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PROPOSED CHANGES IN THE LAWS OF FRANCE AS TO FOREIGN CORPORATIONS.

Foreign moneyed corporations doing business in France have long been subjected to many inconvenient restrictions. They are now likely to be subjected to greater ones. A special parliamentary commission, constituted to consider this general subject, is maturing a bill to prevent their establishment of branch offices in France except under strict limitations. From a correspondent of one of the Law School faculty, information has been received that the measures reported will probably embrace the following features:

1. No branch office can be opened except permission be first given by a public decree, or is guaranteed by treaty.

2. None can be established without first filing with the clerk of the Tribunal of Commerce, and also publishing in the official journals, full details as to the proposed site, and the charter of the corporation, and its active capital.

3. Contracts made at branch offices established without complying with these rules are void as to third parties.

4. No shares or bonds of such foreign corporations can be sold (except on execution) without publication of full particulars as to the financial constitution and condition of the company, the place of its central office, the rules as to shareholders' meetings, etc.

5. All these provisions apply to companies now existing, as well as to those that may be hereafter formed.

6. Heavy fines are provided for violation of the statute, the limit being 20,000 francs.

The enactment of this statute, which seems probable, will prove highly inconvenient to many American corporations doing business in France; but its provisions can hardly be regarded as unreasonable in view of the interests to be protected, and the difficulty, at present existing, in getting precise and authentic information in any country as to the corporations of another. The tendency of the times is to turn on the electric light, wherever and whenever corporate management is brought in question.

By way of compensation, all foreign corporations legally existing in their own country are hereafter to have the right to do ordinary business in France, and to sue in court. This was conceded to British companies in 1862, by a special convention, but up to this time has not been a general right. *S. E. B.*

RES JUDICATA AND ESTOPPEL.

There exists among the authorities no little conflict as to whether the doctrine of *res judicata* has any actual foundation in that of estoppel. This question seems to be, in the last analysis, the line of demarcation between the position taken in Justice Day's opinion in the case of *Deposit Bank of Frankfort v. Board of Councilmen,* 24 Sup. Ct. 154, and that of Chief Justice Fuller's dissenting opinion, in which Justices Brewer, Brown and Peckham concur. In this case city officers were attempting to collect taxes from a bank. The Hewitt law in Kentucky had been declared by the Franklin County Circuit Court to constitute an irrevocable contract exempting the bank from taxation. Then, in an action for the recovery of taxes of other years than those involved in the present case, between the same parties, a Federal court had declared that the question was *res judicata,* and that no taxes for any year could be collected. The original Franklin Circuit Court decision was later reversed by the highest court of the State, and the view that there was an irrevocable contract exemption repudiated by the Federal Supreme Court.

Justice Day's opinion holds that the finding of the Franklin Circuit Court was conclusive evidence for the Federal court, and hence that the decision of the Federal court was a reaffirmation of that of the circuit court *in toto,* including the holding that the Hewitt law was an irrevocable contract. As a logical consequence no taxes whatever could be collected, in spite of the fact that it is the settled law of Kentucky that an adjudication of taxes for one year cannot be pleaded as an estoppel in suits involving taxes of other years. The dissenting opinion maintains that the decision of the Federal court was based upon the doctrine of estoppel; that the board of councilmen was held to be estopped to deny the existence of the irrevocable contract, and that nothing further was involved. Hence, it is argued, the decree could not give to the circuit court decision

any wider scope than the law of the State allowed, and the estoppel would not extend to taxes other than those involved in the adjudicated case. If, then, the doctrine of *res judicata* is not founded upon that of estoppel, the minority position loses its force.

