THE RIGHT TO ENGAGE IN INTERSTATE TRANSPORTATION, ETC.

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There can be, generally speaking, no doubt of the existence of a right to engage in transportation, whether of persons or of property, from State to State. The doctrine seemingly established in the Supreme Court is that the basis of such right is the commerce clause of the Federal Constitution, by which Congress is empowered to regulate commerce "among the several States",[1] "the absence of any law of Congress on the subject" being regarded as "equivalent to its declaration that commerce in that matter shall be free".[2] We submit that a more satisfactory view is that such right exists independently of the commerce clause, either as a "natural" "inalienable" right, or as secured against governmental interference by other constitutional provisions, in particular, the Fifth and the Fourteenth Amendments, to say nothing of numerous provisions in State constitutions. But, for present purposes, it is unnecessary to dwell on this aspect of the matter. Nor need we here consider such obvious qualifications of such right as are illustrated by quarantine regulations and provisions, designed to prevent fraud and deception.

We are here to consider such right of transportation from State to State as existing *under conditions of special privilege*. But first let us consider it as existing in the absence of such conditions, what we call the bald right of transportation. This requires but little consideration, and may easily be illustrated. A peddler with his pack enjoys the right of transportation, of person and of property, between points say in the State of Ohio. Nor is there any difference manifest in this regard when he crosses the State line into Pennsylvania, West Virginia, Kentucky, Indiana, or Michigan. And so as to a farmer driving his wagon laden with produce.

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[1] For the sake of additional clearness this discussion does not specifically include "commerce with foreign nations," though largely applicable thereto.

[2] *Bowman v. Chicago, &c., Ry. Co.*, 125 U. S., 465, 508 (1888); see also *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S., 229, 261 (1911).

But note carefully that we have thus far supposed that neither the peddler nor the farmer asks or receives for the purpose of such transportation any special privilege granted by governmental authority. The complex conditions of our modern civilization soon bring in the necessity for such privileges. Let us consider the case of the Ohio farmer.

The business of transporting produce from the Ohio farm, say to Pittsburg, Wheeling, Louisville, Indianapolis, or Detroit, has now become so extensive that the farm wagon no longer suffices. For purely land transportation the farmer makes use of a railroad, whether owned and operated by him or (as is practically always the case) by others, is immaterial, so far as we are here concerned. But the construction and operation of a railroad commonly, even if not necessarily, requires the obtaining of special privilege or privileges from some governmental authority. To say nothing of the numerous and complex privileges involved in the creation of a corporation, there is now required the grant of the privilege of eminent domain.

Or suppose the farmer to be engaged in transporting his produce into Kentucky or West Virginia, States separated from Ohio by a navigable river. In the absence of suitable bridges, the use of a vessel now becomes necessary, though, indeed, this does not, necessarily at least, involve the grant of any special privilege. But suppose that our farmer, or, for that matter, any one else, having vessels suitable for transportation of persons or property across the Ohio River into Kentucky or West Virginia, desires to make them profitable by carrying for hire. Neither here is there necessarily involved the grant of any special privilege. But those transporting under these conditions commonly find it desirable that they be granted the right of landing at certain points, or that others be excluded from transporting between certain points; in other words, that there be obtained an exclusive ferry privilege or franchise of transporting between such points.

Having thus endeavored to make plain the distinction between the bald right of transportation from State to State (generally speaking, unquestionable) and such transportation under conditions of special privilege, it is now to be considered whether there is likewise under any conditions a like right of such transportation *under conditions of special privilege*: whether, if it exists at all, there are any limitations, and if so, what.

But before considering the particular case of transportation from State to State, let us consider some other cases, thus manu-

facture and sale. Now, subject to qualifications already stated, it may be broadly asserted that there exists an absolute right of manufacture and sale within the territorial limits of a given State, whether existing as a "natural" "inalienable" right, or as secured by say the Fifth and Fourteenth Amendments, to say nothing of numerous provisions in State constitutions. But is there any such absolute right of manufacture and sale, under conditions of special privilege? Can those engaged therein insist upon being clothed with the privileges of a corporation or, having been so clothed, insist upon the right to have such privileges continued? Can they insist upon being allowed the privilege of eminent domain? Clearly not, as a general rule. The point does not require elaboration.

Yet obvious as it is, it seems to have been persistently overlooked or ignored by the Supreme Court in its application to transportation from State to State: that is, the court has overlooked or ignored the distinction between the bald right of transportation and transportation under conditions of special privilege. The opinions contain little discussion of the topic, but that in *Crutcher v. Kentucky*[3] contains the following language: "If a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other States, it would not be within the province of the State legislature to exact conditions on which they should carry on their business, nor to require them to take out a license therefor. To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and *the accession of mere corporate facilities,* as a matter of convenience in carrying on their business, *cannot have the effect of depriving them of such right.*" Illustrations of this attitude of the court will presently be furnished.

