IN THE HONORABLE THE

Supreme Court of the United States.

December Term, 1872.

THE BUTCHERS' BENEVOLENT ASSOCIATION OF NEW ORLEANS, PLAINTIFFS IN ERROR,
vs.
THE CRESCENT CITY LIVE-STOCK LANDING AND SLAUGHTER-HOUSE COMPANY.

PAUL ESTEBEN ET AL., PLAINTIFFS IN ERROR,
vs.
THE STATE OF LOUISIANA, EX REL. S. BELDEN, ATTORNEY-GENERAL.

THE BUTCHERS' BENEVOLENT ASSOCIATION OF NEW ORLEANS, PLAINTIFFS IN ERROR,
vs.
THE CRESCENT CITY LIVE-STOCK LANDING AND SLAUGHTER-HOUSE COMPANY.

Brief of Charles Allen, Esq.,

One of the Counsel of the Crescent City Live-Stock Landing and Slaughter-House Company, Defendants in Error.

1. The only ground on which the jurisdiction of this court can rest is, that the charter is in violation of the Constitution of the United States.

2. There is no provision of the Constitution, prior to the 14th amendment, which this charter can be supposed to violate.

3. Before coming, however, to a direct discussion of the true construction and effect of that amendment, it will be useful to consider whether, before its adoption, a charter like the present would be valid under the constitutions of Louisiana and other States.

The characteristic features of the charter are, that, for the declared purpose of protecting the health of New Orleans, it prohibits the keeping or slaughtering of animals within a certain district, except as provided in the charter; that it gives to the corporation named the exclusive privilege of carrying on the live-stock landing and slaughter-house business, as therein provided, within that district; that the corporation shall erect buildings, and make all necessary preparations for these purposes, and allow the public to use the same on certain prescribed terms; and that they shall allow no animals to be slaughtered there except such as have been ascertained to be sound and fit to be eaten, by an inspector appointed by the Governor of the State.

There is no provision in the constitution of Louisiana which prohibits the granting of such a charter. On the other hand, the constitution contains a recognition of the power to impose excises or duties on particular occupations, in the provision that "all places of business, or of public resort, for which a license is required by either State, parish, or municipal authority, shall be deemed places of a public character," &c.

So, under the former constitution, statutes involving a similar exercise of legislative power were passed and upheld. (See Morano *vs.* Mayor, &c., 2 Louisiana, 217; Pontchartrain Railroad *vs.* Orleans Navigation Company, 15 Louisiana, 404.) And in a later case the doctrine was broadly laid down that the power of the legislative department is supreme, except where restricted by the constitu-

tion. (New Orleans Draining Company, &c., 11 Louis. Ann., 338, 370.)

The latter doctrine, of the authority of the legislature of a sovereign State, has been reiterated and affirmed, in various phrase, by numerous courts and text writers. This authority, when not restricted by constitutional provisions, is sometimes said to be equal to the power of Parliament. (Cooley on Constitutional Limit, 2d ed., 85, 88, 89; Thorpe *vs.* Rutland, &c., Railroad, 27 Verm., 142. See also City of New York *vs.* Miln, 11 Pet., 138, 141; Martin *vs.* Waddell, 16 Pet., 410; Story, J., in 11 Pet., 605; Curtis, J., in 13 How., 90; License Cases, 5 How., 588, 589; Ohio Life Ins. Co. *vs.* Debolt, 16 How., 428; License Tax Cases, 5 Wallace, 470; Moor *vs.* Veazie, 31 Maine, 360; S. C., 32 Maine, 343, 360, 361; S. C. on error, 14 How., 568; Cushing's Law of Legislative Assemblies, § 717; Dwarris on Statutes, Potter's ed., 450, 458; Cooley on Constit. Lim., 573; Govern. and Const. Law, by Tiffany, 190; Charles River Bridge *vs.* Warren Bridge, 7 Pick., 448, by Morton, J.; Varick *vs.* Smith, 5 Paige, 160.) The foregoing authorities amply show that the power of a State is complete, unqualified, and exclusive in relation to all those powers which relate to merely municipal legislation or internal police. The legislature is the sole and exclusive judge of whether a statute is reasonable, and for the benefit of the people. Judge Story said: "Whether the grant of a franchise is or is not, on the whole, promotive of the public interests is a question of fact and judgment, upon which different minds may entertain different opinions. It is not to be judicially assumed to be injurious, and then the grant to be reasoned down. It is a matter *exclusively* confided to the sober consideration of the legislature, which is invested with full discretion," &c. * * * "I know of no power or authority confided to the judicial department to rejudge the decisions of the legislature upon such a subject." (11 Pet., 605.)

