Conway Vs. Taylor's Executor

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SooperKanoon Citation : sooperkanoon.com/81096

Court : US Supreme Court

Decided On : 1861

Appeal No. : 66 U.S. 603

Appellant : Conway

Respondent : Taylor's Executor

Judgement :

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U.S. Supreme Court Conway v. Taylor's Executor, 66 U.S. 1 Black 603 603 (1861)

Conway v. Taylor's Executor

66 U.S. (1 Black) 603

APPEAL FROM THE COURT OF APPEALS

FOR THE STATE OF KENTUCKY

SYLLABUS

1. A ferry franchise on the Ohio is grantable, under the laws of Kentucky, to a citizen of that state who is a riparian owner on the Kentucky side, and it is not necessary to the validity of the grant that the grantee should have a right of

landing on the other side or beyond the jurisdiction of the state.

2. The concurrent action of two states is not necessary to the grant of a ferry franchise on a river that divides them. A ferry is in respect to the landing, not to the water; the water may be to one, and the ferry to another.

3. After a citizen of Kentucky has become the grantee of a ferry franchise, and his riparian rights have been repeatedly held sufficient to sustain the grant by the highest legal tribunal of the state, the same question is not open here; the adjudications of the state courts are a rule of property and a rule of decision which this Court is bound to recognize.

4. A license to establish a ferry which does not extend across the river may be less valuable for that reason, but not less valid as far as it goes.

5. The laws of Kentucky relating to ferries on the Ohio and Mississippi are like the laws of most, if not all, the other states bordering on those rivers: they do not leave the rights of the public unprotected, and are not unconstitutional. The franchises which the state grants are confined to the transit from her own shores, and she leaves other states to regulate the same rights on their side.

6. A ferry franchise is property, and as sacred as other property.

7. An injunction to protect the exclusive privilege to a ferry does not conflict or interfere with the right of a boat to carry passengers or

goods in the ordinary prosecution of commerce without the regularity or purpose of ferry trips; that remedy applies only to one which is run openly and avowedly as a ferry boat.

8. The authority to establish and regulate ferries is not included in the power of the federal government to "regulate commerce with foreign nations and among the several states and with the Indian tribes."

9. The authority to regulate ferries has never been claimed by the general government, has always been exercised by the states, never by Congress, and is undoubtedly a part of the immense mass of undelegated powers reserved to the states respectively.

James Taylor, executor of James Taylor, deceased, and Robert Air, filed their bill in equity in the Circuit Court of Campbell County, Kentucky, against Peter Conway, John J. Simmons, John Sebree, Ernest Klinschmidt, Bernard Delmar, John Schenburg, Thomas Dodsworth, Daniel Wolff, and the Common Council of the City of Newport. The prayer of the bill was that defendants might be enjoined from invading certain ferry rights claimed by plaintiffs as set forth in their bill. An account was also prayed for, and a decree against the defendants in respect of the moneys received by them in violation of the rights of complainants. The defendants filed answers to the bill, and after the taking of much testimony and hearing of the cause, a decree was passed for plaintiffs in accordance with the prayer of their bill. From this decree defendants appealed to the Court of Appeals of the State of Kentucky, where an order was entered modifying the decree of the court below, but still adverse to defendants. The cause was then removed to the Supreme Court of the United States upon a writ of error under the 25th section of the judiciary act.

All the leading facts of the case are stated in the opinion of MR. JUSTICE SWAYNE.

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MR. JUSTICE SWAYNE.

The appellees filed their bill in equity in the Circuit Court of Campbell county, Kentucky, seeking thereby to enjoin the appellants from invading the ferry rights claimed by them as set forth in their bill, and also praying for an account and a decree against the appellants in respect of the moneys received by them in violation of the alleged rights of the complainants. The appellants answered, proofs were taken, and the case brought to hearing.

The Circuit Court of Campbell county entered a decree

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against the appellants. They removed the cause to the Court of Appeals of Kentucky. That court modified the decree of the court below, but also decreed against them. They thereupon brought the cause to this Court by a writ of error under the 25th section of the Judiciary Act of 1789. It is now presented here for adjudication.

