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The Compacts and Agreements of States with One Another and with Foreign Powers

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THE COMPACTS AND AGREEMENTS OF STATES WITH ONE ANOTHER AND WITH FOREIGN POWERS

IT is proposed in this paper to consider the meaning and scope of Section 10, Article I of the federal constitution, which provides:

"No state shall enter into any treaty, alliance, or confederation. . . . No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state or with a foreign power."

May a state without the consent of congress first had and obtained make an agreement with another state or country for the construction of the outlet of a sewer or drainage project within the borders of such other state? May it contract for the leasing or purchase of ground for the construction of a terminal elevator or exposition building? May it contract for the transportation of its products and exhibits over canals which are owned by neighboring states? May it make a contract for the joint suppression of the spread of a threatened contagious disease, either among cattle or human beings, or for the joint control of the vagaries of the I. W. W.s, or for the suppression of the traffic in intoxicating liquors? What is an agreement or compact? Wherein does a treaty differ from an agreement, and an agreement from a compact?

A cursory examination of the section of the constitution cited and of the original case of *Holmes v. Jennison,*[1] to which we shall presently refer, would lead one to think that the hands of the states are absolutely tied and that the states are under congressional tutelage in all matters involving compacts or agreements not only with foreign nations but in the ordinary incidents of interstate social intercourse.

If, however, the later decisions, or rather the later dicta, of the courts are to be relied upon, this is not and perhaps should not be the case.

[1] (1840) 14 Pet. 540 (614), 10 L. Ed. 538 (579).

So far as the supreme court of the nation is concerned, we have but little more than dicta to guide us in the determination of these questions, and it is equally strange that at the time of the adoption of the federal constitution there was little, if any, discussion of the particular clauses here involved. These clauses were seemingly lost sight of in the larger question of the propriety of the delegation of the treaty making power to the federal government, and whether, if delegated at all, it should be exercised by the President alone, or by the President in conjunction with a majority or other proportion of the senate, or by the national congress as a whole. The treaty proper, indeed, seems to have been the topic under consideration rather than the compacts and agreements between the several states, and the relationship of the states with foreign nations rather than between themselves, with the single exception of interstate commerce.

The comprehensiveness of the broad grant of power to the president and the senate seems to have been conceded, and the general opposition to the grant was voiced by Patrick Henry when he protested that, under the terms of the proposed constitution, the states "might relinquish and alienate territorial rights and their most valuable commercial advantages. In short, if anything should be left, it would be because the president and senate were pleased to admit it." It will be noticed, however, that neither the great Virginian nor the critics of the new constitution in general seem in any way to have feared that that constitution would deprive the states of local property rights, interfere with their social usages, or deprive them of the inherent rights of self-protection. These dangers perhaps, in the days of a limited immigration, a limited national intercourse, an entire absence of all general state health regulations and of a scientific knowledge of the communicability of disease whether to the body or to the mind, they did not contemplate or consider.

The first case which should be considered is that of *New York v. Miln*,[2] for although in this case the interstate commerce prerogatives of the federal government rather than its treaty-making powers were directly involved and discussed, the principles of local self-government on which many of the later cases hinge were clearly enunciated.

The question at issue was the right of the state to require, under penalty, the master of every vessel arriving from any foreign

[2] (1837) 11 Pet. 102, 9 L. Ed. 648.

port or from any other state of the United States to make a report in writing of the name, place of birth, last legal settlement, age, and occupation of every person on board. This was claimed to be an interference with interstate commerce. The court, however, in sustaining the regulation, held the act to be an exercise of the police power and not in conflict with the constitution as a regulation of foreign or interstate commerce; that if it were a commercial regulation it would not be an invasion of the power of congress when tested by the rule laid down by the court in the case of *Gibbons v. Ogden*;[3] but the real basis of the decision was declared to be the reserved power of the states. The court (Barbour, J.), says:

". . . . We choose rather to plant ourselves on what we consider impregnable positions. They are these: that a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; and where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive."

