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LEGAL FOUNDATIONS OF CAPITALISM

BY

JOHN R. COMMONS

PROFESSOR OF ECONOMICS IN THE UNIVERSITY OF WISCONSIN

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To My Friend
CHARLES R. CRANE

PREFACE

The aim of this volume is to work out an evolutionary and behavioristic, or rather volitional, theory of value. It was commenced thirty-five years ago at Johns Hopkins University under my stimulating teacher, Richard T. Ely.

Thirty years ago I published a book under the name of *Distribution of Wealth* in which I tried to mix things that will not mix—the hedonic psychology of Böhm-Bawerk, and the legal rights and social relations which he had himself analyzed and then excluded from his great work on the psychological theory of value. Afterwards I had various opportunities for the investigation of labor problems and problems connected with the regulation and valuation of public utilities. This led to a testing of economic and legal theories in the drafting of bills as an assistant to legislative committees in Wisconsin.

It was this experience, shared by my students, that led directly to the theoretical problems of this book. We had to study the decisions of the courts, if the new laws were to be made constitutional, and that study ran into the central question, What do the courts mean by reasonable value? Somehow the answer was tied up with reasonable conduct. None of us could find much in the writings of economists except those of Professor Ely that threw light on the subject. From the court decisions it seemed that anything "reasonable" would be sustained, and so we had to use the words reasonable value, reasonable safety, reasonable wage, and fix up reasonable conduct for public officials and private citizens, whether we knew what it meant or not.

I had read Veblen's brilliant criticisms, beginning in 1895, on the theories of the classical, socialistic, and psychological economists, and his suggestion that an evolutionary theory of value must be constructed out of the habits and customs of social life. But he had not studied the decisions of the courts which are based on these customs, and I went to work with my students digging directly out of the court decisions stretching over several hundred years the behavioristic theory of value on which they were working. We were puzzled, for we tried to reconcile the economists from Quesnay to Cassel with the lawyers from Coke to Taft. We found eventually that what we were really working upon was not merely a theory of Reasonable Value but the Legal Foundations of Capitalism itself.

This work is essentially theoretical, dealing only with concepts derived from the decisions of the English and American courts, but with an eye on the concepts of leading economists from the Physiocrats to modern times. Another volume is in contemplation reviewing these theories of the economists and leading up to practical applications of a theory of Reasonable Value to current problems.

In these researches, I have had important assistance and criticism from Wesley C. Mitchell of Columbia University, Arthur L. Corbin of the Yale Law Faculty, and William H. Page of the Wisconsin University School of Law.

JOHN R. COMMONS.

UNIVERSITY OF WISCONSIN,
July, 1923.

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CHAPTER I

MECHANISM, SCARCITY, WORKING RULES

Economic theory deals with two concepts, Value and Economy. Abstract reasoning regarding these concepts rests ultimately on mathematical concepts of quantity, time and energy. The three are inseparable, for quantity and time are dimensions of energy. The quantity relationships of energy, usually termed "statics," turn on the problem of the relation of the parts to the whole, while the time relationships, usually termed "dynamics," are the relations of a process that connects past, present and future.

Value and Economy are distinguishable as two quantitative relationships of the parts to the whole. The whole is always a function of its parts, but the whole may be the *sum* of its parts or the whole may be a *multiple* of its parts. The former is the quantitative concept of Value, the latter of Economy. A "fund of value" is the sum of the values of all the parts that constitute the whole. A certain quality which we call Value is abstracted from other qualities of commodities, is measured in money as prices, and these are then added together, so that the sum of the parts is the sum of a *similar* quality of all the parts.

But Economy is the proportioning of parts that have *different* qualities yet are complementary to each other, such that one kind of energy acts upon another kind, and the resultant is larger or even smaller than the sum, according to the good or bad proportions in which the limiting and complementary parts are combined. Value is a sum of similar values, but economy is a proportioning of dissimilar values.

These two quantitative relationships of the parts to the whole run everywhere in economic theory. A sum of individuals is the total population, but a proportioning of different kinds of activity of different individuals is a society. A sum of prices is the total business assets of a firm, but a proportioning of land, labor, capital and management is a going concern. Wages are a sum of money paid for periods or pieces of work, but a proportioning of different kinds of activity in acquiring the wages is a job. A sum of all the prices of all kinds of commodities is the total nominal wealth of a nation, but the proportion existing between one commodity and all the others is supply and demand.

