

1876

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State of Maine, Supreme Judicial Court

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STATE OF MAINE.

Supreme Judicial Court,

CUMBERLAND COUNTY.

WESTERN DISTRICT, LAW TERM, 1876.

THE STATE OF MAINE

vs.

THE MAINE CENTRAL RAILROAD COMPANY.

ARGUMENT FOR THE STATE,

By L. A. EMERY, *Attorney General.*

The action is brought to recover the State tax assessed April 1, 1875, upon the defendants' franchise, under the Act of March 4, 1874, printed in the appendix. The declaration is in debt, as authorized by Chapter 115 of the Laws of 1876, and closely follows the Statute of 1874 imposing the tax. The case shows that the tax was regularly assessed, and that all necessary acts were done by the State officers to fix the

defendants' liability, if they could be made liable at all. The counsel make no question, except the one presented by their brief statement in their plea, that the Statute imposing the tax impairs the obligation of a contract, and is therefore void, being in conflict with the Constitution of the United States.

The defendants' counsel have my thanks, and the thanks of the court, I trust, for their cordial assistance in bringing this vital question before the court, singly and unembarrassed by technical objections. The State, also, in this case, has no wish to collect an unconstitutional tax, nor to put this defendant corporation at any disadvantage in the assertion of alleged chartered rights or immunities. Apprehending that constitutional questions might arise, and being willing to meet them, the State Government has waived the summary process in the collection of this part of its revenues, and comes into this court with its demand and joins issue on the defendants' plea.

It is true that the original charters of most if not all of the original railroad companies, now consolidated into the Maine Central, and of other existing companies, provided for another and different mode of taxation, as set forth in the extracts from the charter of the Androscoggin and Kennebec, printed in the case, to wit; a municipal taxation of the shares to the owner in the town where he resided. In process of time, and the course of railroad transactions, the shares have been passing from the original owners, citizens of

Maine, into the hands of railroad kings in other States, by whom they are held in large blocks for purposes of profit, directly or indirectly.

The State at last found itself protecting, by its laws and its courts, immense corporate interests, representing many millions of property, without receiving their fair shares of contributions for the support of the laws and the courts. To remedy this injustice, the Act of 1874 was passed, taking off the tax on the few scattered Maine Stockholders, and assessing the whole tax directly on the franchise, as representing all the shares wherever held. The State was lenient and liberal in it all. It only assessed upon the market value of the shares—what they would sell for. From this were deducted all real estate and other property of the corporation subject to any taxation elsewhere. The Act is eminently just and equitable. It will tend to equalize the public burdens, and restore to the State, revenues of which she has heretofore been deprived.

The defendants, by their plea, set up a contract by which, as they say, the State has bound itself never to alter the mode of taxation from the taxation of shares to the holder, and that this contract is protected by the United States Constitution; and they will invoke those well known decisions of the Supreme Court of the United States, which have become the entrenchments of corporations in their resistance to State control. This raises at once the question of the constitutionality of the State law.

The presumption is, that the Act of March 4, 1874, is constitutional. It is a strong presumption, only to be overcome by the clearest reasoning and most conclusive authorities. All the judges and writers agree upon this. Chief Justice Marshall, in the *Fletcher v. Peck* case, said the judges must be convinced, and "the conviction must be clear and strong." Judge Washington, in *Ogden v. Saunders*, 12 *Wheaton*, 270, declared that if he rested his opinion on no other ground than a doubt as to the unconstitutionality of the law, that alone would be a satisfactory vindication of his opinion in favor of its constitutionality. Chief Justice Mellen of our own court, in *Lunt's case*, 6 *Me.*, 413, says, "All acts of the Legislature are presumed to be constitutional; and the court will never pronounce a statute to be otherwise, unless in a case where the point is free from *all* doubt."

This being the presumption, the burden is on the defendants to establish the proposition necessary to their defense, that there exists between the State and this particular defendant corporation, in relation to taxation, a contract which is within the clause of the United States Constitution, prohibiting a State from passing any law impairing the obligation of contracts; and which the Act of March 4, 1874, does impair; or in other words, that the Act of 1874 rescinds a contract between the State and the defendant, which the State had no power to rescind.

