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Note and Comment

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NOTE AND COMMENT

A SPURIOUS LAW COURSE.—A pamphlet entitled "University of Michigan Law Course," printed by one Edwards, of Ann Arbor, has come to our notice.

In this pamphlet there are offered for sale what are represented to be law lectures by members of the faculty of the Department of Law of the University of Michigan.

The publication is calculated to deceive one as to the real character of these so-called lectures; for anyone unfamiliar with the true state of affairs would get the impression from reading this pamphlet that the lectures offered for sale are those now being delivered in this department, and that they have been revised and corrected by the lecturers who delivered them. As a matter of fact, however, these "lectures" are manufactured from notes taken by students in former days, before the present methods of instruction now used in this law school were adopted. They are in most instances incomplete and very inaccurate. Some of the "lectures" are by men long since deceased, and some are by men who have not been connected with the University of Michigan for some years.

The advertising matter states that the lectures "were revised, corrected, abridged or expanded as the case required; and brought down to date by men conspicuous as teachers, practitioners and authors."

This statement as to revision, correction, etc., is absolutely false as to nearly everyone of the "lectures," and any fairly well trained lawyer reading them would blush with shame if he actually believed that any teachers of law could have been guilty of deliberately allowing the publication of the gross inaccuracies that are to be found in most of them.

Edwards was once permitted to issue typewritten copies of notes of lectures taken by students for use in the class-room; when they were used in this way correction could be made of errors in reporting, and, as thus corrected, the notes were of some use to the students in their studies. They could be, however, of very little use to anyone outside the class, and it was distinctly understood by the man who now offers them for sale that these typewritten notes could be sold by him to students of this department only.

Finding now that changed methods have taken away his occupation here, he tries to palm off on unsuspecting youths who "study law at home" these antiquated, inaccurate and discarded notes, calling them lectures.

Notice has been given to Edwards to discontinue his mischievous scheme, and legal proceedings will be taken if necessary to stop the sale of these notes. Meanwhile students who are compelled to study law at home had better get in touch with some good correspondence school, or, at least, employ their time in reading something that a law-writer has actually written and revised rather than waste it in getting from these "lectures" erroneous ideas on legal subjects. J. H. B.

RAILROAD TAXATION IN MICHIGAN AND WISCONSIN.—After several years of somewhat intense discussion of the methods of taxing railroads the people of Wisconsin by their legislature in 1903 passed a law providing for the taxation of such property by a state board of assessors, Chap. 315, Laws of Wisconsin, 1903. The law directed that the property should be valued as a unit, provided a method of determining the portion of such property which had a taxable situs in the state, empowered said board to ascertain the cash value of the general property in the state and the aggregate tax thereon for all purposes, state and local, and that the railroad property should pay the rate thus found to be the average rate paid by the general property in the state.

The constitutionality of this law has recently been sustained by the Supreme Court of Wisconsin in a most careful, exhaustive and valuable opinion. *Chicago & N. W. Ry. Co.* v. *State,* 108 N. W. Rep. 557.

The Wisconsin law resembles so closely the Michigan law, Chap. 173, Public Acts of 1901, as to indicate that the Michigan law was largely followed by the Wisconsin legislature. From this fact and also because the validity of the Michigan legislation has so recently been determined it seems desirable to preface the consideration of the Wisconsin case by a brief review of the legislation, the constitutional changes and subsequent litigation in the latter state.

For many years Michigan had levied upon railroads and some other public service corporations a specific tax in lieu of all others.

Act No. 168 of Public Acts of 1881 provided that telegraph and telephone companies pay a tax, in lieu of all others, levied upon an assessment of their lines at their true cash value. The rate was to be the average rate paid by general property throughout the state for all general municipal and local taxes.

In *Pingree* v. *Auditor General,* 120 Mich. 95, this tax was held not to be a specific tax because levied according to value. It was also held that the law was unconstitutional, being obnoxious to Article 14, § 11, of the constitution, which requires uniformity in taxation, because this tax was determined in a different way and was different in amount from that imposed upon other property bearing the same relation to the state. This decision was handed down in 1899. The following year the Constitution was amended by certain additions to §§ 10 and 11 of Art. 14, which were in part as follows: Sec. 10 * * * "The legislature may provide for the assessment of the property of corporations at its true value, by a State Board of Assessors, and for the levying and collection of taxes thereon. * * *

Sec. 11. * * * That the legislature shall provide an uniform rule of taxation for such property as shall be assessed by a State Board of Assessors, and the rate of taxation of such property shall be the rate which the State Board of Assessors shall ascertain and determine is the average rate levied upon other property upon which ad valorem taxes are assessed for state, county, township, school, and municipal purposes." * * *

Act. No. 173, Pub. Acts of 1901, created a State Board of Assessors to assess the property of railroad companies, express companies and other related companies, and provided that such property should pay a tax at the average rate and in directing how this average rate should be determined the law followed the language of the amendment to § 11 of Art. 14, of the Constitution, *supra.*

In pursuance of this law a State Board of Assessors was appointed which assessed the railroad properties, but when it came to "ascertain and determine" the "average rate" it concluded that the general property in the state was undervalued by the local assessors and added nearly $297,000,000 to the value as returned by the assessors. By thus increasing the divisor the quotient tax rate was found to be $13.684+ per $1,000 valuation instead of $16.553+, as it would have been had the value as actually assessed by the local officers been employed.

