

Statement of the case.

NORTH MISSOURI RAILROAD COMPANY v. MAGUIRE.

1. A contract by a State to give up its power to tax any property within it, can be made only by words which show clearly and unequivocally an intention to make such a contract.
2. The act of the legislature of Missouri of February 16th, 1865, to provide for the completion of the North Missouri Railroad, does not so show an intention of the State to give up its power to tax the property of the corporation owning that railroad.
3. The ordinance of the 8th of April, 1865, adopted by the people of Missouri, as part of the constitution of the State established on that day, was, as respected the North Missouri Railroad Company, a true exercise of the taxing power of the State, and not a mere change of the order of disbursing the receipts of the earnings of the company as prescribed by the act of legislature above named.

ERROR to the Supreme Court of Missouri, the case being thus:

The North Missouri Railroad Company was incorporated by act of the legislature of Missouri, March 3d, 1851. By an act of January 7th, 1853, its charter was thus amended:

"The capital stock, together with all machines, wagons, cars, engines, or carriages belonging to the company, together with all their works or other property, and all profits which shall arise from the same, shall be vested in the respective *shareholders* of the company forever, in proportion to their respective shares, and the same shall be deemed personal estate, and shall be exempt from any public charge or tax whatsoever for the period of five years from and after the passage of this act."

Under the provisions of several acts of the State legislature between the date of its incorporation and the year 1857, the State issued its own bonds for the benefit of the road, reserving a mortgage on the road to secure their payment. As between the State and the company the latter was bound to pay the bonds and interest on them, and it was provided that, in case the company made default, the governor should foreclose the mortgage.

About the year 1860 the company did make default in the payment of the interest on the bonds, and had paid no part

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of either interest or the principal since. No sale, however, was made of the road, and on the 29th of March, 1863, the legislature passed an act forbidding the governor to make a sale until he should be required by it to do so.

By an act of February 16th, 1865, meant to provide for the completion of the road, the company was authorized to issue \$6,000,000 of *its* mortgage bonds, which should have priority over the mortgage of this State; and this to the extent named, and no farther, was by the act made a *second* lien. The act provided for the appointment of a fund commissioner for the railroad company. It then proceeded:

"SECTION 5. And the said railroad company shall pay over to the said fund commissioner all the *gross earnings and daily receipts* of said corporation, which shall be kept in deposit in the bank, subject to the daily draft of said fund commissioner, as the same may be required by said corporation for actual disbursement in operating said railroad, and in *carrying on the ordinary business of said corporation*, and for the other purposes hereinafter provided; and upon the failure of said company to pay said money to said fund commissioner, as herein provided, the said company shall forfeit and pay to the State of Missouri, for each and every such neglect or refusal, the sum of \$10,000.

"SECTION 6. The said commissioner shall pay over to the said corporation, from time to time, out of the funds coming into his hands as aforesaid, the amounts required for purposes of construction and equipment of said railroad, upon vouchers of the chief engineer, and upon the vouchers of the treasurer thereof, he shall pay the amounts required for operating said railroad and carrying on the ordinary business of said corporation; and he shall pay and disburse the funds in the following order of priority, to wit:

"*First.* To the said corporation the amounts required, from day to day, for the actual current expenditures in operating said railroad and carrying on the ordinary business of said corporation, including all sums that may be necessary for keeping said railroad in a good state of repair, and all sums that may be necessary, from time to time, for such additions to the rolling stock, buildings, and appurtenances of said road, as may be required to enable said corporation to accommodate and transact the business of their said railroad; and,

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"*Second*, the amount of his salary as fund commissioner, in monthly instalments; and,

"*Third*, the interest upon said mortgage bonds, as the same shall fall due; and,

"*Fourth*, the cost of construction and equipment of said railroad as aforesaid; and,

"*Fifth*, the accruing dividends on preferred stock, not exceeding six per cent. per annum thereon, in accordance with the provisions of this act in relation thereto; and,

"*Sixth*, the interest due on the outstanding bonds of the State of Missouri heretofore loaned to said corporation; and,

"*Lastly*, the surplus remaining shall be applied to the payment of the principal of said first mortgage bonds until the same shall be fully paid off, or, if more of said bonds shall have become due, then to the payment of the principal of the said bonds of the State of Missouri if any still outstanding; and the balance shall be paid to the North Missouri Railroad Company, and the said office of fund commissioner shall then cease and be vacated.

