SUPREME COURT OF UNITED STATES

City of Cincinnati,

Vs.

Louisville & Nashville Railroad Company.

No. 385.

Submitted January 9, 1912.

Decided February 19, 1912.

[Syllabus from pages 390-392 intentionally omitted]

Messrs. Edward M. Ballard and Albert Bettinger for plaintiff in error.

[Argument of Counsel from pages 392-396 intentionally omitted]

Messrs. J. B. Foraker and Ellis G. Kinkead for defendants in error.

[Argument of Counsel from pages 396-398 intentionally omitted]

Mr. Justice Lurton delivered the opinion of the court:

Under an act of the legislature of the state of Ohio of May 9, 1908, being § 3283a, and an ordinance of the city of Cincinnati in pursuance of that act, the defendant railroad company instituted, in a court of the state of Ohio, a suit to condemn a right of way for an elevated railroad track across the public landing at Cincinnati. Pending the condemnation proceeding the city of Cincinnati filed a bill in one of the common pleas courts to enjoin the railroad company from constructing its railway across said public landing, in pursuance of its agreement and contract with the city under the ordinance mentioned, and to restrain the prosecution of its pending petition for the condemnation of an easement of way across the landing. The ground upon which it was sought to stop the condemnation proceeding and prevent the company from constructing its elevated tracks across the public landing was that § 3283a, Revised Statutes of Ohio, under which alone an easement of way might be appropriated, was repugnant to article 1, § 10 of the Constitution of the United States, forbidding any state to pass any law impairing the obligation of a contract, in so far as § 3283a

applied to the particular property across which an easement of way was sought to be appropriated.

That section, so far as necessary to be here stated, provides that upon compliance therewith any railroad company owning or operating a railroad wholly or partially within the state might 'use and occupy for an elevated track any portion of any public ground lying within the limits of a municipality and dedicated to the public for use as a public ground, common, landing, or wharf, or for any other public purpose,' excepting streets, alleys, and public roads. It is provided that before instituting a proceeding for the appropriation of the needed easement, which is to be according to a general statute referred to, such company shall submit plans for the structure, and come to an agreement with the city council of the municipality concerned, as to the terms and conditions upon which the easement shall be occupied.

The proprietors of the grant of land upon which the city of Cincinnati was originally laid out made a plan or plat of the proposed town, according to which plan a strip of ground between Front street and the Ohio river was set apart 'as a common for the use and benefit of the town forever.' The effect of the sale of the town lots under this plan has long since been held to constitute a dedication of the river front strip to the public use, and to have vested in the city of Cincinnati a valid title in trust for the public use in the same manner that streets were held under the same plat or plan. Cincinnati v. White, [1832] USSC 35; 6 Pet. 431, 8 L. ed. 452. This dedication was made in 1789, and the property has ever since been used as a public landing or wharf.

A demurrer to the petition was sustained by the court of common pleas, and the bill dismissed. This was affirmed upon appeal to the circuit court, and again affirmed upon appeal to the supreme court of the state.

That the dedication in 1789, and acceptance by the then town of Cincinnati, constitute a contract with the dedicators, obligatory upon the town and its successor, the city of Cincinnati, may be conceded. The contention is that the Ohio act of May 9, 1908, now § 3283a, Revised Statutes of Ohio, is an impairment of the contract, forbidden by the 10th section of the first article of the Constitution of the United States. But the right of every state to authorize the appropriation of every description of property for a public use is one of those inherent powers which belong to state governments, without which they could not well perform their great functions. It is a power not surrendered to the United States, and is untouched by any of the provisions of the Federal Constitution, provided there be due process of law; that is, a law authorizing it, and provision made for compensation. This power extends to tangibles and intangibles alike. A chose in action, a charter, or any kind of contract, are, along with land and movables, within the sweep of this sovereign authority.

The constitutional inhibition upon any state law impairing the obligation of contracts is not a limitation upon the power of eminent domain. The obligation of a contract is not impaired when it is

appropriated to a public use and compensation made therefor. Such an exertion of power neither challenges its validity nor impairs its obligation. Both are recognized, for it is appropriated as an existing, enforceable contract. It is a taking, not an impairment of its obligation. If compensation be made, no constitutional right is violated. All of this has been so long settled as to need only the citation of some of the many cases. Charles River Bridge v. Warren Bridge, [1837] USSC 2; 11 Pet. 420, 9 L. ed. 773; West River Bridge Co. v. Dix, 6 How. 507, 12 L. ed. 535; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. [1885] USSC 240; 115 U. S. 650, 29 L. ed. 516[1885] USSC 240; , 6 Sup. Ct. Rep. 252; Long Island Water Supply Co. v. Brooklyn, [1897] USSC 112; 166 U. S. 685, 41 L. ed. 1165[1897] USSC 112; , 17 Sup. Ct. Rep. 718; Offield v. New York, N. H. & H. R. Co. [1906] USSC 165; 203 U. S. 372, 51 L. ed. 231[1906] USSC 165; , 27 Sup. Ct. Rep. 72.