The Board of Education of Detroit then brought *mandamus* against the State Board of Assessors to compel them to redetermine the average rate in accordance with the values as fixed by the various assessors.

The Supreme Court granted the writ, holding that the statute conferred upon the board only ministerial power to determine the rate by simple calculation. *Board of Education* v. *State Board of Assessors,* 133 Mich. 116.

The railroads resisted this method of assessment and taxation and brought suit in the Federal Circuit Court for the Western District of Michigan and asked for an injunction to restrain the collection of these taxes, claiming that

the Constitution and statutes of Michigan which authorized them were repugnant to the Constitution of the United States and that complainants would be deprived of their property without due process of law.

The suit was heard by the late JUDGE WANTY who, in a most thorough and lucid opinion decided adversely to the contentions of complainants and sustained the constitutionality of the tax. MICHIGAN RAILROAD TAX CASES, 138 Fed. Rep. 223.

Appeal was thereupon taken to the United States Supreme Court, which affirmed without dissent the decree of the Circuit Court. *Michigan Central Ry. Co.* v. *Powers,* 26 Sup. Ct. Rep. 459.

Speaking through Mr. JUSTICE BREWER the court again asserts the broad power of states in matters of taxation, saying: '"We have had frequent occasion to consider questions of state taxation in the light of the Federal Constitution and the scope and limits of national interference are well settled. There is no general supervision on the part of the nation over state taxation, and in respect to the latter the state has, speaking generally, the freedom of a sovereign both as to objects and methods. It is well said by JUDGE WANTY delivering the opinion of the Circuit Court in this case (p. 232):

" 'There can at this time be no question after the frequent and uniform expressions of the Federal Supreme Court that it was not designed by the 14th Amendment to the Constitution to prevent a state from changing its system in all reasonable and proper ways, nor to compel the states to adopt an iron rule of equality to prevent the classification of property for the purposes of taxation, or the imposition of different rates upon different classes. It is enough that there is no discrimination in favor of one as against another of the same class and the method for the assessment and collection of the tax is not inconsistent with natural justice.' "

It was further urged by the railroad companies that this method of taxation obliged a railroad operating in a part of the state where the tax rate was low to bear an increased burden of taxation because in some remote portion of the state the tax rate might be much greater. In answer to this the court says, "Unless there be some specific provision in the state Constitution compelling other action the state may treat its entire territory as composing but a single taxing district and deal with all property as within the district and subject to taxation accordingly. There is no magic in county organization, no inherent necessity of dividing the state into small taxing districts. * * * If it may take all the taxes received from railroad property and apply them to general state purposes and to that extent relieve counties in which there is no railroad property from their contribution to the support of the state, it has equal power to say that the average rate of taxation shall be determined not by the rates upon other property in the immediate localities in which the railroads are located but by those upon all property wherever situated in the state."

We may thus regard the validity of the Michigan law as established.

Reference has already been made to *Board of Education* v. *State Board of Assessors,* where the Supreme Court of Michigan determined that the State Board of Assessors had no power to "ascertain and determine" the values of

the general property of the state but must accept the values as fixed by the local assessors. Acting upon an assumption (hardly warranted we believe by the decision) that the court reached this conclusion because of a want of *statutory* authority in the State Board of Assessors there was passed, apparently in the interest of the railroads, Act No. 282, Pub. Acts 1905, which conferred upon said assessors in express terms the power to ascertain and determine the true cash value of the general property in the state. Acting under this law the State Board in January of this year added to the values as actually assessed by the local assessors a little upwards of $300,000,000, or nearly 20%, thus largely reducing the tax rate on railroad property as compared with the average rate actually levied upon the general property in the state. The Attorney General asked for mandamus to compel the board to redetermine the rate by taking the values as made by the assessors in the state. The Supreme Court granted the writ, holding the law to be in conflict with the Constitution which had made it the duty of the State Board to accept the valuations as returned to it, that is, the assessments actually made. *Attorney General* v. *State Board of Assessors,* 106 N. W. Rep. 698.

The law of Wisconsin of 1903 confers upon the board the power sought to be given by the Michigan Act of 1905, and in the former state the board almost doubled the assessments of personal property and substantially increased the valuation of realty. As there was no constitutional provision in the way the action of the board was sustained.

We will now briefly review the Wisconsin case. It will be borne in mind that the law resembles very closely that of Michigan. The principal differences being in the greater power of the State Board of Assessors, to which reference has just been made and also in giving owners of railroad property a hearing upon the valuation of the general property in the state.

