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The YALE LAW JOURNAL wishes to announce the election of the following men to its editorial board:

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LEGISLATIVE POWER OVER THE CONTRACTS OF A MUNICIPAL CORPORATION.

The case of *Graham et al. v. Folsom et al.*, 26 Sup. Ct. Rep. 245, recently decided, presents an interesting question. Is the exercise by a state of the right to alter or destroy its municipal corporations effectual to impair the obligation of municipal contracts? The United States Supreme Court in the above case held that it was ineffectual.

At common law a corporation, either private or municipal, upon dissolution became civilly dead. The effect of this was that land belonging to the corporation reverted to the grantor and that debts owing to and by the corporation were extinguished. The common law rule that the debts of a private corporation were extinguished upon its dissolution, has been so far modified that a court of equity will now take hold of its property and administer it for the benefit of its creditors and stockholders. The obligation of contract survives dissolution, and the contract may be

enforced by a court of equity, so far as to subject for their satisfaction any property held by it at the time. In equity its property constitutes a trust fund for the payment of its debts; and if a municipal corporation upon its dissolution has property, a court of equity will take possession of it for the benefit of the creditors. *Broughton v. Pensacola*, 93 U. S. 266, 268.

The right of the state to repeal the charter of one of its municipalities cannot be questioned. But while the charter may be repealed at the pleasure of the legislature, the contracts of the municipal corporation made while it was still in existence may still be enforced against the property held by it at the time of the appeal. *Meriwether v. Garrett*, 102 U. S. 472. Judge Dillon in his excellent work lays down the principle that legislative acts respecting the public powers of municipal corporations, not being contracts, may be changed at pleasure when the constitutional rights of creditors and others are not invaded. *Dillon on Municipal Corporations*, (4th ed.) 105.

It is not within the power of a legislature by a repeal of a charter of a municipal corporation to invade the rights of its creditors and cancel its indebtedness. Such legislation impairs the obligation of contract and is unconstitutional and void. *Morris v. State*, 62 Texas 728. The obligation to perform its contracts rests upon a municipal corporation as well as upon a natural person, and a legislative act which deprives a corporation of its charter cannot be construed as relieving it from liabilities already incurred. This is a matter of public policy, for a contrary rule would place persons contracting with municipal corporations so completely at the mercy of the legislature that it would be hard to find anyone willing to contract with them. In the case of *Smith v. Inge*, 80 Texas 285, the court said that the whole legislation abolishing the charter and dissolving the municipal corporation of Mobile were enactments which were unconstitutional and void because they impaired the obligation of contracts, by destroying all remedies of the creditors of the city for the enforcement of their demands.

Municipal corporations cannot extinguish their debts by changing their name or organizing under a new charter. A debt once contracted by a municipal corporation will survive against whatever corporate entity is created to take its place and exercise powers over practically the same people and territory. An action at law may be maintained against the new corporation as successor of the former on a judgment recovered against the former before dissolution. *Hill v. Kahoka*, 35 Fed. 32. The City of Mobile being greatly indebted, the legislature passed an act repealing its

charter and abolishing the city. On the same day an act was passed incorporating the Port of Mobile which included nearly all of the old city within its limits. In an action brought by a creditor of the old city two questions were raised. 1. Whether a preceding creditor was entitled to a judgment against the Port of Mobile on an obligation of the City of Mobile? 2. Whether the power of taxation existing when the debt was created by the City of Mobile could be enforced in favor of the creditor? Both questions were decided in favor of the creditor and the court issued a mandamus against the Port to compel payment. *Mobile v. Watson*, 116 U. S. 289. In *Amy v. Selma*, 77 Ala. 103, it was held that a new corporation named Selma created to replace one named City of Selma, which had been dissolved, was its successor and liable for its debts. See also *Meyer v. Porter*, 65 Cal. 67. A statute extinguishing one corporation and throwing its obligations upon another raises an implied promise on the part of the successor to pay the same. *Little v. Union Township Committee*, 40 N. J. L. 397.

The power of taxation by a municipal corporation and its limitations at the date of contract become part of the contract, and continue in favor of a creditor under such contract without regard to subsequent reductions of the limitation of the power. *Morris v. State*, 62 Texas 728; *U. S. v. Port of Mobile*, 12 Fed. 768. Where there is a mode provided by statute for levying taxes to pay a debt, it is a part of the obligation, and any subsequent act which affects rights under the contract is void. *Siebert v. Lewis*, 122 U. S. 284. Where a municipal corporation entered into a contract while a law giving a remedy by compulsory taxation was in force, the repeal of the law and the adoption of a new constitution forbidding the levy of a tax in such case were held to be unconstitutional and void as impairing the obligation of contract. *Sawyer v. Concordia*, 12 Fed. 754. Although such legislation has been plentiful the courts have been diligent in protecting the interests of the creditors.

UNION REFRIGERATOR TRANSIT CO V. KENTUCKY. 199 U. S. 194.

