

{ Hough & Yard, (successors to Phillips & Boswell.)
} . printers, No. 4, Chancery-court, Trenton, N. J.

Court of Errors and Appeals in the last resort in all Causes.

New Jersey Supreme Court.

NOVEMBER TERM, 1863.

Hudson county, ss.—The State of New Jersey, plaintiff in this suit, by Frederick T. Frelinghuysen, Attorney General of the said State, complains of the Erie Railway Company, a body corporate, defendants, of a plea of trespass on the case upon promises.

For that whereas the said defendants, on the thirty-first day of January, in the year of our Lord one thousand eight hundred and sixty-three, at Jersey City, in the county aforesaid, were indebted to the State of New Jersey in sixty thousand dollars for money then and there lent by the plaintiffs to the defendants; and in sixty thousand dollars for money then and there paid by the plaintiff for the use of the defendants, at their request; and in sixty thousand dollars for money then and there received by the defendants for the use of the plaintiff; and in sixty thousand dollars for money found to be due from the defendants to the plaintiff on an account then and there stated between them. 10

And whereas, the defendants afterwards, on the day and year aforesaid, at the county aforesaid, in consideration of the premises, respectively then and there promised to pay the said several moneys respectively to the plaintiff on request, yet they have disregarded their promises, and have not paid any of the said moneys, or any part thereof, to the plaintiff's damage of sixty thousand dollars. 20

F. T. FRELINGHUYSEN,
Attorney General.

SCHEDULE.

The claim of the State of New Jersey against the Erie Railway Company is founded on the tenth section of the act entitled "A further supplement to the act entitled an act concerning taxes," approved April fourteenth, one thousand eight hundred and fifty-six, which said supplement was approved March 28, 1862.

Number of passengers and tons of goods, wares, and merchandise carried by defendants on railroads in this State, exceeding ten miles, and not transported exclusively within this State, from and including March 28, 1862, to and including December 31, 1862:

Passengers, 184,708½, at 3 cents each,	\$5,541 25
Tons of merchandise, &c., 664,164½, at 2 cents per ton,	13,283 29
	<hr/>
	\$18,824 54

Interest from January 31, 1863.

NEW JERSEY SUPREME COURT.

NOVEMBER TERM, 1863.

THE ERIE RAILWAY COMPANY

adsm.

20 THE STATE OF NEW JERSEY.

Hudson county, *ss.*—And the said defendants, by I. W. Scudder, their attorney, come and defend the wrong and injury, when, &c., and say they did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against them, and of this they put themselves upon the country, &c.

I. W. SCUDDER,
Defendants' Att'y.

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY	}	<i>Case made by means of a rule of the Supreme Court, &c., on the liability of the defendants to pay tax on transit duty.</i>
<i>vs.</i>	}	
THE ERIE RAILWAY COMPANY.	}	

The State of New Jersey claim from the Erie Railway Company the sum of eighteen thousand eight hundred and twenty-four dollars and fifty-four cents, and interest thereon from the thirty-first of January, eighteen hundred and sixty- 10 three, for this, that from and including the twenty-eighth day of March, eighteen hundred and sixty-two, to and including the thirty-first day of December, in the same year, the said company have carried and transported on railroads in this State goods, wares, merchandise, and passengers, which said goods, wares, merchandise, and passengers were carried and transported as aforesaid for a distance exceeding ten miles, and which said goods, wares, and merchandise and passengers were not transported exclusively in this State.

Said claim of the State of New Jersey is made under and 20 by virtue of the tenth section of the act entitled "A further supplement to the act entitled an act concerning taxes," approved April fourteenth, one thousand eight hundred and forty-six, which said supplement was approved March twenty-eighth, eighteen hundred and sixty-two, by which said section it is, among other things, enacted "that all corporations regularly doing business in this State, and not being corporations of this State, shall be assessed and taxed for and in respect of the business so by them done and transacted in this State in manner following, that is to say: Any 30 such company so doing business shall pay a transit duty of three cents on every passenger, and two cents on every ton of goods, wares, and merchandise or other articles carried or transported by or for such company on any railroad or canal in this State for any distance exceeding ten miles, except passengers and freight transported exclusively within this State."

The said the Erie Railway Company admit the transportation of goods, wares, and merchandise and passengers from states and territories beyond the limits of the State of New 40

Jersey, on railroads in New Jersey, which goods, wares, merchandise, and passengers were not transported exclusively within this State during the period aforesaid, which, at the rates in said act, would produce the sum aforesaid, but deny that the said act is applicable to them, and that the same is a valid law under the Constitution of the United States; and in pursuance of the statutes in such case made and provided, the following case is agreed upon, that it may be submitted to the opinion of the Supreme Court whether the said com-
 10 pany shall pay to the treasurer of the State of New Jersey the sum aforesaid or not; and that judgment be entered in accordance with such opinion as upon a special verdict.

CASE.

Most of the goods, wares, merchandise, and passengers, for the transportation of which, by the Erie Railway Company, in the State of New Jersey, the said transit duty or tax is charged, have been by that company, and other railroads in connection with them, carried over the State of New Jersey
 09 from states and territories of the United States in the west
 20 to states of the United States in the east, and from states of the United States in the east over New Jersey to States and territories of the United States in the west.

Some few goods, wares, merchandise, and passengers have been transported from States and territories beyond the limits of the State of New Jersey into New Jersey, which transportation in New Jersey has exceeded ten miles.

That on the twenty-fourth day of April, eighteen hundred and thirty-two, the New York and Erie Railroad Company was incorporated by the Legislature of the State of New
 08 York, with power to construct a railroad commencing at the
 30 city of New York, or such point in its vicinity as should be most eligible and convenient therefor, and continuing the same, through the southern tier of counties of that State, to the shore of Lake Erie.

That, under the authority given by the last named act and other acts of the Legislature of the State of New York, and also, under the authority by acts of the Legislature of the State of Pennsylvania, a railroad was constructed from Pier-
 01 mont, on Hudson river, in the State of New York, through

the southern tier of counties in the State of New York, and through the counties of Pike and Susquehanna, in the State of Pennsylvania, to Dunkirk, on Lake Erie, in the State of New York, and that the said road was completed and in operation on or about the first day of May, eighteen hundred and fifty-one, for the transportation of freight and passengers.

That, on the twenty-first day of January, eighteen hundred and thirty-one, the President and Directors of the Paterson and Hudson River Railroad Company were incorporated by 10 the Legislature of the State of New Jersey with power to construct a railroad from Paterson, in the State of New Jersey, to the Hudson river, at or near Jersey City.

That, under the power granted by the last named act, a railroad was constructed by said company from Paterson, in the county of Passaic, to Bergen Hill, back of and near Jersey City, now in the county of Hudson and State of New Jersey, and on the western side of Bergen Hill a junction was formed with the railroad of the New Jersey Railroad and Transportation Company, also a corporation created by the 20 laws of the State of New Jersey, and which last named railroad extended to the Hudson river, at Jersey City.

That the said Paterson and Hudson River Railroad was completed from Paterson to Bergen Hill aforesaid, and had been in full operation for a considerable period prior to the ninth day of September, eighteen hundred and fifty-two, and passengers and freight were thereby transported from Paterson to Bergen Hill, a distance of about fourteen miles, and from thence over the rails of the New Jersey Railroad and Transportation Company, to the Hudson river, at Jersey 30 City—a distance of about two miles.

That, by the eighteenth section of the act incorporating the President and Directors of the Paterson and Hudson River Railroad Company, it was provided that “the said Company shall pay yearly and every year, after the expiration of ten years, a tax of one-half of one per cent. upon 40 “the capital stock so paid in as aforesaid, and that no further or other tax or impost shall be levied or assessed upon “said company,” and such tax has been paid. And the 19th section of said act declares that said act shall be deemed and taken to be a public act.

That, on the tenth day of March, eighteen hundred and forty-one, the Paterson and Ramapo Railroad Company were incorporated by the Legislature of the State of New Jersey, with power to construct a railroad from a suitable place in the town of Paterson, through the counties of Passaic and Bergen, to some suitable point or points in or near the dividing line between the township of Franklin, in the county of Bergen, in the State of New Jersey, and the State of New York; and said charter provided for paying the State five
 10 cents on each passenger, and eight cents on each ton of
 01 freight transported, "and that no other State tax shall be levied or assessed on said company."

The Legislature of New Jersey, on April 1, 1845, enacted as follows:

SEC. 1. It shall be the duty of the Treasurer of the Paterson and Ramapo Railroad Company to pay to the Treasurer of this State, annually, a tax of one-half of one per centum upon their capital stock expended, until the net earnings of the railroad shall amount, annually, to six per centum upon
 20 the cost thereof, and from and after that time a tax of one
 per centum; and that such payments shall be received and taken in full discharge and satisfaction of the transit duties of five cents a passenger, and eight cents a ton, provided for in the twenty-second section of their act of incorporation, and such tax has been paid.

That the last named company constructed a railroad, under the power given by said act, from Paterson aforesaid, in the State of New Jersey, to the boundary line between the said State of New Jersey and New York, being a distance of
 30 about fifteen miles, and the same was completed before the
 06 ninth day of September, eighteen hundred and fifty-two, and the rails of the Paterson and Ramapo Railroad Company were connected with those of the Paterson and Hudson River Railroad Company at the town of Paterson, in the said county of Passaic; and said railroads made running connections between Jersey City and said boundary and the road of the New York and Erie Railroad Company before the date last aforesaid.

That, prior to the ninth day of September, eighteen hun-

dred and fifty-two, a corporation known as the Union Railroad Company was incorporated under the laws of the State of New York, for the purpose of constructing a railroad from the said termination of the Paterson and Ramapo Railroad, on the line between the State of New York and the State of New Jersey, and a station on the line of the railroad of the said New York and Erie Railroad Company, in the State of New York, and with the intention of carrying the travel and transportation upon said last named road to approach the Hudson river and the City of New York over said New Jersey roads. 10

That the last named company, about thirteen years since, constructed a railroad from the boundary line between New York and New Jersey to the railroad station at Sufferns, in the State of New York, on the line of the said New York and Erie Railroad—being a distance of about half a mile.

On the ninth day of September, eighteen hundred and fifty-two, the said Union Railroad Company became the lessees of the said railroad and chartered franchises of the President and Directors of the Paterson and Hudson River Railroad Company, during the continuance of the charter of the latter Company. 20

That in and to the said lease, the Paterson and Hudson River Railroad Company was the party of the first part, and the said Union Railroad Company was the party of the second; and that the agreement and provisions of said lease relative to the payment of taxes or charges imposed by public authority was and is as follows:

“And the parties of the second part, in like manner and for the like consideration, covenant and agree, to and with the parties of the first part, that during the continuance of this demise, or of any future demise that may be made in pursuance of the provisions above contained, they, the parties of the second part, their successors or assigns, will bear and pay to the State of New Jersey, for taxes that may be laid by the authority of said State on the parties of the first part, or their property, such amount of money annually as shall be equivalent to one-half of one per cent. on the capital stock of six hundred thousand dollars of the parties of the first part. 30

And it is further mutually covenanted and agreed, by and between the parties to these presents, that, in the event of a reduction of capital, the amount to be paid under the agreement herein contained, by the parties of the second part, or towards the taxes imposed or which may be imposed by the Legislature of the State of New Jersey, shall be proportionally reduced."

On the same ninth day of September, eighteen hundred and fifty-two, the Union Railroad Company also became the lessees of the railroad property and estate and franchises of the Paterson and Ramapo Railroad Company, during the continuance of the charter of the latter company.

That in and to the said last named lease, the said Paterson and Ramapo Railroad Company was party of the first part, and said Union Railroad Company was party of the second part, and the agreement and provisions of said lease, as to the payment of taxes and charges imposed by public authority, were as follows :

"It is further understood and agreed, by and between the parties to these presents, that the parties of the first part shall bear and discharge all the taxes that may be imposed on them, the parties of the first part, or on their property and estate, by the Legislature of the State of New Jersey, during the continuance of the demise or demises in this instrument made or agreed to be made.

