Olcott Vs. the Supervisors

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Appellant : Olcott

Respondent : The Supervisors

Judgement :

Olcott v. The Supervisors - 83 U.S. 678 (1872)
U.S. Supreme Court Olcott v. The Supervisors, 83 U.S. 16 Wall. 678 678 (1872)

Olcott v. The Supervisors

83 U.S. (16 Wall.) 678

ERROR TO THE CIRCUIT COURT FOR

THE EASTERN DISTRICT OF WISCONSIN

SYLLABUS

1. This Court will follow, as of obligation, the decisions of the state courts only on local questions peculiar to themselves, or on questions respecting the construction of their own constitution and laws.

2. Whether or not the construction and maintenance of a railroad owned by a corporation and constructed and maintained under a statute of a state authorizing such construction and maintenance is a matter in which the public has any interest of such a nature its to warrant taxation by a municipal division of the state in aid of it is not such a question. It is one of general law.

3. If a contract when made was valid under the constitution and laws of a state as they had been previously expounded by its judicial tribunals and as they were understood at the time, no subsequent action by the legislature or the judiciary will be regarded by this Court as establishing its invalidity.

4. A railroad is it public highway. Being so, and thus a road for public use, a state may impose a tax in furtherance of that use even though the road itself be built and owned by a private corporation.

5. An act of the Legislature of Illinois, authorizing a vote of the people of a particular county upon the question whether they would aid the building of a certain railroad, and if they voted in favor of aiding authorizing the issue of county orders for money to aid in the building, *held,* on an application of the principles just above stated to have been a proper exercise of legislative authority, and the county charged on such orders issued by it, and given to the road by way of donation.

Error to the Circuit Court for the Eastern District of Wisconsin, in which court Olcott sued the supervisors of the County of Fond du Lac, Michigan, upon certain county orders issued by the county February the 15, 1869, in pursuance of an Act of Assembly of the state approved on the 10th of April, 1867, and entitled

"An act to authorize the

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County of Fond du Lac to aid the completion of the Sheboygan & Fond du Lac Railroad, and to aid the building of a railroad from the City of Fond du Lac to the City of Ripon."

This act authorized the people of the county to vote upon the question whether they would aid the building of the railroads named; and provided, in case the vote should be in favor of granting aid, that "county orders" should be issued as the roads should be completed. The sixth section of the act was thus:

"If, under the provisions of this act, the said County of Fond du Lac shall furnish the aid contemplated in this act, then the railroad companies, or their successors and assigns, shall transport wheat upon the said roads upon the following terms for ten years: wheat by the carload from the City of Fond du Lac, and from stations east thereof within the County of Fond du Lac, to the City of Sheboygan, at a price not exceeding five cents per bushel; and from the City of Ripon to the City of Sheboygan, at a price not exceeding seven cents per bushel; and from all stations between the Cities of Fond du Lac and Ripon to Sheboygan, at a rate *pro rata* with the freight from Fond du Lac to Sheboygan; and the companies or corporations owning and building the said roads, their successors and assigns, shall make such arrangements between themselves as shall give full effect to the provisions of this section, and the rates of freight above limited shall also apply to the companies owning or operating the said roads over and upon all other railroads where said companies respectively run their cars for the transportation of freight."

A vote was taken under the act, and was in favor of granting the aid. The county orders were accordingly issued in conformity with the act. They were all made payable to the Sheboygan & Fond du Lac Railroad Company, or bearer, and those now sued on had passed, *bona fide,* into the hands of Olcott.

In 1870, that is to say, subsequent to the issue of these orders, though prior to the trial of this case in the court below, the Supreme Court of the State of Wisconsin, in the

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case of *Whiting v. Fond du Lac County,* [Footnote 1] held this act to be void, upon the ground that the building of a railroad, to be owned and worked by a

corporation in the usual way, was not an object in which the public were interested, and therefore that the act in question was void, for the reason that it authorized the levy of a tax for a private and not a public purpose. The court there said:

