Tucker Vs. Ferguson

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Appellant : Tucker

Respondent : Ferguson

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Tucker v. Ferguson

89 U.S. (22 Wall.) 527

APPEAL FROM THE CIRCUIT COURT FOR

THE WESTERN DISTRICT OF MICHIGAN

SYLLABUS

1. Congress, by act of 1857, granted public lands to a state, to be "held" by it, to aid in the construction of a railroad through the state, the road, when made, to be and remain a public highway for the use of the government of the United States,

free from toll or other charges upon the transportation of property or troops of the United States, the government to have a right also to carry the mails thereon.

The lands were to be exclusively applied in the construction of the road, disposed of only as the work progressed, and applied to no other purpose whatsoever. The act prescribed that the mode of disposition should be by sale made from time to time as the road advanced.

The state, by act of its legislature, accepted the lands "with the restrictions and upon the terms and conditions contained in the said act of Congress," and by the same act, in which the acceptance was made, vested in a then recently organized railroad company the lands "fully and completely, according to the Act of Congress relating thereto and the direction of the board of control" of the state (a body appointed by its governor and Senate), and "whose duty" it was made by the act "to manage and dispose of the lands" in aid of the construction, the company being made, moreover, subject to such rules and regulations as the legislators of the state might from time to time enact and provide

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in regard to the management and disposition of the lands not inconsistent with the Act of Congress, &c.;

The company not being able to sell the lands (then a wilderness) in the manner contemplated by Congress, before the rood was made through them, issued its bonds and mortgaged the lands to trustees, the mortgages containing a clause empowering the trustees to sell the mortgaged lands and apply the proceeds to the payment of the bonds.

The road was completed by aid of the money for which the bonds were sold, and a certain number (a small proportion) of the bonds were taken up and cancelled by the trustees from the proceeds of the land sold for the purpose of doing this.

Before the residue of the bonds were paid, and while the bulk of the lands were yet unsold in the hands of the trustees, the state taxed them. *Held* upon this part

of the case that the lands had been "sold" within the meaning of the act of Congress, and that though the state while she held the title as trustee of the United states could not tax them, she now could do so.

2. A statute, after laying a certain tax *on a "railroad company"* -- a specific annual tax of one percent on the cost of the road -- and reserving a right to impose a further tax upon gross earnings, enacted that "the above several taxes shall be in lieu of a11 other taxes to be imposed within the state."

Held that the statute imposed a tax in reference to the railroad itself, and had no relation to lands owned by the company and not used nor necessary in working the road and in the exercise of its franchise, but which it had mortgaged and was holding for sale, even though the chief purpose of the sale was to pay the mortgage debt, a heavy one and one which had been contracted for the exclusive purpose of building the road. And that these lands might be taxed notwithstanding the abovementioned agreement.

3. An act of the legislature exempting property of a railroad from taxation is not a "contract" to exempt it unless there be a consideration for the act. An agreement where there is no consideration is a nude pact; the promise of a gratuity spontaneously made, which may be kept, changed, or recalled at pleasure, and this rule of law applies to the agreements of states made without consideration as well us to those of persons.

4. No presumption exists in favor of a contract by a state to exempt lands from taxation. Every reasonable doubt should be resolved against it.

5. When such a contract exists, it must be rigidly scrutinized and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require.

The Flint & Pere Marquette Railway Company was a railway corporation of Michigan, and the present suit was

a bill in equity brought by Tucker, trustees for the holders of bonds issued by the said company, which bonds were secured by a mortgage and deed of trust executed by the company to them, the said Tucker, as trustees, upon lands granted by Congress to the State of Michigan, and by that state granted, in a qualified way, to the company to aid in constructing a road which it was about to make, the object of the bill having been to restrain one Ferguson *et al.,* who were supervisors and assessing officers of Osceola County, Michigan, from levying and collecting local taxes upon the said lands situate in the said county.

The general purpose of the bill was to restrain the assessment of taxes at any time on the lands granted by Congress during the term allowed for the completion of the road. But if the court should think there was no ground for so general a restraint, then to restrain the collection of taxes which had been already assessed on the lands for the year 1873, the bill alleging that in no event were they taxable prior to April 1, 1874.