The case of corporate privileges seems, then, to justify us in asserting (as a matter of authority) that there exists, to an extent at least, an absolute right of transportation from State to State, that is something more than a bald right of transportation, being the right of transportation under conditions of special privilege. But it scarcely needs pointing out that there has not yet been recognized the existence of an absolute right of transportation from State to State under any and all conditions of special privilege. A limitation or limitations must exist somewhere. The dis-

[3] 141 U. S., 47, 57 (1891).

covery thereof may be assisted by a consideration of what are not corporate privileges, strictly considered, not, at any rate, as the expression is commonly understood. The most conspicuous instance is the privilege of eminent domain.

Most lawyers would doubtless be considerably surprised at an intimation that there is any doubt of the soundness of the proposition that a foreign corporation, railroad or other, may, under any conditions, without the permission or against the will of a State, exercise the privilege of eminent domain within its territory. And, as a matter of authority, this proposition does seem fairly well established, even as applied to a corporation engaged in interstate transportation. Indeed the point seems to have usually been regarded as too obvious to require extended discussion.[4]

But it is here to be considered whether, after all, this conclusion is to be readily accepted without qualification. It is certainly well established, as a general rule, that it is beyond the power of a State to impose restrictions upon interstate transportation by a foreign corporation. And the rule has been extended to what is not, strictly speaking, transportation, but merely incidental thereto,[5] Now is not the exercise of the privilege of eminent domain so incidental to transportation by railroad that it is beyond the power of a State to impose restrictions upon the exercise thereof by a foreign corporation, engaged in interstate transportation by railroad?

In *Pensacola Tel. Co. v. Western Union Tel. Co.*[6] it was held beyond the power of a State to impose restrictions upon the construction of an interstate telegraph line, but it was regarded as unnecessary to determine whether this included the privilege of eminent domain. In *Western Union Tel. Co. v. Superior Court,*[7]

[4] See, for instance, *Evansville & Henderson Traction Co. v. Henderson Bridge Co.,* 141 Fed., 51 (C. C. A. 6th C., 1905). So *a fortiori* as to a domestic corporation. See, for instance, *Northwestern Tel. Co. v. City of St. Charles,* 154 Fed., 386 (C. C. Minn., 1907). See also *Lewison Eminent Domain,* 3d ed., §374; *Beale on Foreign Corporations,* §115.

[5] Thus in *Norfolk & Western R. R. Co. v. Pennsylvania,* 136 U. S., 114 (1890), was held invalid the imposition of a license tax upon a railroad corporation, on account of having an office that was maintained solely because of the interstate business of the corporation. Clearly keeping an office is not of itself transportation.

[6] 96 U. S., 1 (Oct., 1877). To like effect, *Western Union Tel. Co. v. Ann Arbor R. R. Co.,* 178 U. S., 239 (1900); *Western Union Tel. Co. v. Pennsylvania R. R. Co.,* 195 U. S., 540 (1904).

[7] 115 Pac. 1091 (Cal Dist. Ct. of App., 1911).

however, the right of a telegraph corporation engaged in interstate transportation to exercise such privilege was clearly recognized, even on the assumption that it was the intention of the legislature to exclude it from such right. The Court said: "It may be declared as a matter of common knowledge that the right in telegraph or other corporation organized for cognate purposes to exercise the power of eminent domain is absolutely, indeed, indispensably essential to the carrying on of their business, for obviously, without such right, they could very easily be prevented from doing business at all." Is not this fairly obvious? This conclusion was, indeed, largely based on congressional legislation regarded as referable to the power to establish post roads.[8] But it seems an easy step therefrom to the conclusion that such right may with equal reason be regarded as based on the commerce clause.

But, however, it may be as to the privilege of eminent domain, the existence of a right that seems closely analogous thereto was clearly established in *Oklahoma v. Kansas Natural Gas Co;" Haskell v. Cowham.*[10] Here[11] it was held beyond the power of a State to forbid to a corporation engaged in interstate transportation of natural gas, the use of pipe lines, though the construction thereof involved the crossing of the highways of the State. It was said in one of the opinions: "The only practicable method of transporting natural gas is by a pipe line, and the prohibition of the use of a pipe line for that purpose is in effect a prevention of its transportation." And there was overruled the contention thus stated: "The State owns the highways, hence it has the power to withhold from all the privilege of laying and operating pipes across the lines of these highways beneath their surface for the purpose of transporting natural gas, or any other articles of interstate commerce."

Reference has already been made to interstate transportation by water, thus, by ferry, across a river or other water separating States. It seems established that a State may grant an exclusive

[8] For present purposes, it seems unnecessary to consider whether, merely as a matter of statutory construction, this decision can be reconciled with *Pensacola Tel. Co. v. Western Union Tel. Co.,* and other decisions of the Supreme Court to the same effect.

[9] 221 U. S., 229 (1911).

[10] 187 Fed., 403 (C. C. A. 8th C., 1911).

[11] That is, in *Oklahoma v. Kansas Natural Gas Co.* In *Haskell v. Cowham,* the restriction was upon an individual.

ferry franchise for the purpose of transportation into another State.[12] But it does not follow that, save as a matter of comity, the grant can operate in another State, so as to, for instance, give an exclusive right to land, or to transport from the shore therein. Indeed, so far as the authorities go they seem opposed to the existence of any such right.[13] Yet, if it once be granted that such exclusive right to land in or transport from another State is a reasonably necessary incident of the concededly valid exclusive ferry franchise, it may be difficult to avoid the conclusion that there is such exclusive right. Questions of difficulty might, however, arise out of conflicting grants from different States.