"The question is as to the power of the legislature to raise money or to authorize it to be raised, by taxation, for the purpose of donating it to a private corporation. We held, in *Curtis v. Whipple,* [Footnote 2] that the legislature possessed no such power, and the conclusion in that case we think follows inevitably in this, from the principles stated in the opinion. The cases are not distinguishable, except in the single circumstance that the corporation here, to which it is proposed to give the money, is a railroad company in behalf of which the power of eminent domain has been exercised by the state for the purpose of enabling it to secure the land over which to build its road. . . . But though a railroad company may be, as to its capacity to assume and exercise in the name of the state the power of eminent domain delegated to it, so far a public or *quasi-* public corporation, yet in all its other powers, functions, and capacities it is essentially a private corporation, not distinguishable from any other of that name or character. . . . The road, with all its rolling stock, buildings, fixtures, and other property pertaining to it, is private property, owned, operated, and used by the company for the exclusive benefit and advantage of the stockholders. This constitutes a private corporation in the fullest sense of the term. . . . And if we examine any book of authority on the subject, [Footnote 3] we shall find that such is and always has been the rule of the law as to the corporate character of such companies, notwithstanding the delegation of power of eminent domain, and their consequent subjection in a certain degree to public use and convenience. They are always classed among private corporations, such as banking, insurance, and manufacturing corporations, and corporations for the building of bridges, turnpikes, canals &c.; . . . Our conclusion, therefore, is that though a railroad

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company may possess this single exceptional corporate characteristic, it is nevertheless essentially a private corporation, coming fully within the operation of

the principles laid down in *Curtis v. Whipple,* and that the taxation complained of cannot be sustained."

The court below, in this case, held that decision to be binding upon the federal courts, and charged that the act under which the orders were issued was void. Judgment having gone accordingly it was now here for review.

It may here be mentioned that by the Constitution of Wisconsin, the legislature of the state has power to alter or repeal charters granted by it.

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MR. JUSTICE STRONG delivered the opinion of the Court.

Whether the Act of Assembly of the State of Wisconsin, approved April 10, 1867, under which the county orders or promissory notes sued upon, in this case, were issued, was a lawful exercise of constitutional power, is the only question in the case. In the court below, the jury was instructed in substance that the issue of the orders was unauthorized and void and that the act of assembly above referred to was an unconstitutional exercise of legislative

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power. No other question was made at the trial, and no other is now presented to us for our determination.

At the outset we are met by the fact that the supreme court of the state has decided the act was unauthorized by the constitution. It was thus ruled in *Whiting v. Fond du Lac County.* [Footnote 4] If that decision is binding upon the federal courts, if it has established a rule which we are under obligations to follow, the matter is settled.

It is undoubtedly true in general, that this Court does follow the decisions of the highest courts of the states respecting local questions peculiar to themselves, or respecting the construction of their own constitutions and laws. But it must be kept

in mind that it is only decisions upon local questions, those which are peculiar to the several states, or adjudications upon the meaning of the constitution or statutes of a state, which the federal courts adopt as rules for their own judgments. That *Whiting v. Fond du Lac County* was not a determination of any question of local law, is manifest. It is not claimed to have been that. But it is relied upon as having given a construction to the constitution of the state. Very plainly, however, such was not its character or effect. The question considered by the court was not one of interpretation or construction. The meaning of no provision of the state constitution was considered or declared. What was considered was the uses for which taxation generally, taxation by any government, might be authorized, and particularly whether the construction and maintenance of a railroad, owned by a corporation, is a matter of public concern. It was asserted (what nobody doubts), that the taxing power of a state extends no farther than to raise money for a public use, as distinguished from private, or to accomplish some end public in its nature, and it was decided that building a railroad, if it be constructed and owned by a corporation, though built by authority of the state, is not a matter in which the public has any interest, of such a nature as to warrant taxation in its aid.

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For this reason it was held that the state had no power to authorize the imposition of taxes to aid in the construction of such a railroad, and therefore that the statute giving Fond du Lac County power to extend such aid was invalid. This was a determination of no local question or question of statutory or constitutional construction. It was not decided that the legislature had not general legislative power; or that it might not impose or authorize the imposition of taxes for any public use. Now, whether a use is public or private is not a question of constitutional construction. It is a question of general law. It has as much reference to the constitution of any other state as it has to the State of Wisconsin. Its solution must be sought not in the decisions of any single state tribunal, but in general principles common to all courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no state court can conclusively determine

for us. This consideration alone satisfies our minds that *Whiting v. Fond du Lac County* furnishes no rule which should control our judgment, though the case is undoubtedly entitled to great respect.