But is further agreed, that if during the existence of the lease or leases made or to be made to the parties of the second part, they, the said last named parties, shall make or construct any buildings or additions to the road herein mentioned, whereby additional taxes shall be charged or levied on said road, then the parties of the second part shall bear and discharge additional taxes."

On the same ninth day of September, eighteen hundred and fifty-two, after the execution and delivery of the leases aforesaid, the Union Railroad Company leased their own railroad property and franchises to the New York and Erie Railroad Company, and also in the same instrument assigned the said two leases of the Paterson and Hudson River Railroad and the Paterson and Ramapo Railroad, so held by the

said The Union Railroad Company, to the said The New York and Erie Railroad Company; and the said The New York and Erie Railroad Company thereby acquired the rights and assumed the obligations of said Union Railroad Company, created by said leases, so assigned, and each of them.

These leases were authorized and sanctioned by an act of the Legislature of the State of New Jersey, approved March fourteenth, eighteen hundred and fifty-three; and the act in reference to said lease, and the said assignments of the same, contains the following language: 10

IV. "*And be it enacted*, That the power and authority of the said Paterson and Hudson River Railroad Company, and the Paterson and Ramapo Railroad Company, to make such leases and contracts is hereby declared and affirmed, and said leases and contracts are hereby declared legal and valid; provided, that said leases and contracts shall not be held to grant any power, privilege or right not granted to said companies respectively by their charters and the supplements thereto."

Under said act and leases, the said New York and Erie 20 Railroad Company entered upon said leased property, and run and operated said roads, in connection with its own railroad, until the foreclosure proceeding hereinafter referred to, and since said foreclosure of said roads, have been operated by the said Erie Railway Company in connection with its own road.

By an act of the Legislature of New Jersey, approved February twenty-first, eighteen hundred and fifty-six, the New York and Erie Railroad Company were authorized to purchase and hold lands in the county of Hudson and State of 30 New Jersey in their own name; and were authorized to proceed in their own name, and to make and construct a railroad from any point in the railroad of the Paterson and Hudson River Railroad Company, being the said leased railroad, to any point on the Hudson river opposite to the city of New York, according to the provisions of the act incorporating the said Paterson and Hudson River Railroad Company; and it was provided by the last named act, that in regard to taxes

and public charges, and the fourth section of said act is, as follows:

IV. "*And be it enacted*, That the said New York and Erie Railroad Company shall, as soon as they shall have completed the said railroad to the Hudson river, make and file in the office of the Secretary of this State, a map and plan of said railroad from the point where it shall be constructed from the present road to the Hudson river, and of all side-tracks and switches connected therewith, and the ground
10 covered thereby, and of the land occupied by them as depots or stations, not including therein more than two acres of land not occupied by their track at each station or depot, verified by the oath of the president and engineer of said company; and shall attach thereto a just and true account of the costs of said lands and track and the improvements thereon, verified by the oath of the president and engineer; and said company shall thereafter pay to the Treasurer of this State, yearly and every year, a tax of one half of one
20 per centum upon the amount of said cost, in lieu of all other taxes on the same; and the lands included in said plan or map, and said account, shall be subject to no other tax, impost, or assessment, except city assessments for improvements upon or near the same, to which they shall be liable as all other lands."

VI. "*And be it enacted*, That the Governor, the Chancellor, the Attorney General, the Treasurer, and Secretary of this State, the Justices of the Supreme Court, and the Judges of the Court of Errors of this State, whilst travelling for the purpose of discharging the duties of their offices; and the
30 members and officers of both houses of the Legislature of this State, during their annual or other sessions, shall pass and repass on the railroads of the president and directors of the Paterson and Hudson River Railroad Company, including the extension hereby authorized, and of the Paterson and Ramapo Railroad Company, in the cars of any company running on said railroads, free of charge, subject to the rules and regulations of such company."

And this map and plan, referred to in said act, were made and filed as therein required; and said road not having been

fully completed, said account cannot yet be filed, but said road for two and a half years has been in operation by said railroad company.

That on the twenty-fifth day of February, eighteen hundred and fifty-six, a company, called the Long Dock Company, was incorporated by the Legislature of the State of New Jersey. That said Long Dock Company, having been duly organized under said charter, entered upon the exercise of its chartered rights, and acquired the real estate lying between the Hudson river and the said eastern termination of 10 the said Paterson and Hudson River Railroad; and upon said property the Long Dock is now situated.

The said Long Dock Company were authorized to purchase and hold lands, to establish a ferry to the city of New York, and the construction of a railroad on said lands was also authorized by said act, within the limits of Hoboken and Jersey City, to connect with other railroads authorized or constructed by law.

That on the first day of July, 1856, a contract and lease was made between the said Long Dock Company and the 20 said New York and Erie Railroad Company, by which the latter company was authorized to construct a railroad as above authorized upon said property of the Long Dock Company, from the termination of said Paterson and Hudson River Railroad, at the west side of Bergen Hill, by tunnel through said hill to the Hudson river, a distance of about one and three quarter miles; and was further authorized to enter into possession of said railroad and property, and to acquire title to the same; and a tunnel through said hill, and a railroad upon said property, with extensive docks on 30 the Hudson river, have been constructed at an expense of more than two millions of dollars, by said New York and Erie Railroad Company and by the Erie Railway Company, as the successor to the rights of said New York and Erie Railroad Company. And said contract and lease contained the following provision, still in force :

“ And the said party of the second part further covenants and agrees to pay, as part of said rent, the interest on any sum or sums expended for assessments, impositions, and

taxes that have been or shall be made upon such demised lands, and lands hereafter to be acquired, and the erections and improvements thereon."

That by the said consent of the said Long Dock Company, and under the authority of the State of New Jersey, as conferred by the said act of the twenty-first day of February, eighteen hundred and fifty-six, the New York and Erie Railroad Company constructed a tunnel under said Bergen Hill, and laid rails for a railroad thereon, and on the said property
10 of said Long Dock Company, and constructed the docks aforesaid, and connected the railroad of the President and Directors of the Paterson and Hudson River Railroad Company, west of Bergen Hill, in Hudson county, with the ferry on Hudson river over said Long Dock property.

That in the month of August, 1859, such foreclosure proceedings, (on the fourth and fifth mortgages of the New York and Erie Railroad Company, which covered all its property, rights, and franchises,) and such other legal proceedings were taken in the courts of the State of New York,
20 and in the United States Circuit Court for the State of New Jersey, and in the courts of the State of Pennsylvania, and were therein and thereafter consummated and concluded, and such legislative acts were in the meantime passed and approved by the respective Legislatures and Governors of New York, New Jersey, and Pennsylvania, and such conveyances were made, that on the first day of January, 1861, the Erie Railway Company, then a duly organized corporation under the laws of the State of New York, became possessed of and owned all the said rights, franchises, and
30 property formerly of the said New York and Erie Railroad Company, in each and all of said States, including the said leases and assignments of the same, and the rights thereby created or conveyed, and has since owned said leases and property, and exercised said rights and franchises in each of said states.

That in reference to such foreclosure and sale, and the rights and property so acquired by the Erie Railway Company, the Legislature of New Jersey passed an act with the following heading :

“An act to confirm the sale under foreclosure of the property, rights and franchises of the New York and Erie Railroad Company, and to complete the organization of the Erie Railway Company, approved on the 13th day of March, 1862.”

That the first, fourth and seventh sections of said act are as follows:

“1. *Be it enacted by the Senate and General Assembly of the State of New Jersey*, That it shall be lawful for the Erie Railway Company to hold all the rights, property, franchises, 10 leases and contracts formerly belonging to or vested in the New York and Erie Railroad Company, in the State of New Jersey, or authorized by the laws of the State of New Jersey, mentioned in and conveyed by the fourth or fifth, or supplemental mortgages, stated and set forth in the said proceedings of foreclosure in the said Supreme Court of the State of New York, and which have been sold and transferred by a sale under said proceedings of foreclosure, or intended so to be, and now vested by conveyance or transfer in the Erie Railway Company. 20

“4. *And be it enacted*, That whenever any action shall be commenced against the Erie Railway Company, or any other foreign corporation using said roads, in any of the courts of this State, the first process to be made use of may be a summons or subpœna, a copy whereof shall be served on the president, or one or more of the directors, or the superintendent, or any chief agent of said company, six entire days before its return.

“7. *And be it enacted*, That this act shall not take effect unless the Erie Railway Company shall, within six months 30 from and after the passage or approval thereof, by a vote of their board of directors accept the same, and agree to observe and perform all the terms and provisions thereof, and certify and deliver such acceptance and agreement, under their corporate seal and the signature of their President, to the Secretary of State of this State, to be filed in his office: and such acceptance shall operate, and be construed in all courts to operate, as a covenant or agreement on the part of said Erie Railway Company to observe and perform such terms and provisions.”

And the board of directors of the Erie Railway Company, within said six months, duly accepted and agreed to observe and perform the terms and provisions of said act, and delivered and certified such acceptance and agreement, under the corporate seal of said company and signature of its president, to the Secretary of the State of New Jersey, to be filed in his office.

That the railway company now operating said roads has formed extensive connections with the railroads in other
 10 States, and by contract and arrangement, and in obedience to its public duty, and the said company being common carriers of persons and property, transports passengers and freight from every State west and southwest of New York, not now in actual rebellion against the government of the United States, and also from the Canadas, over their road running as aforesaid, through the States of New York, Pennsylvania and New Jersey, to the city of New York; and also transports passengers and freight from and to all the New
 20 England or Eastern States, over their road running as aforesaid to or on the way to every State west and southwest of New York, not now in actual rebellion, as aforesaid, against the government of the United States, and to or on the way to the Canadas.

That, on the twenty-eighth day of March, eighteen hundred and sixty two, an act having been passed by the Legislature of the State of New Jersey, was approved by the Governor thereof, and became a law, entitled, "A further supplement to an act entitled an act concerning taxes," approved
 April fourteenth, one thousand eight hundred and forty-six.

30 By the tenth section of the said act it was enacted, in the following language:

"That all corporations regularly doing business in this State, and not being corporations of this State, shall be assessed and taxed for and in respect of the business so by them done and transacted in this State, in manner following, that is to say: every such company so doing business shall pay a transit duty of three cents on every passenger, and two cents on every ton of goods, wares and merchandise, or other articles carried or transported by or for such company on
 40 any railroad or canal of this State, for any distance exceed-

ing ten miles, except passengers and freight transported exclusively within this State."

The said The Erie Railway Company claim and insist that they are not subject to the said clause of the last named act, nor bound to pay the transit duty therein mentioned, which the State of New Jersey and the authorities thereof demand of said company; and said company, among other things, insists that it is a corporation of this State, and if not a corporation of this State, that the Legislature of New Jersey cannot, under or without a violation and infringement of the Constitution of the United States and its own laws, impose, claim or collect such transit duty or tax on the business of the Erie Railway Company, or upon or by reason of the passengers and goods that are or may be transported in the State of New Jersey by said company. 10

But whether or not the said The Erie Railway Company shall pay a transit duty of three cents on every passenger, and two cents on every ton of goods, wares and merchandise, or other articles transported by or for said company, for any distance exceeding ten miles, except passengers or freight transported exclusively within this State; and whether said last named act of the Legislature of the State of New Jersey, and the said cited provisions thereof, are void and not binding on said company by reason of being repugnant to the laws or Constitution of the United States; and whether the same are void and not binding on said company by reason of said company not being bound by the said acts of New Jersey, or by its agreements in taking said leases, to pay the same; the Erie Railway Company claiming the protection of the laws and the Constitution of the United States to any or all of said points pertaining, and that said duty cannot be legally collected, respectfully submit to the judgment of this honorable court, in pursuance of the statutes in such cases made and provided. 20 30

It is stipulated between the State of New Jersey and the Erie Railway Company, that the foregoing state of the case shall constitute a part of the record of the Supreme Court, as if a special verdict had been found by a jury, and that

errors can be assigned thereon in the Court of Errors and Appeals in the last resort in all causes.