This case came up on an attempt by the state of Kentucky to tax the corporation, which does business under a Kentucky charter, on 2000 of its cars, which were all the cars owned and operated by the corporation in various states of the Union and of which less than a hundred were operated in the state of Kentucky. The plaintiff's contention is that only those cars operated in the state of Kentucky, and therefore under its protection, should be taxed and not those cars employed in other states in the prosecution of its business and therefore permanently located there.

The attempted taxation is charged to be a violation of the due process of law clause of the Fourteenth Amendment.

Mr. Justice Brown wrote the opinion sustaining the plaintiff's contention, basing his decision on the following principles: the power of taxation is exercised upon the assumption of an equivalent rendered to the taxpayer in protection to his person or property and in other matters; if the property is wholly within the taxing power of another state to which it may be said to owe allegiance and to which it looks for protection, and if the power attempting to tax is not in a position to benefit or protect the property or person to be taxed, the taxation, based merely upon domicile, partakes rather of the nature of extortion than taxation; it is therefore beyond the power of the legislature of Kentucky to lay such a tax. It is to be observed that this case does not involve the question of the taxation of intangible personal property, or of inheritance or succession taxes, nor questions arising between different municipalities or taxing districts within the same state.

Chief Justice Fuller and Justice Holmes agreed in the decision arrived at but doubted the application of the Fourteenth Amendment to the result.

THE RIGHT OF A CARRIER TO DEAL IN THE GOODS IT CARRIES.

Railroad rates and rebates, railroad regulations and remedies have occupied the attention of the American public through debates in Congress, comments in the newspapers and criticism in the magazines to the exclusion, altogether, of other pressing questions in world politics. The situation in this country upon the subject resembles, to a marked degree, the present English discussion on tariff reform; both seem to be universally misunderstood.

As a commentary upon the rate problem the recent opinion of Mr. Justice White of the Supreme Court, showing as it does both the strength and the weakness of the present legislation, is like a bell in the fog of popular misconception. Considering the Interstate Commerce Act of 1887 in a phase never before squarely presented before it, the Supreme Court of the United States in *New York, N. H. & H. R. Co. v. Interstate Commerce Com.*, 26 Sup. Ct. 272, affirmed and enlarged an injunction granted below restraining the Chesapeake & Ohio R. Co. from further executing an agreement to deliver coal in New Haven at \$2.75 per ton when the cost of purchase of the coal at the mines, plus the cost of delivery and the published freight rates, aggregated \$3.92 per ton.

The case went upon the ground that the prohibitions in the second, third and sixth sections of the act to regulate commerce concerning any departure from the public rate "directly or indirectly," any "undue or unreasonable preference or advantage," "undue or unreasonable prejudice or disadvantage" and "unjust discrimination" were in direct conflict with the asserted right of a carrier to sell the commodities which it transports at a price less than the cost and the published rates, and to attribute the loss to the company in its capacity as dealer and not as a carrier.

The court further increased the efficiency of the Interstate Commerce Act by interpreting the prohibitions therein contained as ever operative; from such a construction it is apparent that a contract by a railroad to sell and transport coal at a stipulated price comes within the prohibitions of the act whenever, from any cause, the gross sum realized is insufficient to yield the market rate of the coal plus the freight rate, although the contract may not have been open to that objection when made. The reason for this, according to Mr. Justice White, is that "This must be the case in order to give vitality to the prohibitions of the Interstate Commerce Act against the acceptance at any time by a carrier of less than its published rates. We say this because we think it obvious that such prohibitions would be rendered wholly ineffective by deciding that a carrier may avoid those prohibitions by making a contract for the sale of a commodity stipulating for the payment of a fixed price in the future and thereby acquiring the power during the life of the contract to continue and execute it, although a violation of the act to regulate commerce might arise from doing so."

But, even granted that a violation of the act is thus prevented, what would hinder a carrier from turning such a construction to its advantage, and by raising its own freight rates—as it may lawfully do if still reasonable (Int. Com. Act, sec. 3),—render illegal any unprofitable contract into which it might have entered?

The situation in respect to the great coal carrying railroads of this country is at present anomalous. The "purpose of the act to regulate commerce was to compel the carrier, as a public agent, to give equal treatment to all," but in so far as that statute was intended to affect all railroads alike, its object has been frustrated by the rulings of the Interstate Commerce Commission. To-day there are two distinct classes of carriers of coal; (1) railroads, such as the Chesapeake and Ohio, which are prohibited from making any undue discrimination or departure from their published rates by means of "dealing in the purchase and sale of

coal;" and (2) other carriers, the D. L. & W. R. Co. and the Lehigh Valley R. Co., being examples, which are not subject to the provisions of the act as to rates and undue preferences, because of the administrative construction given to the statute by the Interstate Commerce Commission. *Haddock v. D. L. & W. R. Co.*, 4 I. C. C. Rep. 296, and *Coxe Bros. v. Lehigh Valley R. Co.*, 4 I. C. C. Rep. 535, decided in 1890 and 1891. The controlling consideration in these decisions was that the railroads in question were, either by their charter or by legislative grant, existing at the time of the adoption of the act, possessed of the commingled attributes of carrier and producer, and hence, exempted from its operation. The somewhat doubtful logic of these cases seems to have been recognized by the commission in later holdings and the principles there stated only regarded as applicable to strictly identical cases. *In re Unlawful Rates*, 7 I. C. C. Rep. 33. Mr. Justice White considered the Supreme Court bound by these rulings, but rather significantly added: "at least, until Congress has legislated on the subject."

