Is Escheat of Corporation Property "Due Process"?

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The question whether the Constitution, section 192, and Statutes of Kentucky, section 567, by the provisions of which real property owned by a corporation for more than five years without being used in its business escheats to the state is in conflict with the Fourteenth Amendment to the Federal Constitution has never been decided by the Supreme Court of the United States though the Kentucky Court of Appeals has decided it in the negative. How would the Supreme Court decide the question were it ever submitted to it? The Fourteenth Amendment forbids a state from taking property without due process of law.

Let us examine the decisions of the Supreme Court to see what due process means.

The Slaughter House cases were the first in which it was attempted to have the statute of a state declared invalid as violating the Fourteenth Amendment. The Louisiana statute of charter involved seems high handed. It gave to a new corporation chartered by it a monopoly of slaughtering and packing animals in a territory of nearly twelve hundred square miles, while existing slaughter houses were forbidden to continue their business. That the Supreme Court refused to interfere may have been due to the fact that counsel for the old slaughter house companies were not in earnest in their contention that the statute was devoid of due process. For the court said:

"The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law."

Their efforts were chiefly directed to showing that the charter violated the Thirteenth Amendment. Justices Fields, Bradley and Swayne dissented.

In Davidson v. New Orleans the court considered it wiser not to define the words "due process," but to treat each case as it would come before it on its own merits. Justice Bradley,

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1 16 Wall. 36.
2 96 U. S. 97.
in a separate opinion, held that a statute "if found to be arbitrary, oppressive and unjust may be declared to be not due process of law." In *Lake Shore & M. S. Ry. Co. v. Smith* the court held a statute invalid which compelled railroads to sell one thousand mile tickets and prescribed too low a price therefor, saying: "We say this particular piece of legislation does not partake of the character of legislation *fairly necessary* to attain any of these objects." In *Lawton v. Steele* the court came still nearer to defining what legislation is obnoxious to the amendment in saying "*that the means*" must be "reasonably necessary for the purpose and not unduly oppressive upon individuals."

In *French v. Barber Asphalt Paving Co.* the court held a special assessment for the making of a street valid, saying that it would hold a statute as violating the amendment "only when there is some abuse of law *amounting to confiscation of property* or deprivation of personal rights." This language the court cited again in *Detroit v. Parker.* In *Lochner v. New York* the court held the statute of New York invalid, which provided that employees in bakeries should not be required or permitted to work more than sixty hours a week or ten hours a day on the ground that it was not a legitimate exercise of the police power, but an *unreasonable, unnecessary and arbitrary interference* with the rights and liberty of an individual to contract.

In *Dobbins v. Los Angeles,* where the city had first by ordinance fixed the limits within which gasworks might be erected but afterwards and after such work had been erected passed another ordinance excluding the territory on which the gasworks had been erected, the court held the second ordinance a violation of the Fourteenth Amendment, saying that "*property rights can not be wrongfully destroyed by arbitrary enactment." Where an anti-trust statute of Texas provided for penalties of $5,000.00 per day and after a verdict of guilty for

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*173 U. S. 698.*
*154 U. S. 133.*
*181 U. S. 324.*
*181 U. S. 399.*
*198 U. S. 45.*
*195 U. S. 224.*
three hundred days so that the fine amounted to $1,600,000.00, the court did not hold it unconstitutional, saying that it would only interfere if the fines are "grossly excessive;" and that the oil company had assets of over forty million; that the business was extensive and profitable during the period while it violated the statute and had declared dividends amounting to several hundred per cent.⁹

In *Ex parte Young*⁰ the statute prescribed freight and passenger rates and declared the officers and agents, in case of violation of the freight provisions guilty of misdemeanor, punishable with imprisonment for ninety days for each offense and for disobedience to the passenger rate provision, guilty of felony, punishable with a fine not exceeding $5,000.00 and imprisonment for not exceeding five years, and the company itself liable to immense fines. The court held the statute unconstitutional and violative of the Fourteenth Amendment, without regard to the question of the insufficiency of the rates, because it provided such enormous fines and imprisonment as result of any attempt to test the validity of the law as must deter the company and its officers from testing its validity in court.

In *Shevlin Carpenter Co. v. Minnesota*¹¹ the court refused to interfere with a state statute which punished cutting timber on state lands doubly in two separate proceedings, saying that the legislation may be harsh but that the Supreme Court "can not set aside legislation because it is harsh."

