STATE TAX ON RAILWAY GROSS RECEIPTS.

[READING RAILROAD COMPANY *v.* PENNSYLVANIA.]

1. A statute of a State imposing a tax upon the gross receipts of railroad companies is not repugnant to the Constitution of the United States, though the gross receipts are made up in part from freights received for transportation of merchandise from the State to another State, or into the State from another.
2. Such a tax is not a regulation of interstate commerce.
3. Nor is it a tax on imports or exports.
4. Nor is it a tax upon interstate transportation.
5. A distinction made between a tax upon freights carried between States, because of their carriage, and a tax upon the fruits of such transportation after they have become intermingled with the other property of the carrier.

ERROR to the Supreme Court of Pennsylvania; the case being thus:

By an act of the legislature of Pennsylvania, passed on the 23d day of February, 1866, entitled "An act to amend the revenue laws of the Commonwealth," a tax was imposed upon the gross receipts of certain companies. The second section was as follows:

"In addition to the taxes now provided by law, every railroad, canal, and transportation company incorporated under the laws of this Commonwealth, and not liable to the tax upon income under existing laws, shall pay to the Commonwealth a tax of three-fourths of one per centum upon the gross receipts of said company; the said tax shall be paid semi-annually upon the first days of July and January, commencing on the first day of July, 1866; and for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer, or other proper officer of said company, to transmit to the auditor-general a statement, under oath or affirmation, of the amount of gross receipts of the said company during the preceding six months; and if such company shall refuse, or fail, for a period of thirty days after such tax becomes due, to make said return, or to pay the same, the amount thereof, with an addition of ten per centum

thereto, shall be collected for the use of the Commonwealth, as other taxes are recoverable by law from said companies."

Under this statute the accounting officers of Pennsylvania stated an account between the Commonwealth and the Reading Railroad Company, for tax on the gross receipts of the company, for the half year ending December 31st, 1867. The company, as stated in a preceding case,* was a corporation created by the State of Pennsylvania. Its road was between Philadelphia and the coal regions of Pennsylvania, and one large source of the company's profit was the transportation on the road of coal from the coal regions to a place near Philadelphia, called Port Richmond, or to the Schuylkill Canal, from both which places most of it went to States other than Pennsylvania.

The account, as stated by the accounting officers of the Commonwealth, was based on returns made by the company, which discriminated between receipts from freight transported to points within, and receipts from freight exported to points without, the State of Pennsylvania. The latter were returned under protest against their liability to taxation, and the tax assessed against *these* receipts made the subject of the present controversy. The company, in refusing to pay, alleged that the act of February 23d, 1866—so far as it taxed that portion of the gross receipts which were derived from transportation from the State to another State, or into the State from another,—was unconstitutional and void, because, among other reasons, it was in conflict with the fourth paragraph of the eighth section of the first article 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."

And with the second paragraph of the tenth section of the same article, which ordains 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."

* See *supra*, 234.

The Supreme Court of Pennsylvania adjudged that the act was not in conflict with either of the clauses of the Constitution relied on; and to this, its judgment, the present writ of error was taken.

Messrs. James E. Gowen and R. A. Lamberton, for the plaintiff in error:

We assume that the position taken by us in the case of *The State Freight Tax**—the position, namely, that a State tax upon freight generally is unconstitutional, as applied to the transportation of merchandise from one State to another—will be sustained by the judgment of this court. Setting out, then, as with a postulate, that *such* a tax is unconstitutional, we say:

1st. *There is no difference, in principle, between a freight tax regulated by reference to the articles transported and such a tax levied in the shape of a percentage of the money received for transportation.*

Is it not unreasonable to say that a tax of two cents per ton on the transportation of coal is unconstitutional, and yet that a tax of one per cent. on every two dollars (or two cents) paid for the transportation of coal is constitutional? If State taxation of interstate commerce is forbidden, a tax on the transportation of a ton of freight from one State to another must be equally illegal, whether the sum to be paid is specially mentioned or is left to be ascertained by a simple arithmetical calculation. The great object of the constitutional provision giving Congress the power to regulate commerce between the States was to prevent the States from embarrassing the intercourse which was intended should freely exist between these bodies, designed to be united for many purposes into one nation, with equal rights and privileges conferred upon all. If any one could tax the commodities carried it could exclude their passage through the State or across its lines. Is not a tax imposed on the amount

* *Supra*, 237–245. The case had just been argued.

of freight received by a transportation company the same in effect as one charged against the article carried? If the State can charge three-fourths of one per cent. on the money paid for freight, it can charge fifty per cent. on all money received, and although it can undoubtedly tax its own citizens who are represented in its legislative bodies to any extent that the law-makers may see proper, it cannot thus increase the price of transportation to the people of other States.

2d. *A tax upon the gross receipts of a transportation company is necessarily a tax upon transportation.*

In the *Bank of Commerce* v. *The Commissioners of Taxes*,* it was held that Federal securities held by a bank in New York, as part of the bank's capital, could not be constitutionally taxed under a law of that State which took the actual value of the entire capital stock as the basis of taxation, although it was strongly urged that the Federal securities were not specifically and *eo nomine* taxed; that no discrimination was made between them and other property; and that, in fact, the tax was upon the aggregate value of the property of the bank, irrespective of the character of the component parts of that property. This court, however, unanimously refused to admit that the law of New York did not tax Federal loans, because the tax was imposed indiscriminately upon all the property of the bank.

So a tax upon the gross receipts of a company is, necessarily, a tax upon its receipts from transportation, or any other source; but, when the company is a transportation company, and the tax is chargeable upon the gross receipts of transportation companies only, it is plain that the tax was practically intended to be a tax on gross receipts from transportation, and on nothing else. The gross receipts of a transportation company must, in nearly every case, be receipts from transportation alone.

The *Bank Tax Case*† was but an affirmance of the principle on which the case we refer to was ruled. It was there

* 2 Black, 620.

† 2 Wallace, 200.

held that a tax on *a valuation equal to the amount of the capital stock of a bank, paid in, or secured to be paid in*, was really and substantially a tax upon that portion of the capital stock which consisted of the loans of the United States, notwithstanding it was strenuously urged that the tax was the same, in substance, as a tax of a specific sum upon the franchises and privileges of the bank, irrespective of the character of its investments, or, to use the language of Denio, C. J., in *Utica* v. *Churchill*,* a tax "like that annexed to the franchise as a royalty for the grant," and notwithstanding the form of the tax appears to have been specially devised to obviate the objections sustained in the case of *The Bank of Commerce* v. *The Commissioners*.

Messrs. F. Carroll Brewster and Lewis Waln Smith, contra:

Even if we conceded, which we do not, the unconstitutionality of the tax on freight generally—the matter just now argued in the preceding case—the unconstitutionality of the tax on gross receipts generally by no means follows.

First. The tax of three-fourths of one per cent. on all gross receipts of a transportation company is not a tax on property, but on the franchises of the corporation.

This question came before this court in the case of the *Society for Savings* v. *Coite*,† and in *Provident Institution* v. *Massachusetts*.‡ The identity between the taxes there and the one here, so far as the effect on the corporations was concerned, will be noticed at once. The tax being, therefore, on the franchises of the corporation, and not on the property, it is clearly not included in the prohibited regulation of commerce, even according to the pretensions of the plaintiffs in error.

Second. Even if the tax on gross receipts be considered as a tax on property, it is still constitutional, or within the power of the State so to tax it.

In *Woodruff* v. *Parham*,§ the State levied a tax on the

* 33 New York, 240. † 6 Wallace, 594. ‡ Ib. 611. § 8 Wallace, 123.

gross sales of an auctioneer. He set up that these sales, which were of goods in unbroken packages from other States, were exempt. The court decided they were taxable. To the same effect is *Hinson* v. *Lott.** These cases establish this, as far as adjudication can establish anything, that the States have a right to tax the gross receipts of a citizen transacting business, be the receipts derived from what source soever, and that such a tax is not unconstitutional, provided that the tax does not institute any discrimination against non-residents.

If constitutional, it is not necessary for us to explain why the Commonwealth of Pennsylvania has seen fit to levy, in regard to some corporations in her borders, a tax on gross receipts rather than on something else for which she might have taxed them, yet, as showing the propriety of this sort of tax, sometimes, we may, perhaps, take the freedom to say a word further to the court on this subject.

The greater portion of the revenues of Pennsylvania are derived from the taxes levied on corporations. There are various forms of these taxes. In some cases they are levied on the capital stock; in most, perhaps, on net earnings, or income. The Commonwealth adapts the form of the tax to the particular kind of corporation, so that its collection can be facilitated. Experience has shown her that it is better to charge a mining company a large percentage, as three per cent. on net earnings, and to charge a railroad company a small one, as three-fourths of one per cent., on gross receipts. The reason why the gross receipts are selected as a basis of taxation of a railroad company, was doubtless because the State found that a large number of railroads were expending their receipts in improvements, and charging these as expenses. The cost of every improvement was deducted from the "net earnings," and while thus enriching themselves the railroad companies were avoiding taxation. The State, therefore, takes a low percentage on the gross receipts of railroads, and taxes them, whether they are expended in improve-

* 8 Wallace, 148.

ments or declared as a dividend. Such a course is both just to the corporation, and politic on the part of the State.