"SECTION 9. The holders of the bonds of the State of Missouri, heretofore issued to the North Missouri Railroad Company, are hereby authorized to convert the same, with interest accrued thereon, into preferred stock of the North Missouri Railroad Company, and the holders thereof shall be entitled to receive a special dividend thereon, not exceeding the rate of six per cent. per annum, *in the manner and in the order of priority above herein provided.*"

The thirteenth section provided for an acceptance of this act by the stockholders, and enacted that in the event of its being so accepted,

"*It shall be and become of full force and binding effect upon the said corporation and the State of Missouri.*"

The act was accepted in due form by the stockholders.

On the 8th of April, 1865, a convention of the people of Missouri adopted "An ordinance for the payment of State and railroad indebtedness." This ordinance levied on the railroad company an annual tax of ten per centum of all its gross receipts for the transportation of freight and passengers, and directed that it should be appropriated by the

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General Assembly to the payment of the principal and interest now due, or hereafter to become due, upon the bonds of the State, and the bonds guaranteed by the State, issued to the company.

The provisions of the ordinance will be seen more fully on pages 39-40, *supra*, beginning near the bottom of the former page, at the place marked with a *.

Under this ordinance, the assessor of St. Louis County assessed \$68,257 (being ten per cent.) upon the gross receipts of the company from October 1st, 1866, to October 1st, 1867, and delivered the same to one Maguire, collector of taxes, who, on the company's refusal to pay the bill, levied upon its engines, cars, &c. The company thereupon sued him in trespass in one of the State courts, where a case was stated for the judgment of the court, and by which it was agreed that if the court should be of opinion that the ordinance referred to was unconstitutional, there should be judgment for the company for costs and nominal damages; and if of the opinion that it was constitutional, judgment for Maguire for costs.

The Supreme Court of Missouri, where the case finally got—referring among other clauses of the act of 1865, to that which provided for the payment in the first place of the “amounts required from day to day, for the actual current expenditures for carrying on the ordinary business of the corporation”—within which it considered the payment of taxes to fall—rendered judgment for Maguire, and the company brought the case here.

One Jessup, who claimed the whole road under a sale, also stood in some way on the record as a plaintiff in error.

Mr. J. C. Orrick, for the plaintiff in error:

I. *The act of February 16th, 1865, is a contract between the company and the State.*

The act itself declares that if accepted by the stockholders it shall become of full force and binding effect upon the said corporation and the State of Missouri. The act was accepted by the stockholders.

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In addition, its provisions contain all the elements of a contract. The railroad company was a corporation, vested with certain franchises under a charter from the State, and the act of 1865 gives certain other franchises, and imposes certain restrictions, which required the assent of the corporation to make them valid, and the contract was: That the State would release its lien to a certain extent; authorize the company to issue \$6,000,000 of first mortgage bonds, and grant other privileges to the company, in consideration that the State, through an officer of its own, should be permitted to take charge of all the funds and earnings of the company, coming from whatever source, and disburse them in a particular way, and for certain objects specified in the act, amongst which was the payment of these very bonds for which the State was liable, and the accrued interest thereon which the State had paid, and which had thus become a debt due by the company to the State.

An important provision of the contract was that the interest on the \$6,000,000 of bonds and the dividends on the preferred stock should be paid before the interest or principal of the State bonds. The ordinance is a violation of this contract.