There is another consideration that leads directly to the same conclusion. This Court has always ruled that if a contract when made was valid under the constitution and laws of a state, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the legislature or the judiciary will be regarded by this Court as establishing its invalidity. [Footnote 5] Such a rule is based upon the highest principles of justice. Parties have a right to contract, and they do contract in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rule. If, then, the doctrine asserted in *Whiting v. Fond du Lac County* is inconsistent with what was the recognized

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law of the state when the county orders were issued, we are under no obligation to accept it and apply it to this case. The orders were issued in February, 1869, and it was not until 1870 that the supreme court of the state decided that the uses for which taxation was authorized by the statute of April 10, 1867, were not public uses, and therefore that the statute was invalid. Prior to 1870 it seems to have been as well settled in Wisconsin as elsewhere that the construction of a railway was a matter of public concern, and not the less so because done by a private corporation. That the state might itself make such an improvement, and impose taxes to defray the cost, or exercise its right of eminent domain therefor, was beyond question. Yet confessedly it could neither take property or tax for such a purpose, unless the use for which the property was taken or the tax collected was a public one. And it was also the undoubted law of the state that building a railroad or a canal by an incorporated company was an act done for a public use, and thus the power of the legislature to delegate to such a company the state right of eminent domain was justified. In *Pratt v. Brown,* [Footnote 6] it was said by the supreme court of the state that the incorporation of companies for the purpose of constructing railroads or canals affords the best illustration of the delegation of

power to exercise the right of eminent domain, by the condemnation and seizure of private property for public use upon making just compensation therefore. It is admitted that the only principle upon which such delegation of power can be justified is that the property taken by these companies is taken for the public use. Similar language was used and a decision to the same effect was made in *Robbins v. Railroad Company.* [Footnote 7] In *Hasbrouck v. Milwaukee,* [Footnote 8] a case where the right to tax for the improvement of a harbor was under consideration, the court used this significant language:

"The power of municipal corporations, when authorized by the legislature to engage in works of internal improvement,

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SUCH AS THE BUILDING OF RAILROADS, canals, harbors, and the like, or to loan their credit in aid thereof, and to defray the expenses of such improvements, MAKE GOOD THEIR PLEDGES *by an exercise of the power of taxing the persons and property of their citizens, has always been sustained on the ground that such works, although they are in general operated and controlled by private corporations, are nevertheless, by reason of the facilities which they offered for trade, commerce, and intercommunication between different and distant portions of the country, indispensable to the public interests and public functions.* It was originally supposed that they would add, *and subsequent experience demonstrated that they have added vastly, and almost immeasurably, to the general business, the commercial prosperity, and the pecuniary resources of the inhabitants of cities, towns, villages, and rural districts through which they pass, and with which they are connected.* It is, in view of these results, *the public good thus produced, and the benefits thus conferred* upon the persons and property of all the individuals composing the community, that courts have been able to pronounce them *matters of public concern,* for the accomplishment of which *the taxing power might lawfully be called into action.* It is in this sense that they are said to fall so far within the purposes for which municipal corporations are created, that such corporations may engage in, or pledge their credit for their construction."

So also in *Soens v. Racine,* [Footnote 9] where the validity of a law authorizing a local tax to secure the lake shore was in question, the court discussed at length the nature of a public use for which taxation was lawful, and ruled that the use was a public one though only the property of some inhabitants of the city was saved, remarking that to determine whether a matter is a public or merely private concern we have not to determine whether or not the interests of some individuals will be directly promoted, but whether those of the whole or the greater part of the community will be. And again, in *Brodhead v. Milwaukee,* [Footnote 10] the court said:

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"The legislature cannot create a public debt, or levy a tax, or authorize a municipal corporation to do so, in order to raise funds for a mere private purpose. It cannot, in the form of a tax, take the money of the citizen and give it to an individual, *the public interest or welfare being in no way connected with the transaction.* The objects for which the money is raised by taxation must be public, and such as subserve the common interest and wellbeing of the community required to contribute. . . . To justify the court in arresting the proceedings and declaring the tax void, the absence of *all possible* public interest in the purposes for which the funds are raised must be clear and palpable; *so clear and palpable as to be perceptible by every mind* AT THE FIRST BLUSH."

All these expositions of the law of the state were made by its highest court before the county orders now in suit were issued. They certainly did assert that building a railroad, whether built by the state or by a corporation created by the state for the purpose, was a matter of public concern, and that because it was a public use, the right of eminent domain might be exerted or delegated for it, and taxation might be authorized for its aid. It was the declared law of the state, therefore, when the bonds now in suit were issued, that the uses of railroads, though built by private corporations, were public uses, such as warranted the exercise of the public right of eminent domain in their aid, and also the power of taxation.

We are not, then, concluded by a decision, made in 1870, that such public uses are not of a nature to justify the imposition of taxes. We are at liberty to inquire what are public uses, and what restrictions, if any, are imposed upon the state's taxing power.