The case, more particularly stated, was thus:

On the 3d of June, 1856, [Footnote 1] Congress granted to the State of Michigan, to aid in the construction of certain proposed railroads, including one from Flint, in the southeasterly part of the state, to Pere Marquette, on Lake Michigan, in the northwestern part -- a distance of about one hundred and seventy miles, much of the western part of which especially was a wilderness -- every alternate section of land designated by odd numbers, for six sections in width on each side of said roads, "which lands," said the act of Congress granting them, "shall be held by the State of Michigan for the use and purpose aforesaid." By the terms of the first section of the act, the lands were to be located in no case further than fifteen miles from the lines of the road, and it was enacted that they should be "exclusively applied" in the construction of the road; "disposed of only as the

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work progressed, and applied to no other purpose whatsoever."

Section third enacted that the lands thus granted to the state, should

"be subject to the disposal of the legislature thereof *for the purpose aforesaid, and no other,* and that the railroads shall be and remain public highways *for the use of the government of the United States, free from toll or other charges upon the transportation of any property or troops of the United States.* "

Section fourth was in these words:

"That the lands hereby granted to said state shall be disposed of by said state only in manner following -- that is to say that a quantity of land not exceeding one hundred and twenty section for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold; and when the governor of said state shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of such roads, may be sold, and so from time to time until said roads are completed; and if any of said roads is not completed within ten years, [Footnote 2] no further sales shall be made, and the lands unsold shall revert to the United States."

Section fifth enacted that the United States mail should be transported over the road under the direction of the Post Office Department at such price as Congress might by law direct.

On the 12th of February, 1857, and of course after the passage of the Act of Congress, the Flint & Pere Marquette Company was organized under the *general* railroad law of Michigan. And two days after this, again -- that is to say, on the 14th of February, 1857 -- the State of Michigan by an act enacted

"That the lands, franchises, rights, powers, and privileges

granted to, and conferred upon, the State of Michigan by an act of Congress, approved June 3, 1856, be, and the same are hereby, *accepted,* with the

restrictions and upon the terms and conditions contained in said act of Congress."

The act proceeded in substance thus:

"SECTION 2. So much of the aforesaid lands &c.;, as are or may be granted and conferred in pursuance of said act of Congress to aid in the construction of a railroad, . . . from Flint to Pere Marquette are hereby *vested fully and completely* in the Flint & Pere Marquette Railway Company, *according to the provisions of the Act of Congress relating thereto and the direction of the board of control hereby appointed.* The said railroad company shall be subject to all the conditions, restrictions, and obligations imposed upon them by this act, as hereinafter provided."

"SECTION 3. The lands &c.;, hereby conferred upon and vested in the railroad company shall be exclusively applied in the construction of its line of road, and to no other purposes whatsoever."

Section seventh enacted that after the completion of twenty continuous miles of road, the company might sell sixty sections of land in any twenty continuous miles of line of road &c.;,

"and after the full and final completion of the entire length of its road and the acceptance of the same by the board of control herein provided, then the company may sell the remainder of the lands &c.;, and not before."

The act further enacted,

"None of the lands hereby granted shall be liable to taxation for seven years from 1st September next [*i.e.,* shall not be liable till September, 1863], except such parts as shall be sold or be improved."

The act went on:

"SECTION 8. . . . For the purpose of properly managing and disposing of the lands . . . , the Governor of the State of Michigan, together with six commissioners to be nominated by the governor and confirmed by the senate, are hereby constituted a

board of control of the same, *whose* duty it shall be to manage and *dispose* of such lands in aid,"

&c.;

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"SECTION 12. The said railroad company shall at all times and in all matters be subject to the laws of this state and to such rules and regulations as may from time to time be enacted and provided by the legislature of the State of Michigan in regard to the management and disposition of the said lands not inconsistent with the provisions of this act and the act of Congress making the said grant of lands to this state, and they shall be entitled to all the immunities and privileges conferred by said laws."

" *Provided* that nothing herein contained shall be so construed as to relinquish the right of the state to any specific tax imposed upon any railroad company within this state."

The company was bound by the nineteenth section to complete and put in running order at least twenty continuous miles during each year after 1st December, 1857, and to complete the road within seven years from 15th November next, 1857, *i.e.,* by the 16th of November, 1864, a term, however, by both state legislation and act of Congress subsequently enlarged till March 3, 1876.

At the time when the Flint & Pere Marquette Railway Company was organized, all railroad companies in Michigan were liable, under a *general* railroad act (section forty-five), to a specific tax of one percent on their "paid in capital stock." Of course, in the case of a company like the Pere Marquette and the other companies provided for in the Act of Congress -- built, all of them, chiefly by the land grant -- the tax was a light one.