The concept of good or bad economy is so self-evident, and its psychological equivalent, the sense of fitness or unfitness, which is "common sense," or "good sense," or merely habit and approved custom, is so continually present in every act that, in the history of economic thought, good economy, which is merely a good proportioning of the parts, has often been either taken for granted or erected into an entity existing outside or above the parts. For, is it not an astonishing and blessed thing that the whole should be greater than the sum of its parts? And, how can the parts be greater than their sum unless a benevolent deity or "law of nature" organize them harmoniously? But a mark of the progress that has occurred in economic theory, from the time of Quesnay and Adam Smith, has been the emergence of the concept of good or bad political economy out of mythical entities such as nature's harmony, natural law, natural order, natural rights, divine providence, over-soul, invisible hand, social will, social-labor power, social value, tendency towards equilibrium of forces, and the like, into its proper place as the good or bad, right or wrong, wise or unwise proportioning by man himself of those human faculties and natural resources which are limited in supply and complementary to each other.

An accompanying mark of progress in economic theory is indicated by changing views as to the Time dimensions of value and economy. Early economists found the "cause" and "substance" of value in the stored-up energy of the past, either Quesnay's vital forces of nature, or Ricardo's and Marx's stored-up labor power. Then followed the hedonic economists who found value in the pains and pleasures of the present, aided perhaps by a calculating mechanism of the future, while the later theories find value in the hopes, fears, probabilities and lapse of time of the future, depending on the will of persons existing in the present. The progress has been from "efficient causes" flowing from the past into the present, to "final causes" originating in the purposes and plans for the future and guiding the behavior of the present. While the earlier theories were

quantity theories of value and economy, the later are expectancy theories.

These changes in concepts of quantity and time have accompanied changes in the concept of the energy itself which is the "substance" of value and the "cause" of economy. Early theories attempted to get away from the human will, since that was conceived to be internal, capricious, not subject to law, and therefore economics should be reduced to one of the nature sciences, analogous to chemistry, physics, or physiology. It should be a theory of commodities or mechanisms, not a theory of the will. But a larger knowledge of the human will, derived from the human-nature sciences of psychology, ethics, law and politics, begins to find the will, not in an unknowable caprice, but merely in human behavior, and this behavior begins to be formulated into natural laws of its own.

These many sciences of human nature furnish increasingly a foundation for economic theory, which is concerned with both physical nature and human nature. In one direction economy is a relation of man to nature, in another it is a relation of man to man. The first is Engineering Economy; the second is Business Economy and Political Economy. The first has given us theories of Production, Exchange and Consumption of Wealth, while Business Economy and Political Economy give us a variety of theories specialized in different branches of learning. Theories of Psychology deal with the relations both of man to nature and man to man—his feelings, intellect and will, his persuasions and coercions, his commands and obedience. These are inseparable from Morals, or Ethics, which deals with the good or bad, virtuous or vicious, right or wrong, uses that man makes either of nature or of other persons. This leads to Jurisprudence which concerns itself with both the rights, duties and liberties of Property and the powers and responsibilities of Sovereignty, which, again, are relations of man to man. And, finally, Politics deals with the mass movements and mass psychologies which define, enact and enforce private rights and official responsibilities according to notions pertaining to ethics, politics and economics.

Thus economic theory runs into other theories of man and nature, or else assumes certain common-sense notions regarding them. Early economists, whose outstanding theorists were Quesnay, Smith, Ricardo, Karl Marx and Proudhon, started with man's relation to nature, or engineering economy, in the form of commodities which are produced, exchanged and consumed. But these commodities involved certain notions, express or implied, of human nature, of use-value, utility, scarcity, exchange-value, labor, saving, expectation, private property, liberty, government and economy, which split these physical or technological economists into the several schools of Physiocrats, Classical Economists, Socialists and Anarchists.