A statute of Alabama was attacked which allowed an insured to recover from the company twenty-five per cent in excess of the loss suffered if the insurer belonged to any tariff association of insurers regulating rates of premiums. The Supreme Court of the United States held that the state might in order to prevent combinations among companies to prevent competition lawfully provide for such recovery of twenty-five per cent, and that the provision was germane to the object to be obtained and that such additional recovery was not too arbitrary to be enforced.¹² The court held an Arkansas statute valid

⁹ *Waters Pierce Oil Co. v. Texas*, 212 U. S. 111.
¹¹ 218 U. S. 67.
which required that every train belonging to companies owning roads of more than fifty miles long, carrying twenty-five cars or more must have at least three brakemen finding it not too arbitrary or unreasonable.\(^\text{13}\)

In *Chicago, Burlington & Q. R. R. v. McGuire*\(^\text{14}\) a state statute was upheld which makes railroads liable to employees through neglect of their agents and provides that no contract of insurance, relief benefit or indemnity entered into prior to the injury should be a bar to such liability, finding that the provisions of the statute have a *reasonable relation to a purpose which it is competent for the government to effect and not arbitrary.*

In *House v. Mayes*\(^\text{15}\) the court held a state statute valid which provided that at every sale of grain, &c., the actual weight of the commodity should govern and no deduction made on account of any rule of any board of trade, justifying such deduction and any purchaser who shall deduct any amount from the actual weight by reason of any such rule shall be fined not less than ten nor more than one hundred dollars for each offense, holding that its provisions have a relation to the object to be accomplished and "*do not go beyond the necessities of the case.*"

A California statute was held constitutional which after the earthquake and fire in San Francisco provided for proceedings in court calling on all persons interested by publication to establish the title to land and for judgment declaring the title to be in the persons who may have shown title to the satisfaction of the court, the Supreme Court deciding that this statute answering the necessities of the circumstances was not so unreasonable and unjust as to impair or destroy fundamental rights.\(^\text{16}\)

In *Noble State Bank v. Haskell*\(^\text{17}\) the statute subjected state banks to assessments for a depositor’s guaranty fund to secure the prompt payment of deposits in all state banks. Out of this fund the depositors of any insolvent state bank were to

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\(^\text{14}\) *219 U. S. 549.*

\(^\text{15}\) *219 U. S. 270.*

\(^\text{16}\) *American Land Co. v. Zeiss*, 219 U. S. 47.

\(^\text{17}\) *219 U. S. 104, 575.*
be paid and a lien was reserved upon the assets of the failing bank to make good the sum so taken from the fund. The court in refusing to declare the act unconstitutional says through Justice Holmes that there is no definition possible of police power or due process but "lines are pricked out by the gradual approach and contact of decisions on the opposing sides," and that the statute in question is "well within the state's constitutional power, the credit of banks being a matter of public concern and the banks being made to sustain each other's credit for their mutual benefit. On the other hand an Arkansas statute providing that railroad companies must pay claims for live stock killed or injured within thirty days after notice, and their failure to do so should entitle the owner to double damages and attorney's fees was held unconstitutional and denial of due process, and in Oregon R. R. & N. Co. v. Fairchild a statute requiring certain railroads to make connection and transfers between their almost parallel lines at great expense was held to be taking property without due process of law. In the last mentioned case Justice Lamar considered the demand on the railroads as unreasonable and the public, necessity not such as to justify the taking of property from the companies, as it was not shown in the record what, if any, business would be routed over these connections or what saving would come to the public if they were constructed.

A Virginia statute and ordinance of a city based on it, which authorized city councils to prescribe building lines in particular districts on blocks, at the request of owners of two-thirds of the property abutting on the block, and that no buildings should be erected within the line prescribed by such ordinance on penalty of a fine, was held to be taking the property of owners of the remaining third of the property without due process, because the ordinance did not even assure a uniform line on the whole street, but made "staggering street lines" possible. "Part of the property owners on the block determine the extent of use that the owners shall make of their lots."

19 224 U. S. 510.
20 Eubank v. City of Richmond, 226 U. S. 137.
This Justice McKenna said is the vice of the ordinance and makes it an "unreasonable exercise of the police power."

A statute of Louisiana which created a rebuttal presumption that any person systematically buying sugar in that state for a less price than he pays in any other state is a party to a monopoly or conspiracy in restraint of trade (evidently intended to obstruct the American Sugar Refining Co.) was held unconstitutional as taking property without due process. A statute of Arkansas which punished a telephone company $100.00 per day for refusing to render service to a subscriber who is delinquent on past dues without payment in advance, was held as taking property without due process, because the rule of the company was considered reasonable.

The case of Security Savings Bank v. California seems at first blush to be an escheat case. The statute required the banks to publish the names of the depositors and the balance standing to their credit after the lapse of ten years after they have ceased to deposit or draw at the end of every year and at the end of twenty years after they have ceased to make deposits or to draw, to pay their balance over to the state, which by proceedings of which the depositors were notified by publication would obtain a judgment escheating such balance. The state sued the bank to enforce the payment to it of balances which had remained not called for for ten years, making the depositors parties, giving notice of the pendency of the proceedings by publication and asked for a judgment escheating the balance. The bank claimed that the proceeding by publication only was not due process, but the Supreme Court held that under the circumstances notice by publication was reasonable and therefore due process; that the bank was bound to

22 Southwestern Telephone Co. v. Donahu, 238 U. S. 482.
23 263 U. S. 282.
pay the balances to the state as a new depository and that it was a matter between the state and the depositors merely whether the judgment of escheat was valid as against the depositors.