It is not claimed that the Constitution of Wisconsin contains any *express* denial of power in the legislature to authorize municipal corporations to aid in the construction of railroads, or to impose taxes for that purpose. The entire legislative power of the state is confessedly vested in the General Assembly. An implied inhibition only is asserted.

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It is insisted that, as the state cannot itself impose taxes for any other than a public use, so the legislature cannot empower a municipal division of the state to levy and collect taxes for any other than such a use, and it is denied that taxation to enable the County of Fond du Lac to aid in the completion of the Sheboygan & Fond du Lac Railroad is taxation for a public use. No one contends that the power of a state to tax, or to authorize taxation, is not limited by the uses to which the proceeds may be devoted. Undoubtedly taxes may not be laid for a private use. But is the construction of a railroad by a company incorporated by a state for the purpose of building it, and endowed with the state's right of eminent domain, a thing in which the state has, as such, no interest? That the Legislature of Wisconsin may alter or repeal the charter granted to the Sheboygan & Fond du Lac Railroad Company is certain. This is a power reserved by the constitution. The railroad can, therefore, be controlled and regulated by the state. Its use can be defined; its tolls and rates for transportation may be limited. Is a work made by authority of the state, subject thus to its regulation, and having for its object an increase of public convenience, to be regarded as ordinary private property?

That railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence. Very early the question arose whether a state's right of eminent domain could be exercised

by a private corporation created for the purpose of constructing a railroad. Clearly it could not, unless taking land for such a purpose by such an agency is taking land for public use. The right of eminent domain nowhere justifies taking property for a private use. Yet it is a doctrine universally accepted that a state legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean if not that building a railroad, though it be

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built by a private corporation, is an act done for a public use? And the reason why the use has always been held a public one is that such a road is a highway, whether made by the government itself or by the agency of corporate bodies, or even by individuals when they obtain their power to construct it from legislative grant. It would be useless to cite the numerous decisions to this effect which have been made in the state courts. We may, however, refer to two or three which exhibit fully not only the doctrine itself, but the reasons upon which it rests. [Footnote 11]

Whether the use of a railroad is a public or a private one depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the state. Though the ownership is private the use is public. So turnpikes, bridges, ferries, and canals, although made by individuals under public grants, or by companies, are regarded as *publici juris.* The right to exact tolls or charge freights is granted for a service to the public. The owners may be private companies, but they are compellable to permit the public to use their works in the manner in which such works can be used. [Footnote 12] That all persons may not put their own cars upon the road, and use their own motive power, has no bearing upon the question whether the road is a public highway. It bears only upon the mode of use, of which the legislature is the exclusive judge. [Footnote 13]

It is unnecessary, however, to pursue this branch of the inquiry further, for it is not seriously denied that a railroad, though constructed and owned by a private corporation, is a matter of public concern, and that its uses are so far public that the right of eminent domain of the state may be exerted

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to facilitate its construction. But it is contended that though the purpose and the use may be public, sufficiently to justify taking private property, they are not public when the right to impose taxes is asserted. It is argued that there are differences between the power of taxation and the power of taking private property for a public use, and that because of these differences it does not follow that wherever the one power may be exerted the other can. We do not care to inquire whether this is so or not. The question now is whether if a railroad, built and owned by a private corporation, is for a public use, because it is a highway, taxes may not be imposed in furtherance of that use. If there be any purpose for which taxation would seem to be legitimate it is the making and maintenance of highways. They have always been governmental affairs, and it has ever been recognized as one of the most important duties of the state to provide and care for them. Taxation for such uses has been immemorially imposed. When, therefore, it is settled that a railroad is a highway for public uses, there can be no substantial reason why the power of the state to tax may not be exerted in its behalf. It is said that railroads are not public highways *per se;* that they are only declared such by the decisions of the courts, and that they have been declared public only with respect to the power of eminent domain. This is a mistake. In their very nature they are public highways. It needed no decision of courts to make them such. True they must be used in a peculiar manner, and under certain restrictions, but they are facilities for passage and transportation afforded to the public, of which the public has a right to avail itself. As well might it be said a turnpike is a highway, only because declared such by judicial decision. A railroad built by a state no one claims would be anything else than a public highway, justifying taxation for its construction and maintenance, though it could be no more open to public use than is a road built and owned by a corporation. Yet it is the purpose and the uses of a work which determine its

character. And if the purpose is one for which the state may properly levy a tax

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upon its citizens at large, its legislature has the power to apportion and impose the duty, or confer the power of assuming it upon the municipal divisions of the state. [Footnote 14] And surely it cannot be maintained that ownership by the public, or by the state, of the thing in behalf of which taxation is imposed, is necessary to justify the imposition. There are many acknowledged public uses that have no relation to ownership. Indeed, most public expenditures are for purposes apart from any proprietorship of the state. A public use may, indeed, consist in the possession, occupation, and enjoyment of property by the public, or agents of the public, but it is not necessarily so. Even in regard to common roads, generally, the public has no ownership of the soil, no right of possession, or occupation. It has a mere right of passage. While, then, it may be true that ownership of property may sometimes bear upon the question whether the uses of the property are public, it is not the test.