Blackstone defines estoppel as "where a man hath done some act or executed some deed which estops or precludes him from averring anything to the contrary," 3 *Bl., Comm.,* 308, a definition hardly broad enough to include "estoppel by judgment." This definition is followed by *Stephen, Pl.,* 239, but *Bouvier, Law. Dict.,* 694, and *Bispham, Eq.* (6th ed.), 398, quoting Bigelow, add words to include the judgment of a court. Several courts have criticized the use of the phrase "estoppel by judgment" as confusing and erroneous, maintaining that estoppel must be by the act of the parties, and that a judgment can hardly be said to be the act of the parties, especially when rendered against the party instigating the litigation. *Offutt v. John,* 8 Mo. 120; *Kilheffer v. Kerr,* 17 S. & R. (Pa.) 319, 325; *Ball v. Trenholm,* 45 Fed. 588. In *Sargent v. New Haven Steamboat Co.,* 65 Conn. 116, the court says, "The rule of *res judicata* does not rest wholly on the narrow ground of a technical estoppel, nor on the presumption that the former judgment was right and just, but on the broad ground of public policy, that requires a limit to litigation; a curb to the litigiousness of the obstinate litigant. Like the statute of limitations, it is a rule of rest."

The doctrine of *res judicata* was first formulated in the familiar *Duchess of Kingston's Case,* 20 How. St. Tr. 538, in terms which would not necessarily involve the introduction of the principle of estoppel. "The judgment of a court of concurrent jurisdiction directly upon the point, is as a plea, a bar, or as evidence, conclusive between the parties, upon the same matter, directly in question in another court." That *res judicata* is an estoppel is asserted in *Cheney v. Selman,* 71 Ga. 384, and by Chief Justice Shaw in *Sawyer v. Woodbury,* 7 Gray (Mass.) 499. A typical definition of estoppel to include *res judicata* is found in *Burlen v. Shannon,* 99 Mass. 200, where the court said, "Estoppel is an admission or determination under circumstances of such solemnity that the law will not allow the fact so admitted or established to be afterwards drawn in question between the same parties or their privies." Sometimes the distinction has bten taken that the judgment is a bar to further proceedings upon the same cause of action, but that the adjudication upon a particular fact or matter is an estoppel. *Burt v. Sternburgh,* 4 Cow. (N. Y.) 562; *Caperton v. Schmidt,* 26 Cal. 479.

We have here, then, a clean-cut conflict of authority, and it would be a difficult task to determine on which side the weight lay. It is to be regretted that the Supreme Court did not expressly declare their view of this fundamental question.

THE TAKING OF PRIVATE PROPERTY FOR PRIVATE USE.

Under the general provisions of our State constitutions that "private property shall not be taken for public use without just compensation," it has long been settled that the legislature does not possess the power to authorize the taking of private property for any but a public use. *Taylor v. Porter,* 4 Hill 140; *Coster v. Tide Water Co.,* 18 N. J. Eq. 54. The rare cases in which this rule has been questioned, as in *Harvey v. Thomas,* 10 Watts 63, are among the anomalies of our law. Nor, since the adoption of the Fourteenth Amendment, can a State, in the absence of any express or implied restriction in its constitution, take private property for a private use. *Missouri Pacific Ry. Co. v. Nebraska,* 164 U. S. 403. Public policy has demanded that in some cases the legislature should possess this power, and hence there have been inserted in the constitutions of several States provisions permitting private property to be taken for certain private uses, such as private ways, drains, flumes and ditches for agricultural, domestic or sanitary purposes. Obviously in such cases no question can arise as to the nature of the use. *Downing v. More,* 12 Colo. 316. But the validity of such constitutional provisions has within the past few years been challeneged as being repugnant to the Fourteenth Amendment. *Matter of Tuthill,* 163 N. Y. 133.

Aside from peculiar provisions regarding the exercise of the power of eminent domain embodied in several of the State constitutions, the great point of divergence in the decision has been in conflicting interpretations of the term "public use." One of the most frequent illustrations of this has been in the construction of statutes providing for the condemnation of land for private roads. The subject has again been presented in the case of *Healy Lumber Co. v. Morris,* 74 Pac. 681, recently decided by the Supreme Court of Washington, in which the court holds unconstitutional a statute of that State authorizing the condemnation of land for private logging roads. In this case a sharp distinction is drawn between the terms "public use" and "public policy," and it is held that the use for which private property can be taken under the power of eminent domain "must be either a use by the public, or by some agency which is quasi public, and not simply a use which may incidentally or indirectly promote the public interest or general prosperity of the State." The statute above referred to declared that the person condemning such right of way should have the exclusive use thereof, and the decision is believed to represent the better considered view. *Cf. Welton v. Dickson,* 38 Neb. 767. On the other hand, where it is provided that such roads shall be open to use by the public, such statutes have generally been sustained. *Sherman v. Buick,* 32 Cal. 253; *Denham v. Bristol County Commissioners,* 108 Mass. 202. The restricted meaning given to the term "public use" in *Healy Lumber Co. v. Morris, supra,* is the one approved by most text writers, and followed in a number of

