him.' \* \* \*

"The *Van Allen* Case has settled the law that a tax upon the owners of shares of stock in corporations, in respect of that stock, is not a tax upon United States securities which the corporations own. Accordingly, such taxes have been sustained by this court, whether levied upon the shares of national banks by virtue of the congressional permission, or upon shares of state corporations by virtue of the power inherent in the state to tax the shares of such corporation. The tax assessed to shareholders may be required by law to be paid in the first instance by the corporations themselves, as the debt and in behalf of the shareholder, leaving to the corporation the right to reimbursement for the tax paid from their shareholders, either under some express statutory authority for their recovery or under the general principle of law that one who pays the debt of another, at his request, can recover the amount from him. *First Nat. Bank v. Kentucky*, 9 Wall. 353, 19 L. Ed. 701. [Citing other cases.] The theory sustaining these cases is that the tax was not upon the corporations' holdings of bonds, but on the shareholders' holdings of stock; and an examination of them shows that in every case the tax was assessed upon the property of the shareholders, and not upon the property of the corporation. There is nothing in them which justifies the tax under consideration here, levied, as has been shown, on the corporate property. \* \* \*

"It is said that where a tax is levied upon a corporation, measured by the value of the shares in it, it is equivalent in its effect to a tax

(clearly valid) upon the shareholders in respect of their shares, because, being paid by the bank, the burden falls eventually upon the shareholders in proportion to their holdings. It was upon this view that the lower court rested its opinion. But the two kinds of taxes are not equivalent in law, because the state has the power to levy one, and has not the power to levy the other. The question here is one of power, and not of economics. If the state has not the power to levy this tax, we will not inquire whether another tax, which it might lawfully impose, would have the same ultimate incidence. Precisely the same argument was made and rejected in *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 43 L. Ed. 850, 19 Sup. Ct. 537." \* \* \* [FULLER, C. J., and HARLAN and PECKHAM, JJ., dissented.]

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### HOME INS. CO. v. NEW YORK.

(Supreme Court of United States, 1889. 134 U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1025.)

[Error to the Supreme Court of New York. A New York statute of 1881 taxed certain corporations upon their "corporate franchise or business" at the rate of one-fourth mill upon their corporate stock for each one per cent. of dividend declared, this rate being reduced where dividends were less than 6 per cent. About two-thirds of the capital stock of the Home Insurance Company being invested in United States bonds, it claimed a proportionate reduction in the amount of its tax under this law. The judgment of the Court of Appeals denying this claim was entered in the state Supreme Court and this writ taken.]

Mr. Justice FIELD. The contention of the plaintiff in error is that the tax in question was levied upon its capital stock, and therefore invalid so far as the bonds of the United States constitute a part of that stock. If that contention were well founded, there would be no question as to the invalidity of the tax. That the bonds or obligations of the United States for the payment of money cannot be the subject of taxation by a state, is familiar law, settled by numerous adjudications of this court. \* \* \*

Looking now at the tax in this case upon the plaintiff in error, we are unable to perceive that it falls within the doctrines of any of the cases cited, to which we fully assent, not doubting their correctness in any particular. It is not a tax, in terms, upon the capital stock of the company, nor upon any bonds of the United States composing a part of that stock. The statute designates it as a tax upon the "corporate franchise or business" of the company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year. By the term "corporate franchise or business," as here used, we understand it meant (not referring to corporations sole, which are not usually created for com-

mercial business) the right or privilege given by the state to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise.

The right or privilege to be a corporation, or to do business as such a body, is one generally deemed of value to the incorporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name, and act as a single person, with a succession of members, without dissolution or suspension of business, and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the state, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the state each year or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows. \* \* \*

The tax in the present case would not be affected if the nature of the property in which the whole capital stock is invested were changed, and put into real property or bonds of New York, or of the other states. From the very nature of the tax, being laid upon a franchise given by the state, and revocable at pleasure, it cannot be affected in any way by the character of the property in which its capital stock is invested. The power of the state over its corporate franchise, and the conditions upon which it shall be exercised, is as ample and plenary in the one case as in the other. \* \* \*

This doctrine of the taxability of the franchises of a corporation without reference to the character of the property in which its capital stock or its deposits are invested is sustained by the judgments in *Society v. Coite* and *Institution v. Massachusetts*, which were before this court at the December term, 1867. 6 Wall. 594, 18 L. Ed. 897; 6 Wall. 611, 18 L. Ed. 907. \* \* \* [In these cases taxes upon savings banks were sustained measured by the amount of their deposits, regardless of the investment of part thereof in United States bonds.] In *Hamilton Co. v. Massachusetts*, 6 Wall. 632, 18 L. Ed. 904, a statute of Massachusetts which required corporations having a capital stock divided into shares to pay a tax of a certain percentage upon the excess of the market value of such stock over the value of its real estate and machinery was sustained as a statute imposing a franchise tax, notwithstanding a portion of the property which went to make the



excess of the market value consisted of securities of the United States  
\* \* \*

In this case, we hold, as well upon general principles as upon the authority of the first two cases cited from 6 Wall., that the tax for which the suit is brought is not a tax on the capital stock or property of the company, but upon its corporate franchise, and is not, therefore, subject to the objection stated by counsel, because a portion of its capital stock is invested in securities of the United States. \* \* \*

Judgment affirmed.<sup>1</sup>

[MILLER and HARLAN, JJ., dissented.]

<sup>1</sup> Accord: *Flint v. Stone Tracy Co.*, 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312 (1911) (federal tax on privilege of doing business in corporate form, measured by total income, part of which came from land or state bonds). See extract in note to *Pollock v. F. L. & T. Co.*, ante, p. 1030.

In *Plummer v. Coler*, 178 U. S. 115, 135, 136-138, 20 Sup. Ct. 829, 837, 838, 44 L. Ed. 998 (1900), a state inheritance tax upon United States bonds was upheld, Shiras, J., saying:

"On principle, if a tax on inheritances, composed in whole or in part of federal securities, would, by deterring individuals from investing therein, and, by thus lessening the demand for such securities, be regarded as therefore unlawful, it must likewise follow that, for the same reasons, a tax upon corporate franchises measured by the value of the corporation's property, composed in whole or in part of United States bonds, would also be unlawful.  
\* \* \*

"It is further contended that there is a vital difference between the individual and the corporation; that the individual exists and carries on his operations under natural power and of common right, while the corporation is an artificial being, created by the state and dependent upon the state for the continuance of its existence, and subject to regulations and to the imposition of burdens upon it by the state, not at all applicable to natural persons.

"Without undertaking to go beyond what has already been decided by this court in *Mager v. Grima*, 8 How. 490, 12 L. Ed. 1168 (1850); in *Scholey v. Rew*, 23 Wall. 331, 23 L. Ed. 99 (1875), and in *United States v. Perkins*, 163 U. S. 625, 41 L. Ed. 287, 16 Sup. Ct. 1073 (1896), and in the other cases heretofore cited, we may regard it as established that the relation of the individual citizen and resident to the state is such that his right, as the owner of property, to direct its descent by will, or by permitting its descent to be regulated by the statute, and his right, as legatee, devisee, or heir, to receive the property of his testator or ancestor, are rights derived from and regulated by the state, and we are unable to perceive any sound distinction that can be drawn between the power of the state in imposing taxes upon franchises of corporations, composed of individual persons, and in imposing taxes upon the right or privilege of individuals to avail themselves of the right to grant and to receive property under the statutes regulating the descent of the property of decedents. And, at all events, the mischief apprehended, of impairing the borrowing power of the government by state taxation, is the same whether that taxation be imposed upon corporate franchises or upon the privilege created and regulated by the statutes of inheritance. \* \* \*

"It may be opportune to mention that, even while we have been considering this case, the United States government has negotiated a public loan of large amount at a lower rate of interest than ever before known. From this it may be permissible to infer that the existence of legislation, whether state or federal, including federal securities as part of the mass of private property subject to inheritance taxes, has not practically injured or impaired the borrowing power of the government."

NORTH DAKOTA v. HANSON (1910) 215 U. S. 515, 524-527, 30 Sup. Ct. 179, 54 L. Ed. 307, Mr. Justice WHITE (holding invalid a state statute requiring every holder of a federal retail liquor license to print at his own expense a notice thereof for three weeks in official newspapers, to keep posted in his establishment an affidavit of said publication, and to pay a fee of \$10 for filing a copy of said license with state officials, the statute being designed to furnish information to aid in the enforcement of the state laws against illegal liquor selling. The federal regulations required holders of such licenses to keep them conspicuously in their establishments, and required collectors of internal revenue to keep in their offices for public inspection the names of such license holders):

"Under the construction placed upon the statute by the court below we see no escape from the conclusion that it immediately and directly places a burden upon the lawful taxing power of the United States. or, what is equivalent thereto, places the burden upon the person who pays the United States tax, solely because of the payment of such tax. and wholly without reference to the doing by the person of any act within the state which is subject to the regulating authority of the state.

\* \* \*

"It is clear that, in principle, a state may not so exert its police power as to directly hamper or destroy a lawful authority of the government of the United States. \* \* \* [In] *United States v. Snyder*, 149 U. S. 210, 37 L. Ed. 705, 13 Sup. Ct. 846, \* \* \* a circuit court of the United States had refused to enforce, in favor of the United States, a lien upon real estate for taxes under the internal revenue laws, on the ground that the lien, or assessment for the tax, had not been recorded in the mortgage records for the parish of Orleans. where the real estate in question was situated, as required by the laws of Louisiana, and that the proceeding to enforce the lien had not been brought within the period fixed by the state law. \* \* \* In deciding that this view was unsound, it was said:

"The power of taxation has always been regarded as a necessary and indispensable incident of sovereignty. A government that cannot, by self-administered methods, collect from its subjects the means necessary to support and maintain itself in the execution of its functions, is a government merely in name. If the United States, proceeding in one of their own courts, in the collection of a tax admitted to be legitimate, can be thwarted by the plea of a state statute prescribing that such a tax must be assessed and recorded under state regulation, and limiting the time within which such tax shall be a lien, it would follow that the potential existence of the government of the United States is at the mercy of state legislation."

"Undoubtedly, as suggested by the court below, there are decisions of state courts holding that, in a proceeding to enforce a penalty or to punish for a violation of a state law as to the sale of liquor, the

payment of the special United States tax and taking of a receipt therefor by the defendant may be offered in evidence, and creates a prima facie presumption that the person paying the tax and holding the receipt was engaged in the business of selling liquor.<sup>1</sup> Without in anywise intimating an opinion as to the soundness of the decisions thus referred to, and assuming only for the purpose of the argument their correctness, we yet fail to see how in any respect they can be considered persuasive as to the compatibility of the statute here under consideration with the Constitution of the United States. \* \* \*

"The act here in question is directly antagonistic to the legislation of Congress concerning the subject with which the state statute deals, since that statute adds onerous burdens and conditions in addition to those for which the act of Congress provides, and which burdens are therefore, inconsistent with the paramount right of Congress to exert, within the limits of the Constitution, an untrammelled power of taxation."<sup>2</sup>

[FULLER, C. J., and McKENNA and HOLMES, JJ., dissented.]

<sup>1</sup> See the cases in 23 Cyc. 255, and compare the federal legislation referred to in *Oklahoma v. Gulf, etc., Ry.*, 220 U. S. 290, 293, 31 Sup. Ct. 437, 55 L. Ed. 469, Ann. Cas. 1912C, 524 (1911).

The United States may forbid its officers to furnish for use in state courts or criminal proceedings any returns or records, or copies thereof, or information gained therefrom, which such officers have obtained or hold in their official capacities. In *re Weeks* (D. C.) 82 Fed. 729 (1897); In *re Coningore* (D. C.) 96 Fed. 552 (1899) (cases), affirmed in *Boske v. Coningore*, 177 U. S. 459, 20 Sup. Ct. 701, 44 L. Ed. 846 (1900). See the argument contra in *In re Hirsch* (D. C.) 74 Fed. 928 (1896).

<sup>2</sup> STATE CONTROL OF FEDERAL AGENTS OR AGENCIES.—In *Ohio v. Thomas*, 173 U. S. 276, 19 Sup. Ct. 453, 43 L. Ed. 699 (1899) it was held that a state could not regulate the use of oleomargarine in a federal soldiers' home on land not ceded to the United States.

As regards banks organized under the present National Bank Act, it has been said: "The states can exercise no control over them nor in any wise affect their operation, except in so far as Congress may see proper to admit."—*Farmers' Bank v. Dearing*, 91 U. S. 29, 34, 23 L. Ed. 196 (1875), by Swayne, J. (penalty for usury). So *Tiffany v. Nat. Bank*, 18 Wall. 409, 21 L. Ed. 862 (1874) (rate of interest); *Davis v. Elmira Sav. Bank*, 161 U. S. 275, 16 Sup. Ct. 502, 40 L. Ed. 700 (1896) (distribution of assets in insolvency); *Easton v. Iowa*, 188 U. S. 220, 23 Sup. Ct. 288, 47 L. Ed. 452 (1903) (fraudulent acceptance of deposits). See *Schlesinger v. Gilhooly*, 189 N. Y. 1, 81 N. E. 619, 12 Ann. Cas. 1138 (1907) (when a note is absolutely void under state law for usury between the original parties, can Congress provide that its subsequent transfer to a national bank shall validate it against all parties?).

Compare *Nat. Bank v. Commonwealth*, post, p. 1302, note.

As to how far federal agents or officers while discharging federal duties are exempt from state arrest, see *U. S. v. Kirby*, 7 Wall. 482, 19 L. Ed. 278 (1869) (criminal arrest); *U. S. v. Harvey*, Fed. Cas. No. 15,320 (1845) (civil arrest), explained in *U. S. v. Kirby*, above; *Ex parte Murray* (D. C.) 35 Fed. 496 (1888) (civil arrest). See, also, *U. S. v. Baird* (D. C.) 85 Fed. 633 (1897) (exemption of federal witness from state criminal arrest); *U. S. v. Barney*, Fed. Cas. No. 14,525 (before 1810) (innkeeper's lien not enforceable against horses while actually carrying mail).

## 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 otherwise 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.<sup>1</sup> \* \* \*

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

<sup>1</sup> Accord: *Deakin v. Webb*, 1 Com. L. Rep. 585 (Australia, 1904) (state income tax on federal officer's salary), and cases cited therewith in note 1 to *McCulloch v. Maryland*, ante, p. 1284. Contra: *Abbott v. St. John*, 40 Can. S. C. 597 (Canada, 1908) (similar facts).

Of course the federal government may validly authorize state taxation of federal salaries. *Chaplin v. Comm'r*, 12 Com. L. R. 375 (Australia, 1911).

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 possession 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.<sup>2</sup>

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

<sup>2</sup> Accord: *Ambrosini v. U. S.*, 187 U. S. 1, 23 Sup. Ct. 1, 47 L. Ed. 49 (1902) (federal tax on bond required by state to insure good conduct of holder of state liquor license—semble); *Fifield v. Close*, 15 Mich. 505 (1867) (federal tax on legal process in state courts). Compare *Melcher v. Boston*, 9 Metc. (Mass.) 73, 77, 78 (1845).

It has been held that Congress cannot exclude from evidence in *state* courts documents left unstamped in violation of federal revenue laws, *People v. Gates*, 43 N. Y. 40 (1870); nor make such documents ineffective to convey title under state laws, *Moore v. Moore*, 47 N. Y. 467, 7 Am. Rep. 466 (1872); though the ordinary penalties of fine and imprisonment may be imposed. See *Nicol v. Ames*, 173 U. S. 509, 523, 19 Sup. Ct. 522, 43 L. Ed. 786 (1899). Compare *W. U. Teleg. Co. v. Massachusetts*, 125 U. S. 530, 554, 8 Sup. Ct. 961, 31 L. Ed. 790 (1888).

Under the Australian Constitution the doctrine of the principal case is fully accepted as a corollary to that of *McCulloch v. Maryland*. *Federated Govt. Ry. Ass'n v. N. S. Wales Ry. Ass'n*, 4 Com. L. R. 488 (1906) (Commonwealth cannot regulate terms of employment on state-owned railways engaged in interstate traffic). Compare *Atty. Gen. of N. S. Wales v. Collector of Customs*, 5 Com. L. R. 818 (1905) (Commonwealth can levy import duty on steel rails imported by state for its railways).

As to what persons are "officers" of the state or federal governments within the rule of the principal case, see *Whitehouse v. Langdon*, 10 N. H. 331 (1839) (contractor to carry mail is not); *Melcher v. Boston*, 9 Metc. (Mass.) 73 (1845) (nor a clerk of a local postmaster); *State v. Bell*, 61 N. C. 76 (1867) (nor a licensee under federal excise laws).

As to when income from a non-taxable source becomes taxable as "cash in hand," see *Murray v. Charleston*, 96 U. S. 432, 446, 24 L. Ed. 760 (1878); *Hibernia Society v. San Francisco*, 200 U. S. 310, 316, 26 Sup. Ct. 265, 50 L. Ed. 495, 4 Ann. Cas. 934 (1906); *N. Y. v. Wells*, 208 U. S. 14, 28 Sup. Ct. 193, 52 L. Ed. 370 (1908); *Purnell v. Page*, 133 N. C. 125, 129, 45 S. E. 534 (1903); *Dyer v. Melrose*, 197 Mass. 99, 83 N. E. 6, 125 Am. St. Rep. 330 (1908), annotated in 34 L. R. A. (N. S.) 1215, 1216.

## 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 com-

plain 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 ad-

vantage 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, ship-yards, 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. 1279] 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.<sup>1</sup>

<sup>1</sup> Accord: *Gromer v. Standard Dredging Co.*, 224 U. S. 362, 32 Sup. Ct. 499, 56 L. Ed. 801 (1912) (tax on property brought into jurisdiction and there used solely in performing contract with U. S.); *Baltimore Shipbuilding Co. v. Bal-*



[SWAYNE, J., gave a concurring opinion. BRADLEY, J., gave a dissenting opinion, in which FIELD, J., concurred. HUNT, J., also dissented.]

timore, 195 U. S. 375, 25 Sup. Ct. 50, 49 L. Ed. 242 (1904) (tax on property of which U. S. has certain right of use). The same principle applies to income from a non-taxable source after it has become "cash in hand." See the cases in last paragraph of note 2 to *Collector v. Day*, ante, p. 1297. But compare *Phila. SS. Co. v. Pennsylvania*, ante, p. 1104.

In *Thomson v. Pacific Railroad*, 9 Wall. 579, 588, 589, 591, 19 L. Ed. 792 (1870), Chase, C. J., said: "We do not doubt that \* \* \* Congress may \* \* \* make or authorize contracts with individuals or corporations for services to the government, \* \* \* and may exempt, in its discretion, the agencies employed in such services from any state taxation which will really prevent or impede the performance of them; \* \* \* but it will be safe to conclude, in general, in reference to persons and state corporations employed in government service, that when Congress has not interposed to protect their property from state taxation, such taxation is not obnoxious to that objection."

In *Nat. Bank v. Commonwealth*, 9 Wall. 353, 362, 19 L. Ed. 701 (1870), Miller, J., said (upholding the collection from the bank of the state tax upon national bank shares authorized by Congress):

"The agencies of the federal government are only exempted from state legislation, so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the states. The salary of a federal officer may not be taxed; he may be exempted from any personal service which interferes with the discharge of his official duties; because those exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the state which affect his family or social relations, or his property, and he is liable for punishment for crime, though that punishment be imprisonment or death. So of the banks. They are subject to the laws of the state; and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional. We do not see the remotest probability of this in their being required to pay the tax which their stockholders owe to the state for the shares of their capital stock, when the law of the federal government authorizes the tax."

So *Waite v. Dowley*, 94 U. S. 527, 24 L. Ed. 181 (1877) (cashier of national bank required by state to furnish list of stockholders for taxation; the federal government having interposed no objection). See the cases in note 1 to *North Dakota v. Hanson*, ante, p. 1294.

A state may regulate the local rates of an interstate railroad operated under a federal charter. *Reagan v. Mercantile Tr. Co.*, 154 U. S. 413, 14 Sup. Ct. 1060, 38 L. Ed. 1028 (1894); *Smyth v. Ames*, 169 U. S. 466, 519-522, 18 Sup. Ct. 418, 42 L. Ed. 819 (1898).

## VAN BROCKLIN v. TENNESSEE.

(Supreme Court of United States, 1886. 117 U. S. 151, 6 Sup. Ct. 670, 29 L. Ed. 845.)

[Error to the Supreme Court of Tennessee. In 1864 three lots of land near Memphis, Tennessee, were sold by auction for federal direct taxes and were conveyed to the United States. In 1870 the former owner sold the lots to Van Brocklin, and in 1877 the United States recovered possession of two of them in an action of ejectment, the third being then redeemed by Van Brocklin by payment of back taxes and penalties. In 1878 the other two lots were sold and conveyed to one Stacy by the United States. The state filed a bill to foreclose its lien for state taxes on this land from 1864 to 1877-78, and the state Supreme Court entered a decree in its favor, whereupon this writ was brought.]

Mr. Justice GRAY. \* \* \* The judgment of the supreme court of Tennessee rests upon the position that these lands, although lawfully purchased by the United States, and owned by the United States at the time of being taxed under the laws of the state, were not exempt from state taxation, because they had not been expressly ceded by the state to the United States. We are unable to reconcile this position with a just view of the rights and powers conferred upon the national government by the Constitution of the United States. The importance of the subject, and the consideration due to the opinion of that learned court, make it proper to state somewhat fully the grounds of our conclusion. \* \* \*

The United States do not and cannot hold property, as a monarch may, for private or personal purposes.<sup>1</sup> All the property and revenues of the United States must be held and applied, as all taxes, duties, imposts, and excises must be laid and collected, "to pay the debts and provide for the common defense and general welfare of the United States." Const. art. 1, § 8, cl. 1; *Dobbins v. Erie Co. Com'rs*, 16 Pet. 435, 448, 10 L. Ed. 1022. The principal reason assigned in *Buchanan v. Alexander*, 4 How. 20, 11 L. Ed. 857, for holding that money in the

<sup>1</sup> How federal property shall be administered is entirely in the discretion of Congress, which may open public land to settlement, withdraw it therefrom, or change the use thereof at pleasure, exercising meanwhile the rights incident to private ownership. *Light v. U. S.*, 220 U. S. 523, 31 Sup. Ct. 485, 55 L. Ed. 570 (1911) (cases). So of land held in trust for Indians, although citizens. *Hallowell v. U. S.*, 221 U. S. 317, 31 Sup. Ct. 587, 55 L. Ed. 750 (1911). And in the furtherance of its proprietary rights (*Twin Falls Canal Co. v. Foote* [C. C.] 192 Fed. 583, 594 [1911]) the United States may take privately owned land in a state by eminent domain to construct irrigation works for the benefit of federal public land. *Burley v. U. S.*, 179 Fed. 1, 102 C. C. A. 429, 33 L. R. A. (N. S.) 807 (1910); *U. S. v. O'Neill* (D. C.) 198 Fed. 677 (1912) (federal proceedings for this purpose not limited by state law or procedure).

hands of a purser, due to seamen in the navy for wages, could not be attached by their creditors in a state court was: "The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by state process or otherwise, the functions of the government may be suspended." \* \* \*

In the Articles of Confederation of 1778 it had been expressly stipulated that "no imposition, duties, or restriction shall be laid by any state on the property of the United States." \* \* \* The Constitution, creating a more perfect union, and increasing the powers of the national government, expressly authorized the Congress of the United States "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;" "to exercise exclusive legislation 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 to "dispose of and make needful rules and regulations respecting the territory or other property belonging to the United States." \* \* \* No further provision was necessary to secure the lands or other property of the United States from taxation by the states. \* \* \*

[After referring to provisions in the acts admitting Ohio, Indiana, and Illinois to the Union, by which lands therein sold by Congress should be exempt from state taxation for five years after such sale; and after referring to a dictum of McLean, J., in *U. S. v. R. R. Bridge Co.*, 6 McLean, 517, 531-533, Fed. Cas. No. 16,114, implying a power in the states to tax the federal public lands if not restrained by compact:] The question in issue in that case was not of the state's right of taxation, but of its right of eminent domain for the construction of roads and bridges. The decision of the learned justice in favor of the validity of the exercise of that right by a state over lands of the United States, without the consent of the United States, manifested either by an express act of Congress, or by the assent of a department or officer vested by law with the power of disposing of lands of the United States, appears to have been based upon the theory that the United States can hold land as a private proprietor for other than public objects, and upon a presumption of the acquiescence of Congress in the state's exercise of the power as tending to increase the value of the lands; and it finds some support in dicta of Mr. Justice Woodbury, in a case in which, however, the exercise of the power by the state was adjudged to be unlawful. *U. S. v. Chicago*, 7 How. 185, 194, 195, 12 L. Ed. 660. But it can hardly be reconciled with the views expressed by Congress, in acts concerning particular railroads, too numerous to be cited, as well as in general legislation. Acts August 4, 1852 (chapter 80), and March 3, 1855 (chapter 200, 10 St. 28, 683;) July 26, 1866 (chapter 262, § 8, 14 St. 253; Rev. St. § 2477).

When that question shall be brought into judgment here, it will require and will receive the careful consideration of the court.<sup>2</sup> \* \* \*

[After referring to various provisions in acts admitting other states to the Union, to court decisions, and to state legislation:] Whether the property of one of the states of the Union is taxable under the laws of that state depends upon the intention of the state as manifested by those laws. But whether the property of the United States shall be taxed under the laws of a state depends upon the will of its owner, the United States, and no state can tax the property of the United States without their consent. \* \* \*

[After stating two unreported cases decided in this court in 1849 by an equal division of the judges, upholding state taxation of the federal custom house in Portland, Maine, and of the mint in Philadelphia, both owned by the United States but the former not purchased with the consent of the state legislature:] But the two decisions above mentioned, by an equal division of this court, and with no evidence of the reasons which influenced any of the judges, have no weight as authority in any other case; and we have no hesitation in saying that a tax imposed under authority of a state upon a building used as a custom-house or a mint, and the land on which it stands, owned by the United States, cannot be supported, consistently with the principles affirmed in *McCulloch v. Maryland*, especially in 4 Wheat. 432, 4 L. Ed. 579, above cited, or with the recent judgments of this court. \* \* \*

[After quoting from *R. R. Co. v. Peniston*, ante, p. 1298, and *Collector v. Day*, ante, p. 1295:] Applying the same principles, this court, in *U. S. v. Railroad Co.*, 17 Wall. 322, 21 L. Ed. 597, held that a municipal corporation within a state could not be taxed by the United States on the dividends or interest of stock or bonds held by it in a

<sup>2</sup> In *Pacific R. R. Removal Cases*, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319 (1885) it was apparently assumed that a state might condemn part of the depot grounds of a federal railway corporation in order to widen a street; and in *Union Pac. Ry. v. Burlington, etc., Ry.* (C. C.) 3 Fed. 106 (1880), and *Union Pac. Ry. v. Leavenworth, etc., Ry.* (C. C.) 29 Fed. 728 (1887), this was decided as to the condemnation of a right of way for the crossing of another railroad. See, also, the reasoning in *Ft. Leavenworth Ry. v. Lowe*, 114 U. S. 525, 5 Sup. Ct. 995, 29 L. Ed. 264 (1885), and extract ante, p. 947. Compare *Mo. Pac. Ry. v. Townsend*, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. Ed. 1044 (1903).

It is generally assumed that the United States may condemn state property for federal purposes. See *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 101, 13 Sup. Ct. 485, 37 L. Ed. 380 (1893); *Stockton v. Balt., etc., Ry.* (C. C.) 32 Fed. 9, 17-19 (1887). In *U. S. v. Gettysburg Elec. Ry.*, 160 U. S. 668, 16 Sup. Ct. 427, 40 L. Ed. 576 (1896) the United States took for a park the route of a state electric road; and in *Nahant v. U. S.*, 136 Fed. 273, 70 C. C. A. 641, 69 L. R. A. 723 (1905) it took for fortification purposes the public streets and the appurtenant water and sewer pipes of a Massachusetts city. See the very sensible remarks in *Randolph, Em. Dom.* § 60, as to the adjustment of conflicting state and federal purposes in such cases.