The Constitution provides, "The rule of taxation shall be uniform and taxes shall be levied on such property as the legislature shall prescribe." The court holds that under this provision the legislature can divide property into taxable and non-taxable but that the tax must be uniform on all that is taxed, but that this uniformity is one of burden and not of method and permits classification and different methods in assessing the property and in determining the rate to effect the constitutional requirement, "so it is seen that the constitutional rule looks as it were always to the object to be attained not necessarily to the mere manner of reaching it. * * * Practical equality is constitutional equality."

It was objected by the railroads that their franchises were separately valued while this was not done in other cases. The court said, "This court has held that the franchise is the principal, the visible things the minor part of an organized business machine in a corporate organization, though the franchise is seen only through the physical part and its use; that the intangible part is personal property and draws to it and so impresses the physical thing with its own character as to give the whole the character of personalty."

The court holds that when the assessor places a value on the business of any individual, firm, or private corporation as a going concern the intangible elements are necessarily included. That the consideration by the State Board

of the value of the physical property of railroads was not for the purpose of putting one value on such physical property and another and independent value upon the franchises but was only to aid in determining the value of the whole as a unit. Yet this method is criticized by the court as follows: "The departure from the needful, trying to do the impracticable would seem to be worse than useless. One might as well try to value the life blood of a horse or his capacity to breathe as to try to place a value upon the visible part of a railroad property separate from its rights, franchises and privileges."

The decision is that there is no delegation of legislative power, and refers among others to the Michigan cases, *supra,* though the court ignores the fact that in the latter state the value of the general property is absolutely fixed by the local assessors while in Wisconsin this valuation is subject to change by the State Board, thus leaving the railroad *tax rate* as well as valuation in the hands of the board. This in effect leaves the board instead of the legislature to determine the *amount* to be raised. This may not be an unlawful delegation of legislative power but it is submitted that it goes a step farther in that direction than the Michigan law and far enough to diminish at least the value as precedents of the cases cited.

The law of Wisconsin exempts land from taxation to the mortgagor to the extent that it secures the debt while no such provision is made in behalf of mortgaged railroad property.

The court does not consider the case of *County of Santa Clara* v. *Southern Pacific Railway Co.,* 18 Fed. 385, as controlling, and sustains the law apparently on alternative grounds. First, that railroad property is not to be regarded as realty but personalty, and owners of incumbered personalty have no such right of exemption.

Or if regarded as in some sense as realty the difference in form of the security and the great number of bondholders scattered over the country would make such a plan impracticable and justify the distinction. The court seems to favor the former.

It is further held, as would be expected, that the rate is valid though determined upon a valuation of the preceding year and that the average rate is in compliance with the constitutional requirement of equality and uniformity.

It was strongly urged by counsel that railway property is wholly located where its visible property is situated. This was denied by the court, which says, "By the union of land, and rights granted by the public classed as personalty, forming a thing of itself in which the personal element predominates and which could not be separated from the other element without disintegration to the point of destruction and to the detriment of public and private interests as well, the combination may be deemed to be personalty of an inseparable nature.. * * * Without further discussing the fundamental principle governing the subject of the situs of property for taxation we will state this for our conclusion: In the absence of some statute regulating the situs of property for taxation it is governed by the common law in regard to actual situs. It is competent, however, for the legislature to give thereto for the purposes of taxation any situs it sees fit, subject to the rule of uniformity

and to the limitation that there must be some appreciable relation between the municipality exacting the tax and the person upon whom the burden is cast, either directly or by reference to the property taxed, from which there can reasonably be seen to be reciprocal duties to accord benefits on the one hand and to respond therefor on the other."

This would seem to settle this vexed question for Wisconsin, for the United States Supreme Court in the Michigan case has apparently settled any question that could reach it in accordance with the conclusions of the Wisconsin court.

The questions involved are of such importance and the legislation so new in kind and recent in enactment, that it is hoped the writer may be pardoned for so extended a note, a note so long as to make any increase by way of comment quite impossible. F. L. S.