So also this court, in a later case, said: "With the exception of the powers surrendered by the Constitution of the United States, the people of the several States are absolutely and unconditionally sovereign within their respective territories. It follows, that they may impose what taxes they think proper upon persons or things within their dominion. * * * Contracts are sometimes incautiously made by States, as well as individuals, and franchises, immunities, and exemptions from public burdens improvidently granted. But whether such contracts should be made or not is exclusively for the consideration of the State." (Ohio Life Ins. Co. *vs.* Debolt, 16 How., 428.)

The legislation of this country and of England furnishes numerous illustrations of the characteristic features of the present charter.

LEGISLATION CONFERRING EXCLUSIVE PRIVILEGES.

Markets or fairs, common in England, have not been unknown in the United States. Of late years, markets are established by act of Parliament in England. (See Grant on Corp., 165–182, for much information as to markets; Markets and Fairs clauses act of 1847, St. 10 and 11,Vict., c. 14; 1 Stephens' Com., [6th ed.,] 683; Dane's Ab., ——; 11 Pet., 621, 622, by Story, J.)

Ferries, bridges, railroads, and turnpikes with exclusive privileges are common. (See Charles River Bridge *vs.* Warren Bridge, 7 Pick., 448; Boston and Lowell Railroad *vs.* Salem and Lowell Railroad, 2 Gray, 31; Newburgh Turnpike Co. *vs.* Miller, 5 Johns., ch. 111, 112; and many other cases.)

Exclusive rights of fishing. (Chalker *vs.* Dickinson, 1 Conn., 384; Gould *vs.* James, 6 Conn., 376; Collins *vs.* Benbury, 5 Iredell, 118; Delaware, &c., Railroad *vs.* Shunf, 8 Gill and J., 510; Washburn on Easements, 412; 2 Bl. Com. 40; 3 Kent Com., [6th ed.,] 418.)

Exclusive rights of navigation. (Ogden *vs.* Gibbons, 4 Johns., ch. 150, 160, 161; S. C. on Error, 9 Wheat., 1; Moor *vs.* Veazie, 31 and 32 Maine; and S. C. on Error, 14 How.)

Gas companies with exclusive rights. (Shepard *vs.* Milwaukee Gas Co., 6 Wis., 547; People *vs.* Bowen, 30 Barb., 24.)

Telegraph company with exclusive rights. (Cal. State Tel. Co. *vs.* Alta Tel. Co., 22 Cal., 398.)

LEGISLATION IMPOSING RESTRICTIONS AND BURDENS.

It is laid down generally that all inspection laws, quarantine laws, and health laws of every description belong to the State government. (Gibbons *vs.* Ogden, 9 Wheat., 203; New York *vs.* Miln, 11 Pet., 141, 142, 156.)

Offensive trades of all descriptions, bone-boiling establishments, petroleum factories, livery stables, ten-pin alleys, and the like, are subjects of almost universal legislation.

Restrictions upon slaughter-houses and the keeping of animals are also common. (See Pierce *vs.* Bartrum, Cowp., 269; Player *vs.* Jenkins, 1 Sid., 284; Bosworth *vs.* Hearne, Cas. temp. Hardw., 405; Butchers' Co. *vs.* Morey, 1 H. Bl., 370; Com'th *vs.* Patch, 97 Mass., 221; Brooklyn *vs.* Cleves, Hill and Denio, 231; Cooper *vs.* Schultz, 32 How. Pract. R., 132; Milwaukee *vs.* Gross, 21 Wis., 240; *ex parte* Shrader, 33 Cal., 280.)

Statutes for the observance of the Lord's day, prohibiting labor or business, exist in many States, and with universal recognition by the courts.