As to the power of a state voluntarily to assist the federal government in the exercise of various functions, see *Ft. Leavenworth Ry. v. Lowe*, ante, p. 947, note; *Second Employers' Liability Cases*, ante, p. 953, note 2; *Gilmer v. Lime Point*, 18 Cal. 229 (1861); *Trombley v. Humphrey*, 23 Mich. 471, 9 Am. Rep. 94 (1871).

railroad or canal company, because the municipal corporation was a representative of the state, created by the state to exercise a limited portion of its powers of government, and therefore its revenues, like those of the state itself, were not taxable by the United States. The revenues thus adjudged to be exempt from federal taxation were not themselves appropriated to any specific public use, nor derived from property held by the state or by the municipal corporation for any specific public use, but were part of the general income of that corporation, held for the public use in no other sense than all property and income, belonging to it in its municipal character, must be so held. The reasons for exempting all the property and income of a state, or of a municipal corporation, which is a political division of the state, from federal taxation, equally require the exemption of all the property and income of the national government from state taxation. \* \* \*

The United States acquired the title to all the land now in question under the express authority of acts of Congress, and by proceedings, the validity of which is clearly established by a series of decisions of this court. \* \* \* The provisions authorizing the United States to sell the land for non-payment of the taxes assessed thereon, and to purchase the land for the amount of the taxes if no one would bid a higher price, were necessary and proper means for carrying into effect the power to lay and collect the taxes; and so were the provisions authorizing the United States afterwards to sell the land, to apply the proceeds to the payment of the taxes, and to hold any surplus for the benefit of the former owner. While the United States owned the land struck off to them for the amount of the taxes because no one would pay more for it, and until it was sold by the United States for a greater price, or was redeemed by the former owner, the United States held the entire title as security for the payment of the taxes; and it could not be known how much, if anything, beyond the amount of the taxes the land was worth. To allow land, lawfully held by the United States as security for the payment of taxes assessed by and due to them, to be assessed and sold for state taxes, would tend to create a conflict between the officers of the two governments, to deprive the United States of a title lawfully acquired under express acts of Congress, and to defeat the exercise of the constitutional power to lay and collect taxes to pay the debts and provide for the common defense and general welfare of the United States. \* \* \* All the assessments were unlawful, because made while the land was owned by the United States. The assessments, being unlawful, created no lien upon the land. Those taxes, therefore, cannot be collected, even since the plaintiffs in error have redeemed or purchased the land from the United States. \* \* \*

Decree reversed.<sup>3</sup>

<sup>3</sup> Accord: *No. Pac. Ry. v. Traill County*, 115 U. S. 600, 6 Sup. Ct. 201, 29 L. Ed. 477 (1885) (federal land grant to railroad not taxable by state while U. S. retains title as security for costs of survey unpaid by grantee); *Tucker*



CRANDALL v. NEVADA (1868) 6 Wall. 35, 43, 44, 18 L. Ed. 745, Mr. Justice MILLER (holding invalid a Nevada statute taxing every passenger leaving the state one dollar):

"The people of these United States constitute one nation. They have a government in which all of them are deeply interested. This government has necessarily a capital established by law, where its principal operations are conducted. Here sits its legislature, composed of senators and representatives, from the states and from the people of the states. Here resides the President, directing, through thousands of agents, the execution of the laws over all this vast country. Here is the seat of the supreme judicial power of the nation, to which all its citizens have a right to resort to claim justice at its hands. Here are the great executive departments, administering the offices of the mails, of the public lands, of the collection and distribution of the public revenues, and of our foreign relations. These are all established and conducted under the admitted powers of the federal government. That government has a right to call to this point any or all of its citizens to aid in its service, as members of the Congress, of the courts, of the executive departments, and to fill all its other offices; and this right cannot be made to depend upon the pleasure of a state over whose territory they must pass to reach the point where these services must be rendered. The government, also, has its offices of secondary importance in all other parts of the country. On the sea-coasts and on the rivers it has its ports of entry. In the interior it has its land offices, its revenue offices, and its sub-treasuries. In all these it demands the services of its citizens, and is entitled to bring them to those points from all quarters of the nation, and no power can exist in a state to obstruct this right that would not enable it to defeat the purposes for which the government was established.

"The federal power has a right to declare and prosecute wars, and, as a necessary incident, to raise and transport troops through and over the territory of any state of the Union. If this right is dependent in any sense, however limited, upon the pleasure of a state, the government itself may be overthrown by an obstruction to its exercise. Much the largest part of the transportation of troops during the late

v. Ferguson, 22 Wall. 527, 572, 22 L. Ed. 805 (1875) (U. S. owner of equitable interest); U. S. v. Rieckert, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532 (1903) (land held in trust by U. S. for separate allottees of Indian tribe).

But the states may tax property of which the United States holds a bare legal title without governmental or beneficial interest, *Wis. Cent. Ry. v. Price County*, 133 U. S. 496, 10 Sup. Ct. 341, 33 L. Ed. 687 (1890); or of which it has reserved merely a right of use, with a power of forfeiture for condition broken, *Balt. Shipbuilding Co. v. Baltimore*, 195 U. S. 375, 25 Sup. Ct. 50, 49 L. Ed. 242 (1904).

Congress can control the descent of equitable interests in public lands before issuance of patent, *McCune v. Essig*, 199 U. S. 382, 26 Sup. Ct. 78, 50 L. Ed. 237 (1905); and can forbid the acquisition by adverse possession under state law of any title to a railroad right of way granted by it, *Mo. Pac. Ry. v. Townsend*, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. Ed. 1044 (1903).

rebellion was by railroads, and largely through states whose people were hostile to the Union. If the tax levied by Nevada on railroad passengers had been the law of Tennessee, enlarged to meet the wishes of her people, the treasury of the United States could not have paid the tax necessary to enable its armies to pass through her territory.

"But if the government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several states, and this right is in its nature independent of the will of any state over whose soil he must pass in the exercise of it."

[CLIFFORD, J., and CHASE, C. J., dissented from the reasons for the decision, supporting it under the commerce clause.]

**LIMITATIONS UPON STATE INTERFERENCE WITH PRIVATE RIGHTS DERIVED FROM FEDERAL CONSTITUTION OR GOVERNMENT.**—A state may not prohibit, tax, or otherwise unduly burden by conditions precedent or other regulations the private exercise of any right derived from the federal Constitution or government. In addition to the rights mentioned in the principal case as thus protected, see those enumerated in the Slaughter House Cases, ante, at pp. 222, 223; *Twining v. New Jersey*, 211 U. S. 78, 97, 29 Sup. Ct. 14, 53 L. Ed. 97 (1908); and *Logan v. United States*, ante, p. 948, and notes. As to the right to vote for members of either branch of Congress (now enlarged by the seventeenth amendment), or for presidential electors, see *Ex parte Yarborough*, ante, p. 145, and notes; as to suing in the federal courts, see *Security Ins. Co. v. Prewitt*, ante, p. 254, and cases cited therein; *Herndon v. Chicago, etc., Ry.*, ante, p. 261, note; *David Lupton's Sons Co. v. Automobile Club*, 225 U. S. 489, 32 Sup. Ct. 711, 56 L. Ed. 1177 (1912) [compare *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611, 23 Sup. Ct. 206, 47 L. Ed. 328 (1903)]; as to the right to engage in foreign and interstate commerce, see the cases in chapter XVIII, secs. 3, 4, and 5, ante, passim; and as to patent rights, see *California v. Cent. Pac. Ry.*, post, p. 1312, note 2.

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**SNYDER v. BETTMAN** (1903) 190 U. S. 249, 250-254, 23 Sup. Ct. 803, 47 L. Ed. 1035, Mr. Justice BROWN (upholding a federal tax of 10 per cent. upon a legacy to the city of Springfield, Ohio):

"This case involves the single question whether it is within the power of the federal government \* \* \* to impose a succession tax upon a bequest to a municipal corporation of a state for a corporate and public purpose. The case is, to a certain extent, the converse of those of *United States v. Perkins*, 163 U. S. 625, 41 L. Ed. 287, 16 Sup. Ct. 1073, and *Plummer v. Coler*, 178 U. S. 115, 44 L. Ed. 998, 20 Sup. Ct. 829. In the first of these we held it to be within the competency of the state of New York to impose a similar tax upon a bequest to the federal government, incidentally deciding that the inheritance tax of the state was 'in reality a limitation upon the power of a testator to bequeath his property to whom he pleases, a declara-

tion that, in the exercise of that power, he shall contribute a certain percentage to the public use';<sup>1</sup> and (2) that the tax was not a tax upon the property itself, but upon its transmission by will or descent. In *Plummer v. Coler* we held the incidental fact that the property bequeathed is composed in whole or in part of federal securities did not invalidate the state tax. \* \* \*

"It is insisted, however, that the case under consideration is distinguished from those above cited, in the fact that the inheritance tax of New York was but a condition annexed to the power of a testator to dispose of his property by will, and that such power, being purely statutory, the state has the right to annex such conditions to it as it pleases. The case, then, really resolves itself into the question whether the authority to lay a succession tax arises solely from the power to regulate the descent of property, or, as well from the independent general power to tax, or, as expressed in the Constitution, art. 1, § 8, 'to lay and collect taxes, duties, imposts, and excises.' \* \* \*

"In *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969, 20 Sup. Ct. 747, the question involved here, as to the power of Congress to levy a succession tax, was considered, and it was said by Mr. Justice White (p. 56, L. Ed. p. 975, Sup. Ct. 753): 'The proposition that it cannot rest upon the assumption that, since the transmission of property by death is exclusively subject to the regulating authority of the several states, therefore the levy by Congress of a tax on inheritances or legacies in any form is beyond the power of Congress, and is an interference by the national government with a matter which falls alone within the reach of state legislation.' This proposition was pronounced a fallacy (p. 59, L. Ed. p. 977, Sup. Ct. p. 755): 'In legal effect, then, the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation, by either the government of the United States on the one hand or the several states on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate.'<sup>2</sup> \* \* \*

<sup>1</sup> *Accord*: U. S. v. Fox, 94 U. S. 315, 24 L. Ed. 192 (1877) (state may forbid devise of land to U. S.).

<sup>2</sup> At 178 U. S. 60, 20 Sup. Ct. 755, 44 L. Ed. 969, this opinion continues: "Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but this is a burden cast upon the recipient, and not upon the power of the state to regulate. This distinction shows the inapplicability to the case in hand of the statement made by Mr. Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 431, 4 L. Ed. 607 (1819), 'that the power to tax involves the power to destroy.' This principle is pertinent only when there is no power to tax a particular subject, and has no relation to a case where such right exists. In other words, the power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope. But this reasoning has no application to a lawful tax, for if it had there would be an end of all taxation; that is to say, if a lawful tax can be defeated because the power which is manifested by its imposition may when further exercised be destructive, it would follow that every lawful tax would become unlawful, and there-

"This case must be regarded as definitely establishing the doctrine that the power to tax inheritances does not arise solely from the power to regulate the descent of property, but from the general authority to impose taxes upon all property within the jurisdiction of the taxing power. It has usually happened that the power has been exercised by the same government which regulates the succession to the property taxed; but this power is not destroyed by the dual character of our government, or by the fact that, under our Constitution, the devolution of property is determined by the laws of the several states.  
\* \* \*

"If it be true that it is beyond the power of Congress to impose an inheritance tax because the descent of property is regulated by state statutes, it would be difficult to support its power to impose stamp taxes upon commercial and legal instruments, since the conveyance, regulation, and transmission of all property is governed by the laws of the several states. \* \* \* [Here reference is made to federal stamp duties, beginning as early as 1797, imposed upon documents connected with the devolution of the property of a deceased person.] Not only this, but the same statute [12 Stat. 432, 483, c. 119, U. S. Comp. St. 1901, p. 186 (1862)] imposed a tax upon writs, or other original process, by which suits are commenced in any court of record, exempting only processes issued by justices of the peace, or in suits begun by the United States or any state. This act was treated as applicable to the state courts, although its constitutionality may well be doubted.<sup>3</sup>

"Referable to the same principle is the power of Congress to tax occupations which can only be carried on by permission of the state authorities and under conditions prescribed by its laws,—such, for instance, as the profession of a lawyer or physician, or the business of dealing in spirituous liquors, for which licenses are required under the laws of nearly all the states. While the power of Congress to impose such taxes may never have been expressly affirmed by this court, it does not seem to have been seriously questioned. \* \* \*

"Conceding fully that Congress has no power to impose a burden upon a state or its municipal corporations, the question in each case is whether the tax is direct or incidental; since we have had frequent occasion to hold that the imposition of a tax may indirectly affect the value of property to the amount of the tax without being legally objectionable as a direct burden upon such property. \* \* \* [Referring to *Van Allen v. The Assessors*, 3 Wall. 573, 18 L. Ed. 229, and *Home Ins. Co. v. New York*, ante, p. 1290.]

fore no taxation whatever could be levied. Under our constitutional system both the national and the state governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established."

<sup>3</sup> See cases in note 2, *Collector v. Day*, ante, p. 1297.

"Having determined, then, that Congress has the power to tax successions; that the states have the same power, and that such power extends to bequests to the United States, it would seem to follow logically that Congress has the same power to tax the transmission of property by legacy to states or their municipalities, and that the exercise of that power in neither case conflicts with the proposition that neither the federal nor the state government can tax the property or agencies of the other, since, as repeatedly held, the taxes imposed are not upon property, but upon the right to succeed to property."

[WHITE, J., gave a dissenting opinion, concurred in by FULLER, C. J., and PECKHAM, J.]

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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 within 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 nonarchical 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.<sup>1</sup> [Here follows the extract printed as the latter part of the first paragraph of the portion of this case printed ante, pp. 618, 619.]

"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

<sup>1</sup> Distinguish between a franchise and mere licensing or regulation. Henderson Bdg. Co. v. Kentucky, 166 U. S. 150, 17 Sup. Ct. 532, 41 L. Ed. 953 (1897).



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."<sup>2</sup>

### SOUTH CAROLINA v. UNITED STATES.

(Supreme Court of United States, 1905. 199 U. S. 437, 26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737.)

[Appeal from Court of Claims from a judgment denying to South Carolina the right to recover certain sums exacted from the state dispensers of liquor there under the federal internal revenue laws. Other facts appear in the opinion.]

Mr. Justice BREWER. The important question in this case is whether persons who are selling liquor are relieved from liability for the internal revenue tax by the fact that they have no interest in the profits of the business, and are simply the agents of a state which, in the exercise of its sovereign power, has taken charge of the business of selling intoxicating liquors. \* \* \*

Upon this proposition counsel for appellant rely. There being no constitutional limit as to the amount of a license tax, and the power

<sup>2</sup> Accord: *People v. Assessors*, 156 N. Y. 417, 51 N. E. 269, 42 L. R. A. 290 (1898) (attempted state taxation of patent rights); *In re Sheffield* (C. C.) 64 Fed. 833 (1894) (same); *McCulloch v. Maryland*, 4 Wheat. 316, 432, 4 L. Ed. 579 (1819) (same—semble). See *Ind. Mfg. Co. v. Koehne*, 188 U. S. 681, 690, 23 Sup. Ct. 452, 47 L. Ed. 651 (1903). Compare *Cent. Pac. R. Co. v. California*, 162 U. S. 91, 16 Sup. Ct. 766, 40 L. Ed. 903 (1896) (state may tax state franchise of corporation also having federal franchise).

STATE CONTROL OVER PATENTS AND PATENTED ARTICLES.—While the patent right may probably not be taxed by a state (see cases cited above), the patented article itself may be thus taxed or regulated. *Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115 (1879) (prohibition of use); *Webber v. Virginia*, 103 U. S. 344, 347, 349, 26 L. Ed. 565 (1881) (taxation), in which Field, J., said:

"It is only the right to the invention or discovery, the incorporeal right, which the state cannot interfere with. \* \* \* The right of property in the physical substance, which is the fruit of the discovery, is altogether distinct from the right in the discovery itself. \* \* \* The use of the tangible property which comes into existence by the application of the discovery is not beyond the control of state legislation."

As to a state's power over various incidents of the sale or licensing of patent rights, see *Allen v. Riley*, 203 U. S. 347, 27 Sup. Ct. 95, 51 L. Ed. 216, 8 Ann. Cas. 137 (1906); *Opinion of Justices*, 193 Mass. 605, 81 N. E. 142 (1907); *Henry v. Dick Co.*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645 (1912); *Bauer v. O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. — (1913). Compare *Standard Mfg. Co. v. U. S.*, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. — (1912).

to tax being the power to destroy, if Congress can enforce such a tax against a state, it may destroy this effort of the state, in the exercise of its police power, to control the sale of liquor. It cannot be doubted that the regulation of the sale of liquor comes within the scope of the police power, and equally true that the police power is, in its fullest and broadest sense, reserved to the states; that the mode of exercising that power is left to their discretion, and is not subject to national supervision. But, if Congress may tax the agents of the state charged with the duty of selling intoxicating liquors, it in effect assumes a certain control over this police power, and thus may embarrass and even thwart the attempt of the state to carry on this mode of regulation.

We are not insensible to the force of this argument, and appreciate the difficulties which it presents; but let us see to what it leads. Each state is subject only to the limitations prescribed by the Constitution, and within its own territory is otherwise supreme. Its internal affairs are matters of its own discretion. The Constitution provides that "the United States shall guarantee to every state in this Union a republican form of government." Art. 4, § 4. That expresses the full limit of national control over the internal affairs of a state.

The right of South Carolina to control the sale of liquor by the dispensary system has been sustained. *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, 42 L. Ed. 1100, 18 Sup. Ct. 674. The profits from the business in the year 1901, as appears from the findings of fact were over half a million of dollars. Mingling the thought of profit with the necessity of regulation may induce the state to take possession, in like manner, of tobacco, oleomargarine, and all other objects of internal revenue tax. If one state finds it thus profitable, other states may follow, and the whole body of internal revenue tax be thus stricken down.

More than this. There is a large and growing movement in the country in favor of the acquisition and management by the public of what are termed "public utilities," including not merely therein the supply of gas and water, but also the entire railroad system. Would the state, by taking into possession these public utilities, lose its republican form of government?

We may go even a step further. There are some insisting that the state shall become the owner of all property and the manager of all business. Of course, this is an extreme view, but its advocates are earnestly contending that thereby the best interests of all citizens will be subserved. If this change should be made in any state, how much would that state contribute to the revenue of the nation? If this extreme action is not to be counted among the probabilities, consider the result of one much less so. Suppose a state assumes, under its police power, the control of all those matters subject to the internal revenue

tax, and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a state of liquor, tobacco, etc., from a license tax, would exempt the importation of merchandise by a state from import duty.<sup>1</sup> While the state might not prohibit importations, as it can the sale of liquor, by private individuals, yet, paying no import duty, it could undersell all individuals, and so monopolize the importation and sale of foreign goods.

Obviously, if the power of the state is carried to the extent suggested, and with it is relief from all federal taxation, the national government would be largely crippled in its revenues. Indeed, if all the states should concur in exercising their powers to the full extent, it would be almost impossible for the nation to collect any revenues. In other words, in this indirect way it would be within the competency of the states to practically destroy the efficiency of the national government. \* \* \* We are to find in the Constitution itself the full protection to the nation, and not to rest its sufficiency on either the generosity or the neglect of any state.

There is something of a conflict between the full power of the nation in respect to taxation and the exemption of the state from federal taxation in respect to its property and a discharge of all its functions. Where and how shall the line between them be drawn? We have seen that the full power of collecting license taxes is in terms granted to the national government, with only the limitations of uniformity and the public benefit. The exemption of the state's property and its functions from federal taxation is implied from the dual character of our federal system and the necessity of preserving the state in all its efficiency. In order to determine to what extent that implication will go we must turn to the condition of things at the time the Constitution was framed. What, in the light of that condition, did the framers of the convention intend should be exempt? Certain is it that modern notions as to the extent to which the functions of a state may be carried had then no hold. Whatever Utopian theories may have been presented by any writers were regarded as mere creations of fancy, and had no practical recognition. It is true that monopolies in respect to certain commodities were known to have been granted by absolute monarchs, but they were not regarded as consistent with Anglo-Saxon ideas of government. \* \* \*

Looking, therefore, at the Constitution in the light of the conditions surrounding at the time of its adoption, it is obvious that the framers, in granting full power over license taxes to the national government, meant that that power should be complete; and never thought that the states, by extending their functions, could practically destroy it.

If we look upon the Constitution in the light of the common law, we are led to the same conclusion. All the avenues of trade were open to the individual. The government did not attempt to exclude him

<sup>1</sup> See *Atty. Gen. v. Collector*, cited in note 3, below.

from any. Whatever restraints were put upon him were mere police regulations to control his conduct in the business, and not to exclude him therefrom. The government was no competitor, nor did it assume to carry on any business which ordinarily is carried on by individuals. Indeed, every attempt at monopoly was odious in the eyes of the common law, and it mattered not how that monopoly arose, whether from grant of the sovereign or otherwise. The framers of the Constitution were not anticipating that a state would attempt to monopolize any business heretofore carried on by individuals.

Further, it may be noticed that the tax is not imposed on any property belonging to the state, but is a charge on a business before any profits are realized therefrom. In this it is not unlike the taxes sustained in *United States v. Perkins*, 163 U. S. 625, 41 L. Ed. 287, 16 Sup. Ct. 1073, and *Snyder v. Bettman* [ante, p. 1308]. \* \* \*

It is also worthy of remark that the cases in which the invalidity of a federal tax has been affirmed were those in which the tax was attempted to be levied upon property belonging to the state, or one of its municipalities, or was a charge upon the means and instrumentalities employed by the state, in the discharge of its ordinary functions as a government. \* \* \* [After a reference to *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. Ed. 482, here follow quotations from *Collector v. Day*, ante, p. 1295; *U. S. v. Balt. & O. Ry.*, stated ante at page 1305; and *Ambrosini v. U. S.*, cited ante, p. 1297, note 2.]

These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of state agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the state in the carrying on of an ordinary private business.

In this connection may be noticed the well-established distinction between the duties of a public character cast upon municipal corporations, and those which relate to what may be considered their private business, and the different responsibility resulting in case of negligence in respect to the discharge of those duties. \* \* \* [Here follow quotations from *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *Lloyd v. New York*, 5 N. Y. 369, 55 Am. Dec. 347; and *Western Sav. Soc. v. Philadelphia*, 31 Pa. 175.]<sup>2</sup>

Now, if it be well established, as these authorities say, that there is a clear distinction as respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognized when we are asked to limit the full power of imposing excises granted to the national government by an implied inability to impede or em-

<sup>2</sup> For a somewhat analogous distinction as to the extent of municipal rights and control over property held in a proprietary as contrasted with a governmental capacity, see *Mt. Hope Cemetery v. Boston*, 158 Mass. 509, 32 N. E. 695, 35 Am. St. Rep. 515 (1893); *Hunter v. Pittsburgh*, 207 U. S. 161, 179-181, 28 Sup. Ct. 40, 52 L. Ed. 151 (1907); 48 L. R. A. 485 ff., note.

barrass a state in the discharge of its functions. It is reasonable to hold that, while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet, whenever a state engages in a business which is of a private nature, that business is not withdrawn from the taxing power of the nation. \* \* \*

Judgment affirmed.<sup>3</sup>

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

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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 upon the doing of business in the United States by any corporation or joint stock company, equivalent to 1 per cent. of its net income above \$5,000):

"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

<sup>3</sup> In *Federated Govt. Ry. Ass'n v. N. S. Wales Ry. Ass'n*, 4 Com. L. R. 488, 538-539 (Australia, 1906), Griffith, C. J., said (after referring to the principal case in connection with the doctrine of non-interference by the federal government with state instrumentalities):

"The argument as presented to us is that state instrumentalities for the purposes of the doctrine in question are limited to those which are, strictly speaking, of what was called in argument a 'governmental' character, and that the business of common carriers is not a part of any of the recognized branches of government, legislative, judicial, and executive. We apprehend, however, that the execution and administration of the laws of the state is in the strictest sense a governmental function, and that no rule can be formulated, because there is no authority competent to formulate it, which shall prescribe what functions the state shall undertake in the supposed exercise of its duty to promote the well-being of its people. There is high authority, both ancient and modern, for holding that the construction and maintenance of roads and means of communication is one of the most important, as it is necessarily one of the first, of the functions of government. \* \* \* Apart, however, from this general consideration, we are of opinion that in the year 1900, when the Constitution was adopted, the construction and maintenance of railways was in fact generally regarded as a governmental function in all the Australian colonies."

[It was accordingly held that the construction and maintenance of state railroads was a proper governmental function of the Australian states and as such was protected from certain federal interference under the above-mentioned doctrine.]

Compare *Atty. Gen. of N. S. Wales v. Collector*, 5 Com. L. R. 818 (1908) (Australian Commonwealth may levy import duty on steel rails imported by state for its railways).



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 fran-

chises 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 or 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. \* \* \* [Here reference is made to *So. Carolina v. U. S.*, ante. p. 1312.]

"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.<sup>1</sup> 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

<sup>1</sup> But see *Fed. Govt. Ry. Ass'n v. N. S. Wales Ry. Ass'n*, ante, p. 1316, note.

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."

CHAPTER XX  
JURISDICTION OF FEDERAL COURTS

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SECTION 1.—IN GENERAL\*

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COHENS v. VIRGINIA (1821) 6 Wheat. 264, 378, 5 L. Ed. 257, Mr. Chief Justice MARSHALL:

"The second section of the third article of the Constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the courts of the Union in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. \* \* \* This clause extends the jurisdiction of the court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article.

"In the second class, the jurisdiction depends entirely on the character of the parties. \* \* \* If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union."

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KANSAS v. COLORADO (1907) 206 U. S. 46, 81-83, 27 Sup. Ct. 655, 51 L. Ed. 956, Mr. Justice BREWER:

"In the Constitution are provisions in separate articles for the three great departments of government,—legislative, executive, and judicial. But there is this significant difference in the grants of powers to these departments: The first article, treating of legislative powers, does not make a general grant of legislative power. It reads: 'Article 1, § 1. All legislative powers herein granted shall be vested in a Congress,' etc.; and then, in article 8, mentions and defines the legislative powers that are granted. By reason of the fact that there is no general grant of legislative power it has become an accepted constitutional rule that this is a government of enumerated powers. \* \* \*

\*For a reference to the principal past and present statutory provisions regulating the jurisdiction of the federal courts, see the latter part of the note to *Provident Life Assurance Society v. Ford*, post at p. 1338.

ADMIRALTY JURISDICTION.—This jurisdiction of the federal courts is discussed *passim*, in the cases under chapter XVIII, section 7, ante, pp. 1261-1276.



"On the other hand, in article 3, which treats of the judicial department \* \* \* we find that § 1 reads 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.' By this is granted the entire judicial power of the nation. Section 2, which provides that 'the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States,' etc., is not a limitation nor an enumeration. It is a definite declaration,—a provision that the judicial power shall extend to—that is, shall include—the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial power. There may be, of course, limitations on that grant of power, but, if there are any, they must be expressed; for otherwise the general grant would vest in the courts all the judicial power which the new nation was capable of exercising. \* \* \*

"Speaking generally, it may be observed that the judicial power of a nation extends to all controversies justiciable in their nature, and the parties to which or the property involved in which may be reached by judicial process, and, when the judicial power of the United States was vested in the Supreme and other courts, all the judicial power which the nation was capable of exercising was vested in those tribunals; and unless there be some limitations expressed in the Constitution it must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the nation, no matter who may be the parties thereto. \* \* \*

"These considerations lead to the propositions that when a legislative power is claimed for the national government the question is whether that power is one of those granted by the Constitution, either in terms or by necessary implication; whereas, in respect to judicial functions, the question is whether there be any limitations expressed in the Constitution on the general grant of national power."<sup>1</sup>

<sup>1</sup> Consider the appellate jurisdiction exercised by the federal Supreme Court over cases from territorial and insular courts that involve no federal question\* or other ground of jurisdiction specified in art. III, § 2, par. 1. See *Freeborn v. Smith*, 2 Wall. 160, 17 L. Ed. 922 (1865); *Simms v. Simms*, 175 U. S. 162, 20 Sup. Ct. 58, 44 L. Ed. 115 (1899); *Royal Ins. Co. v. Martin*, 192 U. S. 149, 24 Sup. Ct. 247, 48 L. Ed. 385 (1904); *De La Rama v. De La Rama*, 201 U. S. 303, 26 Sup. Ct. 485, 50 L. Ed. 765 (1906). For the purposes of this jurisdiction the interpretation of the laws of territories or dependencies, at least where not enacted under federal authority, does not necessarily involve a federal question. *Ortega v. Lara*, 202 U. S. 339, 26 Sup. Ct. 707, 50 L. Ed. 1055 (1906) (Porto Rican law existing at time of session).

That part of art. III, § 1, which requires the judges both of the Supreme and inferior federal courts to hold office during good behavior, applies as a limitation upon the power of the United States in this regard only in the states, and perhaps in the District of Columbia (see *James v. United States*, 202 U. S. 401, 26 Sup. Ct. 685, 50 L. Ed. 1079 (1906)). Elsewhere, in the

\*"Federal question" is a phrase commonly used to designate questions concerning the effect or operation of the federal Constitution, treaties, statutes, commissions, or of any authority exercised under the federal government. *Murdock v. Memphis*, 20 Wall. 590, 518, 22 L. Ed. 429 (1857).

