refer to *Freeman* v. *Rawson*,* a standard authority in this class of cases, for the views we have advanced on this subject.

Finally, it is insisted if the mortgage is held void in law, still the delivery of the goods in pledge vests a sufficient lien, *primâ facie*, to enable the appellants to enforce their lien in equity.

The answer to this is, that the case made by the bill does not proceed upon such a delivery at all, but upon the mortgage and seizure under it. Besides, if the appellants could turn the proceeding into a voluntary pledge by the debtors, it would not help them, for it would violate the preference clause of the Bankrupt Act, as they got the goods only twelve days before the petition in bankruptcy was filed.

DECREE AFFIRMED.

TUCKER *v.* FERGUSON ET AL.

1. Congress, by act of 1857, granted public lands to a State, to be "held" by it, to aid in the construction of a railroad through the State, the road, when made, to be and remain a public highway for the use of the government of the United States, free from toll or other charges upon the transportation of property or troops of the United States; the government to have a right also to carry the mails thereon.

The lands were to be exclusively applied in the construction of the road, disposed of only as the work progressed, and applied to no other purpose whatsoever. The act prescribed that the mode of disposition should be by sale made from time to time as the road advanced.

The State, by act of its legislature, accepted the lands "with the restrictions and upon the terms and conditions contained in the said act of Congress," and by the same act, in which the acceptance was made, vested in a then recently organized railroad company the lands "fully and completely, according to the act of Congress relating thereto and the direction of the board of control" of the State (a body appointed by its governor and Senate), and "*whose* duty" it was made by the act "to manage and dispose of the lands" in aid of the construction; the company being made, moreover, subject to such rules and regulations as the legislature of the State might from time to time enact and pro-

* 5 Ohio State, 1.

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Statement of the case.

vide in regard to the management and disposition of the lands, not inconsistent with the act of Congress, &c.

The company not being able to *sell* the lands (then a wilderness) in the manner contemplated by Congress, before the road was made through them, issued its bonds and mortgaged the lands to trustees, the mortgages containing a clause empowering the trustees to sell the mortgaged lands and apply the proceeds to the payment of the bonds.

The road was completed by aid of the money for which the bonds were sold, and a certain number (a small proportion) of the bonds were taken up and cancelled by the trustees from the proceeds of the land sold for the purpose of doing this.

Before the residue of the bonds were paid, and while the bulk of the lands were yet unsold in the hands of the trustees, the State taxed them.

Held, upon this part of the case, that the lands had been "sold" within the meaning of the act of Congress; and that though the State while she held the title as trustee of the United States could not tax them, she now could do so.

2. A statute after laying a certain tax *on a "railroad company"*—a specific annual tax of one per cent. on the cost of the road—and reserving a right to impose a further tax upon gross earnings, enacted that "the above several taxes shall be in lieu of all other taxes to be imposed within the State."

Held, that the statute imposed a tax in reference to the railroad itself, and had no relation to lands owned by the company and not used nor necessary in working the road, and in the exercise of its franchise, but which it had mortgaged and was holding for sale, even though the chief purpose of the sale was to pay the mortgage debt, a heavy one, and one which had been contracted for the exclusive purpose of building the road. And that these lands might be taxed notwithstanding the above-mentioned agreement.

3. An act of the legislature exempting property of a railroad from taxation is not a "contract" to exempt it, unless there be a consideration for the act. An agreement where there is no consideration is a nude pact; the promise of a gratuity spontaneously made, which may be kept, changed, or recalled at pleasure: and this rule of law applies to the agreements of States made without consideration as well as to those of persons.

4. No presumption exists in favor of a contract by a State to exempt lands from taxation. Every reasonable doubt should be resolved against it.

5 When such a contract exists it must be rigidly scrutinized and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require.

APPEAL from the Circuit Court for the Western District of Michigan.

The Flint and Père Marquette Railway Company was a railway corporation of Michigan, and the present suit was

a bill in equity brought by Tucker et al., trustees for the holders of bonds issued by the said company, which bonds were secured by a mortgage and deed of trust executed by the company to them, the said Tucker et al., as trustees, upon lands granted by Congress to the State of Michigan, and by that State granted, in a qualified way, to the company to aid in constructing a road which it was about to make; the object of the bill having been to restrain one Ferguson et al., who were supervisors and assessing officers of Osceola County, Michigan, from levying and collecting local taxes upon the said lands situate in the said county.

The general purpose of the bill was to restrain the assessment of taxes at any time on the lands granted by Congress, during the term allowed for the completion of the road. But if the court should think there was no ground for so general a restraint, then to restrain the collection of taxes which had been already assessed on the lands for the year 1873; the bill alleging that in no event were they taxable prior to April 1st, 1874.

The case, more particularly stated, was thus:

On the 3d of June, 1856,* Congress granted to the State of Michigan, to aid in the construction of certain proposed railroads, including one from Flint, in the southeasterly part of the State, to Père Marquette, on Lake Michigan, in the northwestern part—a distance of about one hundred and seventy miles, much of the western part of which especially was a wilderness—every alternate section of land designated by odd numbers, for six sections in width on each side of said roads, "which lands," said the act of Congress granting them, "shall be *held by the State of Michigan* for the use and purpose aforesaid." By the terms of the first section of the act the lands were to be located in no case further than fifteen miles from the lines of the road, and it was enacted that they should be "exclusively applied" in the construction of the road; "disposed of only as the

* 11 Stat. at Large, 21, § 1.

work progressed, and applied to no other purpose whatsoever."

Section third enacted that the lands thus granted to the State, should "be subject to the disposal of the legislature thereof *for the purpose aforesaid, and no other*, and that the railroads shall be and remain public highways *for the use of the government of the United States, free from toll or other charges upon the transportation of any property or troops of the United States.*"

Section fourth was in these words:

"That the lands hereby granted to said State shall be disposed of by said State *only* in manner following; that is to say, that a quantity of land not exceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be *sold;* and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of such roads, may be *sold*, and so, *from time to time*, until said roads are completed; and *if any of said roads is not completed within ten years,* no further sales shall be made, and the lands unsold shall revert to the United States.*"

Section fifth enacted that the United States mail should be transported over the road, under the direction of the Post-Office Department, at such price as Congress might by law direct.

On the 12th of February, 1857, and, of course, after the passage of the act of Congress, the Flint and Père Marquette Company was organized under the *general* railroad law of Michigan. And two days after this, again, that is to say, on the 14th of February, 1857, the State of Michigan by an act enacted,

"That the lands, franchises, rights, powers, and privileges

* That is to say, by June 4th, 1866.—REP.

granted to, and conferred upon, the State of Michigan by an act of Congress, approved June 3d, 1856, be, and the same are hereby, *accepted*, with the *restrictions and upon the terms and conditions* contained in said act of Congress."

The act proceeded in substance thus:

"SECTION 2. So much of the aforesaid lands, &c., as are or may be granted and conferred in pursuance of said act of Congress, to aid in the construction of a railroad, . . . from Flint to Père Marquette, are hereby *vested fully and completely* in the Flint and Père Marquette Railway Company, *according to the provisions of the act of Congress relating thereto, and the direction of the board of control hereby appointed.* The said railroad company shall be subject to all the conditions, restrictions, and obligations imposed upon them by this act, as hereinafter provided.

"SECTION 3. The lands, &c., hereby conferred upon and vested in the railroad company, shall be exclusively applied in the construction of its line of road, and to no other purposes whatsoever."

Section seventh enacted that after the completion of twenty continuous miles of road, the company might sell sixty sections of land in any twenty continuous miles of line of road, &c.; "and after the full and final completion of the entire length of its road, and the acceptance of the same by the board of control herein provided, then the company may sell the remainder of the lands, &c., and not before." The act further enacted,

"None of the lands hereby granted shall be liable to taxation for seven years from 1st September next [*i. e.*, shall not be liable till September, 1863], except such parts as shall be sold or be improved."

The act went on:

"SECTION 8. . . . For the purpose of properly managing and disposing of the lands . . . the governor of the State of Michigan, together with six commissioners to be nominated by the governor and confirmed by the senate, are hereby constituted a board of control of the same, *whose* duty it shall be to manage and *dispose* of such lands in aid," &c.

Statement of the case.

"SECTION 12. The said railroad company shall at all times and in all matters be subject to the laws of this State, and to such rules and regulations as may from time to time be enacted and provided by the legislature of the State of Michigan, in regard to the management and *disposition* of the said lands, not inconsistent with the provisions of this act and the act of Congress making the said grant of lands to this State, and they shall be entitled to all the immunities and privileges conferred by said laws."

"*Provided*, That nothing herein contained shall be so construed as to relinquish the right of the State to any specific tax imposed upon any railroad company within this State."

The company was bound by the nineteenth section to complete and put in running order at least twenty continuous miles during each year after 1st December, 1857, and to complete the road within seven years from 15th November next, 1857, *i. e.*, by the 16th of November, 1864; a term, however, by both State legislation and act of Congress subsequently enlarged till March 3d, 1876.

At the time when the Flint and Père Marquette Railway Company was organized, all railroad companies in Michigan were liable, under a *general* railroad act (section forty-five), to a specific tax of one per cent. on their "paid in capital stock." Of course, in the case of a company like the Père Marquette, and the other companies provided for in the act of Congress,—built, all of them, chiefly by the land grant,—the tax was a light one.

The twentieth section of the present act, which raised one of the important questions in the case, now made for the Flint and Père Marquette Company, as well as for the others, a heavier tax. The section was as follows:

"SECTION 20. In consideration of the grants of land and other privileges hereby conferred . . . the said several railroad companies are hereby required, within sixty days from and after the first day of each and every year, to pay into the treasury of this State, *as a specific annual tax, one per cent. upon the cost of the road and its equipments and appurtenances of whatever kind;* and it shall be lawful for the legislature of this State, in their

discretion, after ten years, to impose upon either or each of said railroad companies the payment of a further tax upon the gross or total earnings of such road of not exceeding two per cent.; *which said above several taxes shall be in lieu of all other taxes to be imposed within this State.*"

The Flint and Père Marquette Company accepted the grant made by this act.

