A DANGEROUS POSITION FOR THE RAILROADS.

An article by the Honorable Richard Olney on Congressional Regulation of Railway Rates, in the October number of the *North American Review*, has the weight that attaches to all statements of this distinguished author upon legal questions. But the very weight of Mr. Olney's name perhaps increases the danger to the railroads from his argument. The article exemplifies the tendency of the railroads, or of their advocates, to place themselves upon a weak legal position, by attacking powers of Congress which have been slowly developed and often affirmed during more than three-quarters of a century, and to which the railroads have frequently appealed for protection against the States; instead of occupying the strong position offered them by the conservative opinion of the business world and Congress, that however lawful a power may be, its exercise is inexpedient, when that exercise must be attended with evils as great as those involved in the general regulation of railway rates by the Interstate Commerce Commission over an area so large and among interests so diverse as those of the United States. Here a strong practical sentiment is with the roads. But an unsound attack upon the powers of Congress,—an attack which can be sustained only if the constitutional development of the country is set back ninety years, —places the railroads at the outset in the wrong, and, if they could establish the principles for which Mr. Olney contends, would expose them to greater dangers than they now fear.

Of the three legal questions which Mr. Olney answers adversely to the power of Congress, I shall consider at length only that which he asks first and answers last: Does the commerce clause of the federal Constitution authorize Congress to prescribe the charges of carriers engaged in interstate and foreign commerce? For in his answer to this is the danger to the railroads.

As to the other two questions, it suffices now to suggest, that as the demand for the regulation of railway rates

comes in considerable degree from localities which complain that equal competition as to them is destroyed by the present system of regulation by the roads, the proposition that regulation by the Commission (or by Congress) will destroy equal competition among localities, does not commend itself strongly to a judicial mind. That Congress can delegate to the Commission the power to fix rates, if not decided, is at least strongly indicated in the *obiter dicta* of the Supreme Court, as Mr. Olney recognizes; and probably he does not expect that, upon this point, the Court will sustain the position he has taken. Indeed, upon these two questions the argument is rather the desperate plea of a beaten cause than the confident assertion of a victorious principle.

But to consider now the contention that, under the Constitution, Congress inherently lacks the power to fix rates for transportation in interstate and foreign commerce. The question of railroad regulation by the nation, or by the States, cannot be isolated from the general development of American constitutional law; particularly, it cannot be separated from the law of interstate commerce, which now, by slow acquisition, contains a body of settled principles with which Mr. Olney's position conflicts, to the great danger of the roads.

It is an elemental conception of American public law that the body politic, including the nation and the States, or rather the people of the States who constitute the nation, has in its aggregate all the powers possessed by other civilized nations, and that its organs of government—the governmental bodies of the States and the nation—can exercise all the powers, in the aggregate, that the organs of other civilized governments can exercise, except in so far as the exercise of particular powers is restricted by express provisions of the federal and State constitutions. The federal Constitution is fairly permanent and unchangeable, and we may say its restrictions are perpetual; but the constitutions of the several States are plastic and readily changed, and the restrictions of to-day against the exercise of a particular power may be swept away to-morrow. If this nation has any powers, it has them only because they have been bestowed upon it by the people of the several States

out of their abundance. And it is the fundamental conception of American constitutional law that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people"—that is, are reserved to the States respectively, or to the people of each State.[1]

That the power to regulate the rates of transportation of persons and commodities, upon which the well-being and even the lives of the people may depend, is a power appropriate to civilized governments, is apparent upon the statement. That before the adoption of the federal Constitution, it was within the power of the people of the several States which formed this Union to bestow upon the Congress the power to fix the rates of transportation, is certain. But they could only bestow it, because they had it, and if they had it and did not bestow it upon the Congress, they have it still, and it has become a power inherent in the governments of the several States, as the reservoirs of all the reserved powers of sovereignty under the federal Constitution. The point here involved has perhaps never been more clearly stated than it was almost a century ago by Judge Davis, in his celebrated opinion on the Embargo, when he said of the power to prohibit commerce:

"Further, the power to regulate commerce is not to be confined to the adoption of measures, exclusively beneficial to commerce itself, or tending to its advancement; but, in our national system, as in all modern systems, it is also to be considered as an instrument for other purposes of general policy and interest. . . . The situation of the United States in ordinary times might render legislative interferences relative to commerce less necessary; but the capacity and power of managing and directing it, for the advancement of great national purposes, seems an important ingredient of sovereignty. . . . But we are to leave the wide field of general reasonings and abstract principles, and are to consider the construction and operation of an express compact, a government of convention. The general position is incontestable that all that is not surrendered by the convention is retained. The amendment which expresses this is for greater security, but such would have been the true construction without the amendment. . . . Unless Congress, by the Constitution, possess the power in question, it still exists in the State legislatures, but this has never been pretended or claimed since the adoption of the federal Constitution; and the exercise of such a power by the States would be manifestly inconsistent with the power vested by the people in Congress, to regulate commerce. Hence I

[1]Tucker on the Constitution, page 305.

infer that the power reserved to the States by the Articles of Confederation, is surrendered to Congress by the Constitution, unless we suppose that by some strange process it has been merged or extinguished, and now exists nowhere."[1]

There is no warrant for assuming that the American people have ever divested themselves, in the aggregate, of any powers which are appropriate to other commonwealths; although they have imposed restrictions upon their governmental organs in the exercise of certain specified powers.

But turning from general considerations to particular instances, we find that not only is the power to regulate the rates of transportation appropriate to civilized commonwealths, but it has been frequently exercised by the American States, and that exercise upheld by the Supreme Court, as a proper use of the State's powers of control over persons and property within their respective borders.[2] Practically the only restrictions placed by the Supreme Court upon the exercise of this power by the States are, that it shall not conflict with the Constitutional grant of power to Congress to regulate interstate and foreign commerce, and that the rates imposed shall not be so unreasonable as to constitute a confiscation of railroad property.[3] And the conflict of State regulation of rates with Congressional power arises only out of the grant to Congress of power to fix rates in interstate and foreign commerce, as an incident to the grant of power to regulate such commerce. If such power has not been granted to Congress, then it has not been taken from the States, unless some other provision of the federal Constitution has forbidden it generally to the States. But there is no such provision; and not only is the latent capacity to regulate railroad rates in the American body politic, but the active power of regulation is in some

[1] U. S. *v.* Brig William (1808), 2 Hall's Law Journal, 255. Judge Davis had been a member of the Massachusetts convention which adopted the federal Constitution. His decision was rendered less than twenty years afterward, and therefore has the additional weight of a contemporaneous exposition of the Constitution.

[2] Peik *v.* Chic. & N. W. R. Co. (1876), 4 Otto, 164; C. B. & Q. R. Co. *v.* Iowa (1876), 4 Otto, 155; Reagan *v.* Mercantile Trust Co. (1894), 154 U. S., 413; Louisville & Nashville R. Co. *v.* Kentucky (1902), 183 U. S., 503 And numerous other cases cited by the author in 5 COLUMBIA LAW REVIEW, 298.

[3] Reagan *v.* Mercantile Trust Co., supra.

of the organs of government created by that body politic. It has not disappeared. It is in either the national or the State governments.

The power to fix railroad rates being appropriate to civilized commonwealths, and having been long exercised by the States of this Union as to certain kinds of railroad transportation—that within their borders—the power to regulate the rates of all varieties of that transportation is somewhere within the governmental organs of the American Commonwealth. According to the fundamental principle of American law it remains in the governments of the several States, unless it has been granted to the federal Congress, or to some other organ of the national government.

This is not merely the conclusion of ingenious dielectics, it is the unavoidable consequence of the composite nature of the American Commonwealth. The principle has been recognized from the beginning of our federal government; it has never been seriously questioned, it cannot be, because it is involved in the very nature of the government; and it will not now be denied at the instance of the railroads, which in times past have frequently appealed to the very power of Congress now assailed for protection against State regulation.

This, then, is the grave danger to which the position taken by Secretary Olney would expose the railroads. He offers to them regulation by the several States as an alternative to regulation by Congress; because his contention would sweep away the barriers to State regulation of rates, by determining that the power of regulation had not been taken from the States by a grant to Congress, but remained in the States as a part of their reserved powers.

There is no third possibility. The power to regulate the rates of interstate commerce is in the nation or in the States, unless the Supreme Court, one hundred and seventeen years after the adoption of the Constitution, and in opposition to a wide-spread public sentiment, will set aside a fundamental principle of American polity, out of which arose the Constitution itself.

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