They must establish the contract; they must establish its irrevocable character; they must establish its

impairment. They must do all this fully, clearly, and beyond all doubt.

The case shows that the lines of railroad now owned and operated by the defendant corporation, the Maine Central, were originally owned and operated by five different corporations, to wit; the line from Danville to Waterville, by the Androscoggin and Kennebec, incorporated in 1845; the line from Waterville to Bangor, by the Penobscot and Kennebec, incorporated in 1845; the line from Portland to Augusta, by the Kennebec and Portland, incorporated in 1836; the line from Augusta to Skowhegan, by the Somerset and Kennebec, incorporated in 1848; and the line from Leeds Junction to Farmington, by the Androscoggin, incorporated in 1848. The line from Portland to Augusta, in 1862, came into the possession of a new corporation organized by the bondholders, and called the Portland and Kennebec. The Farmington line in 1865 came into the hands of a new corporation, organized by the bondholders and called the Leeds and Farmington.

In September 1862, acting under the Act of April 1, 1856, printed in the case, two of these corporations, the Androscoggin and Kennebec, and the Penobscot and Kennebec, were by virtue of said Act, and their contract under it, consolidated in a new corporation called the "Maine Central." Again, in November, 1874, by virtue of the Act of February 26, 1873, and a contract in pursuance thereof, the other three companies coalesced with the first two and formed the present Maine Central Railroad Company, the defendant in

this case, and the defendant that must show the necessary contract with itself.

All the charters and amendments thereto, either by general or special law of these various companies, and all Acts of the Legislature under which they consolidated into the Maine Central Railroad Company, were granted and enacted subsequent to the general law, Chap. 503 of Laws of 1831, printed in appendix "C."

I presume it will be admitted that this Act of 1831, in all its entirety, was a part of all those charters, amendments and acts, as much as if it had been specifically inserted and re-enacted in each. The proposition hardly needs argument. The Act itself says, "in the same manner as if an express provision to that effect were contained in the charter." If authorities are desired, I would refer to the opinion of Judge Field, in *Tomlinson v. Jessup*, 15 *Wallace*, 454, who says, "The provisions of that law (a similar one in South Carolina) therefore, constituted the condition upon which every charter of a corporation subsequently granted was held, and upon which every modification was made. They were as operative, and as much a part of the charter and amendment, as if incorporated into them. See also cases *Tomlinson v. Branch*, *Holyoke Co. v. Lyman* and *Miller v. The State*, in the same volume.

This stipulation, being in effect, in all the charters and acts in relation to these companies, gives the Legislature full power at any time to "amend, alter or repeal" all or any part of them, without impairing any

obligation of any contract. In fact, the State reserves the right to rescind whatever the corporation claims to be a contract. This power of repeal and amendment goes to the root of every clause. The clause found at the close of the 15th section, printed on page 3, and which is in most of the charters, viz: "But no other tax than is herein provided shall be levied or assessed on said corporation, or any of its privileges or franchises"—and all other clauses in relation to taxation, can be rescinded at the pleasure of the Legislature. This proposition is fully sustained by the authorities already cited, especially the case of *Tomlinson v. Jessup*. Judge Field says, in the opinion, "The power reserved to the State by the Act of 1841 authorized any change in the contract as it originally existed, or as subsequently modified, or its entire revocation. The original corporators or subsequent stockholders took their interests with the knowledge of this power, and of the possibility of its exercise at any time in the discretion of the Legislature." See, also, *West Wisconsin R. R. Co. v. Supervisors*, 35 Wis., 257, *Union Improvement Co. v. The Commonwealth*, 69 Pa. St. R., 140, both of which were cases of the imposition of a tax in spite of an alleged charter exemption.

The Maine Central Railroad Company, to convince the court that they have an irrepealable contract, unaffected by the Act of 1831, must make it clear that they are within the exception in the act; that in their case there is "an express limitation or provision to the contrary."

