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## POLICE POWER; SCHOOLS FOR WHITE AND COLORED PERSONS.

Following the Civil war it was generally thought that the solving of the negro question lay in the association of the colored people with the whites. A decade, however, has wrought a change in this view; public opinion, especially in the southern states, has discarded the association idea and the separation of the races is now considered the proper solution of this vexed problem. Whether this swinging of the pendulum indicates an advancement or a retrogression remains to be seen. That the advocates of separation, of segregation, almost, are sincere is unquestioned, but sincerity in advocating a cause has never been any guarantee of its wisdom. True it is, every patriot is sincere; so too is every demagogue.

This theory of separation has been carried to great lengths in Kentucky. An act was passed by the legislation of that state in 1904 which made it unlawful "for any person, corporation or association of persons to maintain or operate any college school, or institution, where persons of the white and negro races are both received as pupils for instruction." For violation of this act a fine of $1,000 was imposed. This statute has recently been sustained by the Court of Appeals of Kentucky, in *Berea College v. Commonwealth,* 94 S. W. 623. Such an act was the valid exercise of the police power of

the state, it was said, and not in violation of the fourteenth amendment of the constitution of the United States.

Reduced to a single, simple proposition the court decided that "it was a fair exercise of the police power to restrain the two races from voluntarily associating together in a private school to acquire a scholastic education." Hitherto the police power of the states has only been directed to three phases of the relations between colored and white persons, viz.: (1) Intermarriage; (2) Public Conveyances; (3) Public Schools. The grounds upon which the state bases its right to prohibit intermarriage are obvious; the identity and characteristics of each race could be preserved in no other way. *Ex parte Hobbs,* 1 Woods (U. S.) 537 Gen. O. Cas. No. 6-550. Statutes separating the races in public conveyances and public schools are defended and sustained by the courts because in both instances colored and white persons are forced to associate with one another. Necessity brings them in contact on railroads; compulsory attendance statutes, in public schools. To avoid racial clashes arising from such enforced association, the courts have repeatedly upheld regulations for separate railroad cars and separate public schools; *Westchester & Phil. R. R. Co. v. Miles,* 55 Pa. 209; *Asco. v. School Board,* 161 N. Y. 598.

The present case however is beyond the reasoning of the above decisions. If white and colored persons desire to receive instruction at the same private institution, and teachers are willing to instruct both races, upon what ground can the state prevent this association? Upon what ground should instructors be fined for voluntarily teaching white and colored pupils who voluntarily come together for instruction? Is the legitimate tendency of such voluntary association to "destroy the identity and purity of the races?" Does such intermingling logically result in "clashes between the races?" And yet it is upon these two reasons that the court bases its entire decision.

If a state has the power to fine an instructor for teaching negroes and white persons together, it is respectfully submitted that it also has the power to fine any lecturer who addresses an audience composed of both races, whether that lecturer be connected with a college or hire a hall to address any who may choose to hear. If it is made a misdemeanor to teach white and colored persons together, he who throws open his store to both races equally, should be punished; an innkeeper should be penalized for holding out accommodations to all—wherein lies the distinction?

As a result of the enforcement of this statute an institution,

which for fifty years has held its doors open to all, whose purpose in teaching, as expressed in its charter, was "for promoting the cause of Christ," now stands guilty under an indictment. The Court of Appeals of Kentucky considered this separation statute as only a *fair* exercise of the police power by the legislature.

Whether its decision would have been the same had the police power been exercised in reference to any subject except the relation between the colored and white races, is an entirely different question. This power of police is an expansive power and circumstances often alter cases.

THE RIGHTS OF A PASSENGER PRESENTING A WRONG TRANSFER.

This question has usually arisen when the conductor has attempted to eject the passenger presenting such defective transfer, and the late case of *Norton v. Consolidated R. Co.,* 79 Conn. 109, is no exception.There the plaintiff boarded a car, paid his fare, and asked for a transfer. Through the negligence of the conductor this transfer was wrongly punched and the conductor of the second car attempted to eject him, but finally desisted. The action was brought for damages for the alleged assault.

The particular point involved turns on the question of the conclusiveness of the transfer. In deciding whether or not the transfer is conclusive on the passenger, the various courts of appeal, before whom the problem has arisen, have reached exactly opposite conclusions.