In *Terrance v. Thompson* the court had before it a Washington statute which disqualifies aliens who have not declared their intention to become citizens of the United States from holding interests in land and provides that upon making such prohibited conveyance the land shall be forfeited to the state; and it was claimed by persons desiring to lease land to a Japanese that the statute offended against the Fourteenth Amendment, but as the argument of counsel shows the point was made only on the ground that the act is in effect "a prohibition of the right of an alien to engage in one of the common occupations of life" and an inhibition against the use of the owner's land for purposes which were legitimate when he acquired it. This case and its companion cases of *Webb v. O'Brien, Porterfield v. Webb* and *Frick v. Webb*, in the same volume, do not involve the validity of an escheat of land by the state.

This is a review of such of the decisions as seem to throw light on what is due process. To review all would make this article too lengthy.

It seems from this "pricking out" of the road that the Supreme Court is most unwilling to declare a statute of a state unconstitutional and that a combination of certain obnoxious features must exist to compel the court to do so. A "harsh" punishment will not appeal to the court. Nothing short of confiscation will be likely to suffice. There must be a public necessity which makes confiscation the only available remedy for the evil legislated against. The taking must be reasonable. If there is no reasonable relation between the offense and the taking, if the offense could be as well abated in other ways as by confiscation the confiscation will appear not due process. There must be a disproportion between the offense and the punishment and the punishment must be unduly oppressive and unreasonable.

All these elements however seem to combine in our escheat law. There is confiscation of the property—a taking of the property from the owner and appropriation by the state with-

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24 263 U. S. 107, 200.
out compensation. Is the confiscation necessary to abate the evil of the ownership of property by the corporation for more than five years without being used in the business of the corporation or are there remedies just as effective short of confiscation? It appears that there are remedies just as effective and less oppressive. The Supreme Court of California, in *People v. Stockton Savings & Loan Society,*26 has pointed out two ways in which the policy of the state can be carried out without confiscation. The one is to enforce a public sale of the property, turning over the proceeds after payment of the costs and a compensation to the Attorney General to the corporation or its stockholders, as is done in Illinois under chapter 32 of the revised statute on corporations, and under a similar Texas statute. Such a proceeding would resemble that provided for by the statute of West Virginia, passed upon in *King v. Mullins.*26 There lands were forfeited for non-payment of taxes, but there was to be a forced sale of the land forfeited and the balance of proceeds after payment of taxes, penalties and costs, paid to the owner. This course would be more in harmony with what the court said in *Lake Shore & Mich. S. Ry. Co. v. Smith,*27 supra, where a statute compelling the railroad to issue thousand mile tickets at an unreasonably low rate was condemned.

The attorney for the state had argued that the Legislature had power to absolutely repeal the charter of the company and thus terminate its existence. The court said:

“To terminate the charter and thus end the legal life of the company does not take away its property, but on the contrary leaves it to all the shareholders of the company after payment of its debts.”

The other method suggested by the Supreme Court of California is the forfeiture of the franchise of the offending corporation which would bring about the sale of its assets, including the land for distribution among its stockholders.

The most convincing proof that the remedy of confiscation is not necessary, but oppressive and not in conformity to the settled maxim of free government is that of forty-eight states of the union, most of whom condemn the holding of property by

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26 133 Cal. 612.
27 171 U. S. 404.
28 173 U. S. 684.
corporations not used in their business, longer than six, ten, fifteen and a few five years; there are only two Kentucky and Mississippi which have provided for the confiscation or escheat of the property after the elapse of that period. The statute is also unreasonable because it provides the same oppressive punishment no matter what may be the reason why, nor the circumstances under which the company may have held the property for more than five years, whether oversight or the intervention of a period of commercial panic or depression during which the property could not be sold at all or only at ruinous prices, or because the property could not be sold, except after the expenditure for repairs or betterments which the corporation is not able to make during the period allowed. It is unreasonable because it may follow upon a holding over for one day or years before the period allowed, and it is unreasonable because if it is supposed to be a punishment for recalcitrancy it punishes to the tune of $100.00 or $2,500.00, as may be the value of the property, though the defiance of the law is the same in both cases.

I think these reflections ought to prove that this statute is not due process of law, but they do not assure a decision of the Supreme Court to that effect.

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*Sec. 903 of the Code of 1906.*