YALE LAW JOURNAL

SUBSCRIPTION PRICE, $2.50 A YEAR. SINGLE COPIES, 35 CENTS.

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Published monthly during the Academic year, by students of the Yale Law School.
P. O. Address, Box 522, New Haven, Conn.

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COMPULSORY VACCINATION.

Now that the dread disease smallpox has actually appeared in New York and Connecticut, the legal questions attaching to compulsory vaccination again assume an interesting phase.

The desirability of vaccination as a preventive of the spread of the disease is a question to be determined by the science of medicine, and even in its proper field there is much conflict as to its utility. It is conservative to state that the great majority of physicians believe vaccination to be decidedly efficacious; that it lessens the danger of contagion, and mitigates the severity of the attack. On the other hand, a large number of physicians and intelligent laymen insist that inoculation with the virus produces only harmful effects. Only a few weeks ago a large society in New York made vigorous protest against what was termed "lawless and tyrannical conduct of the Board of Health in breaking into the houses of citizens and forcibly injecting into their blood the putrefying matter of a sore."

Public opinion on this subject is moulded by the dominant element of the medical profession, and in many States this has crystallized into laws requiring compulsory vaccination of some sort. Usually these laws have been limited to a delegation of authority to towns and cities to insist, in their discretion, on vaccination as a prerequisite to a child's admission to the public schools.

Whenever, in the States, such laws have been passed, their constitutionality has been stubbornly contested. It has been urged that they violate State constitutional provisions; that they are directly opposed to the Fourteenth Amendment of the Federal Constitution; that such laws allow school privileges to those who believe in vaccination and deny them to those who do not, and are thus in conflict with the constitutional safeguard which guarantees the equal protection of the laws. In nearly all instances, however, such laws have been pronounced valid under the police power of the State. However difficult it may be to define this power, the health of the community is surely within its jurisdiction.

No one can expect that there will be unanimity of belief that every valid law passed by the State is salutary and beneficial, yet its wisdom lies peculiarly within the province of the Legislature, and when enacted, it stands as the law for all within the State.

In sustaining the validity of the compulsory vaccination laws, courts have taken pains to fortify their position by declaring that attendance at public schools is a privilege rather than a right; that being a privilege, it can be extended on such terms as the State sees fit to impose; and that within constitutional limits the Legislature can impose the conditions it deems desirable. (*Bissell* v. *Davison*, 65 Conn. 183; *Abeel* v. *Clark*, 84 Cal. 226; *Duffield* v. *Williamsport*, 162 Pa. St. 476.)

Unless restricted by constitutional provision, there is little doubt that the State can enforce compulsory vaccination, either directly or by delegation, in the case of school children under the conditions described. Whether the State has inherent power to compel all its citizens to undergo such an operation, is a more difficult question. Courts in sustaining the validity of the laws relating to pupils, have generally avoided *obiter* opinions that would shed some light on this broader problem. In the final adjudication of this question the rights guaranteed by the Fourteenth Amendment to the Federal Constitution will be important factors.

RIPARIAN RIGHTS *v.* NAVIGATION.

The power of the Federal Government to improve navigation at the expense of rights is carried further than heretofore in *Scranton* v. *Russell*, 21 Sup. Ct. 48, which involves the question whether a riparian owner's right of access to the navigable part of a stream, permanently lost to him by the building of a government pier to aid navigation, was a taking of private property that required compensation. Although the title to the submerged land was in the adjacent owner, it was held to be so far subject to the servitude of navigation, that the damage resulting was merely consequential. This may be modified in part by the contention of the minority not directly opposed, that the title had been bequeathed by the State of Washington to the United States.

Since Congress has no power to take private property under the Commerce Clause without making compensation (*Monongahela Navigation Co.* v. *United States*, 148 U. S. 312), the present case necessarily decides that the right of access, so far as the exercise of the power to regulate navigation is concerned, is not a property right. This rests chiefly upon *Gibson* v. *United States*, 166 U. S. 269, where the building of a dike rendering a right of access very inconvenient (in a State—Pennsylvania—where taking of property has a narrow definition) was not considered to involve a taking of property. Opposed to this is the contention of the minority that whether the right of access is property depends upon local law.

The status of land between the upland and navigable water received a very elaborate discussion in *Shively* v. *Bowlby*, 152 U. S. 1, where the conclusion reached was that the local law governs, subject, however, to rights reserved to the Federal Government by the Constitution. Thus, in New York, it is now settled law that riparian rights of ingress and egress are available against private persons but are subject to absolute abridgement by the State, under the implied reservation in favor of navigation. (*Sage* v. *Mayor of New York*, 154 N. Y. 61.) Under the Louisiana law, land itself bordering rivers and bayous is subject to be taken without compensation to construct and repair levees. (*Elbridge* v. *Trezevant*, 160 U. S. 452.) But if the State court, where a different interpretation prevails, were to hold that riparian rights could not be taken without compensation, the present case involves its reversal wherever the Federal servitude exists. It is questionable

whether this is not carrying the servitude of navigation too far by clinging too closely to the idea that nothing is property but the *corpus* itself. So that, while not a foot of fast land could be appropriated without compensation, one of the rights that give it value can be completely taken without pay, though both are essentially property rights and one as apt to be needed for commerce as the other. Nor is the suggestion that such rights are acquired with the possibility of being lost when the needs of navigation demand it, entitled to much weight, since the same is true of all property liable to be taken to subserve a public use. The minority seek to extend the taking of property to rights attached to, as well as to the subject of property where the question is one of a purely Federal servitude, leaving it in other cases to the local law, and this, to us, seems the sounder view.