Reply: There is nothing in *The Society for Savings* v. *Coite*, to indicate that the court meant to question the authority of the cases which we have cited from 2d Black and 2d Wallace. It was held in *The Society for Savings* v. *Coite*, that a statute of a State requiring savings societies authorized to receive deposits, but without authority to issue bills, and *having no capital stock or stockholders*, to pay annually into the State treasury a sum equal to three-fourths of one per cent. on the total amount of their deposits on a given day, imposes a franchise tax, not a tax on property.

The court, while admitting that the tax would have been unconstitutional, as to deposits invested in Federal securities—if it could be considered a tax on the property represented by such securities—held, that it was not a tax on the property, but on the franchises or privileges of the defendant corporation. The facts of the corporation having no capital stock (its charter authorizing it to improve deposits for the benefit of its depositors), of its investments really belonging to its depositors, and of the tax being assessed not upon the actual value of the deposits, were all considered as showing that the tax was not imposed on the property, but on the functions, franchises, or corporate privileges of the defendant.

The succeeding case of *The Provident Institution* v. *Massachusetts*, is to the same effect.

Neither tends to prove that a tax on the gross receipts of a transportation company is not a tax upon transportation, nor that a tax upon interstate transportation is not a tax upon, and a regulation of, interstate commerce.

That the tax upon the gross receipts of railroad, canal, and transportation companies, imposed by the Pennsylvania statute, was intended to be a tax upon their franchises, can hardly be asserted in face of the fact that most other incorporated companies in the State are taxed, confessedly, upon their net earnings or income. The value of a franchise

Reply.

depends upon the profit derived from it; and the gross receipts of a railroad or canal company are not the measure of the profit made. But, in truth, the question is not, whether a tax which is alleged to operate as a regulation of commerce between the States or with foreign nations, is or is not a tax upon persons, property, trades or occupations, but whether it does really operate as a regulation of such commerce; since it is practically impossible for any State to collect a tax except from persons or property within her territory. It was contended that the tax upon importers in *Brown* v. *Maryland*,* was not a tax upon imports, but upon a business or occupation carried on in Maryland; that the tax on bills of lading in *Almy* v. *California*,† was a stamp tax, and not a duty on exports; and it might have been, and probably was, urged in *Hays* v. *The Pacific Mail Steamship Company*,‡ that the State of California had an undoubted right to tax ships as well as all other property within her territory. In *Crandall* v. *Nevada*,§ the tax chargeable against the carriers of passengers leaving the State was defended as a tax upon the business of carriers within the State.

When the court decided, in *The Savings Society* v. *Coite*, and in *The Provident Institution* v. *Massachusetts*, that the taxes there in question were charged upon the business of the corporation, and not upon their property, the unexpressed premise of the argument no doubt was, that such taxes did not practically interfere with the power of the United States to borrow money; just as in *Nathan* v. *Louisiana*,‖ a State tax on exchange and money brokers was held not to interfere with the power of Congress to regulate commerce. "Under the law," said McLean, J., in the last-mentioned case, "every person is free to buy or sell bills of exchange as may be necessary in his business transactions, but he is required to pay the tax if he engages in the business of a money or exchange broker." But can it be said that the power of Congress to regulate commerce between the States, and its actual regulation of it by leaving it free

* 12 Wheaton, 419. † 24 Howard, 169. ‡ 17 Id. 596.
§ 6 Wallace, 36. ‖ 8 Howard, 73.

and unrestricted, are not interfered with by a State regulation which exacts a certain sum for every passenger and every bale of goods that cross her boundary? or can it be reasonably said that every person is free to pass or repass, or to send his goods, without being taxed, provided he does not use the railroads or canals of the State?

Mr. Justice STRONG delivered the opinion of the court.

The question is whether the act of the legislature of Pennsylvania passed February 23d, 1866, under which a tax was levied upon the Philadelphia and Reading Railroad Company of three-quarters of one per cent. upon the gross receipts of the company, during the six months ending December 31st, 1867, is in conflict with the third clause of the eighth section, article first, of the Constitution of the United States, which confers upon Congress power to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes;" or whether it is in conflict with the second clause of the tenth section of the same article, which prohibits the States, "without the consent of Congress, from laying any imposts or duties on imports or exports, except what may be absolutely necessary for executing their inspection laws." It was claimed in the State courts that the act is unconstitutional so far as it taxes that portion of the gross receipts of companies which are derived from transportation from the State to another State, or into the State from another, and the Supreme Court of the State having decided adversely to the claim, the case has been brought here for review.

We have recently decided in another case between the parties to the present suit, that freight transported from State to State is not subject to State taxation, because thus transported. Such a burden we regard as an invasion of the domain of Federal power, a regulation of interstate commerce, which Congress only can make. If then a tax upon the gross receipts of a railroad, or a canal company, derived in part from the carriage of goods from one State to another is to be regarded as a tax upon interstate trans-

portation, the question before us is already decided. The answer which must be given to it depends upon the prior question, whether a tax upon gross receipts of a transportation company is a tax upon commerce, so far as that commerce consists in moving goods or passengers across State lines. No doubt every tax upon personal property, or upon occupations, business, or franchises, affects more or less the subjects, and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution. We think it may safely be asserted that the States have authority to tax the estate, real and personal, of all their corporations, including carrying companies, precisely as they may tax similar property when belonging to natural persons, and to the same extent. We think also that such taxation may be laid upon a valuation, or may be an excise, and that in exacting an excise tax from their corporations, the States are not obliged to impose a fixed sum upon the franchises or upon the value of them, but they may demand a graduated contribution, proportioned either to the value of the privileges granted, or to the extent of their exercise, or to the results of such exercise. No mode of effecting this, and no forms of expression which have not a meaning beyond this can be regarded as violating the Constitution. A power to tax to this extent may be essential to the healthy existence of the State governments, and the Federal Constitution ought not to be so construed as to impair, much less destroy, anything that is necessary to their efficient existence. But, on the other hand, the rightful powers of the National government must be defended against invasion from any quarter, and if it be, as we have seen, that a tax on goods and commodities transported into a State, or out of it, or a tax upon the owner of such goods for the right thus to transport them, is a regulation of interstate commerce, such as is exclusively within the province of Congress, it is, as we have shown in the former case, inhibited by the Constitution.

Is, then, the tax, imposed by the act of February 23d,

1866, a tax upon freight transported into, or out of, the State, or upon the owner of freight, for the right of thus transporting it? Certainly it is not directly. Very manifestly it is a tax upon the railroad company, measured in amount by the extent of its business, or the degree to which its franchise is exercised. That its ultimate effect may be to increase the cost of transportation must be admitted. So it must be admitted that a tax upon any article of personal property, that may become a subject of commerce, or upon any instrument of commerce, affects commerce itself. If the tax be upon the instrument, such as a stage-coach, a railroad car, or a canal, or steamboat, its tendency is to increase the cost of transportation. Still it is not a tax upon transportation, or upon commerce, and it has never been seriously doubted that such a tax may be laid. A tax upon landlords as such affects rents, and generally increases them, but it would be a misnomer to call it a tax upon tenants. A tax upon the occupation of a physician or an attorney, measured by the income of his profession, or upon a banker, graduated according to the amount of his discounts or deposits, will hardly be claimed to be a tax on his patients, clients, or customers, though the burden ultimately falls upon them. It is not their money which is taken by the government. The law exacts nothing from them. But when, as in the other case between these parties, a company is made an instrument by the laws to collect the tax from transporters, when the statute plainly contemplates that the contribution is to come from them, it may properly be said they are the persons charged. Such is not this case. The tax is laid upon the gross receipts of the company; laid upon a fund which has become the property of the company, mingled with its other property, and possibly expended in improvements or put out at interest. The statute does not look beyond the corporation to those who may have contributed to its treasury. The tax is not levied, and, indeed such a tax cannot be, until the expiration of each half-year, and until the money received for freights, and from other sources of income, has actually come into the company's

hands. Then it has lost its distinctive character as freight earned, by having become incorporated into the general mass of the company's property. While it must be conceded that a tax upon interstate transportation is invalid, there seems to be no stronger reason for denying the power of a State to tax the fruits of such transportation after they have become intermingled with the general property of the carrier, than there is for denying her power to tax goods which have been imported, after their original packages have been broken, and after they have been mixed with the mass of personal property in the country. That such a tax is not unwarranted is plain. Thus, in *Brown* v. *Maryland*,* where it was ruled that a State tax cannot be levied, by the requisition of a license, upon importers of foreign goods by the bale or package, or upon other persons selling the same by bale or package, Chief Justice Marshall, considering the dividing line between the prohibition upon the States against taxing imports and their general power to tax persons and property within their limits, said 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." This distinction in the liabilities of property in its different stages has ever since been recognized.† It is most important to the States that it should be. And yet if the States may tax at pleasure imported goods, so soon as the importer has broken the original packages, and made the first sale, it is obvious the tax will obstruct importation quite as much as would an equal impost upon the unbroken packages before they have gone into the markets. And this is so, though no discrimination be made.