The case made by the pleadings and proofs is substantially as follows:

On the 29th of April, 1787, James Taylor of Virginia, received from that state a patent for 1,500 acres of land lying upon the Ohio and Licking Rivers at the confluence of those streams and above the mouth of the latter.

In 1792, James Taylor, the patentee, by his agent, Hubbard Taylor, laid out the Town of Newport at the confluence of the two rivers upon a part of the tract of fifteen hundred acres.

According to the map of the town as surveyed and thus laid out, the lots and streets did not extend to either of the rivers. A strip of land extending to the water line was left between the street running parallel with and nearest to each river.

In July, 1793, John Bartle applied to the Mason County Court for the grant of a ferry from his lot in Newport, on Front Street across the Ohio to Cincinnati. An order was made accordingly, but the appellate court of Kentucky reversed and revoked it on the 15th of May, 1798, upon the ground that it did not appear that his lot extended to the Ohio River.

On the 29th of January, 1794, a ferry was granted to James Taylor of Virginia, by the Mason County Court, from his landing in front of Newport, across the Ohio River, with authority to receive the same fares which were allowed upon transportation from the *opposite shore.* A ferry across the Licking was also granted to him.

On the 20th August, 1795, a re-survey and plat of the Town of Newport was made by which the eastern limits of the town were extended to "Eastern Row," and the strip of ground between the Ohio River and the northern boundary of the town, and between Licking River and the western boundary of the town, were endorsed "Common or *esplanade,* to remain common forever." This plat was made by Roberts.

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On the 14th December, 1795, an act was passed by the Legislature of Kentucky incorporating the Town of Newport in conformity with the re-survey and plat of Roberts.

The preamble and so much of the act as is deemed material in this case are as follows:

"Whereas it is represented to the present general assembly that one hundred and eighty acres of land, the property of James Taylor, in the County of Campbell, have been laid off into convenient lots and streets by the said James Taylor for the purpose of a town, and distinguished by the name of Newport, and it is judged expedient to vest the said land in trustees and establish the town:"

" 1. *Be it therefore enacted by the general assembly* that the *land comprehending the said town,* agreeably to a plat made by John Roberts, be vested in Thomas Kennedy and others, 'who are hereby appointed trustees for the same, except such parts as are hereafter excepted.'"

" 7. *Be it further enacted* that such part of said town as lies between the lots and Rivers Ohio and Licking, as will appear by a reference to the said plat, shall forever remain for the use and benefit of said town for a common, *reserving to the said James Taylor, and his heirs and assigns, every advantage and privilege which he has not disposed of or which he would by law be entitled to.* "

The streets and lots exhibited by the Roberts' plat of 1795, as by that of 1792, did not extend to either the Ohio or Licking River.

The disputed ground between the northern boundary of Front Street and the Ohio River varies in width according to the inflexions in the line bounding the margin of the river at high water mark, from five to ten poles, and the distance from high to low water mark varies from seventeen to two hundred yards, and was not included in the 180 acres laid out for the town. This area is denominated "the esplanade."

In 1799, James Taylor of Virginia, the patentee, conveyed to his son, James Taylor of Kentucky, this strip of ground, between Front Street and the Ohio River, together with the other land adjacent to the 180 acres laid out in the plat of the town in 1795, and also the ferry franchise.

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James Taylor of Kentucky, from the time of the conveyance by his father to him, in 1799, continued to run the ferry from the ground in front of Newport, on which it was originally established.

In consequence of the passage of the act of 1806 by the Legislature of Kentucky, concerning ferries, James Taylor of Kentucky applied to the Campbell County Court in 1807 for the establishment of the ferry granted to his father, and the ferry was reestablished in his name, and he executed a bond, and continued to run the ferry from almost every part of the ground or esplanade, in front of the Town of Newport, from that period to the time of the filing of the bill in this case.

In 1830, the Town of Newport applied to the Campbell County Court for the grant to said town of a ferry, from the esplanade across the Ohio River to Cincinnati, which application was refused. An appeal was taken to the Court of Appeals, and at the June term, 1831, the order of the Campbell County Court was affirmed.

This case is reported in 6 J. J. Marshall 134.