Statutes limiting the hours of labor, prohibiting the employment of children, except under certain conditions, in mechanical and manufacturing establishments, also exist in certain States.

In many States, taxes are imposed, or excises or duties,

upon various lawful employments; for instance, upon attorneys, auctioneers, brokers, dealers in junk and second-hand articles, factors, inn-holders, keepers of intelligence offices, pawnbrokers, pedlers, pilots, theatres, and retailers of liquors.

The general authority of the legislature to lay such burdens upon particular occupations has been vindicated whenever assailed. (Simmons *vs.* The State, 12 Missouri, 298; Commonwealth *vs.* Ober, 12 Cush., 493.)

The constitution of Massachusetts, adopted in 1780, contains the following provisions:

"All men are born free and equal, and have certain natural, essential, and inalienable rights; among which may be reckoned the right * * * of *acquiring*, *possessing*, and *protecting* property."

"No man, nor corporation, or association of men, have any other title to obtain advantages, or *particular and exclusive privileges*, distinct from those of the community, than what arises from the consideration of services rendered to the public; and this title being in nature neither hereditary, nor transmissible to children, or descendants, or relatives by blood, the idea of a man born a magistrate, lawgiver or judge, is absurd and unnatural." (Dec. of Rights, art's 1 and 6.)

Yet it was long since held that the first of these provisions did not prevent the legislature from imposing a license fee on particular occupations. In Portland Bank *vs.* Apthorp, 12 Mass., 255, 256, the court say a reasonable revenue may be exacted by the legislature on certain "means of acquiring property,"—"the privilege of using particular branches of business or employment, as the business of an auctioneer, of an attorney, of a tavern-keeper, of a retailer of spirituous liquors," &c. "Every man has a *natural* right to exercise either of these employments, free of tribute, as much as a husbandman or mechanic has to use his

particular calling." (*Ib.*, 256.) "According to the Constitution, there can be no doubt that the legislature might as well exact a fee or tribute from brokers, factors, or commission merchants, for the privilege of transacting their business, as from auctioneers, or inn-holders, or retailers, or attorneys." (*Ib.*, 257.) "Every man has the implied permission of the government to carry on any lawful business; and there is no difference in the right, between those which require a license and those which do not, except in the prohibition, either express or implied, where a license is required." (*Ib.*, 258.)

That decision was affirmed, on great consideration, in Com'th *vs.* People's Savings Bank, 5 Allen, 431; Attorney-General *vs.* Bay State Mining Co., 99 Mass., 152, where the language above quoted is referred to and approved; Commonwealth *vs.* Provident Inst. for Savings, and Commonwealth *vs.* Hamilton Manuf. Co., 12 Allen, 312, 298; the decisions in the two latter cases having been affirmed on error by this court. (See 6 Wallace, 611, 625, 626, and 632.)

The decision in the same State, that the statute requiring pedlers to obtain a license and pay a fee was constitutional, has been before cited. (Com'th *vs.* Ober, 12 Cush., 493.)

Likewise, in the same State, a statute conferring an exclusive privilege upon a railroad company has been held to be not within the constitutional prohibition. (2 Gray, 31.)

The provisions of the Constitution have not been deemed to extend to such cases.

This State has been selected as an illustration because the constitution was adopted long ago, the construction above referred to was contemporaneous with its adoption, or nearly so, and has been long acquiesced in.

Other illustrations to the same effect might be given, if

necessary. But the validity of such legislation, under similar constitutional provisions, is recognized in the general treatises, and is hardly open to question. (See Cooley Const. Lim., 390, 391, 394.) Nor is it open to question, at the present time, that (until the adoption of the 14th amendment) it was fully within the power of any State legislature to pass a law declaring occupations unlawful which before were lawful, and imposing burdens and restrictions upon occupations then lawful. Legislation concerning the employment of selling liquor, and carrying on lotteries, in certain States, has changed occupations which were lawful into unlawful occupations, and has interfered with the acquisition of property by those who were engaged in those occupations, and has abridged their natural rights, and prevented them from laboring in their chosen employment; but the validity of that legislation has been established by this court.