Every contract, whether between the state and an individual, or between individuals only, is subject to this general law. There enters into every engagement the unwritten condition that it is subordinate to the right of appropriation to a public use. West River Bridge Co. v. Dix, 6 How. 507, 12 L. ed. 535; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 691, 692, 41 L. ed. 1167[1897] USSC 112; , 17 Sup. Ct. Rep. 718.

These general propositions are not challenged.

But it is said that the right of appropriating private property to a public use possessed by the state of Ohio is only that which is defined and limited by the second article of the ordinance of 1787, creating a government for the Northwest territory, which embraced the territory which later became the state of Ohio. That ordinance, after providing for a territorial government, declares certain political principles to be fundamental, and that they should constitute the 'basis of all laws, constitutions, and governments,' thereafter organized out of that territory, and should be regarded as 'articles of compact between the original states and the people and states in the said territory, and be unalterable unless by common consent.' The article referred to, and claimed now to be still obligatory, is in these words:

'No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land; and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same.'

But the ordinance of 1787, as an instrument limiting the powers of government of the Northwest territory, and declaratory of certain fundamental principles which must find place in the organic law of states to be carved out of that territory, ceased to be, in itself, obligatory upon such states from and after their admission into the Union as states, except in so far as adopted by such states and made a part of the law thereof. This has been the view of this court, so often announced as to need

no further argument. Pollard v. Hagan, 3 How. 212, 11 L. ed. 565; Permoli v. New Orleans, 3 How. 589, 11 L. ed. 739; Escanaba & L. M. Transp. Co. v. Chicago, [1883] USSC 58; 107 U. S. 678, 688, 27 L. ed. 442, 446[1883] USSC 58; , 2 Sup. Ct. Rep. 185.

In the Escanaba & L. M. Transp. Co. Case, it was said:

'Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a state of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states. She was admitted, and could be admitted, only on the same footing with them. The language of the resolution admitting her is, 'on an equal footing with the original states, in all respects whatever.' 3 Stat. at L. 536. Equality of constitutional right and power is the condition of all the states of the Union, old and new. Illinois, therefore, as was well observed by counsel, could afterwards exercise the same power over rivers within her limits that Delaware exercised over Black Bird creek, and Pennsylvania over the Schuylkill river.'

In Coyle v. Smith, [1911] USSC 109; 221 U. S. 559, 55 L. ed. 853[1911] USSC 109; , 31 Sup. Ct. Rep. 688, the case of Escanaba & L. M. Transp. Co. v. Chicago, and the cases cited therein, were fully reviewed and held applicable to conditions imposed by Congress in the enabling act under which Oklahoma was admitted, and all limitations in that act were held inoperative after admission, in so far as they had not been subsequently adopted by the state, and were in derogation of the equality in power of that state with the other states of the Union.

It is next contended that whether the provisions of article 2 now constitute the irrevocable fundamental law of Ohio or not, that that provision was the only law of eminent domain existing in 1789, and as such is to be regarded as read into the contract of dedication, and, therefore, is the only power of eminent domain to which that contract was subordinate. Upon this hypothesis is based the contention that any subsequent law of Ohio authorizing a taking of this property for a purpose or use not within the terms of the ordinance of 1787 is a law impairing the obligation of a contract.

But the assumption that the power of eminent domain possessed by the Northwest territory in 1787 was limited as claimed is untenable. The clause referred to assumes the existence of a general power of eminent domain in the government, and provides that when exerted there must be full compensation for the property taken or the services required. That this is so is apparent not only from the language of the clause, but from a general consideration of the purpose and object of the congressional act in which the article appears. The ordinance of 1787 was a law providing for the government of the territory of the United States northwest of the River Ohio. It provided for the appointment of a governor and secretary and for the appointment of judges and the organization of courts with common-law jurisdiction. To the governor and judges was granted legislative power to

adopt and publish such laws of the original states as should seem to be adapted to the conditions, which were to be and remain in force unless disapproved by Congress. Authority to elect a legislature was conferred when there should be five thousand inhabitants.