the States, *Bloodgood v. Railroad Co.*, 18 Wend. 9, although in others it has been construed broadly as synonomous with public interest, benefit or advantage. Frequently the magnitude of the interests involved, as the mining industry in Montana, *Butte, etc., Ry. Co. v. Montana Farmers' Co.*, 16 Mont. 504, irrigation in Nebraska, *Paxton Co. v. Farmers' Co.*, 45 Neb. 884, manufacturing in Connecticut, *Olmstead v. Camp*, 33 Conn. 532, has been held to be a determining factor. On this point the decisions are in hopeless conflict.

The case of *Healy Lumber Co. v. Morris, supra,* has an additional element of interest in that it was decided under a constitution which permits private property to be taken for certain private uses, and declares that whenever the power of eminent domain is sought to be exercised the question of the public character of the use shall be a judicial question, to be determined as such regardless of legislative assertion. Among the private uses specified in the constitution for which private property may be taken is included "private ways of necessity," which the court holds—somewhat gratuitously—to be simply in affirmance of the common law rule that a private way of necessity can arise only out of land granted or reserved by the grantor. *Cf. Logan v. Stogsdale*, 123 Ind. 372. In the absence of a constitutional declaration that the public character of the use shall be primarily a judicial question, it is a general rule that the courts will construe the use to be public unless it is manifestly private. *Varner v. Martin*, 21 W. Va. 534; *Chicago, etc., Ry. Co. v. Morehouse*, 112 Wis. 1. The above provision in the constitution of Washington the court construes as having abolished the general rule and entirely removed the influence of any judgment expressed by the legislature.[1] A similar provision in the constitution of Missouri has been so interpreted; *City of Savannah v. Hancock*, 91 Mo. 54; but in the case of *Denver, etc., Co. v. Union Pacific Ry. Co.*, 34 Fed. 386, a like provision in the constitution of Colorado seems to be regarded as merely in affirmance of the general rule, and that notwithstanding a constitutional declaration that all railroads shall be deemed public highways, the question as to the character of a railroad may be raised in a proceeding by it to condemn land.

THE CONSTITUTIONALITY OF THE INITIATIVE AND REFERENDUM.

In June, 1902, the people of Oregon amended article four of their constitution to read as follows: "Section 1. The legislative authority of the State shall be vested in a legislative assembly, consisting of a Senate and House of Representatives, but the people

[1] In delivering the opinion of the court, Dunbar, J., states that "an examination of all the different constitutions in the Union shows that only two other States, viz: Colorado and Missouri, have this provision of our constitution." The learned judge apparently overlooked the constitution of Mississippi, which contains a similar provision. See Const. Miss., Sec. 17.

reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly." The amendment proceeds to state the per cent. of the legal voters required to propose and the manner of proposing any measure in the exercise of the power of initiative, and the per cent. required and the manner of setting in motion the power of referendum. In the recent case of *Kadderly v. City of Portland,* 74 Pac. 710, in the supreme court of the State, the amendment was attacked on the ground that it violated section four, article four, of the Constitution of the United States, guaranteeing to every State a republican form of government. By the reservation of the two powers of this amendment it is possible for the people to exercise directly the functions of government to the exclusion of the general assembly. Is this opposed to our notion of a republican form of government? In construing the clause of guaranty it is essential that we look to that epoch of our history from which we must derive our definition of a republic.