The only places anywhere in the whole range of charters, amendments, and acts concerning these roads that I have been able to find, where the language will even admit of an argument that it is "an express limitation or provision to the contrary," is the concluding phrase in the 17th sections of the charters of the original Androscoggin and Kennebec, and Penobscot and Kennebec Companies, as follows: "This charter shall not be revoked, annulled, altered, limited or restrained without the consent of the corporation, except by due process of law."

This language is strong, perhaps, but it is not the language of the exception of the statute. It makes no reference to the statute. It does not declare in terms that the statute shall not apply.

This language, however, is not found in any other act or charter of any of those companies. On the other hand, by the laws of 1864, chap. 238, appendix "E," chap. 265, appendix "F," the State made a firmer grip on the Leeds and Farmington, and to some extent on the Portland and Kennebec, the new corporations formed by the bondholders on foreclosing their mortgages.

And yet it would not be enough for the defendants to show clearly and strongly that all these five corporations were within the exception; that they every one had immunity in the matter of taxation. They are to convince the court that the Maine Central Railroad Company has this chartered immunity.

Suppose the concluding phrase of the 17th sections of the charters of the Androscoggin and Kennebec, and Penobscot and Kennebec did come within the exception, and did constitute an immunity for each of these companies. I believe it is the only clause the defendants can assume to rely on. Their task, then, is to convince the court that this little leaven of exemption has leavened the whole lump of all five roads—has passed into all the charters, and into all the Acts; that it was in the Act of April 1, 1856, consolidating the first two roads, and in the Act of 1873, consolidating the first two and the last three into the present Maine Central. They have to do this with all the presumptions and rules of construction against them. In construing charters and grants of corporate powers and franchises, all doubts must be against the corporation and in favor of the State. Especially is such the rule where a corporation claims exemption from taxation, “than which,” says Judge Fields, in *Tomlinson v. Jessup*, “there is no subject over which it is of greater moment for the State to preserve its power.” All the cases hold that a surrender of the sovereign power of taxation is never to be inferred. It must be distinctly, unequivocally and directly expressed. In the words of Judge Davis in *Bailey v. Magwire*, 22 Wall, 215, “The language used must leave no room for controversy.”

Now let us examine the Act of 1856. If the Legislature had intended to exclude the Act of 1831 from this Act, it would have said so in terms. Legislatures are to be judged by their words only. They must not

only mean a thing, but they must say they mean it. If they meant to limit the operation of the Act of 1831, upon the Act of 1856, they were obliged to make an *express* limitation, and make it in terms. I cannot find anywhere in the Act such express limitation, nor even an implied limitation. Section 4 of the Act was printed in the body of the case at the suggestion of the defendants, perhaps as showing the best basis of a claim of exception or exclusion. It says, "the new corporation shall have all the powers, privileges and immunities possessed by each," of the old, but it does not say that it shall have them exempt from the operation of the general law then on the Statute book, the Act of 1831. There is no prohibition of Legislative action upon the franchise of the new corporation. The *proviso* is not against annulling the new corporation. It relates solely to the old corporations. It keeps them in existence for certain purposes, but suspends the enjoyment of their immunities until such time as may be necessary for their creditors' protection.

If the Legislature had meant the Act of 1856 to have the same exemption as defendants' claim for the charters of 1845, it would have used the same terms. It would have provided that the powers and immunities of the old "should be possessed by the new," and "should not be revoked, annulled, altered, limited or restrained without its consent." The Legislature didn't say it and didn't mean it, but it is no matter how much they meant it, if they didn't say it. There must be an expression as well as an intention.