The ordinance, disregarding the obligation of the State to pay, through its fund commissioner, out of the "*gross earnings and daily receipts of the corporation*" what might be necessary to keep the road in a good state of repair, and what might be necessary for such additions to the rolling stock, buildings, and appurtenances of the road, as may be required to enable the corporation to accommodate and transact the business of the road, the amount of salary to the fund commissioner, the interest on the first mortgage bonds as the same fell due, the cost of construction and equipment, the dividends on preferred stock, the principal of the first mortgage bonds, to all of which the gross earnings were pledged before the principal of the State bonds could be paid; provides for the levy of an assessment of ten per cent. of all *gross receipts* for transportation of freight and passengers for two years, and fifteen per cent. thereafter

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for the payment of the principal and interest of these bonds until they shall be fully paid.

Thus it will be seen that the contract is impaired in an important particular.

II. *The questions then left for consideration are:*

First. Whether the assessment of ten per cent. on the gross earnings of the road, provided for by the ordinance of the convention, is a tax?

Second. Whether, if it be considered a tax, there is anything in the act of 1865 manifesting an intention on the part of the State to abandon the right of taxation?

As to the first point it appears by the provisions of the ordinance that there was an existing debt due by the company to the State for interest paid, and that there were bonds of the State outstanding for the payment of which the company might become liable to the State. The ten per cent. is to be applied to the payment of this interest and these bonds, and to this purpose only. The amount collected is to be appropriated by the General Assembly, not to the general purposes of the State, but to the payment of a debt already accrued,—the principal and interest of these bonds. And when the bonds and interest shall have been fully paid the assessment and collection of the money is to cease. And if the company should fail to pay the ten per cent., the road and other property and the franchises of the company are to be sold, and the proceeds of the sale are to be applied to the payment of the bonds and the debt, notwithstanding the fact that the State has agreed that they should be paid in another way. In other words, the State says to the railroad company, “You owe a debt, and are likely to owe us more on bonds for which we are liable and which we may have to pay. You must discharge that debt and liability by turning over ten per cent. of your gross receipts until we are satisfied that the debt is paid, and if you do not we will sell your franchise and all your property.” What is this but resuming the position of first mortgagee? The ordinance goes farther. It not only makes the State a first

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mortgagee, in violation of the provisions of the act of 1865, but it changes the mode and time of payment. Can this be considered a tax? Has it any of the elements of a tax?

Taxes are burdens imposed upon persons or property to raise money for *public purposes*. The money here raised is to be applied to the payment of a particular debt. The road had already been placed, by the act of 1865, in the hands of a receiver or fund commissioner, and the company was required to pay all the gross earnings and daily receipts into his hands under penalty of \$10,000 for each instance of neglect to do so.

Calling a thing a tax does not make it a tax; and, as is observed by Cooley in his excellent work on Constitutional Limitations,* "It may happen that an oppressive burden imposed by the government when it comes to be carefully scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property unwarranted by any principle of constitutional government."

As to the second point. The act of 1865 made a complete disposition of all the funds of the company, from whatever source coming. The company as a corporation owned nothing but its road and the property and appliances with which to work it, and everything derived from this source was by the act appropriated. Moreover *who* was to pay the taxes? Not the company; for, under heavy penalty, it was to pay all to the fund commissioner. Not the fund commissioner; for he is directed specifically to pay out all the money in a particular way. How the payment of taxes is any part of the *ordinary business* of the company as the Supreme Court of Missouri argues, it is difficult to understand; but if so, this could not be done by the corporation. The fund commissioner, who was an officer of the State, has control of the funds, and if authority was given to any one to pay the taxes as a part of the expenses of running the road, it was given to him and not to the company.