MARTIN v. HUNTER'S LESSEE (1816) 1 Wheat. 304, 337, 338, 349, 350, 4 L. Ed. 97, Mr. Justice STORY (upholding a writ of error from the federal Supreme Court to the Virginia Court of Appeals in a civil case):

"Appellate jurisdiction is given by the Constitution to the Supreme Court in all cases where it has not original jurisdiction, subject, however, to such exceptions and regulations as Congress may prescribe.<sup>1</sup> It is, therefore, capable of embracing every case enumerated in the Constitution, which is not exclusively to be decided by way of original jurisdiction. But the exercise of appellate jurisdiction is far from being limited by the terms of the Constitution to the Supreme Court. There can be no doubt that Congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. The judicial power is delegated by the Constitution in the most general terms, and may, therefore, be exercised by Congress under every variety of form, of appellate or original jurisdiction. And as there is nothing in the Constitution which restrains or limits this power, it must, therefore, in all other cases, subsist in the utmost latitude of which, in its own nature, it is susceptible.

"As, then, by the terms of the Constitution, the appellate jurisdiction is not limited as to the Supreme Court, and as to this court it may be

"incorporated" territories and in our insular possessions, the judicial powers of the national government are exercised by judges appointed for terms of years only. *American Ins. Co. v. Canter*, 1 Pet. 511, 7 L. Ed. 242 (1828), discussed by Brown, J., in *Downes v. Bidwell*, ante at pp. 991-992. Compare the language of Marshall, C. J., in that case: "These courts are not constitutional courts in which the judicial power conferred by the Constitution on the general government can be deposited, [but] they are legislative courts created in virtue of the [power of Congress to govern the territories]," with the language of Brewer, J., in the principal case, and the cases cited in the first paragraph of this note.

The provisions of the Constitution (art. III, § 2, par. 3, and Amends. V, VI, and VII) requiring grand and trial juries in criminal and civil cases in the federal courts apply in the "incorporated" territories and the District of Columbia. *Hawaii v. Mankichi*, 190 U. S. 197, 23 Sup. Ct. 787, 47 L. Ed. 1016 (1903) (assumed as to grand jury); *Thompson v. Utah*, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061 (1898) (criminal and civil trial juries—cases); *Capital Trac. Co. v. Hof*, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873 (1899) (District of Columbia); but not in "unincorporated" territory, *Dorr v. United States*, ante, p. 1013.

<sup>1</sup> "The appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred 'with such exceptions and under such regulations as Congress shall make.' \* \* \* In \* \* \* *Durrouseau v. U. S.*, 6 Cranch. 312, 3 L. Ed. 232 (1810), \* \* \* the court said \* \* \* that the Judicial Act was an exercise of the power given by the Constitution to Congress 'of making exceptions to the appellate jurisdiction of the Supreme Court.' 'They have described affirmatively \* \* \* Its jurisdiction, and this affirmative description has been understood to imply a negation of the exercise of such appellate power as is not comprehended within it.'"—*Ex parte McCordle*, 7 Wall. 506, 512, 513, 19 L. Ed. 264 (1869), by Chase, C. J.

Congress may forbid the exercise of further appellate jurisdiction by the Supreme Court in a case, before judgment is pronounced, even after it has been argued and submitted. *Id.* 514.

exercised in all other cases than those of which it has original cognizance, what is there to restrain its exercise over state tribunals in the enumerated cases? The appellate power is not limited by the terms of the third article to any particular courts. The words are, 'the judicial power (which includes appellate power) shall extend to all cases,' etc., and 'in all other cases before mentioned the Supreme Court shall have appellate jurisdiction.' It is the case, then, and not the court, that gives the jurisdiction. \* \* \*

"We are referred to the power which it is admitted Congress possess to remove suits from state courts to the national courts. \* \* \* This power of removal is not to be found in express terms in any part of the Constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power. The power of removal is certainly not, in strictness of language, an exercise of original jurisdiction; it presupposes an exercise of original jurisdiction to have attached elsewhere. The existence of this power of removal is familiar in courts acting according to the course of the common law in criminal as well as civil cases, and it is exercised before as well as after judgment. But this is always deemed in both cases an exercise of appellate, and not of original jurisdiction.<sup>2</sup> If, then, the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power, and as Congress is not limited by the Constitution to any particular mode, or time of exercising it, it may authorize a removal either before or after judgment. The time, the process, and the manner, must be subject to its absolute legislative control. A writ of error is, indeed, but a process which removes the record of one court to the possession of another court, and enables the latter to inspect the proceedings, and give such judgment as its own opinion of the law and justice of the case may warrant. There is nothing in the nature of the process which forbids it from being applied, by the legislature, to interlocutory as well as final judgments. And if the right of removal from state courts exists before judgment, because it is included in the appellate power, it must, for the same reason, exist after judgment. And if the appellate power by the Constitution does not include cases pending in state courts,

<sup>2</sup> "Whether removal from a state to a federal court is an exercise of appellate jurisdiction, as laid down in Story's Commentaries on the Constitution, sec. 1745, or an indirect mode of exercising original jurisdiction, as intimated in *Railway Company v. Whitton*, 13 Wall. 270, 20 L. Ed. 57 (1871), we need not now inquire. Be it one or the other, it was ruled in the case last cited to be constitutional."—*Tennessee v. Davis*, 100 U. S. 257, 265, 25 L. Ed. 648 (1880), by Strong, J.

In *Marbury v. Madison*, 1 Cranch, 137, 175, 2 L. Ed. 60 (1803), Marshall, C. J., said: "It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create that cause."

For the distinction between original and appellate jurisdiction in the issue of various writs, see *Virginia v. Rives*, 100 U. S. 313, 327-329, 25 L. Ed. 667 (1880) (*mandamus*); *Ex parte Watkins*, 7 Pet. 568, 8 L. Ed. 786 (1833) (*habeas corpus*); *Ex parte Vallandigham*, 1 Wall. 243, 17 L. Ed. 589 (1864) (*certiorari*).

the right of removal, which is but a mode of exercising that power, cannot be applied to them. Precisely the same objections, therefore, exist as to the right of removal before judgment, as after, and both must stand or fall together. Nor, indeed, would the force of the arguments on either side materially vary, if the right of removal were an exercise of original jurisdiction. It would equally trench upon the jurisdiction and independence of state tribunals." \*

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ELLIS v. DAVIS (1883) 109 U. S. 485, 496-498, 3 Sup. Ct. 327, 27 L. Ed. 1006, Mr. Justice MATTHEWS (discussing the jurisdiction of the lower federal courts over suits contesting the validity of wills, under the section of the Judiciary Act conferring jurisdiction of "suits of a civil nature at common law or in equity" between citizens of different states):

"Where provision is made by the laws of a state, as is the case in many, for trying the question of the validity of a will already admitted to probate, by a litigation between parties in which that is the sole question, with the effect, if the judgment shall be in the negative, of rendering the probate void for all purposes as between the parties and those in privity with them, it may be that the courts of the United States have jurisdiction, under existing provisions of law, to administer the remedy and establish the right in a case where the controversy is wholly between citizens of different states. The judicial power of the United States extends, by the terms of the Constitution, 'to controversies between citizens of different states;' and on the supposition, which is not admitted, that this embraces only such as arise in cases 'in law and equity,' it does not necessarily exclude those which may involve the exercise of jurisdiction in reference to the proof and validity of wills. The original probate, of course, is mere matter of state regulation, and depends entirely upon the local law; for it is that law which confers the power of making wills, and prescribes the conditions upon which alone they may take effect; and as, by the law in all the states, no instrument can be effective as a will until proved, no rights in relation to it, capable of being contested between parties, can arise until preliminary probate has been first made. Jurisdiction as to wills, and their probate as such, is neither included in nor excepted out of the grant of judicial power to the courts of the United States.

\* Accord: *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257 (1821) (removal of criminal case from state courts after judgment); *Chlc., etc., Ry. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571 (1872) (removal of civil case before trial); *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648 (1880) (removal of criminal case before trial). [See the dissent of Clifford, J., in this case at pp. 297-299, and of Field, J., in *Virginia v. Rives*, 100 U. S. at 337, 338, 25 L. Ed. 667 (1880) for some of the practical difficulties in exercising federal jurisdiction of such cases at this stage]. In general, see also *The Moses Taylor*, 4 Wall. 411, 429, 430, 18 L. Ed. 397 (1867).

So far as it is *ex parte* and merely administrative, it is not conferred, and it cannot be exercised by them at all until, in a case at law or in equity, its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties.

"It has been often decided by this court that the terms 'law' and 'equity,' as is used in the Constitution, although intended to mark and fix the distinction between the two systems of jurisprudence as known and practiced at the time of its adoption, do not restrict the jurisdiction conferred by it to the very rights and remedies then recognized and employed, but embrace as well not only rights newly created by statutes of the states, as in cases of actions for the loss occasioned to survivors by the death of a person caused by the wrongful act, neglect, or default of another (*Ry. Co. v. Whitton*, 13 Wall. 287, 20 L. Ed. 571; *Dennick v. Railroad Co.*, 103 U. S. 16, 26 L. Ed. 439), but new forms of remedies to be administered in the courts of the United States, according to the nature of the case, so as to save to suitors the right of trial by jury in cases in which they are entitled to it, according to the course and analogy of the common law.<sup>1</sup> *Ex parte Boyd*, 105 U. S. 647, 26 L. Ed. 1200; *Boom Co. v. Patterson*, 98 U. S. 406, 25 L. Ed. 206.

"In *Hyde v. Stone*, 20 How. 170-175, 15 L. Ed. 874, it was said by Mr. Justice Campbell, delivering its opinion, that 'the court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.'

<sup>1</sup> "Although the statute of a state or territory may not restrict or limit the equitable jurisdiction of the federal courts, and may not directly enlarge such jurisdiction, it may establish new rights or privileges which the federal courts may enforce on their equity or admiralty side, precisely as they may enforce a new right of action given by statute upon their common-law side.

\* \* \* It was also said in *Davis v. Gray*, 16 Wall. 223, 231, 21 L. Ed. 447 (1873), that 'a party, by going into a national court, does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality. The wise policy of the Constitution gives him a choice of tribunals.'—*Cowley v. No. Pac. Ry.*, 159 U. S. 569, 582, 583, 16 Sup. Ct. 127, 40 L. Ed. 263 (1895) by Brown, J.

"The question whether the remedy in the federal courts should be by action at law or by suit in equity depends upon the nature of the remedy given by the statutes of the state."—*Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 756, 7 Sup. Ct. 757, 30 L. Ed. 825 (1887) by Gray, J.

A state remedy, however, will not be so administered in the federal courts as to deprive a party of a jury trial in cases falling fairly under the seventh amendment. *Holland v. Challen*, 110 U. S. 15, 25, 3 Sup. Ct. 495, 28 L. Ed. 52 (1884); *Greeley v. Lowe*, 155 U. S. 58, 75, 15 Sup. Ct. 24, 39 L. Ed. 69 (1894). See *Gormley v. Clark*, 134 U. S. 338, 10 Sup. Ct. 554, 33 L. Ed. 909 (1890).

RIGHT TO JURY TRIAL IN THE FEDERAL COURTS.—See Const. art. III, § 1, par. 3; amends. VI and VII. As to the scope of the guaranty of jury trial in criminal cases, see *Thompson v. Utah* and notes, ante pp. 193-198; as to civil cases, see ante, p. 275, note.



"In *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260, it was decided that the jurisdiction of the circuit court of the United States, in a case for equitable relief, was not excluded because by the laws of the state the matter was within the exclusive jurisdiction of its probate courts; but, as in all other cases of conflict between jurisdictions of independent and concurrent authority, that which has first acquired possession of the res, which is the subject of the litigation, is entitled to administer it.<sup>2</sup> *Williams v. Benedict*, 8 How. 107, 12 L. Ed. 1007; *Bank*

<sup>2</sup> "The point of the decision in *Freeman v. Howe* [24 How. 450, 16 L. Ed. 749 (1861)], is that when property is taken and held under process, mesne or final, of a court of the United States, it is in the custody of the law, and within the exclusive jurisdiction of the court from which the process has issued, for the purposes of the writ; that the possession of the officer cannot be disturbed by process from any state court, because to disturb that possession would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer; that any person, not a party to the suit or judgment, whose property has been wrongfully, but under color of process, taken and withheld, may prosecute, by ancillary proceedings, in the court whence the process issued, his remedy for restitution of the property or its proceeds, while remaining in the control of that court; but that all other remedies to which he may be entitled, against officers or parties, not involving the withdrawal of the property or its proceeds from the custody of the officer and the jurisdiction of the court, he may pursue in any tribunal, state or federal, having jurisdiction over the parties and the subject-matter. And, vice versa, the same principle protects the possession of property while thus held by process issuing from state courts, against any disturbance under process of the courts of the United States, excepting, of course, those cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the Constitution and laws of the United States. \* \* \*

"The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is something more. It is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues. 'The jurisdiction of a court,' said Chief Justice Marshall, 'is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process, subsequent to the judgment, in which jurisdiction is to be exercised.' *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253 (1825)." — *Matthews, J.*, in *Covell v. Heyman*, 111 U. S. 176, 179, 180, 182, 183, 4 Sup. Ct. 355, 28 L. Ed. 390 (1884).

Accord: *Porter v. Sabin*, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815 (1893) (receiver); *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867 (1893) (administrator); *Ex parte Johnson*, 167 U. S. 120, 125, 17 Sup. Ct. 735, 42 L. Ed. 103 (1897) (prisoner in custody). The principle is extended to cases whose progress is likely to require the court to take possession of property. *Farmers' L. & T. Co. v. Lake St. Ry.*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667 (1900).

The state courts cannot enjoin proceedings in the federal courts, *Moran v. Sturges*, 154 U. S. 256, 267, 268, 11 Sup. Ct. 1019, 38 L. Ed. 981 (1894); and

of *Tennessee v. Horn*, 17 How. 160, 15 L. Ed. 70; *Yonley v. Laverder*, 21 Wall. 276, 22 L. Ed. 536; *Taylor v. Carryl*, 20 How. 583, 15 L. Ed. 1028; *Freeman v. Howe*, 24 How. 454, 16 L. Ed. 749; *Hook v. Payne*, 14 Wall. 255, 20 L. Ed. 887.

"It was said by this court in *Gaines v. Fuentes*, 92 U. S. 10-18, 23 L. Ed. 524, Mr. Justice Field delivering its opinion, that 'the Constitution imposes no limitation upon the class of cases involving controversies between citizens of different states, to which the judicial power of the United States may be extended; and Congress may, therefore, lawfully provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the federal judiciary.' And, referring to the nature of suits which, as in that case, sought to annul the probate of a will and adjudge it to be invalid, the court further said (page 20:) 'And if by the law obtaining in the state, customary or statutory, they can be maintained in a state court, whatever designation that court may bear, we think they may be maintained by original process in a federal court, where the parties are, on the one side, citizens of Louisiana, and, on the other, citizens of other states.'"<sup>3</sup>

agreements made or conditions imposed by a state to prevent a resort to the federal courts are invalid, ante, p. 1308, note. Nor will the federal courts enjoin proceedings in the state courts, *Peck v. Jenness*, 7 How. 612, 624, 625, 12 L. Ed. 84 (1849); *Harkrader v. Wadley*, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. Ed. 399 (1898); except to protect their own prior jurisdiction properly acquired, *Julian v. Central Trust Co.*, 193 U. S. 93, 112, 24 Sup. Ct. 399, 48 L. Ed. 629 (1904); *Moran v. Sturges*, 154 U. S. 256, 267-273, 14 Sup. Ct. 1019, 38 L. Ed. 981 (1894) (may state courts do the same?); or to prevent the enforcement of invalid state statutes, *Ex parte Young*, 209 U. S. 123, 161-163, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764 (1908); or in bankruptcy proceedings, *Chapman v. Brewer*, 114 U. S. 158, 172, 173, 5 Sup. Ct. 799, 29 L. Ed. 83 (1885). For the application, between state and federal courts of the same state, of the general rule that as between two courts of concurrent jurisdiction the first to obtain jurisdiction of a controversy may retain it until its jurisdiction is exhausted, see *Starr v. Chic.*, etc., Ry. (C. C.) 110 Fed. 3, 6 (1901) (cases); 42 L. R. A. 449-465, note (1898). In no case do injunctions issue against courts, but only against litigants. *Ex parte Young*, post, at p. 1385.

<sup>3</sup> Later in this opinion, Field, J., continued (92 U. S. at 21, 22): "There are, it is true, in several decisions of this court, expressions of opinion that the federal courts have no probate jurisdiction, referring particularly to the establishment of wills; and such is undoubtedly the case under the existing legislation of Congress. The reason lies in the nature of the proceeding to probate a will as one in rem, which does not necessarily involve any controversy between parties: indeed, in the majority of instances, no such controversy exists. In its initiation all persons are cited to appear, whether of the state where the will is offered, or of other states. From its nature, and from the want of parties, or the fact that all the world are parties, the proceeding is not within the designation of cases at law or in equity between parties of different states, of which the federal courts have concurrent jurisdiction with the state courts under the Judiciary Act; but whenever a controversy in a suit between such parties arises respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties."

Similarly, a railroad may bring or remove into the federal courts the ju-

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.]

dicial hearing which at some stage is indispensable in all rate regulation controversies, no matter what special or exclusive tribunals a state may have provided therefor.

"If the railroads were required to take no active steps until they could bring a writ of error from this court to the supreme court of appeals after a final judgment, they would come here with the facts already found against them. But the determination as to their rights turns almost wholly upon the facts to be found. Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate, and the proportion between the two,—pure matters of fact. When those are settled the law is tolerably plain. All their constitutional rights, we repeat, depend upon what the facts are found to be. They are not to be forbidden to try those facts before a court of their own choosing, if otherwise competent. 'A state cannot tie up a citizen of another state, having property within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts.' *Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 391, 38 L. Ed. 1014, 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. 1047 [1894]; *Smyth v. Ames*, 169 U. S. 466, 517, 42 L. Ed. 819, 838, 18 Sup. Ct. 418 [1898]."—*Prentiss v. Atl. Coast Line*, 211 U. S. 210, 228, 29 Sup. Ct. 67, 53 L. Ed. 150 (1908) by Holmes, J.

**SUITS AT LAW OR IN EQUITY.**—The federal statutes confine the jurisdiction of the lower federal courts, dependent upon diverse citizenship, to "suits of a civil nature at common law or in equity." *Judic. Act* March 3, 1911, c. 231, §§ 24, 28, 36 Stat. 1091, 1094 (U. S. Comp. St. Supp. 1911, pp. 135, 140). As to how far certain proceedings of an ex parte or administrative nature, or which affect the domestic relationships, are excluded from this category, see *O'Callaghan v. O'Brien*, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101 (1905) (probate and settlement of estates); *Waterman v. Canal-La. Bank*, 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80 (1909) (same); *Upshur Co. v. Rich*, 135 U. S. 467, 10 Sup. Ct. 651, 34 L. Ed. 196 (1890) (assessment of taxes); *Madisonville Co. v. St. Bernard Co.*, 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462 (1905) (eminent domain); *Re Burrus*, 136 U. S. 586, 10 Sup. Ct. 850, 34 L. Ed. 500 (1890) (custody of children); *Simms v. Simms*, 175 U. S. 162, 167, 20 Sup. Ct. 58, 44 L. Ed. 115 (1899) (divorce). Compare *Rosenbaum v. Bauer*, 120 U. S. 450, 7 Sup. Ct. 633, 30 L. Ed. 743 (1887) (original mandamus proceeding).

"A proceeding, not in a court of justice, but carried on by executive officers in the exercise of their proper functions, as in the valuation of property for the just distribution of taxes or assessments, is purely administrative in its character, and cannot, in any just sense, be called a 'suit'; and an appeal in such a case, to a board of assessors or commissioners having no judicial powers, and only authorized to determine questions of quantity, proportion, and value, is not a suit; but such an appeal may become a suit, if made to a court or tribunal having power to determine questions of law and fact, either with or without a jury, and there are parties litigant to contest the case on the one side and the other."—*Upshur Co. v. Rich*, 135 U. S. at 477, 10 Sup. Ct. 651, 34 L. Ed. 196, by Bradley, J.

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,<sup>1</sup> 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 exercised in its appellate form.<sup>2</sup> 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.<sup>3</sup> Original jurisdiction, so far

<sup>1</sup> As to what constitutes a "case" or "controversy," see also *Interst. Com. Comm. v. Brinson*, ante, p. 70; *Muskat v. U. S.*, ante at pp. 41-43; and for the meaning of "action," "suit," or "cause," see *Ex parte Milligan*, 4 Wall. 2, 112, 113, 18 L. Ed. 281 (1866); *Upsbur County v. Rich*, 135 U. S. 467, 10 Sup. Ct. 651, 34 L. Ed. 196 (1890).

<sup>2</sup> But if a case involves a subject matter within the Supreme Court's appellate jurisdiction (as, if it arises under the Constitution or laws of the United States) this jurisdiction may be exercised if the suit has originated elsewhere, even though it might have originated in the Supreme Court on account of the parties thereto. *Cohens v. Virginia*, 6 Wheat. 264, 392-405, 5 L. Ed. 257 (1821).

<sup>3</sup> It has since been authoritatively said that the original jurisdiction of the Supreme Court is not exclusive, but that Congress may permit a concurrent jurisdiction to the lower federal courts. *Börs v. Preston*, 111 U. S. 252, 4

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 particu-

Sup. Ct. 407, 28 L. Ed. 419 (1884) (consuls); *Ames v. Kansas*, 111 U. S. 449, 4 Sup. Ct. 437, 28 L. Ed. 482 (1884) (states); or to the state courts, *Delafield v. Illinois*, 2 Hill (N. Y.) 159 (1841). So the Judiciary Act of 1789, 1 Stat. 80, c. 20, § 13; and of 1911, 36 Stat. 1156, c. 231, § 233 (U. S. Comp. St. Supp. 1911, p. 227).

But the original jurisdiction of the Supreme Court cannot be enlarged by Congress, *Marbury v. Madison*, 1 Cranch, 137, 173 ff., 2 L. Ed. 60 (1803); though the *judges* of that court may be required to sit as circuit judges, exercising a wide original jurisdiction in the inferior federal courts, *Stuart v. Laird*, 1 Cranch, 299, 2 L. Ed. 115 (1803). See the history of the latter practice in *Thayer, John Marshall*, 66, 67.

For the extent of the original jurisdiction of the Supreme Court in cases where a state is a party, see *United States v. Texas*, post, p. 1400; and *California v. So. Pac. Co.*, post, p. 1402, note 2.



lar 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.<sup>4</sup>

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?

<sup>4</sup> When a case is brought or removed into a federal court before trial upon the ground of a single federal question, which, at an early stage in the proceedings, is decided against the party invoking the court's jurisdiction, jurisdiction is still retained to render judgment upon all other questions in the case. *Omaha Horse Ry. v. Cable Tramway Co.* (C. C.) 22 Fed. 727 (1887); *So. Pac. Ry. v. California*, 118 U. S. 109, 112, 113, 6 Sup. Ct. 993, 30 L. Ed. 103 (1886). But the federal question alleged to exist must really involve a substantial controversy of this character. *Id.* If it is frivolous or already clearly foreclosed by decisions the case will be dismissed. *Shreveport v. Cole*, 129 U. S. 36, 9 Sup. Ct. 210, 32 L. Ed. 589 (1889); Book 51 (L. Ed.) 231-234, note (cases); *Judic. Act 1911*, § 37. As to how doubtful a question must be to involve a genuine controversy, see *L. & N. Ry. v. Melton*, 218 U. S. 36, 49, 50, 30 Sup. Ct. 676, 54 L. Ed. 921 (1910). The same test is applied to cases taken to the Supreme Court on writ of error from state courts after judgment. *Id.*; *Wilson v. North Carolina*, 169 U. S. 586, 595, 18 Sup. Ct. 435, 42 L. Ed. 865 (1898). The federal Judiciary acts relating to the latter cases have always confined the Supreme Court to the examination of the federal questions only, in the case. *Murdock v. Memphis*, 20 Wall. 590, 22 L. Ed. 429 (1875). See *New Orleans Waterworks Co. v. La. Sugar Co.*, ante, at p. 790, and note 2, for an illustration of the mode in which cases containing both state and federal questions are dealt with under this jurisdiction. As to whether the federal *appellate* jurisdiction may constitutionally be extended to the entire case, or not, if it contains a single federal question, as the *original* jurisdiction may, see the argument of B. R. Curtis in *Murdock v. Memphis*, 22 L. Ed. (U. S.) 435, 436.

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 defense, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, 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.<sup>5</sup>

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

<sup>5</sup> Accord (federal corporations): *Pacific Ry. Removal Cases*, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319 (1885) (railroads) [compare *Oregon, etc., Ry. v. Skottowe*, 162 U. S. 490, 16 Sup. Ct. 869, 40 L. Ed. 1048 (1896) (under later statute); and *Texas, etc., Ry. v. Cody*, 166 U. S. 606, 17 Sup. Ct. 703, 41 L. Ed. 1132 (1897)]; *Butler v. Nat. Home*, 144 U. S. 64, 12 Sup. Ct. 581, 36 L. Ed. 346 (1892) (soldiers' home); *Sup. Lodge K. of P. v. Kalinski*, 163 U. S. 289, 16 Sup. Ct. 1047, 41 L. Ed. 163 (1896) (insurance company domiciled in District of Columbia). See *Matter of Dunn*, 212 U. S. 374, 29 Sup. Ct. 299,

THE MAYOR v. COOPER (1868) 6 Wall. 247, 251-253, 18 L. Ed. 851, Mr. Justice SWAYNE:

"How jurisdiction shall be acquired by the inferior courts, whether it shall be original or appellate, or original in part and appellate in part, and the manner of procedure in its exercise after it has been acquired, are not prescribed [by the Constitution]. \* \* \*

"As regards all courts of the United States inferior to [the Supreme Court], two things are necessary to create jurisdiction, whether orig-

53 L. Ed. 538 (1909). So also all congressional legislation for the District of Columbia, even though of a local character. *Cohens v. Virginia*, 6 Wheat. 264, 423 ff., 5 L. Ed. 257 (1821).

"So far as the judgment of the state court against the validity of an authority set up by the defendants under the United States necessarily involves the decision of a question of law, it must be reviewed by this court, whether that question depends upon the Constitution, laws, or treaties of the United States, or upon the local law, or upon principles of general jurisprudence. For instance, if a marshal of the United States takes personal property upon attachment on mesne process issued by a court of the United States, and is sued in an action of trespass in a state court by one claiming title in the property, and sets up his authority under the United States, and judgment is rendered against him in the highest court of the state, he may bring the case by writ of error to this court; and as his justification depends upon the question whether the title to the property was in the defendant in attachment or in the plaintiff in the action of trespass, this court, upon the writ of error, has the power to decide that question, so far as it is one of law, even if it depends upon local law or upon general principles. *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257 (1866); *Etheridge v. Sperry*, 139 U. S. 266, 11 Sup. Ct. 565, 35 L. Ed. 171 (1891); *Boek v. Perkins*, 139 U. S. 628, 11 Sup. Ct. 677, 35 L. Ed. 314 (1891)."—*Stanley v. Schwalby*, 162 U. S. 255, 278, 279, 40 L. Ed. 960 (1896) by Gray, J.

Accord: Suits by or against a *federal officer* in his official character, *Son-nenthell v. Christian, etc., Co.*, 172 U. S. 401, 404, 405, 19 Sup. Ct. 233, 43 L. Ed. 492 (1899); *Auten v. U. S. Bank*, 174 U. S. 125, 140, 141, 19 Sup. Ct. 628, 43 L. Ed. 920 (1899); same, of a *receiver appointed by a federal court*, *Tex. & Pac. Ry. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829 (1892) (federal corporation); *Milwaukee, etc., Ry. v. Soutter*, 2 Wall. 609, 17 L. Ed. 886 (1865) (state corporation); *McNulta v. Lochridge*, 141 U. S. 327, 331, 12 Sup. Ct. 11, 35 L. Ed. 796 (1891) (same); *Ex parte Tyler*, 149 U. S. 161, 13 Sup. Ct. 785, 37 L. Ed. 689 (1893) (same) [now changed by statute, *Gableman v. Peoria, etc., Ry.*, 179 U. S. 335, 21 Sup. Ct. 171, 45 L. Ed. 220 (1900)]; same, of a *federal assignee in bankruptcy*, *McKenna v. Simpson*, 129 U. S. 506, 510, 511, 9 Sup. Ct. 365, 32 L. Ed. 771 (1889) [under present statutes, if federal officers choose to sue in state courts they may lose federal appellate rights except upon actual federal controversies in suit, *Id.*; *Capital Bank v. First Nat. Bank*, 172 U. S. 425, 19 Sup. Ct. 202, 43 L. Ed. 502 (1899)]; suits on *bonds given by federal officers or in proceedings in federal courts*, *Feibelman v. Packard*, 109 U. S. 421, 3 Sup. Ct. 289, 27 L. Ed. 981 (1883); *Tulloek v. Mulvane*, 184 U. S. 497, 22 Sup. Ct. 372, 46 L. Ed. 657 (1902); *rights of suit given by federal law*, *Rouse v. Hornsby*, 161 U. S. 588, 590, 16 Sup. Ct. 610, 40 L. Ed. 817 (1896) [though of course Congress may permit or require these to be brought in the state courts, *Blackburn v. Portland, etc., Co.*, 175 U. S. 571, 20 Sup. Ct. 222, 44 L. Ed. 276 (1900); *Judic. Act 1911, § 28*, last proviso].