F. T. FRELINGHUYSEN,
Attorney General for the State.

I. W. SCUDDER,
Attorney for the Erie Railway Co.

This cause was argued before the Honorable Chief Justice Whelpley, Justices Haines, Vredenburg, and Van Dyke, at the November term of the Supreme Court, 1863; and at the 10 February term, 1864, the Court ordered judgment for the State and against the Erie Railway Company.

A writ of error was thereupon sued out of the Court of Errors and Appeals by the Erie Railway Company, returnable to the March term of that court.

COURT OF ERRORS AND APPEALS.

THE ERIE RAILWAY COMPANY, }
plaintiffs in error, }

vs. }

Assignment of errors.

THE STATE OF NEW JERSEY, }
defendants in error. }

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Afterwards, that is to say, on the second Tuesday of March, in the year of our Lord one thousand eight hundred and sixty-four, before the Court of Errors and Appeals in the last resort in all causes, came the said the Erie Railway Company, by I. W. Scudder, their attorney, and say, that in the record and proceedings aforesaid, and in giving judgment aforesaid, there is manifest error in this, to wit: that judgment was rendered by the Supreme Court of the State of New Jersey for the State, and against the Erie Railway 30 Company, whereas, by the law of the land, judgment should have been rendered in favor of the Erie Railway Company, and against the State of New Jersey.

There is also error in this, to wit: that the said Supreme Court adjudged that the Erie Railway Company were a corporation, regularly doing business in this State, and not being a corporation of this State, and were therefore liable to be assessed and taxed for and in respect of the business done and transacted in this State, and were liable to pay a transit duty of three cents on every passenger, and two cents on every ton of goods, wares, and merchandise carried and transported by them on the Paterson and Ramapo Railroad and the Paterson and Hudson River Railroad, and the extension of the last named road to Hudson river, for any distance exceeding ten miles, except passengers and freight transported exclusively within this State; whereas, by the law of the land upon the record, and proceedings before the said Supreme Court, and the facts as found, the said the Erie Railway Company were a corporation of this State. 10

There is error in this, to wit: that by the facts, as found and contained in the said record and proceedings, a contract was made between the State of New Jersey and the President and Directors of the Paterson and Hudson River Railroad Company, that the said company should be taxed upon their capital stock paid in, and that no further or other tax or impost shall be levied or assessed upon said company. 20

And also a contract was made between the State of New Jersey and the Paterson and Ramapo Railroad Company, that the last named company should be taxed on their capital stock expended, and that no other State tax shall be levied or assessed on said company.

That the property and franchises of the said two companies, with the full power to run and operate the said roads, became vested in the Erie Railway Company by the express authority of the State of New Jersey, and the contracts made between the State of New Jersey and the said two companies relative to taxation enured to the benefit of the Erie Railway Company, as vested rights and privileges, by virtue of the acts of the Legislature of the State of New Jersey, in that case made and provided; wherefore, by the law of the land, and the facts, as found in the said record and proceedings, the judgment of the Supreme Court should have been 30

for the said the Erie Railway Company, and not for the State of New Jersey.

There is also error in this, to wit: that, by the said record and proceedings, and the facts as found, there was and still is a contract between the State of New Jersey and the Erie Railway Company, that the Erie Railway Company should not be taxed for transporting goods, wares, and merchandise over the Paterson and Ramapo Railroad, over the Paterson and Hudson River Railroad, and the extension of the Paterson and Hudson River Railroad, under the act entitled, "An
10 act to authorize the New York and Erie Railroad Company to purchase and hold lands, and complete and finish the railroad of the Paterson and Hudson River Railroad Company," approved February twenty-first, eighteen hundred and fifty-six, otherwise than on the capital of the said Paterson and Ramapo Railroad and on the capital of the said the Paterson and Hudson River Railroad, and on the cost of said completion and extension.

And therefore, by the law of the land, no transit duty on
20 goods, wares, merchandise, and passengers could be imposed as provided for by the said act approved March twenty-eighth, eighteen hundred and sixty-two, entitled, "A further supplement to an act entitled an act concerning taxes, approved April fourteenth, one thousand eight hundred and forty-six."

There is also error in this, to wit: that the said tax required to be raised by the said act of the Legislature of the State of New Jersey, approved March twenty-eighth, eighteen hundred and sixty-two, by transit duty on freight and pas-
30 sengers, as in the tenth section thereof set forth, was illegal and void, inasmuch as the same was to supply the purposes of a direct tax of twenty millions of dollars upon the United States, the sum of four hundred and fifty thousand one hundred and thirty-four dollars of which was apportioned to the State of New Jersey, under an act of Congress of the United States entitled, "An act to provide increased revenue from imports, to pay interest on the public debt, and for other purposes," approved August 5th, 1861.

And by the act of Congress aforesaid, the said direct tax
40 could only be assessed and laid on the value of all lands and

lots of ground, with their improvements and dwelling houses, and the State of New Jersey could only assess and lay such tax of four hundred and fifty thousand one hundred and thirty-four dollars on lands and lots of ground as aforesaid, with their improvements and dwelling houses. Wherefore, by the law of the land, the said transit duty of three cents on every passenger, and two cents on every ton of goods, wares, and merchandise, was and is illegal, unconstitutional, and void.

There is also error in this, to wit: that the Congress of the 10 United States could not delegate to the State of New Jersey the power to assess and raise a direct tax in the State of New Jersey, under and by virtue of the said act of Congress entitled, "An act to provide increased revenue from imports to pay interest on the public debt and for other purposes," approved August fifth, eighteen hundred and sixty-one, on such objects of taxation, and in such mode and manner as the State of New Jersey might determine to be proper; and therefore, by the law of the land, the said transit duty on goods, wares, merchandise, and passengers was and is illegal 20 and void.

There is also error in this, to wit: that such part of the act of the legislature of the State of New Jersey, approved March twenty-eighth, eighteen hundred and sixty-two, being a further supplement to an act entitled, an act concerning taxes, approved April fourteenth, eighteen hundred and forty-six, as provided "that all corporations doing business in this State, and not being corporations of this State, shall be assessed and taxed for and in respect of the business so by them done and transacted in this State, in manner following, 30 that is to say: every such corporation so doing business shall pay a transit duty of three cents on every passenger, and two cents on every ton of goods, wares, and merchandise, or other articles, carried or transported by or for such company on any railroad or canal in this State for any distance exceeding ten miles, except passengers and freight transported exclusively within this State, as applicable to the Erie Railway Company aforesaid, as appears by the said record and proceedings in the said Supreme Court, is void, the same being repugnant to the constitution of the United 40 States."

The said provisions of the act of the legislature of the State of New Jersey is repugnant to and in violation of the eighth section of article first of the constitution of the United States, and the clauses thereof, which declare "congress shall have power to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States," also "to regulate commerce with foreign nations and among
10 the several States and with the Indian tribes."

And also the ninth section of the first article of the constitution of the United States, and the clauses thereof which declare "no tax or duty shall be laid on any articles exported from any State."

"No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, nor shall vessels bound to or from one State, be obliged to enter, clear, or pay duties in another."

Wherefore, by the law of the land, the said Supreme Court
20 should have declared that part of the said act of the legislature of the State of New Jersey, as above set forth, void, and rendered judgment for the Erie Railway Company.

There is also error in this, to wit: that such part of the act of the legislature of the State of New Jersey, approved March twenty-eighth, eighteen hundred and sixty-two, being "A further supplement to an act entitled, an act concerning taxes, approved April fourteenth, one thousand eight hundred and fifty-six," as provides "that all corporations regularly doing business in this State, and not being corporations
30 of this State, shall be assessed and taxed, for and in respect of the business so by them done and transacted in this State, in manner following, that is to say: every such company so doing business shall pay a transit duty of three cents on every passenger, and two cents on every ton of goods, wares, and merchandise, or other articles carried or transported by or for such company, on any railroad or canal in this State, for any distance exceeding ten miles, except passengers and freight transported exclusively within this State," is repugnant to the constitution of the United States, and therefore
40 in law void; wherefore, by the law of the land, the Supreme

Court should have declared the part of the said act of the legislature of the State of New Jersey, as above set forth, void, and have rendered judgment for the Erie Railway Company aforesaid.

And the said the Erie Railway Company pray that the judgment aforesaid, for the errors aforesaid, and other errors in the said record and proceedings, may be reversed, annulled, and altogether holden for nought, and that they may be restored to all things which they have lost by occasion of the said judgment.

10

I. W. SCUDDER,

*Attorney for and of counsel with the Erie
Railway Company, the plaintiffs in error.*

Joinder in error by the Attorney General.

NEW JERSEY SUPREME COURT,

FEBRUARY, 7th, 1864.

THE STATE OF NEW JERSEY,

vs.

THE DELAWARE, LACKAWANA, and WESTERN
RAILROAD COMPANY.

} *Opinion.*

HAINES, J. This cause comes to us on a special case, made 20 pursuant to the act of March 13th, 1862, relative to taxes due from incorporated companies in the State, and the supplement of March 11th, 1863, making it applicable to incorporated companies, whether in the State or not. The object of the suit is to test the validity of a claim for tax, alleged to be due to the State from the defendants, under the tenth section of the act of 28th of March, 1862, which is a supplement to the act concerning taxes.

The tenth section provides "that all corporations regularly doing business in this State, and not being corporations of the 30 State, shall be assessed and taxed for and in respect of the

business so by them done and transacted in this State, in manner following, that is to say: Every such company shall pay a transit duty of three cents on every passenger, and two cents on every ton of goods, wares, and merchandise, or other articles, carried or transported by or for such company on any railroad or canal in this State, for any distance exceeding ten miles, except passengers and freight transported exclusively within the State."

The case shows the number of passengers and tons of 10 freight so transported by the defendants; and the question is, whether they are liable to be assessed and taxed for the business so done by them.

It is insisted that the company is not liable to the tax claimed: first, because it is not a company regularly doing business in this State. But the case shows that they are the lessees of the Warren Railroad Company, and are in the use of that road for the transportation of coal and other merchandise, and of passengers, a distance exceeding ten miles within this State; and if this be so, they are a corporation 20 regularly doing business in this State.

It is further objected that there is no liability on the defendants, because they are not within the terms of the description, "but not being corporations of this State;" that the legislature, by authorizing the defendants to purchase and hold lands here, and to lease the Warren Railroad, created them a corporation of this State; that the company thereby lost its foreign, and acquired a domestic character.

By the state of the case, it appears that the Delaware, Lackawana, and Western Railroad Company was created by 30 an act of the legislature of Pennsylvania. And the act of New Jersey, conferring upon it power to purchase and hold lands in this State, calls it a corporation existing under the laws of Pennsylvania.

The State which creates a corporation gives it a local habitation as well as a name; and there only it can properly be said to exist. Its aims and operations may extend beyond, but the body, the source of its vitality, is limited to the place of its nativity. Power and privileges may be conferred by another State, but that does not divest the corporation of its 40 foreign character. The rights of citizenship conferred upon

an alien make him a naturalized, but not quite a native born citizen.

In the case of the Phillipsburg Bank and the Lackawana Railroad Company, 3 *Dutcher* 206, on a motion to quash a writ of attachment issued against the latter, it was urged that the act authorizing the defendants to hold land and to transact business within this State did, of necessity, constitute them a domestic corporation, as much so as if chartered by the laws of the State. But this court held that the legislature has clearly distinguished between the creation and the 10 recognition of a corporation; that the one refers clearly to a domestic corporation, having its place within this State, and subject in all respects to the control of its laws; the other, to a foreign corporation, having its place within another State, deriving its being from and subject to the control of the laws of such State, but recognized by the laws of the State, as having power to exercise its franchise or transact its business here."