Indeed, since the passage of the amended charter of January 7th, 1853, the company as a corporation has not been

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taxed either upon its capital stock or any of its property. By the sixth section of that charter, "the capital stock, together with all the machines, wagons, cars, engines or carriages belonging to the company, together with all their works and other property, and all profits which should arise from the same," were vested in the shareholders forever as their personal estate, and as such was exempt from any charge or tax whatsoever for the term of five years. After the expiration of that term the shares were taxable to the individual shareholders, nor was it pretended that any of the property was taxable to the company up to and at the time of the passage of the act of 1865. This was so well understood that there was no necessity of saying anything on the subject of taxation in the act of 1865. That provision of the charter was unchanged by the act of 1865; it was the mode of taxation agreed upon by the State and the corporation. It was left as it was, and to suppose that the State meant, that after the passage of the act of 1865, the corporation should be taxed upon its property or income is to suppose that it should be subjected to a double taxation, because, by the sixth section of the charter all the property and the profits which should arise from the same were vested in the stockholders as their personal property, and as such subject to taxation against them after the expiration of the five years; and if it were taxed again to the corporation it would be double taxation, a thing which the courts will never presume that the legislature intended to do. We do not pretend that there was anything that exempted the shares of stock from taxation; and as the laws of Missouri stood then, and as they stand now, and as they were at the time of the adoption of the convention ordinance, the shares of stock in this corporation were taxable. The ordinance made no change in this respect. The ten per cent. on gross receipts was in addition to the tax on shares, but we do assert that it was the manifest intention of the legislature to exempt the corporation from any tax on its property or its capital.

Messrs. Montgomery Blair and F. A. Dick, contra.

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Mr. Justice CLIFFORD delivered the opinion of the court.

Much discussion of the evidence in the case will be unnecessary, as the principal facts are embodied in an agreed statement, which is made a part of the record.

By the agreed statement it appears that the plaintiff company is a corporation established by the laws of the State, and that the other plaintiff claims to be the legal owner of all the property lately owned by the corporation. Said company was incorporated on the third of March, 1851, with a capital stock of six millions of dollars divided into shares of one hundred dollars each.

Pecuniary aid in large amounts was furnished to the company by the State, as appears from several legislative acts. Such aid was granted by the act of the twenty-third of December, 1851, in terms as follows: that when evidence is produced satisfactory to the governor that the company has collected fifty thousand dollars on their capital stock, and that they have expended the same in the survey, location, and construction of the railroad, the governor shall cause to be issued and delivered to the company special bonds of the State to the same amount, as a loan of public credit, bearing interest and payable as therein provided. Provision is also made in the same section that upon like proof that the company have expended the whole of the sum realized from those bonds, and that they have also expended a further sum of the same amount of their own moneys, that the governor shall in like manner cause to be issued and delivered to the company further like bonds for the same amount, and so on in like manner as often as the company shall, from time to time, furnish like evidence that they have expended from their own moneys further sums, of not less than fifty thousand dollars, for the construction of the railroad, and that they have expended for the purpose the whole of the proceeds of the bonds previously issued by the State, the governor shall cause to be issued and delivered to the company further like bonds in instalments of the same amount, not exceeding in all the sum of two millions of dollars.

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the acceptance thereof should be signified to the secretary of state by the filing in his office of a certificate of such acceptance under the corporate seal of the company with the signature of the president, and the provision was that the certificate of acceptance so executed and filed should be recorded in the office of the secretary of state, and that it shall become and be, according to all intents and purposes, a mortgage of said road and every part and section thereof, and its appurtenances, to the people of the State, for securing the payment of the principal and interest of the sums of money for which such bonds shall from time to time be issued and accepted.

Legislative aid was also furnished in like form to certain other railroad companies of the State to expedite their construction and the completion of the same, amounting in the whole to the sum of nine millions of dollars, including the amount furnished to the plaintiff company, all of which was secured as a first lien on the respective railroads in like manner.

