U.S. Supreme Court
Fitzsommons v. Ogden, 11 U.S. 7 Cranch 2 2 (1812)

Syllabus

He who has equal equity may acquire the legal estate, if he can, so as to protect his equity. Between merely equitable claimants, each having equal equity, he who has the precedence in time has the advantage in right.

This was an appeal from the decree of the Circuit Court for the District of New York, sitting in chancery, entered by consent pro forma to bring the case before this Court.

The material facts as stated by WASHINGTON, JUSTICE, in delivering the opinion of the Court were as follows:

For the purpose of securing certain of his creditors, Robert Morris, on 14 February, 1798, conveyed to the appellants, as trustees for those creditors, a certain tract of land lying in Ontario County in the State of New York, containing 500,000 acres, described by certain bounds. Previous to this, he had made conveyances to sundry persons of considerable portions of this tract, and amongst others to the defendants, S. Ogden, J. B. Church and to G. Cottringer under whom the heirs of Sir William Pulteney claims, of which the appellants had full notice. He had also, by different conveyances, granted to the Holland Company more than three millions of acres of land purchased (as this tract of 500,000 acres had been) from the State of Massachusetts, all in the same county and adjoining the land in question.

On 8 June, 1797, a judgment, at the suit of Talbot and Allum against Robert Morris, was docketed in the supreme court of the State of New York, which, being prior in date to the conveyance made to the appellants, bound all the land which passed by it to the appellants. The bill states that Robert Morris, being confined in the jail at Philadelphia, in order to prevent any improper

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use from being made of the above judgment, and on condition that the title to the land conveyed to the trustees should in no wise be impaired by it, procured Gouverneur Morris to advance the money for such judgment from motives of friendship; that the said judgment was assigned to Adam Hoops, the mutual friend and agent of the parties, which was done to prevent it from being used injuriously against the trustees and the creditors for whom they acted and also to preserve to Robert Morris the right of redemption in 1,500,000 acres which he had conveyed to the Holland Company, in nature of a mortgage as he supposed. That A. Hoops afterwards assigned the said judgment to Gouverneur Morris, and on 16 September, 1799, Robert Morris confirmed the said trust deed (of which it is worthy of remark no mention had been made in the previous parts of the bill), and further agreed that any other land he might have in that county, which had not been previously conveyed, should be applied to pay that judgment in the first place, and the said last mentioned lands were to be sold upon an execution and to be purchased by A. Hoops under Talbot and Allum's judgment for the trustees, to which G. Morris assented, the trustees agreeing to mortgage the land to be purchased, to repay G. Morris the sum advanced for the purchase of the judgment.

It appears by the evidence that previous to the promise thus charged in the bill to have been made by G. Morris to R. Morris, the judgment of Talbot and Allum had been conditionally purchased by R. Morris, Jr., one of the appellants, avowedly for his individual use, from Cotes, Titford & Brooks who then held it by assignment. That when this purpose was effected, it was agreed that the assignment should be made to A. Hoops, though in reality for the use of R. Morris, Jr., and should remain in the hands of a third person as an escrow to take effect on the payment of the note given by the said R. Morris, Jr., for the purchase of the judgment, and that the same should belong to Thomas Cooper, who endorsed the said note, in case he should be compelled to discharge the same.

R. Morris, about the time when this note would become due, found himself unable to take it up, and on

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this account, G. Morris had been solicited by R. Morris, and consented to pay the money and to retain the judgment to secure the advance. G. Morris in his answer, expressly denies that any communication was made to him by R. Morris of his motives for asking his assistance in procuring an assignment of the judgment

or that the had ever heard or knew of the claim of the trustees to any part of this 500,000 acre tract, or that the same would, in any manner, be affected by the judgment of Talbot and Allum, until some time after he had paid for the judgment, when it was accidentally communicated to him by A. Hoops, who held the assignment of the same for A. Morris, Jr., as before mentioned. Upon receiving this information, G. Morris, with the assistance of his counsel, Thomas Cooper, projected a plan for protecting the interests of the trustees from being sacrificed by a sale under the execution which might issue on that judgment. Articles of agreement were accordingly drawn and executed by G. Morris and A. Hoops on 29 August, 1799, by which it was stipulated that the whole of the lands in the County of Ontario, purchased by R. Morris from the State of Massachusetts, amounting to upwards of four millions of acres, should be sold under the judgment, and should be purchased by A. Hoops, who should convey a certain part thereof to G. Morris and should also mortgage that part of the said land which then belonged to the trustees to the said G. Morris for securing the advance made by him on the purchase of the said judgment. Although this large tract of country was, by this arrangement, to be sold under the above judgment, yet that judgment being posterior to the conveyances made to the Holland Company, as well as to the other defendants below, they were consequently not bound by the judgment, nor could the title of the grantees have been affected by a sale under it. The object of this agreement, however, in relation to those lands was to secure to G. Morris a supposed but totally unfounded claim which R. Morris had asserted to an equity of redemption in one of the large tracts sold by him to the Holland Company, and also an imaginary quantity of surplus land presumed by R. Morris to be somewhere within the bounds of this great tract of country which was to be sold, which surplus, as it afterwards turned out, had no

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real existence. As to the land belonging to the trustees, which it is admitted was bound by this judgment, G. Morris was contented to receive a mortgage of that to secure his advance for the judgment.

A draft of an agreement was also made by Thomas Cooper, by the directions of G. Morris and delivered to A. Hoops to be carried to Philadelphia, and to be proposed to R. Morris and the trustees, but the terms of that agreement do not appear in any part of this record, although it is fairly to be presumed that it did not vary materially from the above agreement between G. Morris and A. Hoops. This draft was not altogether approved by the parties in Philadelphia, and another agreement was accordingly drawn and executed by R. Morris, the trustees and A. Hoops, bearing date 16 September, 1799, which did not materially differ from the agreement of 29 August preceding except that, by the latter, the surplus land, if there should be any, was to be mortgaged to the trustees as a security for reimbursing the whole or such part of the aforesaid judgment as the trustees might be obliged to pay for the discharge of the mortgage to be given by A. Hoops for securing the advance made by G. Morris for the purchase of the judgment.

This agreement was afterwards shown to G. Morris, who expressed some displeasure at its departure from the plan which he had himself arranged; but the admits in his answer that he never communicated his disapprobation either to R. Morris or to the trustees.

It appears in evidence that there was a stay of execution on the judgment of Talbot and Allum for three years from the time it was entered, which of course would not have expired before 8 June, 1800. This stay was released by R. Morris at some period subsequent to the interview which took place at the jail between R. Morris and G. Morris, but the particular time when it was executed does not appear from the record. It is not, however, improbable that it was not long subsequent to the second of May, 1799, since it appears that on that day, R. Morris, Jr., in a letter addressed to T. Cooper, directing him to assign the said

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judgment to G. Morris, requested him also to forward to him the form of a release to be executed by his father.

In pursuance of the arrangement which had been agreed upon between these parties as above mentioned, all the lands which R. Morris had purchased from the State of Massachusetts in the County of Ontario were advertised to be sold under the said judgment on 6 February, 1800. Hoops, as it had been agreed, attended on the day of sale and bid for the land, but being overbid and not having the means to pay for the same in case it should be struck off to him, he prevailed upon the sheriff to adjourn the sale to 13 May following upon his engaging to pay the sheriff his poundage, which undertaking G. Morris, soon afterwards, on application, furnished him with the means of discharging.

On 22 April, 1800, G. Morris, without having communicated to R. Morris or to the trustees the slightest intimation that he had come to such a determination, assigned over the said judgment to the Holland Company for a full consideration paid therefor, and without notice, as they, the Holland Company, expressly allege in their answer, of the claim of the trustees or of the equity stated in their bill.

The same day, articles of agreement were entered into between Thomas L. Ogden . . . the Holland Company . . . and G. Morris by which it was stipulated that the sale of all the lands by the execution on the aforesaid judgment, should take place, and should be purchased by the said Ogden in trust to convey to the Holland Company the several tracts of land which had been

granted to them by R. Morris and to the several persons to whom conveyances had been made within the limits of the 500,000 acre tract prior to the deed to the trustees, the tracts to which they were respectively entitled, or such parts thereof as three persons, Hamilton, Cooper and Ogden, should direct, and as to the residue of the said 500,000 in trust to convey the same to such persons in such parcels and upon such terms as the said Hamilton and others should direct. In execution of this agreement, Ogden attended the sale on 13 May,

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and purchased the whole of the lands taken in execution under the said judgment for the sum of $5,200, and received a sheriff's deed for the same. Hamilton, Cooper and Ogden, in virtue of the powers vested in them, directed conveyances to be made by Ogden to the Holland Company according to the bounds expressed in the several conveyances to them by R. Morris, except so far as such bounds would interfere with Watson, Cragie, and Greenleaf. In order to compensate the defendants, Samuel Ogden, Sir William Pulteney, and John B. Church for the land taken on the westward of their tracts, by fixing the true meridian line of the Holland Company to the east, the eastern line of those persons is made to run in upon the lands claimed by the trustees so far as to give the former the full quantity of land mentioned in their respective conveyances. The direction, or award, as it is called, then proceeds to allot to the trustees 58,570 acres (not half the quantity they claimed) upon certain conditions, one of which is to pay to the said trustee, for the use of the Holland Company, $5,623 with interest from 22 January, 1800. This sum together with other charged upon such of the grantees as were benefited by this arrangement, were intended to reimburse the Holland Company the sums they had advanced, not only for the purchase of Talbot and Allum's judgment, but of another which, being posterior to the conveyance to the trustees, created, of course, no lien upon any part of the 500,000 acre tract.

The prayer of the bill is for a conveyance by Thomas L. Ogden of all the land to which the trustees are entitled according to its real boundaries upon the trustees' paying such proportion of the money due by Talbot and Allum's judgments as is fairly chargeable on their land, and for general relief.

http://supreme.justia.com/us/19/448/case.html

U.S. Supreme Court
Gibbons v. Ogden, 19 U.S. 6 Wheat. 448 448 (1821)

APPEAL FROM THE COURT FOR THE TRIAL OF IMPEACHMENTS AND THE CORRECTION OF ERRORS OF THE STATE OF NEW YORK

Syllabus

A decree of the highest court of equity of a state affirming the decretal order of an inferior court of equity of the same state refusing to dissolve an injunction granted on the filing of the bill is not a final decree within the twenty-fifth section of the Judiciary Act of 1789, ch. 20, from which an appeal lies to this Court.

This was a bill filed by the plaintiff below (Ogden) against the defendant below (Gibbons) in the Court of Chancery of the State of New York for an injunction to restrain the defendant from navigating certain steamboats on the waters of the State of New York lying between Elizabethtown, in the State of New Jersey, and the City of New York,

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the exclusive navigation of which with steamboats had been granted by the Legislature of New York to Livingston and Fulton, under whom the plaintiff below claimed as assignee. On this bill an injunction was granted by the chancellor, and on the coming in of the answer, which set up a right to navigate with steamboats between the City of New York and Elizabethtown under a license to carry on the coasting trade, granted under the laws of the United States, the defendant below moved to dissolve the injunction, which motion was denied by the chancellor. The defendant below appealed to the Court for the Trial of Impeachments and the Correction of Errors; the decretal order, refusing to dissolve the injunction, was affirmed by that court, and from this last order the defendant below appealed to this Court upon the ground that the case involved a question arising under the Constitution, laws, and treaties of the United States.

The cause was opened for the appellant, by Mr. D. B. Ogden, but on inspecting the record, it not appearing that any final decree in the cause, within the terms of the 25th section of the Judiciary Act of 1789, c. 20, had been pronounced in the state court, the appeal was dismissed for want of jurisdiction.

DECREE. This cause came on to be heard on the transcript of the record of the Court for the Trial of Impeachments and the Correction of Errors of

the State of New York. On inspection whereof it is ORDERED that the appeal in this cause be and the same is hereby dismissed, it not appearing from the record that there was a final decree in said court for the Correction of Errors, &c., from which an appeal was taken.

U.S. Supreme Court
Gibbons v. Ogden, 22 U.S. 9 Wheat. 1 1 (1824)

APPEAL FROM THE COURT FOR THE TRIAL OF IMPEACHMENTS AND CORRECTION OF ERRORS OF THE STATE OF NEW YORK

Syllabus

The laws of New York granting to Robert R. Livingston and Robert Fulton the exclusive right of navigating the waters of that State with steamboats are in collision with the acts of Congress regulating the coasting trade, which, being made in pursuance of the Constitution, are supreme, and the State laws must yield to that supremacy, even though enacted in pursuance of powers acknowledged to remain in the States.

The power of regulating commerce extends to the regulation of navigation.

The power to regulate commerce extends to every species of commercial intercourse between the United States and foreign nations, and among the several States. It does not stop at the external boundary of a State.

But it does not extend to a commerce which is completely internal.

The power to regulate commerce is general, and has no limitations but such as are prescribed in the Constitution itself.

The power to regulate commerce, so far as it extends, is exclusively bested in Congress, and no part of it can be exercised by a State.

A license under the acts of Congress for regulating the coasting trade gives a permission to carry on that trade.

State inspection laws, health laws, and laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c. are not within the power granted to Congress.

The license is not merely intended to confer the national character.

The power of regulating commerce extends to navigation carried on by vessels exclusively employed in transporting passengers.

The power of regulating commerce extends to vessels propelled by steam or fire as well as to those navigated by the instrumentality of wind and sails.

Aaron Ogden filed his bill in the Court of Chancery of that State, against Thomas Gibbons, setting forth the several acts of the Legislature thereof, enacted for the purpose of securing to Robert R. Livingston and Robert Fulton the

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exclusive navigation of all the waters within the jurisdiction of that State, with boats moved by fire or steam, for a term of years which has not yet expired, and authorizing the Chancellor to award an injunction restraining any person whatever from navigating those waters with boats of that description. The bill stated an assignment from Livingston and Fulton to one John R. Livingston, and from him to the complainant, Ogden, of the right to navigate the waters between Elizabethtown, and other places in New Jersey, and the City of New York, and that Gibbons, the defendant below, was in possession of two steamboats, called the Stoudinger and the Bellona, which were actually employed in running between New York and Elizabethtown, in violation of the exclusive privilege conferred on the complainant, and praying an injunction to restrain the said Gibbons from using the said boats, or any other propelled by fire or steam, in navigating the waters within the territory of New York. The injunction having been awarded, the answer of Gibbons was filed, in which he stated that the boats employed by him were duly enrolled and licensed to be employed in carrying on the coasting trade under the Act of Congress, passed the 18th of February, 1793, c. 3. entitled, "An act for enrolling and licensing ships and vessels to be employed in the coasting trade and fisheries, and for regulating the same." And the defendant insisted on his right, in virtue of such licenses, to navigate the waters between Elizabethtown and the City of New York, the said acts of the Legislature of the

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State of New York to the contrary notwithstanding. At the hearing, the Chancellor perpetuated the injunction, being of the opinion that the said acts were not repugnant to the Constitution and laws of the United States, and were valid. This decree was affirmed in the Court for the Trial of Impeachments and Correction of Errors, which is the highest Court of law and equity in the State, before which the cause could be carried, and it was thereupon brought to this Court by appeal.