The twentieth section of the present act, which raised one of the important questions in the case, now made for the Flint & Pere Marquette Company, as well as for the others, a heavier tax. The section was as follows:

"SECTION 20. In consideration of the grants of land and other privileges hereby conferred . . . , the said several railroad companies are hereby required, within sixty days from and after the first day of each and every year, to pay into the treasury of this state, *as a specific annual tax, one percent upon the cost of the road and its equipments and appurtenances of whatever kind,* and it shall be lawful for the legislature of this state, in their

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discretion, after ten years, to impose upon either or each of said railroad companies the payment of a further tax upon the gross or total earnings of such road of not exceeding two percent, *which said above several taxes shall be in lieu of all other taxes to be imposed within this state.* "

The Flint & Pere Marquette Company accepted the grant made by this act.

It may be here stated that it was afterwards enacted by Congress that the State of Michigan might authorize the *sale* of *sixty* sections, whenever the governor might certify that ten additional miles was completed. The original act, it will be remembered, had prescribed a sale of one hundred and twenty sections on a certificate of twenty miles completed &c.; This last matter is, perhaps, unimportant.

As the reader will doubtless have observed in reading what goes before, Congress granted the lands which it did grant to the state, to be disposed of "only" in a certain manner in the Act of grant stated. They were to be "sold" [Footnote 3] from time to time as certain lengths of the road were completed, and no other manner of disposing of them is stated in the act as contemplated. And the State of Michigan, in accepting the lands, accepted them "with the restrictions and upon the terms and conditions contained in said act of Congress." [Footnote 4] It was soon found, however, as the road progressed westward, that it was coming to regions which were uninhabited and that the land there, being in a wilderness, could not be *sold* for twenty miles ahead of even a completed twenty miles of road -- that is to say, could not be *sold* in advance of the construction of the road through them. It was the road itself which first gave value to them. Thus it

happened that no money could be got out of the lands by sale in advance of a road through the twenty miles. A plan of obviating this difficulty now suggested itself. It being found that the bonds of the company (which now had a part of its road completed) could be sold and the funds requisite to finish the rest of the road raised on such bonds,

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provided they were secured by mortgage with power of sale in the mortgagee on the unsold lands, it was resolved to carry out an arrangement on this basis. The company did accordingly in September, 1866, by a mortgage and *trust deed containing a power of sale* and terms and conditions for the management of the trust, convey to Tucker *et al.* as trustees 153,600 acres of land as security for bonds to the amount of $500,000, which bonds were issued and sold, and which were now outstanding . . . except such portions thereof as had been taken up and cancelled from the proceeds of land sold for that purpose.

Subsequently the company, desiring to raise a further sum of money to enable it to prosecute the further construction of its road, made, September, 1868, a second mortgage and trust deed by which it mortgaged and conveyed all the remaining lands of the land grant for the purpose of securing bonds to the amount of $2,500,000, which were issued and sold upon the market.

It did not appear from anything in the transcript of the record sent here what value the lands mortgaged bore to the amount of bonds issued.

Tucker and the other, as trustees, were to hold said lands together with other property in said trust deed mentioned as security for such bondholders. The second mortgage and trust deed, like the first, contained a power of sale.

In this way, funds were obtained and the road was in process of completion, when a difficulty occurred between the trustees and the assessors of Osceola County which was the cause of the present suit.

This part of the matter was thus:

The reader will remember that by the twentieth section of the act of the Legislature of Michigan accepting the grant from Congress, it was enacted that the railroad company should pay into the treasury of the state, *as a specific annual tax, one percent upon the cost of the road and its equipments and appurtenances of whatever kind,* and that the said twentieth section made it lawful for the legislature of the state, after ten years, to impose upon the company the payment of a

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further tax upon the gross or total earnings of such road of not exceeding two percent, *"which said above several taxes,"* the section declared, *"shall be in lieu of all other taxes to be imposed within this state."* [Footnote 5]

By two subsequent acts -- one of the 14th and one of the 15th of February, 1859 -- this twentieth section was repealed; the company was to sell one hundred and twenty sections on completing twenty miles, and not sell any sections before; was to have a right when the road was finished through its entire length and accepted by the board of control, to sell all the remaining lands; all the lands granted were declared to be free from taxation for seven years, from September 1, 1859, *i.e.,* till September 2, 1866, and the company was declared to be subject to the tax imposed in the already mentioned forty-fifth section of the *general* railroad law of 1855, by which section a tax of one percent upon the capital stock paid in was imposed, which tax of one percent upon the capital stock paid in, it was by the new acts enacted:

" *Shall be in lieu of all other taxes upon the property of the said company,* whether real, personal, or mixed, except penalties by this act imposed."