None of the companies, however, were able to complete their railroads without further aid from the State, and on the tenth of December, 1855, the legislature, by an act entitled "An act to secure the completion of certain railroads in the State," enacted that it shall be the duty of the governor, upon the application of any of said companies, with the proof of the investment of any sum in the actual construction and equipment of the trunk line of the railroad, from sources other than the proceeds of the bonds of the State, and not secured upon the road by a lien prior to that of the State, and verified as therein required, to sign and deliver to such company an amount in the bonds of the State equal to twice the amount so proven to have been invested in the construction and equipment of the said railroad since the last application and issue of bonds to such company, and successively from time to time, upon the application for bonds and proof of such investment, the governor shall issue and deliver, in like manner, bonds to such company until the aggregate amount to the plaintiff company shall be

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two millions of dollars, one million of which shall be exclusively applied to the construction of a portion of said road therein described; and it is made the duty of the governor to expend the other million of dollars for the purchase of the railroad iron necessary to lay the track of said road, from one described point to another, and to purchase the rolling stock for the same, and the provision is that the said iron and rolling stock so purchased shall belong to the State until placed upon the track for use, after which time the State shall have a first lien on said iron and rolling stock, together with all the road and its equipments, constructed and to be constructed, for the security of the payment of the principal and interest of said bonds, and all bonds issued or that may be issued to said company under this or any former act of the legislature granting the credit of the State to the company.

Power is also reserved to the State to enforce the lien on the railroad for the failure on its part to pay punctually principal and interest on the bonds issued for its benefit, as herein and heretofore provided for in such cases; and the company shall pay at the times herein specified, "to the treasurer of the State one and a quarter per cent., in addition, in each year, on each thirty-year bond, and two and a half per cent. in each year on each twenty-year bond so sold or hypothecated, to be invested at not less than seven per cent. interest, in such securities as are provided in the act."

By the same section it is also provided, that from the net profits arising from the road after the same shall be completed and in operation, a sum equal to not less than ten per cent. per annum upon the net earnings of the railroad shall be paid by the company to the treasurer of the State as a sinking fund, for the purpose of paying at maturity the bonds of the State so issued and to be issued to the company.

Special provision is also made that the treasurer of the company and the treasurer of the State shall be the commissioners of the sinking fund, and that it shall be the duty of the company to pay or remit the semi-yearly interest to the designated place, as therein provided, and in case the

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company shall fail to pay such interest or to remit the amount to the designated place, it is made the duty of the treasurer of the State to supply the amount and remit the same, in which event he is required to refund the amount from the sinking fund and charge the same to the defaulting company. In that event the provision is that the defaulting company shall not draw any further State bonds. Moneys, funds, and securities belonging to the sinking fund are declared to be subject to the control, care, and management of the fund commissioners, and the provision is that from time to time they may invest the same in the bonds of the State under the conditions therein provided.

All funds derived from the sale of State bonds were expended, but still the railroad was not completed, and on the third of March, 1857, the legislature made a further loan of credit to the company of one and a half millions of dollars, to be issued in bonds and to be expended upon the railroad south of the junction therein described, which bonds were to be issued in instalments of two hundred thousand dollars, upon proof furnished to the governor of the expenditure for the same purpose of a sum equal to their par value in the construction of the railroad, and the company was authorized by the same act to establish and keep a ferry across the Missouri River, where its road strikes the same, for all purposes connected with the company, and for general purposes, by paying the usual license-tax provided by law in such cases.

Bonds could not be lawfully issued under that act until the company accepted the act, and it was provided that the failure to pay any part of the principal or interest of the bonds should be a forfeiture of all right in such company to demand or receive any further issue of bonds, and in that event it was made the duty of the governor to foreclose the mortgage of the State and to enforce her lien on the property of the company.

Before the year expired, to wit, on the nineteenth of November following, the legislature authorized the governor to issue to the plaintiff company a further amount of two hun-

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dred and fifty thousand dollars in the bonds of the State, to complete a described portion of the road, and the same act provided that the act should not be construed to release the railroad from any penalty or forfeiture to which the company may be liable under such prior laws.