The charter in the present case falls within these principles. It conferred certain exclusive privileges, but it was upon the consideration of moneys to be expended and duties to be performed by the corporation for the public benefit. This is apparent by referring to the following provisions of the charter:

"Cattle and other animals destined for sale or slaughter in the city of New Orleans, or its environs, shall be landed at the live-stock landings and yards of said company, *and shall be yarded, sheltered, and protected*, if necessary, *by said company or corporation*." (Sec. 3.)

"The company *shall*, before the first of June, 1869, *build and complete a grand slaughter-house*, of sufficient capacity to accommodate all butchers, and in which to slaughter five hundred animals per day; also that *a sufficient number of sheds and stables shall be erected* before the date aforementioned to accommodate all the stock received at this port, all of which to be accomplished before the date fixed for the re-

moval of the stock-landing, as provided in the first section of this act, under penalty of a forfeiture of their charter."

"Whenever said slaughter-house and accessory buildings shall be completed *and thrown open for the use of the public*, said company or corporation shall immediately give public notice for thirty days," &c.

"Upon a refusal of said company or corporation to allow any animal or animals to be slaughtered, after the same has been certified by the inspector, as hereinafter provided, to be fit for human food, the said company or corporation shall be subject to a fine in each case of two hundred and fifty dollars, recoverable," &c. (Sec. 5.)

And section 6 provided for the inspection.

The company was thus bound to expend very large sums of money, in the first instance, in preparing for the accommodation of the public, and continuously to perform duties for the benefit of the public. They were bound alike by the provisions of their charter and by the constitution of Louisiana (already cited) to maintain a public slaughter-house, where all persons might resort for the purpose of slaughtering their animals, upon the same terms. The company owed duties to the public which they were bound to perform, under penalty of the forfeiture of their charter and a fine, and they might, moreover, be indicted for the non-performance of them.

It is apparent that these sums to be expended, and these duties to be performed, furnished a substantial consideration for the granting of the charter. The legislature deemed it an adequate consideration. The supreme court of the State have found no reason for setting aside the judgment of the legislature.

Shall this court revise the judgment of the legislature upon a question like this?

This charter does not come within the legal meaning of the word monopoly. A monopoly is an exclusive privi-

lege, *granted without consideration.* This charter was for a consideration. If under its provisions certain persons cannot carry on the business of butchering as advantageously to themselves as they did before, other persons can carry on the business more advantageously to themselves than they did before. There is no longer any necessity of a butcher providing a slaughter-house for himself. Any man with capital or credit enough to procure the necessary animals may now be a butcher. This charter, therefore, is not a monopoly, in the sense that it prevents anybody from being a butcher; instead of that, it makes it easier to be a butcher than it was before. It is not a monopoly in the sense that it confers exclusive privileges *without consideration.* And this is the legal test of a monopoly. (See Charles River Bridge *vs.* Warren Bridge, 11 Pet., 567, per McLean, J.) "A monopoly is that which has been granted without consideration. "The accommodation afforded to the public by the Charles River bridge, and the annuity paid to the college, constitute a valuable consideration for the privilege granted by the charter." And in the same case Mr. Justice Story said: "As long ago as the case in the year-book, 22 Hen. VI, 14, the difference was pointed out in argument between such grants as involve public duties and public matters, for the common benefit of the people, and such as are for mere private benefit, involving no such consideration." (*Ib.*, 639; see also 7 Pick., 448; 3 Kent. Com., 6th ed., 458, 459, and note.)

It is not necessary, therefore, in the present case, to fall back upon the doctrine that the legislative power of a State extends to the granting of strict monopolies; because this charter is not a monopoly. But Chief Justice Gibson did not shrink from the assertion that monopolies were not inconsistent with the laws of Pennsylvania. (Commonwealth *vs.* Canal Comm'rs, 5 Watts & S., 388.) And the power of

Parliament to grant monopolies has not been denied. (Grant on Corp., 34.)

Two cases have been chiefly relied on in opposition to these views: Norwich Gas-light Co. *vs.* Norwich City Gas Co., 25 Conn., 19, and Chicago *vs.* Rumpff, 45 Illinois, 90.