These objections cannot prevail, and it must be held that the defendants are one of the corporations contemplated by 20 the act under which the tax is claimed.

A more serious question is raised upon the constitutionality of the act. It is insisted, by the counsel of the defendants, that it is in violation of the 8th section of the 1st article of the constitution of the United States, which confers upon the Congress of the United States the power to regulate commerce with foreign nations and among the several States. It is claimed that this power conferred on Congress has been adjudged to be exclusive, and that any attempt on the part of a State to regulate commerce among the States, 30 by interfering with its freedom or making hostile or burdensome discriminations, is an infringement of that power and void; and that in the strong and terse language of Judge Grier, in the passenger case, 7 *Howard* 464, "Congress has regulated commerce and intercourse between the several States by willing that it shall be free." If this position is conceded, it must be with considerable modification.

By the term commerce, is meant not traffic only but every species of commercial intercourse, every communication by land or by water, foreign and domestic, external and inter- 40

nal. Hence the power to regulate it must, in the language of Judge Curtis, in *Cooley* against *The Board of Wardens of Philadelphia*, embrace a vast field, containing not only many but exceedingly various subjects, quite unlike in their nature, some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port, and some as imperatively demanding that diversity which alone can meet the local necessities of navigation, and, it may be added, the local necessities of domestic intercourse.

“Where the subjects of such intercourse, continues Judge Curtis, are in their nature national, and require a uniform system of regulation, they may justly be said to require exclusive legislation by Congress.”

Where commerce is the natural character, there is no constitutional or legal power in a State to interrupt, impede, or regulate it. But when it has not such national, but a local character, the States do many things to regulate it, and some that more or less affect commercial intercourse without any violation of the constitution. Laws, for example, for the regulation of pilots and pilotage are not questioned as to their constitutionality. The regulation of the fares and tolls on turnpikes, railroads, and ferries, even directly between two States, are wholly within the jurisdiction of the States, and such power has been constitutionally exercised. And in the case of *The Chosen Freeholders of Hudson County* against *The State*, 4 *Zabriskie* 730, it was held, by the Court of Errors, that the exercise of such power was in no wise repugnant to the provisions of the constitution.

It is further insisted that the act in question practically lays a tax upon imports and exports, and so violates the 10th section of the first article of the constitution of the United States, which provides that no State shall, without the consent of Congress, lay any imposts or duties on imports or exports. If that be true, the act is clearly unconstitutional, no consent of Congress for that purpose having ever been given.

This leads to the important inquiry—does the act in question attempt to interrupt or to regulate commerce, or to impose duties or imposts on exports or imports?

It does not exclude from the State any class of persons or of property, or of vessels or other vehicles of transportation, as did the act of New York, which granted to certain individuals the exclusive use of its waters for navigation by vessels propelled by fire or steam, and which was declared to be unconstitutional in *Gibbons v. Ogden*, 9 *Wheat.* 1.

Nor does it prohibit or restrain the sale, and thereby tend to impede the importation of any article, by requiring the vendor to obtain a license to sell, as in *Brown against The State of Maryland*, 12 *Wheat.* 419, and in the license cases, 5 10 *Howard* 504.

It imposes no impost, tax, tribute, or duty, directly or indirectly, on passengers or goods, and is not within the principle of the passenger cases, 7 *Howard* 283.

Nor does it impede the export of any article by requiring stamps upon bills of lading or otherwise, and is not within the rule of *Alney v. The State of California*, 24 *Howard* 169.

It makes no discrimination between the property of citizens of the State or of other States, nor are the passengers or the owners of goods, or the goods themselves, in any wise 20 made subject to the tax or relieved by it. The tax is laid upon the company without respect to the ownership of the goods or to the residence of the passengers. It is not enforced by levy and distress; but is required to be paid by the company into the treasury of the State, and in default of payment to be recovered by an action at law.

It is a tax upon the company "for and in respect of the business by them done and transacted within the State," computed by the tons of merchandise and number of passengers transported. There is no *ad valorem* clause—all 30 goods are estimated by the ton, whether they consist of iron or gold, coals or diamonds, tow cloth or laces, vinegar or wine. Had the act provided that the company should pay a certain sum for every car or every locomotive employed, the right to do so would hardly have been questioned. The right to tax carriages habitually used in the State will not be denied. Had the act required a payment of a per centage on the earnings of the company from its operations here, it would have been within the principle on which incomes are 40 assessed.

The tax in question is neither more nor less than a tax on the income of the company from its business in this State, the correct mode of ascertaining which is by the company's annual statement of passengers and tons of merchandise transported. It imposes this tax, it is true, on a foreign corporation, and because it is foreign. Were it domestic, it would be taxed on its capital or on its cost, and be subjected to a much greater burthen; but being foreign, it is relieved from the heavier duty. This corporation enjoys the
 10 franchise of the State. Its property here and all its rights are under the protection of the laws of the State, and there is no reason why, in common with the corporations and citizens of the State, it should not bear its fair proportion of the expenses and burthens of the State government. It may be that the rate of taxation is too high, and so operates unequally; but that is a matter of legislative action, and not of judicial construction. The remedy is to be found in the Legislature, and not in the courts.

It is contended further, that the act in question is in vio-
 20 lation of that clause of the constitution of New Jersey which forbids the passage of any law impairing the obligation of contracts; that the charter of the Warren Railroad Company imposes a certain tax on its capital, and exempts the company from any further or other tax; and that a tax imposed by this act is virtually a further tax on the Warren Railroad Company.

If it be admitted, for the sake of argument, that the Warren Railroad Company, by any irrevocable contract in their charter, are exempt from further taxation, and therefore in
 30 the exception of the 8th section of the act in question, it is difficult to perceive how this tax is laid upon them. It is not charged upon them nor upon their property, nor does it diminish the value of their receipts for rent or otherwise. The defendants, by the terms of the lease of the road to them, are required "to pay and discharge all taxes, assessments, and impositions which shall or may be legally taxed, assessed, or imposed upon the premises and property" leased to them. An additional tax cannot affect the Warren Railroad Company.

40 The defendants, as lessees, can on that account claim no

exemption. The tax is not on the Warren Railroad Company, nor upon their road, stock, property or franchises. It is simply upon the defendants in respect of their profits and earnings by the transportation, in the State, of passengers and property. Were they not operating the road, and regularly doing business upon it, they would not be subject to the tax; but as they are lessees operating the road, regularly doing business upon it, they may with propriety be asked to pay something on the profits of that business, and to contribute something to the support of the government whose 10 privileges they enjoy, and under whose protection and laws they prosecute their business. The principle of the section of the act in question is not novel, nor its application without precedent.

By the act of February 4th, 1830, the Camden and Amboy Railroad and Transportation Company were required to pay to the State at the rate of ten cents for each passenger, and fifteen cents for each ton of merchandise transported on their road. By subsequent acts, the payment for passengers was made applicable to those transported over the whole line of 20 the road to through passengers.

By the act of March 7th, 1832, the New Jersey Railroad and Transportation Company were required to pay a tax on their capital; and when thereafter any railroad should intersect, or be attached to their road, so as to make a continued line of railroad carrying passengers across the State of New Jersey, between the States of New York and Pennsylvania, then they were required to pay unto the Treasurer of the State at the rate of eight cents for every passenger, and twelve cents for every ton of merchandise transported 30 thereon. Nor are these precedents confined to this State.

The legislature of Maryland, by an act of 1832, authorized the Baltimore and Ohio Railroad Company to construct a branch road from Baltimore to the city of Washington, and fixed the fare of each passenger at two dollars and fifty cents, and then required the company to pay semi-annually to the Treasurer of the Western Shore of Maryland one-fifth of the whole amount received for the transportation of passengers over their said branch road.

The legislature of Pennsylvania, by an act of the 21st 40

April, 1846, granted the assent of the State to the Baltimore and Ohio Railroad Company to locate and construct a continuation of their railroad from the town of Cumberland, in the State of Maryland, to the city of Pittsburg, and required the company to pay every six months to the treasury of the State, as a tax or duty on all tonnage, except ordinary baggage of passengers transported on that continuation of their road, such tax as the legislature might impose, not exceeding three mills per ton per mile; and in addition thereto a tax
 10 or duty on all passengers that may have passed, during each preceding six months, a distance of one hundred miles or more of said road between those points, at such rate as the legislature might direct, not exceeding fifty cents for each passenger, until the construction of a railroad connecting the Baltimore and Ohio Railroad with the Cumberland Valley Railroad by the Cumberland Valley; after that, the tax or duty not to exceed twenty-five cents for each passenger.

By an act of 26th March, 1846, the legislature of Pennsylvania granted authority to the New York and Erie Railroad
 20 Company to extend their line of railroad from a point in the village of Port Jervis, in the State of New York, across the Delaware river, into the county of Pike, in the State of Pennsylvania, and up the valley, near the river shore, a distance not exceeding thirty miles. And the stock of the company, equal in amount to the cost of such construction in Pennsylvania, was made subject to taxation in the same manner and to the same amount as other similar property was or might be made subject. And the company was further required, after the completion and operation of their road to Dunkirk,
 30 or its connection with any railroad to Lake Erie, to pay into the treasury of Pennsylvania the annual sum of ten thousand dollars, on the penalty of forfeiture of the rights and privileges granted by the act.

In the State of New York, too, we find an act, as early as April 15th, 1817, respecting navigable communication between the great western and northern lakes and the Atlantic ocean. And for the purpose of raising a canal fund, various taxes were imposed, among others a tax of one dollar upon each steamboat passenger for each and every trip or voyage
 40 such passenger may be conveyed on the Hudson river, on

board of any steamboat over one hundred miles, and half that sum for any distance less than one hundred miles and more than thirty miles. These acts, except the last named, have long been in force, and public attention almost constantly directed to them. Great complaints, indeed, have been made by parties interested, and perhaps by others, against the mode of taxation.

The acts of this State, particularly, have been the theme of much criticism, and afforded the subject of many a piquant joke and bitter sarcasm. All the acts referred to have been the subject of much discussion, as to their justice and expediency; but I am not aware of any question having been raised respecting the constitutionality of any of them. It is said that these taxes were a part of the terms of incorporation and a matter of contract entered into by the several companies, and the question of constitutionality thus avoided. But no contract respecting a regulation of commerce can make it constitutional. Consent can give neither jurisdiction nor constitutionality; each act must stand on its own merits, and fall for the want of them. 20

If legislative construction of a measure is of any value, we surely have it in the acts referred to. They are all based on the principle, that a State may tax individuals or companies who exercise privileges within the State, and are protected by its laws; and they emphatically declare that by so doing no article of the constitution of the United States is violated.

I am satisfied that the act in question is not in violation of any clause of the constitution of the United States or of this State.

Whether it is expedient to impose the tax contemplated by the tenth section of the act, and by so doing to follow the precedents set by the States of Maryland, Pennsylvania and New York, is a question to be determined by the makers, and not by the expounders of the law. 30

In my opinion, judgment should be rendered for the State on the case made.

VREDENBURGH, J. concurs.

THE STATE

*vs.*THE NEW YORK AND ERIE RAILROAD
COMPANY.*In case.*

HAYNES, J. This cause, being in all matters material to the question within, like those of the State against the Delaware, Lackawana, and Western Railroad Company, just decided, the like judgment is ordered in favor of the State.

VREDENBURGH, J. concurs.

NEW JERSEY SUPREME COURT.

NOVEMBER TERM, 1864.

10

THE STATE OF NEW JERSEY

vs.

THE ERIE RAILWAY COMPANY.

In case.