Authority was conferred upon the company by the act of the sixteenth of February, 1865, to issue their own bonds to the amount of six millions of dollars, and to secure the same by a first mortgage of their railroad and appurtenances, as more fully set forth in the act. Such bonds were to be issued in three classes and were to be applied as therein provided, and to facilitate the sale of the bonds the State relinquished her first lien and mortgage upon the main line of the railroad, retaining *only* a second lien and mortgage thereon until the principal and interest of said bonds are paid in full. By the same act the legislature created a fund commissioner, and enacted that whenever any portion of said bonds shall be issued that they shall be placed in the hands of the fund commissioner to be negotiated, and the proceeds paid over to the corporation for the purposes and under the regulations and restrictions provided in the same act, but the act was not to be operative unless accepted by the company in the mode therein provided. Prior inconsistent provisions in relation to the plaintiff company were repealed by the twelfth section of the act, and the provision is that the work on the west branch should not be expedited to the exclusion of the construction of the main line of the railroad.

Those several acts were duly accepted by the company and were in force on the eighth of April following. Interest was paid by the company on the bonds issued until the year 1860, when the company made default, and such interest has never been paid. On the said eighth of April the people of the State adopted an ordinance as a part of their constitution, which provides to the effect that an annual tax of ten per centum of all their gross receipts, with an immaterial exception, shall be levied and collected of the company and two other companies therein named, for the

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period of two years, as therein described, and fifteen per centum thereafter, which tax shall be assessed and collected in the county of St. Louis in the same manner as other State taxes are assessed and collected, and shall be appropriated by the legislature to the payment of the principal and interest now due or hereafter to become due upon the bonds of the State issued to the company.

Such receipts for the transportation of freight and passengers for the first of the two years, not including any sum received from the excepted source, amounted to six hundred and eighty-two thousand five hundred and seventy dollars, and the agreed statement shows that a tax of ten per cent., amounting to sixty-eight thousand two hundred and fifty-seven dollars, was assessed in the proper county on the gross receipts of the railroad for that year, under the provisions of the said ordinance. None of the principal of the bonds was due at the time the tax was assessed, but the interest on the same, to an amount greater than the amount of the tax, was due at that time.

Payment of the tax being refused the defendant, as the collector, seized the property of the company to satisfy the same, and the plaintiffs here brought an action of trespass against the collector to test the validity of the tax, in the State Circuit Court for the county where the tax was assessed. Service was made and the defendant appeared, when the parties waived a jury and submitted the case to the court upon an agreed statement of facts. Hearing was had and the court rendered judgment for the plaintiffs and the defendant excepted and appealed to the Supreme Court of the State, where the judgment of the State Circuit Court was reversed and a judgment rendered for the defendant. Whereupon the plaintiffs sued out a writ of error and removed the cause into this court.

Corporate powers were conferred upon the company by the act of the third of March, 1851, but the act of incorporation contains no provision whatever exempting the property of the company from taxation. Three years later the charter was amended, and the sixth section of the amendatory act

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provided that the capital stock, with all machines, wagons, cars, engines, or carriages belonging to the company, with all their works or other property, and all profits which shall arise from the same, shall be vested in the shareholders in proportion to their shares, and that the same shall be deemed personal estate and shall be exempt from any public charge or tax whatsoever for the period of five years from and after the passage of the act, which period has long since elapsed.

Attempt is made in argument to show that an exemption from taxation may be implied from some of the provisions of the act to provide for the completion of the railroad and its west branch. Based solely on that theory the error assigned is that the ordinance of the State imposing the tax is in violation of that provision of the Constitution which prohibits the States from passing any law impairing the obligation of contracts. Pursuant to that theory the plaintiffs contend that the legislative act to complete the railroad enacted a mode of making payments by the company to the State, which, when the act was accepted by the company, became a binding contract between the parties, within the protection of that provision of the Constitution, and that as such it could not be rescinded by any subsequent legislation, and that the ordinance does impair the obligation of that contract by providing another and a different mode of enforcing the payments without the consent of the company.