This tax of one percent on capital paid in -- necessarily a very small tax, as we have already remarked, in the case of a road built chiefly or wholly by land grants of Congress -- was, of course, more favorable to the company than that laid by the twentieth section of the old act now repealed.

On the 18th of April, 1871, came another act laying by its thirty-seventh section -- an act and a section of much importance in this case -- a new tax, that is to say,

"an annual tax upon gross receipts." The section, after laying this tax, proceeded:

" *This tax shall be in lieu of all other taxes upon the property of said company,* whether real, personal, or mixed, except penalties imposed by law, except real property not necessary for carrying on the ordinary operations or franchises of their road. "

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" *Provided* only such lands granted to any railroad company shall be liable to local taxation as are or may be opposite to and coterminous with the constructed portion and portions of said roads respectively."

" *And provided further* that no such lands shall be subject to taxation until after the expiration of three years from and after the 1st day of April, A.D. 1871, and until after three years from the date of the certificate showing that such lands have been earned by said railroad company, after which time said lands shall be taxed as other lands, except as hereinafter provided."

" *And provided further* that the lands of the several land grant railroad companies, opposite to and coterminous with their lines as now in operation, shall be subject to taxation in two years from said 1st day of April, A.D. 1871."

Finally came an Act of May 1, 1873, a "general railroad law," as it was called, and the cause of the present difficulty. This act, which provided for the incorporation of railroad companies, the details of their organization, and which prescribed a great variety of rules, regulations &c.;, in regard to their stock, routes, rights, liabilities, power to borrow money, obligation to pay &c.;, enacted:

"SECTION 3. Every company . . . shall, on or before the 1st day of July in each year, pay to the state treasurer an annual tax upon the gross receipts of said company, which amount or tax shall be in lieu of all other taxes upon the property of such companies *except such real estate as is owned and can be conveyed by such corporation under the laws of this state and not actually occupied in the exercise of its franchises and not necessary or in use in the proper operation of its*

road, but such real estate so excepted shall be liable to taxation in the same manner, for the same purposes, and to the same extent, and subject to the same conditions and limitations as to assessment for taxation, to taxation, and to the collection and return of taxes thereon as is other real estate in the several townships within which the same may be situated. "

Under this law -- the Flint & Pere Marquette Railway not being yet finished, but on the contrary having forty miles yet to make out of the hundred and seventy which if finished it would consist of -- the defendants below, Ferguson

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and others, supervisors of Osceola County, taxed for the year 1873 the lands which the company had by the two mortgages already mentioned, mortgaged with power of sale to Tucker and others, to raise funds to *complete* the road, *these lands being none of them opposite to or coterminous with the line of the railroad in operation in April, 1871.*

There had been issued and sold of the bonds, and were still outstanding in the hands of purchasers, on the 1st of January, 1873:

Under the mortgage and trust deed of 1863 . . . . $ 146,000

" " " " 1868 2,224,000

$2,370,000 [Footnote 6]

The lands now taxed, as stated already, were in Osceola County. There had been in that county,

Originally . . . . . 28,598 acres

Of which the company had sold. . . . 17,705 "

Leaving unsold and now taxed . . . . 10,892 "

Hereupon, on the 20th of August, 1873 -- the road being still unfinished to the extent already stated and $2,368,000 being unpaid out of the $3,000,000 of bonds issued or secured and capable of being issued -- the trustees, Tucker, filed a bill, the bill in the present suit, praying an injunction on the assessors against levying the taxes laid.

I. The bill referred to the Act of Congress of June 3, 1856, granting the land to the State of Michigan, to be held by it to aid in the construction of a railroad between Flint and Pere Marquette, to be subject to the disposal of the legislature

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of the state for that purpose alone, and to be sold by it, and to be applied to the road; the said road to be a public highway for the use of the government of the United States, and the lands to revert to the United States unless the road were made within ten years.

It referred also to the Act of the state of February 14, 1857, accepting the said grant, "with the restrictions and upon the terms and conditions contained in said act of Congress."

It alleged that the title of lands &c.;, granted by Congress to the state, were by the last act vested fully and completely in the Flint & Pere Marquette Company, then just incorporated, to be applied exclusively to the construction of the road, and to no other purpose whatsoever.

It set forth further that the company, to enable it to raise money for the purpose of constructing the road, had made the two mortgages and trust deeds of September, 1866, and September, 1868 -- giving the history of them exactly as already stated -- conveying certain parts of the lands to the complainants as trustees to secure certain bonds, "which bonds," said the bill,

"were issued and sold, and which are now outstanding in the hands of divers persons unknown . . . excepting such portion thereof as has been taken up and

cancelled from the proceeds of lands held for that purpose . . . that the said trust deeds contained a power of sale, and terms and conditions for the management of the trust."