The section of the act empowering the New York officials to remove from the state immigrants deemed liable to become chargeable upon the city was not before the court in *New York v. Miln*.

This decision was handed down in 1837, but three years later, in 1840, there followed the case of *Holmes v. Jennison*.[4] In this case the question to be decided was whether the state of Vermont could, without the consent of congress, recognize the extradition proceedings of the Dominion of Canada and extradite thereunder a fugitive from justice. The court being equally divided, the writ of error was dismissed and thus the main question was not determined. Chief Justice Taney and Justices Mc-

[3] (1824) 9 Wheat. 1 (197), 6 L. Ed. 23.
[4] Supra, note 1.

Lean, Story, and Wayne denied the power of the state to enter into any such relations with a foreign state as were involved in the extradition of a fugitive from justice, while Justices Thompson, Baldwin, Barbour, and Catron for various reasons favored dismissal of the bill. The reporter's note states that the judges of the supreme court of Vermont were satisfied, on an examination of the opinions delivered by the justices of the Supreme Court, that by a majority of the Court it was held that the power claimed to deliver up George Holmes did not exist, and he was accordingly discharged.

Chief Justice Taney in his opinion reaffirmed the doctrine of the inherent right of self-protection announced in the case of *New York v. Miln*[5] and held that the state, without the consent of congress, undoubtedly could remove any person guilty of or charged with crime, and might arrest and imprison him in order to effect this object. This, he held, was a part of the ordinary police powers of the state which were not surrendered to the general government. The state, if it thought proper, in order to deter offenders in other countries from coming within its borders, might make crimes elsewhere punishable also punishable in its courts, if the guilty party should be found within its jurisdiction. In all of these cases the state acts with a view to its own safety and is in no degree connected with the foreign government in which the crime was committed and the state does not co-operate with a foreign government nor hold any intercourse with it when it is merely executing its police regulations. He, however, held that in the case before him the situation was otherwise; that in an extradition proceeding the state acts not with a view to help itself, but to assist another nation which asks its aid; that the refugee from justice, Holmes, was not sought to be removed from the state of Vermont as a man so stained with crimes as to render him unworthy of the hospitality of the state, but was delivered up to the Canadian authorities as an act of comity to them. This Chief Justice Taney held was not the exercise of a police power, which operates only on the internal concerns of a state, and requires no intercourse with a foreign state in order to carry it into execution; it is the comity of one nation to another, acting upon the laws of nations and determining for itself how far it will assist a foreign nation in

[5] Supra, note 2.

bringing to punishment those who have offended against its laws. Among other things, he said:

"The power to make treaties is given by the constitution in general terms, without any description of the objects intended to be embraced by it; and, consequently, it was designed to include all those subjects, which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty; and which are consistent with the nature of our institutions, and the distribution of powers between the general and state governments. . . .

"It being evident, then, that the general government possesses the power in question, it remains to inquire whether it has been surrendered by the states. We think it has; and upon two grounds: (1) According to the express words of the constitution, it is one of the powers that the states are forbidden to exercise without the consent of congress. (2) It is incompatible and inconsistent with the powers conferred on the federal government.

"The first clause of the tenth section of the first article of the constitution, among other limitations of state power, declares that 'no state, shall enter into any treaty, alliance, or confederation.' The second clause of the same section, among other things, declares that no state, without the consent of congress, shall 'enter into any agreement or compact with another state, or with a foreign power.'

"We have extracted only those parts of the section that are material to the present inquiry. The section consists of but two paragraphs, and is employed altogether in restrictions upon the powers of the states. In the first paragraph, the limitations are absolute and unconditional; in the second, the forbidden powers may be exercised with the consent of congress, and it is in the second paragraph that the restrictions are found which apply to the case now before us.