In the case of *Indianapolis St. R. Co. v. Wilson,* 66 N. E. 950, recently decided, the court adopts the view that the ticket is not conclusive evidence of the contract of passage. Jordan, J., says: "The ticket is only evidence of the contract, and if it fails to disclose the true contract its infirmity or fault in this respect must be chargeable to the carrier, and the latter is liable for the natural consequences. . . . Inasmuch as the passenger is not permitted to have anything to do with the preparation of the ticket, the passenger has a right to presume that the ticket furnished him is a correct expression of the contract between himself and the carrier." The plaintiff, therefore, was given damages for the assault. The court cited, in support of this view, *Trice v. Chesapeake, etc., R. R. Co.,* 40 W. Va. 271; *Ellsworth v. Chicago R. Co.,* 95 Iowa 98.

The opposite result, however, was reached in *Bradshaw v. R. R. Co.,* 135 Mass. 407, where the court said the rule of the company requiring the passenger to have a proper ticket was a reasonable one, and the right of the passenger to transportation is no greater than

the right of the railroad company to make reasonable rules. Such a rule, the court says would be more practical and probably result in less fraud and corrupt use of transfers. *Frederick v. R. R. Co.*, 37 Mich. 342.

The case under discussion in Connecticut arrived at the same conclusion as the above holding. The court affirmed that the duty of deciding the passenger's right to ride over the second car devolved upon the conductor of that car and the only evidence of the right was the transfer. The passenger should have paid his fare and sued for the defendant's breach of promise to carry him. The conductor was not considered under an obligation to accept the passenger's statement that the mistake in the transfer was due to the fault of the first conductor. His right to ride for the time being was conclusively evidenced by the terms of the ticket. *Mosher v. St. Louis I. M. & S. Ry. Co.*, 127 U. S. 390.

That the ticket should be conclusive evidence of the passenger's right to travel would seem to be the more practical rule. Any other view makes possible fraudulent statements in regard to the ticket. If the conductor is compelled to take the word of the passenger, what is to hinder the passenger's using a ticket two months old and saying that it had been punched wrongly? An electric road will certainly not make a practice of issuing wrong transfers where an action for damages for breach of contract will always lie; but if the opposite conclusion is adopted, a road is compelled to allow passengers to ride on their own statements of the transactions, and the only remedy open to the company is to bring suits against innumerable unknown persons to decide whether or not an extra fare is owed.

A carrier can always be reached by process if any mistake has been made, but it would impose a great hardship on any corporation to compel it to identify and serve a summons on every passenger who has ridden on a disputed transfer. Considered, therefore, from this point of view, a conclusive transfer is the fairer solution of the problem.

### COAL MINES; THE LAW OF SUBJACENT SUPPORT.

In the case of *Griffin v. The Fairmont Coal Co.*, 53 S. E. 24 (W. Va.), the Supreme Court of Appeals of West Virginia recently handed down a decision which apparently disapproves and repudiates the vital principles of lateral and subjacent support as they have been previously declared by every American court in the interpretation of those contracts which pass title to coal underlying the surface of land. In this case the court decided (Poffenberger, J., *dis-*

*senting*) that where a deed conveys the coal under a tract of land together with the right to enter upon and under said land and to mine, excavate and remove *all* of said coal, there is no implied reservation in such an instrument that the grantee must leave enough coal to support the surface.

The early English cases held, without exception, that the surface owner had a right to demand sufficient support for the surface, even if to that end it was necessary to leave every pound of coal untouched under the land. *Humphries v. Brogden,* 1 Eng. Law & Eq. 250; *Earl of Glasgow v. The Alum Co.,* 8 Eng. Law & Eq. Rep. 13. In the pioneer case of *Harris v. Ryding,* 5 M. & W. 59, Baron Parke said: "I do not mean to say that all the coal does not belong to the defendants, but that they cannot get it without leaving sufficient support for the surface in its natural state." Practically all of the cases base their opinion on one of two grounds, *i. e.,* either on an implied reservation of sufficient support, or on the maxim: *"sic utere tuo ut alienum non laedas."* In the case of *Smith v. Darby,* 42 Law Journal Rep. N. S. Q. B. 140, it was said that there was a presumption in favor of the grantor. That is, the courts adopted the curious mode of assuming, in the first instance, the existence of an intention that the right of support should not be disturbed, and then proceeded to consider whether the provision used could not be reconciled with that intention.

