1907

The State Tax on Illinois Central Gross Receipts - Another View

James Parker Hall

THE STATE TAX ON ILLINOIS CENTRAL GROSS RECEIPTS—ANOTHER VIEW

By James Parker Hall[1]

In the February number of the Review,[2] Professor Schofield raises and discusses an interesting question concerning the validity of Sections 18 and 22 of the Illinois Central Railroad Company's charter by which the company agrees to pay to the state seven per cent of its gross receipts. Assuming that this provision was meant to include receipts from interstate as well as internal commerce it is suggested that it is probably void as violating the interstate commerce clause of the Federal Constitution. The present writer wishes to mention some considerations that seem to him to point to a different conclusion.

In terms the company agrees to pay the seven per cent of gross receipts "in consideration of the grant, privileges, and franchises herein conferred upon said company." As regards interstate commerce Professor Schofield thinks this immaterial, because the franchise to carry on interstate commerce did not and could not come from the state. Even as regards interstate commerce alone it should be noticed that this is not quite accurate. Illinois grants to the company the right to carry on interstate commerce in *corporate* form, and with *corporate* capacity, and this franchise it could deny at pleasure. True, if it did deny it, Congress might grant it to the company, or some other state might grant it, but without an actual grant of corporate privileges from the legislature of a state or of the United States, the commerce clause of the Constitution gives no one the right or power to do any kind of business in corporate form.

"A franchise is a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration. * * * Under our system their existence and disposal are under control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or public ferry, or railroad, or charge tolls for the use of the same, without such authority. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make

[1] Dean of the University of Chicago Law School.
[2] Vol. I, p. 440.

themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely." [3]

"The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value. * * * The granting of such right or privilege rests entirely within the discretion of the state." [4]

If, therefore, the Illinois Central incorporators, not choosing to apply elsewhere for a charter, had said to the state of Illinois: "We intend to engage in interstate commerce, and we demand the right to do this as an Illinois corporation," Illinois could have refused unconditionally to grant the request. If the incorporators still thought it desirable to obtain an Illinois charter, rather than one from Kentucky or the United States, Illinois could make a bargain and grant on terms what it could have withheld altogether. *Ashley v. Ryan*[5] illustrates this. The purchasers of several railways engaged largely in interstate commerce wished to form a consolidated corporation under the laws of Ohio. They alleged they were entitled to do this as a matter of right, under the commerce clause, without complying with the conditions precedent thereto imposed by Ohio. The Supreme Court denied this contention, saying:

"The right thus sought could only be acquired by the grant of the state of Ohio, and depended for their existence upon the provisions of its laws. Without that state's consent they could not have been procured. * * * As it was within the discretion of the state to withhold or grant the privilege of exercising corporate existence, it was, as a necessary resultant, also within its power to impose whatever conditions it might deem fit as prerequisite to corporate life." [6]

It has been repeated with emphasis by the federal Supreme Court in many decisions, quotations from some of which appear below, that a state may exact such terms as it sees fit for franchises conferred by it. No doubt this is not literally true, at least not true in the sense that every promise made in consideration of a franchise will be enforcible in the courts. If a state exacted from a corporation a promise to break a federal statute or treaty, or to violate the United States Constitution, this of course would not be legally enforcible. Nor, doubtless, would promises to forfeit certain important constitutional guaranties of mere private rights fare any better. If the incorporators agreed that they might be put to death without trial upon certain charges, or that substantial parts of their property might be arbitrarily confiscated at the uncontrolled will of the state, these promises would be void even though made in con-

[3] California v. Cent. Pac. R. R. Co., 127 U. S. 1, 40.
[4] Home Ins. Co. v. New York, 134 U. S. 594, 599-600.
[5] 153 U. S. 436.
[6] Ibid. 440-41.

sideration of corporate franchises. Such limitations were suggested as long ago as 1856, when the Supreme Court said:

"A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter state. This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other states, and by this court, provided they are not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense."[7]

This principle has been applied to promises to forego a constitutional right of much less importance than those suggested above—the right to remove a suit to the federal courts on grounds of diverse citizenship. Such a promise by a foreign corporation as a condition of its right to do business in a state may be disregarded by the promisor, and a suit against it be lawfully removed from the state to the federal courts.[8] As a penalty for this the offending corporation may be at once deprived by the state of its license to do business in the state,[9] but the agreement is unenforcible as a contract.