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Mr. Chief Justice MARSHALL delivered the opinion of the Court, and, after stating the case, proceeded as follows:

The appellant contends that this decree is erroneous because the laws which purport to give the exclusive privilege it sustains are repugnant to the Constitution and laws of the United States.

They are said to be repugnant:

1st. To that clause in the Constitution which authorizes Congress to regulate commerce.

2d. To that which authorizes Congress to promote the progress of science and useful arts.

The State of New York maintains the Constitutionality of these laws, and their Legislature, their Council of Revision, and their Judges, have repeatedly concurred in this opinion. It is supported by great names -- by names which have all the titles to consideration that virtue, intelligence, and office can bestow. No tribunal can approach the decision of this question without feeling a just and real respect for that opinion which is sustained by such authority, but it is the province of this Court, while it respects, not to bow to it implicitly, and the Judges must exercise, in the examination of the subject, that understanding which Providence has bestowed upon them, with that independence which the people of the United

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States expect from this department of the government.

As preliminary to the very able discussions of the Constitution which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these States anterior to its formation. It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their league into a government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns and to recommend measures of general utility, into a Legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants expressly the means for carrying all others into execution, Congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this

limitation on the means which may be used is not extended to the powers which are conferred, nor is there one sentence in

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the Constitution which has been pointed out by the gentlemen of the bar or which we have been able to discern that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean by a "strict construction?" If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support or some theory not to be found in the Constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction which would cripple the government and render it unequal to the object for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded. As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule that the objects

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for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor if retained by himself, or which can enure solely to the benefit of the grantee, but is an investment of power for the general advantage, in the hands of agents selected for that purpose, which power can never be exercised by the people themselves, but must be placed in the hands of agents or lie dormant. We know of no rule for construing the extent of such powers other than is given by the language of the instrument which confers them, taken in connexion with the purposes for which they were conferred.

The words are, "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The subject to be regulated is commerce, and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial

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intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals in the actual employment of buying and selling or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense, and the attempt to restrict it comes too late.

If the opinion that "commerce," as the word is used in the Constitution, comprehends navigation

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also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself.

It is a rule of construction acknowledged by all that the exceptions from a power mark its extent, for it would be absurd, as well as useless, to except from a granted power that which was not granted -- that which the words of the grant could not

comprehend. If, then, there are in the Constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.

The 9th section of the 1st article declares that "no preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another." This clause cannot be understood as applicable to those laws only which are passed for the purposes of revenue, because it is expressly applied to commercial regulations, and the most obvious preference which can be given to one port over another in regulating commerce relates to navigation. But the subsequent part of the sentence is still more explicit. It is, "nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties, in another." These words have a direct reference to navigation.

The universally acknowledged power of the government to impose embargoes must also be considered as showing that all America is united

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in that construction which comprehends navigation in the word commerce. Gentlemen have said in argument that this is a branch of the war-making power, and that an embargo is an instrument of war, not a regulation of trade.

That it may be, and often is, used as an instrument of war cannot be denied. An embargo may be imposed for the purpose of facilitating the equipment or manning of a fleet, or for the purpose of concealing the progress of an expedition preparing to sail from a particular port. In these, and in similar cases, it is a military instrument, and partakes of the nature of war. But all embargoes are not of this description. They are sometimes resorted to without a view to war, and with a single view to commerce. In such case, an embargo is no more a war measure than a merchantman is a ship of war because both are vessels which navigate the ocean with sails and seamen.

When Congress imposed that embargo which, for a time, engaged the attention of every man in the United States, the avowed object of the law was the protection of commerce, and the avoiding of war. By its friends and its enemies, it was treated as a commercial, not as a war, measure. The persevering earnestness and zeal with which it was opposed in a part of our country which supposed its interests to be vitally affected by the act, cannot be forgotten. A want of acuteness in discovering objections to a measure to which they felt the most deep-rooted hostility will not be imputed to those who were arrayed in opposition

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to this. Yet they never suspected that navigation was no branch of trade, and was therefore not comprehended in the power to regulate commerce. They did, indeed, contest the constitutionality of the act, but, on a principle which admits the construction for which the appellant contends. They denied that the particular law in question was made in pursuance of the Constitution not because the power could not act directly on vessels, but because a perpetual embargo was the annihilation, and not the regulation, of commerce. In terms, they admitted the applicability of the words used in the Constitution to vessels, and that in a case which produced a degree and an extent of excitement calculated to draw forth every principle on which legitimate resistance could be sustained. No example could more strongly illustrate the universal understanding of the American people on this subject.

The word used in the Constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning, and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

To what commerce does this power extend? The Constitution informs us, to commerce "with foreign nations, and among the several States, and with the Indian tribes."

It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be

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carried on between this country and any other to which this power does not extend. It has been truly said that "commerce," as the word is used in the Constitution, is a unit every part of which is indicated by the term.

If this be the admitted meaning of the word in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied is to commerce "among the several States." The word "among" means intermingled with. A thing which is among others is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the

same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose, and the enumeration of the particular classes of commerce to which the power was to be extended would not have been made had the intention

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been to extend the power to every description. The enumeration presupposes something not enumerated, and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally, but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State.

This principle is, if possible, still more clear, when

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applied to commerce "among the several States." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other States lie between them. What is commerce "among" them, and how is it to be conducted? Can a trading expedition between two adjoining States, commence and terminate outside of each? And if the trading intercourse be between two States remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the States must, of necessity, be commerce with the States. In the regulation of trade with the Indian tribes, the action of the law, especially when the Constitution was made, was chiefly within a State. The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several States. The sense of the nation on this subject is unequivocally manifested by the provisions made in the laws for transporting goods by land between Baltimore and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore.

We are now arrived at the inquiry -- What is this power?

It is the power to regulate, that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the

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questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often they solely, in all representative governments.

The power of Congress, then, comprehends navigation, within the limits of every State in the Union, so far as that navigation may be in any manner connected with "commerce with foreign nations, or among the several States, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York and act upon the very waters to which the prohibition now under consideration applies.

But it has been urged with great earnestness that, although the power of Congress to regulate commerce with foreign nations and among the several States be coextensive with the subject itself, and have no other limits than are prescribed in the Constitution, yet the States may severally

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exercise the same power, within their respective jurisdictions. In support of this argument, it is said that they possessed it as an inseparable attribute of sovereignty, before the formation of the Constitution, and still retain it except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the tenth amendment; that an affirmative grant of power is not exclusive unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description.

The appellant, conceding these postulates except the last, contends that full power to regulate a particular subject implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it.

Both parties have appealed to the Constitution, to legislative acts, and judicial decisions, and have drawn arguments from all these sources to support and illustrate the propositions they respectively maintain.

The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the State, and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly

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exercised by the States are transferred to the government of the Union, yet the State governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to see it placed, for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division, and a power in one to take what is necessary for certain purposes is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, &c. to pay the debts and provide for the common defence and general welfare of the United States. This does not interfere with the power of the States to tax for the support of their own governments, nor is the exercise of that power by the States an exercise of any portion of the power that is granted to the United States. In imposing taxes for State purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress,

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and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.

In discussing the question whether this power is still in the States, in the case under consideration, we may dismiss from it the inquiry whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry because it has been exercised, and the regulations which Congress deemed it proper to make are now in full operation. The sole question is can a State regulate commerce with foreign nations and among the States while Congress is regulating it?

The counsel for the respondent answer this question in the affirmative, and rely very much on the restrictions in the 10th section as supporting their opinion. They say very truly that limitations of a power furnish a strong argument in favour of the existence of that power, and that the section which prohibits the States from laying duties on imports or exports proves that this power might have been exercised had it not been expressly forbidden, and consequently that any other commercial regulation, not expressly forbidden, to which the original power of the State was competent may still be made.

That this restriction shows the opinion of the Convention that a State might impose duties on exports and imports, if not expressly forbidden, will be conceded, but that it follows as a consequence

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from this concession that a State may regulate commerce with foreign nations and among the States cannot be admitted.

We must first determine whether the act of laying "duties or imposts on imports or exports" is considered in the Constitution as a branch of the taxing power, or of the power to regulate commerce. We think it very clear that it is considered as a branch of the taxing power. It is so treated in the first clause of the 8th section: "Congress shall have power to lay and collect taxes, duties, imposts, and excises;" and, before commerce is mentioned, the rule by which the exercise of this power must be

governed is declared. It is that all duties, imposts, and excises shall be uniform. In a separate clause of the enumeration, the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts and as being a new power, not before conferred. The Constitution, then, considers these powers as substantive, and distinct from each other, and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy taxes, and that seems to be its natural place. But the power to levy taxes could never be considered as abridging the right of the States on that subject, and they might, consequently, have exercised it by levying duties on imports or exports, had the Constitution contained no prohibition on this subject. This prohibition, then, is an exception from the acknowledged power of the States

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to levy taxes, not from the questionable power to regulate commerce.

"A duty of tonnage" is as much a tax as a duty on imports or exports, and the reason which induced the prohibition of those taxes extends to this also. This tax may be imposed by a State, with the consent of Congress, and it may be admitted that Congress cannot give a right to a State in virtue of its own powers. But a duty of tonnage being part of the power of imposing taxes, its prohibition may certainly be made to depend on Congress, without affording any implication respecting a power to regulate commerce. It is true that duties may often be, and in fact often are, imposed on tonnage with a view to the regulation of commerce, but they may be also imposed with a view to revenue, and it was therefore a prudent precaution to prohibit the States from exercising this power. The idea that the same measure might, according to circumstances, be arranged with different classes of power was no novelty to the framers of our Constitution. Those illustrious statesmen and patriots had been, many of them, deeply engaged in the discussions which preceded the war of our revolution, and all of them were well read in those discussions. The right to regulate commerce, even by the imposition of duties, was not controverted, but the right to impose a duty for the purpose of revenue produced a war as important, perhaps, in its consequences to the human race as any the world has ever witnessed.

These restrictions, then, are on the taxing power,

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not on that to regulate commerce, and presuppose the existence of that which they restrain, not of that which they do not purport to restrain.

But the inspection laws are said to be regulations of commerce, and are certainly recognised in the Constitution as being passed in the exercise of a power remaining with the States.

That inspection laws may have a remote and considerable influence on commerce will not be denied, but that a power to regulate commerce is the source from which the right to pass them is derived cannot be admitted. The object of inspection laws is to improve the quality of articles produced by the labour of a country, to fit them for exportation, or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the General Government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass.

No direct general power over these objects is granted to Congress, and, consequently, they remain subject to State legislation. If the legislative power of the Union can reach them, it must be for national purposes, it must be where the

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power is expressly given for a special purpose or is clearly incidental to some power which is expressly given. It is obvious that the government of the Union, in the exercise of its express powers -- that, for example, of regulating commerce with foreign nations and among the States -- may use means that may also be employed by a State in the exercise of its acknowledged powers -- that, for example, of regulating commerce within the State. If Congress license vessels to sail from one port to another in the same State, the act is supposed to be necessarily incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a State or to act directly on its system of police. So, if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the State and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers, but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

In our complex system, presenting the rare and difficult scheme of one General Government whose

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action extends over the whole but which possesses only certain enumerated powers, and of numerous State governments which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers would often be of the same description, and might sometimes interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other.

The acts of Congress passed in 1796 and 1799, 2 U.S.L. 345, 3 U.S.L. 126, empowering and directing the officers of the General Government to conform to and assist in the execution of the quarantine and health laws of a State proceed, it is said, upon the idea that these laws are constitutional. It is undoubtedly true that they do proceed upon that idea, and the constitutionality of such laws has never, so far as we are informed, been denied. But they do not imply an acknowledgment that a State may rightfully regulate commerce with foreign nations or among the States, for they do not imply that such laws are an exercise of that power, or enacted with a view to it. On the contrary, they are treated as quarantine and health laws, are so denominated in the acts of Congress, and are considered as flowing from the acknowledged power of a State to provide for the health of its citizens. But as it was apparent that some of the provisions made for this purpose and in virtue of this power might

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interfere with and be affected by the laws of the United States made for the regulation of commerce, Congress, in that spirit of harmony and conciliation which ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the States bear to each other, has directed its officers to aid in the execution of these laws, and has, in some measure, adapted its own legislation to this object by making provisions in aid of those of the States. But, in making these provisions, the opinion is unequivocally manifested that Congress may control the State laws so far as it may be necessary to control them for the regulation of commerce. The act passed in 1803, 3 U.S.L. 529, prohibiting the importation of slaves into any State which shall itself prohibit their importation, implies, it is said, an admission that the States possessed the power to exclude or admit them, from which it is inferred that they possess the same power with respect to other articles.

If this inference were correct, if this power was exercised not under any particular clause in the Constitution, but in virtue of a general right over the subject of commerce, to exist as long as the Constitution itself, it might now be exercised. Any State might now import African slaves into its own territory. But it is obvious that the power of the States over this subject, previous to the year 1808, constitutes an exception to the power of

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Congress to regulate commerce, and the exception is expressed in such words, as to manifest clearly the intention to continue the preexisting right of the States to admit or exclude, for a limited period. The words are

"the migration or importation of such persons as any of the States, now existing, shall think proper to admit shall not be prohibited by the Congress prior to the year 1808."

The whole object of the exception is to preserve the power to those States which might be disposed to exercise it, and its language seems to the Court to convey this idea unequivocally. The possession of this particular power, then, during the time limited in the Constitution, cannot be admitted to prove the possession of any other similar power.

It has been said that the act of August 7, 1789, acknowledges a concurrent power in the States to regulate the conduct of pilots, and hence is inferred an admission of their concurrent right with Congress to regulate commerce with foreign nations and amongst the States. But this inference is not, we think, justified by the fact.

Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject. When the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every State. The act which has been mentioned adopts this system, and gives it the same validity as if its provisions had been specially made by Congress. But the act, it may be said, is prospective also, and the adoption of laws to be made

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in future presupposes the right in the maker to legislate on the subject.

The act unquestionably manifests an intention to leave this subject entirely to the States until Congress should think proper to interpose, but the very enactment of such a law indicates an opinion that it was necessary, that the existing system would not be applicable to the new state of things unless expressly applied to it by Congress. But this section is confined to pilots within the

"bays, inlets, rivers, harbours, and ports of the United States," which are, of course, in whole or in part, also within the limits of some particular state. The acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens may enable it to legislate on this subject to a considerable extent, and the adoption of its system by Congress, and the application of it to the whole subject of commerce, does not seem to the Court to imply a right in the States so to apply it of their own authority. But the adoption of the State system being temporary, being only "until further legislative provision shall be made by Congress," shows conclusively an opinion that Congress could control the whole subject, and might adopt the system of the States or provide one of its own.