"In expounding the constitution of the United States, every word must have its due force and appropriate meaning; for it is evident from the whole instrument that no word was unnecessarily used or needlessly added. The many discussions which have taken place upon the construction of the constitution, have proved the correctness of this proposition, and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument therefore, can be rejected as superfluous or unmeaning; and this principle of construction applies with peculiar force to the two clauses of the tenth section of the first article, of which we are now speaking, because the whole of this short section is directed to the same subject; that is to say, it is employed together in enumerating the

rights surrendered by the states; and this is done with so much clearness and brevity that we cannot for a moment believe that a single superfluous word was used, or words which meant merely the same thing. When, therefore, the second clause declares that no state shall enter into 'any agreement or compact' with a foreign power without the assent of Congress, the words 'agreement' and 'compact' cannot be construed as synonymous with one another: and still less can either of them be held to mean the same thing with the word 'treaty' in the preceding clause, into which the states are positively and unconditionally forbidden to enter, and which even the consent of Congress could not authorize.

"In speaking of the treaty-making power conferred on the general government, we have already stated our opinion of the meaning of the words used in the constitution, and the objects intended to be embraced in the power there given. Whatever is granted to the general government is forbidden to the states, because the same word is used to describe the power denied to the latter, which is employed in describing the power conferred on the former; and it is very clear, therefore, that Vermont could not have entered into a treaty with England, or the Canadian government, by which the state agreed to deliver up fugitives charged with offenses committed in Canada.

"But it may be said that here is no treaty; and, undoubtedly, in the sense in which that word is generally understood, there is no treaty between Vermont and Canada. For when we speak of 'a treaty' we mean an instrument written and executed with the formalities customary among nations; and as no clause in the constitution ought to be interpreted differently from the usual and fair import of the words used, if the decision of this case depended upon the word above mentioned, we should not be prepared to say that there was any express prohibition of the power exercised by the state of Vermont.

"But the question does not rest upon the prohibition to enter into a treaty. In the very next clause of the constitution, the states are forbidden to enter into any 'agreement' or 'compact' with a foreign nation; and as these words could not have been idly or superfluously used by the framers of the constitution, they cannot be construed to mean the same thing with the word 'treaty.' They evidently mean something more, and were designed to make the prohibition more comprehensive.

"A few extracts from an eminent writer on the laws of nations, showing the manner in which these different words have been used, and the different meanings sometimes attached to them, will, perhaps, contribute to explain the reason for using them all in the constitution, and will prove that the most comprehensive terms were employed in prohibiting to the States all intercourse with foreign nations. Vattel, page 192, sec. 152, says: 'A treaty, in Latin foedus, is a compact made with a view to the public wel-

fare, by the superior power, either for perpetuity, or for a considerable time.' "

" 'Section 153. The compacts which have temporary matters for their object, are called agreements, conventions, and pactions. They are accomplished by one single act, and not by repeated acts. These compacts are perfected in their execution once for all; treaties receive a successive execution, whose duration equals that of the treaty.'

" 'Section 154. Public treaties can only be made by the supreme power, by sovereigns who contract in the name of the state. Thus, conventions made between sovereigns respecting their own private affairs, and those between a sovereign and a private person, are not public treaties.'

" 'Section 206. The public compacts called conventions, articles of agreement, etc., when they are made between sovereigns, differ from treaties only in their object.'

"After reading these extracts, we can be at no loss to comprehend the intention of the framers of the constitution in using all these words, 'treaty', 'compact,' 'agreement.' The word 'agreement' does not necessarily import any direct and express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding to which both parties have assented, and upon which both are acting, these terms, 'treaty,' 'agreement,' 'compact,' show that it was the intention of the framers of the constitution to use the broadest and most comprehensive terms; and that they anxiously desired *to cut off all connection or communication between a State and a foreign power;* and we shall fail to execute that evident intention, unless we give to the word 'agreement' its most extended signification, and so apply it as to prohibit *every agreement, written or verbal, formal or informal, positive or implied,* by the mutual understanding of the parties.

"Neither is it necessary in order to bring the case within this prohibition, that the agreement should be for the mutual delivery of all fugitives from justice, or for a particular class of fugitives. It is sufficient, if there is an agreement to deliver Holmes. For the prohibition in the constitution applies not only to a continuing agreement embracing classes of cases, or a succession of cases, but to any agreement whatever. . . .