The Maine Central Railroad Company of that day was not merely the Androscoggin & Kennebec *plus* the Penobscot & Kennebec. It was not a revival nor continuation of corporations. In the very terms of the Act it was a *new* corporation. It was to take a new and different name. It was to have a new Board of Directors. It was a different corporation and was to have an independent existence, for by the language of the fourth section, the old corporations are made to continue their own existence in an attenuated form. It was necessarily a different and separate corporation, for, by the 5th section, the rights, franchises, &c., of the two original corporations are transferred to it. The language is, "they shall be deemed to be transferred to, and vested in such new corporation." The Act all through treats it as new corporation, and not the remodelling of old ones.

This new corporation derived its existence from the only source that could give it life,—the Legislature. No acts of the two prior companies could have the least effect in creating it. No transfers of franchise are recognized by the law until the Legislature grants permission. This new corporation began its existence the 28th day of October, A. D. 1862, but the sole source of, and authority for its existence, was the Act of 1856.

That act made its being, possible. It was, while it lived, the very breath of its nostrils. A repeal of that act would have dissolved it. The franchise of the new corporation was not conferred upon it by the old companies. It was conferred by the Legislature. It may

have a similar charter to those of the others, but it has it from the Legislature, not from any agreement.

The two prior corporations, by their agreement of 1862, accepted the act of 1856. They, in effect, surrendered their franchise, that it might be conferred on a new corporation, covering both roads. There was no other way they could transfer it to another body. If they were through with it, it had to go back to the Legislature to be born again. The new corporation was a new birth, this time without the sin of exemption from taxation.

This franchise so received is certainly subject to the general law on the Statute book at the time it was conferred. This seems a plain proposition, and it is fully supported by authority. In *State v. Sherman*, 22 Ohio, State Re., 411, it was held that a transfer of a franchise is in legal effect a surrender to the Legislature, and a grant by the Legislature of a similar charter to the transferees, and the new grant is subject to the constitution and laws in force at the time it was made, in spite of any exemptions when the franchise was first granted. The court say, "It (the charter) must pass through legislative hands before it can take life in a new organization," which is just my proposition. In that case the general law was in the constitution, but a law upon the general Statute book would be within the same principle.

A chemical illustration occurs to me. Hydrogen and Oxygen, each, claims an exemption from the law of

gravitation, being lighter than air; but when they are combined in certain proportions they form a new substance, water, which is under full subjection to the general law. These old companies, with their claims of exemptions, went into the Legislative crucible, to combine and come out a new organization, subject to the law.

But this is not all: for, as if to still further free itself from an exception so obnoxious to the people, this new organization itself went into the Legislative crucible, there to combine with three other corporations, having no taint of the exception, and with them received from the Legislature a new life. The Act of 1873, and the contract made under it, Nov. 16, 1874, had the legal effect, according to the principle heretofore contended for and the case of *State v. Sherman* before cited, to surrender the charters of the then four roads and receive a grant of one franchise for all.

By the terms of the Act, the four roads,—the Maine Central, the Portland and Kennebec, the Leeds and Farmington, the Somerset and Kennebec,—are permitted “to consolidate into one corporation.” By the 5th article of the consolidation agreement, the 5th, 6th, 7th and 8th sections of the Act of 1856 are made to apply to the new corporation “in the same manner and to the same extent as they apply to a new consolidated corporation.” The Act also adopts the Act of 1856, so far as applicable.

By these sections so adopted and made a part of the new consolidation, “the rights and franchises” of the

Maine Central, as well as the other roads, "are transferred to and vested in the new corporation."

This new consolidated company has the same name as one of its constituents, but it has a new grant of franchise. The old company owned and operated a road from Danville to Bangor only. The new company owns lines of railroad from Portland, at one extremity of the State, to Farmington in one direction to Skowhegan in another, and to Bangor in another. It possesses property to the amount of nine or ten millions, twice as much as the old Maine Central had. It manages all these lines and controls all this property under one franchise, not under four. It has one government and one treasury. All its earnings from Bangor to Augusta, Skowhegan, Farmington and Portland are received and held by one company under one charter. It was no partnership that was formed, but a consolidation; not a confederation, but a nation. The four franchises were transferred to a common successor, and became one franchise of one company. To quote the Ohio Court, they passed through legislative hands and took life in a new organization.