A State, it is said, or even a private citizen, may construct light houses. But gentlemen must be aware that if this proves a power in a State to regulate commerce, it proves that the same power is in the citizen. States or individuals who own lands may, if not forbidden by law,

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erect on those lands what buildings they please, but this power is entirely distinct from that of regulating commerce, and may, we presume, be restrained if exercised so as to produce a public mischief.

These acts were cited at the bar for the purpose of showing an opinion in Congress that the States possess, concurrently with the Legislature of the Union, the power to regulate commerce with foreign nations and among the States. Upon reviewing them, we think they do not establish the proposition they were intended to prove. They show the opinion that the States retain powers enabling them to pass the laws to which allusion has been made, not that those laws proceed from the particular power which has been delegated to Congress.

It has been contended by the counsel for the appellant that, as the word "to regulate" implies in its nature full power over the thing to be regulated, it excludes necessarily the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole which is as much disturbed and deranged by changing what the regulating power designs to leave untouched as that on which it has operated.

There is great force in this argument, and the Court is not satisfied that it has been refuted.

Since, however, in exercising the power of regulating their own purely internal affairs, whether

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of trading or police, the States may sometimes enact laws the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the Constitution, the Court will enter upon the inquiry whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an act of Congress and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several States" or in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of Congress, and the decision sustaining the privilege they confer against a right given by a law of the Union must be erroneous.

This opinion has been frequently expressed in this Court, and is founded as well on the nature of the government as on the words of the Constitution. In argument, however, it has been contended that, if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject and each other like equal opposing powers.

But the framers of our Constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act

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inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties is to such acts of the State Legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to, the laws of Congress made in pursuance of the Constitution or some treaty made under the authority of the United States. In every such case, the act of Congress or the treaty is supreme, and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.

In pursuing this inquiry at the bar, it has been said that the Constitution does not confer the right of intercourse between State and State. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The Constitution found it an existing right, and gave to Congress the power to regulate it. In the exercise of this power, Congress has passed "an act for enrolling or licensing ships or

vessels to be employed in the coasting trade and fisheries, and for regulating the same." The counsel for the respondent contend that this act does not give the right to sail from port to port, but confines itself to regulating a preexisting right so far only as to confer certain privileges on enrolled and licensed vessels in its exercise.

It will at once occur that, when a Legislature

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attaches certain privileges and exemptions to the exercise of a right over which its control is absolute, the law must imply a power to exercise the right. The privileges are gone if the right itself be annihilated. It would be contrary to all reason, and to the course of human affairs, to say that a State is unable to strip a vessel of the particular privileges attendant on the exercise of a right, and yet may annul the right itself; that the State of New York cannot prevent an enrolled and licensed vessel, proceeding from Elizabethtown, in New Jersey, to New York, from enjoying, in her course, and on her entrance into port, all the privileges conferred by the act of Congress, but can shut her up in her own port, and prohibit altogether her entering the waters and ports of another State. To the Court, it seems very clear that the whole act on the subject of the coasting trade, according to those principles which govern the construction of statutes, implies unequivocally an authority to licensed vessels to carry on the coasting trade.

But we will proceed briefly to notice those sections which bear more directly on the subject.

The first section declares that vessels enrolled by virtue of a previous law, and certain other vessels enrolled as described in that act, and having a license in force, as is by the act required,

"and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade."

This section seems to the Court to contain a positive enactment that the the vessels it describes shall

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be entitled to the privileges of ships or vessels employed in the coasting trade. These privileges cannot be separated from the trade and cannot be enjoyed unless the trade may be prosecuted. The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached and in the exercise of which its whole value consists. To construe these words otherwise than as entitling the ships or vessels described to carry on the coasting trade would be, we think, to disregard the apparent intent of the act.

The fourth section directs the proper officer to grant to a vessel qualified to receive it, "a license for carrying on the coasting trade," and prescribes its form. After reciting the compliance of the applicant with the previous requisites of the law, the operative words of the instrument are,

"license is hereby granted for the said steamboat Bellona to be employed in carrying on the coasting trade for one year from the date hereof, and no longer."

These are not the words of the officer, they are the words of the legislature, and convey as explicitly the authority the act intended to give, and operate as effectually, as if they had been inserted in any other part of the act, than in the license itself.

The word "license" means permission or authority, and a license to do any particular thing is a permission or authority to do that thing, and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to

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him all the right which the grantor can transfer, to do what is within the terms of the license.

Would the validity or effect of such an instrument be questioned by the respondent, if executed by persons claiming regularly under the laws of New York?

The license must be understood to be what it purports to be, a legislative authority to the steamboat Bellona "to be employed in carrying on the coasting trade, for one year from this date."

It has been denied that these words authorize a voyage from New Jersey to New York. It is true that no ports are specified, but it is equally true that the words used are perfectly intelligible, and do confer such authority as unquestionably as if the ports had been mentioned. The coasting trade is a term well understood. The law has defined it, and all know its meaning perfectly. The act describes with great minuteness the various operations of a vessel engaged in it, and it cannot, we think, be doubted that a voyage from New Jersey to New York is one of those operations.

Notwithstanding the decided language of the license, it has also been maintained that it gives no right to trade, and that its sole purpose is to confer the American character.

The answer given to this argument that the American character is conferred by the enrollment, and not by the license, is, we think, founded too clearly in the words of the law to require the support of any additional observations. The enrollment of vessels designed for the coasting trade corresponds precisely with the registration of vessels

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designed for the foreign trade, and requires every circumstance which can constitute the American character. The license can be granted only to vessels already enrolled, if they be of the burthen of twenty tons and upwards, and requires no circumstance essential to the American character. The object of the license, then, cannot be to ascertain the character of the vessel, but to do what it professes to do -- that is, to give permission to a vessel already proved by her enrollment to be American, to carry on the coasting trade.

But if the license be a permit to carry on the coasting trade, the respondent denies that these boats were engaged in that trade, or that the decree under consideration has restrained them from prosecuting it. The boats of the appellant were, we are told, employed in the transportation of passengers, and this is no part of that commerce which Congress may regulate.

If, as our whole course of legislation on this subject shows, the power of Congress has been universally understood in America to comprehend navigation, it is a very persuasive, if not a conclusive, argument to prove that the construction is correct, and if it be correct, no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire and property for hire. The subject is transferred to Congress, and no exception to the grant can be admitted which is not proved by the words or the nature of the thing. A coasting vessel employed in the transportation of passengers is as much a portion of the American marine as one employed

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in the transportation of a cargo, and no reason is perceived why such vessel should be withdrawn from the regulating power of that government which has been thought best fitted for the purpose generally. The provisions of the law respecting native seamen and respecting ownership are as applicable to vessels carrying men as to vessels carrying manufactures, and no reason is perceived why the power over the subject should not be placed in the same hands. The argument urged at the bar rests on the foundation that the power of Congress does not extend to navigation as a branch of commerce, and can only be applied to that subject incidentally and occasionally. But if that foundation be removed, we must show some plain, intelligible distinction, supported by the Constitution or by reason, for discriminating between the power of Congress over vessels employed in navigating the same seas. We can perceive no such distinction.

If we refer to the Constitution, the inference to be drawn from it is rather against the distinction. The section which restrains Congress from prohibiting the migration or importation of such persons as any of the States may think proper to admit until the year 1808 has always been considered as an exception from the power to regulate commerce, and certainly seems to class migration with importation. Migration applies as appropriately to voluntary as importation does to involuntary arrivals, and, so far as an exception from a power proves its existence, this section proves that the power to regulate commerce applies equally

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to the regulation of vessels employed in transporting men, who pass from place to place voluntarily, and to those who pass involuntarily.

If the power reside in Congress, as a portion of the general grant to regulate commerce, then acts applying that power to vessels generally must be construed as comprehending all vessels. If none appear to be excluded by the language of the act, none can be excluded by construction. Vessels have always been employed to a greater or less extent in the transportation of passengers, and have never been supposed to be, on that account, withdrawn from the control or protection of Congress. Packets which ply along the coast, as well as those which make voyages between Europe and America, consider the transportation of passengers as an important part of their business. Yet it has never been suspected that the general laws of navigation did not apply to them.

The duty act, sections 23 and 46, contains provisions respecting passengers, and shows that vessels which transport them have the same rights, and must perform the same duties, with other vessels. They are governed by the general laws of navigation.

In the progress of things, this seems to have grown into a particular employment, and to have attracted the particular attention of government. Congress was no longer satisfied with comprehending vessels engaged specially in this business, within those provisions which were intended for vessels generally, and, on the 2d of March, 1819, passed "an act regulating passenger ships and

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vessels." This wise and humane law provides for the safety and comfort of passengers, and for the communication of everything concerning them which may interest the government, to the

Department of State, but makes no provision concerning the entry of the vessel or her conduct in the waters of the United States. This, we think, shows conclusively the sense of Congress (if, indeed, any evidence to that point could be required) that the preexisting regulations comprehended passenger ships among others, and, in prescribing the same duties, the Legislature must have considered them as possessing the same rights.

If, then, it were even true that the Bellona and the Stoudinger were employed exclusively in the conveyance of passengers between New York and New Jersey, it would not follow that this occupation did not constitute a part of the coasting trade of the United States, and was not protected by the license annexed to the answer. But we cannot perceive how the occupation of these vessels can be drawn into question in the case before the Court. The laws of New York, which grant the exclusive privilege set up by the respondent, take no notice of the employment of vessels, and relate only to the principle by which they are propelled. Those laws do not inquire whether vessels are engaged in transporting men or merchandise, but whether they are moved by steam or wind. If by the former, the waters of New York are closed against them, though their cargoes be dutiable goods, which the laws of the

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United States permit them to enter and deliver in New York. If by the latter, those waters are free to them though they should carry passengers only. In conformity with the law is the bill of the plaintiff in the State Court. The bill does not complain that the Bellona and the Stoudinger carry passengers, but that they are moved by steam. This is the injury of which he complains, and is the sole injury against the continuance of which he asks relief. The bill does not even allege specially that those vessels were employed in the transportation of passengers, but says generally that they were employed "in the transportation of passengers, or otherwise." The answer avers only that they were employed in the coasting trade, and insists on the right to carry on any trade authorized by the license. No testimony is taken, and the writ of injunction and decree restrain these licensed vessels not from carrying passengers, but from being moved through the waters of New York by steam for any purpose whatever.

The questions, then, whether the conveyance of passengers be a part of the coasting trade and whether a vessel can be protected in that occupation by a coasting license are not, and cannot be, raised in this case. The real and sole question seems to be whether a steam machine in actual use deprives a vessel of the privileges conferred by a license.

In considering this question, the first idea which presents itself is that the laws of Congress for the regulation of commerce do not look to the

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principle by which vessels are moved. That subject is left entirely to individual discretion, and, in that vast and complex system of legislative enactment concerning it, which embraces everything that the Legislature thought it necessary to notice, there is not, we believe, one word respecting the peculiar principle by which vessels are propelled through the water, except what may be found in a single act granting a particular privilege to steamboats. With this exception, every act, either prescribing duties or granting privileges, applies to every vessel, whether navigated by the instrumentality of wind or fire, of sails or machinery. The whole weight of proof, then, is thrown upon him who would introduce a distinction to which the words of the law give no countenance.

If a real difference could be admitted to exist between vessels carrying passengers and others, it has already been observed that there is no fact in this case which can bring up that question. And, if the occupation of steamboats be a matter of such general notoriety that the Court may be presumed to know it, although not specially informed by the record, then we deny that the transportation of passengers is their exclusive occupation. It is a matter of general history that, in our western waters, their principal employment is the transportation of merchandise, and all know that, in the waters of the Atlantic, they are frequently so employed.

But all inquiry into this subject seems to the Court to be put completely at rest by the act already

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mentioned, entitled, "An act for the enrolling and licensing of steamboats."

This act authorizes a steamboat employed, or intended to be employed, only in a river or bay of the United States, owned wholly or in part by an alien, resident within the United States, to be enrolled and licensed as if the same belonged to a citizen of the United States.

This act demonstrates the opinion of Congress that steamboats may be enrolled and licensed, in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating waters and entering ports which are free to such vessels than if they were wafted on their voyage by the winds, instead of being propelled by the agency of fire. The one element may be as legitimately used as the other for every commercial purpose authorized by the laws of the Union, and the act of a State inhibiting the use of either to any vessel having a license under the act of Congress comes, we think, in direct collision with that act.

As this decides the cause, it is unnecessary to enter in an examination of that part of the Constitution which empowers Congress to promote the progress of science and the useful arts.

The Court is aware that, in stating the train of reasoning by which we have been conducted to this result, much time has been consumed in the attempt to demonstrate propositions which may have been thought axioms. It is felt that the tediousness inseparable from the endeavour to prove that which is already clear is imputable to

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a considerable part of this opinion. But it was unavoidable. The conclusion to which we have come depends on a chain of principles which it was necessary to preserve unbroken, and although some of them were thought nearly self-evident, the magnitude of the question, the weight of character belonging to those from whose judgment we dissent, and the argument at the bar demanded that we should assume nothing.

Powerful and ingenious minds, taking as postulates that the powers expressly granted to the government of the Union are to be contracted by construction into the narrowest possible compass and that the original powers of the States are retained if any possible construction will retain them may, by a course of well digested but refined and metaphysical reasoning founded on these premises, explain away the Constitution of our country and leave it a magnificent structure indeed to look at, but totally unfit for use. They may so entangle and perplex the understanding as to obscure principles which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case, it is peculiarly necessary to recur to safe and fundamental principles to sustain those principles, and when sustained, to make them the tests of the arguments to be examined.

Mr. Justice JOHNSON.

The judgment entered by the Court in this cause, has my entire approbation, but, having adopted my conclusions on views

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of the subject materially different from those of my brethren, I feel it incumbent on me to exhibit those views. I have also another inducement: in questions of great importance and great delicacy, I feel my duty to the public best discharged by an effort to maintain my opinions in my own way.

In attempts to construe the Constitution, I have never found much benefit resulting from the inquiry whether the whole or any part of it is to be construed strictly or literally. The simple, classical, precise, yet comprehensive language in which it is couched leaves, at most, but very little latitude for construction, and when its intent and meaning is discovered, nothing remains but to execute the will of those who made it in the best manner to effect the purposes intended. The great and paramount purpose was to unite this mass of wealth and power, for the protection of the humblest individual, his rights, civil and political, his interests and prosperity, are the sole end; the rest are nothing but the means. But the principal of those means, one so essential as to approach nearer the characteristics of an end, was the independence and harmony of the States that they may the better subserve the purposes of cherishing and protecting the respective families of this great republic.