". . . . It was one of the main objects of the constitution to make us, so far as regarded our foreign relations, one people, and one nation; and to cut off all communications between foreign governments, and the several state authorities. The power now claimed for the states is utterly incompatible with this evident intention, and would expose us to one of those dangers against which the framers of the constitution have so anxiously endeavored to guard."

This case deals with a transaction with a foreign nation. It does not deal with a contract between the several states. It is

controlled as much by the provision which grants to the president and two-thirds of the senate the exclusive treaty making power, as by the prohibition elsewhere contained on the activities of the several states. It is none the less sweeping and comprehensive in its terms and it takes the broad position that all matters which involve a negotiation with a foreign nation come within the treaty making prerogatives of the general government, and this whether it be a treaty, a compact, or an agreement, and, if this be so, it would seem logically to follow that all compacts and agreements between the several states are also subject to the national tutelage and require the congressional consent.

At the date of the decision in *Holmes v. Jennison*,[6] there being no extradition treaty with Great Britain, and the president having disclaimed any authority to surrender up a fugitive to that government, unless Vermont could do so it could not be done at all. It could, therefore, with some propriety be asked, with what federal power does the proposed exercise of authority by Vermont conflict? This question was asked by Justice Thompson, who held that it could, at most, be repugnant to a dormant power which might possibly be brought into action in the future, by treaty, and too remote for consideration.

The reasoning of Chief Justice Taney in *Holmes v. Jennison* would seem to apply as clearly to compacts and agreements between states as between a state and a foreign nation, and to embrace literally "every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties." But without even referring to that opinion, the supreme court of New Hampshire in 1845, in the case of *Dover v. Portsmouth Bridge*,[7] held that there was no violation of the federal constitution in the erection, pursuant to concurrent legislation by the states of New Hampshire and Maine, of a bridge over a navigable river, such joint action not being the result of a contract requiring the consent of congress. The court intimates that the prohibition embraces only some "league or alliance, or contract of a political nature," and was "probably not intended to require the consent of congress to enable states to agree to run the boundary line between them, or to mark and establish its particular locality, etc." Says Parker, C. J.:

"As independent states, New Hampshire and Massachusetts might have made a compact for the building of a bridge over this

[6] Supra, note 1.
[7] (1845) 17 N. H. 200.

river. 12 Peters' Rep. 91, 96. *City of Georgetown v. The Alexandria Canal Co.* And they might have authorized the erection of such kind of bridge as they deemed expedient, and have prescribed the place, terms, and conditions. All the territory above the navigable waters above or upon any thoroughfare leading to them belonged to the one or the other of these states, and the inhabitants might have had more than an equivalent for the inconvenience of a bridge in the facilities for intercourse and trade which it furnished. This must have been a matter for the consideration of the respective legislatures having jurisdiction over the soil and waters. Whether the inhabitants above received a benefit or not, they would not have been entitled to compensation for a consequential injury. 8 Cowen 146, 167.

"Prior to the Revolution, the power of the colonies of New Hampshire and Massachusetts over the soil and waters where this bridge is situated were subject to the jurisdiction and control of the mother country. On the declaration of independence, this control being removed, they might have agreed in relation to the manner of the use of the waters, or in regard to the closing of the navigation, or respecting obstructions to it; or they might, by their separate legislation, have acted upon the subject matter, without any responsibility for their acts except to each other, and except, perhaps, that the union of the colonies for their common defence required them to admit the vessels of the other colonies when resorting thither for intercourse or shelter from the common enemy.