At the close of the Revolution the State governments under which the constitution was ratified were not arbitrary institutions; they recognized ancient customs and the old forms of polity. They had united with these forms of polity the freedom of a new world. *Religious* liberty was the prime motive that brought the early settlers to America. They had enjoyed *civil* liberty in England. What we may call a *constitutional* liberty had been yielded to the people several centuries before by reason of the Crown's finding it necessary to obtain the support of a popular body to successfully oppose the feudal barons in the hereditary House of Lords. The burgesses thus became the guardians of the people's rights. It is a mistaken idea that this liberty had its origin in any right conceded as belonging to the people themselves. *Political* liberty was an institution of the colonists own construction. At the general convention of all the planters, assembled at Hartford, June 14th., 1639, individual rights were in part surrendered, with the formation of a written constitution, that in the remainder the colonists might be more secure.

The early constitution of Connecticut recognized the doctrine that all ultimate power is with the people. It gave legislative power to the general court of magistrates, but it provided also that the people themselves might exercise the power of legislation directly. Article 10 read as follows: "It is ordered, sentenced and decreed that every General Court, except such as through neglect of the Governor and the greater part of Magistrates *the Freemen themselves do call,* shall consist of the Governor, or someone chosen to moderate the Court, and four other Magistrates at least, with the major part of the deputies of the several Towns legally chosen; *and in case the Freemen or major part of them,* through neglect or refusal of the Governor and major part of the Magistrates, *shall call a Court, it shall consist of the major part of Freemen that are*

present or their deputies with a Moderator chosen by them. In which said General Courts shall consist the supreme power of the Commonwealth, * * * "[1] The charter of 1661, granted by Charles II at the request of the colonists, did not disturb the system by which they governed themselves. These charters were allowed and not enacted by the sovereign power. So strictly democratic were the republics of Rhode Island and Connecticut that their laws were not subject to be negatived by the king; in fact, instances were frequent where the colonists disregarded the declarations of the king in council against them.[2] There was thus no need to change their form of government when the union with England was dissolved. Similarly the ratification of the Federal Constitution called for no change of the established principles. It was the Connecticut idea of a republic that spread through the thirteen States. Although the clause of guaranty was proposed by Randolph of Virginia, it is certain that for a definition of the term "republic," the framers looked to New England. From the above article of the Connecticut Constitution it appears that the "Freemen" were to exercise legislative power only in case of neglect or refusal on the part of the Governor and Magistrates to assemble; but it is equally evident that the Court was merely an instrument of the people, and with or without that Court the functions of government were to be continued. It was the intention of the colonists to have government administered by chosen representatives *or* by laws enacted in popular assembly.

The initiative and referendum amendment to the constitution of Oregon may be impracticable, although it is to be used but concurrently, for people collectively are extremely incapable of properly discussing matters of legislation.[3] It may be dangerous. "The great secret of preserving liberty is to lodge the supreme power so as to be well supported and not abused."[4] However unwise the act might appear in the light of modern conditions it is clear that it is more in harmony with, than against, the forms of republican government guaranteed to the States by the Federal Constitution.

LEGAL STATUS OF THE INDIANS—VALIDITY OF INDIAN MARRIAGES.

The legal relationship that exists between the United States government and the tribal Indians within its jurisdiction is difficult of precise description. That the Indians have been regarded from an early period in our national life as wards of the nation is perhaps generally known, but, nevertheless, that relationship has as long been looked upon as anomolous and as only approximating more nearly to that of guardian and ward than to that of any other legal

[1]Trumbull's Colonial Records, I. 20.

[2]North American Review (1844), 376.

[3]Montesquieu, Spirit of Laws, 140, 192.

[4]Gov. Huntington in Connecticut Convention on the adoption of the U. S. Constitution.

status. Chief Justice Marshall in an early case said: "The relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else. * * * It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can with strict accuracy be denominated foreign nations. * * * They may more correctly be denominated domestic dependent nations. They are in a state of pupilage. Their relation to the United States resembles that of guardian and ward. They look to our government for protection and rely upon its kindness and power." *Cherokee Nation v. Georgia,* 5 Peters 1. By recognizing a tribe of Indians as a "nation" that is "domestic" and "dependent" and" in a state of pupilage" it is at once apparent how anomolous is their condition. As a "nation" the attributes of sovereignty are implied, while as a dependent ward in a state of pupilage the suzerainty of the federal government is acknowledged. The United States, however, continued to regard the Indians as nations and made treaties with them as such until 1871, when after an hundred years of the treaty making system of government a new departure was taken in governing them by acts of Congress. The U. S. Rev. Stat., sec. 2079, 1871, provide in substance that from that date no Indian tribe or nation shall be recognized or acknowledged as an independent nation with whom the United States may contract a treaty.