There certainly is a line which separates that power of the Federal government to regulate commerce among the

* 12 Wheaton, 419–441.

† Waring *v.* The Mayor, 8 Wallace, 122; Pervear *v.* The Commonwealth, 5 Id. 479.

States, which is exclusive, from the authority of the States to tax persons' property, business, or occupations, within their limits. This line is sometimes difficult to define with distinctness. It is so in the present case; but we think it may safely be laid down that the gross receipts of railroad or canal companies, after they have reached the treasury of the carriers, though they may have been derived in part from transportation of freight between States, have become subject to legitimate taxation. It is not denied that net earnings of such corporations are taxable by State authority without any inquiry after their sources, and it is difficult to state any well-founded distinction between the lawfulness of a tax upon them and that of a tax upon gross receipts, or between the effects they work upon commerce, except perhaps in degree. They may both come from charges made for transporting freight or passengers between the States, or out of exactions from the freight itself. Net earnings are a part of the gross receipts.

There is another view of this case to which brief reference may be made. It is not to be questioned that the States may tax the franchises of companies created by them, and that the tax may be proportioned either to the value of a franchise granted, or to the extent of its exercise; nor is it deniable that gross receipts may be a measure of proximate value, or, if not, at least of the extent of enjoyment. If the tax be, in fact, laid upon the companies, adopting such a measure imposes no greater burden upon any freight or business from which the receipts come than would an equal tax laid upon a direct valuation of the franchise. In both cases, the necessity of higher charges to meet the exaction is the same.

Influenced by these considerations, we hold that the act of the legislature of the State imposing a tax upon the plaintiffs in error equal to three-quarters of one per cent. of their gross receipts is not invalid because in conflict with the power of Congress to regulate commerce among the States. And under the decision made in *Woodruff* v. *Par-*

ham,* it is not invalid because it lays an impost or duty on imports or exports.

JUDGMENT AFFIRMED.

Mr. Justice MILLER (with whom concurred Justices FIELD and HUNT), dissenting.

The principles announced in the case of the tax on the ton of freight, and the argument by which those principles are supported, meet my full approval. They lie at the foundation of our present Federal Constitution. The burdens which States, possessed of safe and commodious harbors, imposed by way of taxes called imposts upon the transit of merchandise through those ports to their destination for consumption in other States, were the cause as much as any one class of grievances of the formation of that Constitution; and the reluctance of the little State of Rhode Island to give up the tax which she thus levied on the commerce of her sister States through the harbor of Newport, then the largest importing place in the Union, was the reason that she refused for nearly two years to ratify that instrument.

The clauses of the Constitution which forbid the States to levy duties on imports, and which gave to Congress the right to regulate commerce, were designed to remedy that evil, and have always been supposed to be sufficient for that purpose. The one is the complement of the other, and something more. The first forbids the States to levy the tax on goods imported from abroad. The second places the entire control of commerce, with the exception of such as may be begun and completed within a single State, under the control of Congress. That commerce which is carried on with foreigners, or with the Indian tribes, or between citizens of different States, is under the jurisdiction of the General Government.

The opinion which affirms the tax of so much per ton on

* 8 Wallace, 123.

freight carried from one State to another to be a tax upon transportation, and therefore a regulation of the commerce among the several States forbidden by the Constitution, receives the approbation of all the members of this court except two. And it is there declared that any tax upon the freight so transported, or upon the carrier on account of such transportation, is within the prohibition.

Is the tax in the *present* case also within the evil intended to be remedied by the commerce clause of the Constitution?

It seems to me that to hold that the tax on freight is within it, and that on gross receipts arising from such transportation is not, is "to keep the word of promise to the ear and break it to the hope." If the State of Pennsylvania, availing herself of her central position across the great line of necessary commercial intercourse between the east and the west, and of the fact that all the ways of land and water carriage must go through her territory, is determined to support her government and pay off her debt by a tax on this commerce, it is of small moment that we say she cannot tax the goods so transported, but may tax every dollar paid for such transportation. Her tax by the ton being declared void, she has only to effect her purpose by increasing correspondingly her tax on gross receipts. In either event the tax is one for the privilege of transportation within her borders; in either case the tax is one on transportation.

That the tax on gross receipts comes not only ultimately, and in some remote way, but directly out of the freight transported, it is hardly worth while to argue. The railroad company makes precisely the same calculation in making its business profitable in relation to the cost and expenses of transportation, and the price to be demanded for it, in regard to this tax, that it does in reference to the tax on the ton of freight, and it imposes this additional burden for the benefit of the State in fixing the price of transportation.

The tax does not depend on the profits of the companies. It is the same whether the profits or the losses preponderate in a given year. A road may do a large carrying trade at a loss, but the State says, nevertheless, "for every dollar that

you receive for transportation I claim one cent or half a cent."

It is conceded that railroads may be taxed as other corporations are taxed on their capital stock, on their property, real and personal, and in any other way that does not impose necessarily a burden on transportation between one State and another. But a railroad or canal company differs from corporations for banking, insurance, or manufacturing purposes in this, that while their business is only remotely, or incidentally, connected with commerce, *the business of roads and canals, namely, transportation of persons and property, is itself commerce.* So much of said commerce as is exclusively within the State is subject to its regulations by taxation or otherwise, but that which carries goods from or to another State is exempted by the Constitution from its control.

I lay down the broad proposition that by no device or evasion, by no form of statutory words, can a State compel citizens of other States to pay to it a tax, contribution, or toll, for the privilege of having their goods transported through that State by the ordinary channels of commerce. And that this was the purpose of the framers of our Constitution I have no doubt; and I have just as little doubt that the full recognition of this principle is essential to the harmonious future of this country now, as it was then. The internal commerce of that day was of small importance, and the foreign was considered as of great consequence. But both were placed beyond the power of the States to control. The interstate commerce to-day far exceeds in value that which is foreign, and it is of immense importance that it should not be shackled by restrictions imposed by any State in order to place on others the burden of supporting its own government, as was done in the days of the helpless Confederation.

I think the tax on gross receipts is a violation of the Federal Constitution, and therefore void.

CASE OF THE STATE TAX ON FOREIGN-HELD BONDS.

[RAILROAD COMPANY *v.* PENNSYLVANIA.]

1. The power of taxation of a State is limited to persons, property, and business within her jurisdiction. All taxation must relate to one of these subjects.
2. Bonds issued by a railroad company are property in the hands of the holders, and when held by non-residents of the State, in which the company was incorporated, they are property beyond the jurisdiction of that State. A law of Pennsylvania, passed on the 1st of May, 1868, which requires the treasurer of a company, incorporated and doing business in that State, to retain five per cent. of the interest due on bonds of the company, made and payable out of the State to non-residents of the State, citizens of other States, and held by them, is not, therefore, a legitimate exercise of the taxing power of the State. It is a law which interferes between the company and the bondholder, and, under the pretence of levying a tax, impairs the obligation of the contract between the parties.
3. The exemption from taxation by the State of Pennsylvania of bonds thus issued to and held by non-residents of that State, citizens of other States, is not affected by the fact that the bonds are secured by a mortgage, executed simultaneously with them, upon property situated in that State. A mortgage there, though in the form of a conveyance, is a mere security for a debt, and transfers no estate in the mortgaged premises. It simply creates a lien upon them, and only confers upon the holder, or the party for whose benefit the mortgage is given, a right to proceed against the property mortgaged, upon a given contingency, to enforce the payment of his demand. This right has no locality independent of the party in whom it resides.
4. The tax laws of a State can have no extra-territorial operation; nor can any law of a State inconsistent with the terms of a contract, made with or payable to parties out of the State, have any effect upon the contract whilst it is in the hands of such parties or other non-residents of the State.