"By the articles of confederation, in 1778, each state retained its sovereignty, freedom and independence, and every power, jurisdiction and right which was not by that confederation expressly delegated to the United States in Congress assembled. The provision that the people of each state should have free ingress and egress to and from any other state, and should enjoy there all the privileges of trade and commerce, subject to the same duties, impositions and restrictions, as the inhabitants thereof respectively, etc., would not have prevented those states from legislating in such a manner as to obstruct the navigation of the river, so long as the use of it was as free to the citizens of other states as to their own. The clause contained in those articles, by which no two or more states should enter into any treaty, confederation or alliance between them, without the consent of the United States in Congress assembled, could not have been construed as prohibiting them from authorizing the erection of a bridge by separate legislation, nor even by direct agreement or compact. In the language of the court (12 Peters 96), 'They could, by their joint will, have made any improvement which they chose, either by canals along the margin of the river, or by bridges or aqueducts across it, or in any other manner whatsoever.' The acts of agreement by which they should do this would of course

not have the character of a treaty, confederation or alliance, within the meaning of the articles of confederation.

"Maine succeeded Massachusetts in her rights to the soil and waters of this river; and New Hampshire and Maine, by their several grants, authorized the erection of this bridge.

"Unless the constitution of the United States interposes an objection, their power to do this has been fully shown. There is in the constitution no express prohibition upon the states which renders the erection of bridges over navigable waters within their jurisdiction unlawful."

The intimation in *Dover v. Portsmouth Bridge* that "this prohibition applies only to such an 'agreement or compact' as is in its nature political" is expressly declared to be the law by the supreme court of Georgia in *Union Brand R. Co. v. East Tennessee & Georgia R. Co.*,[8] involving a railroad constructed under authority granted by the legislatures of Tennessee and Georgia. Says the court:

"The framers of the constitution clearly intended nothing more than to prohibit the several states from exercising their authority in any way which might limit or infringe upon a full and complete exercise by the general government of the powers intended to be delegated by the federal constitution. . . ."

The states of Virginia and Tennessee jointly appointed commissioners to survey and fix the boundary line between them, and subsequently, by legislation enacted in 1803, adopted and ratified the boundary so ascertained. The validity of this action as concluding the respective states was before the Supreme Court of the United States in 1893 in the case of *Virginia v. Tennessee*.[9] It was held that the mere selection of parties to run and designate a boundary line imported no agreement to recognize the same, and that a legislative declaration, following the survey, that it was correct and that thereafter it should be deemed the true and established line did not in itself import a contract or agreement with the adjoining state, but at the most was merely an admission or declaration against interest. When, however, as in this case, the legislative declaration takes the form of an agreement or compact by reciting some consideration for it, for example, as made upon a similar declaration of the border state, the question arises whether it is such an agreement or compact as is prohibited by the constitution.

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[8] (1853) 14 Ga. 327.

[9] (1893) 148 U. S. 503, 13 S. C. R. 728, 37 L. Ed. 537.

"The compact or agreement," the court said, "will then be within the prohibition of the constitution or without it, according as the establishment of the boundary line may lead or not to the increase of the political power or influence of the states affected, and thus encroach or not upon the full and free exercise of federal authority. If the boundary established is so run as to cut off an important and valuable portion of a state, the political power of the state enlarged would be affected by the settlement of the boundary; and to an agreement for the running of such a boundary or rather for its adoption afterwards, the consent of congress may well be required. But the running of a boundary may have no effect upon the political influence of either state; it may simply serve to mark and define that which actually existed before, but was undefined and unmarked. In that case the agreement for the running of the line, or its actual survey, would in no respect displace the relation of either of the states to the general government. There was, therefor, no compact or agreement between the states in this case which required, for its validity, the consent of congress, within the meaning of the constitution, until they had passed upon the report of the commissioners, ratified their action, and mutually declared the boundary established by them to be the true and real boundary between the states. Such ratification was mutually made by each state in consideration of the ratification of the other."

The opinion contains also the following remarkable dictum which has leavened the whole mass of constitutional construction:

"There are many matters upon which different states may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York which the latter state might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter state to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for that state to obtain the consent of Congress before it could contract with New York for the transportation of the exhibit through that state in that way. If the bordering line of two states should cross some malarious and disease producing district, there could be no possible reason, on any conceivable public grounds, to obtain the consent of Congress for the bordering states to agree to unite in draining the district, and thus remove the cause of disease. So in case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened states could not unite in providing means to prevent and repel the invasion of the pestilence without obtaining the consent of Congress, which might not be at the time in session.