It may be here stated, that it was afterwards enacted by Congress that the State of Michigan might authorize the *sale* of *sixty* sections, whenever the governor might certify that *ten* additional miles was completed. The original act, it will be remembered, had prescribed a sale of one hundred and twenty sections, on a certificate of twenty miles completed, &c. This last matter is, perhaps, unimportant.

As the reader will doubtless have observed, in reading what goes before, Congress granted the lands which it did grant to the State, to be disposed of "only" in a certain manner in the act of grant stated. They were to be "sold"* from time to time, as certain lengths of the road were completed; and no other manner of disposing of them is stated in the act as contemplated. And the State of Michigan in accepting the lands, accepted them "with the restrictions and upon the terms and conditions contained in said act of Congress."† It was soon found, however, as the road progressed westward, that it was coming to regions which were uninhabited, and that the land there being in a wilderness could not be *sold* for twenty miles ahead of even a completed twenty miles of road; that is to say, could not be *sold* in advance of the construction of the road *through* them. It was the road itself which first gave value to them. Thus it happened that no money could be got out of the lands by sale in advance of a road through the twenty miles. A plan of obviating this difficulty now suggested itself. It being found that the bonds of the company (which now had a part of its road completed) could be sold, and the funds requisite to finish the rest of the road raised on such bonds,

* *Supra*, p. 530.

† *Supra*, pp. 530, 531.

provided they were secured by mortgage with power of sale in the mortgagee on the unsold lands, it was resolved to carry out an arrangement on this basis. The company did accordingly in September, 1866, by a mortgage and *trust deed containing a power of sale* and terms and conditions for the management of the trust, convey to Tucker et al. as trustees, 153,600 acres of land as security for bonds to the amount of $500,000, which bonds were issued and sold, and which were now outstanding . . . except such portions thereof as had been taken up and cancelled from the proceeds of land sold for that purpose.

Subsequently the company, desiring to raise a further sum of money to enable it to prosecute the further construction of its road, made, September, 1868, a second mortgage and trust deed, by which it mortgaged and conveyed all the remaining lands of the land grant for the purpose of securing bonds to the amount of $2,500,000, which were issued and sold upon the market.

It did not appear from anything in the transcript of the record sent here, what value the lands mortgaged bore to the amount of bonds issued.

Tucker and the other, as trustees, were to hold said lands together with other property in said trust deed mentioned, as security for such bondholders. The second mortgage and trust deed, like the first, contained a power of sale.

In this way funds were obtained and the road was in process of completion, when a difficulty occurred between the trustees and the assessors of Osceola County, which was the cause of the present suit.

This part of the matter was thus:

The reader will remember that by the twentieth section of the act of the legislature of Michigan accepting the grant from Congress, it was enacted that the railroad company should pay into the treasury of the State, *as a specific annual tax, one per cent. upon the cost of the road and its equipments and appurtenances of whatever kind;* and that the said twentieth section made it lawful for the legislature of the State, after ten years, to impose upon the company the payment of a

further tax upon the gross or total earnings of such road of not exceeding two per cent.; "*which said above several taxes*," the section declared, "*shall be in lieu of all other taxes to be imposed within this State.*"*

By two subsequent acts—one of the 14th and one of the 15th of February, 1859—this twentieth section was repealed; the company was to sell one hundred and twenty sections on completing twenty miles, and not sell any sections before; was to have a right when the road was finished through its entire length and accepted by the board of control, to sell all the remaining lands; all the lands granted were declared to be free from taxation for seven years, from September 1st, 1859, *i. e.*, till September 2d, 1866, and the company was declared to be subject to the tax imposed in the already mentioned forty-fifth section of the *general* railroad law of 1855, by which section a tax of one per cent. upon the capital stock paid in was imposed, which tax of one per cent. upon the capital stock paid in, it was by the new acts enacted—

"*Shall be in lieu of all other taxes upon the property of the said company*, whether real, personal, or mixed, except penalties by this act imposed."

This tax of one per cent. on capital paid in—necessarily a very small tax, as we have already remarked, in the case of a road built chiefly or wholly by land grants of Congress—was, of course, more favorable to the company than that laid by the twentieth section of the old act now repealed.

On the 18th of April, 1871, came another act, laying by its thirty-seventh section—an act and a section of much importance in this case—a new tax; that is to say, "*an annual tax upon gross receipts.*" The section, after laying this tax, proceeded:

"*This tax shall be in lieu of all other taxes upon the property of said company*, whether real, personal, or mixed, except penalties imposed by law, except real property not necessary for carrying on the ordinary operations or franchises of their road.

* See *supra*, p. 532.

"*Provided*, Only such lands granted to any railroad company shall be liable to local taxation as are or may be opposite to and coterminous with the constructed portion and portions of said roads respectively.

"*And provided further*, That no such lands shall be subject to taxation until after the expiration of three years from and after the 1st day of April, A.D. 1871, and until after three years from the date of the certificate showing that such lands have been earned by said railroad company, after which time said lands shall be taxed as other lands, except as hereinafter provided.

"*And provided further*, That the lands of the several land-grant railroad companies, opposite to and coterminous with their lines as now in operation, shall be subject to taxation in two years from said 1st day of April, A.D. 1871."

Finally, came an act of May 1st, 1873, a "general railroad law," as it was called, and the cause of the present difficulty. This act, which provided for the incorporation of railroad companies, the details of their organization, and which prescribed a great variety of rules, regulations, &c., in regard to their stock, routes, rights, liabilities, power to borrow money, obligation to pay, &c., &c., enacted:

"SECTION 3. Every company . . . shall, on or before the 1st day of July in each year, pay to the State treasurer an annual tax upon the gross receipts of said company; which amount or tax shall be in lieu of all other taxes upon the property of such companies, *except such real estate as is owned and can be conveyed by such corporation under the laws of this State and not actually occupied in the exercise of its franchises, and not necessary or in use in the proper operation of its road; but such real estate so excepted shall be liable to taxation in the same manner, for the same purposes, and to the same extent, and subject to the same conditions and limitations as to assessment for taxation, to taxation, and to the collection and return of taxes thereon as is other real estate in the several townships within which the same may be situated.*"

Under this law—the Flint and Père Marquette Railway not being yet finished, but on the contrary having forty miles yet to make out of the hundred and seventy which if finished it would consist of—the defendants below, Fer-

guson and others, supervisors of Osceola County, taxed for the year 1873 the lands which the company had by the two mortgages already mentioned, mortgaged with power of sale to Tucker and others, to raise funds to *complete* the road; *these lands being none of them opposite to or coterminous with the line of the railroad in operation in April*, 1871.

There had been issued and sold of the bonds, and were still outstanding in the hands of purchasers, on the 1st of January, 1873:

Under the mortgage and trust deed of 1863, . .	$146,000
" " " " 1868, . .	2,224,000
	$2,370,000*

The lands now taxed, as stated already, were in Osceola County. There had been in that county,

Originally, ...	28,598 acres,
Of which the company had sold, . . .	17,705 "
Leaving unsold and now taxed, . . .	10,892 "

Hereupon, on the 20th of August, 1873—the road being still unfinished to the extent already stated, and $2,368,000 being unpaid out of the $3,000,000 of bonds issued or secured and capable of being issued—the trustees, Tucker et al., filed a bill, the bill in the present suit, praying an injunction on the assessors against levying the taxes laid.

I. The bill referred to the act of Congress of June 3d, 1856, granting the land to the State of Michigan, to be held by it to aid in the construction of a railroad between Flint and Père Marquette, to be subject to the disposal of the legisla-

* The case did not show with distinctness whether the *whole* $3,000,000 of bonds had been *sold* and gone into the hands of purchasers, and whether $630,000 had been taken up and cancelled (which, since only $2,370,000 were now outstanding, would necessarily have been the case had the whole $3,000,000 been issued), or whether, while the mortgages and trust deeds were made to *secure* the whole $3,000,000, an amount less than that whole had been put on the market and sold. But it was clear that a *portion* of whatever were put on the market and sold had been "taken up and cancelled under an execution of the power in the trust deed," from "the proceeds of lands sold for the purpose."

ture of the State for that purpose alone, and to be sold by it, and to be applied to the road; the said road to be a public highway for the use of the government of the United States, and the lands to revert to the United States unless the road were made within ten years.

It referred also to the act of the State of February 14th, 1857, accepting the said grant, "with the restrictions and upon the terms and conditions contained in said act of Congress."

It alleged that the title of lands, &c., granted by Congress to the State, were by the last act vested fully and completely in the Flint and Père Marquette Company, then just incorporated, to be applied exclusively to the construction of the road, and to no other purpose whatsoever.

It set forth further that the company, to enable it to raise money, for the purpose of constructing the road, had made the two mortgages and trust-deeds of September, 1866, and September, 1868—giving the history of them exactly as already stated—conveying certain parts of the lands to the complainants as trustees to secure certain bonds, "which bonds," said the bill, "were issued and sold, and which are now outstanding in the hands of divers persons unknown . . . excepting such portion thereof as has been taken up and cancelled from the proceeds of lands held for that purpose . . . that the said trust deeds contained a power of sale, and terms and conditions for the management of the trust."

[The bill referred to the mortgages and deeds of trust as annexed to the bill. But none were annexed in the transcript of the record that came here.—REP.]

The bill submitted that the title to the lands taken *by the State* under the act of June 3d, 1856, was taken *in trust* for the specific purpose in the act named, and that it was a violation of the trust thus created for the State to assume to derive a revenue from them, as it was now seeking to do by its general railroad law of 1873, before they were *sold*.

II. The bill further alleged that the said general railroad law violated the obligation of CONTRACTS made by the State with the company. For that,

Statement of the case.

1st. By the twentieth section of the act of the legislature of Michigan, of 1857, accepting the grant, and by the grant from the State to the company, and by the company's construction of the road, a contract had been made with the company that none but specific taxes should be imposed upon it; that accordingly the company's lands should be free from taxation.

