

long time, interest bearing obligations; (2) whether the basis, itself, of the forestry scheme, the legislative diversion of the land and proceeds thereof granted to the State for particular purposes to a different one, is legitimate; (3) whether using revenues raised by present taxation to promote the production or improvement of forests for the benefit of future generations, is a public purpose within the meaning of the Constitution; (4) whether interest bearing obligations of the State in excess of \$100,000 is valid in any event; (5) whether the creation of interest bearing indebtedness of a less amount is valid in view of existing indebtedness of the State to the trust funds or otherwise; and perhaps still others, might, upon due consideration, aided by eminent counsel, be deemed worthy of judicial interference and of being brought to the attention of the courts in this litigation in an appropriate way. The case is of great importance.

"It is therefore considered that the court should and will decline to decide upon the duty of the Secretary of State in respect to making the payments in question on the motion of quash, but will permit such motion to be withdrawn and a return to be made to the alternative writ within thirty days, setting forth by answer every difficulty which he may be advised should be thus set forth in order that all questions in relation to his duty may be so solved as to protect the state and its officers in respect to the use of moneys for forestry purposes which are in the custody of the State Treasurer.

"In case of issue being joined as herein suggested, the Court will aid in reaching a final conclusion speedily by placing the case on the present calendar and advancing it for argument."

The decree of the court was rendered February 12, 1915, and is as follows:

"By the Court: It is considered, ordered, decreed and adjudged that: "First, The demurrer to defendant's pleading be and is overruled.

"Second. The land contract mentioned in the petition is void for reasons indicated in the opinion, particularly because:

"a. It created a state debt and created such when state indebtedness exceeded the constitutional limit.

"b. It is an evidence of indebtedness within the state constitutional prohibition.

"c. The contract was not authorized by statute.

"d. By section 10, Art. VIII, at the date of the contract, it is fatally within the 'Works of internal improvement' feature of the forestry statutes (though they are in important features, as indicated in the opinion, not so tainted) and the addition, in form, to such section in November, 1910, failed for reasons stated in the opinion.

"e. It is an inseparable part of the forestry legislation and particularly of the invalid features thereof stated in the opinion.

"Third. The forestry legislation, including section 1072-1, Chapter 367, Laws of 1897, Chapter 450, Laws of 1903, and Chapter 264, Laws of 1905, and such other acts as there may be, did not repeal or affect sections 250 and 251, Stats. 1898, for reasons cited in the opinion. Such sections are part of the written law of the state and govern the matters therein referred to.

"Fourth. All land derived by the state from the United States under the swamp land grants, the lands in lieu of swamp lands, set aside for educational purposes under Chapter 537, Laws of 1865, and confirmed by Chapter 151, Laws of 1869, and subsequent practice, and all other lands so derived or in lieu of swamp lands and required to be set apart under the terms of said sections 250 and 251, by section 2, Art. X of the constitution and the legislative action referred to became, and so far as not dis-

posed of are, school fund lands, as regards the manner of handling the same, subject to the constitutional duty to conserve the same for the purpose of producing money for the school fund, as indicated in the opinion; but under the control of the legislature in respect to the manner of dealing therewith for such purpose.

"Fifth. The sections of the statutes composing Chap. 740, Laws of 1913, and those composing Chapter 491, Laws of 1907, are unconstitutional for the reasons stated in the opinion.

"Sixth. The provisions of the forestry legislation, other than the features mentioned, are valid within limitations, stated in the opinion.

"Seventh. The state has an equitable lien on the lands included in the illegal contract for the money paid thereon, and such money, equitable, is declared to have been trust money, whereby such lien inures to the benefit of the trust fund property.

"Eighth. For the benefit of the trust funds, the balance due on the contract shall be paid out of trust fund money when practicable, and to provide therefor, all moneys to the credit of the forestry fund derived from sales of land, or from appropriations to buy lands, or in the tax title fund referable to sections 1494-131 to 135 inclusive, Stats. 1913, are declared to equitably belong to the drainage and constitutional trust funds. Because of the diversion of such funds to forestry purposes and to the general fund, and the resulting confusion, the whole is declared to have the character of the more important funds which have wrongfully lost their identity, and such equitable status shall subsist so far as necessary to fully remedy the diversion and confusion.

"Ninth. The newly acquired lands under the forestry law, except those donated to the state for forestry purposes, have the cast of the constitutional trust fund lands and will be administered accordingly until, upon a full accounting it shall be found what part, if any, will remain after fully restoring the integrity of the trust fund lands and trust funds.

"Tenth. The facts being admitted, the alternative writ of mandamus is dismissed, but the cause retained for the purpose of final disposition upon the coming in of the report of the referees hereinafter appointed.