[The bill referred to the mortgages and deeds of trust as annexed to the bill. But none were annexed in the transcript of the record that came here -- REP.]

The bill submitted that the title to the lands taken *by the state* under the Act of June 3, 1856, was taken *in trust* for the specific purpose in the act named, and that it was a violation of the trust thus created for the state to assume to derive a revenue from them, as it was now seeking to do by its general railroad law of 1873, before they were *sold.*

II. The bill further alleged that the said general railroad law violated the obligation of CONTRACTS made by the state with the company. For that,

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1st. By the twentieth section of the Act of the Legislature of Michigan, of 1857, accepting the grant, and by the grant from the state to the company, and by the company, construction of the road, a contract had been made with the company that none but specific taxes should be imposed upon it; that accordingly the company's lands should be free from taxation.

2d. By the Act of the Legislature of Michigan of April 18, 1871, it was, in the thirty-seventh section of the act, provided that railroad companies, under the provisions of the act, should pay a specific tax upon gross receipts, and provided that only such lands granted to any railroad company should be liable to local taxation as might be opposite and coterminous with the constructed portion of its road, and that no such lands should be subject to taxation until after the expiration of three years from April 1, 1871, nor until after three years from the date of the certificate showing that such lands had been earned, and providing further that the lands of the several land grant companies opposite and coterminous with their line then in operation should be subject to taxation in two years from April 1, 1871.

The bill now alleged that the lands which the Supervisors of Osceola County, the defendants in the case, had listed for taxation for the year 1873 were not any of them opposite to or coterminous with the line of the said Flint & Pere Marquette Railway Company, in operation in April, 1871, and therefore that under the proviso of the section, they could not, even if in view of former enactments they were taxable at all, be taxed before April, 1874.

III. The bill made another point.

In the year 1850, as previously thereto, railroad corporations in Michigan were taxed by specific taxes, and a Constitution of the state adopted in that year and in force when the Flint & Pere Marquette Company was organized and all the other matters above spoken of were occurring thus ordained:

"The state may *continue* to collect all specific taxes accruing to the Treasury under existing laws. The legislature may provide

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for the collection of *specific taxes* from banking, *railroad,* plank road, and other *corporations* hereafter created."

The bill stated that from the very organization of the state until the year 1870, the property of railway companies in Michigan had never been taxed by local assessment and taxation, nor in any other manner than by specific taxes. And it insisted that under the constitution of the state, the property was liable to specific taxation only, and that it was not competent for the legislature of the state to change the manner and mode of taxation in respect to such property.

The argument meant to be presented by the bill in its making this statement was this: that specific taxes having been the sort of taxes always collected from railroad corporations prior to the adoption of the constitution, and that instrument having authorized the continuance of such taxes, it was meant that those taxes and no others should be collected; that the language, though in form permissive, was in fact mandatory and restrictive, since if it were not so construed, the clause

might as well be stricken out, the power to levy all sorts of taxes, specific as well as others, existing under the *general* legislative power of the state.

The bill stated that the Flint & Pere Marquette Railway Company had been assessed and had paid each year a specific tax, levied and collected under the laws of Michigan, and that the sum of $23,446 had been paid for the specific tax assessed under the general railroad law of 1873, which last named sum was due and was paid on the 1st day of July, 1873.

The defendants demurred to the bill. To understand one ground on which their demurrer was meant to be founded, it is necessary to mention another provision of the Constitution of Michigan, which as they conceived bore in their favor. It was thus:

"Corporations may be formed by *general* laws, but shall not be created by special act except for municipal purposes. All laws passed pursuant to this section may be amended, altered, or repealed. "

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The manner in which, according to the ideas of the counsel for the state, this provision bore on the subject of controversy was this: for that whereas the contracts which the railroad company alleged to have been made not to tax &c.;, were made by the *general* railroad laws of 1855 and 1871, these laws were, by this provision of the constitution, open to be amended, altered, or repealed.

The reader will have remarked that the ground other than that of specific contract relied on by the bill for injunction was that the state was a trustee for sale as prescribed by the act of Congress, and as such trustee could not tax the lands before they were sold.

In argument in the court below, this ground was sought to be strengthened by reliance on the *interest* which both the United States and the state had in the lands the subject of the trust, and on the ground of contract made by the trust.