SURGICAL OPERATION ON MINOR WITHOUT CONSENT OF PARENT.—The case of *Bakker* v. *Welsh et al.*, 108 N. W. Rep. 94, recently decided by the Supreme Court of Michigan, is of interest, as it involves a question of special importance to the surgical practitioner and one upon which there seems to be a great dearth of authority. The son of the plaintiff, a youth of seventeen years, consulted defendant Welsh, a surgical specialist, in regard to a tumor upon his left ear, and was told that the character of the growth could only be determined with certainty by a microscopic examination. Such examination having been made by a specialist in microscopy and the result reported to the surgeon, the latter advised the young man that it would be best to have the tumor removed by a surgical operation. At the time of young Bakker's first visit to the office of defendant Welsh, he was accompanied by an aunt and two adult sisters, and at least one of the sisters accompanied him upon the second visit when the operation was advised. There was some conflict in the testimony as to what took place upon the occasion of the second visit, the sister testifying that her brother, having objected to taking an anaesthetic, was informed by Doctor Welsh that there was no danger, while the testimony of the doctor was to the effect that he told the patient that, while there was always some danger attending the taking of an anaesthetic, he advised the operation. A few days later, the young man accompanied by his aunt and at least one sister went again to the office of Doctor Welsh, and from there he was sent by the doctor to a hospital where, as all understood, an operation would be performed the following day. Before the administration of the anaesthetic, the doctors took the usual precautions, making a careful examination of the heart and lungs of the young man, both of which appeared to be normal. With the usual appliances for a successful operation at hand, Doctor Apted, an expert in the administration of anaesthetics, who had been engaged by Doctor Welsh, began to administer chloroform by means of the mask and drop method. He had administered about one-third of an ounce, taking from seven to ten minutes in which to do it, when, just as Doctor Welsh was about to commence the operation, the heart of the patient suddenly ceased to beat. Every means known to the profession to meet such an emergency was used but without effect.

The young man lived with his father upon a farm, but the father was not informed of the visits to Doctor Welsh or that an operation was to be performed. No attempt was made by anyone to get the consent of the father to an operation. The father having been appointed administrator of the estate of his deceased son, brought the suit, claiming a right of action under what is commonly known as the "Death Act," and alleging that a liability arose because of the failure of defendant Welsh to inform the father and get his consent before entering upon the operation, the doctor knowing that the son was a minor, and further because of the improper administration of the anaesthetic. The trial judge directed a verdict in favor of the defendants, and the judgment below was affirmed by the Supreme Court. The claim that the anaesthetic was improperly administered was found by this court to be without merit, the court suggesting that the record, instead of disclosing a want of skill, "shows quite the contrary." In regard to the question of the liability of the defendants because of failure to notify the father of the intended operation, the court was obliged to reach a conclusion without the aid of authority. It was argued in behalf of the plaintiff that "as the father is the natural guardian of the child and is entitled to his custody and his services, he cannot be deprived of them without his consent; * * * that it is wrong in every sense, except in case of emergency, for a physician and surgeon to enter upon a dangerous operation, or, as in this case, the administration of an anæsthetic, conceded to be always accompanied with danger that death may result, without the knowledge and consent of the parent or guardian;" that " it is against public policy and the sacred rights we have in our children that surgeons should take them in charge without our knowledge and send to us a corpse as the first notice or intimation of their relation to the case." But in view of the maturity of the son and the fact that he was with adult relatives who understood the entire situation and knew that an operation was to be performed, and the further fact that there was nothing in the record to indicate that if the consent of the father had been asked, it would not have been freely given, the court held that the consent of the father to the operation was not necessary. "We think," said the court, "it would be altogether too harsh a rule to say that under the circumstances disclosed by this record, in a suit under the statute declared upon, the defendants should be held liable because they did not obtain the consent of the father to the administration of the anaesthetic."

The conclusion of the court in this case is in line with a suggestion made in a recent number of this REVIEW. In a note upon the general subject of consent to surgical operations, in which the cases then decided are collected and reviewed, the following language appears: "While the consent of the parents before operating upon a minor child should ordinarily be secured by the surgeon, it is probable that the consent of the child to a necessary operation, if of such age and understanding as to appreciate the situation and the nature of the operation, would protect the surgeon, although so far as the writer has observed, this question has not as yet been passed upon by a court of last resort." See 4 MICHIGAN LAW REVIEW (No. 1), pp. 49-51.

H. B. H.

THE POWER OF MUNICIPAL CORPORATIONS TO GRANT EXCLUSIVE PRIVILEGES.—All questions relating to the municipal ownership of public utilities are of common interest. Many of them, owing to the uncertainty of the law upon the subject, are of peculiar interest to the legal profession. One of the most recent cases upon this subject is *Vicksburg* v. *Vicksburg Water Works Co.* (1906), 202 U. S. 453, 26 Sup. Ct. Rep. 660, in which the Supreme Court passes upon the question of the power of a municipal corporation to grant an exclusive privilege for a term of years without express authority from the state to that effect.

Briefly stated, the facts were as follows: The City of Vicksburg, Mississippi, with the usual general authority to supply itself and inhabitants with water and enter into contracts with reference thereto, executed a contract with the water company's assignors whereby they were to furnish the city with water for thirty years, the city agreeing as a term of the contract that the right of the water company should be exclusive. Later the city council passed an ordinance for the establishment of a municipal water plant. On the ground that the ordinance impaired the obligation of the contract, suit was brought in the federal court to enjoin the city from proceeding further. The Supreme Court disposed of the case by allowing the injunction.