VAN DYKE, J. By certain acts of the Legislature of this State, the Paterson and Hudson River Railroad Company and the Paterson and Ramapo Railroad Company were severally incorporated, and authorized to construct railroads between Jersey City and the northerly line of this State, so that the whole together would form a continuous road between those points.

Both these roads have been completed, and embrace a line of road through the State of a little more than thirty miles. These roads have, under the assent and sanction of our Legislature, been leased to the Erie Railway Company, a corporation chartered by, and belonging to the State of New York, and whose road extends from Piermont, on the Hudson river, to Dunkirk, on the southerly shore of Lake Erie. This company, by virtue of the leases aforesaid, and of the Union Railroad incorporated by the State of New York, are now using the roads so leased, in connection with their own, in transporting passengers, goods, wares, and merchandise,

between Dunkirk and the city of New York, into and through this State.

On the 28th day of March, 1862, our Legislature passed an act concerning taxes, the 10th section of which is as follows, *viz*: "That all corporations regularly doing business in this State, and not being corporations of this State, shall be assessed and taxed for and in respect of the business so by them done and transacted in this State, in manner following, that is to say: every such company so doing business shall pay a transit duty of three cents on every passen- 10
ger, and two cents on every ton of goods, wares, and merchandise, or other articles carried or transported by or for such company, on any railroad or canal of this State, for any distance exceeding ten miles, except passengers and freight transported exclusively within this State."

It appears that, between the passage of this act and the 31st day of December, of the same year, the tax or transit duty on the passengers and merchandise carried by the Erie Railway Company into or through this State over the leased roads aforesaid, amount to the sum of \$18,824.25. To re- 20
cover this sum, the proceedings in this case have been instituted.

Several reasons have been offered to show that this tax or these transit duties should not and cannot be collected from the Erie Railway Company. I shall notice but one of them.

It is insisted that this act, and the enforcement of it, is a violation of the constitution of the United States, for that it is an interference with, and an attempt to regulate commerce among the several States, and also for that it imposes a tax upon imports into, and exports from the State. 30

Among the many wise provisions of the constitution, is that which confides to the national Congress, which usually includes the executive, the power to regulate commerce with foreign nations and among the several States. It is not difficult to see how much the national government might be embarrassed, and the States themselves imperilled, if each one were permitted to make and establish its own laws and rules of trade and commerce with all the world according to its own views of expediency. Nor is it difficult to perceive the strifes and feuds, and bitterness and possible collisions, 40

in which the States might be involved with each other, if spiteful, vindictive, and retaliatory laws were permitted to be passed and executed, with regard to each other, whenever passion or prejudice or self-aggrandizement should present a sufficient motive. The framers of the constitution, therefore, to protect the States from these extreme perils, wisely interposed between them the more discreet and deliberate power of Congress. It is scarcely supposable that a majority of that body would ever consent to give any one State, or to
 10 its citizens exclusively, any material advantage over any of the rest.

This right to regulate commerce among the States, thus confided to Congress, must also, of necessity, be exclusive, as much so as the right to regulate it with foreign nations; for the powers which the States granted to Congress, they must be considered as having surrendered to the general government, and no longer to be exercised by them. No reservation on the part of the States seems to have accompanied this grant to Congress. And if the States can exer-
 20 cise concurrent control with the Congress in the matter before us, or until such time as Congress shall interfere to prevent it, it is difficult to see why they may not also do so in all other similar cases. Why they may not establish general laws of naturalization, laws of bankruptcy; why they may not coin and regulate the value of money and fix the standard of weights and measures, establish post offices and post roads, grant letters patent, declare war, and grant letters of marque and reprisal, and the like. These are powers granted to Congress, and but few of them are in terms prohibited to
 30 the States; and yet they have always been considered as belonging exclusively to Congress, with which the States had no right to interfere or attempt to regulate, whether Congress had at all acted in the matter or not.

If the States have concurrent jurisdiction with Congress to pass laws on the subject of commerce, then the Congress has no power to annul such laws; and if Congress has power to annul them, it must be because the States have no right to pass them; and if the States have no right to pass them, the courts of the States should not sanction them. But this
 40 question seems to be very well settled by authorities which

we are not at liberty to resist; and I do not understand it to be denied.

Is, then, this act of our Legislature, imposing the tax on the passengers and property carried by the Erie Railway Company into and through our State, or over more than ten miles thereof, as before mentioned, and the effort to enforce it, an attempt to regulate commerce among the several States? It is conceded that the passengers and merchandise carried into or through our State, the one way and the other, by this New York railway company, are from most if not 10 all the States of the Union. Now, commerce among the several States unquestionably consists in the carrying of persons or commodities from one State into another, whether it be an adjoining one or not, for the purpose of business or pleasure, or for the purpose of sale or exchange of such commodities, or for the disposition of them in some other way. This is commerce, and it is commerce among the States; and it seems to me to be precisely what the Erie Railway Company, through its agents, its railroads, its conveyances, and its motive power are doing for all persons in the coun- 20 try who see fit to employ it. It is thus aiding, by its great power, the people of the different States in carrying on their commerce and intercourse with each other, as the constitution presumes they will find it necessary or expedient to do, and any attempt on the part of any one of the States to obstruct or impede or prevent such commerce, unless it be in some necessary police regulation, or to prescribe the terms and conditions on which such commerce shall enter its limits, cross its territory, or leave its borders, is necessarily an at- 30 tempt to regulate, to that extent at least, commerce among the States—a thing which it cannot lawfully do. This act of the Legislature does undertake to prescribe and enforce the terms and conditions on which this foreign railway company may carry persons and commodities within, across, and from our territories, not by making contracts with it for that purpose, but by the imposition of a tax, called a transit duty, upon every passenger and every ton of merchandise which it brings into or takes out of the State, provided the distance carried within the State exceeds ten miles.

It may be admitted, I think, for the purposes of this case 40

at least, that the Legislature may regulate the commerce which is carried on exclusively within the limits of the State; for this is not attempting to regulate or interfere with commerce among the *several* States. But the act in question does the exact contrary of this. It is careful not to tax the passengers or freight carried exclusively within the State, although they be carried from one side of it to the other, but it affects *only* the passengers and freight that are brought into the State, and those which are carried out of it into other
 10 States. And every farthing of the tax or transit duty claimed in this suit has arisen on passengers and merchandise that have been brought into or carried out of the State, so that the act operates exclusively upon the commerce among the different States, which is the thing prohibited by the constitution of the United States. It is easy to see, if this law is sustained, how the entire commerce carried on, in, and through the State by this railway company, so far as it relates to the persons and property brought into the State, and those that are carried out, may be wholly destroyed. For if
 20 the courts sustain this law, the company has no alternative but to pay the tax or to cease doing the business; for as there is no limit to the extent to which a tax may be imposed, if the right to assess it at all is conceded, it may be increased and extended to the destruction of the object on which it is made to operate; and if the State can lawfully impose a tax of three cents on a passenger, and two cents on a ton of merchandise, why may it not also impose a tax of ten cents or twenty cents, or more, on each, which would of
 30 necessity ruin and break up the entire commerce thus carried on; and if it can thus tax it at will, why may it not prohibit it altogether? Can it be that the State has power to do this? I cannot think so.

It is doubtless true that the State may refuse to permit railroads and canals to be constructed for the purpose of facilitating this kind of commerce; and this relates only to the particular mode of conveyance, and does not affect the right of the people to carry on this commerce itself by other modes of conveyance. But if the State *had* the right to prohibit these particular modes of conveyance, it is now too
 40 late to exercise that right. It has already granted the privi-

lege, and the roads have been made and are in use. It has already consented to the leasing of these roads to the Erie Railway Company, and the leases have been executed and delivered. These New Jersey roads have already paid all the tax imposed on them by their charters; and now, after having assented to all these arrangements with a view to this very commerce among the States, the State undertakes to tax that commerce by the assessments under consideration.

It is insisted, however, that this is not a taxing of commerce among the several States, but a taxing of the business 10 of the company. It is true that this is a taxing of the business of the company; but then the business of the company is the carrying on of commerce among the States quite as much as if the same thing was done by vessels navigating the waters of the country; so that, whether we call it one thing or the other, it brings us to the same conclusion. It is a tax and restraint upon the commerce among the States. The calling of things by different names cannot change the great thing itself.

It is doubtless true that the business of this railway com- 20 pany, carried on in the State, as well as its property permanently within its limits, may be taxed. But then the business thus taxed must be, I think, that which is confined exclusively to the State, and not that which is necessarily connected with business outside of the State, such as the carrying of merchandise from the one to the other for sale or exchange. This is commerce *among* the States; and, as we have before seen, our act expressly excludes from its operation the business of this company, which relates exclusively 30 to this State, and confines it exclusively to those passengers and that merchandise which enter from, or goes into other States; and this is what gives to the act its objectionable and unconstitutional feature.

There are some things which States may do, although they may to some extent affect commerce. They may pass laws for their own preservation. They may prevent the introduction of dangerous diseases, of crimes and criminals, and the various species of demoralization and pollution. Such acts are held to be not acts for the regulation of commerce, within the meaning of the constitution; but they are 40 laws for the preservation and protection of the people, in

their internal affairs, from the evils which might otherwise be cast upon them, and are therefore termed internal police laws, and are such rights and powers as the States are held never to have surrendered.

So, too, the States may impose such burthens and restraints upon this traffic, on the part of its citizens, in articles that were once imports, after they have lost that character, and become broken up and mingled with other private property in the State, as would discourage the importation of such articles, by which the nation would lose some revenue. But this is held to relate only to their own internal affairs, after they have become such, and not to commerce with foreign nations nor among the several States.

If the question before us were a new one, I should feel constrained, by the very clear and express language of the constitution itself, as well as by the urgent necessity which caused the provision to be inserted, to hold our act to be repugnant to that great instrument. It is well known that the general government, under the old confederacy, had no power over commerce, but each State acted in relation to it in a way most satisfactory to itself; and the consequences of such action became so alarming to the country that they became one of the most leading motives for the assembling of a convention to frame a new constitution. The new constitution, it was supposed, remedied the evils in the old articles of confederation. Such has been the view which the Supreme Court of the United States has constantly taken of the subject; and it has so repeatedly, as I understand it, decided the points under consideration, in the varied forms in which it has been there presented, that if I doubted the correctness of their decisions, I should still feel myself bound by them.

There are a number of decisions in the State courts, in which those tribunals have held differently from the Supreme Court of the United States; but I do not stop to cite them here, not because they are not entitled to great respect in themselves, but because I do not consider them as of authority in such cases. In point of fact, all the cases that have ever reached the Supreme Court, on appeal from the State tribunals, have been cases where those courts have

sustained the State laws; but the higher court reversed or affirmed them, as in its judgment it thought right. It has the power to reverse them. It is the court of last resort in all such cases, and to its decisions we are bound to conform and submit, as much so as our local courts are bound to conform to the decisions of our own supreme tribunal.

