

to set aside the order of the commissioner. The circuit court upheld the order of the respondent, and upon appeal the Supreme Court of Missouri *sustained* the decision of the lower court, thereby upholding the validity of the statute. *Aetna Insurance Company v. Hyde*, (Mo. 1926), 285 S. W. 65.

The fact that the case by writ of certiorari is now pending before the Supreme Court of the United States renders a discussion at this time very appropriate. In substance, the issue involved is whether a state statute that delegated to a public official authority to regulate fire insurance rates is repugnant to the "due process" clause of the Fourteenth Amendment. It is a well settled principle that to deprive a person, artificial or natural, of its "good will," its "going concern value," or to injure one's established business, is sufficient to constitute a confiscation of private property within the meaning of the Fourteenth Amendment. That the "due process" clause is deemed also to embrace freedom of contract to all persons is held in *C. B. & Q. R. R. Co. v. McGuine*, 219 U. S., 566; *Wulff Packing Company v. Industrial Court*, 262 U. S., 534. Ever since *Munn v. Illinois*, 94 U. S., 113, it has been held by the Supreme Court of the United States that any business "affected with a public interest" is subject to legislative regulation. The following businesses have been held to be "clothed with a public interest" and therefore subject to regulation: warehouses and grain elevators, *Munn v. Illinois*, *supra*, stockyards, *Cotting v. Kansas City Stock Yards*, 183 U. S., 79, tenement and apartment houses, *Marcus Brown Holding Co. v. Feldman*, 269 Fed., 306, transportation of freight and passengers, *C. B. & Q. R. R. Co. v. Iowa*, 94 U. S., 155. In *American Surety Co. v. Shalzenberger*, 183 Fed., 636, it was held that the insurance business consists of personal contracts of indemnity against certain contingencies only, and that whether such contracts should be made at all is a matter of private negotiation, demanding exclusive freedom in fixing the terms. But, says Dean Pound, "The law of insurance is so far regarded as a business in which the public has an interest that within recent years the insurance business has been taken out of the category of contracts." (POUND, SPIRIT OF THE COMMON LAW, p. 29.) That the business of fire insurance is one in which the public has such an interest as to justify legislative regulation of its rates has been repeatedly held. *Orient Fire Insurance v. Daggs*, 172 U. S., 565; *Farmers' & Merchants' Insurance Company v. Dohney*, 189 U. S., 301; *Bashier v. Connally*, 113 U. S., 27; and particularly, *German Alliance Insurance Co. v. Lewis*, 233 U. S., 389. It is quite probable that in the instant case the Supreme Court will adhere to the principle laid down in the last named case, wherein the Court said, "The contracts of insurance may be said to be interdependent. They can not be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the money of the insured, possessing great power thereby and charged with great responsibility. How necessary their solvency is, is manifest. On the other hand to the insured, insurance is an asset, a basis of credit. It is practically a necessity to business activity and enterprise. It is, therefore, essentially different from ordinary commercial transactions, and, as we have seen, according to the sense of the world from the earliest times—certainly the sense of the modern world—is of the greatest public concern."

J. R. B. '28.

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CONSTITUTIONAL LAW—POWER OF THE PRESIDENT TO REMOVE APPOINTIVE OFFICIALS.—Where the President removed a postmaster under an Act of Congress which required the Senate to consent to the appointment and removal of such officer, *held*, that this statute was invalid, and the President had the sole power of removal of all officers appointed by him. *Myers v. United States*, (U. S.) 71 L. Ed., 27; 47 S. Ct. Rep., 21.