The strong sympathies, rather than the feeble government, which bound the States together during a common war dissolved on the return of peace, and the very principles which gave rise to the war of the revolution began to threaten the

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Confederacy with anarchy and ruin. The States had resisted a tax imposed by the parent State, and now reluctantly submitted to, or altogether rejected, the moderate demands of the Confederation. Everyone recollects the painful and threatening discussions which arose on the subject of the five percent. duty. Some States rejected it altogether; others insisted on collecting it themselves; scarcely any acquiesced without reservations, which deprived it altogether of the character of a national measure; and at length, some repealed the laws by which they had signified their acquiescence.

For a century, the States had submitted, with murmurs, to the commercial restrictions imposed by the parent State; and now, finding themselves in the unlimited possession of those powers over their own commerce which they had so long been deprived of and so earnestly coveted, that selfish principle which, well controlled, is so salutary, and which, unrestricted, is so unjust and tyrannical, guided by inexperience and jealousy, began to show itself in iniquitous laws and impolitic measures from which grew up a conflict of commercial regulations destructive to the harmony of the States and fatal to their commercial interests abroad.

This was the immediate cause that led to the forming of a convention.

As early as 1778, the subject had been pressed upon the attention of Congress by a memorial from the State of New

Jersey, and in 1781, we find a resolution presented to that body by one of

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the most enlightened men of his day, Dr. Witherspoon, affirming that

"it is indispensably necessary that the United States, in Congress assembled, should be vested with a right of superintending the commercial regulations of every State that none may take place that shall be partial or contrary to the common interests."

The resolution of Virginia, January 21, 1781, appointing her commissioners to meet commissioners from other States, expresses their purpose to be

"to take into consideration the trade of the United States, to consider how far an uniform system in their commercial regulations may be necessary to their common interests and their permanent harmony."

And Mr. Madison's resolution, which led to that measure, is introduced by a preamble entirely explicit to this point:

"Whereas, the relative situation of the United States has been found, on trial, to require uniformity in their commercial regulations as the only effectual policy for obtaining, in the ports of foreign nations, a stipulation of privileges reciprocal to those enjoyed by the subjects of such nations in the ports of the United States, for preventing animosities, which cannot fail to arise among the several States, from the interference of partial and separate regulations,"

&c. "therefore, resolved," &c.

The history of the times will therefore sustain the opinion that the grant of power over commerce, if intended to be commensurate with the evils existing and the purpose of remedying those

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evils, could be only commensurate with the power of the States over the subject. And this opinion is supported by a very remarkable evidence of the general understanding of the whole American people when the grant was made.

There was not a State in the Union in which there did not at that time exist a variety of commercial regulations; concerning which it is too much to suppose that the whole ground covered by those regulations was immediately assumed by actual legislation under the authority of the Union. But where was the existing statute on this subject that a State attempted to execute? or by what State was it ever thought necessary to repeal those statutes? By common consent, those laws dropped lifeless from their statute books for want of the sustaining power that had been relinquished to Congress.

And the plain and direct import of the words of the grant is consistent with this general understanding.

The words of the Constitution are, "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

It is not material, in my view of the subject, to inquire whether the article a or the should be prefixed to the word "power." Either or neither will produce the same result: if either, it is clear that the article "the" would be the proper one, since the next preceding grant of power is certainly exclusive, to-wit: "to borrow money on the credit

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of the United States." But mere verbal criticism I reject.

My opinion is founded on the application of the words of the grant to the subject of it.

The "power to regulate commerce" here meant to be granted was that power to regulate commerce which previously existed in the States. But what was that power? The States were unquestionably supreme, and each possessed that power over commerce which is acknowledged to reside in every sovereign State. The definition and limits of that power are to be sought among the features of international law, and, as it was not only admitted but insisted on by both parties in argument that, "unaffected by a state of war, by treaties, or by municipal regulations, all commerce among independent States was legitimate," there is no necessity to appeal to the oracles of the jus commune for the correctness of that doctrine. The law of nations, regarding man as a social animal, pronounces all commerce legitimate in a state of peace until prohibited by positive law. The power of a sovereign state over commerce therefore amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom necessarily implies the power to determine what shall remain unrestrained, it follows that the power must be exclusive; it can reside but in one potentate, and hence the grant of this power carries with it the whole subject, leaving nothing for the State to act upon.

And such has been the practical construction of

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the act. Were every law on the subject of commerce repealed tomorrow, all commerce would be lawful, and, in practice, merchants never inquire what is permitted, but what is forbidden commerce. Of all the endless variety of branches of foreign commerce now carried on to every quarter of the world, I know of no one that is permitted by act of Congress any otherwise than by not being forbidden. No statute of the United States that I know of was ever passed to permit a commerce unless in consequence of its having been prohibited by some previous statute.

I speak not here of the treaty-making power, for that is not exercised under the grant now under consideration. I confine my observation to laws properly so called. And even where freedom of commercial intercourse is made a subject of stipulation in a treaty, it is generally with a view to the removal of some previous restriction, or the introduction of some new privilege, most frequently, is identified with the return to a state of peace. But another view of the subject leads directly to the same conclusion. Power to regulate foreign commerce is given in the same words, and in the same breath, as it were, with that over the commerce of the States and with the Indian tribes. But the power to regulate foreign commerce is necessarily exclusive. The States are unknown to foreign nations, their sovereignty exists only with relation to each other and the General Government. Whatever regulations foreign commerce should be subjected to in the ports of the Union, the General Government would be

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held responsible for them, and all other regulations but those which Congress had imposed would be regarded by foreign nations as trespasses and violations of national faith and comity.

But the language which grants the power as to one description of commerce grants it as to all, and, in fact, if ever the exercise of a right or acquiescence in a construction could be inferred from contemporaneous and continued assent, it is that of the exclusive effect of this grant.

A right over the subject has never been pretended to in any instance except as incidental to the exercise of some other unquestionable power.

The present is an instance of the assertion of that kind, as incidental to a municipal power; that of superintending the internal concerns of a State, and particularly of extending protection and patronage, in the shape of a monopoly, to genius and enterprise.

The grant to Livingston and Fulton interferes with the freedom of intercourse, and on this principle, its constitutionality is contested.

When speaking of the power of Congress over navigation, I do not regard it as a power incidental to that of regulating commerce; I consider it as the thing itself, inseparable from it as vital motion is from vital existence.

Commerce, in its simplest signification, means an exchange of goods, but in the advancement of society, labour, transportation, intelligence, care, and various mediums of exchange become commodities, and enter into commerce, the subject,

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the vehicle, the agent, and their various operations become the objects of commercial regulation. Shipbuilding, the carrying trade, and propagation of seamen are such vital agents of commercial prosperity that the nation which could not legislate over these subjects would not possess power to regulate commerce.

That such was the understanding of the framers of the Constitution is conspicuous from provisions contained in that instrument.

The first clause of the 9th section not only considers the right of controlling personal ingress or migration, as implied in the powers previously vested in Congress over commerce, but acknowledges it as a legitimate subject of revenue. And, although the leading object of this section undoubtedly was the importation of slaves, yet the words are obviously calculated to comprise persons of all descriptions, and to recognise in Congress a power to prohibit where the States permit, although they cannot permit when the States prohibit. The treaty-making power undoubtedly goes further. So the fifth clause of the same section furnishes an exposition of the sense of the Convention as to the power of Congress over navigation: "nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another."

But it is almost labouring to prove a self-evident proposition, since the sense of mankind, the practice of the world, the contemporaneous assumption and continued exercise of the power, and universal acquiescence, have so clearly established

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the right of Congress over navigation, and the transportation of both men and their goods, as not only incidental to, but actually of the essence of, the power to regulate commerce. As to the transportation of passengers, and passengers in a steamboat, I consider it as having been solemnly recognised by the State of New York as a subject both of commercial regulation and of revenue. She has imposed a transit duty upon steamboat passengers arriving at Albany, and unless this be done in the exercise of her control over personal intercourse, as incident to

internal commerce, I know not on what principle the individual has been subjected to this tax. The subsequent imposition upon the steamboat itself appears to be but a commutation, and operates as an indirect, instead of a direct, tax upon the same subject. The passenger pays it at last.

It is impossible, with the views which I entertain of the principle on which the commercial privileges of the people of the United States among themselves rests, to concur in the view which this Court takes of the effect of the coasting license in this cause. I do not regard it as the foundation of the right set up in behalf of the appellant. If there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints. And I cannot overcome the conviction that, if the licensing act was repealed tomorrow, the rights of the appellant to a reversal of the decision complained of would be as

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strong as it is under this license. One half the doubts in life arise from the defects of language, and if this instrument had been called an exemption instead of a license, it would have given a better idea of its character. Licensing acts, in fact, in legislation, are universally restraining acts, as, for example, acts licensing gaming houses, retailers of spiritous liquors, &c. The act in this instance is distinctly of that character, and forms part of an extensive system the object of which is to encourage American shipping and place them on an equal footing with the shipping of other nations. Almost every commercial nation reserves to its own subjects a monopoly of its coasting trade, and a countervailing privilege in favour of American shipping is contemplated in the whole legislation of the United States on this subject. It is not to give the vessel an American character that the license is granted; that effect has been correctly attributed to the act of her enrollment. But it is to confer on her American privileges, as contradistinguished from foreign, and to preserve the government from fraud by foreigners in surreptitiously intruding themselves into the American commercial marine, as well as frauds upon the revenue in the trade coastwise, that this whole system is projected. Many duties and formalities are necessarily imposed upon the American foreign commerce which would be burdensome in the active coasting trade of the States, and can be dispensed with. A higher rate of tonnage also is imposed, and this license entitles the vessels that take it to those exemptions, but to nothing more.

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A common register equally entitles vessels to carry on the coasting trade, although it does not exempt them from the forms of foreign commerce or from compliance with the 16th and 17th sections of the enrolling act. And even a foreign vessel may be employed coastwise upon complying with the requisitions of the 24th section. I consider the license therefore as nothing more than what it purports to be, according to the first section of this act, conferring on the licensed vessel certain privileges in that trade not conferred on other vessels; but the abstract right of commercial intercourse, stripped of those privileges, is common to all.

Yet there is one view in which the license may be allowed considerable influence in sustaining the decision of this Court.

It has been contended that the grants of power to the United States over any subject do not necessarily paralyze the arm of the States or deprive them of the capacity to act on the same subject. The this can be the effect only of prohibitory provisions in their own Constitutions, or in that of the General Government. The vis vitae of power is still existing in the States, if not extinguished by the Constitution of the United States. That, although as to all those grants of power which may be called aboriginal, with relation to the Government, brought into existence by the Constitution, they, of course, are out of the reach of State power, yet, as to all concessions of powers which previously existed in the States, it was otherwise. The practice of our Government certainly

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has been, on many subjects, to occupy so much only of the field opened to them as they think the public interests require. Witness the jurisdiction of the Circuit Courts, limited both as to cases and as to amount, and various other instances that might to cited. But the license furnishes a full answer to this objection, for, although one grant of power over commerce, should not be deemed a total relinquishment of power over the subject, but amounting only to a power to assume, still the power of the States must be at an end, so far as the United States have, by their legislative act, taken the subject under their immediate superintendence. So far as relates to the commerce coastwise, the act under which this license is granted contains a full expression of Congress on this subject. Vessels, from five tons upwards, carrying on the coasting trade are made the subject of regulation by that act. And this license proves that this vessel has complied with that act, and been regularly ingrafted into one class of the commercial marine of the country.

It remains, to consider the objections to this opinion, as presented by the counsel for the appellee. On those which had relation to the particular character of this boat, whether as a steamboat or a ferry boat, I have only to remark that, in both those characters, she is expressly recognised as an object of the provisions which relate to licenses.

The 12th section of the Act of 1793 has these words: "That when the master of any ship or vessel, ferry boats excepted, shall be changed," &c. And the act which exempts licensed steamboats

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from the provisions against alien interests shows such boats to be both objects of the licensing act and objects of that act when employed exclusively within our bays and rivers.

But the principal objections to these opinions arise,

1st. From the unavoidable action of some of the municipal powers of the States upon commercial subjects.

2d. From passages in the Constitution which are supposed to imply a concurrent power in the States in regulating commerce.

It is no objection to the existence of distinct, substantive powers that, in their application, they bear upon the same subject. The same bale of goods, the same cask of provisions, or the same ship that may be the subject of commercial regulation may also be the vehicle of disease. And the health laws that require them to be stopped and ventilated are no more intended as regulations on commerce than the laws which permit their importation are intended to innoculate the community with disease. Their different purposes mark the distinction between the powers brought into action, and while frankly exercised, they can produce no serious collision. As to laws affecting ferries, turnpike roads, and other subjects of the same class, so far from meriting the epithet of commercial regulations, they are, in fact, commercial facilities for which, by the consent of mankind, a compensation is paid upon the same principle that the whole commercial world submit to pay light money to the Danes. Inspection laws are of a more equivocal nature, and it is obvious that

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the Constitution has viewed that subject with much solicitude. But so far from sustaining an inference in favour of the power of the States over commerce, I cannot but think that the guarded provisions of the 10th section on this subject furnish a strong argument against that inference. It was obvious that inspection laws must combine municipal with commercial regulations, and, while the power over the subject is yielded to the States, for obvious reasons, an absolute control is given over State legislation on the subject, as far as that legislation may be exercised, so as to affect the commerce of the country. The inferences to be correctly drawn from this whole article appear to me to be altogether in favour of the exclusive grants to Congress of power over commerce, and the reverse of that which the appellee contends for.

This section contains the positive restrictions imposed by the Constitution upon State power. The first clause of it specifies those powers which the States are precluded from exercising, even though the Congress were to permit them. The second, those which the States may exercise with the consent of Congress. And here the sedulous attention to the subject of State exclusion from commercial power is strongly marked. Not satisfied with the express grant to the United States of the power over commerce, this clause negatives the exercise of that power to the States as to the only two objects which could ever tempt them to assume the exercise of that power, to-wit, the collection of a revenue from imposts and duties on imports and exports, or from a tonnage duty. As

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to imposts on imports or exports, such a revenue might have been aimed at directly, by express legislation, or indirectly, in the form of inspection laws, and it became necessary to guard against both. Hence, first, the consent of Congress to such imposts or duties is made necessary, and, as to inspection laws, it is limited to the minimum of expenses. Then the money so raised shall be paid into the Treasury of the United States, or may be sued for, since it is declared to be for their use. And lastly, all such laws may be modified or repealed by an act of Congress. It is impossible for a right to be more guarded. As to a tonnage duty that could be recovered in but one way, and a sum so raised, being obviously necessary for the execution of health laws and other unavoidable port expenses, it was intended that it should go into the State treasuries, and nothing more was required therefore than the consent of Congress. But this whole clause, as to these two subjects, appears to have been introduced ex abundanti cautela, to remove every temptation to an attempt to interfere with the powers of Congress over commerce, and to show how far Congress might consent to permit the States to exercise that power. Beyond those limits, even by the consent of Congress, they could not exercise it. And thus we have the whole effect of the clause. The inference which counsel would deduce from it is neither necessary nor consistent with the general purpose of the clause.