The press throughout the country has taken for granted that this decision places the American law upon the same footing as the English doctrine, *Att'y Gen. v. Great Northern R. Co.* 29 L. I. Ch. N. S. 794, and that the railroads are hereafter forbidden from dealing in the goods they carry, but the wish, in this case, has been father of the thought, as the court expressly refrains from determining this question (p. 276) and limits its decision to a denial of the right of a railroad "to become a dealer under the circumstances stated," *i. e.*, when the price stipulated in the contract does not pay the cost of purchase, the cost of delivery and the published freight rates.

FEDERAL INTERFERENCE WITH STATE ADMINISTRATION OF CRIMINAL LAW.

In the case of the *United States ex rel. Drury & another v. Lewis, Warden of the Common Jail of Alleghany County, Penn.*, 26 Sup. Ct. 229, the Supreme court takes a very important stand relative to interference by Federal courts in the state administration of criminal law. It was held that the Circuit Court had properly denied *habeas corpus* to persons in the military service of the United States, held in custody of state authorities to answer a charge of homicide which is asserted by them to have been committed in discharge of their duty, under the Federal Constitution and laws, to apprehend the deceased for larceny of property from

the Federal arsenal, where the evidence was conflicting as to whether the deceased had surrendered before the fatal shot and where it also appeared that the shot was fired and took effect outside the property of the United States and that the deceased had no connection with the service of the United States.

It is a very important matter to the country and to the citizens of the several states to know if their lives and property will be under the protection of their own state courts or placed in the hands of Federal authorities. So long as it is in the sound discretion of the Federal Supreme Court we may rest assured that it will be decided correctly and in a way that will produce the best results. It is a matter, however, about which the Court cannot be too careful or the rights of the states too well guarded.

In the case of *Re Neagle*, 135 U. S. 1, it was announced that the matter was discretionary with the Supreme Court and in cases of so exceptional a nature *habeas corpus* would be granted, freeing the accused from the control of state officers. This case was indeed exceptional and involved the question as to whether or not the person and life of a Federal judge might be guarded from assault.

Again in *West Virginia v. Laing*, 133 Fed. 887, the petition was granted to prisoners who had been called upon to join a *posse comitatus* to capture a person indicted in the Federal courts for resisting officers. It appears that the petitioner shot the fugitive as he was about to assume a position very dangerous to the lives of the posse. The sound discretion of the court was exercised in this case, freeing the petitioner, for the act was committed in the lawful discharge of a duty imposed on him by the laws of the United States.

But there is a question in the case of *Drury v. Lewis*, as to whether or not the deceased was shot after surrender and the evidence is conflicting. It is certain, if he was, that the petitioner did not fire in the performance of any duty prescribed by Federal laws. So, the case presenting grounds for either jurisdiction, it was for the state courts, having once taken jurisdiction, to decide upon the evidence; and its right to do so could not be collaterally attacked. The Circuit Court properly declined to discharge. The authority of the United States extends all over its territory and it is supreme so far as its sovereignty extends and no state can withhold from it the cognizance of any subject committed to it by the Constitution. *Tennessee v. Davis*, 100 U. S. 257. But it would be unsafe for the citizens of the different states as well as demoralizing to the military service if it were understood

that all the persons in that service should be exempt from state prosecution for any criminal act committed against the citizens of that state and in its jurisdiction, under color of official authority.

The rule, as gathered from the cases, seems to be that if the act done was in the lawful discharge of a duty imposed by the United States and was under the circumstances justified, the Supreme Court will, in the exercise of its sound discretion, grant the *habeas corpus*. *West Virginia v. Laing*, 133 Fed. 887; *Re Neagle*, 135 U. S. 1. This power is conferred in the U. S. Revised Statutes, Sec. 753.

In a very interesting case in the 201 U. S., *Kentucky v. Powers*, not yet in the advance sheets, the Supreme Court shows another evidence of its intention to leave the state courts unmolested in the exercise of their proper jurisdiction of crimes committed within their boundaries. This case is a part of the very considerable prosecution resulting from the murder of the governor of that state some years ago. The accused, after being granted his fifth trial, sought to transfer the case to the Federal courts on the ground that the state authorities had packed the juries so that they were constituted of only men opposed to him politically and that in this way he was denied due process of law and the equal protection of the law. But Justice Harlan, writing the unanimous opinion of the court, says that this clause of the Constitution must be violated by the laws of the state and not by their execution. If the laws are valid but executed badly by the trial court the only relief is by appeal to the highest state courts.