2d. By the act of the legislature of Michigan of April 18th, 1871, it was, in the thirty-seventh section of the act, provided that railroad companies, under the provisions of the act, should pay a specific tax upon gross receipts, and provided that only such lands granted to any railroad company should be liable to local taxation as might be opposite and coterminous with the constructed portion of its road; and that no such lands should be subject to taxation until after the expiration of three years from April 1st, 1871, nor until after three years from the date of the certificate showing that such lands had been earned; and providing further that the lands of the several land-grant companies opposite and coterminous with their line then in operation should be subject to taxation in two years from April 1st, 1871.

The bill now alleged that the lands which the supervisors of Osceola County, the defendants in the case, had listed for taxation for the year 1873, were not, any of them, opposite to or coterminous with the line of the said Flint and Père Marquette Railway Company, in operation in April, 1871; and, therefore, that under the proviso of the section they could not, even if in view of former enactments they were taxable at all, be taxed before April, 1874.

III. The bill made another point.

In the year 1850, as previously thereto, railroad corporations in Michigan were taxed by specific taxes; and a constitution of the State adopted in that year, and in force when the Flint and Père Marquette Company was organized, and all the other matters above spoken of were occurring, thus ordained:

"The State may *continue* to collect all specific taxes accruing to the treasury under existing laws. The legislature may pro-

vide for the collection of *specific taxes* from banking, *railroad*, plank-road, and other *corporations* hereafter created."

The bill stated that from the very organization of the State until the year 1870, the property of railway companies in Michigan had never been taxed by local assessment and taxation, nor in any other manner than by specific taxes. And it insisted that under the constitution of the State the property was liable to specific taxation only, and that it was not competent for the legislature of the State to change the manner and mode of taxation in respect to such property.

The argument meant to be presented by the bill, in its making this statement was this: that specific taxes having been the sort of taxes always collected from railroad corporations, prior to the adoption of the constitution, and that instrument having authorized the continuance of *such* taxes, it was meant that those taxes and no others should be collected; that the language though, in form, permissive, was, in fact, mandatory and restrictive; since, if it were not so construed, the clause might as well be stricken out; the power to levy all sorts of taxes, specific as well as others, existing under the *general* legislative power of the State.

The bill stated that the Flint and Père Marquette Railway Company had been assessed, and had paid each year a specific tax, levied and collected under the laws of Michigan, and that the sum of $23,446 had been paid for the specific tax assessed under the general railroad law of 1873, which last named sum was due and was paid on the 1st day of July, 1873.

The defendants demurred to the bill. To understand one ground on which their demurrer was meant to be founded it is necessary to mention another provision of the constitution of Michigan, which as they conceived bore in their favor. It was thus:

"Corporations may be formed by *general* laws; but shall not be created by special act except for municipal purposes. All laws passed pursuant to this section may be amended, altered, or repealed."

Statement of the case.

The manner in which, according to the ideas of the counsel for the State, this provision bore on the subject of controversy was this: For that whereas the contracts which the railroad company alleged to have been made not to tax, &c., were made by the *general* railroad laws of 1855 and 1871, these laws were, by this provision of the constitution, open to be amended, altered, or repealed.

The reader will have remarked that the ground other than that of specific contract relied on by the bill for injunction, was that the State was a trustee for sale as prescribed by the Act of Congress, and as such trustee could not tax the lands before they were sold.

In argument in the court below this ground was sought to be strengthened by reliance on the *interest* which both the United States and the State had in the lands the subject of the trust, and on the ground of contract made by the trust.

The position thus, by way of addition or as ancillary or explanatory, sought to be wrought into the grounds for relief, were exfoliated in three propositions, thus:

"1st. That the interest of the United States in the lands was not so completely extinguished as that they were subject to State taxation in 1873, and would not be so extinguished until the State had finally executed the trust created by the act of Congress granting them, by the application of the proceeds of the *sales* of the lands to the cost of constructing the railroad.

"2d. That in executing this trust the State still retained, as to the road uncompleted or *unpaid* for, an interest in and supervision over the unsold lands, which could not be relinquished until the trust was finally executed as aforesaid; and that this interest and supervision was inconsistent with the right to tax the lands until after they had been *sold*.

"3d. That the National and State legislation granting the lands to and the acceptance of them by the railway companies, on the stipulated terms, and their compliance with those terms, created a contract between the State and the company, that the lands should be applied exclusively and without diminution to the construction of the railroads,

which contract would be impaired by taxation before they had been *sold* and their proceeds so applied."

The court dismissed the bill.

In its opinion it said:

"The three propositions which in different forms object to the tax because the lands are 'unsold' are sufficiently answered by deciding that within the meaning of the act of Congress and the legislation of the State, the disposition of the lands already made constitutes a sale.

"'. . . What the General Government intended has been accomplished. The act has been done which under the statute vested the power of sale."

"A power of sale to raise money is well executed by the creation of a mortgage for that purpose."

To the propositions that, under the constitution of Michigan, it was unconstitutional to tax the corporation other than by a specific tax, and that by the twentieth section of the act of 1857 and the thirty-seventh section of the act of 1871 the State had entered into contracts not to tax the lands, the court said, that an exemption from taxation could not be inferred unless an intention to exempt appeared by language wholly unambiguous; that no such intention here thus appeared in either of the sections relied on; and further, that so far as regarded the provision of the constitution and the twentieth section of the act of 1857, neither applied to the property in question; and that no such contract appeared in the section of the act of 1871.

In this court the following errors were assigned:

"That the interest of the United States in the lands was not so far extinguished that they were liable to taxation by the State.

"That the State, as trustee, has still an interest in the lands inconsistent with taxation.

"That there was a contract between the State and the company that the lands should be applied exclusively and without diminution of value to the construction of the road, and that

this contract is impaired by taxing them before they are sold and the proceeds so applied.

"That the twentieth section of the act of the legislature of 1857 contained a contract that none but specific taxes should be imposed upon railroad companies, and that the taxation of the lands in question under the act of 1873 was a violation of that contract.

"That the State had no power to impair this contract to the prejudice of the company and its creditors.

"That the thirty-seventh section of the act of 1871 contained a grant that lands opposite to and coterminous with the constructed portions of the road should not be subject to local taxation until three years from the 1st of April, 1871, and that the taxation of the lands in question in 1873 impaired that grant, and was illegal.

"That the constitution of Michigan prohibits the imposition of any but specific taxes upon railway corporations."

From the decree dismissing the bill the trustees took this appeal.

It should be here stated that not only at the time when the bill in this case was filed, August 20th, 1873, but afterwards when the case was argued in the court below, and even when the briefs for this court were printed and the above-quoted assignment of errors was made, the road was not yet finished; no rails being yet laid on the western end. So that the reversionary and other *interest* in the United States under the terms of its grant to the State of Michigan was a matter that could be insisted upon in argument with more or less plausibility or reason.

On the case coming here for argument, however, February 17th, 1875, and after it had been called, it was announced at the bar, by the counsel for the State of Michigan, that the road was now built through to its western terminus and open for travel along its entire route, and had been accepted by the State of Michigan. And this was not denied by the other side.

Hence in the oral argument by the complainants here, the reversionary *interest* of the United States in the lands was

not pressed as it had been in the court below, and even in the briefs, though the points as there made were left to stand; the counsel for the company still asserting that the State's trusteeship was still so far unexecuted, that the clause providing for the reversion of the lands to the United States under the Act of Congress was an important factor in ascertaining the extent of the State's responsibility as trustee.

However, as to the immediate object of the bill—an injunction against collecting the taxes laid for 1873, at which date, as the bill alleged, forty miles of the track were not laid, out of the one hundred and seventy necessary to be laid—the argument from interest retained, perhaps, whatever weight it had originally.

Mr. T. J. Coffey, for the appellants:

The case shows that the lands had been mortgaged to trustees to secure payment of the railroad bonds; that the mortgage conferred on the trustees power to sell the lands and apply their proceeds to pay the bonds, and that some lands, but not all, had been sold, and some bonds, but not all, had been paid—in other words, that the trust was in a process of execution but not fully executed—when the tax complained of was laid.

Our first position therefore is, that although the tracks of the road may be laid, and cars may be running on them, yet so long as all this has been brought about no otherwise than with money borrowed on the security of the lands and under a trust created at the time of the loan, and as a condition of it, that the money lent and yet unpaid should be repaid by a *sale* of the lands—that is to say, so long (within, of course, the term limited by statute for finishing the road)—so long as these lands remain as they are, on a trust for sale, in process of execution, but not fully executed, so long the State cannot tax them.

This, our first point, is independent of and rests on different grounds from our second one, which alleges a specific *contract* not to tax the lands; and our third one, based on the provision in the constitution of Michigan.

Argument against the right to tax.—Violation of trust.

I. The act of Congress of 1856 granted the lands, &c., "to aid in the construction" of the road. It enacts that the lands thus granted "shall be *held* by the State of Michigan," for the use and purpose aforesaid, and be "exclusively applied in the construction" of the road, and "shall be applied to no other purpose whatsoever."* The lands thus granted to the State of Michigan are, indeed, to be "subject to the disposal of the legislature thereof" (that is to say, they are to be disposed of by the legislature), but they are to be disposed of "for the purposes aforesaid and no other."†

And as respects the party to dispose of them and the manner of disposal, they are not to be disposed of by anybody, either artificial or natural that the State may transfer the trust to, nor to be disposed of by the legislature, even as in its good judgment it sees fit. They must be disposed of only by the State, and in a particular way, prescribed by the act of Congress. For the act of that body says:

"SECTION 4. The lands hereby granted to the said State shall be disposed of *by said State only in manner following.*"

And the same section prescribes the manner. That manner is through the process of *sale*, and sale of a special sort. The lands may be "sold;" but not sold in a body, but sold in certain quantities, not all at one time, but from time to time "as the work progresses" and "until said road is completed."

The act, in short, creates a trust; a trust to hold certain lands; to apply them through a process of sale, and sale only, and sale made in certain quantities and from time to time, and as the construction of the railroad advanced, in aid of the construction of that road.‡ And the State of Michigan is the party invited to act as trustee. Nothing is said in any part of the act of Congress about any company created or to be created.

* Section 1, *supra*, pp. 529, 530. † Section 3, *supra*, p. 530.