ERROR to the Supreme Court of Pennsylvania; the case being thus:

The plaintiff in error, in this case, the Cleveland, Painesville, and Ashtabula Railroad Company, was incorporated by an act of the legislature of Ohio, passed in 1848, and authorized to construct a railroad from the city of Cleveland, in that State, to the line of the State of Pennsylvania. Under

this act and its supplement, passed in 1850, the road was constructed. By an act of the legislature of Pennsylvania, passed in 1854, the company was authorized to construct a railroad from the city of Erie, in that State, to the State line of Ohio, so as to connect with this road from Cleveland, and also to purchase a railroad already constructed between those points. This grant of authority was subject to various conditions, which the company accepted, and under its provisions the road between the points designated was constructed, or the one already constructed was purchased, and connected with the road from Cleveland, so that the two roads together formed one continuous line between the cities of Cleveland and Erie. The whole road between those places was ninety-five and a half miles in length, of which twenty-five miles and a half were situated in the State of Pennsylvania, and the rest, seventy miles, were situated in the State of Ohio. The company, so far as it acted in Pennsylvania under the authority of the act of her legislature, has been held by her courts to be a separate corporation of that State, and as such subject to her laws for the taxation of incorporated companies.* But there was only one board of directors who managed the affairs of both companies as one company, and had the entire control of the whole road between Cleveland and Erie.

In 1868 the funded debt of the company amounted to $2,500,000 and was in bonds of the company secured by three mortgages, one for $500,000, made in 1854, one for $1,000,000, made in 1859, and one for $1,000,000, made in 1867. Each of the mortgages was executed upon the entire road, from Erie, in Pennsylvania, to Cleveland, in Ohio, including the right of way and all the buildings and other property of every kind connected with the road. The principal and interest of the bonds first issued were payable in the city of Philadelphia; the principal and interest of the other bonds were payable in the city of New York. All the bonds were executed and delivered in Cleveland, Ohio,

* 29 Pennsylvania State, 781.

and nearly all of them were issued to, and have been ever since held and owned by non-residents of Pennsylvania and citizens of other States. The interest was at 7 per cent.

On the 1st of May, 1868, the legislature of the State of Pennsylvania passed an act entitled "An act to revise, amend, and consolidate the several laws taxing corporations, brokers, and bankers;" the eleventh section of which provided as follows:

"The president, treasurer, or cashier of every company, except banks or savings institutions, incorporated under the laws of this Commonwealth, doing business in this State, which pays interest to its bondholders or other creditors, shall, before the payment of the same, retain from said bondholders or creditors, a tax of five per centum upon every dollar of interest paid as aforesaid; and shall pay over the same semi-annually, on the first days of July and January in each and every year, to the State treasurer for the use of the Commonwealth; and every president, treasurer, or cashier as aforesaid shall annually, on the thirty-first day of each December, or within thirty days thereafter, report to the auditor-general, under oath or affirmation, stating the entire amount of interest paid by said corporation to said creditors during the year ending on that day; and thereupon the auditor-general and State treasurer shall proceed to settle an account with said corporation as other accounts are now settled by law."

The treasurer of the company, under this act, made a report in May, 1869, showing that during the previous year the company had paid interest on its funded debt of $2,500,000, at the rate of 7 per cent., amounting to $175,000. Upon this report the auditor-general and State treasurer "settled an account" against the company, finding that it owed to the State the sum of $2336.50 for the tax on the interest which the company had paid.

In reaching this conclusion these officers apportioned the interest upon the debt owing by the company according to the length of the road, assigning to the part in the State of Pennsylvania an amount in proportion to the whole indebtedness which that part bears to the whole road. There was

Statement of the case.

no law, however, in existence at the time directing or authorizing this proceeding.

From the settlement thus made the company appealed, under the law of the State, to the Court of Common Pleas of one of her counties, specifying various objections to the settlement, and among others substantially the following:

That the greater portion of the bonds of the company having been issued upon loans made and payable out of the State, to non-residents of Pennsylvania, citizens of other States, and being held by them, the act in question, in authorizing the tax upon the interest stipulated in the bonds, so far as it applied to the bonds thus issued and held, impaired the obligation of the contracts between the bondholders and the company, and is therefore repugnant to the Constitution of the United States, and void.

The contest in the Court of Common Pleas took the form of a regular judicial proceeding, a declaration having been filed by the attorney-general on behalf of the State against the company as for a debt and the company having joined issue by a plea of non-assumpsit and payment. The Common Pleas sustained the validity of the alleged tax against the objections of the company, and verdict and judgment passed in favor of the State. On error to the Supreme Court of the State the judgment was affirmed, and the case is brought here for review under the second section of the amendatory Judiciary Act of 1867.

The judgment of the Supreme Court of Pennsylvania in the case now brought here, was rested, it may be well to say, upon a prior decision of that court; one made in *Maltby* v. *Reading and Columbia Railroad Co.** That case was thus: An act of the legislature of Pennsylvania of April 29th, 1844, by its 32d section, laid a tax on "mortgages, *money owing by solvent debtors*, whether by promissory notes, penal or single bill, bond or judgment;" and a following section required the commissioners of the county to assess *a tax of three mills on every dollar of the value* of property made liable

* 52 Pennsylvania State, 140.

by the 32d section to taxation. Several years prior to 1864, the Reading and Columbia Railroad Company, a corporation of Pennsylvania, issued bonds payable with semi-annual interest at 7 per cent. On the 30th of April, 1864, the legislature of Pennsylvania passed an act which required the president, &c., of any corporation which pays interest on which a State tax is imposed, "before payment of the same to retain the State tax," and pay the same to the treasurer of the State. Maltby, a holder of certain coupons, due before 1864, presented them to the railroad company for payment. The company insisted on retaining the tax of three mills on each dollar of the bonds. On suit by Maltby, a non-resident of Pennsylvania, he asserted that the tax on "money owing by solvent debtors" was a tax on the debt in the hands of its holder, in other words, in the hands of the creditor, and not in the hands of the debtor; and that he, the holder in this case, being a non-resident of Pennsylvania, the debt followed his person and could not be taxed; moreover, that the tax, if it taxed the debt in the hands of the creditor, impaired the obligation of contracts. The Supreme Court of Pennsylvania decided all three points against Maltby, the creditor.

Woodward, C. J., for the said court, in answering the argument that the holder of the bond was a non-resident of the State, and the tax on the debt was therefore illegal, and the other argument, to wit, that the retention of the tax out of the coupon violated the obligation of a contract, said:

"*As to the non-residence of the holder of the loan.* It is undoubtedly true that the legislature of Pennsylvania cannot impose a personal tax upon the citizen of another State, but the constant practice is to tax property within our jurisdiction which belongs to non-residents. Our land taxes have always been imposed without regard to the domicile of the owner, and so have the taxes of stocks in banks and other incorporated companies. Stocks and loans are personal property, and the domicile of the owner determines the rights of succession to such property, though its *situs* at the time of his death determines the right of administration, but the legislative power of taxation does not

depend upon these distinctions. There must be jurisdiction over either the property or the person of the owner, else the power cannot be exercised; but where the property is within our jurisdiction, and enjoys the protection of our State government, it is justly taxable, and it is of no moment that the owner who is required to pay the tax resides elsewhere. The duties of sovereign and subject are reciprocal, and any person who is protected by government in his person or property may be compelled to pay for that protection.

"The principle of taxation as the correlative of protection, perfectly just in itself, is as applicable to a non-resident as to a resident owner, because civil government is essential to give value to any form of property, without regard to the ownership, and taxation is indispensable to civil government. What would this plaintiff's loan be worth if it were not for the franchises conferred upon the company by the Commonwealth, franchises which are maintained and protected by the civil and military power of the Commonwealth? Is it not apparent that the intrinsic and ultimate value of the loan as an investment rests on State authority—that it is the State which made it property and preserves it as property? Then it would seem that this kind of property, more than any other, ought to contribute to the support of the State government. And I suppose it is upon this ground that the legislature discriminates between corporation loans and private debts as objects of taxation. The artificial debtor, itself a creature of the legislative power, and all its functions derived from legislative grant, is so dependent upon the government, it lives and moves and has its being so entirely by the favor of the government, that not only what it owns, but what it owes also, is thought fit to be taxed, whilst only the possessions of the natural person, and not his debts, are taxed.

"But, it may be said, and indeed was urged in argument, that the plaintiff's loan as personal property follows his person, and is property for all purposes only in the place where he has his domicile. For some purposes, as already intimated, it is undoubtedly subject to the law of the domicile, and yet in a very high sense it is also property here in Pennsylvania. It was admitted in argument that corporation stocks are property here though owned beyond our jurisdiction, and this is a necessary consequence of the final ruling which a long-vexed question in the

Supreme Court of the United States received in the case of *The Ohio and Mississippi Railroad Company* v. *Wheeler*,* where it was held that stockholders in railroad companies become presumptively citizens of the State which creates the corporation. Property has been defined to be the right or interest which one has in lands or chattels, and so domestic is this peculiar species of property that it domesticates the owner. But loans are not stocks, and yet the loans and stock of a railroad company resemble each other in many respects. Both are subscribed under the authority of a special law, and both are so far capital that they are employed for the same general purposes. The certificate of stock, which the plaintiff as a citizen of Rhode Island may hold for shares in this company, is mere paper evidence of property existing here; it is not the thing signified, it is only evidence of it. Is the bond which the plaintiff holds anything more? He cannot enforce it where he lives; he must come here to gather its fruits. It is founded upon and derives its value from a mortgage, but that mortgage is here, and the franchises and properties which the mortgage binds are here within our jurisdiction. The bond signifies his right to receive so much money out of the mortgaged estate, but that estate not only belongs to our jurisdiction, but was in part created by our authority, and the power to raise the mortgage, like all the franchises of the company, was conferred by State authority.