MR. JUSTICE DAY in delivering the opinion says: "The question of the power of the city to exclude itself from competition is controlled in this court by the case of *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. Rep. 77." If the City of Vicksburg excluded itself from competition, it must have been by the contract. That a municipal corporation or other agent in whom is invested a portion of the governmental functions has no authority, in the absence of express power to that effect, to enter into a contract granting an exclusive privilege or monopoly is undoubtedly sustained by the weight of authority. DILLON, MUNIC. CORP., § 692, et seq; ELLIOT, MUNIC. CORP., § 85; BEACH, MUNIC. CORP., § 553, et seq., and cases cited; *Minturn* v. *Larue*, 23 How. 435; *Wright* v. *Nagle*, 101 U. S. 791; *Gale* v. *Village of Kalamazoo*, 23 Mich. 344; *Logan & Sons* v. *Pyne*, 43 Iowa 524; *Jackson County Horse R. Co.* v. *Interstate Rapid Transit Co.*, 24 Fed. Rep. 306; *Saginaw Gas Light Co.* v. *City of Saginaw*, 28 Fed. Rep. 529; *Grand Rapids E. L. & P. Co.* v. *Grand Rapids E. E. L. & F. G. Co.*, 33 Fed. 659; *The Westerly Water Works Co.* v. *Town of Westerly*, 80 Fed. Rep. 611; *Syracuse Water Co.* v. *City of Syracuse*, 116 N. Y. 167; *Altgeld* v. *City of San Antonio*, 81 Tex. 436; *Long* v. *City of Duluth*, 49 Minn. 280; *Davenport* v. *Kleinschmidt*, 6 Mont. 502; *City of Chicago* v. *Rumpff*, 45 Ill. 90. (See particularly opinion of COOLEY, J., in *Gale* v. *Kalamazoo*.) Logically and in reason the result should be so. It has been held repeatedly that the legislature itself when acting directly cannot grant an exclusive privilege by implication, but only by the clearest express terms to that effect. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 422. While if a city acting under only general powers, such as the City of Vicksburg had, can grant an exclusive privilege it is possible for the state acting through its agent, the city, to grant such a privilege by implication, since the authority from the state does not expressly give such power and the city has power to do that only which it is authorized to do. Thus the state does indirectly that

which it cannot do directly. Such power would have to be expressly granted, as it is neither incidental nor necessarily implied in order to carry out those powers that are granted. DILLON, MUNIC. CORP., § 89, and cases cited above. If the city had no authority to enter into such a contract, it is ultra vires and void. DILLON, MUNIC. CORP., §§ 447, 457, 935, et seq., and cases cited therein. See *Illinois Trust and Sav. Bank* v. *Arkansas City*, 76 Fed. 271, 34 L. R. A. 518, in which the court held that the part of the contract relating to exclusiveness was ultra vires and void. So the City of Vicksburg was not bound not to enter into competition, the void contract being equivalent to no contract at all.

Does the decision in the *Walla Walla* case support that of the principal case? In the principal case the part of the contract relating to the exclusive right was: "the exclusive right and privilege is hereby granted for the period of thirty years." *Vicksburg Water Works Co.* v. *Vicksburg*, 185 U. S. 65, 22 Sup. Ct. Rep. 585. In the *Walla Walla* case the corresponding part of the contract was: "The City of Walla Walla shall not erect, maintain, or become interested in any water works except the ones herein referred to, etc." If any words are sufficient to create an exclusive right, those used in the principal case would. (See opinion, p. 471.) While in the *Walla Walla* case the right granted clearly was not exclusive, for it was the city alone that was prohibited by the contract from erecting a water plant, there being nothing whatever in the contract to prevent a franchise being given to another individual or company. See *North Springs Water Co.* v. *Tacoma*, 21 Wash. 535, 58 Pac. 773. That MR. JUSTICE BROWN who delivered the opinion in the *Walla Walla* case recognized this distinction, and did not consider the contract there exclusive, is apparent from the following extracts from the opinion: On page 14 he says "Had the privilege granted been an exclusive one, the contract might have been considered objectionable, upon the ground that it created a monopoly without an express sanction from the legislature to that effect." On page 15 he says: "An ordinance granting a right to a water company for twenty-five years to lay and maintain water pipes for the purpose of furnishing the inhabitants of a city with water does not, in our opinion, create a monopoly, or prevent the granting of a similar franchise to another company. Particularly is this so when taken in connection with the further stipulation that the city shall not erect water works of its own, etc." Again on page 18 he says: "Cases are not infrequent when under a general power to cause the streets of a city to be lighted, or to furnish its inhabitants with a supply of water, without limitation as to time, it has been held that the city has no right to grant an exclusive franchise for a period of years; but these cases do not touch upon the question how far the city, in the exercise of an undoubted power, to make a particular contract can hedge it about with limitations designed to do little more than bind the city to carry out the contract in good faith, and with decent regard to the rights of the other party." The court here cites a number of cases in support of this proposition, all of which sustain the proposition that a city cannot make such an exclusive contract without express authority. It will readily be seen that the distinction between the two cases is that in the one the contract forbidding the city from entering into com-

petition is void, while in the other it is valid. In the principal case it is as though there were no contract at all forbidding competition, while in the *Walla Walla* case there was a valid subsisting contract preventing the city from competing. That it is impossible for a city, in the absence of express authority to contract away its duty to furnish water, light, etc., for a term of years, even when the contract so provides, there being no question involved as to the validity of the contract on the ground of creating a monopoly, is not without the support of authority. ELLIOT, MUNIC. CORP., § 148; DILLON, MUNIC. CORP., § 97, and cases cited.