The Court bases its opinion on two general grounds; first, that the general

executive power vested in the President (Const. U. S., Art. 2, Sec. 1) and his duty to see that the laws are faithfully executed (Const. U. S., Art. 2, Sec. 3) contain the specific power of appointment which in turn carries with it the power of removal. These powers are limited only by the power granted to the Senate to advise and consent to appointments (Const. U. S., Art. 2, Sec. 2). Secondly, that such construction had been placed on these sections by Congress, the Courts, and the Executive, and had been acquiesced in for so long that the court was bound to follow it. In supporting its first point the Court relies on the principle of the separation of powers and on the duty of the President to enforce the laws. The familiarity of the framers of the Constitution with this principle of separation of powers, and the weaknesses of the Confederation led naturally to an insistence in the Constitutional Convention on this point. The reasonable rule of construction applied to these powers is that they shall be kept separate in all cases where they are not expressly blended, and this rule has been repeatedly confirmed by this Court. *Merriweather v. Garrett*, 102 U. S., 472, 515; 27 L. Ed., 197, 205; *Kilbourn v. Thompson*, 103 U. S., 168, 190, 26 L. Ed., 377; 386; *Mugler v. Kansas*, 123 U. S., 623, 662, 31 L. Ed., 205, 210. The powers of appointment and removal of officers are not legislative or judicial, and must therefore be executive. Although the colonists sometimes lodged them in the legislatures or the courts, the prevailing practice in this country and in England was to consider them executive, and the practice was followed by the Constitution, *Ex Parte Grossman*, 267 U. S., 87, 110, 69 L. Ed., 527, 531, 38 A. L. R. 131. The Senate does not make the appointment even under the Constitution but merely confirms or rejects it, which, the Court says, is not essentially an exercise of executive power. The purpose of giving the Senate even this power is not to transfer executive functions to Congress, but to limit to some degree the exercise of them by the President in order to secure proper appointments by him. It is contended by the Court that a check on the power of removal is a much more serious matter for "it may be presumed that the Senate is or may become as well advised as to the fitness of a nominee as the President, but in the nature of things the defects in ability or intelligence or loyalty in the administration of the laws of one who has served as an officer under the President, are facts as to which the President, or his trusted subordinates, must be better informed than the Senate, and the power to remove him may, therefore, be regarded as confined for very sound and practical reasons to the governmental authority which has administrative control." That the power of the Senate over the Executive is to be strictly construed and is not to be extended beyond its express provisions was indicated by the formidable opposition to its inclusion in the Constitution. This leads the Court to a discussion as to whether the power of removal, not expressly granted to anyone, is vested in congress by Article 1, Section 8, of the Constitution which provides that Congress shall have the power to make all laws which shall be necessary and proper for the carrying out of the Constitution. The court points out that this power of removal is a necessary incident of the power of appointment, which is vested in the President. It is beside the point to say that Congress may set up or abolish the office. That it is a province of legislation to have control of the office is admitted, but when the office is created, the power to appoint to it vests in the President with the concurrence of the Senate. As Madison said, "the legislature creates the office, defines the powers, limits its duration and annexes a compensation. This done, the legislative power ceases. They ought to have nothing to do with designating the man to fill the office. That I conceive to be of an executive nature." The attempted analogy between the judicial power established by the Constitution fails because "the functions of distributing jurisdiction to the courts and the exercise of it when distributed and vested are not at all parallel to the creation of an office, and the mere right

of appointment to, and removal from, the office which at once attaches to the executive by virtue of the Constitution." The only time when Congress may govern the appointment and removal of officers is when it vests such appointments in some person other than the President as provided by the Constitution in Article 2, Section 2. When it has not done so there can be no interference by Congress with the executive power.

The Court next turns to the practical side of this problem which is raised by the President's duty to see that the laws are faithfully executed, as laid down by Article 2, Section 3, of the Constitution, a duty which can only be done through assistants. Since the responsibility is placed on the President, he must have the power of enforcing his will on his subordinates. He is the only person who is in a position to judge of the efficient exercise of his office by a subordinate. To say that the power of suspension gives him control of his subordinates is to disregard the fact that the Senate may refuse to affirm the suspension and thus surround him with inefficient, antagonistic aides. It is no part of the duty of Congress to thwart the President in the execution of his duties. To do so would destroy the unity established by the Constitution and make impossible that complete confidence in his subordinates which is necessary to enable the President to carry out his sworn duties. The specification of certain powers in the executive by the Constitution is merely for emphasis and is not to be construed as limiting his powers to them. 7 J. C. HAMILTON, WORKS OF HAMILTON, 80-81

In support of its second general proposition, that of previous construction the court considers first, the construction placed on this provision by Congress itself. In the First Congress which met to set up the government this very question arose in the establishment of the Department of State. After a full debate the Act was deliberately worded in such a way as to make clear the opinion of Congress that the President had the sole power of removal. Succeeding Congresses recognized and applied this construction, 1 Stat., 53, c. 8; 1 Stat., 87 c. 20; 3 Stat., 582 c. 102. Sometimes Congress actually requested the President to make removals, 12 Stat., 596 c. 200. Such acts were held to be merely declaratory of long established law, *Blake v. U. S.*, 103 U. S., 227, 234, 26 L. Ed., 462. It was only when Congress came into conflict with such Presidents as Jackson and Johnson that it attempted to override such construction. Even President Jackson's opponents admitted, that while they believed the theory to be wrong, it had been applied so long that it was the established construction. 4 WEBSTER, WORKS, 179; 1 KENT COM. 310; 2 STORY, CONST. SEC. 1543. The failure of the attempted impeachment of President Johnson over the Tenure of Office Act of 1867 showed that Congress, when pressed to the issue, was not willing to depart from its own construction, and this act was repealed in 1887. When the matter has been taken into the courts they have followed the Congressional construction of 1789, *Ex Parte Hennen*, 13 Pet., 230, 10 L. Ed., 138; *Parsons v. U. S.*, 167 U. S., 324, 42 L. Ed., 185; *Shurtleff v. U. S.*, 189 U. S., 311, 315, 47 L. Ed., 828, 831. It has been applied even to the removal of judges of territorial courts appointed by the President under Acts of Congress, *U. S. ex rel Goodrich v. Guthrie*, 17 How., 284, 15 L. Ed., 102; *McAllister v. U. S.*, 141 U. S., 174, 35 L. Ed., 693. In a discussion of *Marbury v. Madison*, 1 Cranch 137, the Court holds that that case could not be authority on this point, as it was not before the Court and the opinion of Chief Justice Marshall was mere dictum, and if it could be more than that, the case had been expressly overruled by the *Parsons* Case. Conceding great weight to even an opinion of Marshall, it was evident that he later changed his view as to the power of Congress over removals, for in his *LIFE OF WASHINGTON*, he says that the Act of 1789 has "ever been considered as a full expression of the sense of the legislature on this important part of the American Constitution," 5 MARSHALL, LIFE OF WASHINGTON,