Owing to the extensive experience of the English courts in applying the principles of mining law, the American courts naturally followed implicitly in their footsteps. The right of support was said to be, not in the nature of an easement, but *ex jure naturae.* Hence it could not come within the class of those ambiguities which were to be construed most favorably to the grantee, *Horner v. Wilson,* (Pa.) 21 Am. Rep. 61. Where one person makes a grant of land to another, reserving the minerals in the land, a covenant will be implied, in the absence of all words to that effect, and solely from the nature of the transaction, that the grantor, in removing the minerals reserved, should leave or provide sufficient support for the surface, *Lord v. Carbon Iron Manufacturing Co.,* 42 N. J., Eq. 158. This right of support may not be taken away by mere implication from language not necessarily importing such a result. *The Law of Mines and Minerals in the United States, by Barringer and Adams,* 676. To substantially the same effect are *Livingstone v. Moingona Coal Co.,* 49 Iowa 369; *Jones v. Wagner,* (Pa.) 5 Am. Rep. 385; *Coleman v. Chadwick,* 80 Pa. 81; *Nelson v. Hoch,* 14 Phil. 65.

In the case under discussion the whole decision hangs on the construction of the word *all.* The majority in their opinion contend that since there is a grant to remove *all* the coal, there is an implied grant to take away the support of the surface, because the destruction of the surface is the natural and inevitable result of such removal from under the surface; contracts of this nature, it is said, should be construed according to their natural and literal meaning without any preconceived assumption of an intention that the right of support should not be disturbed.

This view seems to us to be founded on sound reason although opposed to what has hitherto been a settled rule of law. If the surface owner has agreed to the act, anticipated the injury and received compensation therefor it is not just that, by invoking the aid of an implied assumption in his favor, or the principle of *sic utere tuo ut alienum non laedas,* he should be able to recover a second compensation. His injury is rather *damnum absque injuria.*

### THE RIGHT OF A STATE TO CANCEL THE LICENSE OF A FOREIGN CORPORATION, FOR REMOVING SUITS TO A FEDERAL COURT.

It is a well accepted principle that a state may allow a foreign corporation to transact business within its limits subject to any restriction not repugnant to the Federal Constitution.

Whether a state has the right to provide that if a foreign insurance company shall remove a case to the Federal Court which has been commenced in a state court, the license of such company shall be thereupon revoked, was decided affirmatively on May 14th, 1906, by the U. S. Supreme Court, Justices Harlan and Day *dissenting.*

Two cases, *The Security Ins. Co.* and *Traveler's Ins. Co. v. Henry E. Prewitt,* insurance commissioner of Kentucky, were tried together on appeal from the Kntucky Court of Appeals. The former was brought in a lower court to avoid the effect of a revocation of a permit to do business in the state of Kentucky and the latter to enjoin the cancellation of the permit.

In 1874 in the case of *Home Ins. Co. v. Morse,* 87 U. S. 445, it was decided that a statute of the state of Wisconsin requiring a foreign insurance company to agree not to remove any suit for trial into the United States Circuit Courts or Federal Courts was unconstitutional and the agreement void as ousting the jurisdiction given them by the Federal Constitution and statutes of the United States. The point on which this decision turned was that the agreement was exacted as a *condition precedent* to the granting of the license by the state. In a later case, *Doyle v. Continental Ins. Co.,* 94 U. S. 535,

the same view was taken, but as another portion of the same statute was under consideration it was held that the state had the right to revoke the license *after* the company had made the transfer of the suit to the Federal Courts. The distinction to be noted here is between the *condition precedent* held to be unconstitutional and void in the first case and the *right of revocation* which was sustained in the latter case.