Upon this article 2, heretofore set out, is claimed to be a contractual limitation, based upon the contract of dedication, by which this particular strip of river front is forever protected against an exercise of the power of eminent domain by the state of Ohio, except where 'the public exigency makes it necessary for the common preservation.' If we assume, for argument, that an affirmative limitation upon the right of appropriating property to any public purpose would so enter into any contract as to forever afterwards bind the hands of the state, no such situation is here presented. Article 2 is not a grant of power, but a limitation upon the power of eminent domain assumed to exist. It was conferred upon the governor and judges by the power to adopt and publish the laws of any original state deemed appropriate, and by the second section there was conferred upon the governor and legislature, when organized, 'authority to make laws in all cases . . . not repugnant to the principles and articles in this ordinance established and declared.' This legislative power, temporarily in the governor and a majority of the judges, and then in the governor and the legislature, when organized, included, by necessary implication, the general power to provide for the appropriation of private property for public purposes. If this is not the case, then the ordinance granted no power of that kind whatever, for the clause above cited is obviously a mere restriction by which compensation is required.

This right of appropriating private property to a public use is one of the powers vital to the public welfare of every self-governing community. It is a power which this court has described as an 'incident to sovereignty,'—a power which 'belongs to every independent government.' In United States v. Jones, 109 U. S. 518, 27 L. ed. 1017[1883] USSC 249; , 3 Sup. Ct. Rep. 346, it was said:

'The provision found in the 5th Amendment to the Federal Constitution and in the Constitutions of the several states, for just compensation for the property taken, is merely a limitation upon the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised. It is undoubtedly true that the power of appropriating private property to public uses, vested in the general government,—its right of eminent domain, which Vattel defines to be the right of disposing, in case of necessity and for the public safety, of all the wealth of the country,—cannot be transferred to a state any more than its other sovereign attributes; and that, when the use to which the property taken is applied is public, the propriety or expediency of the appropriation cannot be called in question by any other authority.'

That the Northwest territory was not a state, but a mere territorial dependency, is of no consequence. The United States was an independent sovereign, and when it created a territorial government with legislative authority subject only to the limitations of the creating act, it granted to this new dependent government this vital power unless it plainly appears that it was withheld.

The denial of such a power to this new government intended as the forerunner of a group of states west of the Ohio, or its restriction to purposes of necessary defense only, as plaintiff in error would construe the language of the article above set out, is not to be easily or lightly presumed. The power was one necessary to the work which this pioneer community was set on doing. It was a power well nigh as essential to the existence of the government as the taxing power. The language of Chief Justice Taney in the Charles River Bridge Case, 11 Pet. 421, 547, 9 L. ed. 774, 824, when speaking of a contention that the state of Massachusetts had surrendered the power, by granting a charter for the construction of a particular bridge, to appropriate that bridge so authorized, is apt and appropriate, when we are asked to construe the ordinance of 1787 as denying to the government of the Northwest territory a power so important to the welfare of its people. Upon this he said:

'But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience, and prosperity of the people. A state ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished. And when a corporation alleges that a state has surrendered, for seventy years, its power of improvement and public accommodation in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist, in the language of this court, above quoted, 'that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.' The continued existence of a government would be of no great value if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform transferred to the hands of privileged corporations. The rule of construction announced by the court was not confined to the taxing power, nor is it so limited in the opinion delivered. On the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving, undiminished, the power then in question; and whenever any power of the state is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies and the rule of construction must be the same.'

Nor should the particular language of the article above set out be given a narrow or hypercritical meaning. The plain purpose was but to limit the general right of eminent domain by the requirement that compensation should be made. A public 'exigency' exists, for the 'common preservation,' when the legislature declares that for a bona fide public purpose there should be a right of way for a common carrier across a particular piece of property. The uses to which § 3283a authorizes a condemnation of a right of way are undeniably public, and not private, uses. When that is the case, 'the propriety or expediency of the appropriation cannot be called in question by any other authority.' United States v. Jones, 109 U. S. 519, 27 L. ed. 1017[1883] USSC 249; , 3 Sup. Ct. Rep. 346.

It follows, then, first, that the legislative power of the state of Ohio was not restricted in any way by

the provisions of the second article of the ordinance of 1787 after its admission to the Union, and it has every power of eminent domain which pertains to other states, unless limited by its own Constitution; and, second, that if the law of eminent domain as it existed at the time of the dedication is to be read into the contract, that that law, properly interpreted, was not such as to forbid an appropriation such as is here involved.

The judgment of the Supreme Court of Ohio must therefore be affirmed.

Rev. St. p. 15 [U. S. Comp. St. 1901, p. lx], § 14.