The Connecticut case differs from the present in this: that the company there was under no obligation to make gas at all, or, if gas should be made, the company might refuse to supply it to any particular citizen. The company owed no duties, and incurred no obligations. There was, therefore, no consideration for that charter, and it might with reason be called a monopoly. Assuming it to be a monopoly, the court thought it unconstitutional; a conclusion not assented to by Chief Justice Gibson in Commonwealth *vs.* Canal Comm'rs, 5 Watts & S., 388. Whether the decision of the Connecticut case was right or wrong, that case differs from the present in the very particular upon which the decision chiefly rests.

In the Illinois case, the power of the legislature to authorize such a city ordinance as was there deemed invalid was not questioned by the court. The ordinance was invalid because not authorized by the legislature.

The provision in this charter for the inspection of animals designed to be eaten is so manifestly an appropriate matter of legislation as to require no extended comment. It is similar in principle to the common inspection laws, which in different States reach a very great variety of articles.

4. Assuming, therefore, that the present charter would not be in violation of any provisions of the Constitution of the United States prior to the adoption of the 14th amendment, the question remains whether the adoption of that amendment involves the surrender, on the part of all the States, to the general Government, of all right of legislation of this character.

So far as can be judged by the public debates upon the subject, it was certainly never intended or contemplated that this amendment should receive such a construction. Have Congress and the whole nation been deceived, misled, mistaken? Have they done that which they did not intend to do?

The language of the amendment is as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws."

Taken in the broadest sense, this provision would prohibit any State from abridging any existing privileges of any citizens of the United States, or from enforcing any law already enacted which abridges any privileges or immunities of citizens. It operates as a repeal of all laws which abridge privileges or immunities of citizens.

Taking it broadly, therefore, and this amendment will have the following results:

a. Repeal all laws imposing license fees upon any particular employments, lawful to pursue under the common law.

b. Repeal all laws regulating the mode of carrying on any lawful employments—all offensive or dangerous trades and articles.

c. Repeal all existing laws restraining the manufacture or sale of intoxicating liquors, restraining lotteries, &c.

d. Repeal all existing laws as to the observance of the Lord's day, prohibiting labor or business thereon.

e. Repeal all existing laws regulating and fixing the hours of labor, and prohibiting the employment of children, women, or men in any particular occupations or places for more than a certain number of hours per day.

f. Repeal all existing charters and laws conferring exclusive privileges, heretofore adjudged constitutional and valid.

g. Prevent any legislature from passing any new statutes abridging the natural liberty of citizens in respect to any of these or kindred matters.

h. Bring within the jurisdiction of this court all questions relating to any of these or kindred subjects, and deprive the legislatures and State courts of the several States to regulate and settle their internal affairs.

There is no occasion to give any such broad significance to the words "privileges and immunities."

It will probably not be contended for a moment that the 14th amendment should receive any such broad construction as would lead to the above results. It will no doubt be conceded that the legislatures of the several States may still regulate all these matters, and that the amendment to the Constitution was not designed to cover them, and does not cover them.

But, if that be so, on what just principles of construction can the amendment be held to render the present charter invalid? Shall it be held to apply to some acts of legislation, and not to others, though the latter are of the same general character?

In its nature, this charter relates solely to matters appropriate for what is sometimes called "municipal legislation," or "internal police." Will this court sit in judgment to determine whether, as an act of municipal legislation, it is reasonable in all its provisions?

A monopoly, in the legal sense, this charter is not; because there is a substantial consideration for the grant of privileges. Will this court sit in judgment to determine whether or not that consideration is adequate?

If this court is to determine these matters, and pronounce judgment whether the provisions of the charter are unrea-

sonable, or the consideration inadequate, then will not the court take testimony upon the subject, to aid in arriving at a just conclusion? How can the court judicially know the exigency which will require the granting of such a charter? The legislature, by its committees and otherwise, inquires into the facts. How shall the court inform itself of the facts?

The result of the argument against the validity of this charter must, it would seem, be this: that the 14th amendment does not prohibit State legislatures from passing acts of municipal legislation which abridge the privileges and immunities of citizens, provided such acts appear to be reasonable, but does prohibit the passing of acts which appear to be unreasonable; that it is for this court to determine whether such acts are reasonable or unreasonable; and that this court will determine the question in each case, as it arises, simply upon a consideration of what appears on the face of the act, the validity of which is brought into question.