"Eleventh. There shall be an accounting which is hereby ordered of all dealings with the trust fund lands of the date of Ch. 367, Laws of 1897, and so long prior thereto as practicable, not earlier than the decision under Chapter 537, Laws of 1865,—and of lands acquired under the forestry legislation since 1897, except those donated to the state for forestry purposes or acquired by proceeds of the latter, and an accounting of all proceeds of such trust lands and income thereof and income which such proceeds would have earned had the same been devoted to the trust to which they belonged, such accounting to include all moneys paid into the forestry fund or general fund, derived from trust fund land or lands purchased therewith and income from such proceeds, and a partition shall be made of the entire property so found equitable and legally to belong to the constitutional trusts, including any indebtedness from the general fund; giving due credit for all proper disbursements chargeable to such trust funds,—so that each of the constitutional trusts will have their equitable and legal portion of the trust fund property with identity established as to lands and other assets, as near as may be, after the manner of the decision under Chapter 537, Laws of 1865. Such accounting shall include all matters not specifically mentioned so far as necessary to cover the field discussed in the opinion and carry out the intent thereof guided by such opinion; and the referee shall report the result of the accounting to the court with all convenient speed.

"For the purposes of the accounting the cause is referred to the commissioners of public land and Judge Samuel D. Hastings as special referee.

"The holders of land contracts like the particular one shall be bound by the decision herein subject to the right of any vendor or assignee of such vendor to show cause why to the contrary within twenty days after service of a copy of this order on such vendor or assignee and notice to show such cause within such time or be so bound, and such notice in writ-

ing shall be given, so far as practicable, within twenty days after the entry hereof and proof be filed as part of the proceeds of this case.

"Administrative orders will be accorded, if necessary, for further guidance in the course of the accounting, to the end that this determination may be fully carried out according to the intent thereof.

"Upon the coming in and confirmation of the report of the referees, judgment shall be rendered in respect to the matters covered thereby in accordance with such confirmation."

In a concurring opinion, Chief Justice Winslow does not share the doubt in regard to the right of the State to raise taxes in acquiring and handling land as a forest reserve. It is as follows:

"My difficulty with the opinion" (of the court) "stated in a general way, is this: It so limits and circumscribes the powers of the state with regard to the afforestation and reforestation that it leaves little more than a shell behind. At least this is the way the opinion impresses me and the way I think it will be generally understood.

"There are three general propositions which I think should be stated in this case clearly and fully, without hedging them about with limitations, qualifications, and provisos which render them practically useless, and those propositions are as follows:

"First, the acquisition, preservation, and scientific care of forests and forest areas by the State, as well as the sale of timber therefrom for gain in accordance with the well understood canons of forest culture, is pre-eminently a public purpose. It would be a mere affectation of learning to dwell upon the value to a state of great forest areas. That has been established long since and is not open to question. The lamentable results which have followed the cutting of forests over large areas, the serious effects of such cutting upon climate, rainfall, preservation of the soil from erosion, regularity of river flow, and other highly important things which go to make the welfare of the state, are matters of history. They need not be descanted upon.

"Second, before a public purpose of the first rank in importance, there can be no question of the power of the state to levy taxes for the accomplishment of the purpose. The power of taxation exists for every public purpose unless some constitutional prohibition, either federal or state, has taken it away. I find no such prohibition. I confess my inability to understand the reasoning which finds it in that clause of the Constitution which commands the legislature to levy an annual tax to defray the estimated expenses of the state. The power of taxation is one of the necessary attributes of sovereignty. To say that, because the Constitution makers thought best to make a specific provision that taxes should be levied for certain purposes, they intended thereby to interdict taxation for all other purposes, is to my mind unthinkable. Besides, if afforestation and reforestation be public purposes, then the moneys spent in carrying them on are necessarily and properly expenses of the state and come within the constitutional command. The expenses of a state include the moneys which it spends in carrying out the public purposes which the legislative judgment directs to be carried out.

"Third, afforestation and reforestation of large areas are not 'works of internal improvement' within the meaning of the Constitution. In stating the proposition, I accept the definition given in the case of the *State vs. Froehlich*, 115 Wis. 32; 91 N. W. 115; 58 L. R. A. 757; 95 Am. St. Rep. 894. It was there said that the term includes 'those things which ordinarily might, in human experience, be expected to be undertaken for profit or benefit to the property interests of private promoters, as distinguished from those other things which primarily, and preponderantly merely facilitate the essential functions of government'. In the same opinion it was said, in substance, that this classification does not exclude the possibility that some of the dominant characteristics of one class