They were followed or accompanied by a school of Hedonists, or Hedonic Economists, whose outstanding names are Bentham, Senior, Gossen, Jevons, Menger, Walras, Böhm-Bawerk, Clark, and these concerned themselves with the subjective side of economic theory. Instead of a commodity their starting point was a feeling of pleasure or pain, of satisfaction or sacrifice, but these feelings turned out to be commodities after all. And while the later hedonists, by the device of diminishing and marginal utility, were able to interpret the concept of value as a function of economy, yet their individualistic point of approach required certain notions, express or implied, of ethics, law, private property, liberty, society, government, which the hedonists either took for granted without investigation, or avoided as being "non-economic" or "anti-economic," or erected into an entity such as "social value" or "fund of value."

These two classes of theories we designate mechanistic theories of value and cost, since they look to the physical sciences for their models of economic theory, and they work out their solutions on what may be designated the Principle of Mechanism. Finally, another class of theories, which we designate Volitional Theories, whose initial thinkers are Hume, Malthus, Carey, Bastiat, Cassel, Anderson, but especially the Supreme Court of the United States, start, not with a commodity or with a feeling, but with the purposes of the future, revealing themselves in rules of conduct governing transactions which give rise to rights, duties, liberties, private property, governments and associations. These are the reciprocal promises and threats, express or implied, of man to man which determine the limits of human behavior in its social and economic transactions. Instead of a commodity or a feeling, their unit of observation becomes a Transaction between two or more persons looking towards the future. Theirs becomes a theory of the human will-in-action, and of value and economy as a relation, partly of man to nature but mainly of man to man; partly of quantities and partly of expectancies depending on future quantities.

Meanwhile, ethical, philosophical and psychological, as well as economic theories, have been approaching a volitional theory. Psychology is becoming "behavioristic," philosophy and ethics "realistic" or "pragmatic," and economics has become historical, experimental and idealistic in that it deals with past, present and hoped-for or dreaded transactions as well as commodities and feelings. In fact, transactions have become the meeting place of economics, physics, psychology, ethics, jurisprudence and politics. A single transaction is a unit of observation which involves explicitly all of them, for it is several human wills, choosing alternatives, overcoming resistance, proportioning natural and human resources, led on by promises or warnings of utility, sympathy, duty or their opposites, enlarged, restrained or exposed by officials of government or of business concerns or labor unions, who interpret and enforce the citizen's rights, duties and liberties, such that individual behavior is fitted or misfitted to the collective behavior of nations, politics, business, labor, the family and other collective movements, in a world of limited resources and mechanical forces.

Thus economic theory began with a Commodity as its ultimate scientific unit, then shifted to a Feeling, in order to explain a Transaction which is its practical problem.

Underlying all of these concepts of commodities, feelings and transactions have been certain principles of explanation, which the theorists either avowedly assumed or took for granted out of the prevailing habits of mind or ways of thinking of the time when they wrote. These may be distinguished as the Principle of Mechanism, the Principle of Scarcity and the Principle of Working Rules of Going Concerns. The principle of mechanism, established by Sir Isaac Newton, became the principle of explanation not only for all physical sciences, but also for biology, physiology and the human sciences of psychology, ethics, law, economics and politics. Gradually, however, the principle of scarcity, always taken for granted but not always definitely incorporated, began to be pointed out along with the principle of mechanism, first by David Hume and Robert Malthus, then was generalized by Darwin for biology and by Gossen, Jevons and the hedonic economists for psychology and economics.

The principle of scarcity did not materially change the habit of mind that relied on principles of mechanism, but rather gave to the latter a more precise formulation in the theories of marginal utility.

This was because commodities and feelings were concepts related to the wants and efforts of individuals rather than groups or associations of individuals, and the theories could be worked out on Adam Smith's mechanical principles of individualism, selfishness, division of labor, exchange of commodities, equality, fluidity, liberty and that divine providence which led individuals to benefit each other without intending to do so.

But later theories have had to account for the incoming of corporations, trade unions, voluntary associations of all kinds, said to number 25,000 in America in the field of business alone, as well as the interference of government through taxes, the police power, and the legal tender power. Consequently later theories have concerned themselves with what may broadly be named the Working Rules of Going Concerns, taking many forms and names, such as the common law, statute law, shop rules, business ethics, business methods, norms of conduct, and so on, which these governing or regulating groups of associated individuals have laid down for the guidance of transactions.