"Now, although loans and stocks are distinguishable for many purposes, yet the legislature committed no very great solecism in treating loans as taxable property within our jurisdiction. The tax may be thought to be extravagant, especially in view of the taxation to which the owner is exposed in the place of his residence, but that is a consideration for legislative attention. The point we rule upon this part of the case is, that corporation loans, though in some sense mere debts, are like moneys at interest, taxable as property, and moneys at interest have long been taxed in Pennsylvania.

"*Then, has the company the right to deduct the tax from the coupons?* This, it is said, violates the faith of the obligation, and renders all such legislation void. How far modern tax laws shall be permitted to impair and alter private contracts is a great question, which must be decided ultimately by the Su-

* 1 Black, 286.

preme Court of the United States. I have my own private opinions, which would probably be found to differ from a majority of this court. Perhaps the sound conclusion is that governmental taxation, a thing always to be anticipated when contracts are made, does not impair the obligation of contracts, within the meaning of the constitutional inhibition. If this be conceded as a principle, then the mode of collecting the tax, whether by a government agent, a debtor corporation or manufacturer, is mere machinery, and involves no principle whatever. For the present, therefore, and speaking for the court, I lay it down that the acts of Assembly, to which I have referred, are constitutional and valid; that they tax the loan as property found here in Pennsylvania, and that they appoint the debtor corporation the collector of that tax for the benefit of the State government."

Messrs. J. E. Gowen and J. W. Simonton, for the plaintiff in error:

I. It being admitted in Maltby's case, above quoted, "that the legislature of Pennsylvania cannot impose a personal tax upon the citizens of another State," that is to say, we suppose, cannot impose on such citizens any tax assessed against them personally, the question is, whether debt due from a citizen of Pennsylvania to a citizen of New York is either actually or technically situated within the limits of the State of Pennsylvania? The Supreme Court of Pennsylvania holds that in the case of bonds issued by railroads, incorporated in Pennsylvania, it is. Now, of course, a debt has no actual or tangible *situs;* and the technical *situs* must necessarily be determined by some technical rule, maxim, or theory. But what rule, theory, or maxim refers the *situs* of a debt, viewed as personal property, to the domicile of the debtor and not that of the creditor? The general rule as to the *situs* of personal property undoubtedly is that it follows the person of the owner. *Mobilia personam sequuntur* is a legal axiom. No court more fully than the Supreme Court of Pennsylvania has declared, that the domicile of the owner is, for all purposes of taxation, the *situs* of choses in action and other intangible personal property. In *McKeen*

v. *The County of Northampton*,* it was held that shares of stock in a corporation of another State, held by a citizen of Pennsylvania, were taxable in Pennsylvania. The court say:

"The defendant below being a citizen of this State, it is clear he is subject personally to its power to tax, and that all his property accompanying his person, or falling legitimately within the territorial jurisdiction of the State, is equally within the authority. The interest which an owner of shares has in the stock of a corporation is personal. Whithersoever he goes it accompanies him, and when he dies his domicile governs its succession."

So in *Short's Estate*.† There Mr. Short, a resident of Philadelphia, owned a vast sum in stocks and corporations of other States, and bonds of the State of Kentucky, and a bank deposit in New York, but all were held to be subject to the Pennsylvania collateral inheritance tax. Gibson, C. J., says for the court:

"That Mr. Short's property out of the State subjected him to personal liability for tax assessed on it here in his lifetime is not to be doubted. The general rule is that the *situs* of personal property follows the domicile of the owner of it, insomuch that even a creditor cannot reach it in a foreign country, except by attachment or some other process provided by the local law; certainly not by a personal action without appearance or something equivalent to it."

It may be that personal property which has an actual *situs* cannot be withdrawn from the taxing powers of the State *within* whose jurisdiction it is actually situated, but this can have no application to the intangible property known as choses in action, which have no actual *situs*, and can have no legal *situs* other than that of their owner. If it is a principle of general jurisprudence that a debt is property, having a taxable *situs* where the debtor resides, what are the consequences? Necessarily that the extent to which the taxing

* 49 Pennsylvania State, 519. † 16 Id. 63.

power of a State may be applied to debts due from its citizens to non-residents can have no limit, except that of the debts themselves. "It is admitted," said Marshall, C. J., in *McCulloch* v. *The State of Maryland*,* "that the power of taxing the people and their property is essential to the very existence of the 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 government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation." But the legislature does not act upon its constituents when it taxes the income of non-resident foreigners. They have not "the influence of the constituents over their representatives," referred to by Chief Justice Marshall; and it is not going too far to say that that influence is not likely to be exerted against the imposition of a tax which relieves the constituents themselves from a burden which they would otherwise have to bear. Considerations of comity would avail but little against the material advantages offered by such a system of taxation. Retaliation by other States or sovereignties, if effective, might induce a conviction of its impolicy, if not of its injustice; but other States or sovereignties might not be in a position to retaliate with effect. The State of Pennsylvania would hardly be deterred from taxing the money due by her corporations to citizens of Great Britain, by the levy of a retaliatory tax in Great Britain upon all money due by British corporations to citizens of Pennsylvania. But it is especially in a country like ours—composed of so many States independent in sovereignty, but yet so closely connected by the commercial relations of their citizens—that the evils of this new theory of taxation would be most severely felt. Could New York be expected to submit patiently to taxation by Pennsylvania of all money owing by citizens of the latter State to citizens

* 4 Wheaton, 428.

of the former? What would be thought of an attempt on the part of the State of Pennsylvania to hold citizens of New York personally responsible for the payment of taxes assessed on the debts due them by the citizens of Pennsylvania?

When we remember, too, that the choses in action, the debts due to a citizen, are always taxable in the jurisdiction within which he is domiciled, the taxation of this species of property in other jurisdictions not only imposes an intolerable burden upon the taxpayer, but impairs the resources from which the revenue of the State of which he is a citizen is derived. The bonds of corporations of other States form no inconsiderable portion of the wealth of citizens of many of the States; but this wealth may be destroyed by taxation in the States where the business of the corporations is carried on. Nor is such a result improbable. Many corporations owe their corporate existence to the concurrent legislation of several States; and if each State should tax the non-resident creditors of the corporation, even at the same rate at which resident creditors are taxed, the accumulation of taxes might well destroy the value of the property taxed. The Philadelphia, Wilmington, and Baltimore Railroad Company is chartered by the States of Pennsylvania, Maryland, and Delaware. It has issued many bonds at 6 per cent. interest. Those bonds are held to a large extent in Massachusetts. Suppose that each of the three States just named should require a tax of 2 per cent. on the par value of the principal of these loans, to be deducted from the 6 per cent. interest due to the Massachusetts holders, what would be the value of their securities, either to themselves or to the State of Massachusetts? If every State within whose territory one or more of the numerous railroads worked by the Pennsylvania Railroad Company happen to lie, should insist upon its right to levy a tax upon the interest paid by that corporation to its non-resident creditors, as an equivalent for the protection afforded by the laws of the State to the operations of the company, the officers of the company might, after retaining the whole interest from the creditors, be

compelled to solve the difficult problem of dividing the whole into parts greater in the aggregate than the whole.

II. The section of the act in question of Pennsylvania, so far as it provides for the collection of a tax from interest due to citizens and residents of other States, conflicts with the clause of the Constitution which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."*

In *Ward* v. *Maryland*,† the right "to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens," is said to be one of the privileges and immunities "plainly and unmistakably" secured and protected by this clause of the Constitution. Now does this act really subject the citizens of other States to taxation, from which the citizens of Pennsylvania are exempt? *Primâ facie*, this might not seem to be so; since the act requires the tax to be collected from all creditors to whom interest is payable by corporations, without regard to their citizenship or residence. But this equality is apparent only; since, unlike the Pennsylvania creditors, the creditors who are citizens of other States receive no equivalent for the taxes which they are compelled to pay, and are taxed on account of their ownership of property which is neither actually nor legally situate in the State of Pennsylvania. The civil rights of a New York creditor of a Pennsylvania corporation are not protected by the State of Pennsylvania, and why should he be required to contribute a part of the expense of maintaining the government of that State? It is idle to say that the State of Pennsylvania accords to him the right to sue in her courts; a similar right is accorded to foreigners by every civilized community on the face of the earth; but no one ever supposed that non-resident foreigners were thereby rendered taxable under the laws of each community which recognized such a right.

The levy of a tax by the British government upon either the persons or property of citizens of the United States, as

* Section 2, Article 4.