James Taylor of Virginia, and his grantee and son, James Taylor of Kentucky, continued therefore uninterruptedly to run this ferry from 1794 until the commencement of this suit. The proof shows also that he constantly exercised acts of ownership over the whole common in front of Newport, and did not permit

even the quarrying of stone without his consent; that he was in the habit of landing his ferry boats at various points on this common or esplanade from time to time, and that he acquiesced in its free use as a common for egress and ingress by the people of the town, but always claimed and exercised the exclusive ferry privilege.

"After the incorporation of the Town of Newport as a city, the City of Newport applied in 1850, at the February term of the Campbell County Court, for the grant of a ferry across the Ohio River, to the president and Common Council of the City of Newport. No notice was given of the application, and the ferry was granted."

At the time of this application, James Taylor of Kentucky

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had departed this life, leaving a will and appointing his son, James Taylor, his executor, and making a particular devise of this ferry and requiring his executor to rent it until the taking effect of the devise, as provided in the will.

As soon as the action of the Campbell County Court granting a ferry to the City of Newport was known, a writ of error was sued out from the *circuit court* by the executor and devisees of James Taylor of Kentucky to reverse the order of the *county court* whereby the ferry was granted. The order was reversed. The City of Newport took the case to the Court of Appeals of Kentucky. That court, in March, 1850, affirmed the judgment of the circuit court. This case is reported in 11 B.Monroe 361.

It appears in the proofs that the ferry boats used by the appellees were duly enrolled, inspected, and licensed under the laws of the United States.

No claim is set up in the bill as to any ferry license from Ohio or to any right of landing on the Ohio side.

In 1853, the appellants built the steamer *Commodore* and constituted themselves "The Cincinnati and Newport Packet company" for the purpose of running that steamer as a ferry boat from Cincinnati to Newport and from Newport to Cincinnati. They rented for five years a portion of the esplanade in front of

Monmouth Street, *in the City of Newport,* from the common council of that city.

The *Commodore* was a vessel of 128 tons burden and in all respects well appointed and equipped.

The appellants caused her to be enrolled on the 4th of January, 1854, at the custom house at Cincinnati, under the act of Congress for enrolling and licensing vessels to be employed in the coasting trade and fisheries, with Peter Conway as master, and obtained on the same day, from the surveyor of customs at the port of Cincinnati, a license for the employment and carrying of the coasting trade.

They commenced running her as a ferry boat from Cincinnati to Newport and from Newport to Cincinnati on the 5th of January, 1854.

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Her landings were at the wharves on each side of the river, opposite to each other, the landing in Newport being at the foot of Monmouth Street.

The right of the *Commodore* to land there for all lawful purposes was not contested in the Court of Appeals, and was not questioned in the argument here.

In January, 1854, the appellees exhibited their bill in equity against the appellants.

In the same month, a preliminary injunction was granted restraining the appellants from running the *Commodore* as a ferry boat between the Cities of Cincinnati and Newport.

In the progress of the cause, proceedings were instituted against the appellants for contempt of the court in violating this injunction. It was then made to appear that the appellants had, on the 6th of March, 1854, obtained a ferry license under the laws of Ohio. This fact appears in the record, and is adverted to in the judgment of the Court of Appeals.

Upon the final hearing, the Campbell Circuit Court decreed, that an account should be taken of the ferriages received by the appellants on account of the

Commodore, and that they

"be and they are, each and all of them, perpetually enjoined from landing the boat called in the pleadings and proof the *'Commodore,'* or any other boat or vessel, upon that part of the Kentucky shore of the Ohio River lying between the lots of the City of Newport and the Ohio River designated upon the plat of the Town of Newport as the 'esplanade,' and including the whole open space so designated, for the purpose of receiving or landing either persons or property *ferried from or to be ferried to the opposite shore of the Ohio River.* "

"It being hereby adjudged against all the defendants to this action that the entire privilege and franchise of ferrying persons and property to and from said part of the Kentucky shore of the Ohio River is in the plaintiffs alone, and it is hereby adjudged that the receiving of persons, animals, carriages, wagons, carts, drays, or any other kind of vehicle, either loaded or empty, upon said boat or any other vessel at said part of the Kentucky shore for the purpose of being transported and landed upon the opposite shore of the Ohio River and

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the landing of persons, animals, and the kind of property above described, which had been received upon said boat or other vessel at or from the opposite shore of the Ohio River, and transported across said river, upon said part of the Kentucky shore, is an infringement of the ferry franchise of the plaintiffs, and is hereby perpetually enjoined, and this injunction shall extend to and embrace all persons claiming under the defendants to this action."