The argument most earnestly urged against the constitutionality of the act is that it attempted to authorize Fond du Lac County to assist the railroad company by a donation. It is stoutly contended that the legislature could not authorize the county to impose taxes to enable it to make a donation in aid of the construction of the railroad, even if its ultimate uses are public. But why not? If the county can be empowered to aid the work because it is a public use, what difference can it make in what mode the aid be extended? It is conceded that in Wisconsin municipal corporations may be authorized to become subscribers to the stock of private railroad companies, and to raise money by taxation to meet bonds given in payment of the subscriptions. This has been decided by the highest court of the state. [Footnote 15] And the reasons given for the decision are, not that the municipal bodies acquired property rights by their subscriptions, or that they thereby obtained partial control of the railroad companies, but that subscriptions to the stock were

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a mode of aiding a work in which the public had an interest, a work of such a nature that it might properly be aided by taxation. Never was the right to tax supposed to rest in any degree upon anything else. Whether the stock had value or not was not even considered. Equally with the taxation, the municipal subscription could be justified only because it was for a public use. If taxation is invalid because laid for a private use, the nature of the use cannot be changed by receiving stock for the money raised. There is no substantial difference in principle between aid given to a railroad company by subscription to its stock and aid given by donations of money or land. The burden upon the county may be the same in whichever mode the aid is given, and the uses promoted are precisely the same. And the courts have never attempted to make any distinction in the cases; certainly not until the case of *Whiting v. Fond du Lac County,* and even then no real difference is shown. On the other hand, the power to tax for the purpose of making donations in aid of railroads built by private corporations has been affirmed. [Footnote 16] We have, however, considered this subject in the case of the *Railroad Co. v. County of Otoe,* [Footnote 17] and nothing more need now be said. What we have already remarked is sufficient to show that in our opinion the Act of the Legislature of Wisconsin approved April 10th, 1867, was a constitutional exercise of legislative power, and consequently that the circuit court erred in instructing the jury that it was unconstitutional and void and in directing a verdict for the defendants.

Judgment reversed and the record remitted with instructions to award a venire de novo.

THE CHIEF JUSTICE, MR. JUSTICE MILLER, and MR. JUSTICE DAVIS dissented from the preceding opinion.

[Footnote 1]

25 Wis. 188.

[Footnote 2]

24 Wis. 350.

[Footnote 3]

See Angell & Ames on Corporations, 40.

[Footnote 4]

25 Wis. 188.

[Footnote 5]

Havemeyer v. Iowa City, 3 Wall. 294; *Gelpcke v. City of Dubuque,* 1 Wall. 175; *Ohio Life & Trust Company v. Debolt,* 16 How. 432.

[Footnote 6]

3 Wis. 612.

[Footnote 7]

6 *id.* 641.

[Footnote 8]

13 *id.* 37.

[Footnote 9]

10 Wis. 280.

[Footnote 10]

19 *id.* 652; *see also Clark v. Janesville,* 10 *id.* 136; and *Bushnell v. Beloit, ib.,* 195.

[Footnote 11]

Beekman v. Saratoga & Schenectady Railroad Co., 3 Paige 45; *Bloodgood v. Mohawk & Hudson Railroad Co.,* 18 Wendell 1; *Worcester v. Railroad Co.,* 4 Metcalf 564.

[Footnote 12]

Charles River Bridge Co. v. Warren, 7 Pickering 495.

[Footnote 13]

Cooley's Constitutional Limitations.

[Footnote 14]

Cooley's Constitutional Limitations 262.

[Footnote 15]

Clark v. Janesville, 10 Wis. 136; *Bushnell v. Beloit, ib.,* 195.

[Footnote 16]

Gibbons v. Mobile and Great Northern Railroad Co., 36 Ala. 410; *Davidson v. Commissioners of Ramsay County, Minnesota.*

[Footnote 17]

Supra, p. 83 U. S. 675 .