It is this franchise that the State has taxed. It is the tax upon this franchise as enjoyed on the first day of April, 1875, that we now ask of this defendant corporation. It is a single tax upon a single franchise. There is but one living active franchise to assess; the others are surrendered or in suspension. It is not a tax upon the property of the company, as was the tax in the cases cited in the 15th Wallace. The Governor

and Council were not to hunt up property and separate it into classes to be taxed or not taxed. They were to tax the franchise, one and indivisible.

Out of all the lines of railroad now owned by this defendant corporation, extending from Portland to Augusta, Skowhegan, Farmington and Bangor, only that part from Danville to Bangor was ever claimed at any time to be within the exception, and so exempt from the laws. All the rest of those lines, when built, were confessedly subject to Legislative control. The defendants would have us believe that the alleged exemption of part, an exemption so contrary to our natural sense of right, so contrary to the admitted principles of law, has been silently extended to the other lines, so that, like the genii in the Arabian Nights, a little clause in the charter of two feeble roads, has expanded until a powerful corporation, combining five roads, almost spanning the State with its iron lines, and bearing up with its franchise nearly ten millions of property, is enveloped in its folds, and under its protection defies the sovereignty of the people.

I know the logical power and persuasive eloquence of the distinguished counsel, but he cannot establish, to the clear conviction of the court, a proposition so startling in its statement and so ruinous in its consequences.

I have endeavored to show that the Act of 1831 takes this present Maine Central Railroad Company out of the pale of those decisions of the Supreme

Court of the United States which are so often quoted in support of corporate immunities. It seems clear that they cannot apply to this tax, nor to this corporation. The Legislature, however, has not simply taxed this corporation, but has, in its wisdom, taxed all railroad corporations, even though some may come within the pale. In this it has only voiced the sentiment of the people, and hence I may be justified, as attorney for the people, in going further, and contending that the rights of the people of the State, over their own corporations, ought not to be prejudiced in any case by those decisions. In doing this I will only present a few summarily stated propositions, more to apprise the court of the position taken by the State in all cases than because necessary to the argument in this cause.

A writer in the *American Law Review*, suggests that if the court in the Dartmouth College case could have had the light since shed upon the history of the clause in question, by the later publication of the Madison papers and the debates, it would not have fallen into such a theory. That history seems to be this :

In the famous ordinance of 1787 for the Northwestern Territory, passed by Congress July 11, there was this restriction respecting laws affecting contracts :
 “No law ought ever to be made or have force in said
 “territory, that shall in any manner whatever, inter-
 “fere with, or affect private contracts or engagements,
 “bona fide and without fraud, previously formed.”

This clause clearly referred only to private contracts

or debts, and had no reference to public debts or obligations.

In the Constitutional Convention, August 28, of the same year, Mr. King moved to insert the identical clause among the prohibitions on States. In the debate on this proposition there was no suggestion by anybody that it applied to public contracts. There was no thought that it affected the Sovereignty of a State over its own corporations and over its own revenues.

The sentiment of the convention, however, seemed to be against even this, for Mr. Rutledge's substitute of *expost facto* law, was carried by seven States to two. When it was discovered that "*expost facto*" only applied to criminal matters, Mr. Gerry made an effort to extend the prohibition to civil cases, but was solidly voted down. Subsequently, in September, on motion of Mr. Wilson, it is thought, the words, "or law impairing the obligation of contracts," were put in.

In the light of these proceedings, it cannot be believed that the convention intended, by the last amendment, any greater prohibition to the States than that they had so strongly voted down so soon before. Having rejected Mr. Gerry's motion unanimously, it is incredible that it now meant such an inroad upon the people's rights. Wilson was bred in the Scotch civil law, and the language used by him was evidently drawn from that code. The term "obligation of contracts" is the terse English equivalent of the latin "*obligatio ex contractu*," which in the Roman law signified a private

debt or express promise, and had no reference to public duties or obligations. The Romans never extended the term to matters of State. The convention, in using the same term, never meant it to be extended beyond private debts.