But instances have been insisted on with much confidence in argument in which, by municipal

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laws, particular regulations respecting their cargoes have been imposed upon shipping in the ports of the United States, and one in which forfeiture was made the penalty of disobedience.

Until such laws have been tested by exceptions to their constitutionality, the argument certainly wants much of the force attributed to it; but, admitting their constitutionality, they present only the familiar case of punishment inflicted by both governments upon the same individual. He who robs the mail may also steal the horse that carries it, and would unquestionably be subject to punishment at the same time under the laws of the State in which the crime is committed and under those of the United States. And these punishments may interfere, and one render it impossible to inflict the other, and yet the two governments would be acting under powers that have no claim to identity.

It would be in vain to deny the possibility of a clashing and collision between the measures of the two governments. The line cannot be drawn with sufficient distinctness between the municipal powers of the one and the commercial powers of the other. In some points, they meet and blend so as scarcely to admit of separation. Hitherto, the only remedy has been applied which the case admits of -- that of a frank and candid cooperation for the general good. Witness the laws of Congress requiring its officers to respect the inspection laws of the States and to aid in enforcing their health laws, that which surrenders to the States the superintendence of pilotage, and the

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many laws passed to permit a tonnage duty to be levied for the use of their ports. Other instances could be cited abundantly to prove that collision must be sought to be produced, and when it does arise, the question must be decided how far the powers of Congress are adequate to put it down. Wherever the powers of the respective governments are frankly exercised, with a distinct view to the ends of such powers, they may act upon the same object, or use the same means, and yet the powers be kept perfectly distinct. A resort to the same means therefore is no argument to prove the identity of their respective powers.

I have not touched upon the right of the States to grant patents for inventions or improvements generally, because it does not necessarily arise in this cause. It is enough for all the purposes of this decision if they cannot exercise it so as to restrain a free intercourse among the States.

DECREE. This cause came on to be heard on the transcript of the record of the Court for the Trial of Impeachments and Correction of Errors of the State of New York, and was argued by counsel. On consideration whereof, this Court is of opinion that the several licenses to the steamboats the Stoudinger and the Bellona to carry on the coasting trade, which are set up by the appellant Thomas Gibbons in his answer to the bill of the respondent, Aaron Ogden, filed in the Court of Chancery for the State of New York, which were granted under an act of Congress, passed in pursuance of the Constitution of the

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United States, gave full authority to those vessels to navigate the waters of the United States, by steam or otherwise, for the purpose of carrying on the coasting trade, any law of the State of New York to the contrary notwithstanding, and that so much of the several laws of the State of New York as prohibits vessels, licensed according to the laws of the United States, from navigating the waters of the State of New York by means of fire or steam is repugnant to the said Constitution, and void. This Court is therefore of opinion that the decree of the Court of New York for the Trial of Impeachments and the Correction of Errors affirming the decree of the Chancellor of that State, which perpetually enjoins the said Thomas Gibbons, the appellant, from navigating the waters of the State of New York with the steamboats the Stoudinger and the Bellona by steam or fire, is erroneous, and ought to be reversed, and the same is hereby reversed and annulled, and this Court doth further DIRECT, ORDER, and DECREE that the bill of the said Aaron Ogden be dismissed, and the same is hereby dismissed accordingly.

http://supreme.justia.com/us/64/167/case.html

U.S. Supreme Court
Ogden v. Parsons, 64 U.S. 23 How. 167 167 (1859)

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Syllabus

Where a charter party stipulated that a vessel should receive a full cargo, the opinions of experts are the best criteria of how deeply she can be loaded with safety to the lives of the passengers. ¥

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Parsons and the other appellees were the owners of the ship Hemisphere, and a charter party was executed between their agents and Ogden, the terms of which, together with the other facts of the case, are summarily stated in the opinion of the Court.

The libel was filed in the district court praying for a writ with a clause of foreign attachment. The writ was accordingly issued against Ogden, commanding the marshal to take his person; if not found, then to take his goods and chattels; if none found, then to attach his credits in the hands of garnishees.

Ogden appeared and the case proceeded through the district and circuit courts in the manner stated in the opinion of the Court. From the decree of the circuit court, Ogden appealed.

MR. JUSTICE GRIER delivered the opinion of the Court.

The libellants let the ship Hemisphere by charter party to David Ogden on a voyage from Liverpool to New York. The covenants which are the subject of this litigation are briefly as follows:

"Ogden to furnish a full cargo of general merchandise and not exceeding 513 passengers, to pay 1,500 for the use of the ship, to have fifteen running lay days, and for every day's detention beyond that to pay one hundred dollars."

The libel demands $700 as demurrage for seven days, and for a balance yet due on the contract.

The answer denies any liability for demurrage, admits that

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the whole amount of £1,500 has not been paid, and charges libellants with breaches of their charter party, and damages in consequence thereof exceeding the balance claimed by them.

1st. "Because that they carelessly, wrongfully, and contrary to usage, stowed portions of the cargo where it ought not to have been stowed," and thereby deprived respondent "of the full and lawful use of the ship" by having room for only 350 passengers instead of 513.

2d. That libellants would not take and receive "a full cargo of general merchandise."

The district court decided against the charge for demurrage, but allowed the respondent no damages for the alleged breaches of the charter party by libellants.

On appeal by respondent to the circuit court, the sum of $1,200 was allowed him by that court for the breach first mentioned with regard to the number of passengers received.

From this decree the respondent has appealed to this Court.

As the libellants have not appealed from the decree of either the district or circuit court, the only question now to be considered is whether the respondent has shown himself entitled to more damages than were allowed him by the circuit court.

The judge of the circuit court being of opinion from the evidence that the cargo might and ought to have been stowed so as to admit the full number of passengers, 513, made a calculation from admitted data of the damage to respondent on that account, without referring the case again to a master, and deducted the sum of $1,200 from the amount of the decree of the district court. Of this the appellant does not complain, but insists that the owners had refused to receive a "full cargo of merchandise."

The registered tonnage of the ship was 1,030 tons; the cargo of general merchandise received was 1,297 tons.

The charter party covenants for no specific amount to be received. What was "a full cargo" under all the circumstances, and whether the ship could have been loaded to a greater depth than 18 feet 10 inches with safety to the lives of the passengers was a question which could be solved only by experienced shipmasters. Where experts are introduced to testify

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as to opinions on matters peculiar to their art or trade, there is usually some conflict in their testimony. What was a full cargo for this ship to carry with safety was not a fact which could be settled by any rule of law or mathematical computation, and the court must necessarily rely upon the opinions of those who have experience, skill, and judgment, in such matters. At least three

competent witnesses of this character testify that the ship was loaded as deep as prudence would permit under all the circumstances. Both the district and circuit court were of the same opinion, and we do not find in the evidence anything to convince us that they have erred.

Let the decree of the circuit court be affirmed with costs.

: http://supreme.justia.com/us/66/450/case.html

U.S. Supreme Court
Washington and Turner v. Ogden, 66 U.S. 1 Black 450 450 (1861)

ERROR TO THE CIRCUIT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

Syllabus

1. Where a written agreement for the sale of lands, executed and sealed by vendor and vendee, binds one party to make a deed for the property and the other to pay a certain sum, part in cash, within sixty days, and the remainder in annual installments, with a bond and mortgage for the deferred payments, the covenants are concurrent and reciprocal, constituting mutual conditions to be performed at the same time.

2. The vendor, in such a case, is not bound to convey unless the first installment be paid, nor is the purchaser bound to pay unless the vendor is able to convey a good title free from all encumbrances.

3. Where the agreement to purchase is expressly made dependent on the "surrender and cancelment" of a former agreement of the vendor to sell the same land to another person, it is a condition precedent that the former agreement shall be cancelled and surrendered.

4. Where the words of the covenant on the part of the vendor are that

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he will "make a deed" for the property, there is a covenant that the land shall be conveyed by a deed from one who has a good title and full power to convey.

5. A plaintiff who sues upon an agreement containing such a covenant must aver and prove not merely his readiness to perform it in the words of the contract, but that he had a good title which he was ready and willing to convey by a legal deed.

6. The want of such an averment in the declaration will not be cured by the verdict upon the presumption that the facts necessary to support it have been proved before the jury if it appears by the record that no such proof was offered.

7. Where the terms of an agreement make the sale of land dependent upon the cancellation and surrender of a previous agreement with another person, the acquiescence of the former vendee or his assigns, or the mutual understanding of all parties interested in the former contract that it shall be regarded as at an end, is not equivalent to a surrender and cancellation of it.

8. Acquiescence expressed by parol and mutual understanding that a title shall be released cannot be made a substitute for a deed of release or surrender; executed and recorded deeds under seal can be surrendered and cancelled only by other deeds under seal.

9. An objection to the form of the action or other defect in the pleadings will not be noticed in this Court when it appears from the undisputed facts of the case that the plaintiff is not entitled to recover in any form of action.

This suit was originally brought in the Superior Court of Cook County, Illinois, but removed thence to the federal circuit court upon the petition of the defendants and proof that they were both citizens of Virginia, while the plaintiff was a citizen of Illinois.

The plaintiff filed his declaration in debt, claiming a right to recover the sum of thirty-five thousand dollars, being the amount payable and due on the paper copied by MR. JUSTICE GREER in his opinion, with interest thereon from the expiration of sixty days after the date of the paper, to-wit, 20 July, 1859. The declaration describes fully the property which

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Washington and Turner agreed to buy from Ogden, and which is designated in their agreement merely as the property described in the John S. Wright contract of June 4, 1855. The narr. further avers that the contract with Wright to whom the same land had been previously sold by the plaintiffs was surrendered and cancelled, and that the plaintiffs were ready at all times to make a deed to the defendants for the property sold.

The defendants demurred first, and the declaration was amended. Then pleaded thirteen pleas, craving oyer four times of the paper on which suit was brought, and which was fully set out in plaintiff's declaration. The plaintiff demurred to some of the pleas, and some of the demurrers were sustained and some overruled. The pleadings were at length settled so as to raise the questions:

Whether the plaintiff was ready and willing to perform his part of the contract by making the proper conveyance to the defendants of the lands described in the agreement.

Whether the contract previously made with Wright for the sale of the same lands was surrendered and cancelled within sixty days, agreeably to the terms of the contract between the present parties.

Whether it was necessary that Wright should release his title by a written deed.

Whether the plaintiff, in demanding securities for the deferred payments, which he had no right to ask, absolved the defendants from the obligation of tendering the thirty-five thousand dollars now sued for.

Evidence on both sides was given, documentary and oral. The court decided the points of law and the jury found the facts in favor of the plaintiff, for whom a verdict and judgment were rendered for debt and interest amounting to $36,481 66.

The defendants thereupon took this writ of error.

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MR. JUSTICE GRIER.

The very numerous exceptions to the sufficiency of the pleadings and the correctness of the instructions given by the court all depend on the construction given to the covenants of the agreement which is the foundation of the suit. It is in the following words:

"CHICAGO, June 20, 1859"

"We will give M. D. Ogden, trustee Chicago Land company, sixty-seven thousand and five hundred dollars for the property described in the John S. Wright contract with the trustees of the Chicago Land company, dated June 4, 1855, or thereabouts, and pay for the same as follows: thirty-five thousand in cash within the next sixty days, and the balance in one, two, and three years, in equal installments, with six percent interest, payable annually. It is understood that it is all payable at the office of Ogden, Fleetwood & Co., in Chicago. In the event of our being deprived of the waterfront on block 35, Elston's Addition to Chicago by Robins, a difference in the purchase money shall be made corresponding to the value of the property lost. The said M. D. Ogden, trustee &c., agrees to sell to John A. Washington and Wm. F. Turner, both of Virginia, the above described property for the said sum of sixty-seven thousand five hundred dollars, payable as above, and on the payment of the said thirty-five thousand dollars cash within the next sixty days, he will make a deed to said Washington and Turner for said property and take a bond and mortgage on the same for payment of the balance of thirty-two thousand five hundred dollars, to be paid as above stated. This agreement is to be dependent on the surrender and cancelment of said contract with said Wright."

It is evident that the covenants of this contract are not independent. They are concurrent or reciprocal, constituting mutual conditions to be performed at the same time. The vendor is not bound to convey unless the money due on the first installment

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be paid; nor is the purchaser bound to pay unless the vendor can convey a good title, free of all encumbrance. The agreement shows that the vendor at that time was not able to give a satisfactory title, having a deed on record, by which he had covenanted to convey the same land to another. It is therefore made a condition precedent by this agreement that this previous contract should be surrendered and cancelled. The declaration avers that the contract with Wright was surrendered and cancelled on the 28th day of June, and that the plaintiff has been ever ready and willing to receive the money at the time and place, and "to deliver to defendants a deed of the property." But there is no averment in the narr. that the plaintiff had a good and sufficient title, free from all encumbrance, which he was ready and willing to convey. It is true, the words of his covenant are "that he will make a deed" to his vendees on receipt of the first installment. But the meaning of these words in the contract requires that the deed shall convey the land, and it is not sufficient to aver his readiness to perform, merely according to the letter of the contract. The performance must always be averred according to the intent of the parties. It is not sufficient to pursue the words if the intent be not performed. The legal effect of a covenant to sell is that the land shall be conveyed by a deed from one who has a good title or full power to convey a good title.

A sale, ex vi termini, is a transfer of property from one man to another. It is a contract to pass rights of property for money. This defect in the declaration cannot be cured by the verdict under a presumption that the facts necessary to support it have been proved before the jury, because it appears by the record that no such proof was offered to aid the insufficient averments of the declaration.

It appears also that the averment with regard to the surrender and cancelment of the contract with Wright even if sufficiently pleaded, was wholly without proof to support it, and that the court instructed the jury that they might presume it without proof. It is clearly a condition precedent, without the literal performance of which the purchasers were not bound to pay their money. The vendor had, on the 4th of

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June, 1855, covenanted to sell this land to John S. Wright on payment of certain installments. The vendors had reserved to themselves very stringent and unusual powers of declaring the contract forfeited in case of nonpayment of the several installments. John S. Wright, on the third of July, 1837, by his

deed conveyed all his right and title to the premises to Timothy and Walter Wright. This deed was recorded 13 July, 1837.