In order to reach the conclusion, therefore, which it did the Supreme Court must have considered it within the powers of the city to grant an exclusive privilege without having such authority expressly given by the state. This, as has been shown, is contrary to the decisions of the same court in *Wright* v. *Nagle,* 101 U. S. 791, and *Minturn* v. *Larue,* 23 How. 435, and, it seems, contrary to the weight of authority in the state courts. R. W. A.

INHERITANCE TAXES AND THE RIGHT TO TRANSFER AND INHERIT PROPERTY. — In 1903 the legislature of Wisconsin passed a law similar to those found in many of the states which provided for a tax upon the devolution of property upon the death of the owner. The law makes certain exemptions, and is progressive, increasing with the amount and with the remoteness or absence of relationship to the deceased. The constitutionality of this law has just been sustained by the Supreme Court of Wisconsin. CASSODAY, C. J. and DODGE, J., dissenting. *Nunnemacher* v. *State,* 108 N. W. Rep. 627.

The constitutionality of the law was attacked on three grounds. First, that the right to take property by will or descent is a natural right which can not be taken away nor substantially impaired by the legislature. Second, that under the Constitution only property can be taxed. Third, that this tax violated the constitutional requirement of uniformity.

The court says that the right to take property by will or descent is a natural right and not a privilege created by law and subject to the legislative pleasure, and it is because of this conclusion the case possesses peculiar interest.

That this is new doctrine cannot well be denied and we know of no cases to sustain it. The court certainly cites none and recognizes that its view is opposed to all the decided cases, but quotes with approval a dictum of JUSTICE FIELD in *Minot* v. *Winthrop,* 162 Mass. 113. Similar support might have been found in an expression in the opinion of MR. JUSTICE WHITE in *Knowlton* v. *Moore,* 178 U. S. 41. The court also asserts that it is sustained by the Athenian Law, the laws of the Twelve Tables in Rome and also by the law in England prior to the Norman conquest, and that the formation of constitutional governments which recognized certain "inalienable rights" established the ownership of property upon a foundation which makes it impossible for the legislature to destroy or substantially impair the right to will property or to receive property by will or through intestate succession.

That this view is opposed to the whole current of legal authority is conceded, that it is equally in conflict with the views of political economists and many able statesmen cannot be doubted. It will be remembered that President Roosevelt in his last message advocated a federal tax on inheritances, and it seems clear that he considered the right to control the devolution of the property of a deceased person to rest absolutely in the state. It is needless to cite authorities in support of the accepted view and only a few are given: *Magoun* v. *Illinois Trust Co.*, 170 U. S. 283; *State* v. *Hamlin*, 86 Me. 495; *Eyre* v. *Jacob*, 14 Gratt. 422; *Pullen* v. *Commissioners*, 66 N. C. 361; *State* v. *Alstan*, 94 Tenn. 674; *Knowlton* v. *Moore*, 178 U. S. 41; *Plummer* v. *Coler*, 178 U. S. 115.

The law, however, was upheld on the ground that the tax was an excise on the transfer of the property, so the doctrine just discussed is purely obiter. The court seems to feel a keen pleasure in promulgating this theory and indulges a hope that it has blazed the way to better things. We are inclined to think that neither the pleasure nor the hope is justified.

The court also concluded that the Constitution did not confine the legislature to a tax on property nor was the law obnoxious to the constitutional requirement of equality and uniformity. See, also, *Knowlton* v. *Moore*, *Magoun* v. *Illinois Trust Co.*, *Minot* v. *Winthrop*, *State* v. *Hamlin*, *supra*, *Kochersperger* v. *Drake*, 167 Ill. 122; *State* v. *Guilbert*, 70 Ohio St. 229.

In Pennsylvania the tax is regarded as one on property. *Bittinger's Estate*, 129 Pa. St. 338; *Handley's Estate*, 181 id. 339.

For decisions condemning exemptions and progressive rates, see *State ex rel. Davidson* v. *Gorman*, 40 Minn. 232; *Drew* v. *Tifft*, 79 id. 175; *State* v. *Bazille*, 87 id. 500; *State* v. *Switzler*, 143 Mo. 287; *Fatjo* v. *Pfister*, 117 Cal. 83; *State* v. *Ferris*, 53 Ohio State 314. F. L. S.