The position thus, by way of addition or as ancillary or explanatory, sought to be wrought into the grounds for relief were exfoliated in three propositions, thus:

"1st. That the interest of the United States in the lands was not so completely extinguished as that they were subject to state taxation in 1873, and would not be so extinguished until the state had finally executed the trust created by the act of Congress granting them by the application of the proceeds of the *sales* of the lands to the cost of constructing the railroad."

"2d. That in executing this trust, the state still retained, as to the road uncompleted or *unpaid* for, an interest in and supervision over the unsold lands which could not be relinquished until the trust was finally executed as aforesaid, and that this interest and supervision was inconsistent with the right to tax the lands until after they had been *sold.* "

"3d. That the national and state legislation granting the lands to and the acceptance of them by the railway companies on the stipulated terms, and their compliance with those terms, created a contract between the state and the company that the lands should be applied exclusively and without diminution to the construction of the railroads,

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which contract would be impaired by taxation before they had been *sold* and their proceeds so applied."

The court dismissed the bill.

In its opinion, it said:

"The three propositions which in different forms object to the tax because the lands are 'unsold' are sufficiently answered by deciding that within the meaning of the act of Congress and the legislation of the state, the disposition of the lands already made constitutes a sale."

". . . What the General Government intended has been accomplished. The act has been done which under the statute vested the power of sale."

"A power of sale to raise money is well executed by the creation of a mortgage for that purpose."

To the propositions that under the Constitution of Michigan it was unconstitutional to tax the corporation other than by a specific tax, and that by the twentieth section of the Act of 1857 and the thirty-seventh section of the Act of 1871, the state had entered into contracts not to tax the lands, the court said that an exemption from taxation could not be inferred unless an intention to exempt appeared by language wholly unambiguous, that no such intention here thus appeared in either of the sections relied on, and further that so far as regarded the provision of the constitution and the twentieth section of the Act of 1857, neither applied to the property in question, and that no such contract appeared in the section of the act of 1871.

In this Court the following errors were assigned:

"That the interest of the United States in the lands was not so far extinguished that they were liable to taxation by the state."

"That the state, as trustee, has still an interest in the lands inconsistent with taxation."

"That there was a contract between the state and the company that the lands should be applied exclusively and without diminution of value to the construction of the road, and that

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this contract is impaired by taxing them before they are sold and the proceeds so applied."

"That the twentieth section of the act of the legislature of 1857 contained a contract that none but specific taxes should be imposed upon railroad companies,

and that the taxation of the lands in question under the Act of 1873 was a violation of that contract."

"That the state had no power to impair this contract to the prejudice of the company and its creditors."

"That the thirty-seventh section of the Act of 1871 contained a grant that lands opposite to and coterminous with the constructed portions of the road should not be subject to local taxation until three years from the 1st of April, 1871, and that the taxation of the lands in question of 1873 impaired that grant, and was illegal."

"That the Constitution of Michigan prohibits the imposition of any but specific taxes upon railway corporations."

From the decree dismissing the bill the trustees took this appeal.

It should be here stated that not only at the time when the bill in this case was filed, August 20, 1873, but afterwards when the case was argued in the court below and even when the briefs for this Court were printed and the above-quoted assignment of errors was made, the road was not yet finished, no rails being yet laid on the western end. So that the reversionary and other *interest* in the United States under the terms of its grant to the State of Michigan was a matter that could be insisted upon in argument with more or less plausibility or reason.

On the case's coming here for argument, however, February 17, 1875, and after it had been called, it was announced at the bar by the counsel for the State of Michigan that the road was now built through to its western terminus and open for travel along its entire route, and had been accepted by the State of Michigan. And this was not denied by the other side.

Hence, in the oral argument by the complainants here, the reversionary *interest* of the United States in the lands was

not pressed as it had been in the court below and even in the briefs, though the points as there made were left to stand, the counsel for the company still asserting that the state's trusteeship was still so far unexecuted that the clause providing for the reversion of the lands to the United States under the act of Congress was an important factor in ascertaining the extent of the state's responsibility as trustee.

However, as to the immediate object of the bill -- an injunction against collecting the taxes laid for 1873, at which date, as the bill alleged, forty miles of the track were not laid out of the one hundred and seventy necessary to be laid -- the argument from interest retained, perhaps, whatever weight it had originally.

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MR. JUSTICE SWAYNE, having referred to the statutes and recapitulated the facts bearing on the case, delivered the opinion of the Court.

The appellants have assigned in this Court various errors. [Footnote 7]

We shall consider the several propositions which they state without specifically enumerating them.