T. & W. Wright, on the 3d day of December, 1857, conveyed to James Clapp, and the deed was recorded on the 12th of December, 1857. These deeds could not be surrendered or cancelled by parol. Both the original and the record should have been cancelled and surrendered by act of the parties thereto under seal, if not by all, yet certainly by Clapp. This was not done. The plaintiffs in error had prepared their money. Their agent called on Ogden to obtain an abstract of the title and a proper surrender or release of the outstanding title, and was instructed to prepare proper bonds and a mortgage. Ogden promised to attend to having a proper surrender executed, but none was shown or tendered to the agent; on the contrary, Ogden handed him a mortgage and notes to be sent to the purchasers to be executed by them. They refused to sign instruments in that form and returned them to their agent. He returned them to Ogden, stating, among other reasons, that they expected a proper release or surrender of the outstanding title, and that in the absence of such a release, Ogden could not make a good title nor give possession. A second mortgage and bonds were then drawn and sent to the purchasers by Ogden, which were also objected to, and another promise given "that the release should be attended to."

But no such deed of release or surrender was made, executed, or tendered to the purchasers within the sixty days. Clapp did not execute a release till after the 1st of September, which was antedated as of the 15th of August. On this evidence, which was uncontradicted, it was clearly the duty of the court to have instructed the jury that the plaintiffs below had not made out a case which entitled them to a verdict; on the contrary, the court instructed the jury as follows:

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"2d. By the terms of the John S. Wright contract, if default were made in the payment of the installment due in 1859, it was competent for the Messrs. Ogden, at their option, to declare it forfeited and at an end as a contract for conveyance, and the land might be granted to another. No release or conveyance in writing by Wright or his assignee was absolutely necessary in such case in order to put an end to the contract to convey. Strictly speaking, Wright, having parted with his interest in the land to Clapp, had no power over the contract; but if he, with the acquiescence and consent of Clapp, after default of payment, delivered the contract to Mr. Ogden, and it was the agreement and understanding of all parties in interest that the contract was at an end, then it might be regarded as substantially surrendered and cancelled. That the offer of the property for sale, and a declaration of forfeiture after default of payment, might be sufficient as showing the exercise of the option on the part of the grantor."

This instruction was excepted to by defendant. It was a very grave error to instruct the jury that the acquiescence of Clapp, and the mutual understanding of the parties to that transaction, might be regarded by the jury as an actual cancellation and surrender as between the parties to this suit. Acquiescence expressed by parol, and mutual understanding that a title should be released, cannot be made a substitute for a deed of release or surrender, executed and recorded. Deeds under seal can be surrendered and cancelled only by other deeds under seal. No prudent man would accept a title with full notice on record and knowledge of such an outstanding title. This contract, by its plain terms, is "dependent on such surrender and cancelment being made within the sixty days." It is a condition precedent without the performance of which, within the term specified, the purchaser had a just right to declare the contract annulled. To entitle the plaintiffs below to recover in this suit, the declaration should have averred that such deeds of surrender and cancellation had been duly executed; that the plaintiff had a perfect title, free of all encumbrances, and was able as well as willing and ready to convey a good title to the plaintiff on the day named in the agreement.

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But he was not able to prove such averments, if they had been made, and his case failed both in its pleadings and its proofs; consequently there was error in ruling the demurrers of the plaintiff to the 4th, 6th, and 7th pleas of defendant in favor of plaintiffs. The pleas alleged proper matters of defense to the suit, either in whole or in part. They were sufficient on general demurrer, which goes back to the first error in pleading. And from what we have already said, the first error in pleading is found in the declaration. It is not necessary to discuss more at large the form of the pleadings, or whether the action should not have been covenant, and not debt, as the plaintiff was not entitled to recover in any form of action, according to the undisputed facts in evidence.

The judgment of the circuit court reversed and venire de novo.

http://supreme.justia.com/us/69/57/case.html

U.S. Supreme Court
Banks v. Ogden, 69 U.S. 2 Wall. 57 57 (1864)
Banks v. Ogden

69 U.S. (2 Wall.) 57

ERROR TO THE CIRCUIT COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS

Syllabus

1. A plat of an addition to a town, not executed, acknowledged, and recorded in conformity with the laws of Illinois, operates in that state as a dedication of the streets to public use, but not as a conveyance of the fee of the streets to the municipal corporation.

2. A conveyance, by the proprietor of such an addition, of a block or lot bounded by a street, conveys the fee of the street to its center, subject to the public use.

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3. When a street of such an addition is bounded on one side by Lake Michigan, the owner of the block on the other side takes only to the center, while the fee of the half bounded by the lake remains in the proprietor, subject to the easement.

4. When the lake boundary so limits the street as to reduce it to less than half its regular width, the street so reduced must still be divided by its center line between the grantee of the lot bounded by it and the original proprietor.

5. Accretion by alluvion upon a street thus bounded will belong to the original proprietor, in whom, subject to the public easement, the fee of the half next the lake remains.

6. The limitation of the 8th section of the bankrupt act of 1841 does not apply to suits by assignees or their grantees for the recovery of real estate until after two years from the taking of adverse possession.

This was an ejectment brought to December Term 1859, in the Circuit Court for the Northern District of Illinois to recover a lot of ground, A A, formed by accretion on the western shore of Lake Michigan. The case was thus:

Kinzie, being owner in fee of a fractional section of land bounded on the east by the said lake and lying immediately north of the original Town of Chicago, made a subdivision of it in 1833, which he called Kinzie's Addition, and deposited a plat of it in the office of the county recorder, where it was recorded in February, 1834, though not in accordance with certain statutes of Illinois which, it was contended in the argument, give an effect to plats properly made, acknowledged, and recorded that changes the rule of the common law regarding the streets on which the lots are sold.

The north and south street of the subdivision nearest the lake was called Sand Street; the east and west street nearest the north line of the fraction was named Superior Street. The waters of the lake limited Sand Street on the north by an oblique line extending from a point on its eastern side, about a hundred feet below, to a point on its western side about a hundred feet above Superior Street, as indicated on the diagram opposite. The northeastern block of the subdivision, numbered 54, was bounded, on its eastern side, in part by Sand Street and in part by the lake. Sand Street therefore terminated in a small triangular piece of land,

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image:a

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b, c, d, between the lake and Block 54. This triangle was less than thirty-three feet wide at its lower or southern end, and diminished to a point at its northern extremity. Upon this triangle, distinctly shown by the plat, new land was formed in 1844-1845 -- the date must be observed -- by accretion, and extended eastwardly in the direction of the dotted lines more than two hundred feet. The question was to whom did this new land belong?

In 1842, Kinzie had been declared a bankrupt under the bankrupt act of 1841, and his whole property passed of course by operation of law to his assignee.

Under this title, the assignee claimed, subject to public use as a street, the eastern half of the triangle, and the newly formed land as accretion. Acting upon this claim, he sold, under petition and order of the district court, made in 1857, part of the accretion, being the land in controversy, to one Sutherland, who conveyed to Banks, plaintiff in the ejectment. Of course this newly formed land had not been included in the assignee's inventory of the bankrupt's effects.

On the other hand, Ogden, the defendant, deriving title by regular conveyance in 1833 from Kinzie, to that part of Block 54 to which the triangle was adjacent, conceived that the fee of the whole triangle, subject to the public use, passed to him with the land bounded by it. His theory was that Sand Street, which was sixty-six feet wide below its meeting with the lake, continued sixty-six feet wide to its northern termination, and that the whole triangle being everywhere less than thirty-three feet wide, was west of the

middle line of the street, and therefore belonged to him as owner of the adjoining land. As the legal result of these propositions, he claimed the whole accretion as formed upon land of which he held the fee.

It is necessary here to state that the bankrupt act, under which Banks, the plaintiff, claimed, enacts, by its eighth section, that

"No suit at law or in equity shall in any case be maintained by or against the assignee of the bankrupt touching any property or rights of property of the bankrupt,

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transferable to or vested in him, in any court whatever unless the same be brought within two years of the declaration of bankruptcy, or after the cause of suit shall have first accrued."

At what date Ogden, the defendant, went into possession did not appear. The bankrupt act (§ 10) also enacts that all proceedings in bankruptcy shall, if practicable, be brought to a close by the court within two years after a decree.

Upon this case, the court below instructed the jury that the law was for the defendant, and, judgment having been so entered after verdict, the case was now before the court on error.

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THE CHIEF JUSTICE delivered the opinion of the Court, and, after stating facts, proceeded as follows:

The rule governing additions made to land bounded by a river, lake, or sea has been much discussed and variously settled by usage and by positive law. Almost all jurists and legislators, however, both ancient and modern, have agreed that the owner of the land thus bounded is entitled to these additions. By some the rule has been vindicated on the principle of natural justice that he who sustains the burden of losses and of repairs imposed by the contiguity of waters ought to receive whatever benefits they may bring by accretion; by others, it is derived from the principle of public policy that it is the interest of the community that all land should have an owner, and most convenient that insensible additions to the shore should follow the title to the shore itself.

There is no question in this case that the accretion from Lake Michigan belongs to the proprietor of land bounded by the lake. The controversy turns on ownership.

In deciding this controversy, we derive to important aid from the statutes of Illinois referred to in the argument.

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The plat of Kinzie does not appear to have been executed, acknowledged, and recorded in conformity with either of them. [Footnote 1] It operated, therefore, only as a dedication, and the law applicable to dedications must control our judgment.

It is a familiar principle of that law that a grant of land bordering on a road or river carries the title to the center of the river or road unless the terms or circumstances of the grant indicate a limitation of its extent by the exterior lines. There is indeed a passage in one of the judgments of the Supreme Court of Illinois which, if taken literally, would exclude grantees of lots in towns and cities from any interest whatever in the streets beyond the common use. The court said: "In the case of a valid plat," that is, a plat duly executed, acknowledged, and recorded,

"the title to the ground set apart for public purposes is held by the corporation for the use and benefit of the public; in the case of a dedication by a different mode, the fee continues in the proprietor, burdened with the public easement. [Footnote 2]"

his rule would limit the grantee of Block 54 to the lines of the block, and he would take nothing in Sand Street, but the propositions quoted were not essential to the decision of the question before the court, and there are other cases [Footnote 3] which seem to warrant a belief that when the operation of an ordinary dedication shall come directly before that tribunal, it will not apply any other principle to its construction than that generally recognized.

We shall assume, therefore, that the owner of the southeast part of Block 54 was the owner of the adjacent part of Sand Street to its center. But adjacent to that part of the block, Sand Street had been reduced, as the plat clearly shows, to the small triangle already described, and it must follow that it was to the center line of the street thus reduced that the defendant acquired title. He took, subject to the public use, the westerly half of the triangle and no more.

But Kinzie was the original owner of the whole fractional

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section. He retained every part of which he did not divest himself by deed or dedication. By the dedication of Sand Street, he gave to the public the use and only the use of the land within the artificial and natural lines marked on the plat. By the conveyance of Block 54 west of the street, he conveyed the fee of Sand Street within those lines to its center. On the east side of the street, opposite that block, he conveyed nothing, for he had nothing to convey. The fee, therefore, of the eastern half of the triangle which

there formed the street remained in him. In the words of the Supreme Court of Illinois, clearly just when applied to the land in question, "the fee continued in the proprietor, subject to the easement."

Upon Kinzie's bankruptcy, the fee of this strip of land passed to the assignee. It was about this time or shortly afterwards that the alluvion began to form upon it, and continued to increase until the commencement of the suit below. The title to the accretion thus made followed the title to the land, and vested in the assignee.

It is unnecessary to consider the effect of the accretion, under the dedication, upon the width of the street, for whatever that effect may have been, the fee of the east half and of the accretion beyond the true width, whatever that width was, remained constantly in Kinzie or the assignee. A part, therefore, of the bankrupt's estate remained unsold when the order of sale, under which the plaintiff in error claims, was made by the district court, and the only remaining inquiry is whether that order was lawfully made.

The eighth section of the bankrupt act of 1841 limited suits concerning the estate of the bankrupt by assignees against persons claiming adversely, and by such persons against assignees, to two years after decree of bankruptcy or first accrual of cause of suit. There is no express limitation upon sales, nor any limitation upon any action other than suits, by the assignee except a general requirement in the tenth section that all proceedings shall, if practicable, be brought to a close by the court within two years after decree. We are not satisfied that the limitation in the eighth

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section can be applied to sales of real estate made by assignees under orders of district courts having general jurisdiction of proceedings in bankruptcy. But it is not necessary now to pass upon this point. The limitation certainly could not affect any suit, the cause of which accrued from an adverse possession taken after the bankruptcy, until the expiration of two years from the taking of such possession, and there is nothing in the record which shows when the adverse possession relied on by the defendant in error commenced, and therefore nothing which warrants the application of the limitation to the petition for the order of sale.

We think the court below erred in instructing the jury that the defendant in error, upon the case made, was entitled to their verdict. Its judgment must therefore be reversed, and the cause remanded with directions to issue a

New venire.

[Footnote 1]

Jones v. Johnson, 18 How. 153.

[Footnote 2]

Manly v. Gibson, 13 Ill. 312.

[Footnote 3]

Canal Trustees v. Havens, 11 Ill. 557; Waugh v. Leech, 28 id. 488.

http://supreme.justia.com/us/102/634/case.html

U.S. Supreme Court
Ogden v. County of Daviess, 102 U.S. 634 (1880)
Ogden v. County of Daviess

102 U.S. 634

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

Syllabus

1. An act of the General Assembly of Missouri approved Jan. 4, 1860, authorizes counties, towns, and cities to subscribe to the stock of a railroad company which it incorporated, and issue bonds in payment therefor. The seventh section enacts that

"Upon the presentation of a petition of the president and directors of said company to the county court of any county through which said road may be located praying that a vote may be taken in any strip of country through which it may pass, not to exceed ten miles on either side of said road, that the inhabitants thereof are desirous of taking stock in said road and of voting upon themselves a tax for the payment of the same, it shall be the duty of said county court to order an election therein, and shall prescribe the time, place, and manner of holding said election, and if a majority of the taxable inhabitants shall determine in favor of the tax, it shall be the duty of said court to levy and collect from them a special tax, which shall be kept separate from all other funds and appropriated to no other purposes, and as fast as collected shall cause the same to be paid to the treasurer of said company

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Held that the affirmative vote of the inhabitants of such a strip authorized the county court to levy, collect, and pay over to the treasurer of the company such special tax, but it did not create a debt of the county, as such, for which bonds might be issued under that act or the act of March 24, 1868, authorizing "counties, cities, and incorporated towns to fund their respective debts."

2. The Act of March 24, 1870, entitled "An Act to amend an act to facilitate the construction of railroads in the State of Missouri, approved March 23, 1868," granted no new power of subscription. The act of 1868 related entirely to municipal townships as such.

3. The court reaffirms its former rulings that the holder of a municipal bond is chargeable with notice of the statutory provisions under which it was issued.

The facts are stated in the opinion of the Court.