The Supreme Court of the United States, having frequently had this question in some form before it, has uniformly, as I understand it, decided it the same way. In 1819, or thereabouts, the State of Maryland passed an act to tax the branch 10 of the United States Bank located in that State. The bank was chartered by an act of Congress, in carrying out one of its constitutional functions. The courts held that the act of Congress under the provision of the constitution on the subject was supreme, and that where that power was supreme, an act of a State legislature that attempted to interfere with that power, or to burthen, or restrain, or impede it, was contrary to the constitution, and therefore void. The decision of the State court sustaining that act was reversed. *McCulloch v. The State of Maryland*, 4 *Wheat.* 316. 20

A case, which attracted much more public attention, was next elaborately argued, and carefully considered, the case of *Gibbons v. Ogden*, decided in 1819. The legislature of the State of New York had granted to certain persons the exclusive right, for a period of years, to navigate vessels propelled by fire or steam within or upon all the waters of that State, including its rivers, lakes, and a portion of its bays. These exclusive rights had been transferred to Ogden, and were owned by him. Gibbons was the owner of two vessels propelled by fire and steam, which were duly licensed, en- 30 rolled, &c., for the coasting trade. With these vessels he attempted to navigate the waters of New York, and carry in them passengers, &c., from Elizabethtown, in this State, to places in the State of New York, and also from places in that State to Elizabethtown, in this State. From doing this he was restrained by an injunction from the Court of Chancery of the State of New York, pursuant to the provisions of the statute of that State. This proceeding was sustained by its highest legal tribunal, from which an appeal was taken to the Supreme Court of the United States. That court held 40

the act of New York to be one which attempted to regulate commerce, which included navigation among the several States, and was therefore void. The court held that the right to regulate commerce among the States extends to every species of commerce and intercourse between the States, to men as well as to things; that it does not stop at the boundaries of States, but penetrates their interiors; that the powers vested in Congress are complete in themselves, limited only by the constitution itself, and is not a concurrent power which a State may exercise. 9 *Wheat.* 1.

In 1827, the case of *Brown v. The State of Maryland* came before the court. The legislature of that State had enacted "that all importers of foreign articles or commodities, of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whisky, and other distilled spirituous liquors, &c., and all persons selling the same, by wholesale, bale, or package, hogshead, barrel, or tierce, shall, before they are authorized to sell, take out a license from the State authorities, for which they should pay \$50, subject to a penalty, &c. The defendant below was charged with having imported and sold one package of foreign dry goods, without having a license so to do. Judgment was given against the defendant in the State tribunals, and the case was removed into the Supreme Court. That court held this act of the legislature of Maryland to be void, not only because it was contrary to the provisions of the constitution of the United States, which prohibits the States laying imposts or duties on imports or exports, but also because it was contrary and repugnant to the provision which gives to the Congress the power to regulate commerce with foreign nations and among the several States, the court strongly asserting that the congressional privilege of importing foreign goods, &c., into a State, upon the payment of duties, or free from the payment of such duties, carried with it the right to sell such imports within a State, so long as they retained their character of imports, and remained in their original packages unbroken, and prior to their becoming mingled with the other private property of citizens of the State, free from any impediments, in the shape of tax, license, or otherwise, imposed by State authority, re-affirming the doctrines

announced in the case of *Gibbons v. Ogden*, and assuming that the same principles which applied to foreign importations applied equally to importations from sister States. [12 *Wheat.* 419.

In 1847, came up what were termed the license cases. The States of New Hampshire, Massachusetts, and Rhode Island had each passed a law prohibiting the sale of spirituous liquors within their respective limits, without a license for that purpose first obtained from the State authorities. The violators of these acts being prosecuted, as a defense, set up 10 in two of the cases, that the liquors in question had been imported from abroad, and in the other case that a barrel of American gin, the one in question, had been purchased in Boston, and carried coastwise thereon to New Hampshire, and there sold in the same barrel. The cases were all argued and decided together. The court reaffirmed the doctrine announced in the case of *Brown v. The State of Maryland*, but the court held, several of the judges delivering separate opinions, that in all the cases the point of importation into the State had been passed, without obstruction or impediment. 20 No question was made by the State laws about bringing the liquors into the State. They were then there and had become the property of the citizens of the States, the same as their other property, and, as such, the traffic in them was subject to the control of the State authorities, and might be taxed or restrained by them, the same as any other business or traffic.

The court also held that these acts were already matters of internal police regulations; that the right of the State to guard and protect themselves against internal violence, dis- 30 ease and demoralization was one which they had never surrendered, which were in their nature paramount to the right of Congress to regulate commerce, and that such laws did not necessarily come in conflict with the exclusive power of Congress to do so. These propositions are unquestionably correct, and if they were not so, they need not be controverted here. They do not reach the case before us. The act of our legislature is not one for the protection of our health, or peace, or morals, nor has it any of the features of a police regulation, but is purely one for the raising of reve- 40 nue; nor is it one which relates to the persons and property

in the State, after all question as to the mode and manner and terms in and upon which they came into the State has been lawfully settled and disposed of, but it is confined exclusively to those transactions which relate to the terms and conditions on which persons and property are brought into the State or are carried out of it. The railway company, call it what we may, are prohibited from either bringing them in or carrying them out of the State, except on the condition of paying this tax for the privilege of doing so. If in these
 10 license cases the States had prevented the *introduction* of these liquors into the State, or the carrying of them out, except upon a purchased license so to do, they would have been analogous to the one under consideration. Judge McLean, in his opinion on this distinction, remarks, that "if this tax had been laid on the property as an import into the State, the law would have been repugnant to the constitution. It would have been a regulation of commerce among the States, which has been given exclusively to Congress." 5 *How.* 504.

In 1849, the passenger cases came before the Supreme
 20 Court. The State of New York had passed an act imposing a certain tax on every passenger that should arrive in the port of New York, either from foreign parts or in coasting vessels, which tax was to be collected from the masters of the vessels, who were in turn authorized to collect it from the passengers, and the moneys thus collected were to be termed "hospital moneys;" and after the requisite sums had been expended for that purpose, the surplus, if any, was to be paid to the treasurer of the Society for the Reformation of Juvenile Delinquents in the city of New York. In 1841,
 30 the ship *Henry Bliss* arrived in the port of New York, and landed two hundred and ninety steerage passengers. The master was sued for the tax imposed on these passengers by this act of New York, and the claim was resisted on the ground that the act under which the effort to collect the tax was made was contrary to the constitution of the United States. The case was elaborately discussed, and although the court was not unanimous, it adhered to its former decisions, and held that the act of New York was one regulating, or attempting to regulate commerce, and was therefore
 40 void, although it was earnestly insisted that it was but a police regulation. 7 *Howard* 283.

In 1851, the Wheeling bridge case came before the Supreme Court. This bridge was erected wholly within the State of Virginia, and was specifically authorized by an act of the legislature of that State, but in its construction was made so low that steamboats with the tall chimneys, commonly used on the western waters, could not pass under it. The State of Pennsylvania, finding her commerce with the west and southwest greatly obstructed and hindered thereby, applied to the equity side of the Supreme Court of the United States to compel its removal or modification, so that commerce would not 10 be obstructed or impeded thereby, taking the ground, that the Ohio river, though belonging to Virginia, was a highway of commerce, and that no act of the legislature of Virginia could authorize or sanctify the erection of a bridge over such a river that would interfere with the commerce of the river. The court entertained the application, declared the bridge to be an obstruction and a nuisance, and ordered it to be removed, or so elevated that it should cease to be an obstruction to commerce, the latter of which alternatives has been adopted. 13 *Howard* 518. 20

In 1859, the legislature of the State of Alabama passed an act requiring the owners of steamboats navigating the waters of that State, before such boats should leave the port of Mobile, to file a statement in writing in the office of the probate judge of Mobile county, setting forth—1st, the name of the vessel; 2, the name of the owner or owners thereof; 3, his or their place of residence; and 4, the interest each has in the vessel, and on omitting to do so they should be subject to a fine, &c. This act was resisted, as being contrary to the power conferred on Congress to regulate commerce 30 among the several States and the act of Congress regulating the coasting trade. The Supreme Court of the United States held this act of the legislature of Alabama to be unconstitutional and void for these reasons. *Smith and others v. Davenport and others*, 22 *Howard* 227.

The cases that are supposed to take a different view of the subject are—first, that of *Wilson and others v. The Blackbird Creek Marsh Company*, which was decided as early as 1829. The legislature of Delaware, by an act which it passed authorizing this creek company to build a dam across one 40

of the small creeks of that State into which the tide flowed for some distance from the Delaware river through the marsh, and also to raise embankments on the shores. The defendants below were the owners of a sloop of less than 100 tons burthen, regularly licensed and enrolled, claiming the right to navigate the creek as a highway of commerce, broke and injured the dam, for which injury the suit was brought; and the question was, whether this act of the legislature of Delaware authorizing the dam was repugnant to the consti-
 10 tution of the United States, on the ground of its interfering with commerce among the States. The defendants below were citizens of the State of Delaware.

The court said, the value of the property on the banks of the creek must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come in conflict with the powers of the general government, are undoubtedly within those reserved to the States. But the measure authorized by this act stops a
 20 navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the constitution of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance. The court adds, if Congress had passed any act which bore upon the case, any act in execution of the power to regulate commerce, which was to control State legislation over these small navigable creeks, we should feel
 30 not much difficulty in saying that a State law coming in conflict with such act would be void. But Congress has passed no such act. We do not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek can be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject.

It must be conceded, I think, that the language of the court in this case, which is quite brief, is not very clear as to what general propositions it intended to enumerate, except to sustain the act of Delaware in that particular case;
 40 but it seems to assume that the State authorities in that sec-

tion have a kind of concurrent jurisdiction with the general government, and that until Congress sees fit to act in the matter, the States may do so, even to the damming up of a navigable river. If this be the idea, then it is certainly in conflict with all the cases decided on that subject, either before that time or since. *2 Peters* 245.

The only other case which it is supposed sustains the act of our legislature, is that of *The City of New York v. Milne*, *11 Peters* 102, decided in 1837. An act of the legislature of New York provided that the master of every ship or vessel 10 arriving in the port of New York from any country out of the United States, or from any other State of the United States, shall, within twenty-four hours after the arrival, make a report in writing to the mayor of the city of the name, place of birth, and last legal settlement, age, and occupation of every person brought as a passenger in the ship or vessel, or on board of her on her last voyage, &c., under a penalty of \$75 on each passenger. The city of New York sued the master of a vessel, who had landed such passengers, for not making the report required. The Supreme 20 Court held that this act of the legislature of New York did not attempt in any way to regulate commerce, but was one which acted on the master and passengers after they were landed and had become inhabitants of that State, and was therefore a police regulation which the State had a right to adopt, and was not in conflict with the laws or constitution of the United States. This decision is, I think, in perfect harmony with all that have been cited, or that have been rendered by that supreme tribunal, unless it may be, perhaps, the case of *Wilson and others against The Blackbird* 30 *Creek Company*; and that case, so far as it seems to hold that a State may go so far as to dam up a navigable river, and abolish thereby all navigation and all commerce thereon, provided Congress has not legislated on the subject to the contrary, would not, I apprehend, at this day be sustained by any one.

The case of *Almy v. The State of California* came before the court as late as 1860. The legislature of that State passed an act to raise revenue for the support of the government thereof, and among other things they enacted that all 40

bills of lading for the transportation of gold or silver, in coin, bars, or dust, from any point or place in that State, to any other point or place without the State, should have upon it a certain stamp, known then as a tax stamp, expressing in value the amount of such tax or duty.

To use such bill of lading without such stamp was by the act made a misdemeanor, and punished by fine. Almy, the defendant below, being the master of the ship *Rattler*, then lying at San Francisco, and bound for New York, received
 10 a quantity of gold dust, for which he gave a bill of lading without having any stamp attached to it. For this disobedience to the laws of California, he was indicted, convicted, and fined \$100.

The application for the reversal of this decision was put upon the ground of the unconstitutionality of this law of California, both because it attempted to tax the commerce among the States, and also because it was a tax upon exports. The Chief Justice, in delivering the opinion of the
 20 court, put it upon the latter ground only, not discussing the other one at all. He says, if this tax was laid on gold or silver exported, every one would see that it was repugnant to the constitution of the United States; but a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing. He says the intention to tax the export of gold and silver, in the form of a tax on the bill of lading, is too plain to be mistaken. The act was pronounced unconstitutional of course.

In that case it will be seen that the Supreme Court brushed away without ceremony a most ingenious fiction, by which
 30 the constitutional prohibition was to be evaded by the use of other terms and other means, and reached at once the real thing itself. If the court would do this when some question was supposed to exist as to the legality of the act, in consequence of this attempt at evasion, we may be assured that it would have annulled without hesitation an act that had taxed the export itself. The Chief Justice remarked that that case could not be distinguished from that of *Brown v. The State of Maryland*, already referred to. That was an indirect tax upon an import.