† 2 Wallace, 418.

an equivalent for the right of citizens of the United States to sue in the courts of Great Britain, would hardly be submitted to; and yet the wrong done would not be of so aggravated a character as that which would result from the imposition of a tax by the State of Pennsylvania upon the persons or property of the citizens of other States of this Union for the privilege of suing in the courts of Pennsylvania. This must be apparent, when it is considered that the Constitution of the United States, in securing to the citizens of each State all the privileges and immunities of citizens in the several States, undoubtedly secures the right to sue in the courts of the respective States; that this right can neither be withheld by any State, nor made the pretext for taxing the persons upon whom it has been conferred, and that citizens of other States are not obliged to pursue their claims to the courts of the respective States in which their debtors reside, but can always have ample remedy in the courts of the United States.

It is not of course meant to be contended that the property of non-residents actually within the State should be exempt from taxation. A citizen of New York has no reason to complain if his real estate or his merchandise in Pennsylvania is taxed to support the government which protects it. He receives an equivalent for the tax; and if the ownership of the property does not entitle him to representation in the legislature of Pennsylvania, it is because property in Pennsylvania, no matter to whom belonging, is not entitled to representation. But if, as we submit is true, a debt due from a citizen of Pennsylvania is neither actually nor theoretically property *in* Pennsylvania, the taxation of such a debt as against a New York creditor is taxation without protection of either the taxpayer's person or property, and without representation; and no citizen of Pennsylvania is, under such circumstances, taxed by the laws of Pennsylvania.

III. The section, so far as it provides for the collection of a tax from interest due to citizens and residents of other States, impairs the obligation of the contracts between the railroad company and such citizens and residents of other States, and is therefore repugnant to the Constitution of the

United States and void. It requires the officers of the debtor corporation to withhold a part of the interest stipulated to be paid to such citizens of other States, and to pay the same into the treasury of the State.

A tax law, therefore, which does accomplish this result impairs the obligation of a contract, and is prohibited by the Constitution, and the only question in the case is, was the non-resident citizen of another State, whose rights under the contract are affected, so situated with relation to the law-making power, that he was bound to anticipate, and contract with reference to, the passage of such a law?

It may well be that all citizens of any given State, in entering into contracts to be performed within such State, are bound to have regard to the laws of the State, then in force, which relate to or bear upon the subject; as well as to the fact that there are certain classes of laws, such as tax laws and police laws, which may be constitutionally applied to prior contracts; but a citizen of one State, entering into a contract lawful in his own State, *which is to be performed there*, is not bound in contracting to have any reference to the laws of another State, present or future, whether they be tax laws or laws of any other kind.

An illustration of this principle is given in the effect of State insolvent laws. Thus, citizens of a given State, entering into a contract to be performed in such State, are bound by the fact of the existence of an insolvent law; but one who is a citizen of another State, even though contracting in the State where such law exists, with one of its citizens, is not bound to have any regard to such law, and his rights cannot be affected by it, owing to the clause in the Constitution of the United States prohibiting any State from passing any law impairing the obligation of contracts. The State law has no jurisdiction over him, and his contract is not affected by it, because he is not a citizen of such State. This was adjudged in *Ogden* v. *Saunders*,* and in *Baldwin* v. *Hale*.†

In *Baldwin* v. *Hale* the principle of *Ogden* v. *Saunders* was

* 12 Wheaton, 213.

† 1 Wallace, 223.

affirmed and applied to the case of a debt not only contracted, but expressly made payable, in the State in which the debtor resided, and where he afterwards obtained his discharge as an insolvent.

It would seem plain that the principle on which these decisions are based applies *a fortiori* to State tax laws. The argument that the obligation of a contract should be regulated by the law of the place where the contract was made, and where one of the contracting parties resides, and still continues to reside, is not without plausibility. But what can be said in favor of extending the operation of the tax laws of a State to citizens of other States who happen to have debtors residing in the State which imposes the tax? Such a theory has no foundation, either in the practice of civilized nations or in the speculative opinions of juridical writers.

IV. But it is said, by the Supreme Court of Pennsylvania, that though the bondholder is beyond the jurisdiction of the State, his property, when the bond is secured by a mortgage, is within it.

But he does not own the property of the corporation which owes him the money, nor anything that has an actual *situs* within the State. The property mortgaged belongs to the debtor. It is as well settled as anything can be, in Pennsylvania, whatever the doctrine may be elsewhere, that a mortgage is only a lien or incumbrance on the land mortgaged, and that the mortgagee has no estate in the land.

If the non-resident creditor own neither the land bound nor the money lent, but merely the bond and mortgage, the choses in action which follow the person of the owner, and are actually in his possession without the State, we submit that he owns nothing within the jurisdiction of the State. Neither does he need, as has been argued, to invoke the aid of the courts of the State to reap the fruits of his security in case of the non-payment of the interest or principal of the bonds. The courts of the United States have ample jurisdiction and power to give the non-resident bondholder all the judicial aid he may need.

These considerations have led the courts of those States where this question has been raised, to decide in favor of the position taken by the plaintiff in error.*

V. The case of *Maltby* v. *Reading and Columbia Railroad*, if it were rightly decided and of authority in this court, has slight bearing on the question of a violation of a contract. There the law laying the tax was in force when the bond was issued. Here it was not. The tax here is not laid under the act there referred to of 1844 (the three mills tax), but under a different law, one of 1868, and passed *after* the bond was issued. The tax is a tax of 5 per cent. on the interest; which, on a 7 per cent. bond, which these bonds were, gives a different result from one of three mills on the dollar of principal.

Messrs. F. Carroll Brewster and J. W. M. Newlin, contra:

The opinion of the Supreme Court of Pennsylvania in Maltby's case presents our views so forcibly that all that we can say will add little to its argument. Still we may say:

1. The place of residence of the bondholders is quite unimportant. The tax does not discriminate against non-residents, and further, it is levied neither on the security—the road—nor on the chose in action—the bond,—but upon the *interest* payable by the defendant, a Pennsylvania corporation, which it is directed to withhold and pay to the State. This interest-money is in the actual possession of the corporation, and it is undeniable that it might be made a garnishee and the money be attached in its hands by the creditors of the bondholders. Even if the tax were directly upon the chose in action the proposition advanced by the plaintiff in error, that the thing taxed has no *situs* of its own, but follows the domicile of the non-resident holder and cannot be taxed elsewhere, is founded on a fiction of law which is not applicable to the questions of taxation.

* See State of Nevada *v.* Earl, 1 Nevada State, 397; Davenport *v.* The Mississippi and Missouri Railroad Co., 12 Iowa, 539; The State *v.* Ross, 3 Zabriskie, 517; People *v.* Eastman, 25 California, 603.

Argument in favor of the tax.

In *Green* v. *Van Buskirk*,* this court, speaking of the *situs* of personal property, said:

"But this fiction is by no means of universal application, and as Judge Story says, 'yields whenever it is necessary for the purpose of justice that the actual *situs* of the thing should be examined;' . . . . and always yields to laws for attaching the estate of non-residents, because such laws necessarily assume that property has a *situs* entirely distinct from the owner's domicile."

In *Catlin* v. *Hull*,† one H., who resided in New York, owned certain property, consisting of debts due from solvent debtors, resident in Vermont, evidenced by promissory notes; and he appointed the plaintiff, who was also a resident of Vermont, his agent, to control and manage the property, and collect and re-lend from time to time, as he should think proper, and allowed the plaintiff a specified salary for so doing. It was held that the legislature of this State had power to enact a law, subjecting property so situated to taxation, and that the property was taxable under the statute of the State. The court say:

"It is insisted that the property of Hammond, of which the plaintiff has the care, as his agent, cannot be considered as legally existing in this State, and that this is an attempt to tax property when neither the property nor the owner is within the State, and within the jurisdiction of our laws. We think, however, that this doctrine is quite too refined and artificial to be put to any practical use.

"It is undoubtedly true that, by the general acknowledged principles of public law, personal chattels follow the person of the owner, and that upon his death they are to be distributed according to the law of his *domicile*, and in general any convey-

* 7 Wallace, 139; and see St. Louis *v.* The Ferry Company, 11 Wallace, 428.

† 21 Vermont, 158; and see Hoyt *v.* Tax Commissioners, 23 New York, 226, 230, p. 232-3; City of New Albany *v.* Meekin, 3 Indiana, 481; Faxton *v.* McCosh, 12 Iowa, 529; Taylor, Admr. *v.* St. Louis County Court, 47 Missouri, 594; People *v.* Home Insurance Company, 29 California, 533; People *v.* Gardner, 51 Barbour, 352.

ance of chattels, good by the law of his own *domicile*, will be good elsewhere. But this rule is merely a legal fiction, adopted from considerations of general convenience and policy, for the benefit of commerce, and to enable persons to dispose of their property at their decease, agreeably to their wishes, without being embarrassed by their want of knowledge in relation to the laws of the country where the same is situated. But even this doctrine is to be received and understood with this limitation, that there is no positive law of the country where the property is in fact, which contravenes the law of his domicile, for if there is, the law of the owner's domicile must yield to the law of the State where the property is in fact situate. We do not consider this doctrine in relation to the *situs* of personal chattels, and relating to its transfer and distribution, as at all conflicting with the actual jurisdiction of the State where it is situate, over it, or with their right to subject it, in common with other property of the State, to share the burden of the government by taxation."