Congress may probably fix the period of limitation, even in the state courts, for any action that it could require to be brought in a federal court. *Stewart v. Kahn*, 11 Wall. 493, 20 L. Ed. 176 (1871); *Mitchell v. Clark*, 110 U. S. 633, 4 Sup. Ct. 170, 312, 28 L. Ed. 279 (1884).

inal or appellate. The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it. Their concurrence is necessary to vest it.<sup>1</sup> It is the duty of Congress to act for that purpose up to the limits of the granted power. They may fall short of it, but cannot exceed it. To the extent that such action is not taken, the power lies dormant. It can be brought into activity in no other way. Jurisdiction, original or appellate, alike comprehensive in either case, may be given. The constitutional boundary line of both is the same. Every variety and form of appellate jurisdiction within the sphere of the power, extending as well to the courts of the states as to those of the nation, is permitted. There is no distinction in this respect between civil and criminal causes. Both are within its scope. Nor is it any objection that questions are involved which are not all of a federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient. That element is decisive upon the subject of jurisdiction. 'A case in law or equity consists of the right of the one party as well as the other, and may be truly said to arise under the Constitution or a law of the United States whenever its correct decision depends upon the right construction of either.'

"The rule applies with equal force where the plaintiff claims a right, and where the defendant claims protection, by virtue of one or the other. *Martin v. Hunter's Lessee*, 1 Wheat. 314, 4 L. Ed. 97 (1816); *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257 (1821); *Osborn v. Bank of United States*, 9 Wheat. 821, 6 L. Ed. 204 (1824)."<sup>2</sup>

<sup>1</sup> The original jurisdiction of the Supreme Court is the only jurisdiction possessed by a federal court of which Congress cannot deprive it. *U. S. v. Hudson*, 7 Cranch, 32, 33, 3 L. Ed. 259 (1812); ante, p. 1323, note to *Martin v. Hunter*. In the absence of congressional regulation of the mode of procedure in exercising this jurisdiction, the Supreme Court may regulate it by its own rules. *Florida v. Georgia*, 17 How. 478, 15 L. Ed. 181 (1855). Quære as to a similar power over its appellate procedure? See *Ex parte McCordle*, 7 Wall. 506, 513, 19 L. Ed. 264 (1869).

<sup>2</sup> The federal circuit courts in a state are not technically *inferior* courts in the common-law sense, *McCormick v. Sullivan*, 10 Wheat. 192, 6 L. Ed. 300 (1825); *Turner v. Bank of No. Am.*, 4 Dall. S. 1 L. Ed. 718 (1799); though, being of *limited* jurisdiction, their jurisdiction must affirmatively appear on their records in every stage of a case, *Id.*; *Börs v. Preston*, 111 U. S. 252, 4 Sup. Ct. 407, 28 L. Ed. 419 (1884). A similar affirmative showing of jurisdiction must be made in cases taken on writs of error from state courts to the federal Supreme Court. *Detroit City Ry. v. Gutbard*, 114 U. S. 133, 5 Sup. Ct. 811, 29 L. Ed. 118 (1885). As to what constitutes the "record" under former and present Judiciary Acts, see *Armstrong v. Athens Co.*, 16 Pet. 281, 10 L. Ed. 965 (1842); *Murdock v. Memphis*, 20 Wall. 590, 22 L. Ed. 429 (1875).



PROVIDENT SAVINGS LIFE ASSUR. SOC. v. FORD (1885) 114 U. S. 635, 641, 642, 5 Sup. Ct. 1104, 1107, 29 L. Ed. 261, Mr. Justice BRADLEY (denying that a suit in a state court upon a judgment obtained in a federal court could necessarily be removed to a federal court under the Act of 1875):

"It is suggested, however, that a suit on a judgment recovered in a United States court is necessarily a suit arising under the laws of the United States, as much so as if the plaintiff or defendant were a corporation of the United States; and hence that such a suit is removable under the act of March 3, 1875. \* \* \*

"What is a judgment, but a security of record showing a debt due from one person to another? It is as much a mere security as a treasury note, or a bond of the United States. If A. brings an action against B., trover or otherwise, for the withholding of such securities, it is not therefore a case arising under the laws of the United States, although the whole value of the securities depends upon the fact of their being the obligations of the United States. So, if A. have title to land by patent of the United States and brings an action against B. for trespass or waste, committed by cutting timber, or by mining and carrying away precious ores, or the like, it is not therefore a case arising under the laws of the United States. It is simply the case of an ordinary right of property sought to be enforced. A suit on a judgment is nothing more, unless some question is raised in the case (as might be raised in any of the cases specified) distinctly involving the laws of the United States,—such a question, for example, as was ineffectually attempted to be raised by the defendant in this case. If such a question were raised, then it is conceded it would be a case arising under the laws of the United States.

"These considerations show a wide distinction, as it seems to us, between the case of a suit merely on a judgment of a United States court, and that of a suit by or against a United States corporation: which latter, according to the masterly analysis of Chief Justice Marshall in *Osborn v. Bank*, 9 Wheat. 738, 6 L. Ed. 204, is pervaded from its origin to its close by United States law and United States authority."<sup>1</sup>

<sup>1</sup> Litigation over the ownership of property originally acquired from or under authority of the United States does not necessarily involve a federal question, if there is no controversy regarding such acquisition or authority or their legal effect. *Hastings v. Jackson*, 112 U. S. 233, 5 Sup. Ct. 113, 28 L. Ed. 712 (1884) (land titles); *Blackburn v. Portland Co.*, 175 U. S. 571, 579-581, 20 Sup. Ct. 222, 44 L. Ed. 276 (1900) (same—cases); *Shoshone Co. v. Rutter*, 177 U. S. 505, 20 Sup. Ct. 726, 44 L. Ed. 864 (1900) (same); *Leyson v. Davis*, 170 U. S. 36, 18 Sup. Ct. 500, 42 L. Ed. 939 (1898) (national bank stock); *Avery v. Popper*, 179 U. S. 305, 21 Sup. Ct. 94, 45 L. Ed. 203 (1900) (property bought at federal execution sale). So, questions regarding the title of property prior to its alleged acquisition under the United States. *Cramer v. Wilson*, 195 U. S. 408, 25 Sup. Ct. 91, 49 L. Ed. 256 (1904). So, questions regarding contracts concerning property or rights acquired under the United States. *Le Sasser v. Kennedy*, 123 U. S. 521, 8 Sup. Ct. 244, 31 L. Ed. 262

## HOOE v. JAMIESON.

(Supreme Court of the United States, 1897. 166 U. S. 395, 17 Sup. Ct. 596, 41 L. Ed. 1049.)

[Error to the federal Circuit Court for the Western District of Wisconsin to review the judgment stated below.]

Mr. Chief Justice FULLER. This was an action of ejectment, brought in the circuit court of the United States for the Western district of Wisconsin, by the complaint in which plaintiffs in error alleged that they resided in and were citizens of the city of Washington, D. C., and that defendants all resided in and were citizens of the state of Wisconsin. Defendants moved to dismiss the action on the ground that the circuit court had no jurisdiction, as the controversy was not between citizens of different states. The circuit court ordered that the action be dismissed unless plaintiffs within five days thereafter should so amend their complaint as to allege the necessary jurisdictional facts. Plaintiffs then moved for leave to amend their complaint by averring that three of them were, when the suit was commenced, and continued to be, citizens of the District of Columbia, but that one of them was a citizen of the state of Minnesota, and that each was the owner of an undivided one-fourth of the lands and premises described in the complaint, and that they severally claimed damages and demanded judgment. This motion was denied, and the action dismissed. \* \* \*

The judicial power extends under the Constitution to controversies between citizens of different states, and the judiciary act of 1789 provided, as does the act of March 3, 1887, as corrected by the act of August 13, 1888 (25 Stat. 433, c. 866), that the circuit courts of the United States should have original cognizance of all suits of a civil nature at common law or in equity in which there should be a controversy between citizens of different states.

We see no reason for arriving at any other conclusion than that

(1887) (national bank stock); *Marsh v. Nichols, etc., Co.*, 140 U. S. 344, 11 Sup. Ct. 798, 35 L. Ed. 413 (1891) (patent rights).

Most or all of the decisions denying the jurisdiction of the federal courts have been based upon the construction of the various federal Judiciary Acts, the principal ones of which were enacted in 1789, 1867, 1875, 1887-88, 1891, and 1911. All of them have restricted the federal jurisdiction in many particulars far within its constitutional limits, and no act regulating the jurisdiction of the lower federal courts or the appellate jurisdiction of the Supreme Court has ever been declared invalid. The constitutional limits of such legislation have therefore been little judicially discussed.

The present Federal Judicial Code (36 Stat. 1087 [U. S. Comp. St. Supp. 1911, p. 128]) governing the organization, jurisdiction, and (in part) the procedure of the federal courts was enacted March 3, 1911, and took effect January 1, 1912. Its sections of general importance dealing with jurisdiction and related matters are as follows: District Courts—§§ 24-68; Circuit Courts of Appeal—§§ 128-135; Commerce Court—§§ 206-214; Supreme Court—§§ 233-253; General Provisions—§§ 256, 261-271.

The new federal Rules of Equity Practice, promulgated by the Supreme Court on November 4, 1912, and effective February 1, 1913, appear in 226 U. S. 629-673, 33 Sup. Ct. v-xlii.

announced by Chief Justice Marshall in *Hepburn v. Ellzey*, 2 Cranch, 445, 2 L. Ed. 332 (Feb. term, 1805), "that the members of the American confederacy only are the states contemplated in the Constitution"; that the District of Columbia is not a state within the meaning of that instrument, and that the courts of the United States have no jurisdiction of cases between citizens of the District of Columbia and citizens of a state.

In *Strawbridge v. Curtiss*, 3 Cranch, 267, 2 L. Ed. 435, it was held that, if there be two or more joint plaintiffs and two or more joint defendants, each of the plaintiffs must be capable of suing each of the defendants in the courts of the United States in order to support the jurisdiction; and in *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635, *Strawbridge v. Curtiss* was followed, and it was decided that under the acts of 1887 and 1888 the circuit court has not jurisdiction, on the ground of diverse citizenship, if there are two plaintiffs to the action who are citizens of and residents in different states and the defendant is a citizen of and resident in a third state, and the action is brought in the state in which one of the plaintiffs resides.

*New Orleans v. Winter*, 1 Wheat. 91, 4 L. Ed. 44, was an action in ejectment, brought by two plaintiffs claiming as joint heirs, and it appeared that one of them was a citizen of the state of Kentucky, and that the other was a citizen of the territory of Mississippi. It was held that jurisdiction could not be maintained, and Chief Justice Marshall, delivering the opinion of the court, said: "Gabriel Winter, then, being a citizen of the Mississippi territory, was incapable of maintaining a suit alone in the circuit court of Louisiana. Is his case mended by being associated with others who are capable of suing in that court? In the case of *Strawbridge v. Curtiss* it was decided that, where a joint interest is prosecuted, the jurisdiction cannot be sustained unless each individual be entitled to claim that jurisdiction. In this case it has been doubted whether the parties might elect to sue jointly or severally. However this may be, having elected to sue jointly, the court is incapable of distinguishing their case, so far as respects jurisdiction, from one in which they were compelled to unite."

In *Iron Co. v. Stone*, 121 U. S. 631, 7 Sup. Ct. 1010, 30 L. Ed. 1020, the interests of the parties being separate and distinct, but depending on one contract, plaintiffs elected to sue on the common obligation, and the case was dismissed under the rule in *New Orleans v. Winter*.

\* \* \*

Many other decisions are to the same effect, and in the late case of *Merchants' Cotton-Press & Storage Co. v. Insurance Co. of North America*, 151 U. S. 368, 384, 14 Sup. Ct. 367, 372, 38 L. Ed. 195, the rule in *New Orleans v. Winter* was applied, and it was held that "the voluntary joinder of the parties has the same effect, for purposes of jurisdiction, as if they had been compelled to unite."

In the case at bar no application was made for leave to discontinue

as to the three plaintiffs who were citizens of the District of Columbia, and to amend the complaint and proceed with the cause in favor of that one of the plaintiffs alleged to be a citizen of Minnesota. Jurisdiction of the case as to four plaintiffs could not be maintained on the theory that when the trial terminated it might be retained as to one. Judgment affirmed.<sup>1</sup>

### OHIO & M. R. CO. v. WHEELER.

(Supreme Court of United States, 1862. 1 Black, 286, 17 L. Ed. 130.)

[Certificate of division of opinion from the federal Circuit Court for Indiana in a suit upon a stock subscription stated below.]

Mr. Chief Justice TANEY. \* \* \* The declaration states that the plaintiffs are "a corporation, created by the laws of the states of Indiana and Ohio, having its principal place of business in Cincinnati, in the state of Ohio; that the corporation is a citizen of the state of Ohio, and Henry D. Wheeler, the defendant, is a citizen of the state of Indiana." The defendant pleaded to the jurisdiction of the court,

<sup>1</sup> Where diverse citizenship has been the ground of federal jurisdiction, the federal statutes have always been construed to require *all* of the *parties plaintiff* to an indivisible controversy to be citizens of different states from *each* of the *parties defendant*. *California v. So. Pac. Co.*, 157 U. S. 229, 259, 260, 15 Sup. Ct. 591, 39 L. Ed. 683 (1895); *Cochran v. Montgomery Co.*, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. Ed. 182, 4 Ann. Cas. 451 (1900). Whether Congress could confer a jurisdiction where some of the parties on each side were citizens of the same state has never been decided. *California v. So. Pac. Co.*, above, at pp. 260, 261.

In applying the above rule the parties are aligned according to their real interests in the controversy and not according to their formal relation to it on the pleadings. Removal Cases, 100 U. S. 457, 468, 469, 25 L. Ed. 593 (1879); *Wilson v. Oswego Twp.*, 151 U. S. 56, 14 Sup. Ct. 259, 38 L. Ed. 70 (1894) (cases). The fraudulent joinder of an improper defendant will not prevent a removal to the federal courts by the real defendant, *Wecker v. Nat., etc., Co.*, 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, 9 Ann. Cas. 757 (1907); but, if plaintiff really has a cause of action against several defendants jointly he may join them in a single suit, though the object and effect of this be to prevent part of them from removing the case to a federal court, *Chic., etc., Ry. v. Willard*, 220 U. S. 413, 31 Sup. Ct. 460, 55 L. Ed. 521 (1911) (tort action against railroad, joining negligent employé); *Chic., etc., Ry. v. Schwyhart*, 227 U. S. 184, 33 Sup. Ct. 250, 57 L. Ed. — (1913) (same).

The transfer of an interest or a change of domicile for the sole purpose of giving jurisdiction to the federal courts does not defeat the jurisdiction, if the transfer or change is genuine and absolute; otherwise it does. *Morris v. Gilmer*, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. Ed. 690 (1889); *Crawford v. Neal*, 144 U. S. 585, 12 Sup. Ct. 759, 36 L. Ed. 552 (1892).

If a party has a genuine legal interest in a cause of action his motive in seeking the federal courts is immaterial, *Blair v. Chicago*, 201 U. S. 400, 448, 449, 26 Sup. Ct. 427, 50 L. Ed. 801 (1906) (cases); even though he be indemnified against liability for costs and counsel fees by other interested parties not themselves eligible to the federal courts, *Wheeler v. Denver*, 229 U. S. 342, 33 Sup. Ct. 842, 57 L. Ed. — (1913), distinguishing *Cashman v. Amador Canal Co.*, 118 U. S. 58, 6 Sup. Ct. 926, 30 L. Ed. 72 (1886). Compare *New Hampshire v. Louisiana*, 108 U. S. 76, 2 Sup. Ct. 176, 27 L. Ed. 656 (1883). See, also, *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827 (1882) (collusive stockholders' bills); *Judic. Act 1911, § 37* (U. S. Comp. St. Supp. 1911, p. 146).

averring that he was a citizen of the state of Indiana, and that the plaintiffs were a body politic and corporate, created, organized, and existing in the same state, under and by virtue of an act of assembly of the state. The plaintiffs demurred to this plea; and the judges being opposed in opinion upon the question whether their court had jurisdiction, ordered their division of opinion to be certified to this court.

A brief reference to cases heretofore decided will show how the question must be answered. And, as the subject was fully considered and discussed in the cases to which we are about to refer, it is unnecessary to state here the principles and rules of law which have heretofore governed the decisions of the court, and must decide the question now before us.

In the case of the *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. Ed. 274, the court held that the artificial person or legal entity known to the common law as a corporation can have no legal existence out of the bounds of the sovereignty by which it is created; that it exists only in contemplation of law, and by force of law; and where that law ceases to operate, the corporation can have no existence. It must dwell in the place of its creation.

It had been decided, in the case of *Bank of U. S. v. Devcaux*, 5 Cranch, 61, 3 L. Ed. 38, long before the case of *Bank of Augusta v. Earle* came before the court, that a corporation is not a citizen, within the meaning of the Constitution of the United States, and cannot maintain a suit in a court of the United States against the citizen of a different state from that by which it was chartered, unless the persons who compose the corporate body are all citizens of that state. But, if that be the case, they may sue by their corporate name, averring the citizenship of all of the members; and such a suit would be regarded as the joint suit of the individual persons, united together in the corporate body, and acting under the name conferred upon them, for the more convenient transaction of business, and consequently entitled to maintain a suit in the courts of the United States against a citizen of another state.<sup>1</sup>

<sup>1</sup> In this case Marshall, C. J., said (5 Cranch, 87, 88): "However true the fact may be that the tribunals of the state will administer justice as impartially as those of the nation to parties of every description, it is not less true that the Constitution itself either entertains apprehension on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and citizens, or between citizens of different states. Aliens or citizens of different states are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provision because they were allowed to sue by a corporate name. That name, indeed, cannot be an alien or a citizen, but the persons whom it represents may be the one or the other, and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate names, for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially the parties in such a case, where the members of the corporation are aliens or citizens of a different state from



This question, as to the character of a corporation, and the jurisdiction of the courts of the United States, in cases wherein they were sued, or brought suit in their corporate name, was again brought before the court in the case of *Louisville, Cincinnati & Charleston Railroad Company v. Letson*, reported in 2 How. 497, 11 L. Ed. 353, and the court in that case, upon full consideration, decided, that where a corporation is created by the laws of a state, the legal presumption is, that its members are citizens of the state in which alone the corporate body has a legal existence; and that a suit by or against a corporation, in its corporate name, must be presumed to be a suit by or against citizens of the state which created the corporate body; and that no averment or evidence to the contrary is admissible, for the purposes of withdrawing the suit from the jurisdiction of a court of the United States.<sup>2</sup>

The question, however, was felt by this court to be one of great difficulty and delicacy; and it was again argued and maturely considered in the case of *Marshall v. Baltimore & Ohio Railroad Company*, 16 How. 314, 14 L. Ed. 953, as will appear by the report, and the decision in the case of *The Louisville, Cincinnati, and Charleston Railroad Company v. Letson* reaffirmed.<sup>3</sup> And again, in the case of *Covington Drawbridge Company v. Shepherd* and others, 20 How. 232, 15 L. Ed. 896, the same question of jurisdiction was presented, and the rule laid down in the two last-mentioned cases fully maintained. After these successive decisions, the law upon this subject must be regarded as settled; and a suit by or against a corporation in its corporate name, as a suit by or against citizens of the state which created it.

It follows from these decisions that this suit in the corporate name is, in contemplation of law, the suit of the individual persons who compose it, and must, therefore, be regarded and treated as a suit in which citizens of Ohio and Indiana are joined as plaintiffs in an action against a citizen of the last-mentioned state. Such an action can-

the opposite party, come within the spirit and terms of the jurisdiction conferred by the Constitution on the national tribunals."

<sup>2</sup> The purpose and limits of this presumption are discussed in *Doctor v. Harrington*, 196 U. S. 579, 25 Sup. Ct. 355, 49 L. Ed. 606 (1905) (suit by New Jersey stockholder against his New York corporation).

<sup>3</sup> In this case (an individual plaintiff suing a corporation of another state in the federal courts), Grier, J., said (16 How. at 328): "Nor is it reasonable that representatives of numerous unknown and ever-changing associates should be permitted to allege the different citizenship of one or more of these stockholders, in order to defeat the plaintiff's privilege. \* \* \* The persons who act under these faculties, and use this corporate name, may be justly presumed to be resident in the state which is the necessary habitat of the corporation, and where alone they can be made subject to suit; and should be estopped in equity from averring a different domicile as against those who are compelled to seek them there, and can find them there and nowhere else. If it were otherwise it would be in the power of every corporation, by electing a single director residing in a different state, to deprive citizens of other states, with whom they have controversies, of this constitutional privilege, and compel them to resort to state tribunals in cases in which, of all others, such privilege may be considered most valuable."

not be maintained in a court of the United States, where jurisdiction of the case depends altogether on the citizenship of the parties. And, in such a suit, it can make no difference whether the plaintiffs sue in their own proper names, or by the corporate name and style by which they are described.

The averments in the declaration would seem to imply that the plaintiffs claim to have been created a corporate body, and to have been endowed with the capacities and faculties it possesses by the co-operating legislation of the two states, and to be one and the same legal being in both states. If this were the case, it would not affect the question of jurisdiction in this suit. But such a corporation can have no legal existence upon the principles of the common law, or under the decision of this court in the case of the *Bank of Augusta v. Earle*, before referred to.

It is true that a corporation by the name and style of the plaintiffs appears to have been chartered by the states of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects, and it is spoken of in the laws of the states as one corporate body, exercising the same powers and fulfilling the same duties in both states. Yet it has no legal existence in either state, except by the law of the state. And neither state could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be composed of and represent, under the corporate name, the same natural persons. But the legal entity or person, which exists by force of law, can have no existence beyond the limits of the state or sovereignty which brings it into life and endues it with its faculties and powers. The President and Directors of the Ohio and Mississippi Railroad Company is, therefore, a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio, and they cannot be joined in a suit as one and the same plaintiff, nor maintain a suit in that character against a citizen of Ohio or Indiana in a circuit court of the United States.

\* \* \*

Answer so certified.<sup>4</sup>

<sup>4</sup> For the purposes of federal jurisdiction, municipal corporations of a state are also its citizens, *Mercer Co. v. Cowles*, 7 Wall. 118, 19 L. Ed. 86 (1869); but not the state itself, though it may be a political corporation, *Postal Teleg. Co. v. Alabama*, 155 U. S. 482, 15 Sup. Ct. 192, 39 L. Ed. 231 (1894); nor various associations, boards, or joint-stock companies, organized under state laws with some of the attributes of corporations, *Thomas v. Board of Trustees*, 195 U. S. 207, 25 Sup. Ct. 24, 49 L. Ed. 160 (1904) (cases).

A territorial corporation becomes a citizen of that state when it is admitted to the Union, *Kansas Pac. Ry. v. Atchison, etc., Ry.*, 112 U. S. 414, 5 Sup. Ct. 208, 28 L. Ed. 794 (1884); *Shulthis v. McDougal*, 225 U. S. 561, 32 Sup. Ct. 704, 56 L. Ed. 1205 (1912); and a Spanish corporation doing business only in Porto Rico became a citizen of that dependency upon its cession, *Martinez v. La Asociacion, etc., de Ponce*, 213 U. S. 20, 29 Sup. Ct. 327, 53 L. Ed. 679 (1909).

As to the citizenship of corporations of one state which voluntarily or compulsorily reincorporate also in other states, see *St. L., etc., Ry. v. James*, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802 (1896); *So. Ry. v. Allison*, 190 U.

## SECTION 2.—ADMINISTRATION OF STATE LAW

## 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, establishing 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.

S. 326, 23 Sup. Ct. 713, 47 L. Ed. 1078 (1903); *Patch v. Wabash Ry.*, 207 U. S. 277, 28 Sup. Ct. 80, 52 L. Ed. 204, 12 Ann. Cas. 518 (1907).

As to when the organization of a corporation and the transfer to it of property in litigation will be held a fraud upon the jurisdiction, see *Lehigh, etc., Co. v. Kelly*, 160 U. S. 327, 16 Sup. Ct. 307, 40 L. Ed. 444 (1895); *Miller & Lux v. East Side Co.*, 211 U. S. 293, 29 Sup. Ct. 111, 53 L. Ed. 189 (1908). Compare p. 1344, ante, note to *Hooe v. Jamieson*.

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,<sup>1</sup> 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 con-

<sup>1</sup> Accord (as to unwritten real property law): *Beaugard v. New Orleans*, 18 How. 497, 502, 15 L. Ed. 469 (1855); *Walker v. N. Mex.*, etc., Ry., 165 U. S. 593, 17 Sup. Ct. 421, 41 L. Ed. 837 (1897) (surface water); *St. Anthony Co. v. Board Water Com'rs*, 168 U. S. 349, 18 Sup. Ct. 157, 42 L. Ed. 497 (1897) (riparian rights); *De Vaughn v. Hutchinson*, 165 U. S. 566, 570, 17 Sup. Ct. 461, 41 L. Ed. 827 (1897) (rule in *Shelley's Case*), *Shiras, J.*, saying:

"It is a principle firmly established that to the law of the state in which the land is situated we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and other conveyances."

As to the distinction between cases where the construction of words in deeds or wills has become a settled rule of property in a state, and those where particular devises have received individual constructions by state courts, see *Barber v. Pitts.*, etc., Ry., 166 U. S. 83, 99, 100, 17 Sup. Ct. 428, 41 L. Ed. 925 (1897).

struction 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,<sup>2</sup> 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;

<sup>2</sup> Accord: *Beauregard v. New Orleans*, 18 How. 497, 502, 15 L. Ed. 469 (1855); *Madisonville Co. v. St. Bernard Co.*, 196 U. S. 239, 255, 256, 25 Sup. Ct. 251, 49 L. Ed. 462 (1905), Harlan, J., saying:

"The original jurisdiction of the circuit courts, whatever may be ordained by state legislation, extends to suits in which there is a controversy between citizens of different states. The exercise by the circuit courts of the United States of the jurisdiction thus conferred upon them is pursuant to the supreme law of the land, and will not, in any proper sense, entrench upon the dignity, authority, or autonomy of the states; for each state, by accepting the Constitution, has agreed that the courts of the United States may exert whatever judicial power can be constitutionally conferred upon them. In the exercise of that power a circuit court of the United States, sitting within the limits of a state, and having jurisdiction of the parties, is, for every practical purpose, a court of that state. Its function, under such circumstances, is to enforce the rights of parties according to the law of the state, taking care, always, as the state courts must take care, not to infringe any right secured by the Constitution and the laws of the United States."



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,<sup>3</sup> 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.

<sup>3</sup> The federal courts will not necessarily follow a single state decision which appears inadvertent or not really to settle the local law. *Shelby v. Guy*, 11 Wheat. 361, 366-369, 6 L. Ed. 495 (1826); *Suydam v. Williamson*, 24 How. 427, 16 L. Ed. 742 (1861) (explaining *Williamson v. Berry*, 8 How. 495, 12 L. Ed. 1170 [1850]); *Mohr v. Manierre*, 101 U. S. 417, 25 L. Ed. 1052 (1880); *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428 (1901).

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 contents. 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.<sup>4</sup>

[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

<sup>4</sup> Accord (interpretation of state statutes or constitutions): *Elmendorf v. Taylor*, 10 Wheat. 152, 159, 160, 6 L. Ed. 289 (1825); *Leffingwell v. Warren*, 2 Black. 599, 17 L. Ed. 261 (1862); *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. Ed. 154 (1877) (existence of statute); *Union Bank v. Bank of Kansas City*, 136 U. S. 223, 10 Sup. Ct. 1013, 34 L. Ed. 341 (1890) (assignment for creditors); and particularly all questions as to the existence, powers, or liabilities of state municipalities, officers, or tribunals, *Clairborne Co. v. Brooks*, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470 (1884); *Norton v. Shelby Co.*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178 (1886); *Detroit v. Osborne*, 135 U. S. 492, 10 Sup. Ct. 1012, 34 L. Ed. 260 (1890). The dictum to the contrary in *Olcott v. Supervisors*, 16 Wall. 678, 21 L. Ed. 382 (1873) is clearly wrong, as is also what is said in *Williamson v. Berry*, 8 How. 495, 543, 12 L. Ed. 1170 (1850).

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 construc-

tion 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."<sup>1</sup>

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

<sup>1</sup> Accord (negotiable paper): *R. R. Co. v. Nat. Bank*, 102 U. S. 14, 26 L. Ed. 61 (1880); *Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. 704, 27 L. Ed. 424 (1883) (municipal bonds irregularly issued).