Consequently, it is not only principles of mechanism and scarcity conceived as working themselves out automatically and beneficently, through commodities, feelings and individual selfishness, but also principles of the collective control of transactions through associations and governments, placing limits on selfishness, that are more recently included in economic theory. For a working rule lays down four verbs for the guidance and restraint of individuals in their transactions. It tells what the individuals *must* or *must not* do (compulsion or duty), what they *may* do without interference from other individuals (permission or liberty), what they *can* do with the aid of the collective power (capacity or right), and what they *cannot* expect the collective power to do in their behalf (incapacity or exposure). In short, the working rules of associations and governments, when looked at from the private standpoint of the individual, are the source of his rights, duties and liberties, as well as his exposures to the protected liberties of other individuals.

These changes from mechanism to scarcity and thence to working rules as the underlying principles of economics have had a profound effect upon the concept of property, changing that concept from a principle of exclusive holding of physical objects for the owner's private use, into a principle of control of limited resources needed by others

for their use and thus into a concept of intangible and incorporeal property arising solely out of rules of law controlling transactions. The change was gradually accomplished in American jurisprudence between the years 1872 and 1897, and consisted in changing the definitions, by the Supreme Court, of the terms "property," "liberty" and "due process of law," as found in the Fourteenth Amendment to the Constitution.

Thus both legal theory and economic theory, in modern times, have based their explanations first on Newton's principle of mechanism, then on Malthus' principle of scarcity, then on juristic principles of common rules that both limit and enlarge the field for individual wills in a world of mechanical forces and scarcity of resources. Since transactions are the economic units, and working rules are the principles on which the Supreme Court of the United States has been working over its theories of property, sovereignty and value, and since that court occupies the unique position of the first authoritative faculty of political economy in the world's history, we shall begin with the court's theory of property, liberty and value. For it is mainly upon that theory that modern business is conducted and that American legislatures, executives and inferior courts are held in conformity to the Constitution of the United States, which, as latterly interpreted by the Supreme Court, prohibits the taking of property, liberty *or value* without due process of law or equal protection of the laws.[1]

While the economists start with a commodity or an individual's feelings towards it, the court starts with a transaction. Its ultimate unit of investigation is not an individual but two or more individuals —plaintiff and defendant—at two ends of one or more transactions. Commodities and feelings are, indeed, implied in all transactions, yet they are but the preliminaries, the accompaniments, or the effects of transactions. The transaction is two or more wills giving, taking, persuading, coercing, defrauding, commanding, obeying, competing, governing, in a world of scarcity, mechanism and rules of conduct. The court deals with the will-in-action. Like the modern

[1] Fifth Amendment (1791) applicable to the Federal Government —No person shall be "deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation" Fourteenth Amendment (1868) applicable to State Governments.—"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 the laws."

physicist or chemist, its ultimate unit is not an atom but an electron, always in motion—not an individual but two or more individuals in action. It never catches them except in motion. Their motion is a transaction.

A transaction occurs at a point of time. But transactions flow one into another over a period of time, and this flow is a process. The courts have fully developed the notion of this process in the concept of a "going concern," which they have taken over from the customs of business, and which is none other than a technological process of production and consumption of physical things and a business process of buying and selling, borrowing and lending, commanding and obeying, according to shop rules or working rules or laws of the land. The physical process may be named a "going plant," the business process a "going business,'' and the two constitute a "going concern" made up of action and reaction with nature's forces and transactions between human beings according to accepted rules.

Thus economic theory has passed from commodities to feelings, and finally to a process, and from principles of mechanism to principles of scarcity, and then of working rules that apportion the conduct of individuals. Value and economy become verbs instead of nouns. Value becomes *valuing;* economy becomes *economizing.* Economizing becomes the operation of rules of conduct in the nation or the business concern. A transaction is a unit picked out of the process for minute examination. Value and economy become millions of people valuing and economizing through billions of transactions in conformity to numberless working rules over a stretch of time that has no beginning and no ending. The mathematical concepts of deductive reasoning become statistical concepts of quantity and time, of correlations, probabilities, lags and forecasts, respecting billions of valuations in billions of transactions, moving forward on that energy which we call the will, within limits set by the accepted rules of conduct.

