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## SOME RECENT CRITICISM

OF

GELPCKE VERSUS DUBUQUE.

PART IV.

SECTION VI.—SHOULD THE SUPREME COURT ALLOW WRITS OF ERROR TO STATE COURTS IN CASES SIMILAR TO GELPCKE v. DUBUQUE?

We have elsewhere incidentally referred to the anomalous position assumed by the Supreme Court on this question. In cases of this nature, where they acquire jurisdiction by reason of the citizenship of the parties, they disregard the decisions of state courts. They do this because the state court has upheld an altered interpretation of a state statute, which impairs the obligation of a contract. In this class of cases they hold such an interpretation to be a "law" within the meaning of the federal clause. But if the case is brought up by writ of error to a state court, the Supreme Court will refuse to take jurisdiction, because, they say, for purposes of jurisdiction a state decision construing a statute is not a "law."

Thus, one who is so fortunate as to be a citizen of a state other than the one where the cause of action arises may obtain

relief; while an individual who is so unfortunate as to be a citizen of the same state has no remedy. This condition of affairs is little less than monstrous. The two positions are absolutely irreconcilable. We shall discuss this subject under three heads:

A. An examination of the cases similar to *Gelpcke v. Dubuque* which have come up by writ of error to state courts and have been refused.

B. An examination of cases coming up by writ of error to state courts where the act involves a contract.

C. The question of jurisdiction examined on principle.

*A. An examination of the cases similar to Gelpcke v. Dubuque which have come up by writ of error to state courts and have been refused.*

Ever since the date of the decision in *Gelpcke v. Dubuque* cases from state courts involving similar facts have been consistently applying to the Supreme Court for their consideration and have been consistently refused. The two lines of cases have grown up side by side. The only explanation which can be offered for this strange spectacle is that the court recognized the justice of refusing to give a state court's re-interpretation of a statute a retroactive effect, and at the same time shrank from calling it a "law" in the technical language of the judiciary acts. That this would have been not only the more honest but also the more correct course, would follow from the conclusions worked out in this paper.

The first case where the question was before the court was *Railroad v. Rock*.<sup>1</sup> In that case the facts were identical with *Gelpcke v. Dubuque*, except for the circumstance that here the parties were citizens of the same state. The court dismissed the writ because they declared that the case might have been decided on the ground of fraud, and that *not only must it be shown that a federal question might have been involved, but it must be shown that it necessarily was involved.* This ground was ample, and the court so considered it, for the dismissal of

<sup>1</sup> 4 Wall. 177 (1866), Miller, J.

the writ. What follows cannot have the full force of a decision, but must partake of the nature of a dictum.

The court, however, then went on to say: "That counsel had based their whole claim on the ground that 'the Supreme Court of Iowa had made a decision impairing the obligation of a contract,' and had based their entire argument on the fundamental error that this court can as an appellate tribunal reverse the decision of a state court, because that court may hold a contract to be void which this court might hold to be valid." It is submitted that if counsel did base their whole claim on that broad assumption, they deservedly and unquestionably failed to make out a case for the consideration of the Supreme Court of the United States.

The argument of counsel is very briefly reported, so we can hardly tell whether or not they distinguished between state decisions which interpret state statutes, and state decisions which merely interpret contracts. Mr. Justice Miller, who delivered the opinion, made no distinction, and evidently considered only state decisions in their broad sense. Viewed in this light, the statement of Mr. Justice Miller is unquestionable. He says that the court would refuse to assume jurisdiction, because "If this were the law, every case of a contract held by the state court not to be binding, for any cause whatever, would be brought to this court for review, and we should thus become the court of final resort in all cases of contract where the decisions of the state courts were against the validity of the contracts set up in those courts."

No one would question Mr. Justice Miller's argument if his premises were sound. He assumes that the Supreme Court were asked to review the state court's construction of a contract. It is submitted that this is incorrect. It was not the construction of the contract, *but the interpretation of the statute*, that impaired its obligation. The Supreme Court were asked to review the decision which *upheld* and *applied* that altered interpretation.

*Railroad v. Rock* first laid down the rule that the Supreme Court would not in such cases assume jurisdiction. The part of the opinion devoted to the question we are discussing, which

was only a few lines in extent, was not necessary for the decision, and yet this case undoubtedly is the foundation of all the other decisions which follow it in adopting the same course.