The United States granted the lands to the state for a specific purpose. That purpose was "to aid in the construction of railroads" upon the routes designated. The land was made "subject to the disposal of the legislature for the purpose aforesaid, and no other." Congress prescribed certain safeguards to secure their application to the construction of the roads and to prevent failure or diversion. The precautions were few and simple. Except as to the first one hundred and twenty sections, the power of sale was to attach only as the road was completed in successive sections of twenty miles each. Subsequently the extent of the sections and the quantity of land were reduced one-half. If the entire road was not completed within the time limited, no further sales were to be made, and all the unsold land was to revert to the United States. Subsequently the reverter was limited to the lands to which the right to sell had not attached. In other words, it was confined to those where the title was inchoate only, and had no application to

those where the title was complete. As to those of the former class, there was not, when the bill was filed, and is not now, any default. If the fact were otherwise, it would be for the United States, by office found or other proper proceeding, to assert their rights. But they do not complain, and the complainants cannot do it vicariously for them. [Footnote 8] It is a conclusive answer to the proposition we are considering that the United States have no more claim, legal or equitable, touching the lands here in question than they have to lands which they have sold and patented to others in the regular course of the administration of the land department of the government, and that Congress has not seen

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fit, either expressly or by implication, to impose any restriction upon the taxing power of the state. That subject was remitted, as, under the circumstances, it might well be, wholly to her wisdom and discretion.

The state accepted the grant subject to all the conditions prescribed. She thereupon became the agent and trustee of the United States. The powers and duties with which she was clothed might all have been discharged by private individuals. The characters of sovereign and trustee were united in the same party. The state did not in any wise abdicate her sovereignty by accepting the trust, but the former might be exercised to render more effectual the discharge of the latter. She was in no wise fettered except as she had agreed to fulfill all the terms and conditions which accompanied the grant. To that extent she was clearly bound, and anything in conflict with those conditions would be *ultra vires,* and cannot be supported. What were the terms to which she submitted herself? She was to devote the lands to the accomplishment of the object which Congress had in view, and there was an implied agreement on her part to take all the measures reasonably within her power to make their application effectual to that end. The mode was left entirely to herself. We see no ground upon which it can be claimed she bound herself any further. Upon general principles, she could not tax the land while the title remained in the United States, nor while she held them as the trustee of the United States, which, in the view of the law, was the same thing. But when the state, proceeding in the execution of the trust, had transferred her entire

title to the company and they had perfected their title and acquired the right to sell, the case assumed a very different aspect.

The validity of the mortgages is not drawn in question, and is too clear to be doubted. We need not, therefore, consider that subject. When the mortgages were executed, the complainants took the legal title, so far as the company held by that title, and the equitable or inchoate title of the company to the residue of the lands. Copies of the mortgages

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are not attached to the bill, and we are not advised particularly of their contents. If they contain a covenant of warranty, the legal title, as fast as it was acquired by the company, inured to the mortgagees. [Footnote 9]

If there was no warranty, and the land, and not the title, of the company was conveyed, the company is barred by estoppel from setting up the after-acquired title, and the estoppel runs with the land. The result is the same as if there had been a warranty. [Footnote 10]

When the grant was made by the state to the company, the entire title before held by the former passed to the latter. Nothing remained to the state but the performance of the remaining duties of the trust, without any title, present or potential, to the lands.

Forbearance to tax was a bounty voluntarily given by the state. Forbearance for a time doubtless increased to some extent the value of the lands. Never to tax would have increased their value still more. [Footnote 11] There is no foundation for a claim for one more than for the other. The state, in the act accepting the grant, agreed *sua sponte* to forbear to tax for seven years. There is no complaint that this stipulation has been violated. Any obligation, legal or equitable, to do more in this way is wanting.

The company, so far as the matter of right is concerned, were upon a footing with all other alienees of the United States. The imposition of taxes can in no just sense

be said to be a diminution of the value of the lands. [Footnote 12] If Congress had thought so, they would have forbidden it. Liability to taxation is an incident to all real estate. Exemption is an exception. When claimed, to be effectual, it must be clearly made out.

The proposition founded upon the twentieth section of the Act of the legislature of the 14th of February, 1857, is unsound.

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There are several answers. We shall state but one of them. That section imposes a tax with reference to the railroad itself. It has no relation to the lands owned by the company not used nor necessary in operating the road. The lands of the class of those here in question doubtless were not present to the mind of the legislature when that section was framed. The language employed cannot receive the comprehensive construction contended for. [Footnote 13] The subject of taxing the lands of the company had already been dealt with. The seventh section of the act provided that they should not be taxed for seven years from the 1st of September, 1857. It would have been a solecism to exempt them for seven years and in the same act to exempt them without limit of time. Our view gives harmony and symmetry to the two provisions. Where such an exemption is claimed, the language from which it is alleged to arise is always to be strictly construed.