In reviewing this adjudication, the Court of Appeals held:

"The judgment is erroneous in the extent to which it perpetuates the injunction and to which it restrains the *Commodore* and the defendants in landing upon the slip in question persons and property transported from the Ohio shore, and in adjudging, as it seems to do, the exclusive right of ferrying from both sides of the river to be in plaintiffs alone. *The transportation as carried on* was illegal and properly enjoined, and the injunction should have been perpetuated against future

transportation of a like kind, either under color of any license obtained, or to be obtained, from the authorities of the United States under the existing laws, or without such license, unless authorized to transport from the Ohio shore from a ferry established on that side under the laws of that state, and they might have been restrained or prohibited, under all or any circumstances, from transporting persons or property from this to the other side, within the interdicted distance above or below an established ferry on this side, unless authorized under the laws of this state to do so, and the exclusive right of ferrying from the Kentucky side should have been declared to be in the plaintiffs."

"Wherefore the judgment perpetuating said injunction and adjudging the exclusive right of ferrying from both sides of the river to be in the plaintiffs is reversed, and the cause as to that is remanded with directions to perpetuate the injunction to the extent just indicated, and to adjudge the right as above directed."

"And afterwards, to-wit, on the 9th day of February, 1860, the following order was entered on the records of this Court:"

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"It is ordered that the mandate be amended as follows: that the judgment perpetuating the said injunction is reversed, and the cause as to that is remanded with directions to perpetuate the injunction to the extent just indicated, and to adjudge the right, as above directed."

It is objected by the appellants that no such ferry franchise exists as was sought to be protected by this decree, because it was granted under the laws of Kentucky, and did not embrace a landing on the Ohio shore. It is insisted that such a franchise, when confined to one shore, is a nullity, and that the concurrent action of both states is necessary to give it validity.

Under the laws of Kentucky, a ferry franchise is grantable only to riparian owners. The franchise in this instance was granted in pursuance of those laws. Any

riparian ownership, or right of landing, or legal sanction of any kind beyond the jurisdiction of that state, is not required by her laws.

The riparian rights of James Taylor, deceased, and of his executor and devisees in respect of the Kentucky shore have been held sufficient to sustain a ferry license by the highest legal tribunal of that state whenever the subject has been presented. The question came under consideration and was discussed and decided in the year 1831 in 6 J.J.Marshall 134, *Trustees of Newport v. James Taylor;* in 1850 in B.Monroe 361, *City of Newport v. Taylor's Heirs;* in 1855 in this case, 16 B.Monroe 784; and finally, in 1858, in the *City of Newport v. Air & Wallace* (Pamphlet copy of Record).

These adjudications constitute a rule of property, and a rule of decision which this Court is bound to recognize. Were the question an open one and now presented for the first time for determination, we should have no hesitation in coming to the same conclusion. We do not see how it could have been decided otherwise. This point was not pressed by the counsel for the appellants. The judgments referred to exhaust the subject. We deem it unnecessary to go again over the same ground.

The concurrent action of the two states was not necessary. "A ferry is in respect of the landing place, and not of the

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water. The water may be to one, and the ferry to another." 13 Viner's Ab. 208, A.

In 11 Wend. 590, *People v. Babcock,* this same objection was urged, in respect of a license under the laws of New York, for a ferry across the Niagara River. The court said:

"The privilege of the license may not be as valuable to the grantee, by not extending across the river; but as far as it does extend, he is entitled to all the provisions of the law, the object of which is to secure the exclusive privilege of maintaining a ferry at a designated place."