As these cases are all very similar in their facts, an extended investigation would be of no service. We shall quote, however, from one of the later cases to show the development of the doctrine, and cite some of the intervening cases in the note.<sup>1</sup> In *Bacon v. Texas*, Mr. Justice Peckham for the court says: "The argument involves the claim that jurisdiction exists in this court to review the judgment of a state court on writ of error when such jurisdiction is based upon an alleged impairment of a contract, by reason of the alteration by a state court of a construction heretofore given by it to such contract, or to a particular statute, or series of statutes, in existence when the contract was entered into. Such a foundation for our jurisdiction does not exist. It has been held that where a state court has decided, in a series of decisions, that its legislature had the power to permit municipalities to issue bonds to pay their subscriptions to railroad companies, and such had been issued accordingly, if in such event suit were brought on the bonds in a United States court, that court would not follow the decision of the state court rendered after the issue of the bonds, and holding that the legislature has no power to permit the municipality to issue them, and that they were therefore void. Such are the cases of *Gelpcke v. Dubuque* and *Douglas v. Co. of Pike*. In cases of that nature there is room for the principle laid down that the construction of a statute and admission as to its validity, made by the highest court of a state, prior to the issuing of any obligations based upon the statute, enters into and forms a part of the contract, and will be given effect to by this court, as against a subse-

<sup>1</sup> *R. R. v. McClure*, 10 Wall. 511 (1870), Swayne, J.; *Bank v. Bank*, 14 Wall. 9 (1871), Swayne, J.; *Palmer v. Marston*, 14 Wall. 10 (1871), Swayne, J.; *Kennebec River v. R. R.*, 14 Wall. 23 (1871), Miller, J.; *Dugger v. Boccock*, 104 U. S. 596 (1881), Waite, C. J.; *Lehigh Water Co. v. Easton*, 121 U. S. 388 (1886), Harlan, J.; *N. O. Water Works v. La. Sugar Ref. Works*, 125 U. S. 19 (1887); *Central Land Co. v. Laidley*, 159 U. S. 102 (1895), Gray, J.

quent changing of decision by the state court, by which such legislation might be held to be invalid. But effect is given to it by this court, only on appeal from a judgment of a United States court and not from that of a state court. This court has no jurisdiction to review a judgment of a state court made under precisely the same circumstances, although such state court thereby decided that the state legislation was void, which it had prior thereto held to be valid. It has no jurisdiction, because of the absence of any legislation subsequent to the issuance of the bonds, which had been given effect to by the state court. In other words, we have no jurisdiction because a state court changes its views in regard to the proper construction of its state statutes, although the effect of such judgment may be to impair the value of what the state court had before that held to be a valid contract.”<sup>1</sup>

This opinion is quoted somewhat at length that we may have before us the reason why a writ of error is not allowed, and that we may perceive the distinction between this case and the line to which Mr. Justice Peckham referred as represented by *Gelpcke v. Dubuque* and *Douglas v. Co. of Pike*. We do not derive much satisfaction from a perusal of his language, and yet this is the latest exposition of the subject.

The reason given why the court does not take jurisdiction is because there has been no subsequent statute passed impairing the obligation of contracts, and which the state court has upheld, which is declared to be a condition precedent to bringing up a case under the 25th section of the Judiciary Act. The court does not attempt to distinguish the cases coming up from Circuit Courts. Mr. Justice Peckham evidently realized that they cannot be distinguished. He contents himself by stating that in the one case the court will overthrow the authority of the state court, and in the other case they will not assume jurisdiction.

After this glance at the cases we come back again to our starting point. As late as January 9th, in the current year, the federal court reasserted the doctrine that a state court's

<sup>1</sup> 163 U. S. 207 (1895), Peckham, J.

interpretation of a statute is a "law" within the meaning of the federal clause forbidding states to pass laws impairing the obligation of contracts; and that they refuse to apply it for that reason.<sup>1</sup> But in the latest case which we have examined on the other side, we find it just as positively stated that such interpretation is not a "law" within the meaning of the 25th section of the Judiciary Act. This is the situation, not entirely satisfying, which we find in that field.