MR. CHIEF JUSTICE WAITE delivered the opinion of the Court.

On the 4th of January, 1860, the General Assembly of Missouri incorporated the Platte City and Des Moines Railroad Company, now, by statutory change of name, the Chicago and Southwestern Railway Company. Sec. 7 of the charter is as follows:

"SEC. 7. Upon the presentation of a petition of the president and directors of said company to the county court of any county through which said road may be located praying that a vote may be taken in any strip of country through which it may pass, not to exceed ten miles on either side of said road, that the inhabitants thereof are desirous of taking stock in said road and of voting upon themselves a tax for the payment of the same, it shall be the duty of said county court to order an election therein, and shall prescribe the time, place, and manner of holding said election, and if a majority of the taxable inhabitants shall determine in favor of the tax, it shall be the duty of said court to levy and collect from them a special tax, which shall be kept separate from all other funds and appropriated to no other purposes, and as fast as collected shall cause the same to be paid to the treasurer of said company. "

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On the 4th of July, 1865, a new Constitution of Missouri went into effect, sec. 14, art. 11, of which is as follows:

"The General Assembly shall not authorize any county, city, or town to become a stockholder in or to loan its credit to any company, association, or corporation unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto."

By an act to facilitate the construction of railroads passed March 23, 1868, municipal townships in any county of Missouri were authorized to subscribe, through the county court of the county, to the stock of railroad companies, with the assent of two-thirds of the qualified voters of the township, and to pay their subscriptions with bonds in the name of the county, payable out of a special tax to be levied on the real estate of the township. On the 24th of March, 1870, the General Assembly amended this law by adding the following as sec. 7:

"In all cases where, by the provisions of the charter of any railroad company organized under the laws of this state, the taxable inhabitants of a portion of a municipal township of any county in this state have voted or may hereafter vote to take stock in such railroad company, they are hereby declared entitled to and shall have all the privileges, rights, and benefits in said act conferred

upon counties or townships, and the county court of such county shall exercise the same powers and perform the same duties in issuing bonds, levying, collecting, and paying over the taxes which it is required to in the case of a county or township under the provisions of said act: provided however that no part of such township outside the limits of the district voting shall be taxed to pay any of the bonds or coupons so issued by the county court. This act shall take effect from its passage."

After the passage of this act, the Daviess County Court, on the petition of the Chicago and Southwestern Railway Company, ordered an election on the twenty-first day of June, 1870, to obtain the assent of the

"taxable inhabitants living within a strip of five miles on each side of the line of said railway to be built through the County of Daviess, . . . to the

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subscription by the County of Daviess, for and on behalf of the taxable inhabitants of said strip, of the sum of $60,000 of the capital stock of said railway company, on such terms and conditions as [the court] should deem proper."

Thereupon the court fixed, as one of the conditions of the subscription, that

"in payment of said subscription, sixty bonds shall be issued by said county to the Chicago and Southwestern Railway Company . . . of $1,000 each, payable ten years after date, with interest at the rate of eight percent per annum, evidenced by semiannual coupons,"

&c. The election was held, and resulted in five hundred and sixty-eight votes for the subscription and four hundred against it. The county court subscribed the stock, and to pay the subscription issued and delivered to the company bonds in the following form:

"UNITED STATES OF AMERICA"

"$1,000] State of Missouri, County of Daviess [$1,000"

"Daviess County Ten-year Bond, No. 3"

"Know all men by these presents that the County of Daviess, in the State of Missouri, acknowledges itself to owe and be indebted to, and promises to pay the bearer the sum of one thousand dollars, on the first day of August, in the year of our Lord one thousand eight hundred and eighty, for value received, negotiable and payable without defalcation or discount at the Metropolitan National Bank, in the City and State of New York, with interest thereon from the first day of August, A.D. 1870, at the rate of eight percentum per annum until paid, which interest shall be due and payable semiannually on the first day of February and August in each year, on the presentation of the proper interest coupon, as annexed hereto, attested by the signature of William M. Bostaph, clerk at the said Metropolitan National Bank. This is one of sixty bonds of like date, amount, and effect, numbered from one to sixty, both numbers inclusive, issued in payment of the indebtedness of said County of Daviess to the Chicago and Southwestern Railway Company, incurred on account of an election held in said county on the twenty-first day of June, A. D. 1870, by certain taxable inhabitants of said county."

"In testimony whereof, the said County of Daviess, by order of its county court, has caused these presents to be executed by the signature of the presiding justice of said court, attested by the

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clerk thereof, with the seal of said county affixed, at office in Gallatin, Daviess County, Missouri, this twenty-seventh day of July, A.D. 1870."

"PETER BEAR, Presiding Justice"

"Attest: WILLIAM M. BOSTAPH, Clerk"

"{SEAL OF DAVIESS COUNTY COURT, MO.}"

The coupon is in words and figures following, to-wit:

"$40] GALLATIN, MO., July 27, 1870"

"County of Daviess, in the State of Missouri, will pay to the bearer forty dollars on the first day of February, 1873, at the Metropolitan National Bank, in the City and state of New York, for value received, being the semiannual interest due on bond No. 3 of said county, issued to Chicago and Southwestern Railway Company."

"WILLIAM M. BOSTAPH, Clerk"

When the delivery of the bonds was made, the interest coupons were cancelled to Sept. 1, 1871. The coupons for 1873 were not paid, and this suit was brought to recover what was due on that account. The plaintiff is a bona fide holder of the coupons. On the trial, the judges of the circuit court were divided in opinion on several questions which have been certified here, the principal of which is whether there was lawful authority for the issue of the bonds. The presiding judge being of the opinion that there was not, judgment was given in favor of the county, and to reverse that judgment this writ of error was brought.

We think the presiding judge was right in the view he took of the controlling question in this case. Without doubt, sec. 7. of the charter of the company authorized the taxable inhabitants of the "strip of country" designated to vote a tax upon themselves to take stock, and required the county court to levy and collect such a tax, if voted, and pay over the money as fast as collected to the treasurer of the company; but in this we find no authority for the county to issue bonds in anticipation of the tax. The taxable inhabitants of the strip of country could not themselves make a bond, and all the county court could do was to collect and pay over the tax they

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voted. The inhabitants were not even organized by themselves, much less made a body politic for any purpose. They could vote the tax, if called upon to do so by the county court, but that was all. The effect of their vote was nothing more than to authorize the county court to levy, collect, and pay over to the treasurer of the company the special tax they had determined upon. The requirement of the law -- that the money, when collected, should be paid over to the treasurer of the company -- is entirely inconsistent with any idea that the obligations to be met in this way were to be in the form of negotiable paper afloat on the market as commercial securities. Under the provisions of sec. 6 of the charter, counties, towns, and cities were expressly authorized to issue bonds in payment of their subscriptions. The omission of any such power in sec. 7 is conclusive evidence that nothing of the kind was intended in case of "strip" subscriptions. In this particular, the case is even stronger than that of Wells v. Supervisors, supra, p. 102 U. S. 625.

Neither did the Act of March 24, 1870, give the power to issue bonds. That was an act amending what is commonly known as the "township aid law" of Missouri, which related only to subscriptions by municipal townships. The amendment granted no new power of subscription, but simply provided that where, under the charter of any railroad company, the taxable inhabitants of a portion of a municipal township had voted or might vote to take stock in the company, the county court might issue bonds for the stock so taken, to be paid out of taxes levied on property within the limits of the district voting. In the charter of the Chicago and Southwestern Company, authority was not given the taxable inhabitants of any portion of a township to take stock, but to the taxable inhabitants of any strip of country through which the road might pass, not exceeding ten miles on either side. This strip was not necessarily part of a township. It might include parts of several townships, or the whole of some and parts of others. As the act amended related entirely to municipal townships as such, and there had before been legislation in relation to strips of country without any reference to townships, it must be presumed that the amendment applied only

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to parts of townships separately, and not to the aggregation of townships or parts of townships which would almost necessarily be included in a strip of country twenty miles wide or less along a railroad as it runs through a county. The bonds which this statute authorizes were to be issued on behalf of a portion of a township, not on behalf of a "strip of country." Under the charter, the taxable inhabitants of the strip were to take the stock, and they were to be taxed. We cannot, without a perversion of language, apply the act of 1870 to this provision of this charter. It follows that neither in the charter nor in the amending act relied on can there be found authority to issue the bonds in question.

On the 24th of March, 1868, the General Assembly of Missouri passed an act "to enable counties, cities, and incorporated towns to fund their respective debts." Sec. 1 of that act is as follows:

"That the various counties of this state be, and they are hereby, authorized to fund any and all debts they may owe, and for that purpose may issue bonds bearing interest at not more than ten percentum per annum, payable semiannually, with interest coupons attached, and all counties, cities, or towns in this state which have or shall hereafter subscribe to the capital stock of any railroad company may in payment of such subscription issue bonds bearing interest at not more than ten percentum per annum, payable semiannually, with interest coupons attached. The bonds authorized by this act shall be payable not more than twenty years from date thereof."

It is claimed that authority for the issue of the bonds can be found in this law. We do not agree to this. Neither the county nor a city nor a town took the stock now in question. The county did not owe any debt. The taxable inhabitants of the "strip of country" had authority to vote to tax themselves for the stock. In this way they could bind themselves, but that did not create a debt of the county, as such, for which funding bonds might be issued. The debt, if any, was of the "strip" only, and not the county. As no bond could be issued under the original vote, the county assumed no obligation whatever. The county court and other officers of the county could be compelled to levy, collect, and pay over the

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tax, but that was all the county or its officers were required to do.

We have always held that every holder of a municipal bond is chargeable with notice of the provisions of the law by which the issue of his bond was authorized. If there was no law for the issue, there can be no valid bond. On the face of these bonds, it appears that they were issued to the Chicago and Southwestern Company

on account of an election held by "certain taxable inhabitants of the county." This clearly connects the bonds with the Chicago and Southwestern charter and indicates unmistakably that they were put out on account of a "strip" subscription. The holder is therefore chargeable with notice of the want of legal authority for their issue.

The principal question certified is answered in the negative, and, without specially replying to the others, further than may be implied from this opinion, the judgment is

Affirmed.

http://supreme.justia.com/us/168/224/case.html

U.S. Supreme Court
Ogden City v. Armstrong, 168 U.S. 224 (1897)
Ogden City v. Armstrong

No. 127
Argued November 11, 1897
Decided November 29, 1897

168 U.S. 224

APPEAL FROM THE SUPREME COURT
OF THE TERRITORY OF UTAH

Syllabus

An examination of the record discloses that none of the complainants, save one, was assessed with a sufficient amount of taxes, to enable him to bring the case here on appeal, and accordingly, under the doctrine of Russell v. Stansell, 106 U. S. 303, and Gibson v. Shufeldt, 122 U. S. 27, the appeal is dismissed as to such parties.

No jurisdiction vested in the appellant's city council to make an assessment and levy a tax for the improvements which are the subject of this controversy until the assent of the requisite proportion of the owners of the property to be affected had been obtained, and the action of the city council in regard to that question was not conclusive.

In order to justify a court of equity in restraining the collection of a tax, circumstances must exist bringing the case under some recognized head of equity jurisdiction, and this case seems plainly to be one of equitable jurisdiction within that doctrine.

When the illegality or fatal defect in a tax does not appear on the face of the record, courts of equity regard the case as coming within their jurisdiction.

When the authorities have jurisdiction to act, the statutory remedy is the taxpayer's exclusive remedy, but when the statute leaves open to judicial inquiry all questions of a jurisdictional character, a determination of such questions by an administrative board does not preclude parties aggrieved from resorting to judicial remedies.

The original bill in this case was filed in May, 1892, in the Fourth Judicial District Court of the late Territory of Utah, against Ogden City, a municipal corporation, and its mayor and the members of its Common Council, and it was thereby sought to restrain the city and its officers from levying assessments upon the real estate of the plaintiffs and other similarly

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situated, for the purpose of paving a portion of one of the streets of the city.

To this bill a demurrer was filed, which was sustained by the district court, and a judgment was entered dismissing the bill. On appeal to the supreme court of the territory, that judgment was reversed, and the cause remanded to the court below. 34 P. 53. An answer to the bill was then filed, denying substantially the equities of the bill. Subsequently, on April 9, 1894, a supplemental bill was filed, bringing in additional parties complainant and alleging that, since the filing of the original bill, the defendants had passed the ordinance assessing the properties of the plaintiffs, and were about to expose to sale the real estate described in the original and supplemental bills to satisfy the assessments, and threatened to continue to sell said real estate annually for ten years as each installment of said assessment became due, whereby the plaintiffs had been compelled to pay certain amounts, stated in detail, in order to prevent a sale of their property and to prevent a cloud upon their titles, and that certain real estate belonging to some of the plaintiffs had been sold by the city to satisfy the illegal assessments. The prayers were for a decree declaring the ordinance and assessments to be void, restraining the defendants from proceeding thereunder; that an account be ordered of the amounts paid by plaintiffs under protest; that plaintiffs have judgment for the same; that the sales of real estate be set aside, and for general relief. An answer was filed to the supplemental bill, denying specifically all of its allegations but admitting that the ordinance in question was passed as alleged. It alleged affirmatively that the plaintiffs were estopped to complain as in the supplemental bill alleged; that the same did not state facts sufficient to constitute a supplemental complaint; that the cause of action was barred by the statute of limitations; that there was a misjoinder of parties plaintiff, and that there was a misjoinder of causes of action.

On the 27th day of October, 1894, findings were signed and judgment entered giving the plaintiffs the relief prayed for in both the original and the supplemental bill. The decree of

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the court below was on appeal affirmed by the supreme court of the territory, from whose decree an appeal was taken and allowed to this Court.

The findings of fact were as follows:

"1. That the plaintiffs were at the date of the filing of the complaint in this action, residents and taxpayers in Ogden City, Weber County, Utah Territory, and brought this action, concerning a matter of general interest to all taxpayers in said Ogden City, on their own behalf and on the behalf of all others similarly situated."

"2. That the defendants, except Ogden City at the time of the bringing of this action, were the mayor and members of the Common Council of said Ogden City, defendant."

"3. That on the 7th day of March, 1892, proceedings were had by the Common Council of said Ogden City, as follows:"

"Finance committee recommending immediate creation of three paying districts, as follows: District No. 2, Twenty-Fifth Street, from the west line of Washington Avenue to the west line of Wall Avenue."

"Councillor Dee moved to lay on the table for one week. Motion lost."

"Councillor McManus moved to adopt the motion. Carried."

"4. That the above were the only proceedings had by said Council of Ogden City in regard to the creation of said paying district prior to the publication of the notice hereinbelow mentioned, and upon the same day the following proceedings were had:"

"Councillor Spencer moved the following motion, in pursuance of the proceedings already taken in ordering the creation of three paving districts:"

"I move that the council adopt the accompanying notice of intention, and that the same be published for twenty days, beginning with to-morrow morning, Tuesday, March 8th."