There are, however, a variety of burdens which a state may impose upon a corporation as a condition of conferring a franchise, which it could not constitutionally impose upon the corporation otherwise, either under its powers of taxation or of regulation. It was early decided that United States bonds were exempt from state taxation,[10] and that a tax upon the capital of a bank was invalid as to such part of the capital as was invested in such bonds.[11] But a tax upon a corporate franchise, measured by the amount of corporate capital, is valid, even though part or all of this consist of government bonds.[12]

"It [the state] may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the state each year, or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection

---

[7] Lafayette Ins. Co. v. French, 18 How. 404, 407; and see, suggesting possible limitations under the commerce clause, Purdy v. Erie Ry., 162 N. Y., at 48.

[8] Home Ins. Co. v. Morse, 20 Wall. 445.

[9] Doyle v. Ins. Co., 94 U. S. 535; Security Ins. Co. v. Prewitt, 202 U. S. 246.

[10] Weston v. Charleston, 2 Pet. 449.

[11] Bank of Commerce v. New York City, 2 Black, 620.

[12] Home Insurance Co. v. New York, 134 U. S. 594.

lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows."[13]

"From the very nature of the tax, being laid upon a franchise given by the state, and revocable at pleasure, it cannot be affected in any way by the character of the property in which its capital stock is invested."[14]

"It is true that where a state tax is laid upon the property of an individual or a corporation, so much of their property as is invested in United States bonds is to be treated, for the purposes of assessment, as if it did not exist, but this rule can have no application to an assessment upon a franchise, where a reference to property is made only to ascertain the value of the thing assessed."[15]

The same is held regarding patent rights. A tax on corporate property or capital cannot include such part of the value as consists of patent rights,[16] but a state tax on the corporate franchise may be measured by the amount of capital employed in the state, though this consist in part of patent rights.[17]

So of imported goods in the original packages. These may not be taxed directly as property by a state,[18] but they may be included in the property of a corporation the amount of which is used as a measure of a franchise tax.[19]

The same is true of tangible property outside the taxing jurisdiction. This may not be assessed even to a domestic corporation as property or capital,[20] but it may all be included in a valuation to measure a franchise tax, even though but a small part of a capital of $10,000,000 is actually within the taxing state.[21]

The same principle has been applied to the regulation of railway rates. It has been held unconstitutional to compel a railroad to sell thousand-mile tickets at a reduced rate,[22] but if a corporation accepts a franchise from the state, subject to such a provision, it may be compelled to observe it.[23] The latter case was carried to the United States Supreme Court by the railroad, and there dismissed for want of prosecution.[24] In the *Purdy Case* the Court said:

"A regulation as to the price of transportation, which would be an illegal

[13] Ibid., at 600.
[14] Ibid., at 601.
[15] Ibid., at 602.
[16] In re Sheffield, 64 Fed. 833; People ex rel. Edison Co. v. Assessors, 156 N. Y. 417.
[17] People ex rel. U. S. Aluminum Co. v. Knight, 174 N. Y. 475.
[18] Brown v. Maryland, 12 Wheat. 419.
[19] People ex rel. Parke, Davis & Co. v. Roberts, 171 U. S. 658.
[20] D., L. & W. Ry. v. Pennsylvania, 198 U. S. 341; Union Transit Co. v. Kentucky, 199 U. S. 194.
[21] Horn Silver Co. v. New York, 143 U. S. 305.
[22] Lake Shore, etc., Ry. v. Smith, 173 U. S. 684; Beardsley v. N. Y., L. E. & W. Ry., 162 N. Y. 230.
[23] Purdy v. Erie Ry., 162 N. Y. 42; Minor v. Erie Ry., 171 N. Y. 566.
[24] Erie Ry. v. Minor, 199 U. S. 613.

exaction when sought to be imposed on existing corporations solely by legislative fiat, may, in the case of future corporations, be the mere performance of the obligation of a contract. The authority to construct and operate a railroad is not the natural right of a citizen, but a franchise proceeding from the favor or grant of the state. As a condition of such grant, the legislature may require the company to transport passengers at any prescribed rate of fare; equally, it may require that certain classes of passengers be transported at a particular rate of fare, or that any passenger, under certain circumstances and on compliance with certain requirements, be transported at such rate."[25]