40 The California tax was a tax upon an export. Both stand

on the same footing, and the acts sustaining both were alike condemned as being unconstitutional. Now, in what do those cases differ from the one before us? What does one act, in this respect, do but to impose a tax on imports and exports both? Commodities brought into the State are imports, those taken out are exports. Is not this very business in which the railway company is engaged, bringing imports into, and carrying exports out of the State? And what can an imposition of a tax or duties on both of them be but a tax upon imports and exports? Not, it is true, by taxing the commodities themselves directly, but by levying the tax upon the persons who carry them. This was the California case precisely. They did not attempt to tax the commodities themselves, but they attempted to tax, in an indirect form, the master of the ship who carried them. I do not propose further to discuss this feature of the case. It appears to me that no words that I can use can make it plainer.

I will simply add here that the California case is a very conclusive one on the other point which I have considered. If that act authorized a tax upon an export, it unquestionably authorized an interference with commerce among the States, for a taxing of imports or exports is most certainly an attempt to regulate commerce; and if an act is an attempt to tax imports or exports, it is undoubtedly an act to regulate to that extent commerce among the States.

Now, I am unable to see anything in conflict with the views I have expressed, in the fact that certain of the States, our own among the number, have, in the granting of chartered rights to canal and railroad companies, imposed upon them, as a part of the terms of the grant, the payment to the State of certain transit duties on the passengers and merchandise which they transport over their works; for, in the first place, these things are all confined to the limits of the States themselves. It is not contrary to the constitution of the United States to tax the property or business of persons or of corporations carried on exclusively within the State.

The transit duties paid by the Camden and Amboy Railroad Company are not paid on passengers or merchandise on the ground that they come from other States, but it is exclusively on those that are carried within the State. Nei- 40

ther the chartered companies nor their rights extend beyond the limits of the State, nor is any difference made, nor is any notice taken, so far as the duties are concerned, whether the passengers and freight belong in the State or not. The charge is made on the assumption that all belong to the State, and nothing in addition is added in consequence of their coming from a foreign State.

The Camden and Amboy Railroad does not extend from Philadelphia to New York, but from Camden to Amboy, 10 wholly within the State, and the legislature had the right to impose on them the terms which they did, and the company had the right to accept them, and pay the duties, if they thought proper to do so. This being a transaction entirely within the State, it is in no way an attempt to regulate or interfere with commerce among the States. The State, then, has the right to tax the business of anybody carried on exclusively within the State, unless it may be the business of corporations or others who may have some special exemption from such taxation.

20 I do not know that any State has proceeded further, by its legislature, in this respect than our own previous to the act complained of; but if any of them have proceeded so far as to tax foreign persons or foreign merchandise for the privilege of coming into the State, I do not hesitate to pronounce such taxation unlawful.

It is not unconstitutional for the owner of a ship who carries the commodities of another across the Atlantic ocean, to charge him for the transportation of such commodities from New York to Europe. This is not a tax upon exports, nor 30 is it a regulation of commerce; nor is it repugnant to the constitution, for this State, or any of its corporations, to charge persons, whether they be foreigners or not, for the privilege of being carried over their roads in an easy, convenient, and expeditious manner, which the State or company has been at great expense in providing. The traveller is not bound to adopt that mode of travel. He may go on foot, or he may go with his commodities in his own conveyance; but if he accept the terms of the company, and go with them, it becomes a matter of contract, and it is lawful for the com- 40 pany to accept the compensation. But does it follow that

the State of Pennsylvania can prevent me from going into Philadelphia with my wagon load of commodities for sale, and then the State of New Jersey prevent me from returning into the State with my box of dry goods, or my barrel of sugar, or my load of guano, unless I pay a tax on myself and commodities, on each side, for the privilege of so doing? No one, I think, will contend for this. It is the very thing which the national constitution intended to prevent; and if the tax cannot be assessed directly on me, and on my merchandise, what better pretence can there be for assessing the 10 same thing against the person who owns the railroad, or the ferry-boat, or the wagon and horses, which I employed to carry me and my goods the one way and the other.

Another answer, the idea that precedents for imposing transit duties on corporations is to be found in different States, is that those things are all matters of contract, voluntarily entered into between the States, on the one side, and the companies on the other. The companies offer to pay the State for the privileges granted, and this is done generally by the payment of a definite sum of money, or by contributing a specific por- 20 tion of their earnings, or in some other way. Neither party is bound to accept the terms; but if they do so, it is a voluntary matter, and the enforcement of it is not illegal, bearing in mind always that the contracts confine themselves to the State where the contract is made. If the attempt be made to go beyond the State, the transaction would probably be illegal, notwithstanding its voluntary character.

But in the case before us it is not confined to the State. It is not voluntary on the part of the company, nor is it a contract of any kind. On the contrary, it is involuntary; it 30 has no pretence of agreement about it, and it relates exclusively to transactions with persons and property of other States. There is no analogy, therefore, between the transactions referred to and the case before us.

It will be seen, I think, by a careful examination of all the cases, that the Supreme Court has been extremely cautious in attempting to interfere with the legislation of any of the States, and has only done so when compelled by the supreme law of the land. And while the State tribunals should not yield up to the general government any of the rights which 40

belong to the States, it does not seem wise to attempt a useless conflict for the mere purpose of showing State independence, when it is morally certain that the Supreme Court, in accordance with its former decisions, will reverse the decisions of such State tribunals.

I think, therefore, that this claim on the part of the State against the railway company cannot be sustained, for the reason that our legislature had no power to pass the law under which the claim is made.

- 10 In the case of the Delaware, Lackawana, and Western Railroad Company, which was argued at the same time as the case with the Erie Railway Company, the same questions and principles precisely are involved, so far at least as the questions which I have endeavored to consider are concerned, and the conclusion in both cases should be the same.

APPENDIX.

AN ACT to authorize the New York and Erie Railroad Company to purchase and hold lands, and to complete and finish the railroad of "the Paterson and Hudson River Railroad Company."

WHEREAS, the New York and Erie Railroad Company, by virtue of certain leases and agreements made by the Paterson and Hudson River Railroad Company and the Paterson and Ramapo Railroad Company to the Union Railroad Company, bearing date the ninth day of September, eighteen hundred and fifty-two, and assigned to the New York and Erie Railroad Company, have the right to use the railroads of said two first mentioned companies during their respective charters, and have the right to extend said Paterson and Hudson River Railroad, and to make a railroad from any point in the same to the Hudson river, at some point opposite the city of New York, which leases and agreements were approved and confirmed by an act of the legislature of this state, approved March fourteenth, eighteen hundred and fifty-three; AND WHEREAS, it is desirable that the New York and Erie Railroad Company should have the power to purchase and hold in their own name such lands necessary and convenient for the transaction of their business, as said Paterson and Hudson River Railroad Company, and other companies incorporated by this state, may by law purchase and hold at their stations and depots, and to proceed in their own name to construct and extend said railroad from the Paterson and Hudson River Railroad to the Hudson river, and to hold the lands necessary for such construction in their own name—

1. BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*, That the New York and Erie Railroad Company are hereby authorized to purchase and hold in their own name such and so much land and real estate in the county of Hudson, at or near any station or depot that they

may establish in said county, as may be necessary for the convenient transaction of their business, for storing and working upon their engines, cars, fuel, and materials to be used upon their roads, for receiving, delivering and keeping property transported, or to be transported, on their road to the best advantage, for side tracks, platforms and station houses, and for all other purposes strictly connected with and appertaining to their business of transporting passengers and freight; *provided*, that two acres of land at any such depot
 10 or station, and no more, shall be exempt from city, township, and county tax.

2. *And be it enacted*, That the New York and Erie Railroad Company may proceed in their own name to make and construct a railroad from any point in the railroad of the Paterson and Hudson River Railroad Company to any point on the Hudson river opposite the city of New York, according to the provisions of the act incorporating said Paterson and Hudson River Railroad Company, and the several supplements thereto, and that for that purpose they are hereby au-
 20 thorized to survey, lay out and locate such extension or continuation of said railroad of any width not exceeding one hundred feet; and when such location has been filed in the office of the secretary of state, to purchase and hold all lands necessary or convenient for the continuation of said road, and in all cases provided for in the eighth section of the act entitled "An act to incorporate the Paterson and Hudson River Railroad Company," are authorized to proceed to acquire the
 30 title to the same, by proceeding in their own name, in the manner provided in such eighth section, and upon paying the inquisition assessed, with the costs, or bringing the same into court, as in said section provided, shall be seized of the lands in such inquisition described in the same manner as the Paterson and Hudson River Railroad Company would have been; *provided*, that in this proceeding to acquire lands, this section shall confer the same power upon the New York and Erie Railroad Company as was vested by the said act in the Paterson and Hudson River Railroad Company, and no greater
 40 power; *and provided further*, that said road from the east side of Palisade avenue, for the distance of thirty-five hundred feet westwardly through the city of Hudson, shall not be

constructed with an open cut, but shall be tunneled or arched over, except proper and suitable openings and shafts for light and ventilation.

3. *And be it enacted*, That for the purpose of enabling the state of New Jersey to take the said railroad, upon an appraisement of its value, at any time after the fourth of July, eighteen hundred and eighty-six, in the manner provided for by the seventeenth section of said act to incorporate the Paterson and Hudson River Railroad Company, the continuation of said railroad and its depots and appendages, constructed, purchased and acquired by virtue of the provisions of this act, shall be considered part of the road of the Paterson and Hudson River Railroad Company, and may and shall be taken by the state at the same time and in the same manner as the state may take the road of said company, except, nevertheless, that the lands, railroad and appendages thereto, acquired or purchased by the New York and Erie Railroad Company, and owned by them, shall be appraised separately from the residue of said railroad and appendages, and the value thereof paid to the New York and Erie Railroad Company. 20

4. *And be it enacted*, That the said New York and Erie Railroad Company shall, as soon as they shall have completed the said railroad to the Hudson river, make and file in the office of the secretary of this state a map and plan of said railroad, from the point where it shall be constructed from the present road to the Hudson river, and of all side tracks and switches connected therewith, and the ground covered thereby, and of the land occupied by them as depots or stations, not including therein more than two acres of land not occupied by their track at each station or depot, verified by the oath of the president and engineer of said company, and shall attach thereto a just and true account of the costs of said lands and track, and the improvements thereon, verified by the oath of the president and engineer; and said company shall thereafter pay to the treasurer of this state, yearly and every year, a tax of one-half of one per centum upon the amount of said cost, in lieu of all other taxes on the same, and the lands included in said plan or map and said account shall be subject to no other tax, impost or assessment, except 40

city assessments for improvement upon or near the same, to which they shall be liable as all other lands.

5. *And be it enacted*, That this act shall not affect or impair any contract or agreement heretofore made and entered into between the New Jersey Railroad and Transportation Company of the one part, and the President and Directors of the Paterson and Hudson River Railroad Company of the other part, or between any other parties or corporations.

6. *And be it enacted*, That the governor, the chancellor, the attorney general, the treasurer and secretary of this state, the justices of the supreme court, and the judges of the court of errors of this state, whilst travelling for the purpose of discharging the duties of their offices, and the members and officers of both houses of the legislature of this state, during their annual or other sessions, shall pass and repass on the railroads of the President and Directors of the Paterson and Hudson River Railroad Company, including the extension hereby authorized, and of the Paterson and Ramapo Railroad Company, in the cars of any company running on said railroads, free of charge, subject to the rules and regulations of such company.

7. *And be it enacted*, That this act shall take effect immediately.

Approved February 21, 1856.