*B. An examination of cases coming up by writ of error to state courts where the act involves a contract.*

As this class of cases has already been discussed in a former section, we shall not re-examine the early cases at this point. We wish, however, to ask careful attention to the very recent case of *McCullough v. Commonwealth of Va.*<sup>2</sup> The famous coupon cases of Virginia are well known, and also the frequent attempts of Virginia to limit her liability by legislative enactments. The original coupon act was passed on March 30, 1871, and provided for the issuance of coupon bonds, which were declared to be receivable in payment of taxes due the state. This act was uniformly held by the Supreme Court of Virginia to be a constitutional and valid act during a period of twenty-seven years. Finally, the Supreme Court of Virginia adjudged the act to be null and void, and the case, in which this action was taken, was then brought into the Supreme Court by writ of error.

The judgment of the lower court was entirely directed to an investigation of the original act. Nothing else was ever mentioned. Mr. Justice Peckham, in his dissenting opinion, observes, "The opinion of the state court shows that the judgment went upon the original and inherent invalidity of the coupon statutes, and its judgment in that respect, as I shall hereafter attempt to show, gave no effect to any subsequent legislation."

The question was then squarely before the court. Is a decision adjudging an act void which, during a long period of

<sup>1</sup> *Loeb v. Trustees of Ham. Co.*, 91 Fed. 37 (1899), Thompson, J.

<sup>2</sup> 172 U. S. 102 (1898), Brewer, J.

years, the same court had held valid, a "law" impairing the obligation of contracts; or, in other words, had the court authority to review?

This is a peculiarly strong case. Mr. Justice Brewer observes: "Now, at the end of twenty-seven years from the passage of the act, we are asked to hold that this guarantee of value, so fortified as it has been, was never of any validity, that the decisions to that effect are of no force, and that all the transactions which have been had, based thereon, rested on nothing. Such a result is so startling that it, at least, compels more than ordinary consideration." These considerations were so powerful as almost to overthrow the court's hesitancy to call a spade a spade and admit that this decision was a "law."

The court did assume jurisdiction, but not upon the ground we have indicated. Instead, it cast about for an excuse to take cognizance of the case, and finally hit upon the expedient of saying that, while the decision did not *refer* to the later acts, yet its *effect* was to *uphold* them by removing the only constitutional bar to their validity; *i. e.*, vested rights acquired under the act of '71.

This reasoning is, indeed, most attenuated, and Mr. Justice Peckham, dissenting, effectually shatters it. He says: "The state court has held the coupon acts to be entirely void, because in violation of the state constitution in existence when they were passed. . . . This judgment did not give the slightest effect to the legislation subsequent to the coupon statutes. It simply held there were no coupon statutes because those which purported to be such were totally void. No subsequent statute was necessary, and none such was given effect to. Striking down the coupon statutes effectually destroyed any assumed right to pay taxes in coupons, and the subsequent legislation was needless and ineffectual."

This language is quoted, not because we concur in Mr. Justice Peckham's dissent, for we do not, but to show how completely the court failed to justify its assumption of jurisdiction on this ground.

We submit that the case was correctly decided, but that,

though not directly asserted, the real ground of taking jurisdiction was because the State of Virginia was attempting to impair the obligation of contracts by judicial legislation.

If this be not admitted then we must concur with Mr. Justice Peckham that the court had no jurisdiction.

This case plainly indicates that the Supreme Court, realizing that *judicial interpretation does have all the force of law, and that a change of construction does impair the obligation of contracts just as effectually as positive statutes*, are eagerly catching at every theory, no matter how shadowy, to give them jurisdiction.

We hope the time is not far distant when they will cease offering apologetic theories for assuming the jurisdiction which is theirs by right.

### *C. The question of jurisdiction examined on principle.*

In view of the conclusions worked out in the preceding sections of this paper, it was really unnecessary to discuss the action of the court under A and B, but we do so to show how grave is the situation before us, and that the court are already nearing the point where they are ready to accept the full theory of judicial legislation.

We cannot better illustrate the theory that the court have power to assume jurisdiction than by making use of the facts involved in *Railroad v. Rock*, which, it will be remembered, are similar to *Gelpcke v. Dubuque*, except in that the parties were both citizens of Iowa.

We will take Mr. Justice Miller at his word, and assume that no cases can be brought into the Supreme Court by writ of error under the 25th section of the Judiciary Act, unless the judgment of the state court has upheld a law passed subsequently to the making of the contract. As to the meaning of law, we quote from Mr. Justice Field's opinion in *Williams v. Bruffy*:<sup>1</sup> "Any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state within the meaning of the clause cited relating to the jurisdiction of the court."