Serious difficulty would arise in sustaining the judgment of the State court if the view assumed in the proposition was correct, that the ordinance was a mere change of the order of disbursing the receipts and earnings of the company, instead of being what it purports to be on its face, an expression of the sovereign will of the people of the State levying taxes to pay and discharge the indebtedness of the State.

Power to tax is granted for the benefit of the whole people, and none have any right to complain if the power is fairly exercised and the proceeds are properly applied to discharge the obligations for which the taxes were imposed. Such a

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power resides in the State government as a part of itself, and need not be reserved when property of any description is granted to individuals or corporate bodies.*

Unless exempted in terms which amount to a contract not to tax, the property, privileges, and franchises of a corporation are as much the legitimate subjects of taxation as any other property of the citizens which is within the sovereign power of the State. Repeated decisions of this court have held, in respect to such corporations, that the taxing power of the State is never presumed to be relinquished, and consequently that it exists unless the intention to relinquish it is declared in clear and unambiguous terms.†

Express exemption is not pretended, nor does the act to provide for the completion of the railroad contain any provision which, when properly construed, affords any support to the proposition that any such contract exists between the company and the State, either express or implied, even if it could be admitted that mere implication is sufficient, which may well be questioned, as the current of the decisions of this court warrant the conclusion that if such an exemption be claimed it must be made to appear in clear, explicit, and unequivocal terms.

Authorities from numerous sources are cited by the plaintiffs, but none of them show that a lawful tax on a new subject, or an increased tax on an old one, interferes with a contract or impairs its obligation, within the meaning of the Constitution, even though such taxation may affect particular contracts, as it may increase the debt of one person and lessen the security of another, or may impose additional burdens upon one class and release the burdens of another, still the tax must be paid unless prohibited by the Constitution, nor can it be said that it impairs the obligation of any existing contract in its true legal sense.‡

* Cooley on Constitutional Limitations, 127-280.

† Society for Savings v. Coite, 6 Wallace, 606; Philadelphia and Wilmington Railroad Co. v. Maryland, 10 Howard, 393; Providence Bank v. Billings, 4 Peters, 561; Jefferson Bank v. Skelly, 1 Black, 486; Ohio Life Insurance and Trust Co. v. Debolt, 16 Howard, 416.

‡ Blackwell on Tax Titles (2d ed.), 408.

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Properties of every kind over which the sovereign power of a State extends are objects of taxation outside of the means and instruments of the Federal government.*

Unrestricted by constitutional limitations the only restraint upon the taxing power of the States is the responsibility of those in whom the power is lodged, and the power of appropriation of the proceeds, when not so restrained, is equally unlimited.†

Questions not involved in the assignment of errors will not be examined, nor is it necessary, as all agree that the main question in the case is whether the ordinance impairs the obligation of any contract made and concluded between the State and the company before the ordinance was adopted.

Unless the power of the State to tax the company was surrendered by the antecedent act to provide for the completion of the railroad, it must be conceded that the power exists, as it is plain that none of the other acts referred to afford any support whatever to such a proposition.

Five years before that act was passed the company made default in the payment of the interest falling due on the bonds which the State issued for their benefit, and by that act the legislature postponed and released the lien of the State, which was a first lien on all their property to the amount of four millions three hundred and fifty thousand dollars, and accepted in its stead a second lien upon the same property, in order that the company might issue six millions of dollars of bonds of their own and be able to secure their payment, principal and interest, by a first mortgage upon the same property, to complete the main line of the road and its west branch and the bridge therein described.