Other subjects, which have been held to be governed by principles of commercial law or of "general jurisprudence" upon which the federal courts exercise an independent judgment, are:

*Insurance*: *Carpenter v. Prov. Ins. Co.*, 16 Pet. 495, 511, 512, 10 L. Ed. 1044 (1842) (construction of fire policy); *Washburn Co. v. Reliance Co.*, 179 U. S. 1, 21 Sup. Ct. 1, 45 L. Ed. 49 (1900) (same—marine).

*Carriers*: *N. Y. C. Ry. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627 (1873) (contract exemption for negligent carriage invalid); *Liverpool, etc., Co. v. Phenix Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788 (1889) (same—in admiralty); *Myrick v. Mich. Cent. Ry.*, 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325 (1883) (construction of contract of carriage); *Balt. & O. Ry. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772 (1893) (liability in tort to employees—cases); *L. S., etc., Ry. v. Prentice*, 147 U. S. 101, 106, 13 Sup. Ct. 261, 37 L. Ed. 97 (1893) (liability to passenger for punitive damages), *Gray, J.*, saying: "This question, like others affecting the liability of a railroad corporation as a common carrier of goods or passengers, \* \* \* is a ques-

## BUCHER v. CHESHIRE R. CO.

(Supreme Court of United States, 1888. 125 U. S. 555, 8 Sup. Ct. 974, 21 L. Ed. 795.)

[Error to the federal Circuit Court for Massachusetts. Plaintiff sued to recover for injuries due to defendant's negligence while plaintiff was traveling on defendant's road on Sunday in violation of a state statute. Numerous Massachusetts decisions held plaintiff's own illegal conduct a defence in such cases. The trial court so instructed the jury, and from a judgment for defendant this writ was taken.]

Mr. Justice MILLER. \* \* \* If the proposition, as established by the repeated decisions of the highest court of that state, were one which we ourselves believed to be a sound one, there would be no difficulty in agreeing with that court, and, consequently, affirming the ruling of the circuit judge in the present case. But without entering into the argument of that subject, we are bound to say that we do not feel satisfied, that upon any general principles of law by which the courts that have adopted the common-law system are governed, that this is a true exposition of that law. \* \* \*

The question then arises, how far is this court bound to follow the decisions of the Massachusetts supreme court on that subject? The Congress of the United States, in the act by which the federal courts were organized, enacted that "the laws of the several states, except where the Constitution, treaties or statutes of the United States 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." Rev. St. § 721 (U. S. Comp. St. 1901, p. 581); Judiciary Act, § 34, 1 U. S. St. at Large, 92. This statute has been often the subject of construction in this court, and its opinions have not always

tion not of local law, but of general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the several states."

*International law and conflict of laws:* Dred Scott v. Sandford, 19 How. 393, 603, 15 L. Ed. 691 (1857) (status of former slave), by Curtis, J., in individual opinion; Huntington v. Attrill, 146 U. S. 657, 683, 13 Sup. Ct. 221, 36 L. Ed. 1123 (1892) (extraterritorial enforcement of penal laws). Compare the reasoning in Oden v. Saunders, ante, at pp. 801-804, regarding enforcement of local bankruptcy laws in courts of other jurisdictions.

Chicago v. Robbins, 2 Black, 418, 17 L. Ed. 298 (1863) (responsibility of landowner for dangerous area abutting on highway) would probably not be followed to-day. So, also, Oleott v. Supervisors, 16 Wall. 678, 21 L. Ed. 382 (1873) (public use for taxation under state constitution).

State statutes changing any of the above rules of commercial or general jurisprudence are, however, binding upon the federal courts. Phipps v. Harding, 70 Fed. 468, 17 C. C. A. 203, 30 L. R. A. 513 (1895) (negotiable paper—discussing cases); Moses v. Nat. Bank, 149 U. S. 298, 13 Sup. Ct. 900, 37 L. Ed. 743 (1893) (same); N. Y. Ins. Co. v. Cravens, 178 U. S. 389, 20 Sup. Ct. 962, 41 L. Ed. 1116 (1900) (insurance policy); Chic., etc., Ry. v. Solan, 169 U. S. 133, 136, 137, 18 Sup. Ct. 289, 42 L. Ed. 688 (1898) (liability of carrier).

Should a federal court follow a variant local construction of a state statute intended to make uniform the various state laws of negotiable paper? Forrest v. Safety Co. (C. C.) 174 Fed. 345, 348 (1909).



been expressed in language that is entirely harmonious. What are the laws of the several states which are to be regarded "as rules of decision in trials at common law," is a subject which has not been ascertained and defined with that uniformity and precision desirable in a matter of such great importance.

The language of the statute limits its application to cases of trials at common law. There is, therefore, nothing in the section which requires it to be applied to proceedings in equity,<sup>1</sup> or in admiralty; nor is it applicable to criminal offenses against the United States (see *U. S. v. Reid*, 12 How. 361, 13 L. Ed. 1023), or where the Constitution, treaties, or statutes of the United States require other rules of decision. But with these, and some other exceptions which will be referred to presently, it must be admitted that it does provide that the laws of the several states shall be received in the courts of the United States, in cases where they apply, as the rules of decision in trials at common law. It has been held by this court that the decisions of the highest court of the state in regard to the validity or meaning of the Constitution of that state, or its statutes, are to be considered as the law of that state, within the requirement of this section. \* \* \*

It is also well settled that where a course of decisions, whether founded upon statutes or not, have become rules of property as laid down by the highest courts of the state, by which is meant those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereto, they are to be treated as laws of that state by the federal courts. The principle also applies to the rules of evidence.<sup>2</sup> In *Ex parte Fisk*, 113 U. S. 720, 5 Sup. Ct. 724, 28 L. Ed. 1117, the court said: "It has been often decided in this court that in actions at law in the courts of the United States the

<sup>1</sup> The federal courts follow their own interpretation of the general unwritten rules of equity, *Neves v. Scott*, 13 How. 268, 14 L. Ed. 140 (1851); and, so far as procedure and the form of remedies are concerned, even state statutes are not compulsive upon this jurisdiction as it exists under present acts of Congress, *Miss. Mills v. Cohn*, 150 U. S. 202, 14 Sup. Ct. 75, 37 L. Ed. 1052 (1893); *Kirby v. Lake Shore, etc., Ry.*, 120 U. S. 130, 7 Sup. Ct. 430, 30 L. Ed. 569 (1887) (statute of limitations against concealed fraud).

But equity rules which are really substantive rules of right or property are treated by the federal courts like other rules of property established by state statutes or decisions. *Fisher v. Shropshire*, 147 U. S. 133, 13 Sup. Ct. 201, 37 L. Ed. 109 (1893) (vendor's lien); *Dupree v. Mansur*, 214 U. S. 161, 29 Sup. Ct. 548, 53 L. Ed. 950 (1909) (bar of debt releasing security); [but see *James v. Gray*, 131 Fed. 401, 65 C. C. A. 385 (1904), annotated 1 L. R. A. (N. S.) 321]. And state statutes altering them will be enforced by the federal courts. *Mo., etc., Tr. Co. v. Krumseig*, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474 (1899).

<sup>2</sup> See *Camden, etc., Ry. v. Stetson*, 177 U. S. 172, 20 Sup. Ct. 617, 44 L. Ed. 721 (1900). But Congress has full power to regulate all matters touching the procedure of the federal courts. *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253 (1825) (process and execution); *Conn. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. Ed. 251 (1877) (evidence and competency of witnesses); *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117 (1885) (same, and rules of practice); *Mitchell v. Clark*, 110 U. S. 633, 4 Sup. Ct. 170, 312, 28 L. Ed. 279 (1884) (limitation of actions).

rules of evidence and the law of evidence generally of the state prevail in those courts." See, also, *Wilcox v. Hunt*, 13 Pet. 378, 10 L. Ed. 209; *Ryan v. Bindley*, 1 Wall. 66, 17 L. Ed. 559.

There are undoubtedly exceptions to the principle that the decisions of the state courts, as to what are the laws of that state, are in all cases binding upon the federal courts. The case of *Swift v. Tyson*, 16 Pct. 1, 10 L. Ed. 865, which has been often followed, established the principle that if this court took a different view of what the law was in certain classes of cases which ought to be governed by the general principles of commercial law, from the state court, it was not bound to follow the latter. There is, therefore, a large field of jurisprudence left in which the question of how far the decisions of state courts constitute the law of those states is an embarrassing one.

There is no common law of the United States,<sup>3</sup> and yet the main body of the rights of the people of this country rest upon and are governed by principles derived from the common law of England, and established as the laws of the different states. Each state of the Union may have its local usages, customs, and common law. *Wheaton v. Peters*, 8 Pet. 591, 8 L. Ed. 1055; *Pennsylvania v. Bridge Co.*, 13 How. 518, 14 L. Ed. 249. When, therefore, in an ordinary trial in an action at law we speak of the common law we refer to the law of the state as it has been adopted by statute or recognized by the courts as the foundation of legal rights. It is in regard to decisions made by the state courts in reference to this law, and defining what is the law of the state as modified by the opinions of its own courts, by the statutes of the state, and the customs and habits of the people, that the trouble arises.

It may be said generally that wherever the decisions of the state courts relate to some law of a local character, which may have become established by those courts, or has always been a part of the law of the state, that the decisions upon the subject are usually conclusive, and always entitled to the highest respect of the federal courts. The whole of this subject has recently been very ably reviewed in the case of *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359. Where such local law or custom has been established by repeated decisions of the highest courts of a state it becomes also the law governing the courts of the United States sitting in that state.

We are of opinion that the adjudications of the supreme court of Massachusetts, holding that a person engaged in travel on the Sabbath day, contrary to the statute of the state, being thus in the act of violating a criminal law of the state, shall not recover against a corporation upon whose road he travels for the negligence of its servants, thereby establish this principle as a local law of that state, declaring, as they do, the effect of its statute in its operation upon the obligation of the carrier of passengers. The decisions on this sub-

<sup>3</sup> See *Western Union Co. v. Call Co.*, ante, p. 1178, note.

ject by the Massachusetts court are numerous enough and of sufficiently long standing to establish the rule, so far as they can establish it, and we think that, taken in connection with the relation which they bear to the statute itself, though giving an effect to it which may not meet the approval of this court, they nevertheless determine the law of Massachusetts on that subject.

Judgment affirmed.\*

[FIELD and HARLAN, JJ., dissented.]

### GELPCKE v. DUBUQUE.

(Supreme Court of United States, 1864. 1 Wall. 175, 17 L. Ed. 520.)

[Error to the federal District Court for Iowa. Plaintiff, a citizen of another state, sued the city of Dubuque upon the interest coupons of certain bonds issued by it in 1857 for railroad stock under authority of an Iowa statute. Judgment was given for defendant, following a decision of the Iowa Supreme Court in 1862 declaring a similar statute to be in violation of the state constitution.]

Mr. Justice SWAYNE. \* \* \* It is claimed "that the Legislature of Iowa had no authority under the Constitution to authorize municipal corporations to purchase stock in railroad companies, or to issue bonds in payment of such stock." \* \* \* All these objections have been fully considered and repeatedly overruled by the Supreme Court of Iowa. *Dubuque County v. Dubuque & Pacific R. R. Co.*, 4 G. Greene, 1; *State v. Bissell*, 4 G. Greene, 328; *Clapp v. Cedar County*, 5 Iowa, 15, 68 Am. Dec. 678; *Ring v. County of Johnson*, 6 Iowa, 265; *McMillen v. Boyles*, 6 Iowa, 304; *McMillen v. County Judge of Lee Co.*, 6 Iowa, 393; *Games v. Robb*, 8 Iowa, 193; *State v. Board of Equalization of County of Johnson*, 10 Iowa, 157, 74 Am. Dec. 381. The earliest of these cases was decided in 1853, the latest in 1859. The bonds were issued and put upon the market between the periods named. These adjudications cover the entire ground of this controversy. They exhaust the argument upon the

\* Accord: *Etheridge v. Sperry*, 139 U. S. 266, 11 Sup. Ct. 565, 35 L. Ed. 171 (1891) (validity of chattel mortgage) ["They are instruments for the transfer of property, and the rules for the transfer of property are primarily, at least, a matter of state regulation."—*Id.* 277]; *Dooley v. Pease*, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457 (1901) (sale without change of possession); *Hartford Ins. Co. v. Chic., etc., Ry.*, 175 U. S. 91, 100, 20 Sup. Ct. 33, 37, 44 L. Ed. 84 (1899) (contract exempting railway for negligently igniting a warehouse on its right of way), Gray, J., saying:

"Questions of public policy as affecting the liability for acts done, or upon contracts made and to be performed, within one of the states of the Union,—when not controlled by the Constitution, laws, or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application,—are governed by the law of the state as expressed in its own Constitution and statutes, or declared by its highest court."

subject. We could add nothing to what they contain. We shall be governed by them, unless there be something which takes the case out of the established rule of this court upon that subject.

It is urged that all these decisions have been overruled by the supreme court of the state, in the later case of the State of Iowa, *ex relatione v. County of Wapello*, 13 Iowa, 390,<sup>1</sup> and it is insisted that in cases involving the construction of a state law or constitution, this court is bound to follow the latest adjudication of the highest court of the state. *Leffingwell v. Warren*, 2 Black, 599, 17 L. Ed. 261, is relied upon as authority for the proposition. In that case this court said it would follow "the latest settled adjudications." Whether the judgment in question can, under the circumstances, be deemed to come within that category, it is not now necessary to determine. It cannot be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur. The earlier decisions, we think, are sustained by reason and authority. They are in harmony with the adjudications of sixteen states of the Union. Many of the cases in the other states are marked by the profoundest legal ability.

The late case in Iowa, and two other cases of a kindred character in another state, also overruling earlier adjudications, stand out, as far as we are advised, in unenviable solitude and notoriety. However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. "The sound and true rule is, that if the contract, when made, was valid by the laws of the state as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law." *Ohio Life & Trust Co. v. Debolt*, 16 How. 432, 14 L. Ed. 997.<sup>2</sup>

The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case. \* \* \*

We are not unmindful of the importance of uniformity in the decisions of this court, and those of the highest local courts, giving constructions to the laws and constitutions of their own states. It is the settled rule of this court in such cases to follow the decisions of the

<sup>1</sup> In 1870 this case and others following it between 1862-1870 were in turn overruled in Iowa and the former rule re-established. *Stewart v. Supervisors*, 30 Iowa, 9, 1 Am. Rep. 238.

<sup>2</sup> "Whatever may be thought of the constitutionality of a statute, if it were a new question, there may, by concurrence of legislative, judicial, and popular action, become impressed upon bonds issued thereunder an unimpeachable validity."—*Pleasant Township v. Aetna Ins. Co.*, 138 U. S. 67, 71, 11 Sup. Ct. 215, 34 L. Ed. 864 (1891), by Brewer, J.

state courts. But there have been heretofore, in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases. We shall never immolate truth, justice, and the law, because a state tribunal has erected the altar and decreed the sacrifice.

Judgment reversed.

Mr. Justice MILLER, dissenting. \* \* \* [After referring to the general principle that this court follows the constructions placed upon local statutes by state courts:] The only special charge which this court has over contracts, beyond any other court, is to declare judicially whether the statute of a state impairs their obligation. No such question arises here,\* for the plaintiff claims under and by virtue of the statute which is here the subject of discussion. Neither is there any question of the obligation of contracts, or the right to enforce them. The question goes behind that. We are called upon, not to construe a contract, nor to determine how one shall be enforced, but to decide whether there ever was a contract made in the case. To assume that there was a contract, which contract is about to be violated by the decisions of the state court of Iowa, is to beg the very question in dispute. In deciding this question the court is called upon, as the court in Iowa was, to construe the Constitution of the state. It is a grave error to suppose that this court must, or should, determine this upon any principle which would not be equally binding on the courts of Iowa, or that the decision should depend upon the fact that certain parties had purchased bonds which were supposed to be valid contracts, when they really were not.

The supreme court of Iowa is not the first or the only court which has changed its rulings on questions as important as the one now presented. I understand the doctrine to be in such cases, not that the law is changed, but that it was always the same as expounded by the later decision, and that the former decision was not, and never had been, the law, and is overruled for that very reason. The decision of this court contravenes this principle, and holds that the decision of the

\* There being no federal question in such a case, because no effect is given to a statute passed *subsequently* to the alleged contract, the federal Supreme Court has no jurisdiction on writs of error to *state courts* to compel the earlier state decisions to be followed. *Cent. Land Co. v. Laidley*, 159 U. S. 103, 111, 112, 16 Sup. Ct. 80, 40 L. Ed. 91 (1895); *Bacon v. Texas*, 163 U. S. 207, 220-222, 16 Sup. Ct. 1023, 41 L. Ed. 132 (1896). The original jurisdiction of the federal courts, where it exists in such cases, is based on diverse citizenship. See, also, p. 384, note 1.

Where the interpretation of a state statute itself forms part of a federal question, then the Supreme Court construes it independently of the state courts, even on writ of error to the latter. *New Orleans W. Co. v. La. Sugar Co.*, ante, p. 788 (statutory contract alleged impaired by later law); *Huntington v. Attrill*, 146 U. S. 657, 683, 684, 13 Sup. Ct. 224, 36 L. Ed. 1123 (1892) (statutory liability under full faith and credit clause); *U. S. v. Bellingham Boom Co.*, 176 U. S. 211, 20 Sup. Ct. 343, 44 L. Ed. 437 (1900) (state statute measuring federal right); *Fauntleroy v. Lum*, 210 U. S. 230, 28 Sup. Ct. 641, 52 L. Ed. 1039 (1908) (jurisdiction of state court under faith and credit clause).



court makes the law, and in fact, that the same statute or constitution means one thing in 1853, and another thing in 1859. For it is impliedly conceded, that if these bonds had been issued since the more recent decision of the Iowa court, this court would not hold them valid.<sup>4</sup> \* \* \*

BURGESS v. SELIGMAN (1883) 107 U. S. 20, 33-35, 2 Sup. Ct. 10, 27 L. Ed. 359. Mr. Justice BRADLEY (refusing, on error to a federal Circuit Court in Missouri, to reverse its decision regarding a statutory liability of corporate stockholders and to follow a contrary decision of a state court subsequently rendered):

"We do not consider ourselves bound to follow the decisions of the state court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the circuit court, no construction of the statute had been given by the state tribunals contrary to that given by the circuit court. The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by

<sup>4</sup> It had previously been held that an original construction of a state constitution by the federal Supreme Court, upon the faith of which contracts had been made, would not be overruled as to such contracts by the federal courts, merely on account of a subsequent contrary interpretation by the state courts. Rowan v. Runnels, 5 How. 134, 12 L. Ed. 85 (1847).

Bonds earned under a contract prior to the changed state decisions, although actually issued later, are protected in the federal courts. Taylor v. Ypsilanti, 105 U. S. 60, 26 L. Ed. 1008 (1882).

In Douglass v. Pike County, 101 U. S. 677, 687, 25 L. Ed. 968 (1880), Walte, C. J., said: "We recognize fully, not only the right of a state court, but its duty to change its decisions whenever, in its judgment, the necessity arises. It may do this for new reasons, or because of a change of opinion in respect to old ones; and ordinarily we will follow them, except so far as they affect rights vested before the change was made. \* \* \* The new decisions would be blinding in respect to all issues of bonds after they were made."

As regards contracts made after the changed decisions of the state courts the federal courts will follow the latter. Douglass v. Pike Co., above; Supervisors v. U. S., 18 Wall. 71, 21 L. Ed. 771 (1873); as they will also do where the later state decisions validate contracts instead of avoiding them. Wade v. Travis Co., 174 U. S. 499, 509, 510, 19 Sup. Ct. 715, 43 L. Ed. 1060 (1899) [compare Fairfield v. Gallatin Co., 100 U. S. 47, 25 L. Ed. 544 (1879)].

The federal Supreme Court may overrule its own decisions after property rights have become vested in reliance thereon, if clearly convinced of its former error. Roberts v. Lewis, 153 U. S. 267, 14 Sup. Ct. 945, 38 L. Ed. 747 (1894). See, also, Snyder v. Williamson, 24 How. 427, 16 L. Ed. 742 (1861).

The doctrine of Gelpcke v. Dubuque applies only in favor of rights vested upon the faith of a ruling actually necessary to the decision of the former state case, not to mere dicta nor to decisions upon distinguishable grounds. Carroll v. Carroll's Lessee, 16 How. 275, 14 L. Ed. 936 (1853); Pleasant Township v. Aetna Ins. Co., 138 U. S. 67, 11 Sup. Ct. 215, 34 L. Ed. 861 (1891).

the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate, and the construction of state Constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is.

"But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So, when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals, which, it might be supposed, would be unaffected by local prejudices and sectional views,<sup>1</sup> it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by the previous adjudication. \* \* \* [Here citations are given to all prior cases in this court (nearly sixty in number) bearing upon the subject.]

"In the present case, as already observed, when the transactions in question took place, and when the decision of the circuit court was rendered, not only was there no settled construction of the statute on the point under consideration, but the Missouri cases referred to arose upon the identical transactions which the circuit court was called upon, and which we are now called upon, to consider. It can hardly be contended that the federal court was to wait for the state courts to decide the merits of the controversy and then simply register their decision; or that the judgment of the circuit court should be reversed merely because the state court has since adopted a different view. If we could see fair and reasonable ground to acquiesce in that view,

<sup>1</sup> See the reasoning of Johnson, J., in *Ogden v. Saunders*, ante, at pp. 801-804.

we should gladly do so; but in the exercise of that independent judgment which it is our duty to apply to the case, we are forced to a different conclusion." <sup>2</sup>

<sup>2</sup> Accord (Supreme Court will not reverse lower federal decision *merely* on account of intervening contrary state court decision): *Pense v. Peck*, 18 How. 395, 15 L. Ed. 518 (1856) (existence of statute); *Morgan v. Curtenius*, 20 How. 1, 15 L. Ed. 823 (1859) (real property statute); *Roberts v. Bolles*, 101 U. S. 119, 25 L. Ed. 880 (1880) (municipal bonds). See, however, *Bauserman v. Blunt*, 147 U. S. 647, 655, 656, 13 Sup. Ct. 466, 37 L. Ed. 316 (1893) (statute of limitations) and the cases there commented upon.

Likewise the federal courts exercise an independent judgment upon state statutes or constitutions, even against a prior state decision, if the rights in litigation became vested *before* the state decision. *Stanley Co. v. Coler*, 190 U. S. 437, 23 Sup. Ct. 811, 47 L. Ed. 1126 (1903) (municipal bonds); *Gt. Southern Hotel Co. v. Jones*, 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778 (1901) (mechanics' lien). Quere as to the existence of the exception apparently alleged in that case at page 546.

In the New York Elevated Railroad cases (stated in *Sauer v. N. Y.*, ante, at pp. 746-748) the New York courts held that an abutter upon a public street, under a municipal grant containing a covenant that the street should continue as other streets, had an easement of light, air, and access over said street which could not be impaired by an elevated railroad in the street, without compensation. In a later New York case (173 N. Y. 549, 66 N. E. 558 [1903]) the doctrine of the former cases was held inapplicable where a railroad, already in the occupation of a trench in a street which cut off all access across the street, was compelled by statute to elevate its tracks on a viaduct 30 feet above the street. Plaintiff, who owned abutting property originally conveyed to prior grantees by the city, with the above-mentioned covenant, took the case to the federal Supreme Court on writ of error in *Muhler v. N. Y.*, etc., Ry., 197 U. S. 544, 25 Sup. Ct. 522, 49 L. Ed. 872 (1905). In reversing the state decision, McKenna, J., said in this case at pages 570, 571:

"We are not called upon to discuss the power, or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of state decisions the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the Elevated Railroad Cases and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, and that these decisions might have been different, or that the plaintiff might have balanced the chances of the commercial advantage between the right to have the street remain open and the expectation that it would remain so, is too intangible to estimate."

Holmes, J., dissenting, said (at pages 572-576):

"The plaintiff's rights, whether expressed in terms of property or of contract, are all a construction of the courts, deduced by way of consequence from dedication to and trusts for the purposes of a public street. They never were granted to him or his predecessors in express words or probably, by any conscious implication. If at the outset the New York courts had decided that, apart from statute or express grant, the abutters on a street had only the rights of the public and no private easement of any kind, it would have been in no way amazing. \* \* \* Again, more narrowly, if the New York courts had held that an easement of light and air could be created only by express words, and that the laying out or dedication of a street, or the grant of a house bounding upon one, gave no such easement to abutters, they would not have been alone in the world of the common law. \* \* \*

"If the decisions, which I say conceivably might have been made, had been made as to the common law, they would have infringed no rights under the Constitution of the United States. So much, I presume, would be admitted

by everyone. But, if that be admitted, I ask myself what has happened to cut down the power of the same courts as against that same Constitution at the present day. So far as I know the only thing which has happened is that they have decided the Elevated Railroad Cases, to which I have referred. It is on that ground alone that we are asked to review the decision of the court of appeals upon what otherwise would be purely a matter of local law. In other words, we are asked to extend to the present case the principle of *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520 [1864], and *Louisiana v. Millsbury*, 105 U. S. 278, 26 L. Ed. 1090 [1882], as to public bonds bought on the faith of a decision that they were constitutionally issued. That seems to me a great, unwarranted, and undesirable extension of a doctrine which it took this court a good while to explain.

"The doctrine now is explained, however, not to mean that a change in the decision impairs the obligation of contracts (*Burgess v. Seligman*, 107 U. S. 20, 34, 2 Sup. Ct. 10, 27 L. Ed. 359 [1883]; *Stanly County v. Coler*, 190 U. S. 437, 444, 445, 23 Sup. Ct. 811, 47 L. Ed. 1126, 1131, 1132 [1903]; and certainly never has been supposed to mean that all property owners in a state have a vested right that no general proposition of law shall be reversed, changed, or modified by the courts if the consequence to them will be more or less pecuniary loss. I know of no constitutional principle to prevent the complete reversal of the Elevated Railroad Cases to-morrow if it should seem proper to the court of appeals. See *Central Land Co. v. Laidley*, 159 U. S. 103, 16 Sup. Ct. 80, 40 L. Ed. 91 [1895].

"But I conceive that the plaintiff in error must go much further than to say that my last proposition is wrong. I think he must say that he has a constitutional right, not only that the state courts shall not reverse their earlier decisions upon a matter of property rights, but that they shall not distinguish them unless the distinction is so fortunate as to strike a majority of this court as sound. For the court of appeals has not purported to overrule the Elevated Railroad Cases. It simply has decided that the import and the intent of those cases does not extend to the case at bar. \* \* \*

[After referring to certain distinctions between the Elevated Railroad cases and the present one:] "The foregoing distinctions seem to me not wanting in good sense. \* \* \* But I am not discussing the question whether they are sound. \* \* \* I am considering what there is in the Constitution of the United States forbidding the court of appeals to hold them sound. I think there is nothing; and there being nothing, and the New York decision obviously not having been given its form for the purpose of evading this court, I think we should respect and affirm it, if we do not dismiss the case.

"What the plaintiff claims is really property, a right in rem. It is called contract merely to bring it within the contract clause of the Constitution. It seems to me a considerable extension of the power to determine for ourselves what the contract is, which we have assumed when it is alleged that the obligation of a contract has been impaired, to say that we will make the same independent determination when it is alleged that property is taken without due compensation. But it seems to me that it does not help the argument. The rule adopted as to contract is simply a rule to prevent an evasion of the constitutional limit to the power of the states,\* and, it seems to me, should not be extended to a case like this. Bearing in mind that, as I have said, the plaintiff's rights, however expressed, are wholly a construction of the courts, I cannot believe that whenever the 14th Amendment, or article 1, § 10, is set up, we are free to go behind the local decisions on a matter of land law, and, on the ground that we decide what the contract is, declare rights to exist which we should think ought to be implied from a dedication or location if we were the local courts. \* \* \* If we are bound by local decisions as to local rights in real estate, then we equally are bound by the distinctions and the limitations of those rights declared by the local courts."

\*See, also, as to grounds of policy for the rule, *Patterson v. Colorado*, ante, at pp. 292, 293, note.

## KUHN v. FAIRMONT COAL CO.

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

[Question 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*, ante, p. 1357; and *Bucher v. Cheshire Ry.*, ante, p. 1351, and citations of other cases.]

We take it, then that it is no longer to be questioned that the fed-  
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eral 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.<sup>1</sup>

<sup>1</sup> 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). See, also, *Fretts v. Shriver* (C. C.) 181 Fed. 279 (1910) (construction of contract as option or sale).