192-200. Ex Parte Hennen decided in 1839 established this construction as the one which this Court will follow. That this is the executive construction is amply proved by the consistent action of all the Presidents, following the advice of their Attorney-General, in removing officers without the consent of the Senate. The conflict was sharp over President Jackson's removal of Secretary Duane and he refused to yield to the Senate. President Johnson dared impeachment rather than surrender the point, and it was insisted upon by Cleveland in 1886, Wilson in 1920, and Coolidge in 1924.

The dissenting opinions attack the theory of the court on four general grounds. That by Mr. Justice Holmes is, that this office is a creation of Congress which has the power of control over its own creations; that of Mr. Justice McReynolds is, that there is no such broad power inherent in the executive as laid down by the Court and that Congress has repeatedly asserted its control; and that by Mr. Justice Brandeis admits the control of the President over high political officers, but points out the distinction between such officers and the complainant.

W. M. T. '27.

[Due to lack of time before going to press this note contains only a digest of the Court's opinion.]

CRIMINAL LAW—EXPERIMENTS BY JURORS—INSPECTION OF CONTENTS OF BOTTLE.—The defendant was charged with the possession of intoxicating liquor. After the court had directed the attention of the jury to bottles which had been introduced in evidence one of the jurors took up one of the bottles and tasted the contents. The defendant's motion to withdraw the case from the jury was overruled and he duly excepted to the ruling of the court. *Held*, that permitting the juror to taste the liquor and the refusal to withdraw the case from the jury was reversible error. *Nix v. City of Andalusia*, (Ala. 1926) 109 So., 182.

In recent years two distinct lines of judicial decisions with respect to the propriety of permitting jurors to taste liquor introduced in evidence and upon whose intoxicating character the guilt of the accused depends have grown up. Cases in which the practice has been permitted and sanctioned are: *People v. Kinney* (1900) 124 Mich., 486, 83 N. W., 147; *Schulenberg v. State* (1907) 79 Neb., 65, 112 N. W., 304, 16 Ann. Cas., 217; *State v. Simmons*, (1922) 183 N. C., 684, 110 S. E., 591; *Troutner v. Commonwealth*, (1923) 135 Va., 750, 115 S. E., 693. In close proximity with these decisions are those holding that it is proper for the jurors to test by their sense of smell the liquor which has been introduced in evidence. *Reed v. Territory* (1908) 1 Okl. Cr., 481, 98 P. 583, 129 A. S. R., 861; *Enyart v. People*, (1921) 70 Colo., 362, 201 P. 564; *State v. Dascenzo*, (1924) 30 N. M., 34, 226 P. 1099. This latter doctrine also obtains in Missouri where jurors have been permitted to "inspect and smell" the liquor introduced. *State v. Sissom*, (Mo. 1926) 278 S. W., 704. In *State v. Stapleton*, (1923) 155 Minn., 499, 193 N. W., 35, it was held proper to permit the jury to pour the liquor into saucer and touch a match thereto for the purpose of testing its alcoholic content. The chief grounds of decision in these cases seem to be: (1) that the jurors do not learn facts independent of evidence but simply test the evidence already introduced in order properly to determine its truth or probative value; (2) that to a juror the best and highest proof of which any fact is susceptible is the evidence of his own senses; (3) that he should be permitted to requisition freely any or all of these senses in the determination of a disputed question of fact because the ultimate purpose for which the evidence is introduced is to assist the jury in reaching the correct conclusion; (4) and that jurors must necessarily take into consideration their knowledge and impressions founded upon experience in their everyday life and jurors without such knowledge and impressions could not be had.