The point has been ruled in the same way in a large number of other cases:

2 McLean 377, *Bowman's Devisees v. Burnley;* 3 Yerger 390, *Memphis v. Overton;* 1 Green's Iowa 498, *Phelps v. Bloomington;* 4 Zabriskie 723, *Freeholders v. State;* 49 U. S. 8 How. 569, *Wills v. St. Clair County;* 57 U. S. 16 How. 524, *Fanning v. Gregoire.*

In the case last cited, *Fanning v. Gregoire,* 16 How. 524, the arguments on file show that this objection was pressed with learning and ability. In the opinion delivered, the Court seems to have assumed the validity of such a license without in terms adverting to the question. Another question was fully discussed and expressly decided. This point does not appear in the report of the case.

Our attention has been earnestly invited to the following provisions of the ferry laws of Kentucky, under which the license of the appellees was granted:

"None but a resident of Kentucky can hold the grant of a ferry. Sec. 5, Stanton's Revised statutes, 540."

"Any sale or leasing of a ferry right, or contract not to use it, made with the owner of a ferry established on the other side of the Ohio or Mississippi, shall be deemed and abandonment, for which the right shall be revoked. Sec. 12."

"Anyone who shall, for reward, transport any person or thing across a watercourse from or to any point within one mile of an established ferry, unless it be the owner of an established ferry on the other side of the Ohio and Mississippi

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Rivers so transporting to such point on this side, and any owner or lessee or servant of the owner of a ferry on the other side of either of those rivers, who shall so transport from this side, without reward, shall forfeit and pay to the owner of the nearest ferry the sum of sixteen dollars for every such offense, recoverable before a justice of the peace. Sec. 14."

"No ferry shall be established on the Ohio River within less than a mile and a half, nor upon any other stream within less than a mile of the place in a straight line, where any existing ferry was pre-established, unless it be a town or city, or where

an impassable stream intervenes."

"No new ferry shall be so granted within a city or town unless those established therein cannot properly do all the business or unless public convenience greatly requires a new ferry at a site not within four hundred yards of that of any other. Sec. 15."

We have considered these in connection with the other provisions of those laws. Whether they are wise and liberal of the opposite are inquiries that lie beyond the sphere of out powers and duties.

Considered all together, they have not seemed to us to de serve the character which has been ascribed to them. While they fence about with stringent safeguards the rights of the holder of the ferry franchise, they do not leave unprotected the rights of the public. If they give the franchise only to the riparian owner and citizen of the state, they surround him with sanctions designed to secure the fulfillment of his obligations.

The franchise is confined to the transit from the shore of the state. The same rights which she claims for herself she concedes to others. She has thrown no obstacle in the way of the transit from the states lying upon the other side of the Ohio and Mississippi. She has left that to be wholly regulated by their ferry laws. We have heard of no hostile legislation and of no complaints by any of those states. It was shown in the argument at bar that similar laws exist in most, if not all, the states bordering upon those streams. They exist in other states of the Union bounded by navigable waters.

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Very few adjudged cases have been brought to our notice in which the ferry rights they authorize to be granted have been challenged, none in which they have been held to be invalid.

A ferry franchise is as much property as a rent or any other incorporeal hereditament, or chattels, or realty. It is clothed with the same sanctity and entitled

to the same protection as other property.

"An estate in such a franchise and an estate in land rest upon the same principle." 3 Kent's Com. 459.

Lastly, it is urged that, the *Commodore* having been enrolled under the laws of the United States and licensed under those laws for the coasting trade, the decree violates the rights which the enrollment and license gave to the appellants in respect of that trade by obstructing the free navigation of the Ohio.

Here it is necessary to consider the extent of the injunction which the decree directs to be entered by the court below.

The counsel for the appellants insists that,

"as respects transportation from the Kentucky side, and from the *Commodore's* wharf at the foot of Monmouth Street, that vessel is enjoined, under *'all or any circumstances, from transporting persons or property'* to the opposite shore unless under the authority of the State of Kentucky."

We do not so understand the decree. If we did, we should without hesitation reverse it. An examination of the context leaves no doubt in our minds that the court intended only to enjoin the *Commodore* under "all or any circumstances from transporting persons or property" from the Kentucky shore in *violation of the ferry rights of the appellees,* which it was the purpose of the decree to protect. The bill made no case, and asked nothing, beyond this. The court could not have intended to go beyond the case before it. That the appellants had the right after as before the injunction, in the prosecution of the carrying and coasting trade and of ordinary commercial navigation, to transport "persons and property" from the Kentucky shore, no one, we apprehend, will deny. The limitation is the line which protects the ferry rights of the appellees.