CONFLICTING STATE AND FEDERAL DECISIONS IN AUSTRALIA.—Under the Australian Constitution (§ 74) no appeal lies as of right to the British Privy Council from the decisions of the federal High Court upon constitutional questions; but, under the British Orders in Council of June 9, 1860, such an appeal lies from the decisions of Australian state courts upon all questions. If a constitutional question is decided one way by the High Court and the other way by the Privy Council, and neither will yield, there is no way to secure uniformity in future decisions save by a federal statute excluding the state courts from all jurisdiction of such questions. The situation is precisely parallel to that existing between the state and federal courts in the United States under the doctrines of *Swift v. Tyson*, ante, p. 1348; *Gelpcke v. Dubuque*, ante, p. 1354; and the cases that are corollaries of these doctrines, except that it involves federal questions instead of those of state law. Such a situation arose in Australia in 1904-7 regarding the validity of state income taxation of a federal officer's salary, which was upheld by the Privy Council and declared invalid by the High Court, until a federal statute finally permitted it. See the progress of the controversy through all stages in: *Wollaston's Case*, 28 Vict. L. R. 357 (1902); *In re Income Tax Acts*, 29 Vict. L. R. 748 (1904); *Deakin v. Webb*, 1 Com. L. R., 585 (1904); *Outtrim's Case*, [1905] Vict. L. R. 463; *Webb v. Outtrim*, [1907] A. C. 81; *Baxter v. Comm'rs*, 4 Com. L. R. 1087 (1907); *Flint v. Webb*, 4 Com. L. R. 1178 (1907); *Comm'rs v. Baxter*, [1908] A. C. 214 [see Atty. Gen. N. S. Wales v. Collector (1909) A. C. 345]; *Chaplin v. Comm'r*, 12 Com. L. R. 375 (1911).

SECTION 3.—IMMUNITY OF SOVEREIGN FROM PRIVATE  
SUIT—ELEVENTH AMENDMENT

## 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 par-



ties, 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.<sup>1</sup> \* \* \*

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.<sup>2</sup>

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

<sup>1</sup> A state may consent to be sued in its own courts *only*, but cannot deny a federal review of any federal questions involved in the final judgment therein. *Smith v. Reeves*, 178 U. S. 436, 445, 20 Sup. Ct. 919, 44 L. Ed. 1140 (1900). A state may waive the benefit of the Eleventh Amendment. *Clark v. Barnard*, 108 U. S. 436, 2 Sup. Ct. 878, 27 L. Ed. 780 (1883).

<sup>2</sup> Accord: *Smith v. Reeves*, 178 U. S. 436, 20 Sup. Ct. 919, 44 L. Ed. 1140 (1900) (suit against state by federal corporation).

For a discussion of the history and principle of the doctrine that government is exempt from suit, see *U. S. v. Lee*, 106 U. S. 196, 205-207, 1 Sup. Ct. 240, 27 L. Ed. 171 (1882); and for English and American methods of redressing claims against the state, see *U. S. v. O'Keefe*, 11 Wall. 178, 20 L. Ed. 131 (1871). A similar exemption is by the rules of public law accorded to sovereigns when sued in a foreign jurisdiction. *Mighell v. Sultan of Johore*,

## 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

[1894] 1 Q. B. 149 (breach of promise suit against sovereign of an East Indian province residing in England).

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. — (1913).

The Eleventh Amendment protects only the states, not their political subdivisions or municipal corporations. *Lincoln Co. v. Luning*, 133 U. S. 529, 10 Sup. Ct. 363, 33 L. Ed. 766 (1890). It does not exclude the appellate jurisdiction of the federal Supreme Court over cases in which defendants are sued by states in state courts. *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257 (1821). Nor does it prevent a defendant sued by a state from using a set-off or counterclaim against the state, arising out of an independent transaction, where the state has contracted that such a defence may be made. *Virginia Coupon Cases*, 114 U. S. 269, 300, 5 Sup. Ct. 903, 29 L. Ed. 185 (1885); *McGahey v. Virginia*, 135 U. S. 662, 685, 10 Sup. Ct. 972, (1890). Compare *Pringle v. U. S.*, 2 Eq. 659 (Eng., 1866).



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.<sup>1</sup> \* \* \*

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

<sup>1</sup> In this case Marshall, C. J., said (9 Wheat. at pages 842, 843): "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."

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.<sup>2</sup> 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 defendant, 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.<sup>3</sup>

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 perform-

<sup>2</sup> The leading case, the land being actually in use, under orders of the President, as a federal fort and cemetery. See the extract from the opinion of Miller, J., printed ante, pp. 112, 113, note.

<sup>3</sup> See, also, *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185 (1885) and *Tindal v. Wesley*, 167 U. S. 204, 17 Sup. Ct. 770, 42 L. Ed. 137 (1897). Similar relief will be granted where the injury to plaintiff's interests from threatened illegal official action is intangible. *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447 (1873) (cloud on title); *Pennoyer v. McConnaughy*, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363 (1891) (same); *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. Ed. 623 (1876) (misuse of certain class of state bonds); *Am. Sch. Magnetic Healing v. McAnnulty*, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90 (1902) (exclusion from mails). But compare *Oregon v. Hitchcock*, 202 U. S. 60, 26 Sup. Ct. 568, 50 L. Ed. 935 (1906).

ance 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,<sup>4</sup> 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. \* \* \*

<sup>4</sup> No mandamus will issue to compel state officers to do acts in performance of contracts repudiated by the state. *Louisiana v. Jumel*, 107 U. S. 711, 2 Sup. Ct. 128, 27 L. Ed. 448 (1883) (payment of money out of state treasury). See Bradley, J., dissenting, in *Va. Coupon Cases*, 114 U. S. 269, 336, 337, 5 Sup. Ct. 903, 962, 29 L. Ed. 185 (1885). But where the existing state law, unrepudiated by de facto legislative action, imposes ministerial duties upon state officers, mandamus proceedings to compel the performance of such duties do not violate the Eleventh Amendment. *Rolston v. Mo. Fund Com'rs*, 120 U. S. 390, 411, 7 Sup. Ct. 590, 30 L. Ed. 721 (1887). See, also, *Board of Liquidation v. McComb*, 92 U. S. 531, 541, 23 L. Ed. 623 (1876), as qualified by the above cases.



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.<sup>5</sup>

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

<sup>5</sup> In *Pennoyer v. McConaughy*, 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, 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

CHRISTIAN v. ATLANTIC & N. C. R. CO. (1890) 133 U. S. 233, 241-246, 10 Sup. Ct. 260, 262-264, 33 L. Ed. 589, Mr. Justice BRADLEY (affirming the dismissal of a bill by bondholders of North Carolina to enforce a lien given by the state upon its stock in defendant railroad company to secure said bonds):

"How the dividends due to the state can be seized and appropriated to the payment of the bonds, or how the stock held and owned by the state can be sold and transferred, through the medium of a suit in equity, without making the state a party to the suit, it is difficult to comprehend. \* \* \* The proposal is to take the property of the state, and apply it to the payment of its debts due to the plaintiffs, and to do it through the instrumentality of a court of equity. The ground on which it is contended that this may be done is that the property is affected by a pledge, and may therefore be dealt with in rem. But a pledge, in the legal sense, requires to be delivered to the pledgee. He must have the possession of it. He may then, in default of payment of the debt for which the thing is pledged, sell it, for the purpose of raising the amount, by merely giving proper notice to the pledgor. \* \* \*

"The tenth section of the act of 1855, relied on by the complainant for creating a pledge, \* \* \* in addition to the pledge of the public faith, declares that all the stock held by the state in the Atlantic & North Carolina Railroad Company shall be pledged for the same purpose, and any dividend of profit declared thereon shall be applied to the payment of the interest on said bonds. This was nothing more than a promise that the stock should be held and set apart for the payment of the bonds, and that the dividends should be applied to the interest. There was no actual pledge. It was no more of a pledge than is made by a farmer when he pledges his growing crop, or his

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."

Compare also Board of Liquidation v. McComb, 92 U. S. 531, 23 L. Ed. 623 (1876), explained in Louisiana v. Jumel, 107 U. S. 711, 725, 726, 2 Sup. Ct. 128, 27 L. Ed. 448 (1883); and Bradley, J., dissenting, in Va. Coupon Cases, 114 U. S. 269, 336, 5 Sup. Ct. 903, 962, 29 L. Ed. 185 (1885).

For suggested American analogies to the English doctrine of ministerial responsibility for all acts of the sovereign, see Langford v. U. S., 101 U. S. 341, 25 L. Ed. 1010 (1880); Poindexter v. Greenhow, 114 U. S. 270, 290-292, 335, 5 Sup. Ct. 903, 962, 29 L. Ed. 185 (1885); W. D. Guthrie in 8 Col. L. R. 189-198 (1908).

stock of cattle, for the payment of a debt, without any delivery thereof. He does not use the word in its technical, but in its popular, sense. His language may amount to a parol mortgage, if such a mortgage can be created; but that is all. So, in this case, the pledge given by the state in a statute may have amounted to a mortgage, but it could amount to nothing more; and, if a mortgage, it did not place the mortgagee in possession, but gave him merely a naked right to have the property appropriated and applied to the payment of his debt.

"But how is that right to be asserted? If the mortgagor be a private person, the mortgagee may cite him into court, and have a decree for the foreclosure and sale of the property. The mortgagor or his assignee would be a necessary party in such a proceeding. Even when absent, beyond the reach of process, he must still be made a party, and at least constructively cited, by publication or otherwise. This is established by the authorities before referred to, and many more might be cited to the same effect. The proceeding is a suit against the party to obtain, by decree of court, the benefit of the mortgage right; but where the mortgagor in possession is a sovereign state no such proceeding can be maintained. The mortgagee's right against the state may be just as good and valid, in a moral point of view, as if it were against an individual. But the state cannot be brought into court, or sued by a private party, without its consent. \* \* \*

"There is a class of cases, undoubtedly, in which the interests of the state may be indirectly affected by a judicial proceeding without making it a party. Cases of this sort may arise in courts of equity, where property is brought under its jurisdiction for foreclosure, or some other proceeding; and the state, not having the title in fee, or the possession of the property, has some lien upon it, or claim against it, as a judgment against the mortgagor, subsequent to the mortgage. In such a case the foreclosure and sale of the property will not be prevented by the interest which the state has in it, but its right of redemption will remain the same as before.<sup>1</sup> Such cases do not affect the present, in which the object is to take and appropriate the state's property for the purpose of satisfying its obligations. *The Siren*, 7 Wall. 152, 157, 19 L. Ed. 129; *Briggs v. Light Boat*, 11 Allen (Mass.) 158, 173.

"It remains true, therefore, that a bill will not lie to effect a foreclosure and sale, or to obtain possession of property belonging to the state; and for the very plain reason that in such a case the state is a necessary party, and cannot be sued. This was distinctly held by this court in the case of *Cunningham v. Railroad Co.*, 109 U. S. 446, 3 Sup. Ct. 292, 609, 27 L. Ed. 992. \* \* \* Be it true that the bondholders have a lien on said dividends and stock, it is not a lien that can be enforced without suit, and that a suit against the state.

<sup>1</sup> As to cases of this class, see, also, *Cunningham v. Macon, etc., Ry.*, 109 U. S. 446, 451, 452, 3 Sup. Ct. 292, 609, 27 L. Ed. 992 (1883).

"We are referred to a decision made at the circuit by Chief Justice Waite in the case of *Swasey v. Railroad Co.*, 1 Hughes, 17, Fed. Cas. No. 13,679, in which, in a case similar to the present, it was held that, inasmuch as the shares of stock belonging to the state were pledged for the payment of the complainants' bonds, they were held by the railroad company as trustee for the bondholders as well as the state; and that if the trustee was a party to the suit it was not necessary that the state should be a party.<sup>2</sup> \* \* \* [The Chief Justice's] views in the *Swasey Case* seem to have been based on the notion that the stock of the state was lodged in the hands of the railroad company as a trustee for the parties concerned, and was not in the hands of the state itself, or of its immediate officers and agents. But, if the facts in that case were as he supposed them to be, the facts in the present case are certainly different from that. No stockholder of any company ever had more perfect possession and ownership of his stock than the state of North Carolina has of the stock in question. There may be contract claims against it; but they are claims against the state, because based solely on the contract of the state, and not on possession.

"We think that the state is an indispensable party to any proceeding in equity in which its property is sought to be taken and subjected to the payment of its obligations; and that the present suit is of that character, and cannot be sustained."<sup>3</sup>

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INTERNATIONAL POSTAL SUPPLY CO. v. BRUCE (1904)  
194 U. S. 601, 605, 606, 24 Sup. Ct. 820, 48 L. Ed. 1134, Mr. Justice HOLMES (denying to the patentee of a stamp canceling machine an injunction against the use, by a federal postmaster under the direction of the Postoffice Department, of an infringing machine of which the United States was a lessee in possession):

"This case is governed by *Belknap v. Schild*, 161 U. S. 10, 40 L. Ed. 599, 16 Sup. Ct. 443. There an injunction was sought against the commandant of the United States navy yard at Mare island, California, and some of his subordinates, to prevent the use of a caisson gate in the dry dock at that place, contrary to the rights of the plaintiff, as patentee. The case was heard on pleas setting up

<sup>2</sup> As to such a possible case, see *Louisiana v. Jumel*, 107 U. S. 711, 722-726, 2 Sup. Ct. 128, 27 L. Ed. 448 (1883), and *Murray v. Wilson Co.*, 213 U. S. 151, 170, 171, 29 Sup. Ct. 458, 53 L. Ed. 742 (1909).

<sup>3</sup> Accord (as to all private attempts to secure an adjudication binding the sovereign upon a title alleged to be held by a state or the United States): *Stanley v. Schwalby*, 162 U. S. 255, 16 Sup. Ct. 754, 40 L. Ed. 960 (1896) (action of trespass to try title); *Chandler v. Dix*, 194 U. S. 590, 24 Sup. Ct. 766, 48 L. Ed. 1129 (1904) (bill to quiet title). The award of possession against agents of the government does not bind the government itself. *U. S. v. Lee*, 106 U. S. 196, 222, 1 Sup. Ct. 240, 27 L. Ed. 171 (1882); *Tindal v. Wesley*, 167 U. S. 204, 223, 17 Sup. Ct. 770, 42 L. Ed. 137 (1897).

that the caisson gate was made and used by the United States for public purposes, and, as they were construed, that it was the property of the United States. The pleas were held bad as answers to the whole bill, because the bill also sought damages, and the defendants might be personally liable, but it was held that an injunction could not be granted, and the bill was dismissed, without prejudice to an action at law. *Vavasseur v. Krupp*, L. R. 9 Ch. Div. 351, was cited for the proposition which was made the turning point of the case, that the court could not interfere with an object of property unless it had before it the person entitled to the thing, and this proposition was held to extend to an injunction against the use of the thing as well as to a destruction of it or to a removal of the part which infringed. It was pointed out that the defendants had no personal interest in the continuance of the use, and that, so far as the injunction was concerned, the suit really was against the United States. Of course, if those defendants were enjoined, other persons attempting to use the caisson gate would be, and thus the injunction practically would work a prohibition against its use by the United States.

"*Belknap v. Schild* differed from *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171, 1 Sup. Ct. 240, and *Tindal v. Wesley*, 167 U. S. 204, 42 L. Ed. 137, 17 Sup. Ct. 770, and also from *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 47 L. Ed. 90, 23 Sup. Ct. 33, relied on by the appellant, in the fact, among others, that the title of the United States to the caisson gate was admitted, and therefore the United States was a necessary party to a suit which was intended to deprive it of the incident of title,—the right to use the gate. As the United States could not be made a party, the suit failed. In the case at bar the United States is not the owner of the machines, it is true, but it is a lessee in possession, for a term which has not expired. It has a property,—a right in rem,—in the machines, which, though less extensive than absolute ownership, has the same incident of a right to use them while it lasts. This right cannot be interfered with behind its back; and, as it cannot be made a party, this suit, like that of *Belknap v. Schild*, must fail. The answer to the question certified must be 'No.' Whether or not a renewal of the lease could be enjoined is not before us."

Mr. Justice HARLAN [with whom concurred PECKHAM, J.], dissenting: \* \* \*

"The United States is not here sued, although, as in *United States v. Lee* [stated ante, p. 1374, and note 2], it may be incidentally affected by the result. No decree is asked against it. The suit is against Dwight H. Bruce, who is proceeding in violation of the plaintiff's right of property, and denies the power of any court to interfere with him, solely upon the ground that what he is doing is under the order and sanction of the Postoffice Department. He is,



so to speak, in the possession of, and wrongfully using, the plaintiff's patented invention, and denies the right of any court, by its mandatory order, to prevent him from continuing in his lawless invasion of a right granted by the Constitution and laws of the United States. \* \* \*

"It may be said that the patentee has a remedy in an action for damages against the infringer. But clearly such a remedy is not at all adequate or efficacious. The slightest reflection will show this. The only effectual remedy is an injunction against him. \* \* \* I am of opinion that every officer of the government, however high his position, may be prevented by injunction, operating directly upon him, from illegally injuring or destroying the property rights of the citizen; and this relief should more readily be given when the government itself cannot be made a party of record."

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Ex parte YOUNG.

(Supreme Court of United States, 1908. 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. [N. S.] 932, 14 Ann. Cas. 764.)

[Petition for habeas corpus. In 1907 Minnesota by statute fixed certain railway rates in the state, a failure to observe which by any railroad company or its agents was heavily punished by fine and imprisonment. The day before the act took effect, certain stockholders of railroads affected thereby filed bills in the federal circuit court for Minnesota against their respective railroad companies, the members of the state railroad commission, and E. T. Young, the state attorney-general, asking an injunction against observing or attempting to enforce said rates on the ground that they took property without due process of law in violation of the federal Constitution. After a hearing, a preliminary injunction was issued against the enforcement of said rates, pending a final hearing. In violation of this order, Young began a mandamus suit against the Northern Pacific Railway to enforce said rates, and, upon being committed for contempt therefor, obtained this writ.]

Mr. Justice PECKHAM. \* \* \* We have, upon this record, the case of an unconstitutional act of the state legislature and an intention by the attorney general of the state to endeavor to enforce its provisions, to the injury of the company, in compelling it, at great expense, to defend legal proceedings of a complicated and unusual character, and involving questions of vast importance to all employes and officers of the company, as well as to the company itself. The question that arises is whether there is a remedy that the parties interested may resort to, by going into a federal court of equity, in a case involving a violation of the federal Constitution, and obtaining a judicial investigation of the problem, and, pending its solution, ob-

tain freedom from suits, civil or criminal, by a temporary injunction, and, if the question be finally decided favorably to the contention of the company, a permanent injunction restraining all such actions or proceedings. \* \* \*

The objection [is] that the suit is, in effect, one against the state of Minnesota, and that the injunction issued against the attorney general illegally prohibits state action, either criminal or civil, to enforce obedience to the statutes of the state. This objection is to be considered with reference to the 11th and 14th amendments to the federal Constitution. The 11th amendment prohibits the commencement or prosecution of any suit against one of the United States by citizens of another state or citizens or subjects of any foreign state. The 14th amendment provides that no state shall deprive any person of life, liberty, or property without due process of law, nor shall it deny to any person within its jurisdiction the equal protection of the laws.

The case before the circuit court proceeded upon the theory that the orders and acts heretofore mentioned would, if enforced, violate rights of the complainants protected by the latter amendment. We think that whatever the rights of complainants may be, they are largely founded upon that amendment, but a decision of this case does not require an examination or decision of the question whether its adoption in any way altered or limited the effect of the earlier amendment.<sup>1</sup> We may assume that each exists in full force, and that we must give to the 11th amendment all the effect it naturally would have, without cutting it down or rendering its meaning any more narrow than the language, fairly interpreted, would warrant.

\* \* \* [Here follows a review of the cases discussed in *In re Ayers* and notes, ante, p. 1371.]

The injunction asked for in the *Ayers Case*, 123 U. S. [443, 8 Sup. Ct. 164, 31 L. Ed. 216] was to restrain the state officers from commencing suits under the act of May 12, 1887 (alleged to be unconstitutional), in the name of the state and brought to *recover taxes for its use*, on the ground that, if such suits were commenced, they would be a breach of a contract with the state. The injunction was declared illegal because the suit itself could not be entertained, as it was one against the state, to enforce its alleged contract. It was said, however, that, if the court had power to entertain such a suit, it would have power to grant the restraining order preventing the commencement of suits. (Page 487.) It was not stated that the suit or the injunction was necessarily confined to a case of a threatened direct trespass upon or injury to property.

Whether the commencement of a suit could ever be regarded as an actionable injury to another, equivalent, in some cases, to a tres-

<sup>1</sup> See *Pront v. Starr*, 188 U. S. 537, 543, 23 Sup. Ct. 398, 47 L. Ed. 584 (1903).

pass such as is set forth in some of the foregoing cases, has received attention in the rate cases, so called. \* \* \* [Here follows a discussion of *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014, and *Smyth v. Ames*, 160 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, and references to other cases.]

The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the federal Constitution, may be enjoined by a federal court of equity from such action. \* \* \*

[After discussing *Fitts v. McGhee*, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535:] In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party. \* \* \*

In the course of the opinion in the *Fitts Case* the *Reagan* and *Smyth Cases* were referred to (with others) as instances of state officers specially charged with the execution of a state enactment alleged to be unconstitutional, and who commit, under its authority, some specific wrong or trespass, to the injury of plaintiff's rights. In those cases the only wrong or injury or trespass involved was the threatened commencement of suits to enforce the statute as to rates, and the threat of such commencement was in each case regarded as sufficient to authorize the issuing of an injunction to prevent the same. The threat to commence those suits under such circumstances was therefore necessarily held to be equivalent to any other threatened wrong or injury to the property of a plaintiff which had theretofore been held sufficient to authorize the suit against the officer. The being specially charged with the duty to enforce the statute is sufficiently apparent when such duty exists under the general authority of some law, even though such authority is not to be found in the particular act. It might exist by reason of the general duties of the officer to enforce it as a law of the state. The officers in the *Fitts Case* occupied the position of having no duty at all with regard to the act, and could not be properly made parties to the suit for the reason stated. \* \* \*

It is also argued that the only proceeding which the attorney general could take to enforce the statute, so far as his office is concerned, was one by mandamus, which would be commenced by the state, in its sovereign and governmental character, and that the right to bring such action is a necessary attribute of a sovereign government. It is contended that the complainants do not complain and

they care nothing about any action which Mr. Young might take or bring as an ordinary individual, but that he was complained of as an officer, to whose discretion is confided the use of the name of the state of Minnesota so far as litigation is concerned, and that when or how he shall use it is a matter resting in his discretion and cannot be controlled by any court.

The answer to all this is the same as made in every case where an official claims to be acting under the authority of the state. The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. \* \* \*

It is proper to add that the right to enjoin an individual, even though a state official, from commencing suits under circumstances already stated, does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature, nor does it include power to prevent any investigation or action by a grand jury. The latter body is part of the machinery of a criminal court, and an injunction against a state court would be a violation of the whole scheme of our government. If an injunction against an individual is disobeyed, and he commences proceedings before a grand jury or in a court, such disobedience is personal only, and the court or jury can proceed without incurring any penalty on that account. The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction, is plain, and no power to do the latter exists because of a power to do the former. \* \* \*

The difference between [enjoining] an actual and direct interference with tangible property and the enjoining of state officers from enforcing an unconstitutional act, is not of a radical nature, and does not extend, in truth, the jurisdiction of the courts over the subject-matter. In the case of the interference with property, the person enjoined is assuming to act in his capacity as an official of the state, and justification for his interference is claimed by reason of his position as a state official. Such official cannot so justify when acting under an unconstitutional enactment of the legislature. So, where the state official, instead of directly interfering with tangible prop-

erty, is about to commence suits which have for their object the enforcement of an act which violates the federal Constitution, to the great and irreparable injury of the complainants, he is seeking the same justification from the authority of the state as in other cases. The sovereignty of the state is, in reality, no more involved in one case than in the other. The state cannot, in either case, impart to the official immunity from responsibility to the supreme authority of the United States. See *Re Ayers*, 123 U. S. 507, 31 L. Ed. 230, 8 Sup. Ct. 164. \* \* \*

Under the federal habeas corpus statute (§ 753, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 592), \* \* \* persons in the custody of state officers for alleged crimes against the state have been taken from that custody and discharged by a federal court or judge, because the imprisonment was adjudged to be in violation of the federal Constitution. The right to so discharge has not been doubted by this court, and it has never been supposed there was any suit against the state by reason of serving the writ upon one of the officers of the state in whose custody the person was found. \* \* \* It is somewhat difficult to appreciate the distinction which, while admitting that the taking of such a person from the custody of the state by virtue of service of the writ on the state officer in whose custody he is found is not a suit against the state, yet [maintains that] service of a writ on the attorney general, to prevent his enforcing an unconstitutional enactment of a state legislature, is a suit against the state. \* \* \*

Petition dismissed.

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

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#### SECTION 4.—SUITS BY OR BETWEEN STATES AND UNITED STATES

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##### LOUISIANA v. TEXAS.

(Supreme Court of United States, 1900. 176 U. S. 1, 20 Sup. Ct. 251, 44 L. Ed. 347).

[Original bill of complaint by Louisiana against Texas, and Governor Sayers and Health Officer Blunt of the latter state, alleging in substance a maladministration of the Texas quarantine laws by said officials in the particulars set forth in the opinion below, for the ostensible purpose of preventing the introduction of yellow fever from New Orleans; and asking an injunction against said conduct. Demurrer on the ground that Louisiana and Texas have no such interest in the controversy as to make them proper parties to this suit.]

Mr. Chief Justice FULLER. \* \* \* [After quoting the eleventh



amendment:] Referring to this amendment, Mr. Chief Justice Waite, in *New Hampshire v. Louisiana and New York v. Louisiana*, 103 U. S. 76, 91, 27 L. Ed. 656, 662, 2 Sup. Ct. 176, 184, said: "The evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a state by or for citizens of other states, or aliens, without the consent of the state to be sued, and, in our opinion, one state cannot create a controversy with another state, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other states to its citizens."

In order, then, to maintain jurisdiction of this bill of complaint as against the state of Texas, it must appear that the controversy to be determined is a controversy arising directly between the state of Louisiana and the state of Texas, and not a controversy in vindication of the grievances of particular individuals. \* \* \*

In the absence of agreement it may be that a controversy might arise between two states for the determination of which the original jurisdiction of this court could be invoked, but there must be a direct issue between them, and the subject-matter must be susceptible of judicial solution. And it is difficult to conceive of a direct issue between two states in respect of a matter where no effort at accommodation has been made; nor can it be conceded that it is within the judicial function to inquire into the motives of a state legislature in passing a law, or of the chief magistrate of a state in enforcing it in the exercise of his discretion and judgment. Public policy forbids the imputation to authorized official action of any other than legitimate motives.

As might be expected in view of the nature of the jurisdiction, the cases are few in which the aid of the court has been sought in "controversies between two or more states." They are cited in *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 32 L. Ed. 239, 8 Sup. Ct. 1370, and are chiefly controversies as to boundaries. \* \* \*

In *Re Debs*, 158 U. S. 564, 39 L. Ed. 1092, 15 Sup. Ct. 900, involving a case in the circuit court in which the United States had sought relief by injunction, it was observed: "That while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are intrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties."

It is in this aspect that the bill before us is framed. Its gravamen is not a special and peculiar injury such as would sustain an action by

a private person, but the state of Louisiana presents herself in the attitude of *parens patriæ*, trustee, guardian, or representative of all her citizens.

She does this from the point of view that the state of Texas is intentionally absolutely interdicting interstate commerce as respects the state of Louisiana by means of unnecessary and unreasonable quarantine regulations. Inasmuch as the vindication of the freedom of interstate commerce is not committed to the state of Louisiana, and that state is not engaged in such commerce, the cause of action must be regarded, not as involving any infringement of the powers of the state of Louisiana, or any special injury to her property, but as asserting that the state is entitled to seek relief in this way because the matters complained of affect her citizens at large. Nevertheless, if the case stated is not one presenting a controversy between these states, the exercise of original jurisdiction by this court as against the state of Texas cannot be maintained. \* \* \*

The complaint here, however, is not that the laws of Texas in respect of quarantine are invalid, but that the health officer, by rules and regulations framed and put in force by him thereunder, places an embargo in fact on all interstate commerce between the state of Louisiana and the state of Texas, and that the governor permits these rules and regulations to stand and be enforced, although he has the power to modify or change them. The bill is not rested merely on the ground of the imposition of an embargo without regard to motive, but charges that the rules and regulations are more stringent than called for by the particular exigency, and are purposely framed with the view to benefit the state of Texas, and the city of Galveston in particular, at the expense of the state of Louisiana, and especially of the city of New Orleans.

But in order that a controversy between states, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one state are injured by the maladministration of the laws of another. The states cannot make war, or enter into treaties, though they may, with the consent of Congress, make compacts and agreements. When there is no agreement whose breach might create it, a controversy between states does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one state to a distinct collision with a sister state.

In our judgment this bill does not set up facts which show that the state of Texas has so authorized or confirmed the alleged action of her health officer as to make it her own, or from which it necessarily follows that the two states are in controversy within the meaning of the Constitution.