THE SOVEREIGN POWER OF A STATE TO PREVENT ELECTION FRAUDS.—A case which has caused widespread and excited discussion in Colorado, and which involves legal questions of great importance, is *People ex rel. Miller, Atty. Gen.*, v. *Tool*, 86 Pac. Rep. 224 (— Col. —), decided late in 1904, but the opinion in which was officially published for the first time August 27, 1906. The case was an original proceeding in the Supreme Court, instituted by the People of the State of Colorado on the relation of the Attorney-General and the Governor. The bill charged that the respondents, the judges of election in many precincts, the fire and police board, the sheriff, members of the Election Commission and others were conspiring to commit at the ensuing election in Denver fraudulent and unlawful acts, such as causing many thousand false and fictitious names to be entered upon the registration lists, the intimidation of the minority election judges and the refusal to allow watchers and challengers of the minority party to be present at the polling places; that similar frauds had been perpetrated by the same parties at previous elections, thus preventing fair elections and defeating the will of the people, and that the consummation of the present plans would have a like result at the impending election. The bill therefore prayed that an injunction issue restraining

respondents from committing the said unlawful acts, commanding them to perform the duties required by law, and that the court appoint two watchers in each of the several precincts, "to observe how the election in those precincts is conducted."

The respondents filed answers which denied the conspiracy charges, claimed that the relief sought was in conflict with section 5 of Art. 2 of the Colorado Constitution, which provides that "all elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage," and challenged the jurisdiction of the court, because, as counsel argued, (1) the questions involved were political and not judicial, (2) a court of equity has no power to enjoin the commission of crimes, and (3) there were adequate remedies at law. The decision of the court granting substantially the relief prayed for, was announced, with JUSTICE STEELE dissenting, when the court consisted of only three members, though before the opinion was filed the court had been enlarged to seven members by a constitutional amendment adopted at the election in question.

The court disposed of the objection made by the respondents that the action prayed for was political, not judicial, by saying: "The action is not to have this court exercise functions which belong to any other department of government, but merely to construe the law relative to the duty of the respondents and the power of the state to execute its laws, and to command obedience to them. The questions presented by the bill are, therefore, purely judicial." This position is amply sustained by authority. *Atty.-Gen.* v. *Barstow,* 4 Wis. 567; *State* v. *Houser,* 122 Wis. 534, 100 N. W. 964; *State ex rel. Lamb* v. *Cunningham,* 83 Wis. 90, 53 N. W. 35, 17 L. R. A. 145. In the last mentioned case it was said by CASSODAY, J.: "We readily perceive that the determination of an action may have a political effect, and in that sense may effect a political object; but that would not necessarily make the question determined a political instead of a judicial question." And in *Marbury* v. *Madison,* 1 Cranch 137, CHIEF JUSTICE MARSHALL said that undoubtedly the proper court could rightfully issue mandamus to compel the secretary of state to deliver to Marbury his commission, which had been made out, signed and sealed by President John Adams and his secretary of state, but which Jefferson and Madison had refused to deliver. And yet it cannot be questioned that this action would have had a "political effect." So in the principal case in commanding the performance by the election and other officers, of purely ministerial duties and in restraining unlawful interference with the performance of these duties, the court was taking action which must necessarily have political effect, yet its action was purely judicial. As to the other principal arguments made by respondents against the issuance of the writ of injunction, the court based its action on the broad ground that the state in its sovereign capacity is intrusted with powers and duties to be exercised for the general welfare, and that in the exercise of these powers "it is not restricted in the remedies it may employ" except as limited by the fundamental law; and that "the interest of the state in a pure election is not limited to the protection which may be afforded by the punishment of those, through criminal prosecutions, who violate the laws relating to elections." The court said further:

"If, then, the state, in order to secure an honest election, should be limited to the prosecution and punishment of those who might be guilty of the frauds charged, the people of this commonwealth are at the mercy of those who have combined to commit these frauds. Government is not such a failure; the state is not so impotent. The result to be accomplished by a proceeding which the state may institute, rather than its character, constitutes the test of its power. It has the right to appeal to this court for a determination and exercise of its powers by an appropriate process, to prevent wrongs which, in its sovereign capacity, it is its duty to prevent. * * * Individuals cannot invoke the power of a court of equity to enjoin these acts, but the state in its sovereign capacity as *parens patriae,* has the right to invoke the power of a court of equity to protect its citizens when they are incompetent to act for themselves. The state is not bound to wait until the object of the illegal combination is effected, which will deprive the people of their liberties and constitutional rights, but may bring an action at once to prevent its consummation; and while the writ of injunction may not be employed to suppress a crime as such, yet when acts, though constituting a crime, will interfere with the liberties, rights and privileges of citizens, the state not only has the right to enjoin the commission of such acts, but it is its duty to do so." This reasoning seems to be in harmony with that of the Supreme Court of the United States in the Debs case, in which MR. JUSTICE BREWER, after reaching the conclusion that the government had, in that case, a property right to protect, said: "We do not care to place our decision upon this ground alone. Every government, entrusted by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one, and the discharge of the other; and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court." *In re Debs,* 158 U. S. 564, 15 Sup. Ct. 900. The same doctrine received support in *United States* v. *Bell Telephone Co.,* 128 U. S. 315, 367.