In the light of these decisions we should expect to find a percentage of gross receipts, though partly derived from interstate commerce, upheld as a valid measure of compensation for a state franchise; and this appears to be the law. The first federal case raising the question was *State Tax on Railway Gross Receipts,*[26] which upheld a Pennsylvania tax on the gross receipts of a domestic railway corporation, obtained in part from interstate transportation. The decision was placed on two grounds: (1) that the receipts in the hands of the company were property whose derivation had lost its distinctive character; and, (2) that, as a tax on the franchises of a domestic corporation, gross receipts might be properly used as a measure of the value or extent of exercise of such franchises. The first ground was later overruled in *Phila SS. Co. v. Pennsylvania,*[27] but the second was not, and was referred to without criticism.[28] The Court did indeed say that the law then before it, if intended as a tax on the franchise of *doing business* (consisting here of foreign and interstate transportation only), would be bad, but it did not refer to the franchise of assuming corporate form. The distinction between these two kinds of franchises has often been adverted to.[29] The second ground of the *Gross Receipts Case* has never been disapproved by the Court, although Mr. Justice MILLER grumbled about it guardedly for some years.

In *The Delaware Railroad Tax,*[30] a Delaware statute was unanimously upheld which measured a tax upon the corporate entity or franchise of a railway company by a percentage of its net income, though most of this was derived from interstate transportation. The

[25] 162 N. Y. at 49.
[26] 15 Wall. 284.
[27] 122 U. S. 326.
[28] Ibid., at 342.
[29] See Home Insur. Co. v. New York, 134 U. S., at 599; Lumberville, etc., Co. v. Assessors, 55 N. J. Law, at 537; Adams Express Co. v. Ohio Auditor, 166 U. S., at 224; People ex rel. Aluminum Co. v. Knight, 174 N. Y., at 478.
[30] 18 Wall. 206.

statute provided that only such part of the railroad's income should be assessed as was proportional to its mileage in the state as compared with its total mileage, which in this case was about one-fourth. In so small a state as Delaware, however, it is clear that a large part, probably the larger part, of this, came from transportation between Delaware and other states. The Court said that the manner in which such a tax should be assessed, however arbitrary or capricious, was a mere matter of legislative discretion. This part of the opinion was quoted with approval in the *Home Ins. Co. Case.*[31]

When Maryland authorized a railroad company to construct the line between Baltimore and Washington the charter provided that not over $2.50 should be charged for passage fare between these points, and that twenty per cent of the gross receipts from passenger traffic should be paid to the state. After a time the railroad declined to pay this, alleging its exaction to be unconstitutional. With a single dissenting voice (Mr. Justice MILLER), the Supreme Court sustained the bargain, saying:

"This exercise of power on the part of a state is very different from a tax upon the movements of commerce between the states. Such an imposition * * * the states cannot make, because * * * it is virtually a tax on the transportation, and not in any sense a compensation therefor, or for the franchises enjoyed by the corporation that performs it. * * * It [the percentage stipulation] may incidentally affect transportation, it is true; but so does every burden or tax imposed on corporations or persons engaged in that business. * * * The state is conceded to possess the power to tax its corporations; and yet every tax imposed on a carrier corporation affects more or less the charges it is compelled to make upon its customers. So, the state has an undoubted power to exact a bonus for the grant of a franchise, payable in advance or *in futuro;* and yet that bonus will necessarily affect the charge upon the public which the donee of the franchise will be obliged to impose."[32]

This case, which is directly in point (unless, indeed, commerce between Maryland and the District of Columbia is to be treated differently from interstate commerce, as to which see *Stoutenburg v. Hennick,*[33]) has never been said to be qualified by the Supreme Court except in the minority opinion in the *Northern Securities Case,*[34] where Mr. Justice WHITE said of it:

"True it is that some of the expressions used in the opinion in the case, giving rise to the inference that there was power in the state to regulate the rates of freight on interstate commerce, may be considered as having been overruled by *Wabash, Etc., Ry. v. Illinois,* 118 U. S. 557."

[31] 134 U. S. at 600.
[32] Balt. & Ohio Ry. v. Maryland, 21 Wall. 456, 472, 473.
[33] 129 U. S. 141.
[34] 193 U. S. at 378.

The *Maryland Case* was expressly approved in *Covington Bridge Co. v. Kentucky*,[35] as an authority that: "The states may exact a bonus, or even a portion of the earnings of such [carrier] corporation, as a condition to the granting of its charter," notwithstanding that the goods carried may be interstate; and in *Ashley v. Ryan*,[36] the extract from the *Maryland Case* quoted above was repeated with approbation.