Finally, we are unable to hold that the bill may be maintained as presenting a case of controversy "between a state and citizens of an-

other state." Jurisdiction over controversies of that sort does not embrace the determination of political questions, and, where no controversy exists between states, it is not for this court to restrain the governor of a state in the discharge of his executive functions in a matter lawfully confided to his discretion and judgment. Nor can we accept the suggestion that the bill can be maintained as against the health officer alone on the theory that his conduct is in violation or in excess of a valid law of the state, as the remedy for that would clearly lie with the state authorities, and no refusal to fulfill their duty in that regard is set up. In truth it is difficult to see how on this record there could be a controversy between the state of Louisiana and the individual defendants without involving a controversy between the states, and such a controversy, as we have said, is not presented.

Demurrer sustained.<sup>1</sup>

[WHITE, J., concurred in the result, and HARLAN and BROWN, JJ., gave concurring opinions.]

<sup>1</sup> In *New Hampshire v. Louisiana* and *New York v. Louisiana*, cited in the principal case, the plaintiff states accepted voluntary assignments of bond claims against defendant state held by their citizens, and the suits brought thereon were entirely controlled and paid for by the assignors, to whom the plaintiff states had agreed any recoveries should be paid. In his opinion, Waite, C. J., said (108 U. S. at 89-91):

"It is contended, however, that, notwithstanding the prohibition of the amendment, the states may prosecute the suits, because, as the 'sovereign and trustee of its citizens,' a state is 'clothed with the right and faculty of making an imperative demand upon another independent state for the payment of debts which it owes to citizens of the former.' There is no doubt but one nation may, if it sees fit, demand of another nation the payment of a debt owing by the latter to a citizen of the former. Such power is well recognized as an incident of national sovereignty, but it involves also the national powers of levying war and making treaties. As was said in *U. S. v. Dickel-*man, 92 U. S. 524, 23 L. Ed. 742, if a sovereign assumes the responsibility of presenting the claim of one of his subjects against another sovereign, the prosecution will be 'as one nation proceeds against another, not by suit in the courts, as of right, but by diplomatic negotiation, or, if need be, by war.'

"All the rights of the states, as independent nations, were surrendered to the United States. \* \* \* But it is said that even if a state, as sovereign trustee for its citizens, did surrender to the national government its power of prosecuting the claims of its citizens against another state by force, it got in lieu the constitutional right of suit in the national courts. There is no principle of international law which makes it the duty of one nation to assume the collection of the claims of its citizens against another nation, if the citizens themselves have ample means of redress without the intervention of their government. \* \* \* Under the Constitution, as it was originally construed, a citizen of one state could sue another state in the courts of the United States for himself, and obtain the same relief his state could get for him if it should sue. Certainly, when he can sue for himself, there is no necessity for power in his state to sue in his behalf, and we cannot believe it was the intention of the framers of the Constitution to allow both remedies in such a case. \* \* \* In other words, the giving of the direct remedy to the citizen himself was equivalent to taking away any indirect remedy he might otherwise have claimed, through the intervention of his state, upon any principle of the law of nations. It follows that when the amendment took away the special remedy there was no other left. Nothing was added to the Constitution by what was thus done. No power, taken away by the grant of the special remedy, was restored by the amendment. The effect of the amendment was simply to revoke the new right that had been given,

and leave the limitations to stand as they were. In the argument of the opinions filed by the several justices in the *Chisholm* Case [2 Dall. 419, 1 L. Ed. 440] there is not even an intimation that if the citizen could not sue, his state could sue for him." [Here follows the extract printed in the principal case, above, at p. 1387.]

But where the assignment of individual claims against a state was made absolutely to another state, the latter was allowed to recover thereon. *South Dakota v. North Carolina*, 192 U. S. 286, 312, 24 Sup. Ct. 260, 273, 48 L. Ed. 448 (1904). Brewer, J., saying (upholding a suit by South Dakota upon repudiated North Carolina bonds donated to the plaintiff state by an individual barred from suit by the eleventh amendment):

"Has this court jurisdiction of such a controversy, and to what extent may it grant relief? Obviously, that jurisdiction is not affected by the fact that the donor of these bonds could not invoke it. The payee of a foreign bill of exchange may not sue the drawer in the federal court of a state of which both are citizens, but that does not oust the court of jurisdiction of an action by a subsequent holder if the latter be a citizen of another state. The question of jurisdiction is determined by the status of the present parties, and not by that of prior holders of the thing in controversy. Obviously, too the subject-matter is one of judicial cognizance. If anything can be considered as justiciable it is a claim for money due on a written promise to pay; and if it be justiciable, does it matter how the plaintiff acquires title, providing it be honestly acquired? It would seem strangely inconsistent to take jurisdiction of an action by South Dakota against North Carolina on a promise to pay made by the latter directly to the former, and refuse jurisdiction of an action on a like promise made by the latter to an individual, and by him sold or donated to the former."

[White, J., gave a dissenting opinion, in which concurred Fuller, C. J., and McKenna and Day, JJ.]

When West Virginia separated from Virginia the former agreed with the latter to pay a fair share of the old state debt. Virginia settled with the old creditors for two-thirds of the debt and was released by them from the remaining one-third, giving them certificates for this "to be accounted for by West Virginia." Virginia took these certificates on deposit and sued West Virginia to compel the payment of the latter's share, for the benefit of these certificate-holders. A recovery was allowed, Holmes, J., saying, in *Virginia v. West Virginia*, 220 U. S. 1, 33, 34, 31 Sup. Ct. 330, 335, 55 L. Ed. 353 (1911):

"The liability of West Virginia is a deep-seated equity, not discharged by changes in the form of the debt, nor split up by the unilateral attempt of Virginia to apportion specific parts to the two states. If one third of the debt were discharged in fact, to all intents, we perceive no reason, in what has happened, why West Virginia should not contribute her proportion of the remaining two thirds. But we are of opinion that no part of the debt is extinguished, and further, that nothing has happened to bring the rule of *New Hampshire v. Louisiana* into play. For even if Virginia is not liable, she has the contract of West Virginia to bear an equitable share of the whole debt,—a contract in the performance of which the honor and credit of Virginia is concerned, and which she does not lose her right to insist upon by her creditors accepting from necessity the performance of her estimated duty as confining their claims for the residue to the party equitably bound. Her creditors never could have sued her if the supposed discharge had not been granted, and the discharge does not diminish her interest and right to have the whole debt paid by the help of the defendant. The suit is in Virginia's own interest, none the less that she is to turn over the proceeds."

## 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, 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."<sup>1</sup>

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 represent-

<sup>1</sup> See *Missouri v. Illinois*, 200 U. S. 496, 26 Sup. Ct. 268, 50 L. Ed. 572 (1906), dismissing this suit on the merits.

ing 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;<sup>2</sup> and we are unwilling in this case to proceed on 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.]

<sup>2</sup> 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 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.]

See also *Grier, J.*, in *Passaic Bridge Cases*, ante, pp. 1151, 1152, note.

As to the rules applicable to suits between individuals for acts done under state authority in one state, injurious to riparian rights in another, see *G. B. French and J. Smith* in 8 *Harv. L. Rev.* 133; *Pine v. Mayor, etc.*, of New York (C. C.) 103 *Fed.* 337 (1900); *Id.*, 112 *Fed.* 98, 50 C. C. A. 145 (1901) (cases); *N. Y. City v. Pine*, 185 U. S. 93, 22 *Sup. Ct.* 592, 46 L. Ed. 820 (1902).

Most of the suits between states of which the federal Supreme Court has assumed jurisdiction have involved boundary disputes. See *Rhode Island v. Massachusetts*, 12 *Pet.* 657, 9 L. Ed. 1233 (1838); *Virginia v. West Virginia*, 11 *Wall.* 39, 20 L. Ed. 87 (1871). Other cases have been: *South Carolina v. Georgia*, 93 U. S. 4, 23 L. Ed. 782 (1876) (compact as to use of boundary riv-

## GEORGIA v. TENNESSEE COPPER CO.

(Supreme Court of United States, 1907. 206 U. S. 230, 27 Sup. Ct. 618, 51 L. Ed. 1038, 11 Ann. Cas. 488.)

Mr. Justice HOLMES. This is a bill in equity filed in this court by the state of Georgia, in pursuance of a resolution of the legislature and by direction of the governor of the state, to enjoin the defendant copper companies from discharging noxious gas from their works in Tennessee over the plaintiff's territory. It alleges that, in consequence of such discharge, a wholesale destruction of forests, orchards, and crops is going on, and other injuries are done and threatened in five counties of the state. It alleges also a vain application to the state of Tennessee for relief. A preliminary injunction was denied. \* \* \*

The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The state owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a state for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power. The alleged damage to the state as a private owner is merely a makeweight, and we may lay on one side the dispute as to whether the destruction of forests has led to the gulying of its roads.

The caution with which demands of this sort, on the part of a state, for relief from injuries analogous to torts, must be examined, is dwelt

er); *Missouri v. Illinois*, 180 U. S. 208, 21 Sup. Ct. 331, 45 L. Ed. 497 (1901) (discussed in principal case); *South Dakota v. North Carolina*, 192 U. S. 286, 24 Sup. Ct. 269, 48 L. Ed. 448 (1904) (see note, ante, p. 1390, and mention of case below in this note); *Virginia v. West Virginia*, 206 U. S. 290, 27 Sup. Ct. 732, 51 L. Ed. 1068 (1907); *Id.*, 220 U. S. 1, 31 Sup. Ct. 330, 55 L. Ed. 353 (1911) (see note, ante, p. 1390).

As to interest in such suits, see *U. S. v. North Carolina*, 136 U. S. 211, 10 Sup. Ct. 920, 34 L. Ed. 336 (1890); *South Dakota v. North Carolina*, 192 U. S. 286, 321, 24 Sup. Ct. 269, 48 L. Ed. 448 (1904); *Virginia v. West Virginia*, 220 U. S. 1, 35, 36, 31 Sup. Ct. 330, 55 L. Ed. 353 (1911); and costs. *Missouri v. Illinois*, 202 U. S. 598, 26 Sup. Ct. 713, 50 L. Ed. 1160 (1906).

For the procedure in instituting and conducting suits between states, see C. F. Randolph in 2 Col. L. Rev. 303-305; for certain indulgences accorded by the court to the litigants, in view of their character, see *Virginia v. West Virginia*, 220 U. S. 1, 35, 36, 31 Sup. Ct. 330, 55 L. Ed. 353 (1911); *Id.*, 222 U. S. 17, 32 Sup. Ct. 4, 56 L. Ed. 71 (1911); and for some observations upon the nature and enforceability of judgments in such suits, see C. F. Randolph, in 2 Col. L. Rev. 308-312; *South Dakota v. North Carolina*, 192 U. S. 286, 318-321, 24 Sup. Ct. 269, 48 L. Ed. 448 (1904) (in which case, however, a mortgage of certain railway stock, given by defendant state to secure the debt, was ordered to be foreclosed for the benefit of plaintiff state).

upon in *Missouri v. Illinois*, 200 U. S. 496, 520, 521, 50 L. Ed. 572, 578, 579, 26 Sup. Ct. 268. But it is plain that some such demands must be recognized, if the grounds alleged are proved. When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court. *Missouri v. Illinois*, 180 U. S. 208, 241, 45 L. Ed. 497, 512, 21 Sup. Ct. 331.

Some peculiarities necessarily mark a suit of this kind. If the state has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up quasi-sovereign rights for pay; and, apart from the difficulty of valuing such rights in money, if that be its choice it may insist that an infraction of them shall be stopped. The states, by entering the Union, did not sink to the position of private owners, subject to one system of private law. This court has not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains, that it would have in deciding between two subjects of a single political power. Without excluding the considerations that equity always takes into account, we cannot give the weight that was given them in argument to a comparison between the damage threatened to the plaintiff and the calamity of a possible stop to the defendants' business, the question of health, the character of the forests as a first or second growth, the commercial possibility or impossibility of reducing the fumes to sulphuric acid, the special adaptation of the business to the place.

It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source. If any such demand is to be enforced this must be notwithstanding the hesitation that we might feel if the suit were between private parties, and the doubt whether, for the injuries which they might be suffering to their property, they should not be left to an action at law.

The proof requires but a few words. It is not denied that the defendants generate in their works near the Georgia line large quantities of sulphur dioxide which becomes sulphurous acid by its mixture with the air. It hardly is denied, and cannot be denied with success, that this gas often is carried by the wind great distances and over great tracts of Georgia land. On the evidence the pollution of the air and the magnitude of that pollution are not open to dispute. Without any attempt to go into details immaterial to the suit, it is proper to add that we are satisfied, by a preponderance of evidence,



that the sulphurous fumes cause and threaten damage on so considerable a scale to the forests and vegetable life, if not to health, within the plaintiff state, as to make out a case within the requirements of *Missouri v. Illinois*, 200 U. S. 496,<sup>1</sup> 50 L. Ed. 572, 26 Sup. Ct. 268. Whether Georgia, by insisting upon this claim, is doing more harm than good to her own citizens, is for her to determine. The possible disaster to those outside the state must be accepted as a consequence of her standing upon her extreme rights. \* \* \*

If the state of Georgia adheres to its determination, there is no alternative to issuing an injunction, after allowing a reasonable time to the defendants to complete the structures that they now are building, and the efforts that they are making to stop the fumes. The plaintiff may submit a form of decree on the coming in of this court in October next.<sup>2</sup>

Injunction to issue.

[HARLAN, J., gave a concurring opinion.]

<sup>1</sup> "Before this court ought to intervene, the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side."—*Missouri v. Illinois*, 200 U. S. at 521 (1906), by Holmes, J.

<sup>2</sup> "It is recognized that the state, as quasi-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned."—*Hudson Water Co. v. McCarter*, 209 U. S. 349, 355, 28 Sup. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560 (1905), by Holmes, J. See extract therefrom, ante, pp. 524, 525, note.

Other cases where the Supreme Court has taken original jurisdiction of suits by states against citizens or corporations of other states are: *Pennsylvania v. Wheeling Bdg. Co.*, 13 How. 518, 14 L. Ed. 249 (1852) (plaintiff's property rights affected); *Wisconsin v. Duluth*, 96 U. S. 379, 24 L. Ed. 668 (1878) (injury to navigation in plaintiff's territory). See comment in *Missouri v. Illinois*, 180 U. S. 208, 228-230, 21 Sup. Ct. 331, 45 L. Ed. 497 (1901). Compare *In re Debs*, ante, p. 1211.

In *Oklahoma v. Atchison, etc., Ry.*, 220 U. S. 277, 286, 289, 31 Sup. Ct. 431, 55 L. Ed. 465 (1911), Harlan, J., said (denying original jurisdiction of a suit by a state to enjoin a foreign railroad corporation from charging illegal rates within its borders):

"Plainly, the *state*, in its corporate capacity, would have no such interest in a controversy of that kind as would entitle it to vindicate and enforce the rights of a particular shipper or shippers, and, incidentally, of all shippers, by an original suit brought in its own name, in this court, to restrain the company from applying the Kansas rates, as such, to shippers generally in the local business of Oklahoma. \* \* \* Under a contrary view that jurisdiction could be invoked by a state, bringing an original suit in this court against foreign corporations and citizens of other states, whenever the state thought such corporations and citizens of other states were acting in violation of its laws to the injury of its people generally or in the aggregate; although an injury in violation of law, to the property or rights of particular persons through the action of foreign corporations or citizens of states, could be reached, without the intervention of the state, by suits instituted by the persons directly or immediately injured.

"We are of opinion that the words in the Constitution conferring original jurisdiction on this court in a suit 'in which a state shall be a party' are not to be interpreted as conferring such jurisdiction in every case in which the state elects to make itself strictly a party plaintiff of record, and seeks

OKLAHOMA v. GULF, C. & S. F. RY. CO. et al. (1911), 220 U. S. 290, 297-300, 31 Sup. Ct. 437, 55 L. Ed. 469, Ann. Cas. 1912C. 524, Mr. Justice HARLAN (dismissing an original bill in equity brought by Oklahoma to enjoin persons and corporations of other states from violating its penal laws against traffic in intoxicating liquors):

"It is manifest that the object of this suit by the state is, by means of an injunction issued by this court, to prevent the defendant companies from violating the penal or criminal laws of Oklahoma. It is, therefore, in its essence, a suit to enforce those laws. But of such a suit this court cannot take original cognizance, although the suit is in form of a civil nature. The Constitution, after enumerating, in the first clause of § 2 of article 3, the cases, in law and equity, as well as the controversies, to which the judicial power of the United States shall extend, provides that '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 enumerated in the article, the court to have appellate jurisdiction, both as to law and facts, with such exceptions and under such regulations as Congress shall make.

"The words 'in which a state shall be party,' literally construed, would embrace original suits of a civil nature brought by a state in this court to enforce a judgment rendered for a violation of its penal or criminal laws. But it has been adjudged, upon full consideration, that that result was inadmissible under the Constitution. This will appear from an examination of the opinion and judgment in *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 267, 290, 293, 32 L. Ed. 239, 243, 244, 8 Sup. Ct. 1370. That was an original action brought in this court by the state of Wisconsin against the Pelican Insurance Company of Louisiana, to recover the amount of a judgment rendered in a Wisconsin court against that company for certain penalties incurred by it for violating the laws of that state relating to the business of fire insurance companies. The question was distinctly presented whether the *state* could invoke the original jurisdiction of this court, to enforce the collection of such judgment. It was argued in that case that the suit was simply an action of debt, founded upon a contract of

not to protect its own property, but only to vindicate the wrongs of some of its people, or to enforce its own laws or public policy against wrongdoers generally."

So, also, *Oklahoma v. Gulf, etc., Ry.*, 220 U. S. 290, 301, 31 Sup. Ct. 437, 55 L. Ed. 469, Ann. Cas. 1912C, 524 (1911).

It should be noted that the cases in this section deal only with the *original* jurisdiction of the Supreme Court under the Constitution, art. III, § 2, par. 2. They do not concern the jurisdiction of inferior federal courts, under acts of Congress, over suits brought in them, either originally or by removal, by states against persons to enforce state laws in any mode the state sees fit. As regards such suits the federal courts sitting in a state are virtually state courts. *Madisonville Trac. Co. v. St. Bernard Co.*, 196 U. S. 239, 255, 25 Sup. Ct. 251, 49 L. Ed. 462 (1905).

record, to wit, a judgment, and was therefore to be regarded only as a civil suit, as distinguished from a criminal prosecution. But that view was overruled. The court said that notwithstanding the comprehensive words of the Constitution, 'the mere fact that a state is the plaintiff is not a conclusive test that the controversy is one in which this court is authorized to grant relief against another state or her citizens.'

"After an examination of the authorities it was further said, the court speaking by Mr. Justice Gray: 'The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties. If this were not so, all that would be necessary to give ubiquitous effect to a penal law would be to put the claim for a penalty into the shape of a judgment. Wharton, Conf. L. § 833; Westlake, International Law, 1st ed. § 388; Piggott, Foreign Judgm. 209, 210.' Further: 'From the first organization of the courts of the United States, nearly a century ago, it has always been assumed that the original jurisdiction of this court over controversies between a state and citizens of another state, or of a foreign country, does not extend to a suit by a state to recover penalties for a breach of her own municipal law. \* \* \* The real nature of the case is not affected by the forms provided by the law of the state for the punishment of the offense. It is immaterial whether, by the law of Wisconsin, the prosecution must be by indictment or by action, or whether, under that law, a judgment there obtained for the penalty might be enforced by execution, by scire facias, or by a new suit. In whatever form the state pursues her right to punish the offense against her sovereignty, every step of the proceeding tends to one end—the compelling the offender to pay a pecuniary fine by way of punishment for the offense. This court, therefore, cannot entertain an original action to compel the defendant to pay to the state of Wisconsin a sum of money in satisfaction of the judgment for that fine. The original jurisdiction of this court is conferred by the Constitution, without limit of the amount in controversy, and Congress has never imposed (if, indeed, it could impose) any such limit. If this court has original jurisdiction of the present case, it must follow that any action upon a judgment obtained by a state in her own courts against a citizen of another state, for the recovery of any sum of money, however small, by way of a fine for any offense, however petty, against her laws, could be brought in the first instance in the Supreme Court of the United States. That cannot have been the intention of the Convention in framing, or of the people in adopting, the federal Constitution.' The principles announced in *Wisconsin v. Pelican Ins. Co.*, supra, have been recognized in many subsequent cases. \* \* \*

"Those principles must, in our opinion, determine the present case adversely to the state. Although the state does not ask for judgment against the defendant railroad company for the penalties prescribed by the Oklahoma statutes for violations of its provisions, she yet seeks the aid of this court to enforce a statute one of whose controlling objects is to impose punishment in order to effectuate a public policy touching a particular subject relating to the public welfare. The statute, viewed as a whole, is to be deemed a penal statute. The present suit, although in form one of a civil nature is, in its essential character, one to enforce by injunction regulations prescribed by a state for violations of one of its penal statutes, and is therefore one of which this court cannot take original cognizance at the instance of the state."<sup>1</sup> \* \* \*

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### UNITED STATES v. TEXAS.

(Supreme Court of United States, 1891. 143 U. S. 621, 12 Sup. Ct. 488, 36 L. Ed. 285.)

[Original bill by the United States against Texas, pursuant to an act of Congress, to determine the boundary between Texas and Oklahoma Territory, this depending upon the interpretation of the treaty of 1819 between Spain and the United States. Texas demurred to the jurisdiction of the court.]

Mr. Justice HARLAN. \* \* \* By the Articles of Confederation. Congress was made "the last resort on appeal in all disputes and differences" then subsisting or which thereafter might arise "between two or more states concerning boundary, jurisdiction, or any other cause whatever;" the authority so conferred to be exercised by a special tribunal to be organized in the mode prescribed in those articles, and its judgment to be final and conclusive. Article 9. At the time of the adoption of the Constitution, there existed, as this court said in *Rhode Island v. Massachusetts*, 12 Pet. 657, 723, 724, 9 L. Ed. 1233, controversies between 11 states, in respect to boundaries, which had continued from the first settlement of the colonies. The necessity for the creation of some tribunal for the settlement of these and like controversies that might arise, under the new government to be formed, must, therefore, have been perceived by the framers of the Constitution; and consequently, among the controversies to which the judicial power of the United States was extended by the Constitution, we find those between two or more states. And that a controversy between two or more states, in respect to boundary, is one to which, under the Constitution, such judicial power extends, is no longer an open question in this court. \* \* \*

<sup>1</sup>So also the state courts cannot be required to execute the penal laws of the United States. See ante, p. 953, last paragraph of note 2, *Second Employers' Liability Cases*.

[After citing and quoting from various cases to this effect:] In view of these cases, it cannot with propriety be said that a question of boundary between a territory of the United States and one of the states of the Union is of a political nature, and not susceptible of judicial determination by a court having jurisdiction of such a controversy. The important question, therefore, is whether this court can, under the Constitution, take cognizance of an original suit brought by the United States against a state to determine the boundary between one of the territories and such state. \* \* \*

The cases in this court show that the framers of the Constitution did provide by that instrument for the judicial determination of all cases in law and equity between two or more states, including those involving questions of boundary. Did they omit to provide for the judicial determination of controversies arising between the United States and one or more of the states of the Union? This question is, in effect, answered by *U. S. v. North Carolina*, 136 U. S. 211, 10 Sup. Ct. 920, 34 L. Ed. 336. That was an action of debt brought in this court by the United States against the state of North Carolina upon certain bonds issued by that state. The state appeared, the case was determined here upon its merits, and judgment was rendered for the state. It is true that no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against a state.<sup>1</sup> \* \* \*

[After quoting Const., art. III, § 2, pars. 1 and 2:] It is apparent upon the face of these clauses that in one class of cases the jurisdiction of the courts of the Union depends "on the character of the cause, whoever may be the parties," and in the other, on the character of the parties, whatever may be the subject of controversy. *Cohens v. Virginia*, 6 Wheat. 264, 378, 393, 5 L. Ed. 257. The present suit falls in each class; for it is, plainly, one arising under the Constitution, laws, and treaties of the United States, and also one in which the United States is a party. It is therefore one to which, by the express words of the Constitution, the judicial power of the United States extends. That a circuit court of the United States has not jurisdiction, under existing statutes, of a suit by the United States against a state, is clear; for by the Revised Statutes it is declared—as was done by the judiciary act of 1789—that "the supreme court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state

<sup>1</sup>The court of its own motion will raise the question of jurisdiction, where doubtful. *Minnesota v. Hitchcock*, 185 U. S. 373, 382, 22 Sup. Ct. 650, 46 L. Ed. 954 (1902).



and citizens of other states, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction." Rev. St. § 687; Act Sept. 24, 1789, c. 20, § 13; 1 St. p. 80 (U. S. Comp. St. 1901, p. 565).

\* \* \*

Unless a state is exempt altogether from suit by the United States, we do not perceive upon what sound rule of construction suits brought by the United States in this court—especially if they be suits, the correct decision of which depends upon the Constitution, laws, or treaties of the United States—are to be excluded from its original jurisdiction as defined in the Constitution. That instrument extends the judicial power of the United States "to all cases," in law and equity, arising under the Constitution, laws, and treaties of the United States, and to controversies in which the United States shall be a party, and confers upon this court original jurisdiction "in all cases" "in which a state shall be party;" that is, in all cases mentioned in the preceding clause in which a state may of right be made a party defendant, as well as in all cases in which a state may of right institute a suit in a court of the United States.<sup>2</sup> The present case is of the former class.

<sup>2</sup>In *California v. So. Pac. Co.*, 157 U. S. 229, 257, 258, 261, 15 Sup. Ct. 591, 39 L. Ed. 683 (1895), the Supreme Court was held to have no original jurisdiction of a suit by a state against its own citizens and those of other states joined as defendants even though a federal question were involved, Fuller, C. J., saying:

"The language [of Const., art. III, § 2, par. 2], 'in all cases in which a state shall be party,' means in all the cases above enumerated in which a state shall be a party, and this is stated expressly when the clause speaks of the other cases where appellate jurisdiction is to be exercised. This second clause distributes the jurisdiction conferred in the previous one into original and appellate jurisdiction, but does not profess to confer any. The original jurisdiction depends solely on the character of the parties, and is confined to the cases in which are those enumerated parties, and those only. Among those in which jurisdiction must be exercised in the appellate form are cases arising under the Constitution and laws of the United States. \* \* \*

"Under the Constitution the cases in which a state may be a party are those between two or more states; between a state and citizens of another state; between a state and foreign states, citizens, or subjects; and between the United States and a state, as held in *U. S. v. Texas*, 143 U. S. 621, 12 Sup. Ct. 488, 36 L. Ed. 285 (1891). \* \* \* The original jurisdiction of this court in cases between a state and citizens of another state rests upon the character of the parties, and not at all upon the nature of the case.

"If, by virtue of the subject-matter, a case comes within the judicial power of the United States, it does not follow that it comes within the original jurisdiction of this court. That jurisdiction does not obtain simply because a state is a party. Suits between a state and its own citizens are not included within it by the Constitution, nor are controversies between citizens of different states.

"It was held at an early day that Congress could neither enlarge nor restrict the original jurisdiction of this court. *Marbury v. Madison*, 1 Cranch, 137, 173, 174, 2 L. Ed. 60 (1803). And no attempt to do so is suggested here. The jurisdiction is limited, and manifestly intended to be sparingly exercised, and should not be expanded by construction. What Congress may have power to do in relation to the jurisdiction of circuit courts of the United States is not the question, but whether, where the Constitution provides that this court shall have original jurisdiction in cases in which the state is plain-

We cannot assume that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more states of the Union, and between a state of the Union and foreign states, intended to exempt a state altogether from suit by the general government. They could not have overlooked the possibility that controversies capable of judicial solution might arise between the United States and some of the states, and that the permanence of the Union might be endangered if to some tribunal was not intrusted the power to determine them according to the recognized principles of law. And to what tribunal could a trust so momentous be more appropriately committed than to that which the people of the United States, in order to form a more perfect Union, establish justice, and insure domestic tranquility, have constituted with authority to speak for all the people and all the states upon questions before it to which the judicial power of the nation extends? It would be difficult to suggest any reason why this court should have jurisdiction to determine questions of boundary between two or more states, but not jurisdiction of controversies of like character between the United States and a state. \* \* \*

[After referring to *Hans v. Louisiana*, ante, p. 1366:] That case, and others in this court relating to the suability of states, proceeded upon the broad ground that "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."

The question as to the suability of one government by another government rests upon wholly different grounds. Texas is not called to the bar of this court at the suit of an individual, but at the suit of the government established for the common and equal benefit of the people of all the states. The submission to judicial solution of controversies arising between these two governments, "each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other" (*McCulloch v. State of Maryland*, 4 Wheat. 316, 400, 410, 4 L. Ed. 579), but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty. The states of the Union have agreed, in the Constitution, that the judicial power of the United States shall extend to all cases arising under the Constitution, laws, and treaties of the United States, without regard to the character of the parties (excluding, of course, suits against a state by its own citizens or by citizens of other states, or by citizens or subjects of foreign states), and equally to controversies to which the United States shall be a party, without regard to the subject of such controversies, and that this court may exercise original jurisdiction in all such cases "in which a state

tiff and citizens of another state defendants, that jurisdiction can be held to embrace a suit between a state and citizens of another state and of the same state. We are of opinion that our original jurisdiction cannot be thus extended."