This provision for exemption was by the clearest implication an assertion by the state *in limine* of the power to tax. The subsequent exemption involves the like claim.

The provision of the thirty-seventh section of the act of 1871, exempting the lands specified from local taxation until three years from the 1st of April, 1871, which period has not elapsed, was not a contract. There was no consideration. The company was required to do nothing, and did nothing in return. As between individuals, the stipulation would belong to the category of *nude pacts.* It has no higher character because one of the parties was a state, the other a corporation, and it was put in the form of a statute. It was the promise of a gratuity

spontaneously made, which might be kept, changed, or recalled at pleasure. The case of *Christ Church Hospital v. County of Philadelphia* [Footnote 14] is

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instructive upon this subject. In 1833, the Legislature of Pennsylvania passed an act declaring

"That the real property, including ground rents, now belonging to Christ Church Hospital, in the City of Philadelphia, so long as the same shall continue to belong to said hospital, shall be and remain free from taxes."

In 1853, a law was passed which subjected the ground rents to taxation. The supreme court of the state sustained the validity of the latter act. The hospital removed the case, by a writ of error under the twenty-fifth section of the Judiciary Act of 1789, to this Court. Here it was insisted that the act of 1833 was a contract in perpetuity, and the contract clause of the Constitution of the United States was invoked for its protection. This Court unanimously affirmed the judgment of the supreme court of the state.

The taxing power is vital to the functions of government. It helps to sustain the social compact and to give it efficacy. It is intended to promote the general welfare. It reaches the interests of every member of the community. It may be restrained by contract in special cases for the public good, where such contracts are not forbidden. But the contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists, it is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require. It is in derogation of public right, and narrows a trust created for the good of all. [Footnote 15]

Whether under the Constitution of Michigan the state can impose taxes other than those which are specific upon the Flint & Pere Marquette Company is a question which in this case does not arise. The taxes involved in this controversy were not to be upon the corporation, nor

upon property used in the exercise of its franchises, but upon lands which it had mortgaged and was holding for sale. The distinction and the consequences have been considered. We need say nothing further upon the subject.

We think the demurrer was necessarily sustained, and the bill properly dismissed.

Decree affirmed.

[Footnote 1]

11 Stat. at Large 21, 1.

[Footnote 2]

That is to say, by June 4, 1866 -- REP.

[Footnote 3]

Supra, p. 89 U. S. 530 .

[Footnote 4]

Supra, pp. 89 U. S. 530 -531.

[Footnote 5]

See supra, p. 89 U. S. 532 .

[Footnote 6]

The case did not show with distinctness whether the *whole* 3,000,000 of bonds had been *sold* and gone into the hands of purchasers and whether $630,000 had been taken up and cancelled (which, since only $2,370,000 were now outstanding, would necessarily have been the case had the whole $3,000,000 been issued) or whether, while the mortgages and trust deeds were made to *secure* the whole $3,000,000, an amount less than that whole had been put on the market and sold.

But it was clear that a *portion* of whatever were put on the market and sold had been "taken up and cancelled under an execution of the power in the trust deed" from "the proceeds of lands sold for the purpose."

[Footnote 7]

See them set out as made, *supra,* pp. 89 U. S. 542 -543 -- REP.

[Footnote 8]

Baker v. Gee, 1 Wall. 333.

[Footnote 9]

Bank of Utica v. Masereau, 3 Barbour's Chancery 367.

[Footnote 10]

Van Rensselaer v. Kearney, 11 How. 323.

[Footnote 11]

New Jersey v. Wilson, 7 Cranch 164.

[Footnote 12]

Burlington & Missouri Railroad Company v. Hayne, 19 Ia. 143.

[Footnote 13]

Vermont Central Railroad Co. v. Town of Burlington, 28 Vt. 193; *State v. City of Newark,* 1 Dutcher 315; *Inhabitants of Worcester v. Western Railroad Corporation,* 4 Met. 564; *State v. Flavell & Fredericks,* 4 Zabriskie 370.

[Footnote 14]

65 U. S. 24 How. 301.

[Footnote 15]

Providence Bank v. Billings, 4 Pet. 561; *Philadelphia Railroad Co. v. Maryland,* 10 How. 393; *Jefferson Branch v. Skelly,* 1 Black 447; *Delaware Railroad Tax,* 18 Wall. 225.