2. *The Pennsylvania acts do not impair the obligation of the contract of the company with its bondholders.* The corporation pays no less interest, but a part of it is diverted to the State as a tax on the bondholder, who is made, in common with the citizens of the State, to pay for the value given to his property here through the grant of the franchises of the corporation and the protection afforded to it by the State.

Mr. Justice FIELD, after stating the facts of the case, delivered the opinion of the court as follows:

The question presented in this case for our determination is whether the eleventh section of the act of Pennsylvania of May, 1868, so far as it applies to the interest on bonds of the railroad company, made and payable out of the State, issued to and held by non-residents of the State, citizens of other States, is a valid and constitutional exercise of the taxing power of the State, or whether it is an interference, under the name of a tax, with the obligation of the contracts between the non-resident bondholders and the corporation. If it be the former, this court cannot arrest

the judgment of the State court; if it be the latter, the alleged tax is illegal, and its enforcement can be restrained.

The case before us is similar in its essential particulars to that of *The Railroad Company* v. *Jackson*, reported in 7th Wallace. There, as here, the company was incorporated by the legislatures of two States, Pennsylvania and Maryland, under the same name, and its road extended in a continuous line from Baltimore in one State to Sunbury in the other. And the company had issued bonds for a large amount, drawing interest, and executed a mortgage for their security upon its entire road, its franchises and fixtures, including the portion lying in both States. Coupons for the different instalments of interest were attached to each bond. There was no apportionment of the bonds to any part of the road lying in either State. The whole road was bound for each bond. The law of Pennsylvania, as it then existed, imposed a tax on money owing by solvent debtors of three mills on the dollar of the principal, payable out of the interest. An alien resident in Ireland was the holder of some of the bonds of the railroad company, and when he presented his coupons for the interest due thereon, the company claimed the right to deduct the tax imposed by the law of Pennsylvania, and also an alleged tax to the United States. The non-resident refused to accept the interest with these deductions, and brought suit for the whole amount in the Circuit Court of the United States for the District of Maryland. That court, the chief justice presiding, instructed the jury that if the plaintiff, when he purchased the bonds, was a British subject, resident in Ireland, and still resided there, he was entitled to recover the amount of the coupons without deduction. The verdict and judgment were in accordance with this instruction, and the case was brought here for review.

This court held that the tax under the law of Pennsylvania could not be sustained, as to permit its deduction from the coupons held by the plaintiff would be giving effect to the acts of her legislature upon property and effects lying beyond her jurisdiction. The reasoning by which the learned

justice, who delivered the opinion of the court, reached this conclusion, may be open, perhaps, to some criticism. It is not perceived how the fact that the mortgage given for the security of the bonds in that case covered that portion of the road which extended into Maryland could affect the liability of the bonds to taxation. If the entire road upon which the mortgage was given had been in another State, and the bonds had been held by a resident of Pennsylvania, they would have been taxable under her laws in that State. It was the fact that the bonds were held by a non-resident which justified the language used, that to permit a deduction of the tax from the interest would be giving effect to the laws of Pennsylvania upon property beyond her jurisdiction, and not the fact assigned by the learned justice. The decision is, nevertheless, authority for the doctrine that property lying beyond the jurisdiction of the State is not a subject upon which her taxing power can be legitimately exercised. Indeed, it would seem that no adjudication should be necessary to establish so obvious a proposition.

The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways. 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.

Corporations may be taxed, like natural persons, upon

their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be in the nature of things in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, 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 expression could add anything to its obvious truth, which is recognized upon its simple statement.

The bonds issued by the railroad company in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-residents of the State, they are property beyond the jurisdiction of the State. The law which requires the treasurer of the company to retain five per cent. of the interest due to the non-resident bondholder is not, therefore, a legitimate exercise of the taxing power. It is a law which interferes between the company and the bondholder, and under the pretence of levying a tax commands the company to withhold a portion of the stipulated interest and pay it over to the State. It is a law which thus impairs the obligation of the contract between the parties. The obligation of a contract depends upon its terms and the means which the law in existence at the time affords for its enforcement. A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation, for, as stated on another occasion, such a law relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement. The Act of Pennsylvania of May 1st, 1868, falls within this description. It directs the treasurer

of every incorporated company to retain from the interest stipulated to its bondholders five per cent. upon every dollar and pay it into the treasury of the Commonwealth. It thus sanctions and commands a disregard of the express provisions of the contracts between the company and its creditors. It is only one of many cases where, under the name of taxation, an oppressive exaction is made without constitutional warrant, amounting to little less than an arbitrary seizure of private property. It is, in fact, a forced contribution levied upon property held in other States, where it is subjected, or may be subjected, to taxation upon an estimate of its full value.

The case of *Maltby* v. *The Reading and Columbia Railroad Company*, decided by the Supreme Court of Pennsylvania in 1866, was referred to by the Common Pleas in support of its ruling, and is relied upon by counsel in support of the tax in question. The decision in that case does go to the full extent claimed, and holds that bonds of corporations held by non-residents are taxable in that State. But it is evident from a perusal of the opinion of the court that the decision proceeded upon the idea that the bond of the non-resident was itself property in the State because secured by a mortgage on property there. "It is undoubtedly true," said the court, "that the legislature of Pennsylvania cannot impose a personal tax upon the citizen of another State, but the constant practice is to tax property within our jurisdiction which belongs to non-residents." And again: "There must be jurisdiction over either the property or the person of the owner, else the power cannot be exercised; but when the property is within our jurisdiction, and enjoys the protection of our State government, it is justly taxable, and it is of no moment that the owner, who is required to pay the tax, resides elsewhere." There is no doubt of the correctness of these views. But the court then proceeds to state that the principle of taxation as the correlative of protection is as applicable to a non-resident as to a resident; that the loan to the non-resident is made valuable by the franchises which the company derived from the Commonwealth, and

as an investment rests upon State authority, and, therefore, ought to contribute to the support of the State government. It also adds that, though the loan is for some purposes subject to the law of the domicile of the holder, "yet, in a very high sense," it is also property in Pennsylvania, observing, in support of this position, that the holder of a bond of the company could not enforce it except in that State, and that the mortgage given for its security was upon property and franchises within her jurisdiction. The amount of all which is this: that the State which creates and protects a corporation ought to have the right to tax the loans negotiated by it, though taken and held by non-residents, a proposition which it is unnecessary to controvert. The legality of a tax of that kind would not be questioned if in the charter of the company the imposition of the tax were authorized, and in the bonds of the company, or its certificates of loan, the liability of the loan to taxation were stated. The tax in that case would be in the nature of a license tax for negotiating the loan, for in whatever manner made payable it would ultimately fall on the company as a condition of effecting the loan, and parties contracting with the company would provide for it by proper stipulations. But there is nothing in the observations of the court, nor is there anything in the opinion, which shows that the bond of the non-resident was property in the State, or that the non-resident had any property in the State which was subject to taxation within the principles laid down by the court itself, which we have cited.

The property mortgaged belonged entirely to the company, and so far as it was situated in Pennsylvania was taxable there. If taxation is the correlative of protection, the taxes which it there paid were the correlative for the protection which it there received. And neither the taxation of the property, nor its protection, was augmented or diminished by the fact that the corporation was in debt or free from debt. The property in no sense belonged to the non-resident bondholder or to the mortgagee of the company. The mortgage transferred no title; it created only a lien upon the property. Though in form a conveyance, it was

both at law and in equity a mere security for the debt. That such is the nature of a mortgage in Pennsylvania has been frequently ruled by her highest court. In *Witmer's Appeal** the court said: "The mortgagee has no estate in the land, any more than the judgment creditor. Both have liens upon it, and no more than liens." And in that State all possible interests in lands, whether vested or contingent, are subject to levy and sale on execution, yet it has been held, on the ground that a mortgagee has no estate in the lands, that the mortgaged premises cannot be taken in execution for his debt. In *Rickert* v. *Madeira*,† the court said: "A mortgage must be considered either as a chose in action or as giving title to the land and vesting a real interest in the mortgagee. In the latter case it would be liable to execution; in the former it would not, as it would fall within the same reason as a judgment bond or simple contract. If we should consider the interest of the mortgagee as a real interest, we must carry the principle out and subject it to a dower and to the lien of a judgment; and that it is but a chose in action, a mere evidence of debt, is apparent from the whole current of decisions."‡

Such being the character of a mortgage in Pennsylvania, it cannot be said, as was justly observed by counsel, that the non-resident holder and owner of a bond secured by a mortgage in that State owns any real estate there. A mortgage being there a mere chose in action, it only confers upon the holder, or the party for whose benefit the mortgage is given, a right to proceed against the property mortgaged, upon a given contingency, to enforce, by its sale, the payment of his demand. This right has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the State when held by a resident therein, but when held by a non-resident it is as much beyond the jurisdiction of the State as the person of the owner.