If, then, the terms 'compact' or 'agreement' in the constitution do not apply to every possible compact or agreement between one state and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the constitution apply?"

Although the above is dictum merely, the reasoning which accompanies it and which was applicable to the question under consideration, as well as to the dictum, is full of significance and fully supports the theory that it is only in things political that congress has exclusive and original jurisdiction. The doctrine of noscitur a sociis is relied upon and the argument is made that the words "treaty," "compact," and "agreement" merely take the place of the words "confederation," "agreement," "alliance," and "treaty," which are to be found in Article 6 of the articles of confederation, and of the provision that "no two or more states shall enter into any treaty, confederation, or alliance whatever between them," which are contained in the same articles. These two clauses are as follows:

"Article VI. No state without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any king, prince or state, nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign state; nor shall the United States in congress assembled, or any of them, grant any title of nobility."

"No two or more states shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purpose for which the same is to be entered into, and how long it shall continue."

In the case of *McCready v. Virginia*[10] the Supreme Court of the United States held that each state owns the beds of all tide-waters within its jurisdiction and may appropriate them, to be used by its citizens as a common for taking and cultivating fish, and a law of Virginia prohibiting non-citizens of the state from planting oysters in the soil covered by her tide-waters is valid; and in *Wharton v. Wise*[11] the validity of a compact between Virginia and Maryland was involved, which gave to the citizens of Maryland the privilege of taking oysters within the waters of the

[10] (1877) 94 U. S. 391, 24 L. Ed. 248.
[11] (1894) 153 U. S. 155, 14 S. C. R. 787, 3 L. Ed. 674.

former state. The question, therefore, was whether a state by agreement with another state, and without the consent of congress, could give to the citizens of the favored state privileges which it did not accord to those of other states. The court pointed out that this agreement had been made under the articles of confederation and was not antagonistic to these articles. It held it was "not a treaty, confederation, or alliance," within the meaning of those terms as they are used; it remained as a subsisting, operating contract between them in full force when the confederation went out of existence upon the adoption of the present constitution of the United States, and it was not affected or set aside by the prohibitory clauses of that instrument. It is a prohibition that extends only to future agreements or compacts, not against those already in existence, except so far as their stipulations might affect subjects placed under the control of congress, such as commerce and the navigation of public waters, which is included under the power to regulate commerce.

By way of dictum, however, it cited with approval the language which we have before quoted from the case of *Virginia v. Tennessee,*[12] and applied this language to the articles of confederation. It did not, as it might have done, point out the fact that the articles of confederation merely prohibited "any conference, agreement, alliance or treaty with any King, Prince or state," and provided that "no two or more states shall enter into any treaty, confederation, or alliance whatever between them, without the consent of congress." It might have held, and plausibly, that the word "state," as used in the first paragraph of Article 6 of the articles of confederation, merely applied to foreign states, and that the word "agreement" therein used was an agreement in the nature of a treaty. It might have pointed out, as it did not, that it merely forbade two states from entering into "any treaty, confederation, or alliance, without the consent of congress;" that the words "treaty, confederation, alliance" clearly characterized transactions of a political character, which affected sovereignty; and that, on the other hand, Section 10 of Article I of the federal constitution prohibits any "agreement or compact."

The supreme court of Louisiana, in the case of *Fisher v. Steele,*[13] in 1887, sustained a contract between that state and Arkansas for the construction of a levee along the Mississippi River in Arkansas, against the objection that it was in conflict with Sec-

[12] Supra, note 9.
[13] (1887) 39 La. Ann. 447, 1 So. 882.

tion 10 of Article I of the constitution, treating the contention of invalidity somewhat scornfully:

"On reading that objection in connection with the constitutional prohibition just quoted, the mind would naturally expect a charge that the state of Louisiana was projecting a treaty of alliance with the state of Arkansas, or contemplating some joint scheme of commercial or industrial enterprise, or perhaps conspiring for the establishment of a new confederacy; but great is the relief when the mind is informed that the purpose which plaintiff resists with such a powerful shield is merely to build a piece of levee in the state of Arkansas, if necessary, and if that state does not object, or consents. It is, indeed, too clear for argument that such a transaction is no more a prohibited compact between two states than is contained in the requisition of one governor for, and the consent of another to, the capture and arrest of a fugitive from justice."