Those rights give them no monopoly, under "all circumstances," of all commercial transportation from the Kentucky shore. They have no right to exclude or restrain those there prosecuting the business of commerce in good faith, without the regularity or purposes of ferry trips, and seeking in nowise to interfere with the enjoyment of their franchise. To suppose that the Court of Appeals, in the language referred to, intended to lay down the converse of these propositions would do that distinguished tribunal gross injustice.

The *Commodore* was run openly and avowedly as a ferry boat; that was her business. The injunction as to her and her business was correct.

The language of the court must be considered as limited to that subject. The zeal with which this point was pressed by the counsel for the appellants has led us thus fully to consider it.

The enrollment of the *Commodore* ascertained her ownership and gave her a national character.

The license gave her authority to carry on the coasting trade. Together, they put the appellants in a position to make the question here to be considered.

The language of the Constitution to which this objection refers is as follows: "The Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes." Art. I, 8, clause 4.

The character and extent of the power thus conferred, and the boundaries which separate that power from the powers of the states touching the same subject, came under discussion in this Court for the first time in *Gibbons v. Ogden,* 9 Wheat. 1. It was argued on both sides with exhaustive learning and ability. The judgment of the Court was delivered by Chief Justice Marshall. The Court said:

"They [state inspection laws] form a portion of the immense mass of legislation which embraces everything within the territory of a state *not surrendered to the general government,* all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every

description, as well as laws for regulating the internal commerce of a state, and

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those which respect turnpike roads, ferries &c.;, are parts of this mass."

The proposition thus laid down has not since been questioned in any adjudicated case.

The same principle has been repeatedly affirmed in other cases both in this and the state courts.

In *Fanning v. Gregoire,* 9 How. 534, before referred to, this Court held:

"The argument that the free navigation of the Mississippi, guaranteed by the ordinance of 1787, or any right which may be supposed to arise from the exercise of the commercial power of Congress, does not apply in this case. Neither or these interferes with *the police powers of a state* in granting ferry licenses. When navigable rivers within the commercial powers of the Union may be obstructed, one or both of these powers may be invoked."

Rights of commerce give no authority to their possessor to invade the rights of property. He cannot use a bridge, a canal, or a railroad without paying the fixed rate of compensation. He cannot use a warehouse or vehicle of transportation belonging to another without the owner's consent. No more can he invade the ferry franchise of another without authority from the holder. The vitality of such a franchise lies in its exclusiveness. The moment the right becomes common, the franchise ceases to exist.

We have shown that it is property, and as such rests upon the same principle which lies at the foundation of all other property.

Undoubtedly the states, in conferring ferry rights, may pass laws so infringing the commercial power of the nation that it would be the duty of this Court to annul or control them. 54 U. S. 13 How. 519, *Wheeling Bridge* case. The function is one of extreme delicacy, and only to be performed where the infraction is clear. The

ferry laws in question in this case are not of that character. We find nothing in them transcending the legitimate exercise of the legislative power of the state.

The authorities referred to must be considered as putting the question at rest. The ordinance of 1787 was not particularly

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brought to our attention in the discussion at bar. Any argument drawn from that source is sufficiently met by what has been already said.

The counsel for the appellees has invoked the authority of *Cooley v. Board of Wardens of Philadelphia,* 12 How. 299, in which a majority of this Court held that upon certain subjects affecting commerce as placed under the guardianship of the Constitution of the United States, the states may pass laws which will be operative till Congress shall see fit to annul them.

In the view we have taken of this case, we have found it unnecessary to consider that subject.

There has been now nearly three-quarters of a century of practical interpretation of the Constitution. During all that time, as before the Constitution had its birth, the states have exercised the power to establish and regulate ferries -- Congress never. We have sought in vain for any act of Congress which involves the exercise of this power.

That the authority lies within the scope of "that immense mass" of undelegated powers which "are reserved to the states respectively" we think too clear to admit of doubt.

We place our judgment wholly upon that ground.

There is no error in the decree of the Court of Appeals. It is therefore affirmed, with costs.