On the whole, it would scarcely seem that the limits of the doctrine of the right to engage in interstate transportation under conditions of special privilege have been clearly established, though so far as they have been, the test would seem to be whether the possession of such privilege is in any particular case, reasonably necessary to the exercise of the right to engage in such transportation.

The subject of interstate transportation, under conditions of special privilege is much complicated by the circumstance that there are two recognized sources of such special privilege, the State and the Federal governments. Thus it is established that either Congress or a State legislature may create a corporation with authority to engage in interstate transportation. With reference to interference with such transportation under governmental authority, we obviously have four distinct classes of cases: (1) interference by a State, where the grant of special privilege is by a State; (2) by Congress, where the grant is by a State; (3) by a State, where the grant is by Congress; (4) by Congress, where the grant is by Congress.

(1) *Interference by a State, where the grant of special privilege is by a State.* It should be obvious, we submit, that, so far at any rate, as the commerce clause is concerned, it is within the power of the State to withdraw such privilege entirely, or to prescribe the conditions under which it may be exercised. Yet the decisions of the Supreme Court do not support this view, the reason being, as it seems to us, failure to distinguish between the bald right to engage in interstate transportation and the right to

[12] See *Conway v. Taylor,* 1 Black., 603 (Dec. 7, 1861).

[13] See *Weld v. Chapman,* 2 Iowa, 524 (1856); *Burlington & Henderson County Ferry Co. v. Davis,* 48 Iowa, 133 (1878).

so engage under conditions of special privilege. Having reached the conclusion that, in the former case, it is, as a rule, beyond the power of a State to impose restrictions, the same rule was, without discrimination, applied to transportation under conditions of special privilege granted to the State itself. This fallacious conclusion[14] underlies *Wabash, St. Louis & Pacific Ry. Co. v. Illinois,*[15] where, in the case of a *domestic* corporation, the regulation of rates for interstate transportation was held invalid. The same is true of *Philadelphia & Southern Steamship Co. v. Pennsylvania,*[16] a case of taxation of the gross receipts of a domestic corporation. And the same fallacy has been applied to foreign corporations, as so recently illustrated by a decision that we have just considered, *Oklahoma v. Kansas Natural Gas Co.*[17]

(2) *Interference by Congress, where the grant of special privilege is by a State.* It seems beyond doubt that the bald right of interstate transportation is, as a rule, secured against interference by Congress, if not as a matter of natural, inalienable right, then by the Fifth Amendment, which has been said to forbid "a regulation of interstate commerce, not merely affecting the mode or manner of transportation, but excluding from interstate transportation altogether certain classes of persons, or imposing conditions on such transportation as would wantonly and arbitrarily affect personal liberty."[18] But is the same true of such transportation under conditions of special privilege granted by a State? It seems difficult to see why it is not, if we once admit, as indeed we must, as a matter of authority that it is within the power of a State to grant such special privilege. To take a concrete case, may Congress, either absolutely prohibit interstate transportation by a corporation created by a State, or require it to perform a condition such as the payment of a license fee, before engaging therein? Leaving out of consideration the exercise of the taxing power, pure and simple[19] we submit that, speaking generally, such

[14] The fallacy has not been altogether overlooked in the decisions. See very pertinent observations in *State v. C. N. O. & T. P. Ry. Co.,* 47 Ohio St., 130 (1890). See also *Railroad Co. v. Maryland,* 21 Wall. (U. S.), 456, 471, (1874) and dissenting opinion in *Wabash, St. Louis & Pacific Ry. Co. v. Illinois;* also argument of Counsel in *State Freight Tax Case,* 15 Wall (U. S.), 232, 264 (Dec. 1872).

[15] 118 U. S., 557 (1886).

[16] 122 U. S., 326 (1887).

[17] *Supra.*

[18] *U. S. v. Delaware & H. Co.,* 164 Fed., 215, 231 (C. C. Pa., 1908).

[19] See *Flint v. Stone, Tracy Co.,* 220 U. S., 107 (1911).

interference is beyond the power of Congress. But the contrary view that Congress has such power under the commerce clause has been conspicuously advocated.[20] It remains for the Supreme Court to settle the point.

(3) *Interference by a State, where the grant is by Congress.* It seems clear that such interference is, as a rule, beyond the power of a State, thus, as to interference with interstate transportation by a corporation deriving authority from Congress. *Western Union Tel. Co. v. Superior Court*[21] suggests that this is even true of the exercise of the power of eminent domain.

(4) *Interference by Congress where the grant is by Congress.* This point requires little consideration. Doubtless there exists, generally speaking, such power of interference, though under certain conditions there may be limitations imposed by the Fifth Amendment.

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[20] See in 3 *Mich. Law Rev.*, 264 (1905), discussion by H. L. Wilgus of the recommendation by Mr. Garfield as Commissioner of Corporations.

[21] *Supra.*