To the opinions expressed in the foregoing cases may be added the dictum of Chief Justice Marshall in *Barron v. Baltimore*:[14]

"It is worthy of remark too that these inhibitions generally restrain state legislation on subjects intrusted to the general government, or in which the people of all the states feel an interest. A state is forbidden to enter into any treaty, alliance, or confederation. If these compacts are with foreign nations, they interfere with the treaty-making power, which is conferred entirely on the general government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the constitution."

On the other hand, Story, writing about the year 1833,[15] commenting on the two clauses under consideration before any of the cases above mentioned were decided, says:

"Sec. 1403. Perhaps the language of the former clause may be more plausibly interpreted from the terms used, 'treaty, alliance, or confederation,' and upon the ground, that the sense of each is best known by its association (noscitur a sociis) to apply to treaties of a political character; such as treaties of alliance for purposes of peace and war; and treaties of confederation, in which the parties are leagued for mutual government, political cooperation, and the exercise of political sovereignty; and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges. The latter clause 'compacts and agreements,' might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty; such as questions of boundary;

[14] (1833) 7 Pet. 243, 8 L. Ed. 672.
[15] Story's Commentaries on the Constitution, Sec. 1403.

interests in land situate in the territory of each other; and other internal regulations for the mutual comfort and convenience of states bordering on each other. Such compacts have been made since the adoption of the constitution. The compact between Virginia and Kentucky, already alluded to, is of this number. Compacts, settling the boundaries between states, are, or may be, of the same character. In such cases, the consent of Congress may be properly required, in order to check any infringement of the rights of the national government; and, at the same time, a total prohibition to enter into any compact or agreement might be attended with permanent inconvenience or public mischief."

If we consider the history of these constitutional provisions together with the other provisions of the constitution which grant or limit authority, we are led to conclude that only political compacts or agreements which affected their sovereignty as between themselves or between them and the federal government were sought to be regulated or controlled.

We realize that the support to be found for this proposition in the federal cases is largely dicta, yet such dicta have been of long standing and, so far as we can learn, have never been judicially criticized. We realize also the difficulty of determining in every particular case whether the sovereignty of the state is enlarged or that of the federal government encroached upon. It seems clear, however, that where a state obtains permission to drain its surface waters within the borders of another state or nation, as was the situation in the case of *McHenry County v. Brady*,[16] or seeks to purchase a site for an exposition or other public building, or to do things mentioned by Mr. Justice Field in the dictum in the case of *Virginia v. Tennessee*, such a state is in no way increasing its political power or encroaching upon that of the nation. Though the transaction may involve a negotiation and perhaps an agreement or compact, it is an exercise of a corporate and property-owning rather than a governmental power. It is true that in the case of *Virginia v. Tennessee* the Supreme Court

[16] (N. D. 1917) 163 N. W. 540. An agreement was entered into between the drainage boards of certain counties in North Dakota and a municipality in the province of Manitoba for the improvement of Mouse River, which flows from North Dakota into Canada, in order to facilitate the drainage of certain lands by securing an outlet for surface waters. The contract was made under the authority of the state of North Dakota and contemplated the expenditure of money and the performance of work in the territory of a foreign country. It was attacked as being an "agreement" or "compact" with a foreign power, prohibited by the constitution. *Held*, (Bruce, C. J.) an agreement not in any way calculated to encroach upon or weaken the authority of congress, not political in its character, and therefore not within the constitutional prohibition.—Ed.

of the United States drew a careful distinction between an agreement for the survey of a boundary line and an agreement which would make that line controlling. Permanently locating a boundary line, however, would place the persons on either side of it either within or without the jurisdiction of the particular state and would increase or decrease its sovereignty and often that of the national government itself.[17]

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[17] On April 1, 1918, congress gave its consent to a compact and agreement between the states of Oregon and Washington regarding concurrent jurisdiction over the waters of the Columbia River and its tributaries, in connection with regulating, protecting, and preserving the fisheries in the river. Cong. Record, 1918, p. 4730.