A recognition of the former idea of nationalism in the Indians as well as paternalism in the federal government was shown recently in Oregon, whose Supreme Court held that, although an act of Congress made Indians receiving allotments of land in severalty citizens of the United States subject to the laws of the State in which they live, and although a later congressional act made the State law of alienation and descent applicable to such allotments, yet the issue of the male and female Indian who cohabited as husband and wife according to the custom of Indian life was deemed legitimate to determine the descent of the land. *Kalyton v. Kalyton,* 74 Pac. 491, Oregon. The court regarded "a quasi tribal relation" as subsisting in the tribe of which the parties were members and that as a consequence the State laws were inapplicable. On the theory that "marriages valid where made are valid everywhere," the courts have uniformly recognized marriages among Indians retaining their tribal character. *Wall v. Williamson,* 8 Ala. 184; *Earl v. Godley,* 42 Minn. 361; *La Revierre v. La Revierre,* 77 Mo. 512. The doctrine has even been extended to include polygamous marriages among the Indians. *Kobogum v. Jackson,* 76 Mich. 498. The validity of such marriages proceeds upon the tacit admission that while tribal Indians are not nations nor possessed of the full attributes of sovereignty, yet they are a separate people or "political community" with the power of regulating their internal and social relations. *Vide U. S. v. Kagama,* 118 U. S. 375. The United States courts and the State courts have alike adopted as law that no State laws have any force over Indians when they live together

as a tribe. *Kansas Indians,* 5 Wall. 737; *Hastings v. Farmer,* 4 N. Y. 293. They are, in fact, wards of the nation and both their personal and property rights are under the immediate protection and control of Congress. *U. S. v. Thomas,* 151 U. S. 577. As to the land which they occupy in their collective capacity they have only a possessory right of occupancy and subject to this right the United States may dispose of the fee; *Buttz v. Railroad,* 119 U. S. 55; but the right of the Indians to their occupancy is as sacred as that of the United States to the fee. *Leavenworth v. Railroad,* 92 U. S. 733. An exception to this general policy obtains with reference to certain tribes in the Indian territory, commonly known as "the five civilized nations," to whom the fee has been conveyed by treaty with the limitation that the lands shall revert to the United States if the Indians become extinct or abandon the same. *Vide Keokuk v. Ulam,* 4 Okla. 5. Moreover, Congress has provided that the legislative enactments and judicial proceedings of these more advanced Indians shall be entitled to the same faith and credit as those of the territories. 26 *Stat. at L.,* 93, secs. 29-37.

Individually, the Indian is not a citizen of the United States. He cannot become such as long as he remains a member of a tribe, *McKay v. Campbell,* 2 Sawy. 118, nor is his status changed by abandoning his tribal relation unless the government, his guardian, consents. *Elk v. Wilkins,* 112 U. S. 94. It was formerly held that he was not a "white person" within the naturalization laws, *Re Camille,* 6 Sawy. 541, but that rule has been changed by recent statutes, 26 *Stat. at Large,* 99, and Indians who are taxed or who have abandoned their tribes may become naturalized citizens. *U. S. v. Elm,* Fed. Cases No. 15,048; *Ex parte Kenyon,* 5 Dill. 385.

The trend of legislation and adjudication, it will be observed, is to eradicate the notion that the Indians, whether regarded individually or collectively, are to be considered "not as citizens but as domestic subjects." 7 *Op. Att'y.-Gen.,* 756. The congressional measures of 1871, which prohibited their further recognition as nations and the later provision allowing them to become naturalized are alike evidence of the wiping out of their once anamolous relation and of placing them more nearly, if not quite, on the same footing as other persons. In short, the tendency is to amalgamate them with the people of the United States.