Such an argument is not supported by the true rules of constitutional construction. On the other hand, according to those rules, such a construction should be adopted, if possible, as will give effect to the intent with which the provision of the Constitution was framed and adopted. The rules of the common law should be kept in view. The amendment finds in existence this system, which is still to remain in force, except so far as modified by the amendment. The object to be accomplished by the amendment, and the mischief designed to be remedied or guarded against, may also be considered. It has been thought proper, in this aspect, to refer to the proceedings of conventions which framed constitutional provisions which are brought into question. (See Cooley's Const. Lim., 66, and cases cited.) By the same rule, the debates in Congress at the time the present amendment was under discussion may

be referred to, as aiding to ascertain the purpose. So also a provision of the Constitution should not be taken from its connection and considered by itself alone, but should be considered with reference.

The true method of constitutional interpretation is not to take a provision from its connection and consider it by itself alone, but to consider it with reference to all other provisions upon the same or kindred subjects, and to the state of things in which it had its origin.

The letter killeth.

Various illustrations might be given of departures from a literal construction of constitutional provisions.

The prohibition of *ex post facto* laws is held by judicial construction to have reference only to crimes. (Calder *vs.* Bull, 3 Dall., 390.)

The right conferred by certain State constitutions for every subject to produce all proofs favorable to him, and be fully heard in his defence, gives no right to attend the investigation of his case by the grand jury.

The right to meet witnesses face to face does not exclude proof of dying declarations. (Commonwealth *vs.* Richards, 18 Pick., 437)

The provision that no person shall "be compelled in any criminal case to be a witness against himself" was held in New York not to render invalid a statute against bribery, which required participators to testify against each other, with a provision that their testimony so given should not be used against themselves. (People *vs.* Kelley, [or Hackley,] 24 N. Y., 81, 83; See also Perine *vs.* Pixley, 7 Paige, 598; Henry *vs.* Bank of Salina, 5 Hill, 523; Redfield's section in 1 Greenl. Ev., § 451, *a.*)

The provision securing the right of trial by jury is held not to be applicable to proceedings in admiralty.

These are but illustrations.

The phrase, "privileges and immunities of citizens," is not used for the first time in this amendment. The original Constitution provided that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." The privileges and immunities here contemplated are those which are fundamental; as, for instance, the right of going into any State for the purpose of residing therein; the right of taking up one's residence therein, and becoming a citizen; the right of free entrance and exit, and passage through; the protection of the laws affecting personal liberty. (See Corfield *vs.* Coryell, 4 Wash. C. C., 381; Bennett *vs.* Boggs, Baldwin, 60, 72; Smith *vs.* Maryland, 18 How., 71; Paul *vs.* Virginia, 8 Wallace, 180; Dunham *vs.* Lamphere, 3 Gray, 276.)

There is no reason for giving any more extensive signification to this phrase, as used in the amendment, than was given to it as used in the original Constitution.

The language of the 14th amendment is no more comprehensive in its scope than the language of several State constitutions, which have received a judicial construction, as shown heretofore. There is no reason for giving any more extensive signification to this language than has been given to other provisions, quite as broad in their language, by the courts of different States.

It is sought to obtain from this court a construction of the language of this amendment different from that put upon similar language by this court heretofore; different from that put by State courts upon provisions as comprehensive, and different from that put upon this amendment by Congress, or by the people of the nation.

There is no necessity for giving any such construction to it. The design in establishing this amendment to the Constitution was simple and well known. It was to assure to all citizens and persons the same rights enjoyed by white

citizens and persons. Every citizen should enjoy the same rights as white citizens. Every person should enjoy the same protection of the laws as white persons.

This view of this amendment has been substantially recognized in California. (People *vs.* Brady, 40 Cal., 198; see also People *vs.* Washington, 36 Cal., 658; and in North Carolina State *vs.* Hairston, 63 N. C., 452; see also State *vs.* Underwood, *Ib.* 98.)

The same view is obviously taken by Judge Cooley, of Michigan, in Cooley on Const. Lim., 573 *n.*, 397.

Respectfully submitted.

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Of Counsel.