In 1891 was decided the important and often cited case of *Maine v. Grand Trunk Ry.*[37] A Maine corporation had a state franchise to construct and operate a railway, and, with the consent of New Hampshire and Vermont, it built a road across the three states, somewhat less than half being outside of Maine. The road and franchises were then leased to the Grand Trunk, which operated them with the consent of the state. Maine levied upon every railroad company "an annual excise tax for the privilege of exercising its franchises," computed progressively up to three and one-fourth per cent of its gross receipts. Where part of the mileage of a road was outside the state such proportion of the gross receipts was taxed as the mileage in the state bore to the total mileage. The Grand Trunk refused to pay, because much of such receipts arose from interstate traffic, but the tax was upheld by a divided court. The majority said:

"As the granting of the privilege rests entirely in the discretion of the state, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the state in its judgment may deem most conducive to its interests or policy. It may require the payment each year of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its receipts of the present or past years. * * * A resort to the receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied; and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the company, or any regulation of commerce which consists in such transportation. If the amount ascertained were specifically imposed as the tax, no objection to its validity would be pretended. And if the inquiry of the state as to the value of the privilege were limited to the receipts of certain past years instead of the year in which the tax is collected, it is conceded that the validity of the tax would not be affected; and, if not, we do not see how a reference to the results of any other year could affect its character."[38]

The *Grand Trunk Case* does not go quite so far as the *Maryland*

[35] 154 U. S. 204, 210.
[36] 153 U. S. 436, 444.
[37] 142 U. S. 217.
[38] Ibid., 228-29.

Case, because not all the gross receipts were taxed as in the latter, but only a part proportioned to the mileage in the state. Professor Schofield thinks such receipts can not be apportioned, and quotes a *dictum* of Mr. Justice MILLER in *Wabash, etc., Ry. v. Illinois,*[39] to the effect that there is no distinction in this respect between regulating rates and taxing receipts from transportation. The Supreme Court has recently unanimously affirmed the distinction between the two, and cited the *Grand Trunk Case* as an illustration of the validity of such a tax, while holding bad a corresponding rate regulation. *Hanley v. Kansas City Ry.*[40] The *Grand Trunk Case* has stood uncriticised by the Court for sixteen years, and would seem to be conclusive if the Illinois Central provision can be construed as permitting an apportionment of gross receipts upon the basis of mileage in Illinois.

Even if such a construction be not placed upon it, however, the broader principle of the *Maryland Case* was affirmed the year following the *Grand Trunk Case.* A commission merchant in Memphis took out a license from the city which authorized him to sell goods on commission in return for his promise to pay at the end of the year 2½% of his gross commissions from all business. The license gave the right, if he saw fit, to do internal business. In the year in question the merchant actually did interstate business only, selling by sample, which business could not be directly taxed.[41] He therefore refused to pay the agreed percentage on his sales. It was held he could be compelled to pay it, as a mere means of measuring the tax on his license to do such internal business as he had the wish or opportunity to do it.[42] A tax on the right to do internal business was here permitted to be measured by the gross receipts from both internal and interstate business, and that in a case where the entire income chanced to be from the latter. Within the principle of this case it appears that Illinois could tax the Illinois Central Ry. for its franchise to do internal business in Illinois, and measure it by the gross receipts from *all* business, internal and interstate. To uphold the Illinois Central charter it is only necessary to admit that the privilege of doing all kinds of commerce *as an Illinois corporation* may be taxed and measured by a percentage of all kinds of receipts. The *Ficklen Case* goes beyond this, but it has never been questioned by the Court that decided it.

---

[39] 118 U. S. at 570.
[40] 187 U. S. 617, 621.
[41] Robbins v. Shelby Co. Dist., 120 U. S. 489.
[42] Ficklen v. Shelby Co. Dist., 145 U. S. 1.

It is, however, not only upon the theory of a franchise tax that the tax on Illinois Central gross receipts may be sustained, but as a *property* tax. It is, of course, elementary that a railroad may be classified separately and taxed in a mode and at a rate different from other property.[43] If its lines extend beyond the taxing state it may be valued as a unit, and the fair share of this value taxable within the state may be ascertained in any reasonable way. So holds the line of decisions beginning with *Western Union Co. v. Massachusetts*[44] and ending with *Fargo v. Hart*,[45] which cites most of the intervening cases. Usually the taxable value of a part of the line has been determined chiefly on a mileage basis, attributing to the part within the state such a proportion of the total value of the road's stock or stock and bonds as the length of that part bore to the total mileage. In some cases other modes have been approved, and one of these has been by a reference to gross receipts, computed, as to the part of the line within the state, by adding to the receipts from all internal commerce such part of the receipts from interstate commerce as is proportional to the fraction of the interstate carriage which actually takes place within the state.