It should be borne in mind, too, that the clause was not a transfer of power from the State to the National Government, so that it was still left to the people to be wielded in another form. So far as it goes it is a limitation upon sovereignty. When the people in their State Conventions adopted the constitution with that simple phrase in, they never dreamed they were so limiting themselves in their sovereignty that their legislatures could barter away their control over corporations and their right to raise revenues.

The people of Maine do not admit that they ever gave the Legislature or any department of the State government, authority to bind them to an eternal surrender of any part of their sovereignty, or their power to compel all classes to contribute their share to the public burdens, which is that part of their sovereignty most essential to them to preserve.

Louis XIV arrogantly exclaimed, "I am the State." Such was the theory of the feudal monarchs, but even they held the sovereignty for the people. In republics like ours, sovereignty is vested in no officer, in no department. The three departments are created to administer the government, not to possess it. Combined, they cannot diminish one jot or tittle of the powers of the people, nor enlarge by a hair's breadth

their own powers. They cannot abolish the State of Maine, nor any part of it—nor any department of its government—nor change the form of its government—nor in any way abridge a particle of its sovereignty. The State is over all and above all, departments, officers, citizens and corporations.

State Courts have resisted any infringement of the rights of the people, and it is not now claimed that the Legislature can barter away the police power, or the power of eminent domain. *Thorpe v. R. & B. R. Co.*, 27 *Vt.*, 149. *State v. Intoxicating Liquors*, 115 *Mass.*, 153. Judge Cooley says on this point, “It would seem to be the prevailing opinion, and one “based on sound reason, that the State could not barter, “or in any manner abridge or weaken any of those “essential powers which are inherent in all govern- “ments, and the existence of which, in full vigor, is “important to the well being of organized society; “and that any contracts to that end, being without “authority, cannot be enforced under the provision of “the national constitution now under consideration.”

In the case *State v. Noyes*, in this State, it was admitted that the Legislature could not irrevocably barter away the police power of the State.

The power of taxation, however, is as completely an attribute of sovereignty and as essential to the existence of organized society as either that of police or eminent domain. All political and legal writers so declare, and all who reflect upon the subject must admit it.

Governments are essential to human happiness, and yet such is the selfishness of human nature, that without this power, universal, inherent and unceasingly present in the government, it cannot exist for a day. To suspend the power for a single day is to dissolve society.

It is difficult to understand how courts (the very tribunals, to sustain which governments are organized and levy taxes), while protecting the power of police and eminent domain, yet can hold that the Legislature may forever deprive the government of this essential power of taxation. The only reason assigned, is that of a consideration; that the public have received a consideration for the exemption, and are therefore bound by the action of the Legislature, even though it is a contract to commit partial suicide. If the Legislature have no right to give away the people's sovereignty, it is difficult to see how they can sell it. The taking a price cannot invest the surrender with greater solemnity or greater validity.

If the element of consideration is what gives the authority to yield up the taxing power, the same element would justify a surrender of other powers. A corporation or individual could as easily pay a price for immunity from the police or eminent domain. The consideration, however, would receive no consideration when the emergency arose requiring the exercise of the power. In the midst of a raging fire, threatening the destruction of this whole city, the blowing up of buildings to stay the progress of the flames would not

be long delayed by the fact that the owner had paid a price for immunity. In the midst of war, or invasion by the public enemy, the protest of the Maine Central against the use of its property and road to transport troops and munitions, would be little heeded, no matter how high a price she had paid for exemption from eminent domain. Were any person, however powerful, indicted in this court for an offense against the laws, his plea of immunity, granted him for a price paid, would be most summarily overruled. Were this corporation brought into this court upon the suit of any citizen, however humble, its plea of immunity from the process of the court, though granted for a price, would only receive the indignant rebuke of the judges.

The State itself has here come into court, and demands of this corporation that it contribute its fair share toward that revenue without which, State, Court and corporation must all perish together. Yet, here the corporation pleads immunity purchased for a price. The plea ought to be instantly overruled. Sovereignty is beyond price.