<sup>1</sup> 96 U. S. 176 (1877), Field, J.

The Iowa Supreme Court, in *Railroad v. Rock*, decided two separate and distinct points :

(1) That the legislative act was invalid.

(2) That that interpretation should be applied to the contract before it.

The first point the Supreme Court had no jurisdiction to review. It could no more interfere with it than it could have repealed a repealing act overturning the same law. But what about the second point? Here the state court *applied* an *interpretation of a statute* to a contract so as to impair its obligation. "That interpretation of a statute," as we have shown, is really an act of a legislative character. That part of the decision, which was purely judicial, upheld this "interpretation." It therefore upheld a "law." The fact that the same case involved both points makes the principle more difficult to see, but not less sound.

That a decision may involve both functions is not unfounded in authority. In the English case of *Winthrop v. Lechmere* a colonial act of Connecticut was declared void (because it was adjudged to be in conflict with the English law) by an order in council. The decision also involved a review of four judicial sentences, and one judicial order of the Superior Court of Connecticut. Mr. Brinton Coxe says: "In the writer's opinion, the order in council determining the appeal of *Winthrop v. Lechmere* was actually of a mixed nature. He deems it partly judicial and partly legislative. It was no mere judicial judgment. That part of it was judicial which reversed and set aside the four sentences and declared the order of the court to be null and void. That part of it was legislative which declared the two acts of the colonial legislature to be null and void. The writer understands this view to be supported by authority. In an order in council dated April 10, 1730, the order in council determining *Winthrop v. Lechmere* is referred to. The action therein taken concerning the Connecticut act for settling intestates' estates, is expressly called *a repeal of that act.*"<sup>1</sup>

<sup>1</sup> See Judicial Power and Unconstitutional Legislation, p. 212.

This is precisely the position which we now assume. That part of the Iowa decision which declared the act null and void was legislative; it may be referred to in the language above cited, as a "repeal of the act." That part of the Iowa decision which upheld that "repeal" and so applied it as to impair the obligation of the contract before it, was judicial. It was, therefore, a judicial decision by the Supreme Court of the state, upholding and applying a "law" which impaired the obligation of the contract, and it should have been reviewed on writ of error by the Supreme Court of the United States.

The objection that this would throw open the door to a vast multitude of new cases, even if it were a legitimate objection, is not true. Mr. Justice Miller says that to allow writs of error in such cases would be "to permit an appeal to be taken every time a state court adjudged a contract to be void which we might think to be valid." It is submitted that this reasoning cannot be supported. It springs from the same fundamental error of assuming that it was the *construction of the contract*, and not the *interpretation of the act* which impaired its obligation.

We submit that, if a principle be correct, it should be made a rule of action, even though additional cases will thereby be admitted to the courts, and that the vast horde of contracts, adjudged void, which Mr. Justice Miller saw, in his imagination, ready to swarm into the Supreme Court as soon as they opened the door to cases like *Railroad v. Rock*, had no existence elsewhere. Cases like *Railroad v. Rock* would in all probability be less numerous than those like *Gelpcke v. Dubuque*.

Mr. Justice Miller further declares that there could be here no impairment, because the state court by its construction of its own statute, which was conclusive, had decided that no contract ever existed. This is arguing in a circle. It assumes in the first place that a state decision altering its former interpretation and declaring a statute void, makes it void *ab initio*, which is the very point at issue, and, in the second place, it again confuses the two separate and distinct things, the interpretation of the act and the construction of the contract.

It is said further that the federal clause is aimed at the legislative acts of the states and not at the decisions of its courts. This is of course true in theory. But this theory is not contradicted because, as we have shown, the decisions in the cases we are discussing are "legislative acts" in their intrinsic nature.

It is also declared that to allow writs of error would be to permit the Supreme Court to interfere with the state court's construction of state statutes. As we have already pointed out, in no sense would this be true. The federal clause, while theoretically aimed at the fundamental power of the state to make the law, really operates by preventing the application of forbidden laws by the state courts. As the Supreme Court cannot get out a writ of injunction to prevent a state from passing a law impairing the obligation of contracts, nor repeal it when it has been passed, so they cannot prevent nor change the state court's construction of its laws. In both cases the power of the court is simply preventive.