‡ Rice *v.* Railroad Company, 1 Black, 378; Illinois Central Railroad *v.* McLean County, 17 Illinois, 291; People *v.* Auditor-General, 7 Michigan, 84.

The purpose of Congress in all this was clear. Congress wanted to have a railroad for the transportation of its mails, its troops, munitions of war, and other property. The State, of its own means, could not build the road. Capitalists, of theirs, would not. Congress, therefore, comes in and supplies the effective means. Aiding thus munificently, it desired also that its munificence should not be brought to naught, either through the sinister interests or the bad judgment or the reckless doings of any persons to whom, as directors of a corporation or otherwise, the execution of the enterprise might be committed.

Congress, we say, wanted roads for important purposes of the nation; but it did not want, even for these purposes, roads built in fraud. It did not want roads on which common laborers had bestowed their daily toil only to be wronged out of their daily wages. It did not want transportation over rails which had been furnished by contractors who would be ruined by a misplaced confidence in the corporation making the road. And it wanted, we may believe, as little as it wanted any other disgrace and immorality, the disgrace and immorality of repudiated railroad bonds, or even of railroad bonds which though acknowledged were yet dishonored and unpaid.

Hence all the particularity of the act in everything. A trustee of the highest dignity—a State—is selected. No authority is given to mortgage or otherwise incumber, at any time or in any way, the lands conveyed in trust; or to resort to any other of the numerous well-known equivocal expedients, by which so many roads in our country have been made and so many makers of them ruined.

The State of Michigan understood all this. Its act of February 14th, 1857, speaks of the grant offered by Congress to it as one offered with "restrictions," and upon "terms and conditions." The State was free to reject the proffered trust or to accept it. She accepted it; and accepted it in so many words, "with the restrictions and upon the terms and conditions contained in said act of Congress."

The State of Michigan thus became a trustee. And a

Argument against the right to tax.—Violation of trust.

part of the trust was that the State of Michigan should remain and act as trustee; that IT should hold the lands; that IT, of course, should make the sales prescribed.

And while, of course, the State could act only by officers and agents, including, if desirable, a railroad company specially incorporated to take charge of the details of the trust, it was still the State that was bound to do all that was done, and without the consent of the United States the State could neither pass away the legal estate of the trust nor disown its own obligation to administer the trust, nor change in any way the terms prescribed for its equitable parts by the acts of Congress, by which it was created.

Now, it will be conceded, we assume, that if the State is trustee—is herself holding the lands and administering the trust—she cannot, before the lands are "sold"—sold within the meaning of the act of Congress—tax them. In Michigan, as in other States, taxes make a lien and are payable annually. If not paid, the lands are sold, and all prior titles and trusts are swept away.

The reasons why the State, while acting as trustee, cannot tax are plain. A party owning a large body of valuable lands, which the State has no right to tax, conveys those untaxable lands to her IN TRUST to apply them through a process of sale—in other words, to sell them and apply the proceeds—to building a road in which, when made, the party founding the trust shall have certain rights of user, and also a right of having the lands, or a part of them, back again, if the road is not made. And the State accepts the lands on these trusts. Of course she can do nothing which renders the trust less easy of accomplishment, which imperils its existence in any way, or which abstracts or gives a direction different from that contemplated by the founder of the trust, to any part of the trust property, or of its proceeds. Her relations to the trust forbid her to do anything of this sort, and especially in the case of a trust where it is a very part of the trust, explicitly made known, that the *whole* of the trust property is to be applied "exclusively" to the building of the road, and "to no other purpose whatsoever."

Argument against the right to tax.—Violation of trust.

And all this is true even if she have a right to shift and do shift the execution of the trust from herself to some one else; whether an individual or a corporation. She cannot, without the consent of the party founding the trust, change or even modify the trusts themselves; she having accepted the trusts from that other, and the founder of the trusts having the same interest in the proper execution of the trusts, whether State, corporation, or private person administer them. The *trusts* remain exactly as they were, whoever may be trustee. And the State, having once recognized and approved the trust by accepting the trust property, she can, at a later day, when the legal estate of the trust is transferred to another—if it is transferred—by no act of her own any more impede or misdirect the operations of the trust, in the hands of the new trustee—or imperil its existence—than she could while she herself was acting as trustee and administering the trust.

All this rests on general principles of the law of trusts; a fundamental one of which is that trustees and even all who stand in fiduciary relations do nothing inconsistent with their positions; in other words, be faithful to their trusts or fiduciary relations.

It would be true, we rather suppose, if the founder were a private individual conveying to any other private individual, in trust, for a beneficial public purpose, lands previously free from taxes (or possibly lands previously taxable), the same to be devoted exclusively to that purpose, there being no fund provided from which to pay taxes, and the State knowing all this, and while knowing it all, approving and encouraging the grant on the trusts specified.

Whether true or not, in the case just supposed, it is certainly true when the United States is the party founding the trust, out of the public lands; when *it*, for the purposes of the Federal government is interested, in every part of the matter; in the making of the road primarily, that it may be able to transport its mails and troops and property, and in its not being made, contingently, by its right, through reverter, in the lands if the road be not made.

Argument against the right to tax.—Violation of trust.

The State then, until the lands pass out of the trustee through the process of sale—in other words, until the trust is executed—be the trustee the State or the assignee of the State—is estopped from taxing:

1st. On the general principle of the law of trusts.

2d. By the fact that the United States is interested in the proper and complete execution of the trust, and interested not to have its execution either impeded, misdirected, imperilled, or destroyed.

We need not, under this second head, talk about rights of reverter or of re-entry for conditions broken, especially not in the present form of action; nor of the freedom from State power of the instrumentalities of the United States. It is enough that the United States are interested in the way just above stated.

Now, there has been no "sale," unless made by either:

1*st*. The second section of the act of 1857, vesting the lands in a body, and at the same moment in the Flint and Père Marquette Railway, according to the act of Congress relating thereto, and the board of control of the State which the act constituted; or by

2*d*. The mortgage with power to sell. . . .

In regard to the first, it is enough to say:

1. The State, a mere trustee, had no power to *sell*, except in the way that the act of Congress prescribed, that is to say, in certain amounts and as the road advanced. Any attempt to sell in another way would have been a breach of trust, a fraud on the act, and a mere nullity.

2. The transaction had no aspect of a sale in fact. The company gave no money. The State received none.

3. The act of the State of Michigan shows that the State did not pretend to sell, nor even to discharge herself of the duty and position of a trustee, but meant only to employ an agent or department charged with this special matter, one constituted by herself to act for her and under the direction of her officers; the duty of executing the trust remaining still with her. This is her language:

"SECTION 2. All the lands, &c., which are or may be granted

and conferred in pursuance of said act of Congress . . . are hereby vested fully and completely in the Flint and Père Marquette Railway Company, *according to the provisions of the act of Congress relating thereto, and the direction of the board of control hereby appointed.*"

There is, indeed, in the words of the act—"are hereby vested fully and completely in the Flint and Père Marquette Railway Company, according to the provisions relating thereto"—enough (taking the expressions by themselves) on which to found an argument that the State meant—not to sell—but to transfer the legal estate of the lands, &c., to the company as a trustee in its place; in other words to relieve itself from the execution of the trust, and to put it wholly on the Flint and Père Marquette Company.

To this, one answer is that it was a part of the trust as granted to and as accepted by the State that it should itself execute the trust; and that it had no power, without the assent of the United States, to pass away its duty to another.

But a better answer is, that the State did not mean to get out of the obligations of the trust, and put them on anybody else. And this is shown by reference to other parts of the act.

By the first section of that same act in which the above-quoted words make the second, the State *eo instanti* in which it makes the transfer, accepts the trust, "with the restrictions, and upon the terms and conditions" contained in the act of Congress; one of which conditions was that the lands granted "shall be held by the State of Michigan," and also that they "shall be disposed of by said *State*," and shall be disposed of by it "*only* in manner following"—that manner being prescribed, and bearing no resemblance to a transfer in gross, but being by "sales" in certain quantities, from time to time, and as the road progressed. The State, we assume, did not accept a trust only in the same instant to throw it up, and also to throw it up in violation of its duty.

In addition. Though the lands are vested fully and completely in the company by the words above mentioned, yet

it is not the duty of, nor have the company any power in itself to manage and dispose of them. That power and that duty by the eighth section* belongs exclusively to the board of control; a board composed of the governor of the State and of six persons, to be appointed by him with the consent of the State senate. And as if this were not enough, by the twelfth section,† the company is made "at all times and in all matters" subject to the rules which *the State*, through its legislature, may prescribe, "in regard to the management and *disposition* of the lands."

It is obvious, therefore, that the Flint and Père Marquette Company was nothing but a *depository* of the barest legal title, with a residuary beneficial interest in itself as to the lands, which by a final completion of the road in the mode contemplated by Congress—in other words, by the execution of the trust—should be earned. The board of control of the State and the legislature—in other words the State itself, through its board of control and its legislature—were to manage and *dispose* of the lands; the company being absolutely subjected to whatever the legislature by rules and regulation might from time to time—that is to say at any and all times—provide, consistently with the act of Congress.

Was not the State of Michigan then still the real trustee? the manager and disposer, through its board of control and legislature, of everything in or about the lands? And if it was inconsistent with its relations to the trust or to the United States to tax before this so-called vesting fully and completely in the railroad corporation, was it not so equally afterwards?

But as we have already said, if the State had divested itself completely of its trusteeship, the *trusts* remained as they were, and the State, having encouraged and approved of them, could not impede, imperil, misdirect, or destroy them by taxation of anybody in the execution of them.

No sale then has been made up to this date, and the State

* *Supra*, p. 531.

† *Supra*, p. 532.

Argument against the right to tax.—Violation of trust.

then still remains the trustee; the trustee to sell still. Up to this time she has no power to tax.

2. Has the State executed her trust and made a "sale" by the mortgage to Tucker, made doubtless through or with the approval of its agents?

The learned judge below says that it has, and this mortgage it is, according to his idea, which makes the "sale," which, if made, makes the land taxable. . . . He does not attempt to rest a sale on the second section "vesting the lands fully and completely" in the company. He saw plainly that they were thus vested by this section in the company only as an agent of the State; the State managing everything, "according to the provisions of the act of Congress," by its own board of control.