A SUPPLEMENT to an act entitled "An act to authorize the New York and Erie Railroad Company to purchase and hold lands, and to complete and finish the railroad of the Paterson and Hudson River Railroad Company," approved February twenty-first, one thousand eight hundred and fifty-six.

1. BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*, That the New York and Erie Railroad Company are hereby authorized to purchase and hold in their own name such and so much land and real estate, at or near any station or depot that they may have or use in

the city of Paterson, in the county of Passaic, as may be necessary for the convenient transaction of their business, for storing and working upon their engines, cars, fuel and materials to be used upon their roads, for receiving, delivering and keeping property transported or to be transported on their road to the best advantage, for side tracks, platforms, and station houses, and for all other purposes strictly connected with and appertaining to their business of transporting passengers and freight.

2. *And be it enacted*, That it shall be lawful for the said 10 company to acquire or purchase, and hold in their own name, so much land as may be required to widen the railroad of the Paterson and Ramapo Railroad Company sufficiently for double or additional tracks to be laid thereon, and for the use of any stone, gravel, sand, clay, or other materials along or near the said railroad, which may be required for the making, maintaining, or repairing of said railroads; and in all cases provided for in the eighth section of the act entitled, "An act to incorporate the Paterson and Ramapo Railroad Company," are authorized to proceed to acquire the title to 20 the said land, or the right to the use of said materials, by proceeding in their own name, in the manner provided in said act, and upon paying the inquisition assessed, with the costs, or bringing the same into court, as in said act provided, shall be seized of or entitled to the said lands or materials in such inquisition described in the same manner as the Paterson and Ramapo Railroad Company would have been; *provided*, that in this proceeding to acquire lands or materials this section shall confer the same power upon the New York and Erie Railroad Company as was vested by the 30 said act in the Paterson and Ramapo Railroad Company, and no greater power.

3. *And be it enacted*, That this act shall take effect immediately.

Approved February 27, 1857.

AN ACT to facilitate the foreclosure of mortgages given by the New York and Erie Railroad Company, and to aid the purchasers under such foreclosures in acquiring title.

WHEREAS, it is represented to the legislature of this state that proceedings have been instituted in the Supreme Court of the state of New York by James Brown and John C. Bancroft Davis, trustees for the holders of the fourth and fifth mortgage bonds of the New York and Erie Railroad Company, and Daniel Drew, mortgagee, 10 plaintiffs, against the New York and Erie Railroad Company and others, as defendants, to foreclose the said mortgages and the mortgage supplemental to said fifth mortgage given to secure the said bonds; and that by order of the said Supreme Court a receiver has been appointed; and it is further represented that the said the New York and Erie Railroad Company were vested with certain rights, contracts, rights in action, leases, franchises, and property in the state of New Jersey; and it is further represented that, to carry out and effectuate said proceedings 20 of foreclosure in the Supreme Court of New York, a bill has been exhibited in the Circuit Court of the United States for the District of New Jersey by William Francis Splatt, holder of a large number of the said fourth and fifth mortgage bonds, as complainant, against the New York and Erie Railroad Company and others, as defendants; and that, by the order of the court last aforesaid, the authority of the receiver appointed by the order of the Supreme Court of the State of New York has been recognized, and the same person so appointed receiver by the 30 Supreme Court of the State of New York has been appointed receiver of all and singular the said roads, property, estate, contracts, covenants, agreements, franchises, powers, and authority of the said the New York and Erie Railroad Company in New Jersey, and in the said the New York and Erie Railroad Company vested and covered by or mentioned in the said fourth and fifth and supplemental mortgages; and it is further represented that a sale may hereafter be made under the said proceedings to foreclose one or more of the said mortgages in the state of New

York, and that it is desirable that the purchaser or purchasers at such sale shall be entitled to all and singular the roads, property, estates, contracts, covenants, agreements, franchises, powers, and authority of the said the New York and Erie Railroad Company in New Jersey, and in the said the New York and Erie Railroad Company vested and mentioned in or covered by the said fourth, fifth, and supplemental mortgages, or either of them—therefore,

SEC. 1. *Be it enacted by the Senate and General Assembly of the State of New Jersey,* That the purchaser or purchasers of 10 the estate, rights, property, and franchises of the New York and Erie Railroad Company, at any sale thereof which shall be decreed to be made by the Supreme Court of the State of New York under said proceedings referred to, to foreclose the said fourth and fifth and supplemental mortgages of the said company, or either or any of the said mortgages, shall, by virtue of such decree and sale, and any deed or deeds made in pursuance thereof, be vested with all the estate, rights, property, franchises, leases, and contracts of the said the New York and Erie Railroad Company in this state 20 mentioned in and covered by the said fourth and fifth and supplemental mortgages, subject to such taxes and restrictions as now exist by the laws of the State of New Jersey, and also subject to such mortgages and liens as the Supreme Court of New York may order and decree the same to be sold subject to, and as shall not be foreclosed by said decree; and the receiver appointed by any of the said courts, or who shall hereafter be appointed by any competent tribunal, shall be allowed to use the powers and authority heretofore vested in the New York and Erie Railroad Company, or in such re- 30 ceiver by the orders of his appointment, so as to operate the said road in New Jersey as heretofore, until his powers shall be divested by such purchaser or purchasers, or at the discretion of such purchaser or purchasers, subject to the orders of the court until a new company shall be formed; and it shall be lawful for such receiver of the said the New York and Erie Railroad Company as has been appointed by the courts aforesaid, or shall hereafter be appointed by the said courts or by any other competent tribunal of the state of New Jersey; and also for any other person or persons, body 40

or bodies corporate, to make such deeds, conveyances, assignments, and transfers to such purchaser or purchasers of all the said estate, rights, property, franchises, leases and contracts of the said the New York and Erie Railroad Company, mentioned in and covered by the said fourth and fifth and supplemental mortgages, as may be deemed advisable to carry out the purposes of this act, and any new corporation that may be organized under the laws of the state of New York, to receive and become vested with the property and

10 estate covered by the said fourth, fifth and supplemental mortgages, may become vested with the property and rights herein mentioned and acquired by their deed or deeds of purchase under said proceedings of foreclosure, subject only to such liens as were not affected by said proceedings of foreclosure; *provided however*, that the said mortgages herein before mentioned, and any sale as aforesaid to be had or made under or by virtue of the same or either of them, shall be subject to the contract made between the Long Dock Company and the Hoboken Land and Improvement Com-

20 pany for a right of way for a railroad through the Bergen Tunnel and lands of said Long Dock Company, and for other purposes, as in said contract is mentioned, the said Hoboken Land and Improvement Company having, under said contract, advanced money for the construction of said tunnel.

SEC. 2. *And be it enacted*, That the purchaser at such foreclosure sale, and said new corporation, when organized as herein mentioned, shall hold and be vested with the property included in said fourth and fifth mortgages and said franchises, subject to the limitations, covenants, and agreements

30 relative thereto, made with the Long Dock Company or other corporations, before the date of said mortgages, that the New York and Erie Railroad Company would have been subject to, except so far as the parties in interest therein may be parties to and bound by the decree in any foreclosure suit, and also subject to the said contract between the Long Dock Company and Hoboken Land and Improvement Company.

SEC. 3. *And be it enacted*, That this act shall be operative upon the New York and Erie Railroad Company when they shall file their acceptance thereof in the office of the secre-

40 tary of state in this state.

SEC. 4. *And be it enacted*, That this act shall take effect immediately.

SEC. 5. *And be it enacted*, That the legislature may at any time alter, amend, or repeal this act.

Approved March 22, 1860.

AN ACT to confirm the sale, under foreclosure, of the property, rights, and franchises of the New York and Erie Railroad Company, and to complete the organization of the Erie Railway Company.

WHEREAS, under proceedings had in the supreme court of the state of New York to foreclose mortgages given by the New York and Erie Railroad Company, a sale of the property, rights, and franchises of the said company has been made; and whereas, the purchasers at such sale have conveyed such property, rights, and franchises to the Erie Railway Company, a new company already organized under the laws of the state of New York, therefore—

1. BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*, That it shall be lawful for the Erie Railway Company to hold all the rights, property, franchises, leases, and contracts formerly belonging to or vested in the New York and Erie Railroad Company in the state of New Jersey, or authorized by the laws of the state of New Jersey, mentioned in and conveyed by the fourth or fifth or supplemental mortgages stated and set forth in the said proceedings of foreclosure in the said supreme court of the state of New York, and which have been sold and transferred by a sale under said proceedings of foreclosure, or intended so to be, and now vested by conveyance or transfer in the Erie Railway Company. 20

2. *And be it enacted*, That the title of the Erie Railway Company to such rights, property, franchises, leases, and contracts shall be subject to the provisions of the act entitled, "An act to facilitate the foreclosure of mortgages given by 30

the New York and Erie Railroad Company, and to aid the purchasers under such foreclosure in acquiring title," approved March twenty-second, eighteen hundred and sixty; and also to the provisions of all leases, contracts, and agreements heretofore made by the New York and Erie Railroad Company, or by any person or party operating said railroad, with any other company or party of this state, so far as the said leases, contracts, or agreements are in force.

3. *And be it enacted*, That the Erie Railway Company and
 10 any other corporation or individuals using the Paterson and
 Hudson River Railroad and the Paterson and Ramapo Rail-
 road under leases and contracts heretofore made, and hereby
 confirmed, and using the road and tunnel connecting the
 Paterson and Hudson River Railroad with Pavonia Ferry at
 Jersey City, shall be and are hereby declared liable for all
 claims for debts, damages, omissions, and delinquencies that
 hereafter shall arise from the running and operating said rail-
 roads, and carrying freight and passengers on the same, as
 fully as the said Paterson and Hudson River Railroad Com-
 20 pany and the Paterson and Ramapo Railroad Company, or
 any other company, are now liable by the laws of this state.

4. *And be it enacted*, That whenever any action shall be
 commenced against the Erie Railway Company, or any other
 foreign corporation using said roads, in any of the courts of
 this state, the first process to be made use of may be a sum-
 mons or subpœna; a copy whereof shall be served on the
 president or one or more of the directors, or the superin-
 tendent, or any chief station agent of said company, six en-
 tire days before its return.

5. *And be it enacted*, That when the sheriff or other
 30 officer shall serve and return such summons or subpœna
 "served" or "summoned," the defendant shall be considered
 as appearing in court, and may be proceeded against accord-
 ingly.

6. *And be it enacted*, That the Erie Railway Company
 shall keep and perform the contracts, guarantees, and agree-
 ments heretofore made and executed by the New York and
 Erie Railroad Company to and with the Paterson and Ram-
 apo Railroad Company, and the president and directors of
 40 the Paterson and Hudson River Railroad Company, respect-

ively, as fully as the New York and Erie Railroad Company were or are bound by the terms thereof to perform the same; and for any breach or nonperformance of such contracts, guarantees, or agreements, or any of them, by the Erie Railway Company, shall be liable to the Paterson and Ramapo Railroad Company and the president and directors of the Paterson and Hudson River Railroad, respectively, to the same extent and in the same manner as the New York and Erie Railroad Company would have been liable for the breach or nonperformance thereof.

7. *And be it enacted*, That this act shall not take effect 10 unless the Erie Railway Company shall, within six months from and after the passage or approval thereof, by a vote of their board of directors, accept the same, and agree to observe and perform all the terms and provisions thereof, and certify and deliver such acceptance and agreement under their corporate seal and the signature of their president to the secretary of state of this state, to be filed in his office; and such acceptance shall operate and be construed in all courts to operate as a covenant or agreement on the part of said Erie Railway Company to observe and perform such 20 provisions.

8. *And be it enacted*, That this act shall be deemed and taken as a public act, and shall be so construed in all courts and places, and shall go into effect immediately after the acceptance thereof, and agreement mentioned in the seventh section shall have been filed in the office of the secretary of state; and the legislature may at any time amend or repeal this act.

Approved March 13, 1862.

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