When, a few years ago, the Shah of Persia contracted to lease the royal revenues of his kingdom to an English capitalist, though on strictly commercial principles, and for what seemed an adequate consideration, the statesmen and lawyers of Europe were astonished that even an eastern despot should assume to so dispose of the people of his realm. It must have been that the Shah had heard of some contracts of American Legislatures, and some decisions of American courts.

I invoke another principle,—that taxation must be equal—that every one must pay his fair share of the public revenues. The Legislature may determine the mode—may specify the objects—but it can only do this by general laws applicable to all objects of the class. It cannot tax A's property, and exempt B's property, for the exemption of B's adds just so much to the burden of A. It cannot exempt anybody's property, for such exemption increases so much the burden of all the others. This was the underlying principle in that most righteous decision of this court, in the Brewer tax case, 62 *Me.*, 62. Judge Appleton said, in the opinion, "Exemption from taxation includes the imposition of taxes. To the precise extent that one man's estate is exempted from taxation, to the same extent is there an imposition of the amount exempted upon the rest of the inhabitants." The Legislature may exempt all franchises, until they see fit to impose a tax, but they cannot exempt the franchise of the Maine Central and tax the franchise of the Portland, Saco and Portsmouth. The exemption of the Maine Central increases the tax upon the P. S. and P.—a proceeding that is wrong, despotic, and never to be endured.

I am not alone in venturing to urge the error of these anomalous decisions. In the Ohio Bank cases, in the 16 Howard, a third of the Judges most unqualifiedly and emphatically dissented. Judges Catron and Campbell put on record able and earnest protests against so pernicious a doctrine. If in subsequent cases there was no expressed dissent, it is well understood that it

was not because none existed. These dissenting opinions are to my mind unanswerable arguments which I beg this court to read.

Perhaps at the time of the first decisions neither the courts nor the people anticipated the immense consequences. With the enormous increase in the number and wealth of corporations, these evil consequences have become more apparent and more acutely felt, until there is now among the people a wide spread conviction that the doctrines are wrong and should be abandoned. The Legislature of this State have expressed that conviction in the Act of 1874. The Legislatures of other States, I am told, have voiced the same sentiments in their constituents. The same conviction is growing among the profession. No where do we find the doctrines defended, but only resting on the *stare decisis*. Two elaborate and convincing arguments against them have appeared in the Law Journals, one in the American Law Review for January, 1873, and one now in course of publication in the Southern Law Review, two parts having appeared in the April and July number. Also an article in the number for October, 1875. I would wish to make them a part of this argument, but I feel sure they will be read by the members of the court. No matter how often the Supreme Court of the United States may say that the question is not open, dissent, like Banquo's ghost, will not down. But even that Supreme Court has felt the impulse of this spirit among the people.

As late as 1869, in the case Washington University

against Rouse, 8 *Wallace*, 439, the Chief Justice, and Judges Miller and Field, three of the eight judges of the United States Supreme Court, dissent from the doctrine, and close their able opinion with these words: "With as full respect for the authority of former decisions as belongs from teaching and habit to judges trained in the common law system of jurisprudence, we think there may be questions touching the powers of legislative bodies, which can never be finally closed by the decisions of a court; and that the one we have considered (the surrender of taxation) is of this character. We are strengthened in this view of the subject, by the fact that a series of dissent from this doctrine, by some of our predecessors, shows it has never received the full assent of this court; and referring to those dissents for more elaborate defense of our views, we content ourselves with thus renewing the protest against a doctrine which we think must be finally abandoned."

Public attention has been excited on this question all over the country. It is everywhere felt that doctrines so dangerous to the State, so anomalous and unrepugnant, must, sooner or later, be judicially condemned, and the rights of the people again asserted. When I look upon the Great Seal of our State, and behold there its bright motto, I have the proud hope that our court may have the distinguished honor to lead in the way to so glorious a consummation.

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Berry, Pr.