It is undoubtedly true that language may be found in many cases, which lends itself to the view that equity will not interfere with the conduct of elections by the election officers, but it is believed that most of these statements will be found, upon examination, to be mere dicta, or uttered in cases in which the sovereign state was not itself asking relief. Certainly, in the present case, the position of the court seems more in harmony with progressive and adequate views of the functions and powers of the state and with the requirements of an intelligent public policy. H. M. B.

ORIGINAL JURISDICTION OF SUPREME COURT IN ELECTION CASES.—Less than two years after the decision in the *Tool* case, *supra,* the Supreme Court of Colorado had occasion to pass upon the same kind of controversy, from the point of view of procedure, in *People ex rel. Graves* v. *District Court and Frank T. Johnson, Judge,* not yet officially reported. In that case a bill was

filed in the District Court by certain citizens and taxpayers and qualified voters, who are members of a voluntary organization for conserving the purity of elections, based upon allegations of conspiracy and fraud with reference to the elections in Denver set for May 15, 1906, similar to those in the *Tool* case, and relief in the nature of injunction like that granted by the Supreme Court in that case, was prayed for. The District Court issued such an injunction and entered certain supplemental orders designed to effect supervision of the election. After the election the court was proceeding to inquire into alleged violations of its decree and orders, when a writ of prohibition was presented to the Supreme Court, and a temporary order was there entered restraining the respondent judge and the District Court from proceeding further until the question of the jurisdiction in the premises should be determined. This question was decided adversely to respondents and an absolute writ of prohibition was finally entered. The opinion was written by GABBERT, C. J., who also prepared the opinion in the *Tool* case, and two of the seven justices dissented on grounds not yet published. The decision was rendered July 2, 1906.

The Colorado constitutional provisions defining the jurisdiction of the courts of the state are similar to those in a majority of the other states, and the problem presented is therefore manifestly one of general interest as well as of great importance. Section 2, of Article VI of the Colorado Constitution gives the Supreme Court appellate jurisdiction only, except as otherwise provided, and general supervisory power over all inferior courts. Section 3 provides: "It shall have power to issue writs of *habeas corpus, mandamus, quo warranto, certiorari, injunction* and other remedial writs, with authority to hear and determine the same." Section 11, of Article VI, is as follows: "The district courts shall have original jurisdiction of all causes, both at law and in equity * * *." The court bases its conclusions upon three principal arguments. First: It was argued that the supreme and district courts could not be given concurrent jurisdiction in any class of cases, as the "inevitable result" would be to deprive the Supreme Court of its power to review the action of the district court in such causes. It may be observed, in the first place, that having regard only for actual expressions upon that subject in the organic law of the state, that very concurrence of jurisdiction seems to have been given to the courts in question. No sort of limitation, express or implied, upon the authority of the district courts to grant these extraordinary remedial writs, can be found in the Colorado constitution. Nor is the theory of review by the Supreme Court, even though concurrent jurisdiction in issuing such writs be conceded, a legal solecism, as is abundantly shown by the constitutional provisions and the practice in this class of cases in many other states.

Second: The court argued that injunction, as a matter of history and by the constitutional grouping quoted above, is a prerogative remedy and hence should issue only from the highest court of the state. Conceding, for the purposes of argument, the correctness of the court's postulate as to the prerogative origin of this writ, yet the historical argument must fail in view of the fundamental changes made in procedure regarding, and the right to,

all the extraordinary remedies, effected by the Statute of Anne in England, and by constitutional and statutory provisions in the United States. Notwithstanding some early cases to the contrary, notably in Arkansas, Wisconsin and Illinois, the writs cannot in any proper sense, be said to be prerogative. Finally the court based its decision upon the ground that, at least, when franchises or privileges of the state are concerned it is fitting that the matter should be determined not by an inferior court, with one judge sitting, but by the court of ultimate authority. The strength of this argument cannot be denied, but the question of propriety, of expediency, thus involved, is one for the people to decide through their constitution or statutes. The Colorado Constitution does not provide that the Supreme Court shall have exclusive jurisdiction in the extraordinary remedial processes, even where political questions and public rights are involved. On the contrary it has given jurisdiction to the district courts "in all causes, both at law and in equity." It would therefore seem that the Supreme Court was not justified in denying jurisdiction in this matter to the district court. In so doing it was adding to the Constitution. Nor is the position of the court wholly consistent with its own declarations in earlier cases.

Thus in *Wheeler* v. *Northern Irrigation Co.*, 9 Col. 248, the court said, at p. 255: "We have frequently declined to take original cognizance of causes in some of which questions *publici juris* were involved." See also, *People ex rel Wolpert* v. *Rogers*, 12 Col. 278. H. M. B.