Now, in this assumption of the learned judge below, he assumes exactly that which this court, in *Railroad Company* v. *McShane*, just now decided,* declined on a stronger case to decide. There the trust was to "sell or *dispose of*" the property mortgaged. It was pressed on the court that this, if not a sale, was at least a "disposition of" the lands. But this court would not rest the case on such ground.

Undoubtedly, when Congress conveyed the lands to the State of Michigan on a trust to "sell" them, that body had no idea of anything but a sale in the ordinary meaning of the word; a final operation where one party gets a deed in fee simple and keeps the land, and the other receives the money, and is never expected to be called on to repay it.

In most States of this Union a mortgage bears no resemblance, even in law, to so much as a defeasible conveyance, to say nothing of a sale. In almost all of our States, and especially in Michigan, it is a lien, and no more. It conveys no title. That remains with the mortgagor. A chief justice of Michigan speaks of the expression "equity of redemption" as an antiquated phrase;† and so to half the bar it is.

* *Supra*, p. 464.

† Gorham *v.* Arnold, 22 Michigan, 247; and see Blackwood *v.* Van Vleet, 11 Id. 252; Caruthers *v.* Humphrey, 12 Id. 278; Ladue *v.* Detroit and Milwaukee Railroad Company, 13 Id. 380.

Argument against the right to tax.—Violation of trust.

When you come to speak of the two things in fact, and in reference to a matter like the present one, the difference between a mortgage and a sale is as wide. If the lands are *sold* and the company gets money, the road is built and the company is free from debt. But when they are mortgaged only, if sold for taxes—and we may mention as a fact that some of these very lands have been so sold—the company has lost, perhaps, half of that which it should have applied exclusively to build the road; it is still in debt, while with all this catastrophe its creditor is entirely unsecured!

The truth is that in the present case the mortgaging was a mere step in the way to a sale. It was to bring into existence, subserve and advance the capacity of an actual sale. Money was borrowed, and had to be borrowed, to build the road, and the road when built gave the practical capacity to sell at high rates. Sale, however, not mortgaging—a complete out and out disposition, not mere incumbrancing—was the object of the conveyance to the trustee here appellant. But the sale had to be conducted through this preliminary stage. The mortgaging gave a sort of resting-place, where the company might prepare things for its further and real purpose. The trust was not for a single object, but for two objects conjoined, or rather two objects one sequent to the other. The conveyance to the trustees was as much to sell after mortgaging as to mortgage before sale, and more so. It was really to mortgage first in order to sell to good advantage afterwards. Indeed, could there have been as good a sale without a mortgage as with, no mortgage would have been given.

The lands now taxed have, therefore, never been "sold" at all; though they are now held on a trust to be sold, and to pay a debt contracted in building the road.

Then the question is this: When there is a trust, in the first place to *sell* lands, and after sale to apply the lands—meaning, of necessity, the proceeds of them—exclusively to a particular purpose, as *ex. gr.*, the construction of a railroad—one purpose of the trust being obviously, as is shown by numerous limitations, terms, and conditions put on the

trustee, as to his times and modes of sale, to provide money to pay everybody who has contributed to build the road, so that to the extent of the full value of the lands it may be clear of debt—the question we say is this: When there is a trust to sell in order to build a road, and in order that by means of the existence of the road itself you may be able to sell, you borrow, and as a condition of the loan to you, mortgage in trust with a power to sell, and owe that borrowed money still—the question, we say, is—Is your trust executed before you have sold, even though you have mortgaged? And if thus, while in a way to selling and for the purpose of enabling you to sell at all, and for the further purpose of assisting you to sell advantageously, you mortgage before sale, are you not morally and equitably bound to apply the proceeds of your sale to satisfy your creditors by mortgage, whose money has been put by them into the construction of your road; and who do in some sort have a right to be subrogated to the claims of your day laborers and furnishers, to satisfy whose claims you were bound to *sell*, and whose claims, have been discharged by the money raised upon mortgage?

The mortgagees, of course, have the power to compel you to sell. And why? Only because it is the duty of the trustees to sell under the power of sale in the mortgages. But if it is their duty to sell under that power, and pay the mortgages, and they do not sell and pay them, how is the trust, which has been assumed under the act of Congress, executed? It is not executed at all.

It will not do to assert, as did the court below, that "what the General Government intended has been accomplished;" that the act had been done which, under the statute, vested the power of "sale." This we deny. What the government intended has not been accomplished. The act which, under the statute, vested the power of sale, has not been done. The government conveyed land not to build a road simply, but to build a road in a way that it prescribed in detail, and which to the *whole* extent of the land given, should leave no debts behind to any one, and which by se-

curing a sale of every alternate odd section should secure a probable settlement of it, and so secure a sale of its own even ones. It made a gift, but a gift with "restrictions, terms, and conditions." May you build a road in a way the reverse in all particulars of the way prescribed, and which does leave a vast debt behind, and does not secure any probable sale of the unsold sections retained by the government, and yet say that what the General Government intended has been done? May a donee of a gift with conditions prescribed by a donor, cast away all the conditions and enjoy the gift simply?

Suppose that no lands at all had been sold; that the whole road had been built in fraud; not one contractor nor one day laborer paid, and that all the iron was got with some absolute and equal disregard of right. Has that which the General Government intended, been accomplished? Has the company under the act of Congress earned any lands at all? Do they not all belong to the United States? As we have seen, the lands were granted on "restrictions, terms, and conditions," and restrictions, terms, and conditions which follow the gift wherever it goes. If none of these conditions are performed, if no land has ever been sold, will the mere fact that rails are laid—laid as we have supposed in fraud of everybody—and that cars roll upon them, give the company a title to the lands under the act of Congress? Surely not.

Is the case altered by the fact that to secure a *part* of the debts contracted in building the road, you have pledged the lands, and that while the day laborer and the contractors, and the furnishers of iron and other materials have all been paid, the persons from whom you have borrowed money to pay them, are all left unpaid? Suppose that instead of borrowing money to pay the day laborers, contractors, and furnishers, you had left them unpaid and mortgaged the lands directly to them or to somebody in trust for them to secure a payment. Is your trust executed before a sale? It makes no difference in morals or in law who it is that is left unpaid, so long as anybody is left unpaid; the debt left unpaid

being one contracted in making the road under the act of Congress. The case of *Denniston* v. *Unknown Owners*, in the Supreme Court of Wisconsin,* a case on its facts closely like this one, expresses the true view. The court say:

"It must be presumed . . . that the legislature intended so to dispose of these lands as to secure the completion of the work as soon as practicable, and also the payment of all lawful claims and demands against the improvement fund. In no other way could it fully discharge its obligation to the United States which it had assumed."

A trust of the sort created in the present case, we may here remark, bears some analogy to a charitable use. In fact, gifts from the government for promoting works of public use are considered as gifts to charitable uses;† and are to be administered by courts of equity on the principles on which such uses are habitually administered; that is to say, upon such rules of construction as will secure the *most* complete, pervading, and effectual execution of the trust, and in the sense *most* consistent with the honor, the purpose, and the interest of the donor; in this case the nation. Administering it thus, the court will administer it in a way that shall insure payment of all the company's debts contracted in constructing the road; whether the debts be for labor, materials, or money borrowed to procure them.

II. *The act of May 1st*, 1873—*the general railroad law of that year*‡—*violated the obligation of contracts; violating at least two specifically made.*

1. It violated one made by the twentieth section of the act of February 14th, 1857,§ vesting the title to the lands in the Flint and Père Marquette Company.

When that company was organized in 1857 all railroad companies were subject, under the general railroad act of 1855, to the specific tax of one per cent. on "*paid in*" capital

* 29 Wisconsin, 360.

† Attorney-General *v.* Heelis, 2 Simon & Stuart, 67, 76.

‡ *Supra*, p. 536.

§ *Supra*, pp. 532, 533.

Argument against the right to tax.—Violation of contract.

stock. The present road was built chiefly by land grant. The tax under the general railroad act would, of course, have been small. The State, regarding the land grant as a valuable gift, "in consideration of the grant," &c., imposed a greater specific tax than the general railroad law exacted. It imposed one per cent. on the *cost of the road*, &c., and reserved the right, after ten years, in its discretion, to add a further tax on gross receipts. Here was taxation, "in consideration of the grant," greatly in excess of existing, or prospective, taxation on other roads. But, because of this unequal burden, present and prospective, the State pledged itself that it should "be in lieu"—not of all other specific taxation, but in lieu of ALL other taxes within the State.*

There was, therefore, an agreement on consideration; in other words a contract, that the State would make no other taxes than the specific tax then laid. The general railroad act of 1873, in taxing lands within the State, violates the contract.

2. It violates—so far as relates to the taxes immediately in question, the taxes of 1873—another contract made by the thirty-seventh section of the act of April 18th, 1871. This act of April, 1871, indeed, itself, so far as it undertook to tax our land grant at all, violated previous contracts of the State. However, we now speak only of the contract made in the thirty-seventh section. That section, after imposing an annual tax on gross receipts, declared it to be in lieu of all other taxes on the property of the company, whether real, personal, or mixed, except penalties, and "except real property not necessary for carrying on the ordinary operations or franchises of their road." Then, by a first and second proviso, lands opposite to, and coterminous with, the constructed portions of roads were promised exemption *until after April 1st*, 1874.

Here, then, is a plain agreement not to tax these lands prior to April 1st, 1874. And this agreement was one on consideration; in other words it was a contract. What was

* See *supra*, p. 533.

the consideration? This plainly: The mortgage of 1868 had been executed, and the bonds which it secured by these lands were seeking a market, and the road through the lands here assessed was in a course of construction with the proceeds of these bonds. The only condition on which the bonds could be sold was that the security on the lands should be unimpaired. All men knew that if the lands were exposed to the dangerous and ever-increasing burden of local taxation, in a country where population and wealth were yet undeveloped, the bonds could not be sold. The legislature, of course, knew it. Hence, and in order to tempt investors to buy the bonds, in order to secure to the State of Michigan the benefits which the railroads would bring the State, it was promised that the security of the bonds—these lands—should be exempt from taxation until 1st April, 1874. On the faith of that promise the investors parted with their money, which act was an injury to them; and the road was constructed, *afterwards*, through the lands now in question, which act was a benefit to the State. Here is benefit to one side, and loss to the other. Certainly if a consideration—a consideration in the fullest common-law sense of the word,—can ever exist, one existed here. Now, confessedly the lands listed for taxation were not, in April, 1871, opposite to, and coterminous with, the line of road then in operation; and we insist that to tax them now under the acts of 1873, in that year, is a breach of a contract.