It is undoubtedly true that the actual *situs* of personal

* 45 Pennsylvania State, 463. † 1 Rawle, 329.

‡ Wilson *v.* Shoenberger's Executors, 31 Pennsylvania State, 295.

property which has a visible and tangible existence, and not the domicile of its owner, will, in many cases, determine the State in which it may be taxed. The same thing is true of public securities consisting of State bonds and bonds of municipal bodies, and circulating notes of banking institutions; the former, by general usage, have acquired the character of, and are treated as, property in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are. But other personal property, consisting of bonds, mortgages, and debts generally, has no *situs* independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt, are not separated from the possession of the owners.

Cases were cited by counsel on the argument from the decisions of the highest courts of several States, which accord with the views we have expressed. In *Davenport* v. *The Mississippi and Missouri Railroad Company*,* the question arose before the Supreme Court of Iowa whether mortgages on property in that State held by non-residents could be taxed under a law which provided that all property, real and personal, within the State, with certain exceptions not material to the present case, should be subject to taxation, and the court said:

"Both in law and equity the mortgagee has only a chattel interest. It is true that the *situs* of the property mortgaged is within the jurisdiction of the State, but, the mortgage itself being personal property, a chose in action, attaches to the person of the owner. It is agreed by the parties that the owners and holders of the mortgages are non-residents of the State. If so, and the property of the mortgage attaches to the person of the owner, it follows that these mortgages are not property within the State, and if not they are not the subject of taxation."

In *People* v. *Eastman*,† the question arose before the Supreme Court of California whether a judgment of record in

* 12 Iowa, 539.

† 25 California, 603.

Mariposa County upon the foreclosure of a mortgage upon property situated in that county could be taxed there, the owner of the judgment being a resident of San Francisco, and the law of California requiring all property to be taxed in the county where situated; and it was held that it was not taxable there. "The mortgage," said the court, "has no existence independent of the thing secured by it; a payment of the debt discharges the mortgage. The thing secured is intangible, and has no *situs* distinct and apart from the residence of the holder. It pertains to and follows the person. The same debt may, at the same time, be secured by a mortgage upon land in every county in the State; and if the mere fact that the mortgage exists in a particular county gives the property in the mortgage a *situs* subjecting it to taxation in that county, a party, without further legislation, might be called upon to pay the tax several times, for the lien for taxes attaches at the same time in every county in the State, and the mortgage in one county may be a different one from that in another, although the debt secured is the same."

Some adjudications in the Supreme Court of Pennsylvania were also cited on the argument, which appear to recognize doctrines inconsistent with that announced in *Maltby* v. *Reading and Columbia Railroad Company*, particularly the case of *McKeen* v. *The County of Northampton*,* and the case of *Short's Estate*,† but we do not deem it necessary to pursue the matter further. We are clear that the tax cannot be sustained; that the bonds, being held by non-residents of the State, are only property in their hands, and that they are thus beyond the jurisdiction of the taxing power of the State. Even where the bonds are held by residents of the State the retention by the company of a portion of the stipulated interest can only be sustained as a mode of collecting a tax upon that species of property in the State. When the property is out of the State there can then be no tax upon it for which the interest can be retained. The tax laws of Penn-

* 49 Pennsylvania State, 519. † 16 Id. 63.

sylvania can have no extra-territorial operation; nor can any law of that State inconsistent with the terms of a contract, made with or payable to parties out of the State, have any effect upon the contract whilst it is in the hands of such parties or other non-residents. The extra-territorial invalidity of State laws discharging a debtor from his contracts with citizens of other States, even though made and payable in the State after the passage of such laws, has been judicially determined by this court.* A like invalidity must, on similar grounds, attend State legislation which seeks to change the obligation of such contracts in any particular, and on stronger grounds where the contracts are made and payable out of the State.

JUDGMENT REVERSED, and the cause remanded for further proceedings,

IN CONFORMITY WITH THIS OPINION.

Mr. Justice DAVIS, with whom concurred Justices CLIFFORD, MILLER, and HUNT, dissenting.†

NOTE.

AT the same time with the adjudication as to the tax in the preceding case was adjudged the validity of the tax in the cases of two other railroad companies, to wit: The Pittsburg, Fort Wayne, and Chicago; and the Delaware, Lackawanna, and Western, both writs of error against the State of Pennsylvania, and to judgments of the Supreme Court of that State. The tax levied in these last two cases upon the bonds of non-residents of the State was three mills on the dollar of capital, to be paid out of the interest; and the law laying the tax, a law of 1844, was in existence when the bonds were issued. In the previous case it will be remembered that the tax levied was five per cent. upon the interest of the bonds, and the law levying it was not in such existence. The last two cases, therefore, resembled the case of

* Ogden *v.* Saunders, 12 Wheaton, 214; Baldwin *v.* Hale, 1 Wallace, 223.

† See their opinion, *infra*, note following, pp. 327-8.

Maltby v. *Reading and Columbia Railroad*, the particulars of which are stated *supra*.*

Mr. Justice FIELD, who delivered the judgment of the court, in the additional two cases now mentioned, as in the first one, said that the cases involved the same questions that had been considered and decided in the previous case, that of the Cleveland, Painesville, and Ashtabula Railroad; and that "the difference in the mode of the assessment of the tax did not affect the principle decided."

Upon the authority of the case cited, the judgments in these two cases, now mentioned, were accordingly REVERSED, and the causes remanded for further proceedings, Justices CLIFFORD, MILLER, DAVIS, and HUNT dissenting; and Mr. Justice DAVIS saying, for himself and them, in all the cases, as follows:

"I cannot agree to the opinion of a majority of my brethren in these cases. That the tax in question is valid and binding, both on the corporation and its creditor, is clearly settled in *Maltby* v. *The Philadelphia and Reading Railroad Company*, and that, too, whether the creditor resides in Pennsylvania or elsewhere. As the highest court of the State has decided that the act of 1844 authorized the imposition of the tax in controversy, and as that act was in force when the bonds and mortgages were issued, I cannot see how any principle of the Federal Constitution is violated, nor can I see how this court can reach the conclusion it does in these cases without denying to the State government the right to construe its own local laws. This right has been recognized so often and in such a variety of ways, that it is no longer an open question. Indeed this court in *Railroad Company* v. *Jackson* has expressly recognized the binding force of the construction which the Supreme Court in Pennsylvania has put on the act of 1844. Mr. Justice Nelson, delivering the opinion of the court, said:

"'It has been argued for the plaintiff, that the acts of the legislature of Pennsylvania, when properly interpreted, do not embrace the bonds or coupons in question; but it is not important to examine the subject, for it is not to be denied, as the courts of the State have expounded these laws, that they authorized the deduction, and, if no other objection existed against the tax, the defence would fail.'

* Pp. 303–307.

"I am also of opinion, that a State legislature is not restrained by anything in the Federal Constitution nor by any principle which this court can enforce against the State court, from taxing the property of persons which it can reach and lay its hands on, whether these persons reside within or without the State."

FOWLER *v.* RAPLEY.

Under the landlord and tenant law of the District of Columbia, as regulated by the act of Congress of February 22d, 1867, the "tacit lien" given by the act upon certain of the tenant's personal chattels, on the premises, attaches at the commencement of the tenancy to any such chattels then on the premises, and continues to attach to them into whosesoever hands the chattels may come during the time allowed by the act for instituting proceedings, unless the lien is displaced by the removal of the chattels, or by the sale of them by the tenant in the ordinary course of mercantile transactions. It is not displaced by a sale of the stock in mass, while they remain in mass, to a person who knew that the premises were leased, and continues to occupy them, selling in the ordinary way the goods; nor even by a second sale of that sort.

APPEAL from the Supreme Court of the District of Columbia; the case being thus:

An act of Congress of February 22d, 1867,* abolishes the right of distress in the District of Columbia, and enacts that

"Instead of it the landlord shall have a tacit lien upon such of the tenant's personal chattels, upon the premises, as are subject to execution for debt, to commence with the tenancy and continue for three months after the rent is due, and until the termination of any action for such rent brought within said three months. And this lien may be enforced—

"*First.* By attachment, to be issued upon affidavit that the rent is due and unpaid; or if not due, that the defendant is about to remove or sell all or some of said chattels; or,

"*Second.* By judgment against the tenant, and execution to

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* 14 Stat. at Large, 404.