In the *Grand Trunk Case* the dissenting judges said:

"This court held that the taxation of the capital stock of the Western Union Telegraph Co. in Massachusetts, graduated according to the mileage of lines in that state compared with the lines in all the states, was nothing but a taxation upon the property of the company; yet it was in terms a tax upon its capital stock, and might as well have been a tax upon its gross receipts. * * * Then it comes to this: A state may tax a railway company upon its gross receipts in proportion to the number of miles run within the state, as a tax on its property; and may also lay a tax upon these same gross receipts in proportion to the same number of miles for the privilege of exercising its franchise in the state."[46]

In *Erie Ry. v. Pennsylvania*,[47] a statute imposed a tax upon transportation companies of four-fifths of one per cent upon their gross receipts from tolls and transportation. As regards tolls from interstate commerce paid to the Erie Ry. as lessor of lines running out of the state, the state court held the statute required these to be apportioned and only such part be taxed as was paid for using the part of the line within the state. This was upheld by the Supreme Court, saying:

---

[43] Michigan Central Ry. v. Powers, 20 U. S. 245, and cases cited.
[44] 125 U. S. 530.
[45] 193 U. S. 490.
[46] 142 U. S. at 235.
[47] 158 U. S. 431.

"It is a tax laid upon the corporation on account of its property in a railroad, and which tax is measured by a reference to the tolls received."[48]

In *McHenry v. Alford*,[49] the Court upheld a Dakota statute imposing upon railroads a tax upon gross receipts in lieu of all other taxes. There was doubt whether earnings from interstate commerce were meant to be included, but the Court thought the case distinguishable from *Phila. SS. Co. v. Pennsylvania*,[50] either way:

"It is a tax upon the lands and all the other property of the company, but instead of placing a valuation upon the property, and apportioning a certain amount upon such valuation directly, as was the old method, a new one is established of taking a percentage upon the gross earnings as a fair substitute for the former taxes upon the property of the company, and when it is said, as in this act, that the tax collected by this method shall be in lieu of all other taxes whatever, it would seem that it might be claimed with great plausibility that a tax levied under such circumstances and by such methods was not in reality a tax upon the gross earnings, but was a tax upon the lands and other property of the company, and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of its gross earnings."[51]

The older case of *Erie Ry. v. Pennsylvania*,[52] also upholding a state tax on gross receipts, could probably be sustained today on the same ground. It will be noticed that the gross receipts tax in the Illinois Central charter is in lieu of local municipal taxes and so may be the more readily defended by the above reasoning. Finally there is the very recent case of *Wis. & Mich. R. v. Powers*,[53] in which a tax upon "the property and business" of a railway was unanimously upheld, though it was computed upon a percentage of the gross income determined by adding to the purely internal earnings "such proportion of the income arising from interstate business as the length of the road over which said interstate business is carried in this state bears to the entire length of the road over which said interstate business is carried." The *Grand Trunk Case* is cited with approval, and the conjectures of the minority therein as to the varied offices of a gross receipts tax seem fulfilled. The Illinois Central charter may easily, and it would seem properly, be interpreted to permit such an apportionment of gross receipts from interstate carriage as this, and so interpreted would be upheld.

To summarize, it seems to the writer that, within the decisions

---

[48] Ibid. at 439.
[49] 168 U. S. 651.
[50] 122 U. S. 326.
[51] Ibid. at 671.
[52] 21 Wall. 492.
[53] 191 U. S. 379.

of the Supreme Court, the Illinois Central gross receipts tax may be upheld on one or all of the following grounds:

1—As the price of Illinois's granting to the company the right to do any kind of business in corporate form.

2—As a tax upon the franchise to do internal business, measured by a percentage of the gross receipts from all business, within the *Ficklen Case.*

3—As a tax upon the property value of that part of the railroad, considered as a unified system, which can fairly be said to be within the state, measured by a fair apportionment of its gross receipts.