This process has three attributes which give us three meanings of value, each of which was separately emphasized by different schools of economists. Value has that subjective or volitional meaning of *anticipation* which may be named *psychological value* and which is the moving force. It has next that objective meaning of *commodities* produced, exchanged and consumed, which may be named *real value.* It has lastly that behavioristic meaning of *prices* which emerge in the transactions of buying, borrowing and hiring, in terms of standards of weights and measures prescribed by the working rules, which may be named *nominal value.*

The system of prices is like the system of words or the system of numbers. Words, prices and numbers are nominal and not real. They are signs and symbols needed for the operation of working rules. Yet each is the only effective means by which human beings can deal with each other securely and accurately with regard to the things that are real. But each may be insecure and inaccurate. Words are deceptive if they do not convey the meaning intended; numbers are liars if they do not indicate the actual quantities; prices are inflated or deflated if they do not reflect the course of real value. Every transaction has these three aspects of valuing. It is a meeting of wills, a transfer of commodities, a determination of their prices. A transaction is thus a compendium of psychological value, real value and nominal value. The courts, in their decisions, endeavor, by means of common rules, to make the nominal value or prices, represent, as nearly as practicable, the psychological value, or anticipation, and the real value, or quantity, of commodities and services. Their goal is a scheme of "reasonable value."

But the court does not cover the whole of the will-in-action. Individuals deal with the forces of nature as well as with other persons. This dealing with nature may be distinguished as action and reaction, so that the behavior of individuals consists in two kinds of acts, action and reaction with nature's forces and transactions with other persons. The one is production and consumption of wealth, the other is buying and selling, borrowing and lending, leasing, renting, "hiring and firing," exchanging, competing and governing.

Now, a transaction may be looked upon from several points of view, each of which is related to the others, though with widely different implications. It may be looked upon as the activity of one of the forces of nature, say, will-power, operating like other forces, in which case we have a physical or mechanical equivalent of the will-in-action. It may be looked upon as accompanied by anticipation and memories which are its psychological equivalent. These expectations may be looked upon as induced by and inducing others to act or avoid action, giving us an equivalent in social psychology. This social psychology of two or more individuals is influenced, in turn, by a mass psychology, or collective psychology, giving us ethical, juristic or political grounds for the working rules. Finally, both the individual and the mass psychology are an adaptation of the will to the principle of scarcity, and this point of view gives us an economic equivalent of the transactions and the working rules The words which express one order of phenomena are tinged with meanings projected from the others. We simply look upon the same process from different angles, always seeing the same outline, but with different shapes, colors and shades.

We thus have two concepts with which economic theory deals, the concepts of Value and Economy. These are inseparable from the subject-matter which various schools have picked out for investigation, namely, Commodities, Feelings and Transactions. And three ultimate principles have been relied upon, the principles of Mechanism, of Scarcity and of the Working Rules of associations, concerns and governments Hence, while we begin with the working rules that underlie the decisions of the Supreme Court of the United States, we shall find the economic and juristic dimensions derived from those rules shading off into mechanical, psychological, ethical and political dimensions.

CHAPTER II

PROPERTY, LIBERTY AND VALUE

I. Use-Value and Exchange-Value

In the year 1872 the Supreme Court of the United States was called upon, in the Slaughter House Cases,[1] to interpret the meanings of the words Property and Liberty as used in the Constitution of the United States. The Thirteenth Amendment to the Federal Constitution, adopted in 1865, prohibited slavery and involuntary servitude except as punishment for crime, and the Fourteenth Amendment, adopted three years later, prohibited a state from depriving any person of "life, liberty, or property" without "due process of law," and gave to the federal courts jurisdiction. The legislature of Louisiana had granted to a corporation a monopoly to maintain slaughtering places for stock in the city of New Orleans, and had regulated the charges to be made to other butchers who used these facilities. The latter, through their attorneys, contended that the statute deprived them of both their property and their liberty without due process of law. The Supreme Court divided. If the court should hold that property meant exchange-value, then the federal court would take jurisdiction under the Amendments. But if property meant only the use-value of physical things, then the court would not interfere with the legislature of Louisiana. Justice Miller, for the majority, declared that the act was not a deprivation of property or liberty as the terms were used in the Thirteenth and Fourteenth Amendments. The term "liberty," he said, should be construed with reference to the well-known purpose of those Amendments, namely, to establish freedom from slavery or personal servitude. Even conceding that the term "liberty," as popularly used, might mean "civil liberty" or the right to buy and sell, yet that aspect of liberty was not included in the meaning of the term as used in the Amendments. Prior to the adoption of these amendments the liberty of citizens, whether personal, civil or economic, was, for the