Moneys belonging to the company from that time were to be placed in the hands of the fund commissioner created by the act, and were to be disbursed by him as follows: (1.) Amounts required for the actual current expenditures in operating the railroad and carrying on the ordinary business

* *Hamilton Co. v. Massachusetts*, 6 Wallace, 639.

† *Griffin v. The Mayor*, 4 Comstock, 419; *Crowell v. Lawrence*, 41 New York, 141.

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of the corporation, including all sums that may be necessary for keeping the same in a good state of repair, and for such additions to the rolling stock, &c., as may be required to enable the company to transact the business of the railroad.

(2.) Amounts sufficient to pay the salary of the fund commissioner. (3.) Amounts sufficient to pay the interest upon said first mortgage bonds, as the same shall fall due. (4.) Amounts necessary to pay the cost of the construction and equipment of the railroad. (5.) Amounts sufficient to pay accruing dividends on preferred stock, not exceeding six per cent. per annum thereon, as provided in the act. (6.) Amounts sufficient to pay the interest due on the outstanding bonds of the State previously loaned to the company. (Lastly.) He shall disburse the surplus to the payment of the principal of said first-mortgage bonds until the same shall be fully paid off, or if none of such bonds shall have become due, then to the payment of the principal of the bonds of the State, if any are still outstanding, and the balance shall be paid over to the company.

Further examination of those provisions is certainly unnecessary, as it is too plain for argument that they do not afford the slightest support to the views of the plaintiffs. On the contrary, they are entirely silent upon the subject of taxation, and fully justify the remarks of the State court when they say that the subject of taxation forms no part of the contract contained in the act under consideration.*

Nothing is said about taxation, and it does not seem to have entered into the contract between the parties, but was obviously left where the law had placed it before the act was passed, nor was any provision made for the payment of taxes unless it may be held that the disbursements for that purpose may fairly be included in such as are required to pay the current expenditures in carrying on the ordinary business of the corporation.†

Reference is also made to some other sections of the act

* *City of St. Louis v. Insurance and Trust Co.*, 47 Missouri, 155.

† *Railroad Company v. Maguire*, 49 Missouri, 490; *Pacific Railroad v. Maguire*, 51 Id. 142.

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as supporting the proposition submitted by the plaintiffs, but it is so obvious that they cannot be so regarded without departing from the established rules of law applicable in such cases, that it is not necessary to pursue the discussion.

Like controversy exists between the State and another of the railroads mentioned in the ordinance, in which case it is contended that the ten per cent. charge imposed by that instrument is not a tax within any correct meaning of that word, that it is an appropriation of the property of the company without due process of law, or the taking of the property of the company without just compensation, but no such questions are open for examination in this case, as no such errors are assigned in the record.

JUDGMENT AFFIRMED.

The CHIEF JUSTICE dissented. STRONG, J., did not sit.

OREGON STEAM NAVIGATION COMPANY v. WINSOR.

Questions about contracts in restraint of trade must be judged according to the circumstances on which they arise, and in subservience to the general rule that there must be no injury to the public by its being deprived of the restricted party's industry, and that the party himself must not be precluded from pursuing his occupation and thus prevented from supporting himself and his family. Accordingly, where A., engaged in navigating waters of California alone, sold in 1864 a steamer to B., engaged in navigating a particular river (the Columbia River), of Oregon and Washington Territories (regions to the north of California), subject to a stipulation that he, B., would not employ it or suffer it to be employed for ten years from the date of the sale, in any waters of California, and B., three years afterwards, *i. e.*, in 1867, sold the same steamer to C., engaged in navigating Puget's Sound (water in the extreme northwest corner of Washington Territory and remote from all the other waters described), subject to a stipulation that she should not be run or employed upon any of the routes of travel, or the rivers, bays, or waters of the State of California, or the Columbia River and its tributaries, for the period of ten years from May 1st, 1867, *held* that the contract was not void as in restraint of trade.

Held, further--the contract in the second case having been for ten years from the date of *it*, and therefore for three years after the first contract