It is, however, but fair to the legislature, we think, to assume that, in subjecting the lands of the company to local taxation by the act of 1873, it did not intend to include the lands exempted by the thirty-seventh section of the act of 1871. Nothing in the act of 1873 repeals, in terms, the clauses of the act of 1871 now in view. The act of 1873 is general in its scope, and finds enough to operate on without seeking out these specially and temporarily exempted lands.

III. If there were no violation of a trust in the case, and if we had no special contract about anything, the constitution of the State, adopted in 1850, and before the organiza-

Argument against the right to tax.—Violation of contract.

tion of our company, makes the tax invalid. The bill alleges, and such is undeniably the fact, that prior to the adoption of this constitution, it had always been the practice of the State to collect specific taxes from railroad companies, and to collect no other. The clause of the constitution is thus:

"The State may *continue* to collect all specific taxes accruing to the treasury under existing laws. The legislature may provide for the collection of *specific* taxes from banking, railroad, plankroad, and other corporations hereafter created."

This constitutional provision was evidently framed with a view to the continuation of that practice. Railroad corporations not having been subjected to local taxation, the framers of the constitution intended that they should not be.

Now, although this language is permissive in form, it is to be construed as mandatory in effect—as a limitation upon the power of the legislature to impose taxes upon the corporations therein named, other than specific taxes: and for the obvious reason that if the language of the section is to be construed but as conferring a power on the legislature to be exercised at its discretion, the entire section might be obliterated from the constitution without changing the effect of that instrument. The power and the discretion as to its exercise would still remain in the legislature, under the general grant of legislative power.

Words of permission in statutes are frequently construed as obligatory. *May*, in a statute, means *must*, whenever third persons or the public have an interest in having the act done which is authorized by such permissive language.* And the rules of interpretation of constitutions and of statutes are substantially the same, with this difference, however, that constitutional provisions are more rarely treated as directory than are statutory ones.†

* Rex *v.* Barlow, 2 Salkeld, 609; Rex *v.* Flockwold, 2 Chitty, 251; Newburg Turnpike Co. *v.* Miller, 5 Johnson's Chancery, 113; Malcolm *v.* Rodgers, 5 Cowen, 188.

† Potter's Dwarris on Statutes, p. 654; Cooley's Constitutional Lim., 74.

Argument in favor of the right to tax.—The mortgage a sale in effect.

Messrs. C. A. Kent and I. Marston, Attorney-General of Michigan, with whom was Mr. C. Upson, contra:

I. *The great question in the first part of this case is, "Has there been a* sale *of these lands by any one having authority to sell?"*

If there has been such a sale, and if the proceeds have been applied exclusively to the construction of the road, there is an end of the case, so far as respects this part of it. The questions of violation of the specific contract and of the constitution of Michigan, remain of course for subsequent consideration.

Now, whatever may have been the nature of the transfer from the State to the Flint and Père Marquette Railway Company, it will be conceded on the other side, that a valid conveyance by way of mortgage was made by the company to the complainant, Tucker; that the company, in consideration of the lands thus conveyed, did receive $2,370,000, and that the company did apply that sum of money exclusively to the construction of the road, and to no other purpose; and that in consequence of the money so received and applied, the road is now a completed road, which the government of the United States and all persons may safely use in the way that the act of Congress intended.

Whether practically a mortgage is a lien, or whether it is a sale, depends generally upon the amount which the sum lent bears to the value of the land on which it is lent. When, for example, one lends $1000 on land worth $10,000, the mortgage is paid and is proved to have been a lien only. If, however, he lends $11,000 on the same property, the transaction generally reveals itself in its true legal character, that is to say, of a defeasible conveyance not defeated. One party, not the original owner of it, keeps the money, and the other, not the original owner of *it*, keeps the land. And this is the same thing exactly which occurs in an ordinary sale.

Further. It will be admitted, we suppose, that we are not engaged in inquiring whether, technically and by definitions given in text-books, &c., what has been done, apparently by way of mortgage, would come within the term "sale." It is enough if practically what was then done was,

Argument in favor of the right to tax.—The mortgage a sale in effect.

in consideration of the $2,370,000, a final parting by the State, company, or trustees—whichever you please—with the lands, and for about their money value, so that if the trustees executed their power of technical *sale*, little money would be got by them above the sum and interest due on the bonds.

Now this case comes here on bill and demurrer. A pleader is always held to have stated his own case as strongly as the case makes it possible for him to state it. And doubtless the complainant here so stated his case.

Yet, though it may be inferred from the statements of the bill filed here that the company has a right to the surplus, if any, that may remain from the sale of the lands after the bonds are paid, there is no averment that any surplus will remain; nor so much as a statement of the value of the lands mortgaged compared with the amount of the outstanding bonds, from which so much as an inference can be made on the subject. Neither directly, therefore, nor indirectly, is there any averment of a surplus. On the contrary, so far as things are stated, there will presumably be no surplus. The only lands specifically spoken of in the bill as mortgaged are—

The lands in Osceola County, taxed—acres, . .	10,892
While of outstanding bonds there are still, . .	$2,370,000

So far as the bill specifically shows a security, it shows one plainly inadequate to yield a surplus. If there were other lands mortgaged, their amount or value does not appear.

On the case, therefore, of the complainant, as shown by himself, the company has parted with the lands for their substantial value, or for more than such value.

With the lands thus practically sold, and the property of other people—with an equity of redemption in the company that amounts to a mere shadow—nothing can be less soundly argued than that they should be still exempt from taxation, as still belonging to the company.

The most that could be so argued would be that they should be exempted from taxation to the small degree of

Argument in favor of the right to tax.—The mortgage a sale in effect.

value which the equity of redemption bears to the interest conveyed or secured by mortgage.

Then again, and on the other hand, suppose that there will be a large surplus. What is the opposing argument? This only, that there should be no debts left unpaid. But all workmen and all contractors, and all persons furnishing work or equipments to the road have confessedly been paid. And if the persons who have lent the money to pay them are made abundantly secure by the mortgage, what harm has been done, or can occur to any one?

The purpose of the United States was that the road should be made; that so much of the land as was necessary to make it should be applied to making it; that any surplus should belong to the company. An application of the necessary portion of the land through a process of sale, was, no doubt, the process contemplated for getting the money. But the process through which the application of the land was to be made, was a modal matter simply, not one of essence. Any surplus of the land, as we have said, after an application of enough of it to get the requisite amount of money to make the road, belonged to the company; and, whether that surplus remained in the form of an equity of redemption, or in the form of a part of the lands clear of any mortgage, was of no importance to the United States; and, indeed, concerned nobody but the company. As things now stand, the road is built, it is paid for, it is paid for out of the land. The conscience of the company, it seems, is exercised because the bondholders who have lent money on the faith of the mortgage are not paid off. But they hold the land; and they can compel a sale of it if they are not paid. Suppose they lose, that is to say, suppose they have given more for the bonds than they are worth; more than the land secures. They are no worse off than if for the same money they had bought the land at a sale of it; nor as badly off, since the company is bound on the bonds. If the land is worth greatly more than the amount which it secures, and the company, in the face of its own interests, suffers the bondholders to take it, wherein does the com-

pany stand worse off than if for the amount borrowed, it had sacrificed the land on a sale?

The matter, as we have said, concerns the question of surplus only; and the surplus concerns no one but the company. If the bonds are paid without any sale, and satisfaction entered on the mortgage, then all is well, for all has ended well.

Thus far we have contemplated the matter in a point of view not technical; in a point of view such as men of plain and practical sense would take.

But if we need come to technical rules, technical rules declare that the mortgage was a sale. The whole purpose of the grant by the United States was to raise money to build the road. The power to sell was given only to do this thing. But it is well settled that a power of sale to raise money is well executed by the creation of a mortgage for that purpose.*

So far as any interest in the United States is concerned—a matter much pressed in the points taken, and on the argument in the court below, and in the briefs; but which, since the case of *Railroad Company* v. *McShane*, just now decided in this court,† and qualifying and restraining the operation of *Railway Company* v. *Prescott*,‡ and since the completion of the road, is feebly pressed in the oral argument here,—the United States are the only party who could complain therefor. The case of *Baker* v. *Gee*§ is in point.

II. *The State of Michigan has not entered into any contract with the Flint and Père Marquette Company, or with complainants, which forbids the proposed taxation.*

The power of taxation is an attribute of sovereignty and essential to every independent government. It is well settled that an intention to exempt private property from taxa-

* Sugden on Powers, 513; Mills *v.* Banks, 3 Peere Williams, 9; Williams *v.* Woodard, 2 Wendell, 492.

† *Supra*, pp. 461–2.

‡ 16 Wallace, 603.

§ 1 Wallace, 333; and see Burlington and Missouri Railroad Co. *v* Hayne, 19 Iowa, 137; and Iowa Homestead Co. *v.* Webster, 21 Id. 221; and Cedar Rapids and Missouri Railroad Co. *v.* Woodbury County, 29 Id. 247.

tion by legislative contract will never be inferred except from the clearest language. There is no safety in any other rule.*

And it is of the essence of such contract, as it is of every other contract, that it have a consideration.† Privileges which are granted by the State without any agreement as to their continuance, and without the passing of any consideration from the grantees, may be withdrawn at any time.‡

1. To the claim of exemption founded on the twentieth section of the act of 1857, there are two answers.

(*a*) The section, by its terms, refers only to taxation upon the cost of the road and its equipments, and to taxation of the gross receipts, and the limitation in the last clause must be referred only to the taxation previously mentioned. There is here no reference to the taxation of the lands in question.