[1] 16 Wall. 36 (1872).

most part, in the keeping of the states. The Thirteenth and Fourteenth Amendments only transferred from the states to the federal government the protection of such fraction of the total concept of liberty as was comprehended in freedom from personal slavery. All other aspects of liberty were left, as they had been, to the keeping of the states.[1] And as to the meaning of the term "property," as used in the Fourteenth Amendment, he held that the term retained its common-law meaning of physical things held exclusively for one's own use. Property, according to the Fourteenth Amendment meant use-value, not exchange-value. "Under no construction of that provision that we have ever seen," he said, "can the restraint imposed by the state of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision." [2] The state of Louisiana had not deprived the butchers of the use-value of their property—it had deprived them of its exchange-value.

The minority of the court, however, contended that the police power (which they admitted, of course, might justly deprive a person of liberty or property for public purposes without compensation), could have been exercised in this case without resorting to a monopoly, by merely regulating all of the butchers alike in the interest of public health, but that the monopoly feature of the law deprived the other butchers of their liberty and property and turned it over to the monopolist. They then went on to define the property and liberty which was thus unjustly taken away, not by a proper exercise of the police power, but by a special privilege granted to the slaughter-house monopolist. A man's "calling," his "occupation," his "trade," his "labor," was property, as well as the physical things which he might own; and "liberty" included his "right of choice," his right to choose a calling, to choose an occupation or trade, to choose the direction in which he would exercise his labor. Justice Bradley, of the minority, for example, declared that the "right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. . . . Their right of choice is a portion of their liberty; their occupation is their property." (116, 122.) Justice Field, also of the minority, desired to change the meaning of "slavery" from physical coercion to economic coercion. He said, "A person

[1] 16 Wall. 69–73

[2] 16 Wall. 81

allowed to pursue only one trade or calling, and only in one locality of the country, would not be, in the strict sense of the term, in a condition of slavery, but probably none would deny that he would be in a condition of servitude. . . . The compulsion which would force him to labor even for his own benefit only in one direction, or in one place, would be almost as oppressive and nearly as great an invasion of his liberty as the compulsion which would force him to labor for the benefit or pleasure of another, and would equally constitute an element of servitude." (90.) Thus Justice Field described slavery as physical coercion and servitude as economic coercion. And Justice Swayne declared, "Property is everything which has exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property, and as such merits protection. The right to make it available is next in importance to the rights of life and liberty." (127.) Thus Justice Swayne defined property as the exchange-value of one's ability to work, and liberty as the right to realize that exchange-value on the labor market.

These minority definitions of liberty and property as exchange-value were unavailing in the Slaughter House Cases. The majority held to the older meaning of use-value. Twelve years later the municipal authorities of New Orleans, acting under a new constitution for the state, granted to another company privileges in conflict with those of the original monopolist, thus infringing upon their exclusive right. This time, therefore, the Slaughter House company was plaintiff against the municipality. The majority of the court now retained its original definition of property and liberty, but now held that not only the original act, as they had contended before, but also this annulling act were a proper exercise of the police power.[1] But Justices Bradley and Field, while concurring in the court's decision, placed it on the grounds of their dissenting opinions in the original Slaughter House Cases, and repeated their earlier views that the original act was itself an unlawful deprivation of liberty and property. In their earlier dissent the minority had not cited any cases where the term property had been used in the sense of a trade, occupation, calling, or one's labor, whose value to the owner is in its exchange-value, though they asserted that it *ought* to have that meaning. Thus, in the constitutional sense of the term, they

[1] Butchers' Union Co. v Crescent City Co, 111 U. S. 746, 751 (1884)