They say to the state legislature, "Pass what laws you please, we have no power to prevent you, but if your courts so apply a law as to impair the obligation of a contract *in a particular case*, then we shall step in and protect that contract." In most cases this practically nullifies the law, but in any case the court do not go beyond the rights which they are protecting. The law may impair the obligation of the contract before them, and yet be valid as to other contracts. In such a case the court content themselves with neutralizing its effect in the case before them.<sup>1</sup>

So, in the same manner, the Supreme Court, addressing themselves to the state court, say: "Interpret your laws as you see fit. We have no power to prevent you. But if you so apply an interpretation as to impair the obligation of a contract, then we will protect that contract."

To both the court say: "Whatever you may or may not do, here is one field into which you may not enter. We stand here by virtue of the duty and privilege laid upon us by

<sup>1</sup> *Sturgis v. Crowninshield*, 4 Wheat. 122 (1879), Marshall, C. J.

the Constitution of the Union to prevent it, and we shall prevent it. But we have no intention of interfering with you in those fields where we admit you to be supreme."

The fear that the liberty of the state court to interpret its own laws will be taken away is thus seen to be unfounded. The power to do that does not exist. It is only the purely judicial action in *applying* either the statute or the interpretation of that statute which can be reviewed by the Supreme Court.

After all, the objection most often urged to permitting writs of error in this class of cases is a technical one. It is said that the judiciary act provides that a subsequent law must be upheld before the writ can be allowed. We believe that upholding an authoritative interpretation of a statute is upholding a "law." But if we are to be hindered by a procedural difficulty, when we are resting upon our constitutional rights, the difficulty should be obviated by altering the language of the act.

Although sometimes said, with fine irony, to be quite unusual in the law, it may not be amiss to survey this question, for a moment, from the standpoint of common sense.

Every one can see that to permit a court to unsettle rights, acquired during a long period of years, upon the faith of a law, sanctioned by every department of government, ought not to be allowed. Every business man knows that a system which makes it impossible for one ever to be sure what the statute law is, is most dangerous to the welfare of the community. It does not require one learned in the law to see that the decisions in *Gelpcke v. Dubuque* and kindred cases are pre-eminently just.

This may not be an argument, but, as practical men, we know that the law exists for the purpose of doing justice, and this fact should cause us to think twice before rejecting a theory which admittedly has always been just in its application, and before we refuse to apply that principle to a class of suitors equally as deserving as those to whom relief is granted.

Moreover, the full significance of the action of the court in refusing to assume jurisdiction has never yet been fully real-

ized. If a state can, by judicial legislation, pass laws impairing the obligation of contracts, it can also, in the same manner, enact *ex post facto* laws. Suppose, to take an extreme case, the offence of horse stealing at common law is punishable with death. Suppose a state passes a law reducing the punishment to fine and short imprisonment. Suppose, for a long period of years, this act is enforced by the courts and is uniformly held to be constitutional. The court then reverses its ruling and declares the act null and void. If Mr. Justice Miller's reasoning be correct, all those individuals who have stolen horses in the meantime can be condemned to death. It is no answer to say that the state would probably not take such action. If the principle be sound it must be correct in all possible situations. We submit that if a state should attempt, by judicial action, to thus in effect enact an *ex post facto* law, the Supreme Court would speedily forget their procedural scruples and would assume jurisdiction.

As lawyers, we know that judicial legislation is a fact with which we have to deal. We know that the states can and often do impair the obligation of contracts with impunity by means of legislative-judicial action. We see also a constantly increasing tendency on the part of the state courts to constitute themselves not only the judges of the *constitutionality* of legislative acts, but even judges of whether a law be not, in their opinion, *improper*, as appears from the opinion of a judge who arrogates to himself the right to overturn a law,<sup>1</sup> because it "is a species of sumptuary legislation which has been universally condemned as an attempt to degrade the intelligence, virtue and manhood of the American laborer and foist upon the people a paternal government of the most objectionable character, because it assumes that the employer is a knave and the laborer an imbecile." This *is judicial legislation*, whatever may be thought of the principle. It should, in all cases, be recognized as such, and its effect defined and restrained, not given the unlimited extent of purely judicial decisions.

*Thomas Raeburn White.*

<sup>1</sup> State v. Goodwill, 33 W. Va. 802 (1889).