It is settled that laws which provide for the exemption or the specific taxation of corporations, though in terms including their entire property, will be construed to extend only to property which is needed in the performance of the public duties of the corporation, and that it does not include that held for general investment or profit.§

The settled tendency of all the courts is to a narrow construction of all exemptions from taxation.

(*b*) Section twenty was repealed by the legislature of 1859, and the taxation of the land-grant railroads was made uniform with that of other railroads, under the *general* railroad law of 1855, which provided for a tax of one per cent. upon the capital stock paid in of any company.‖

* Providence Bank *v.* Billings, 4 Peters, 561; Philadelphia, &c., Railroad Co. *v.* Maryland, 10 Howard, 393; Jefferson Branch *v.* Skelly, 1 Black, 447; Delaware Railroad Tax, 18 Wallace, 225.

† Cooley's Constitutional Limitations, 281; 16 American Jurist, 253.

‡ Christ Church Hospital *v.* County of Philadelphia, 24 Howard, 300; Salt Co. *v.* East Saginaw, 13 Wallace, 373.

§ The Vermont Central Railroad Co. *v.* The Town of Burlington, 28 Vermont, 193; The Inhabitants of Worcester *v.* The Western Railroad Corporation, 4 Metcalf, 564; The State *v.* Newark, 1 Dutcher, 315; The State *v.* Flavell & Fredericks, 4 Zabriskie, 370.

‖ Laws of 1859, pp. 442, 558; Compiled Laws of 1857, vol. i, p. 652.

This change diminished the rate of taxation upon the Flint and Père Marquette Company, and they assented to it by paying the lesser taxes. Hence they can claim no rights under the law thus repealed. If it be said that that enactment putting this company under the tax as laid by the general railroad law of 1855, was substituted for section twenty, as a part of the contract, the answer is that the general railroad law of 1855 was in every section of it made amendable or repealable at any time by the constitution of Michigan,* and that the tax provided in the law of 1855 has been changed by the act of 1873, and the company has paid its tax for the year 1873 in accordance with this last law.

(*c*) Section seven of the same act† of 1857, under which the exemption is claimed, is inconsistent with the construction sought to be put by the complainant upon section twenty. The inference, from the existence in the act of section seven, is irresistible, that section twenty was not supposed to make any provision as to the taxation of these lands, and that by providing that they should not be taxed for seven years both parties supposed them taxable after the seven years had expired.

2. To the allegation that the general railroad law of 1871, which provided a specific rate of taxation, constituted a contract between the State and the companies that no other tax would be laid, it is enough to say that no consideration was ever given by the company for the alleged contract, and the provision was in "general law," which is expressly made subject to amendment or repeal, at the pleasure of the legislature. At the most the provisions relied on were but grants of privileges, which could be withdrawn at any time.

III. *The taxation is not in conflict with the constitution of Michigan.*

To the position, that it is so, there are at least two sufficient replies:

1. The specific taxes which may be imposed upon corporations, cover only such property as is used in the prosecu-

* See *supra*, p. 540.

† See *supra*, p. 531.

tion of the purpose for which the corporation is organized. This we have already said, citing some authorities, in commenting on the claim for exemption set up under the twentieth section of the act of 1857.*

2. A comparison of the clause of the constitution of Michigan relied on shows that the word "may" does not, in the clause relied on, mean "shall."

Indeed, we submit that the word "may" does mean "shall," only when some officer has been given an authority which, under certain circumstances, it is his duty to protect.

Reply:

I. It is plainly inferable from the statements of the bill that before the road was made, the lands were mortgaged to pay bonds sold in order to make it; that a power to sell the lands and redeem the bonds accompanied the mortgage; that since the bonds were issued the road has been made or is a making; that a portion of the bonds have been taken up by a sale of the lands, and that this process is now going on. This shows that the lands are worth more than they are mortgaged for; and it stands to reason, that lands which were valuable enough, before the road was made, to tempt capitalists to advance money on them, are now more valuable since the road has been actually made, and the amount of the debt reduced by the cancellation of some of the bonds issued in order to make it.

II. We admit that the power of taxation is an essential one to every government, and that anybody claiming an exemption from it under statute must show an intention expressed in unambiguous terms; that a consideration is of the essence of every contract, &c., &c. But of what pertinence in this case is the enunciation of such general and universally admitted truths; it being perfectly settled that contracts to exempt, when expressed with any such plainness as shows their meaning, and when resting on a sufficient consideration are valid, and to be enforced?† The

* See *supra*, p. 564.

† New Jersey *v.* Wilson, 7 Cranch, 164; McGee *v* Mathis, 4 Wallace, 143;

only inquiry pertinent is, does the language of the statutes in *this* case, plainly show a purpose to confine the taxation in the way which we allege, and was there a consideration *here?* And we refer to the language itself, of the different acts, as a conclusive argument to show that the statutes do clearly show such purpose, and to the facts of the case, to show that they rest on considerations both pecuniarily valuable and having strongest foundation in policy and honor.

While, however, we admit that a consideration is necessary to make a binding contract even on a State, we cannot but recognize some distinction between individuals, who can be summoned by any one before the courts of the country when it is alleged that they have broken their contracts, and States, which by individuals, at least, cannot be; and we respond reluctantly to the position that a State of this Union can violate a promise, deliberately made by it, published on its statute-book, enrolled in its capitol, and sent forth to the nations, on the ground—that no "consideration" was received by it for what it did.

It is argued—

(*a*) That by the settled rules of construction the general words at the conclusion of section twenty, that the "said above several taxes shall be in lieu of *all* other taxes *to be imposed within this State*," are to be referred to the "specific annual tax, one per cent., &c.," then laid, and that the right is reserved to make a further tax on gross earnings, spoken of in the previous part of the section, and that only such specific taxes are meant to be referred to.

The argument in the face of the words which we have italicized is incomprehensible. Is the tax laid on these lands a tax not specific, and is it imposed within the State of Michigan? Certainly it is both. Then it is void, for the State has contracted that a specific tax laid in another act shall be "in lieu of *all* such taxes." No rule of construc-

Home of the Friendless, &c., *v.* Rouse, 8 Wallace, 430; Furman *v.* Nichol, Ib. 44; Chicago *v.* Sheldon, 9 Id. 50; Wilmington Railroad *v.* Reid, 13 Id. 264; Raleigh and Gaston Railroad *v.* Reid, Ib. 259; Humphreys *v.* Pegues, 16 Id. 244.

tion will infer a contrary effect in the case of such words as these, for no rule of construction will allow us to disregard the meaning of words when the meaning is clear.

It is said that laws which provide for the exemption or for the specific taxation of property, which include their entire property, will be construed to extend "only to property which is used in the performance of the public duties of the corporation, and that it does not include that held for general investment or profit." And the inference is supposed to follow, that the contract of the twentieth section to exempt from all but specific taxes does not apply to these lands. Concede the rule to be true, yet the inference supposed to follow does not follow; for the application of it to these lands would be a misapplication of it.

The lands are not held by the railway company for any purpose of use in connection with the running of its road, or the exercise of its ordinary business. Neither are they held for general purposes of investment or profit. They were the gift of Congress to build the road; the substance out of which the road is a making. They constitute a part of the capital stock, taking the place, and doing the work, which the money paid in by shareholders does in ordinary railway enterprises.* Lands held by railway companies for investment or profit, or for purposes merely convenient to the business of their roads, are purchased out of the capital stock or other assets, and held incidentally to the main business. And as to these, questions of taxation properly arise. But the lands in question, standing in place of the paid-in stock, are in no sense of that class. They are as much property exempt as the paid-in stock, or the road-bed, rails, and rolling stock which they are pledged to pay for. It is directly out of their pledge and sale that the road exists, that its business is prosecuted, and that it earns the money to pay its specific tax.

It is further argued—

(*b*) That section twenty of the act of 1857 was repealed by an act of 1859, and a less rate of taxation established, to

* *Supra*, pp. 529–30.

which rate the company assented; and that the act of 1859 was not a contract.

But these amendments relaxing the provisions of section twenty, were made at the instance of and for the benefit of the company. Of course, legislation made in such circumstances does not raise an inference that there was a change of contract, or that the legislature had any right to change the contract to the prejudice or against the interests of the company.

The general railroad act of 1873 was in truth the first attempt of the legislature to impair the obligation of the contract made in the twentieth section, and the company has resisted it from the first.

It is argued next—

(*c*) That because the seventh section of the act of 1857 exempts the lands from taxation for seven years, the implication is irresistible that after the seven years had expired they might be taxed; and, therefore, that we misconstrue the twentieth section of the act.

The argument is plausible, but it is refuted by the fact that this seventh section is followed by another section, the nineteenth, which provides that the whole of the railroad is to be completed within seven years. The two sections are to be construed in connection with each other. The assumption of the legislature was that the road would be completed within seven years (the nineteenth section being a mandate to that effect), and the seventh section holding out a promise that if persons would invest capital in the road, then, inasmuch as the road was to be built in seven years, that the land should not be taxed during that time. So far from being evidence of a purpose not to make a contract of that kind, it is evidence that the legislature held out that the land would not be subject to taxation until after the trust had been executed, and until after the land had done the proposed work and passed into private ownership.

This seventh section, it is to be observed, provides that nothing in the act shall be so construed as to relinquish the right of the State to any specific taxes. This shows that

the legislature thought the provision about the lands made an irrevocable contract. Why else reserve the right to impose specific taxes?

2. A clause in the constitution of Michigan is invoked. The clause authorizes corporations to be formed under general law, and forbids their creation by specific act except for municipal purposes. It adds:

"All laws passed pursuant *to this section* may be amended, altered, or repealed."

Now, what laws may be passed pursuant to that section? Obviously, general laws under which corporations may be formed, or special acts for municipal purposes. But the act of February, 1857 (the contract act), is neither a general law forming a corporation, nor a special act for municipal purposes. Therefore, it is not a law "passed pursuant to this section," and hence not a law which may be amended, altered, or repealed under the clause of the constitution relied on.