NOTE.—The article in the February REVIEW which called forth the above from Professor Hall was not intended as a complete discussion of the view there suggested. I know nothing about the facts to which the tax provision of this charter must be applied to determine its constitutionality, except as they are outlined in the Governor's Message referred to in the February REVIEW, and except for a general knowledge of the situation acquired a few years ago from a slight investigation of it from the point of view of Chicago taxpayers. It seems certain that the State's case, as outlined in the Governor's Message, *supra,* does in places lap over into the sphere allotted to the General Government, and that, therefore, the action of the State Supreme Court cannot be final, unless it decides *against* the constitutionality of the tax. I do not see how the State's side of the case can be made to appeal forcibly to any Court's sense of National and State substantial right and justice to individual citizens of other States or of Illinois, or to the Illinois Central—regarded, if it is possible so to regard it, as a purely private organization, solely for pecuniary profit—when recent Acts of Congress are recalled, and it is remembered that Illinois taxes the Illinois Central's competitors at a very much lower rate than 7 per cent. of their gross receipts. I still think there is no decided case that any lawyer would be justified in pronouncing conclusively controlling in favor of the Federal side of the State's case. This charter, it must not be forgotten, in words gives the State a right to apply the *7 per cent* to *all* of the gross receipts from interstate commerce, or to *none* of them. The State is trying now to get a *legal* basis for the *7 per cent* somewhere in between *all* and *none;* and is asking the State Supreme Court to *invent*—seemingly upon some undefined notion of natural equity—and to *write into* the charter some rule of apportionment that will give the State that basis. Can the State Supreme Court do that lawfully? And if it does do that, what will happen at Washington? A detailed discussion of the applicability of decided cases and Acts of Congress is hardly worth while, even if it would be proper, because the State probably has given the Illinois Central an opportunity to lay the whole thing before the Supreme Court of the United States in such a way that that Court must view it *ab initio,* and examine it, with a mind free from embarrassment by any fair suggestion of the thought that the case is but another instance of an unconscionable attempt to repudiate the obligation of a contract become unduly burdensome by lapse of time and the unforeseen march of events. The opinions in *Railroad Company v. Mary-*

land, 21 Wallace 456, and *Railroad Company v. Richmond,* 19 Wallace 584, aptly illustrate how that thought in this sort of a case, *strictissimi juris* right or wrong, once lodged, always will affect "every well organized judicial mind." Mr. Justice MILLER, dissenting, in *Washington University v. Rouse,* 8 Wallace 439.

An additional suggestion, entirely outside of the judicial aspect of the subject, may not be inappropriate here, especially in view of the expression, "the present-day tendency to extend the power of Congress under the commerce clause," in remarks upon this Illinois Central tax in the April *Harvard Law Review,* Vol. 20, p. 504. To my mind this Illinois Central case shows, as many familiar cases already in the books show, that the time is not far distant when Congress must put its hand to the subject of State taxation of interstate railroads. If we go back to the words and object of the commerce clause, and keep steadily in view the very practical origin and significance of the Supreme Court's ingenious and purely artificial rule as to the constitutional effect of the silence of Congress upon National and local subjects or objects of interstate commerce, it is difficult to see how it can be denied successfully that the power of Congress is adequate for that. Judges and lawyers, at least, cannot rightfully mistake the awakening of Congress out of its long sleep, during which the Legislatures of the several States, under the supervision and moderating control of the Federal Supreme Court, have been exercising its prerogative over interstate commerce—for an unlawful attempt to extend the delegated power of the Federal Government at the expense of the reserved powers of the States. The question up before the country now is not a question of the *existence* of power in the Federal Government, but only a question of the *right and just use* of its acknowledged power. These two widely different things always have been confounded, and probably always will be confounded, so long as our written Constitution endures. "And so it happens, as one looks over our history and the field of political discussions in the past, that he seems to see the whole region strewn with the wrecks of the Constitution—of what people have been imagining and putting forward as the Constitution. * * * People sometimes foolishly talk as if * * * the great barriers of this instrument had been set at naught, and may be set at naught in great exigencies; as if it were always ready to give way under pressure; and as if statesmen were always standing ready to violate it when important enough occasion arose. What generally happens, however, on these occasions, is that the littleness and looseness of men's interpretation of the Constitution are revealed, and that this great instrument shows itself wiser and more far-looking than men had thought." "It is forever silently bearing witness to the wisdom that went into its composition, by showing itself suited to the purposes of a great people under circumstances which no one of its makers could have foreseen." Professor Thayer, "Our New Possessions," 12 Harvard Law Rev., 464, 468. And see the opening paragraphs of Mr. Justice BREWER's opinion in *South Carolina v. United States,* 199 U. S. 437, 438.

HENRY SCHOFIELD