See *Cohens v. Virginia*, 6 Wheat. 264, 392-394, 398, 5 L. Ed. 257 (1821).

shall be party," without excluding those in which the United States may be the opposite party. The exercise, therefore, by this court, of such original jurisdiction in a suit brought by one state against another to determine the boundary line between them, or in a suit brought by the United States against a state to determine the boundary between a territory of the United States and that state, so far from infringing in either case upon the sovereignty, is with the consent of the state sued. Such consent was given by Texas when admitted into the Union upon an equal footing in all respects with the other states. \* \* \*

Demurrer overruled.<sup>3</sup>

[FULLER, C. J., gave a dissenting opinion, with which LAMAR, J., concurred, denying the original jurisdiction of the Supreme Court in suits between a state and the United States. Compare *California v. So. Pac. Co.*, ante, p. 1402, note 2, this case.]

<sup>3</sup>Accord: *U. S. v. North Carolina*, 136 U. S. 211, 10 Sup. Ct. 920, 34 L. Ed. 336 (1890) (bond debt); *U. S. v. Michigan*, 190 U. S. 379, 23 Sup. Ct. 742, 47 L. Ed. 1103 (1903) (suit for accounting of canal tolls).

But a state may not sue the United States without the consent of the latter, *Kansas v. United States*, 204 U. S. 331, 27 Sup. Ct. 388, 51 L. Ed. 510 (1907); which of course may be given, *Minnesota v. Hitchcock*, 185 U. S. 373, 386, 22 Sup. Ct. 650, 46 L. Ed. 954 (1902).

As to the right of the United States to appear in its own courts as trustee for those actually beneficially interested (Indians), see *Minnesota v. Hitchcock*, 185 U. S. 373, 387, 388, 22 Sup. Ct. 650, 46 L. Ed. 954 (1902); or to enforce the private rights of its Indian wards arising out of federal legislation in pursuance of its governmental policy, see *Heckman v. U. S.*, 224 U. S. 413, 437-439, 32 Sup. Ct. 424, 56 L. Ed. 820 (1912) (suit by United States to cancel deeds made by Indians in violation of federal restrictions on alienation of Indian allotments), *Hughes, J.*, saying:

"This national interest is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust. \* \* \* [The] object [sought] could not be accomplished if the enforcement were left to the Indians themselves. It is no answer to say that conveyances obtained in violation of restrictions would be void. That, of course, is true, and yet, by means of the conveyances and the consequent assertion of rights of ownership by the grantees, the Indians might be deprived of the practical benefits of their allotments. \* \* \* In order that it might properly discharge its duty, and that it might obtain adequate relief, suited to the nature of the case, in accordance with the principles of equity, the United States was entitled to invoke the equity jurisdiction of its courts. It was not essential that it should have a pecuniary interest in the controversy."

See, also, the reasoning in *In re Debs*, ante, p. 1211, and cases there cited. SUITS BETWEEN STATES AND FOREIGN NATIONS.—As to the possible jurisdiction of the federal courts over such suits, see C. F. Randolph in 2 Col. L. Rev. 288, 289.

# APPENDIX I

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## CONSTITUTION OF THE UNITED STATES OF AMERICA<sup>1</sup>

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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 that 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.<sup>2</sup> 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

<sup>1</sup> 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 in 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 Amend

<sup>2</sup> Superseded by Amend. XIV, [§ 2]—*Ed.*

Years, in such Manner as they shall by Law direct. The Number of Representatives 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. [Superseded by Amend. XVII.]

[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

ments 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.

#### IMPORTANT EVENTS LEADING TO UNION UNDER CONSTITUTION.

May, 1754. Meeting at Albany of 25 commissioners from seven colonies, under instructions from the British Board of Trade, to consider plans for a defensive union of the colonies against the French.

October, 1765. "Stamp Act Congress," composed of delegates from nine states, met at New York to protest against British colonial taxation.

September 5—October 26, 1774. First Continental Congress, composed of delegates from 12 colonies, met at Philadelphia and recommended peaceful concerted action against British taxation and coercion.

April 19, 1775. Beginning of Revolution. Battle of Lexington and Concord.

May 10, 1775. Second Continental Congress met at Philadelphia and assumed direction of the war. Recommended the formation of revolutionary colonial governments.

July 4, 1776. Declaration of Independence by Congress.

November 15, 1777. Articles of Confederation proposed by Congress.

March 1, 1781. Confederation became operative by ratification of the last state, Maryland.

September 3, 1783. Conclusion of treaty of peace with Great Britain, ratified by Congress on January 14, 1784.

July 13, 1787. Passage by Congress of Ordinance of 1787 for government of Northwest Territory ceded to Congress by various states, 1780-1787.

September, 1786. Meeting at Annapolis of commissioners from five states to consider the trade of the United States. A convention of all the states recommended.

February 21, 1787. Declaration by Congress in favor of a convention of delegates from the states to revise the Articles of Confederation and report to Congress the changes necessary.

May 25—September 17, 1787. Meeting at Philadelphia of delegates from all of the states except Rhode Island. The Constitution agreed upon and laid before Congress with the recommendation that it be submitted to conventions of delegates chosen by the people of each state as directed by its legislature, and that when nine states had ratified it Congress should enact the necessary provisions for putting it into operation.

September 28, 1787. Congress submitted the Constitution to the states, as recommended. For subsequent steps in its adoption, see note 5, below.



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.

[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 increased 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 Obligation 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.<sup>3</sup>

[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 Sen-

<sup>3</sup> Superseded by Amend. XII.—*Ed.*

ate, 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 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;—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;<sup>4</sup>—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.

<sup>4</sup> See Amend. XI.



## 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.

[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.<sup>5</sup>

[Note of the draughtsman as to interlinations 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.*

*Delaware.*

{GEO: READ  
{GUNNING BEDFORD JUN  
{JOHN DICKINSON  
{RICHARD BASSETT  
{JACO: BROOM

*Maryland.*

{JAMES McHENRY  
{DAN OF ST THOS. JENIFER  
{DANL CARROLL

*Virginia.*

{JOHN BLAIR—  
{JAMES MADISON JR.

*North Carolina.*

{WM. BLOUNT  
{RICHD. DOBBS SPAIGHT  
{HU WILLIAMSON

*South Carolina.*

{J. RUTLEDGE  
{CHARLES COTESWORTH  
{PINCKNEY  
{CHARLES PINCKNEY  
{PIERCE BUTLER.

*Georgia.*

{WILLIAM FEW  
{ABR BALDWIN

*New Hampshire.*

{JOHN LANODON }  
{NICHOLAS GILMAN }

*Massachusetts.*

{NATHANIEL GORHAM  
{RUFUS KING

*Connecticut.*

{WM: SAML. JOHNSON  
{ROOER SHERMAN

*New York.*

ALEXANDER HAMILTON

*New Jersey.*

{WIL: LIVINGSTON  
{DAVID BREARLEY  
{WM: PATERSON.  
{JONA: DAYTON

*Pennsylvania.*

{B FRANKLIN  
{THOMAS MIFFLIN  
{ROBT MORRIS  
{GEO. CLYMER  
{THOS FITZSIMONS  
{JARED INGERSOLL  
{JAMES WILSON.  
{GOUV MORRIS

<sup>5</sup> The states ratified the Constitution in the following order:

Delaware.....	December 7, 1787	April 28, 1788. See 2 Doc. Hist. Const. 104, 121.)
Pennsylvania....	December 12, 1787	
New Jersey.....	December 18, 1787	South Carolina.....
Georgia.....	January 2, 1788	May 23, 1788
Connecticut.....	January 9, 1788	New Hampshire.....
Massachusetts....	February 6, 1788	June 21, 1788
Maryland.....	April 26, 1788	Virginia.....
(Vote taken on April 26, but official ratification signed by delegates on		June 26, 1788
		New York.....
		July 26, 1788
		North Carolina...November 21, 1789
		Rhode Island.....
		May 29, 1790

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

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.<sup>6</sup>

[ARTICLE I.]<sup>7</sup>

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 com-

in the states that 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.

<sup>6</sup> This heading appears only in the joint resolution submitting the first ten amendments [1 Stat. 97].—*Ed.*

In Vol. II of Amer. Hist. Assn. Reports (1896) is an elaborate essay by H. V. Ames upon Proposed Amendments to U. S. Constitution, 1789-1889, which contains a calendar of over 1,800 amendments proposed in Congress or the state legislatures, with a history of the more important proposals.

<sup>7</sup> The first 10 amendments were proposed by Congress on September 25, 1789, when they passed the Senate [1 Ann. Cong. (1st Cong. 1st Sess.) 88], having previously passed the House on September 24 [Id. 913]. They appear officially in 1 Stat. 97. The eleventh state (Virginia), there then being 14 in all, ratified them on December 15, 1791 [2 Doc. Hist. Const., 386-90].

Two other amendments proposed at the same time failed of ratification. One of these concerned the ratio of representation to population in the House, and the other forbade any change in the compensation of senators and representatives to become effective until after an intervening election of representatives. The first was ratified by ten states and the second by six states [2 Doc. Hist. Const., 325-390].

pelled 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.

#### [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.]<sup>a</sup>

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.

<sup>a</sup> The eleventh amendment was proposed by Congress on March 4, 1794, when it passed the House [4 Ann. Cong. (3rd Cong. 1st Sess.) 477], having previously passed the Senate on January 14 [Id. 30, 31]. It appears officially in 1 Stat. 402. The ratifications of but six states appear among the official records printed in 2 Doc. Hist. Const. 392-407. The fifth of these (North Carolina) was on February 7, 1795. Three others were announced to Congress in a message by President Washington on January 8, 1795 [1 Mess. and Papers of Pres. 174]. Rhode Island ratified at the March session of its legislature, 1794 [R. I. Laws (March, 1794) 32]; New Hampshire on June 20, 1794 [N. H. Laws, 1785-1796, p. 501]; Georgia on November 29, 1794 [Dig. Georgia Laws, 1755-1800, p. 291]; and Delaware on January 22, 1795 [2 Del. Laws (Ed. 1797) 1199, 1200]. North Carolina was therefore the twelfth state (there then being 15 in all) and the amendment became effective on February 7, 1795. On January 8, 1798, President Adams stated in a message to Congress that the amendment had been adopted by three-fourths of the states (there being then 16 in all) and might now be declared a part of the Constitution [1 Mess. and Papers of Pres. 260].

[ARTICLE XII.]<sup>o</sup>

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-President, shall be the Vice-President, if such number be a majority of the whole

<sup>o</sup>The twelfth amendment was proposed by Congress on December 8, 1803, when it passed the House [13 Ann. Cong. (8th Cong. 1st Sess.) 775, 776], having previously passed the Senate on December 2 [Id. 209, 210]. It appears officially in 2 Stat. 306. The ratifications of but 12 states appear among the official records printed in 2 Doc. Hist. Const., 411–450; and 5 Doc. Hist. Const., 480–491; the last of which were Georgia (May 19, 1804) and Tennessee (July 27, 1804). In addition, Kentucky ratified on December 27, 1803 [3 Littell, Ky. Stats. 149]. On June 15, 1804, the New Hampshire legislature passed an act ratifying the amendment, which was vetoed by the governor and failed to pass again by the two-thirds vote then required by the state Constitution for the enactment of laws over a veto. [Transcript of proceedings in New Hampshire House of Representatives, June 20, 1804, furnished by Secretary of State Pearson in September, 1913]. If this veto was ineffective (see Const. art. V; ante, p. 14, note 1; and H. V. Ames in 2 Am. Hist. Assn. Rep. [1896] 297, 298), New Hampshire was the thirteenth state to ratify, and the amendment became operative on June 15, 1804. Otherwise, Tennessee was the last state needed, and the amendment dates from July 27, 1804. On September 25, 1804, Secretary of State Madison in a circular letter to the governors of the states declared it ratified by three-fourths of the states, there then being 17 in all [2 Doc. Hist. Const., 451, note].

A thirteenth amendment depriving of United States citizenship any citizen who should accept any title, office, or emolument from a foreign power, was proposed by Congress on May 1, 1810, when it passed the House [21 Ann. Cong. (11th Cong. 2d Sess.) 2050], having previously passed the Senate on April 27 [20 Ann. Cong. (11th Cong. 2d Sess.) 672]. It appears officially in 2 Stat. 613. It failed of adoption, being ratified by but 12 states up to December 10, 1812 [2 Miscell. Amer. State Papers, 477–479; 2 Doc. Hist. Const., 454–499], there then being 18 in all.

Another thirteenth amendment, forbidding any future amendment that should empower Congress to interfere with the domestic institutions of any state, was proposed by Congress on March 2, 1861, when it passed the Senate [Cong. Globe (36th Cong. 2d Sess.) 1403], having previously passed the House on February 28 [Id. 1285]. It appears officially in 12 Stat. 251. It failed of adoption, being ratified by but three states: Ohio, May 13, 1861 [58 Laws Ohio, 190]; Maryland, January 10, 1862 [Laws Maryland (1861–62) 21]; Illinois, February 14, 1862 [2 Doc. Hist. Const. 518] (irregular, because by convention instead of by legislature as authorized by Congress).



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.<sup>10</sup>

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.<sup>11</sup>

### ARTICLE XIV.<sup>12</sup>

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 re-

<sup>10</sup> The thirteenth amendment was proposed by Congress on January 31, 1865, when it passed the House [Cong. Globe (38th Cong. 2d Sess.) 531], having previously passed the Senate on April 8, 1864 [Id. (38th Cong. 1st Sess.) 1490]. It appears officially in 13 Stat. 567 under date of February 1, 1865. The twenty-seventh state (Georgia), there then being 36 in all, ratified it on December 9, 1865 [2 Doc. Hist. Const., 613]; and on December 18, 1865, it was certified by Secretary of State Seward to have become a part of the Constitution [13 Stat. 774]. In making this and subsequent certificates of like character the Secretary of State has acted under the authority of 3 Stat. 439, c. 80, § 2 (1818) [now R. S. U. S. § 205], which however attaches no legal effect to such certification.

<sup>11</sup> In the original manuscript this section does not appear as a separate paragraph [2 Doc. Hist. Const., 520].

<sup>12</sup> The fourteenth amendment was proposed by Congress on June 13, 1866, when it passed the House [Cong. Globe (39th Cong. 1st Sess.) 3148, 3149], having previously passed the Senate on June 8 [Id. 3042]. It appears officially in 14 Stat. 358 under date of June 16, 1866. Two states (Ohio and New Jersey) which had ratified it withdrew their assent before three-quarters of the states had ratified, occasioning grave doubt as to the validity of such action. Assuming this withdrawal to be ineffective, the twenty-eighth state (South Carolina), there then being 37 in all, ratified on July 9, 1868 [2 Doc. Hist. Const., 764]. If such withdrawal was effective, the twenty-eighth state (Georgia) ratified on July 21, 1868 [5 Doc. Hist. Const., 554-557]. On July 20, 1868, Secretary of State Seward certified that it had become a part of the Constitution if said withdrawals were ineffective [15 Stat. 708]. On July 21, 1868, Congress by joint resolution declared it a part of the Constitution and that it should be promulgated as such by the Secretary of State [15 Stat. 709-10]. As to the possible legal effect of this, see ante, p. 24, note 2. On July 28, 1868, Secretary Seward certified it as such without reservation [15 Stat. 708-711].

duced 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.

#### ARTICLE XV.<sup>13</sup>

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.<sup>14</sup>

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.

<sup>13</sup> The fifteenth amendment was proposed by Congress on February 26, 1869, when it passed the Senate [Cong. Globe (40th Cong. 3d Sess.) 1641], having previously passed the House on February 25 [Id. 1563, 1564]. It appears officially in 15 Stat. 346 under date of February 27. As in the case of the fourteenth amendment (see note 12, above) one state (New York) withdrew its assent before three-quarters of the states had ratified. If such withdrawal was ineffective, the twenty-eighth state (Iowa), there then being 37 in all, ratified on February 3, 1870 [2 Doc. Hist. Const., 877]. Otherwise the last state needed (Nebraska) ratified on February 17, 1870 [Id. 879]. On March 30, 1870, Secretary of State Fish certified that it had become a part of the Constitution [16 Stat. 1131].

<sup>14</sup> The sixteenth amendment was proposed by Congress on July 12, 1909, when it passed the House [44 Cong. Rec. (61st Cong. 1st Sess.) 4390, 4440, 4411], having previously passed the Senate on July 5 [Id. 4121]. It appears officially in 36 Stat. 184. The thirty-sixth and thirty-seventh states (Delaware and Wyoming), there then being 48 in all, ratified on February 3, 1913; and on February 25, 1913, Secretary of State Knox certified that it had become a part of the Constitution [37 Stat. 1785].

[ARTICLE XVII.]<sup>15</sup>

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.

<sup>15</sup> The seventeenth amendment was proposed by Congress on May 13, 1912, when it passed the House [48 Cong. Rec. (62d Cong. 2d Sess.) C367], having previously passed the Senate on June 12, 1911 [47 Cong. Rec. (62d Cong. 1st Sess.) 1925]. It appears officially in 37 Stat. 646. The thirty-sixth state (Wisconsin), there being 48 in all, ratified on May 9, 1913; and on May 31, 1913, it was certified by Secretary of State Bryan to have become a part of the Constitution [38 Stat. —].

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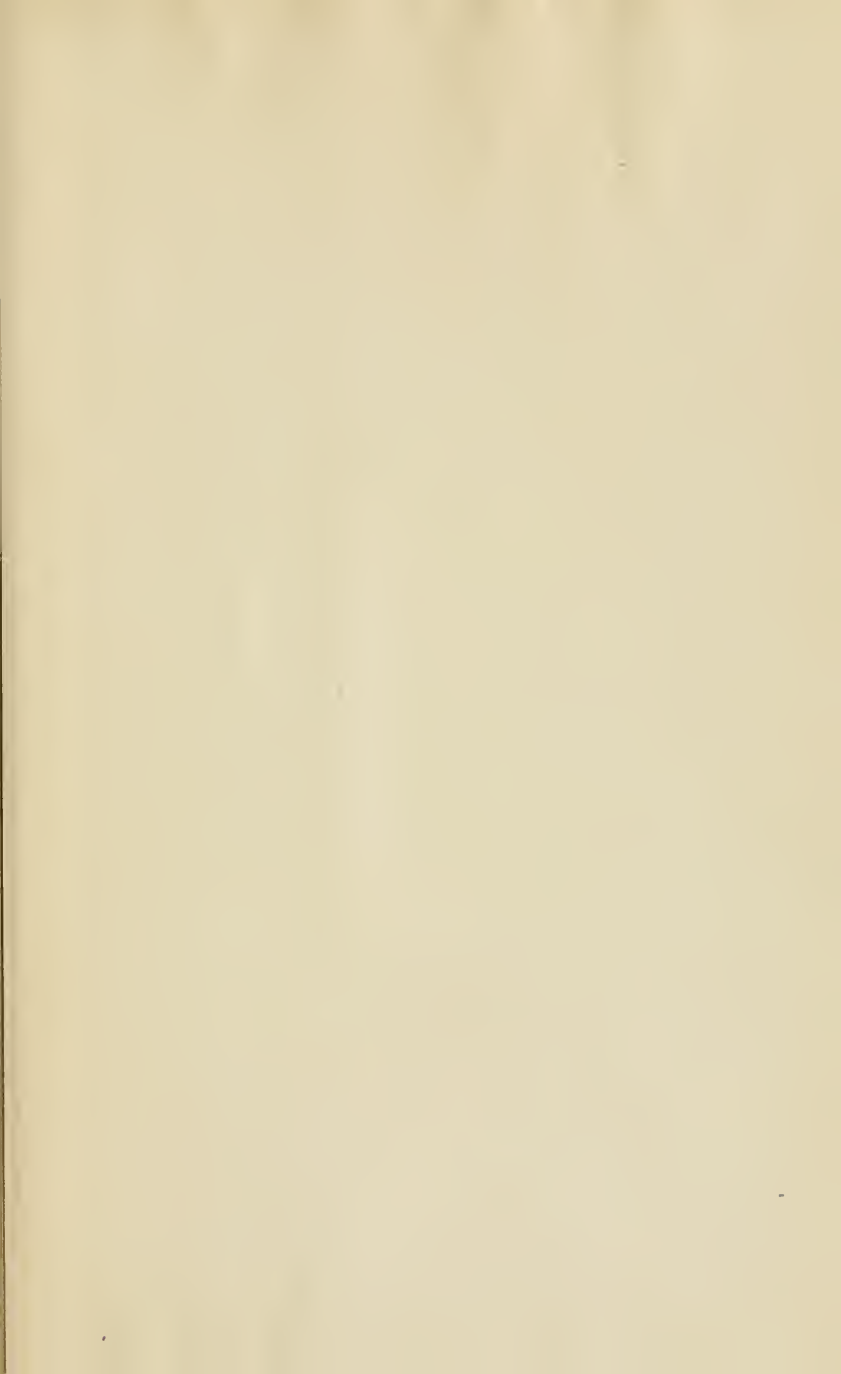
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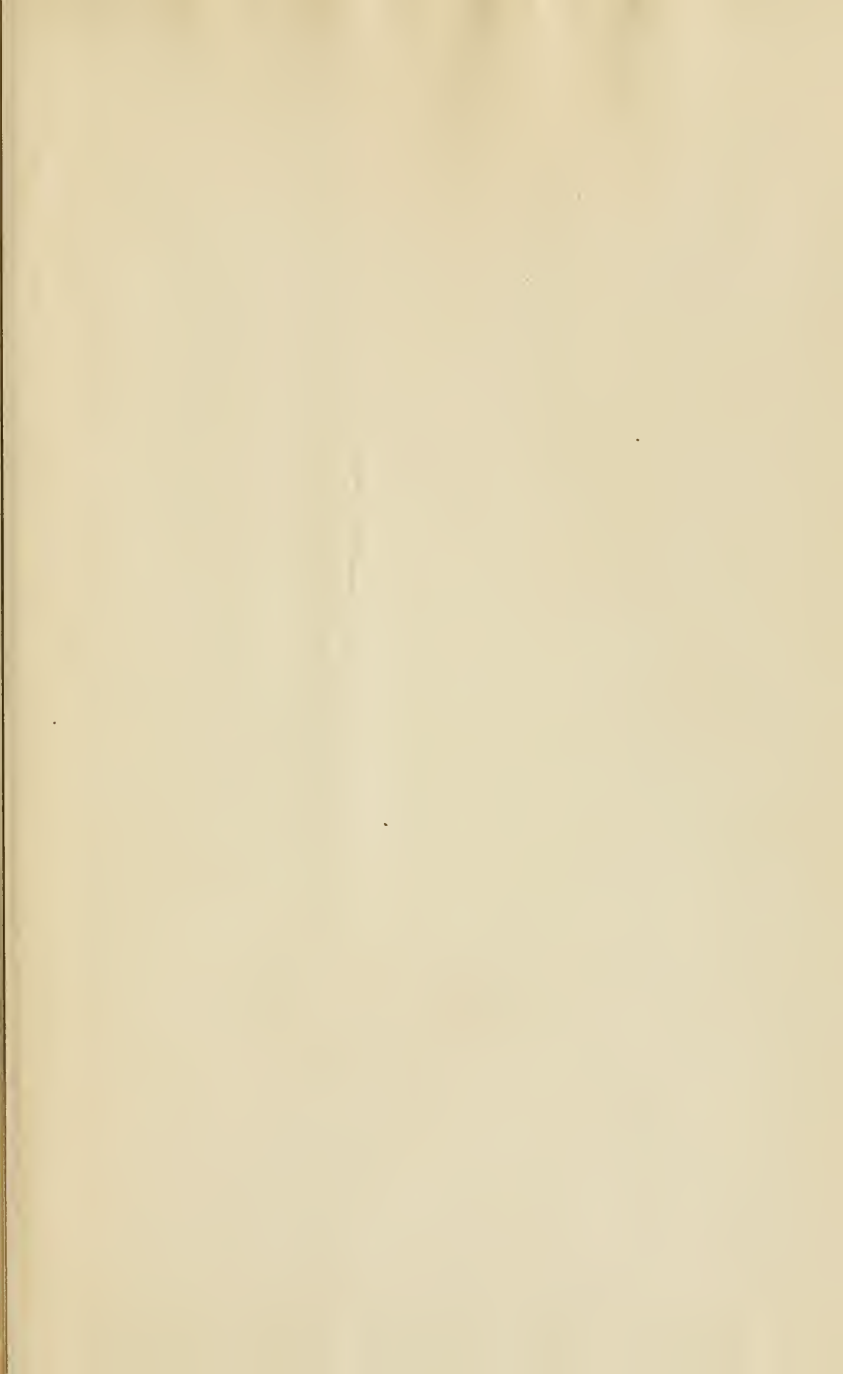
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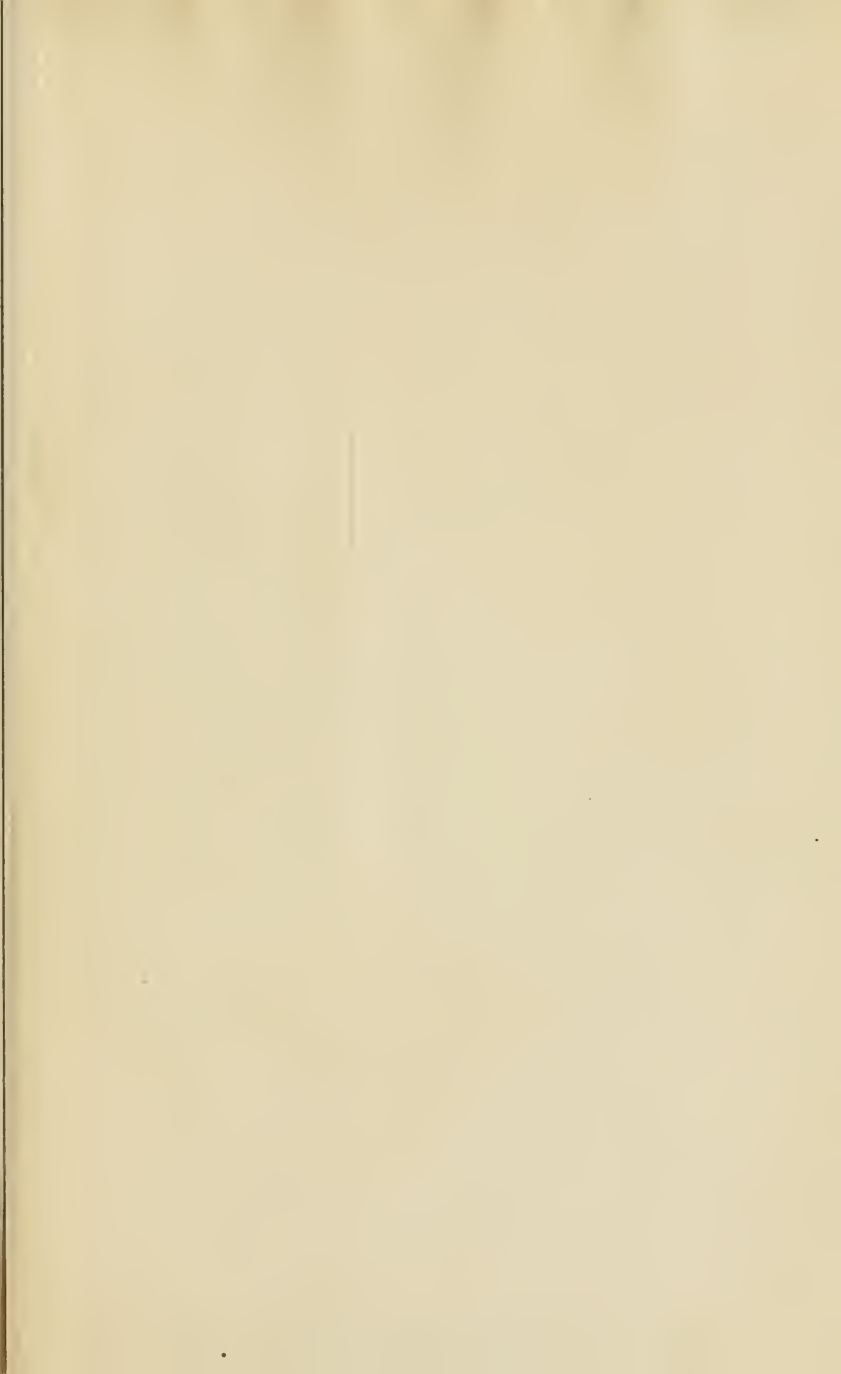












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