III. The specific taxes which the constitution allows the continuance of in the case of railroad corporations cover, it is said—just as was said in regard to statutes—only the property used in the prosecution of the purpose for which the road is organized.

But the bill alleges, and the demurrer admits it to be true, that prior to the adoption of that constitution "*the property of railway corporations* had never been taxed by local assessment, nor otherwise than by specific taxation;" and these taxes and these alone, it seems to be admitted by the opposite counsel, the State may lay; the position being only that the clause does not apply to lands like those of the land grant. But if "*the property*" of railway corporations had never been assessed otherwise than by specific taxation, and only such taxation may be continued, surely the lands cannot be taxed. They are "the property" of railroad corporations exactly, and fully as much as the railroad bed itself; and in common comprehension, as being more external to the corporation, even more so.

Opinion of the court.—The State's duties as a trustee.

Mr. Justice SWAYNE, having referred to the statutes and recapitulated the facts bearing on the case, delivered the opinion of the court.

The appellants have assigned in this court various errors.*

We shall consider the several propositions which they state without specifically enumerating them.

The United States granted the lands to the State for a specific purpose. That purpose was "to aid in the construction of railroads" upon the routes designated. The land was made "subject to the disposal of the legislature for the purpose aforesaid, and no other." Congress prescribed certain safeguards to secure their application to the construction of the roads, and to prevent failure or diversion. The precautions were few and simple. Except as to the first one hundred and twenty sections, the power of sale was to attach only as the road was completed in successive sections of twenty miles each. Subsequently the extent of the sections and the quantity of land were reduced one-half. If the entire road was not completed within the time limited, no further sales were to be made, and all the unsold land was to revert to the United States. Subsequently the reverter was limited to the lands to which the right to sell had not attached. In other words, it was confined to those where the title was inchoate only, and had no application to those where the title was complete. As to those of the former class, there was not, when the bill was filed, and is not now, any default. If the fact were otherwise, it would be for the United States, by office found, or other proper proceeding, to assert their rights. But they do not complain, and the complainants cannot do it vicariously for them.† It is a conclusive answer to the proposition we are considering that the United States have no more claim, legal or equitable, touching the lands here in question than they have to lands which they have sold and patented to others in the regular course of the administration of the land department of the government; and that Congress has not seen

* See them set out as made, *supra*, pp. 542–3.—REP.

† Baker *v.* Gee, 1 Wallace, 333.

fit, either expressly or by implication, to impose any restriction upon the taxing power of the State. That subject was remitted, as, under the circumstances, it might well be, wholly to her wisdom and discretion.

The State accepted the grant subject to all the conditions prescribed. She thereupon became the agent and trustee of the United States. The powers and duties with which she was clothed might all have been discharged by private individuals. The characters of sovereign and trustee were united in the same party. The State did not in any wise abdicate her sovereignty by accepting the trust, but the former might be exercised to render more effectual the discharge of the latter. She was in no wise fettered, except as she had agreed to fulfill all the terms and conditions which accompanied the grant. To that extent she was clearly bound, and anything in conflict with those conditions would be *ultra vires* and cannot be supported. What were the terms to which she submitted herself? She was to devote the lands to the accomplishment of the object which Congress had in view, and there was an implied agreement on her part to take all the measures reasonably within her power to make their application effectual to that end. The mode was left entirely to herself. We see no ground upon which it can be claimed she bound herself any further. Upon general principles she could not tax the land while the title remained in the United States, nor while she held them as the trustee of the United States, which, in the view of the law, was the same thing. But when the State, proceeding in the execution of the trust, had transferred her entire title to the company, and they had perfected their title and acquired the right to sell, the case assumed a very different aspect.

The validity of the mortgages is not drawn in question, and is too clear to be doubted. We need not, therefore, consider that subject. When the mortgages were executed the complainants took the legal title, so far as the company held by that title, and the equitable or inchoate title of the company to the residue of the lands. Copies of the mort-

gages are not attached to the bill, and we are not advised particularly of their contents. If they contain a covenant of warranty, the legal title, as fast as it was acquired by the company, inured to the mortgagees.*

If there was no warranty, and the *land*, and not the *title*, of the company was conveyed, the company is barred by estoppel from setting up the after-acquired title, and the estoppel runs with the land. The result is the same as if there had been a warranty.†

When the grant was made by the State to the company, the entire title before held by the former passed to the latter. Nothing remained to the State but the performance of the remaining duties of the trust, without any title, present or potential, to the lands.

Forbearance to tax was a bounty voluntarily given by the State. Forbearance for a time doubtless increased to some extent the value of the lands. Never to tax would have increased their value still more.‡ There is no foundation for a claim for one more than for the other. The State, in the act accepting the grant, agreed *sua sponte*, to forbear to tax for seven years. There is no complaint that this stipulation has been violated. Any obligation, legal or equitable, to do more in this way is wanting.

The company, so far as the matter of right is concerned, were upon a footing with all other alienees of the United States. The imposition of taxes can in no just sense be said to be a diminution of the value of the lands.§ If Congress had thought so, they would have forbidden it. Liability to taxation is an incident to all real estate. Exemption is an exception. When claimed, to be effectual it must be clearly made out.

The proposition founded upon the twentieth section of the act of the legislature of the 14th of February, 1857, is un-

* Bank of Utica *v.* Masereau, 3 Barbour's Chancery, 367.

† Van Rensselaer *v.* Kearney et al., 11 Howard, 323.

‡ New Jersey *v.* Wilson, 7 Cranch, 164.

§ Burlington and Missouri Railroad Company *v.* Hayne, 19 Iowa, 143.

sound. There are several answers. We shall state but one of them. That section imposes a tax with reference to the railroad itself. It has no relation to the lands owned by the company not used nor necessary in operating the road. The lands of the class of those here in question doubtless were not present to the mind of the legislature when that section was framed. The language employed cannot receive the comprehensive construction contended for.* The subject of taxing the lands of the company had already been dealt with. The seventh section of the act provided that they should not be taxed for seven years from the 1st of September, 1857. It would have been a solecism to exempt them for seven years and in the same act to exempt them without limit of time. Our view gives harmony and symmetry to the two provisions. Where such an exemption is claimed, the language from which it is alleged to arise is always to be strictly construed.

This provision for exemption was by the clearest implication an assertion by the State *in limine* of the power to tax. The subsequent exemption involves the like claim.

The provision of the thirty-seventh section of the act of 1871, exempting the lands specified from local taxation until three years from the 1st of April, 1871, which period has not elapsed, was not a contract. There was no consideration. The company was required to do nothing, and did nothing in return. As between individuals the stipulation would belong to the category of *nude pacts*. It has no higher character because one of the parties was a State, the other a corporation, and it was put in the form of a statute. It was the promise of a gratuity spontaneously made, which might be kept, changed, or recalled at pleasure. The case of *Christ Church Hospital* v. *The County of Philadelphia*† is

* Vermont Central Railroad Co. *v.* The Town of Burlington, 28 Vermont, 193; The State *v.* The City of Newark, 1 Dutcher, 315; The Inhabitants of Worcester *v.* The Western Railroad Corporation, 4 Metcalf, 564; The State *v.* Flavell & Fredericks, 4 Zabriskie, 370

† 24 Howard, 301.

instructive upon this subject. In 1833 the legislature of Pennsylvania passed an act declaring "that the real property, including ground-rents, now belonging to Christ Church Hospital, in the city of Philadelphia, so long as the same shall continue to belong to said hospital, shall be and remain free from taxes." In 1853 a law was passed which subjected the ground-rents to taxation. The Supreme Court of the State sustained the validity of the latter act. The hospital removed the case, by a writ of error under the twenty-fifth section of the Judiciary Act of 1789, to this court. Here it was insisted that the act of 1833 was a contract in perpetuity, and the contract clause of the Constitution of the United States was invoked for its protection. This court unanimously affirmed the judgment of the Supreme Court of the State.

The taxing power is vital to the functions of government. It helps to sustain the social compact and to give it efficacy. It is intended to promote the general welfare. It reaches the interests of every member of the community. It may be restrained by contract in special cases for the public good, where such contracts are not forbidden. But the contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists it is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require. It is in derogation of public right, and narrows a trust created for the good of all.*

Whether under the constitution of Michigan the State can impose taxes other than those which are specific upon the Flint and Père Marquette Company, is a question which in this case does not arise. The taxes involved in this controversy were not to be upon the corporation, nor

* Providence Bank *v.* Billings, 4 Peters, 561; Philadelphia Railroad Co. *v.* Maryland, 10 Howard, 393; Jefferson Branch *v.* Skelly, 1 Black, 447; Delaware Railroad Tax, 18 Wallace, 225.

Statement of the case.

upon property used in the exercise of its franchises, but upon lands which it had mortgaged and was holding for sale. The distinction and the consequences have been considered. We need say nothing further upon the subject.

We think the demurrer was necessarily sustained, and the bill properly dismissed.

DECREE AFFIRMED.

ROSS, ADMINISTRATOR, *v.* JONES.

1. The late civil war was flagrant in Arkansas from April, 1861, till April, 1866, and the statutes of limitation did not run during that term. This principle applies to suits between persons in different States of the late so-called Confederate States of America, as much as to suits between citizens of States of the North, which remained loyal, and citizens of the said so-called Confederate States, with which they were at war.
2. An indorser of a promissory note, though an indorser for accommodation only, is not a "person bound as security" within the meaning of the statute of Arkansas which enacts that any person bound as "security" for another, on any bond, bill, or *note*, may at any time after action has accrued thereon require the person having such right of action forthwith to commence suit against the principal debtor, on penalty of such security being exonerated.

ERROR to the Circuit Court for the Eastern District of Arkansas; the case being thus:

On the 11th of June, 1864,* Congress enacted that:

"Whenever, during the existence of the present rebellion, any action . . . shall accrue against any person who by reason of resistance to the execution of the laws of the United States, or the interruption of the ordinary course of judicial proceedings, cannot be served with process; OR whenever after such action . . . shall have accrued such person cannot, &c.

"The time during which such person shall so be beyond the reach of legal process, shall not be deemed or taken as any part

* 13 Stat. at Large, 123.