*Barron v. Burnside,* 121 U. S. 186, held an Iowa statute unconstitutional as to a section providing for an agreement not to remove a suit to the Federal Court. Under the particular section an officer of the corporation was arrested for not complying with the statute and, though the highest court of Iowa refused to release him under a writ of *habeas corpus,* its decision was reversed by the U. S. Supreme Court. It is worthy of notice, in this connection, that in the Doyle case the statute, as a whole, was upheld, though certain sections of it were decided to be unconstitutional; while in the Barron case the whole statute was rejected through the invalidity of a material part which was a sub-division of one of the sections. The cases cited, in line with the present decision, all hold that a state may not exact an agreement from a foreign corporation not to remove cases to the Federal Court as a condition precedent to transacting business within the state.

A review of the cases and text-books would indicate that even without such a statute the state can expel the foreign corporations and the motive therefore is not to be inquired into. The Kentucky statute is defended on the ground that it only seeks to place foreign corporations on a level with those of the state of Kentucky. Considering the constitutional questions involved, this statement is rather misleading and no attempt is made to explain it either in the case considered or in any of those coming up from the Kentucky courts.

Justices Day and Harlan dissent emphatically from the majority opinion. By a strained construction of previous decisions it is made to appear that such power of revocation does not exist in the state. It is strongly stated that "under the guise of exercising a privilege belonging to the state every foreign corporation might be deprived of the opportunity of doing business within the borders of another state, except on condition that it strip itself of every protection given it by the Federal Constitution." But the state is not exercising a "privilege" in this matter but an admitted right. If such a thing can be imagined it may indeed bring about such a condition of things as existed in the days before the adoption of the Articles of Federation when commerce between the colonies was carried on under great

difficulties. All discussion of corporations engaged in inter-state commerce has been carefully avoided in all of the decisions.

To maintain that a state cannot say to a corporation: "You may do business here if you won't remove cases to the Federal Courts" and then allow the state to revoke or cancel the license of the corporation for this very thing and without any stipulation previously made seems more like an evasion of the question than a distinction.

The foundation of this last decision, and the only ground upon which it can be sustained, seems to be the right inherent in the state to expel any foreign corporation with or without reason.

### POLITICAL CAMPAIGN CONTRIBUTIONS BY INSURANCE COMPANIES.

A question which has been of considerable public interest since the recent insurance investigation in New York arises as to the nature of an insurance company's act in making a contribution to a national campaign fund of a political party. Such act is of course *ultra vires,* but is it illegal in the absence of statutory prohibition?

In a case where the vice-president of an insurance company was sought to be convicted of larceny for participating in such an act, a decision was rendered on *habeas corpus* proceedings which held such a contribution by an insurance company illegal inasmuch as it was against public policy. *People ex rel. Perkins v. Moss, et al.,* 100 N. Y. Supp. 427. The court says: "To permit an artificial creature of the state, unless it be a corporation expressly permitted by law to engage in political matters, by the unauthorized use of its corporate funds to become an active force in a political contest, would be to sanction an infringement upon the rights of the voters who alone . . . may elect, directly or indirectly, officials in advocacy of the principles for which they contend. To encourage the unauthorized use of corporate funds to political purposes might result in the creatures of the state becoming its masters. . . . An unauthorized act of a corporation that affects public interests with such serious and far-reaching consequences is a menace to the state and contrary to pubic policy."

An opposite conclusion, however, was reached on appeal to the Appellate Division, *People v. Moss,* 99 N. Y. Supp. 138, it there being said that such act is neither *malum prohibitum* nor *malum in se;* nor even wrong ethically to the extent of implying criminality inasmuch as "the object could not have been to influence legislation favorable to the interests of the company or to prevent unfriendly legislation, because Congress has no jurisdiction over insurance corporations organized under state laws."

This later opinion in regard to this particular point is by no means satisfactory. It is undoubtedly true as is said in *Thompson on Corporations* (Volume VII, sec. 8314) that the theory that every act of a corporation in excess of its granted powers is an act in contravention of public policy, is now happily disappearing from American jurisprudence. Nevertheless there are many *ultra vires* acts of corporations which by reason of their mischievous nature or tendency are contrary to the peace and order of society and hence illegal. The argument that a contribution to a national campaign fund does not fall within that class because Congress has no jurisdiction of state insurance corporations is by no means convincing. As a conclusive answer to the grounds upon which the lower court bases its reasoning, the opinion of the Appellate Division leaves much to be desired.