Following is a list of agreements between states to which the consent of congress has been given:

ACTS OF CONGRESS GIVING CONSENT TO AGREEMENTS BETWEEN STATES.

Resolution of May 12, 1820 (3 Stat., 609). Kentucky and Tennessee, February 2, 1820. Boundary line.

Act of June 28, 1834 (4 Stat., 708). New York and New Jersey, September 16, 1833. Boundary line, execution of process, etc.

Act of January 3, 1855 (10 Stat. 602). Massachusetts and New York, May 14 and July 21, 1853. Cession of district of Boston Corner by Massachusetts to New York.

Act of February 9, 1859 (11 Stat., 382). Massachusetts and Rhode Island. Attorney General directed to assent to agreement between States in adjustment of boundary dispute before Supreme Court.

Joint resolution of February 21, 1861 (12 Stat., 250). Arkansas, Louisiana, and Texas. Joint action for removal of raft from Red River (past or prospective agreements).

Joint resolution of March 10, 1866 (14 Stat., 350). Virginia and West Virginia. Cession of Berkeley and Jefferson Counties to West Virginia.

Act of March 3, 1879 (20 Stat., 481). Virginia and Maryland, January 16, 1877. Boundary line.

Act of April 7, 1880 (21 Stat., 72). New York and Vermont, November 27, 1876, and March 20, 1879. Boundary line.

Act of February 26, 1881 (21 Stat., 351). New York and Connecticut, December 8, 1879. Boundary line.

Act of October 12, 1888 (25 Stat., 553). Connecticut and Rhode Island, May 25, 1887. Boundary line.

Act of August 19, 1899 (26 Stat., 329). New York and Pennsylvania, March 26, 1886. Boundary line.

Act of July 24, 1897 (30 Stat., 214). South Dakota and Nebraska, June 3 and 7, 1897. Boundary line.

Joint resolution of March 3, 1901 (31 Stat., 1465). Tennessee and Virginia, January 28 and February 9, 1901. Boundary line.

Act of March 1, 1905 (33 Stat., 820). South Dakota and Nebraska. Boundary line.

Act of January 24, 1907 (34 Stat. 858). New Jersey and Delaware, March 21, 1905. Jurisdiction over Delaware River, process, etc.

Joint resolution of January 26, 1909 (35 Stat., 1160). Mississippi and Louisiana. Boundary line and criminal jurisdiction (prospective agreement).

Joint resolution of January 26, 1909 (35 Stat., 1161). Mississippi and Arkansas. Boundary line and criminal jurisdiction (prospective agreement).

Joint resolution of February 4, 1909 (35 Stat., 1163). Tennessee and Arkansas. Boundary line and criminal jurisdiction (prospective agreement).

Perhaps the true rule is that all compacts or agreements which increase or decrease political power are void, but that all others are voidable merely, at the option of the national government, and that a consent thereto may be inferred from silence and acquiescence.

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BISMARCK, NORTH DAKOTA.

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Joint resolution in June 7, 1910 (36 Stat., 881). Missouri and Kansas. Boundary line and criminal jurisdiction (prospective agreement).

Joint resolution of June 10, 1910 (36 Stat., 881). Oregon and Washington. Boundary line (prospective agreement).

Joint resolution of June 22, 1910 (36 Stat., 882). Wisconsin, Illinois, Indiana, and Michigan. Criminal jurisdiction on Lake Michigan (prospective agreement).

Act of October 3, 1914 (38 Stat., 727). Massachusetts and Connecticut, March 19, 1908, and June 6, 1913. Boundary line.—Cong. Record, 1918, p. 4731.