"Said notice was read, and Councillor Dee moved to lay on the table for one week. Motion lost; Dee and Elliott voting 'Aye;' Calvert, Cannon, Graves, McManus, Shurtliff, and Spencer voting 'Nay.' The original motion was then put and carried; Calvert, Cannon, Graves, McManus, Shurtliff, and Spencer voting 'Aye,' and Dee and Elliott voting 'Nay.' "

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"5. That thereupon, on March 9, 1892, in the Ogden Daily Standard, the following notice of intention mentioned above was published, to-wit:"

" Notice of intention of the City Council of Ogden City of creating a district for paving and of paving and macadamizing the streets therein, and to defray the expenses of such improvement by local assessment."

" The City Council of Ogden City, situate in the County of Weber, Territory of Utah, gives notice that it intends to make the following improvements, to-wit, pave and macadamize the following streets: Twenty-fifth Street, from the west line of Washington Avenue to the west line of Wall Avenue. This district shall be known as 'Paving District No. 2.' The boundaries of the district to be affected and benefited are the lines running one hundred and fifty feet back and parallel with the outer lines of each side of the streets on each and every block, and for the full length thereof therein. The estimated cost of such improvement is $40,000. For the payment of the costs and expenses thereof, the city council intends to levy local taxes upon the real estate lying and being within said paving district, and to the extent of the benefits to such property by reason of such improvement. The city council will, on March 29, 1892 at 10 a.m., hear objections in writing and from any and all persons interested in said local assessment. By order of the City Council."

" T. P. Bryan, City Recorder"

"6. That on March 29, 1892 at 9:55 o'clock, D. H. Peery and sixty-eight others, including all the plaintiffs in this action and in the supplemental complaint, who were then the owners of real property within the said Paving District No. 2, and with frontage on Twenty-Fifth Street within the said paving district, filed a protest with the said recorder of said Ogden City, protesting against the levying of any local assessment against or upon their property for the purpose of paving said street within said district; that said persons so protesting owned and protested for more than one-half of the whole

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frontage on said Twenty-Fifth Street within said district, to-wit, 2,414 feet; that, after said hour of 10 a.m. of said day, certain persons who had protested to the amount of 302 1/4 feet withdrew their protests, leaving at all times 2,111 3/4 feet frontage on said Twenty-Fifth Street in said district still protesting against the said local assessment; that the total number of feet fronting on said Twenty-Fifth Street in said paving district, as mentioned in said notice of intention above set forth, was 3,960, of which 660 feet belonged at said time, and still belong, to said Ogden City, and were then and are now used for public purposes by the said city, and 125 feet of said frontage were then, and are now, the property of the said Ogden City, and was public school property, used and owned for public schools."

"7. That notwithstanding said protest of said abutting property owned on said Twenty-Fifth Street in said Paving District No. 2, and without giving any other or further notice except as hereinbefore stated, the said City Council, on the 4th day of April, 1892, passed the following resolution, to-wit:"

" Resolved, that the city proceed as speedily as possible to the paving of Twenty-Fifth Street district with Utah sandstone blocks; that the city engineer be instructed to prepare the necessary specifications at once, and submit the same at the next meeting of the council; that the competition of said work be restricted to bona fide residents of Ogden, and that, so far as it is possible, only Ogden labor be employed in the performance of the work."

"8. That on May 2, 1893, said City Council of Ogden City passed a resolution instructing the city recorder to advertise for bids for the paving of Twenty-Fifth Street, in said district, which notice was as follows:"

" To paving contractors: bids will be received by the City Recorder of Ogden City until 12 o'clock m. May 23, 1892, for the paving of Twenty-Fifth Street, in Ogden City, from Washington to Wall Avenue, according to the specifications of the city engineer of Ogden City, on file in the City Recorder's office. Competition is restricted to bona fide residents of Ogden City. The city reserves the right to reject any and all bids. Specifications will be furnished on application to the City Recorder. "

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"9. That no specifications had been made by the city prior to this time, but afterwards new specifications were made and filed, providing for the paving, grading, and curbing of said Twenty-Fifth Street, and were adopted by the City Council, which specifications provided for the paving of said street with asphaltum and the sides of the street with sandstone blocks and curbing the street, and the contract which was awarded for the doing of said work provided that the contractor should keep the said street in repair for two years after the work upon the same was finished."

"10. That the plaintiffs in this action were at the date of the filing of the complaint herein, to-wit, May 21, 1892, the owners of the real property mentioned in the complaint; but upon the trial of this action it appeared that John Broom and William Chapman were deceased. Samuel Chapman, administrator of the estate of William Chapman, and Hester Broom, administratrix of the estate of John Broom, were substituted as plaintiffs, and said other parties were still the owners of the property mentioned as belonging to them in the complaint in this action."

"11. That said plaintiffs had, upon filing their complaint, obtained a temporary injunction against the said defendants, but afterwards a demurrer to said complaint was sustained by the said court, and said complaint ordered dismissed, which ruling was afterwards by

the supreme court of the Territory of Utah reversed, and the said cause was ordered remanded, with directions to the defendant to answer said complaint."

"12. That the said council, in spite of the protest hereinbefore mentioned, proceeded, and at the time of the filing of the complaint in this action had, upon its passage, the ordinance attached as Exhibit B to the complaint in this action, and afterwards, on the 22d day of March, 1893, passed the ordinance which is hereto attached, and marked 'Exhibit A,' and made a part of these findings."

"13. That on the 9th day of April, 1894, the plaintiffs filed a supplemental complaint in this action, and asked that Mathias Biel, Joseph Clark, George W. Lashus, Lamoni Grix, Carl Soreason, J. E. Horrocks and Ann Horrocks, J. S. Lewis,

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Lindsey R. Rogers, Patrick Healey, Joseph Morely, Zilpha J. Stephens, W. C. Warren, Almira C. Baker, D. H. Stephens, Mary A. Stephens, Elizabeth Stephens, and the Ogden Union Depot & Railway Company, a corporation, be made parties to this action, which supplemental complaint was ordered by the court to be filed; that at the time of the filing of the supplemental complaint, the said parties (except the Ogden Depot & Railway Company, a corporation) were, and still are, the owners of real estate fronting on said Twenty-Fifth Street (and said plaintiff last named was the owner of real estate assessed with said special tax, but not included in said paving district), included in said paving district, and upon the trial of this action D. H. Peery, Jr., and the Realty Company of Kittery, Maine, a corporation, and J. Pingree and Zilpha J. Stephens, Carrie Lewis, and George W. Murphy were added as parties plaintiff, and were at the date, and still are, the owners of real estate in said district fronting on said Twenty-Fifth Street, the pleadings having been allowed to be amended by the court in accordance with such facts."

"14. That said Ogden City, in pursuance of said ordinance of March 22, 1893, was about to expose the real estate described in the original and supplemental complaints to sale, to satisfy the illegal assessment imposed by said ordinance, and that the parties plaintiff in this action, after their said property had been advertised for sale, and was about to be sold, to satisfy the said illegal assessment then due, paid under protest to said Ogden City, in order to prevent the sale of their property, the following amounts, to-wit: J. C. Armstrong, $95.04; Mathias Biel, $63; Joseph Clark, $48; Samuel Chapman, for the William Chapman estate, $49.20; Joseph Clark, for Clark, Emmet, and Thompson, $30; William Driver, $60; H. I. Griffin, $23.76; Lamoni Grix, $24.90; Ann Horrocks and James E. Horrocks, $124.80; Geo. W. Lashus, $60; H. D. and J. S. Lewis, $82.00; Carrie Lewis, $30; Joseph Morely, $36; Patrick Healey, for Patterson and Healey, $30; Joseph Clark, for Patterson and Clark, $60; L.R. Rogers, $74.04; J. H. Spargo, $48; D. M. Stephens, $14.70; Carl S. Soreason, $20.40; W. C. Warren, $48;

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Geo. M. Kerr, guardian of the Nichols heirs, $160.08; D. H. Peery, Jr., $24; Realty Company, of Kittery, Maine, $748.80; Job Pingree, $35.40; Ogden Union Depot and Railway Company, a corporation, $118.80; Geo. W. Murphey, $154.20."

"15. That said plaintiffs are without any speedy and adequate remedy at law for the recovery of said amounts without a great multiplicity of the suits, and said assessment constitutes a cloud upon the title of the various plaintiffs to their several parcels of realty, and that said city asserts that it will annually, for nine years hereafter, levy assessments upon said real estate for the payment of said paving, and collect the same from the said parties plaintiff, and has already caused to be sold the property of certain of the plaintiffs under and by virtue of said assessment."

"16. That the number of feet frontage in said paving district was 3,300, as the same is described in the ordinance (Ex. A); that the difference between the district described in the ordinance and the district described in the notice of intention consisted of 660 feet of the public property of the said Ogden City, and the lots affected by the said assessment and described in said ordinance varied in depth, some being 75 feet deep, and others 150 feet deep, and that the property owned by the various parties plaintiff in this action varied greatly in depth; that no ascertainment of actual benefits to the property assessed was ever made in order to determine the amount of assessment, or to determine whether the amount assessed exceeded the actual benefits to the property by reason of the improvement, but the cost of the improvement was assessed upon the property abutting and fronting upon Twenty-Fifth Street within the said paving district at an arbitrary rate of $12 per front foot, without any finding or attempt to find the amount of actual benefits to the property; that the said improvement was made without any general plan and form of public improvement having been adopted by the said Ogden City, and the actual benefits to the property assessed for said improvement were not equal and uniform, nor was said assessment equal and uniform. "

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MR. JUSTICE SHIRAS, after stating the facts in the foregoing language, delivered the opinion of the court.

The first question to be determined is whether the amount in controversy is sufficient to give us jurisdiction of the appeal.

Although no motion was made to dismiss the appeal, it was suggested at the argument that, as it was not competent to make up the sum necessary to give this Court jurisdiction by uniting the several sums for which each taxpayer was liable, this was such a case, and that therefore we should dismiss the appeal.

Undoubtedly it is the well settled rule of this Court that, in a suit in equity brought in the circuit court by two or more persons on several and distinct demands, the defendant can appeal to this Court as to those plaintiffs only to each of whom more than five thousand dollars is decreed. Russell v. Stansell, 105 U. S. 303, was a case in its facts much like the present one. There, land within a particular district was assessed for taxation, each owner being liable only for the amount wherewith he was separately charged. A bill of complaint was filed by a number of them praying for an injunction against the collection of the assessment, and from a decree dismissing the bill an appeal was taken to this Court. It was held that, while the complainants were permitted, for convenience and to save expense, to unite in a petition setting forth the grievances of which complaint was made, the object was to relieve each separate owner from the amount for which he personally or his property was found to be accountable, and that such distinct and separate interests could not be united for the purpose of making up the amount necessary to give this Court jurisdiction on appeal.

The same conclusion was reached in Gibson v. Shufeldt, 122 U. S. 27, where the previous cases were fully discussed.

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An examination of this record discloses that none of the complainants save one were assessed with an amount sufficient to have enabled them to bring the case here on appeal, and accordingly, under the doctrine of the cases cited, this appeal must be dismissed as to such parties.

But it appears that the Realty Company of Kittery, a corporation of the State of Maine, a party complainant in the supplemental bill, had been assessed, under the ordinance complained of, for the sum of $748.80, as an installment for one year, and had been compelled to pay the same, and that the city was threatening to continue said proceedings, and to sell the real estate of said company annually for nine years as each installment for a like sum became due. The liability of that company then, under the ordinance and assessment complained of, amounted to the sum of $7,488, and as that company could, had the decree of the court below been adverse to it, have brought the case here on appeal, so, upon the authorities above referred to, it is competent for the defendant city to do the same.

Upon the merits, the first and most important question to consider is whether the City Council had jurisdiction to assess and collect the paving tax.

The proceedings were initiated and the tax sought to be levied and collected under the provisions of chapter 41 of the Session Laws of 1890 of the late Territory of Utah. The thirteenth section thereof reads as follows:

"In all cases before the levy of any taxes for any improvements provided for in this act the city council shall give notice of intention to levy said taxes, naming the purposes for which the taxes are to be levied, which notice shall be published at least twenty days in a newspaper published within said city. Such notice shall describe the improvements so proposed, the boundaries of the district to be affected or benefited by such improvements, the estimated cost of such improvements, and designate the time set for such hearing. If at or before the time so fixed, written objections to such improvements signed by the owners of one-half of the front feet abutting upon that portion of the street, avenue or alley

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to be so improved be not filed with the Recorder, the Council shall be deemed to have acquired jurisdiction to order the making of such improvements."

The bill alleged, the answer admitted, and the trial court found, that the notice of intention to pave in District No. 2, and to defray the expenses thereof by levying a local tax on abutting property owners, was published on March 9, 1892, and in which it was stated that the City Council would on March 29, 1892 at 10 o'clock a.m., hear objections in writing from any and all persons interested in said local assessment.

The sixth finding of the trial court was as follows:

"That on March 29, 1892, at 9:55 o'clock, D. H. Peery and sixty-eight others, including all the plaintiffs in this action and in the supplemental complaint, who were then owners of real property within the said Paving District No. 2, and with a frontage on Twenty-Fifth Street within the said paving district, filed a protest with the said Recorder of said Ogden City protesting against the levying of any local assessment against or upon their property for the purpose of paving said street within said district; that said persons so protesting owned and protested for more than one-half of the whole frontage on said Twenty-Fifth Street within said district, to-wit, 2,414 feet; that, after said hour of 10 a.m. of said day, certain persons who had protested to the amount of 302 1/2 feet withdrew their protests, leaving at all times 2,111 3/4 feet frontage on said Twenty-Fifth Street in said district still protesting against said local assessment; that the total number of feet

fronting on said Twenty-Fifth Street in said paving district, as mentioned in said notice of intention above set forth, was 3,960 feet, of which 660 feet belonged at said time, and still belong, to said Ogden City, and were then, and are now, used for public purposes by said city, and 125 feet of said frontage were then, and are now, the property of the said Ogden City, and was public school property, used and owned for public schools."

It is contended on behalf of the appellant that the City Council, on April 4, 1892, determined that less than half of the whole frontage had protested, and that, as the City Council was acting principally in a proceeding duly inaugurated, such

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action cannot be reviewed in an equitable action to restrain the collection of the tax, but should be reviewed, if at all, by certiorari, in which action the whole record would be removed to the district court.

So far as this proposition involves questions of facts as to the proportion of frontage covered by the protests, we, of course, accept finding on that subject made by the trial court, and approved and adopted by the supreme court of the territory. Stringfellow v. Cain, 99 U. S. 610; Haws v. Victoria Copper Mining Co., 160 U. S. 303.

But the argument seems to be that, when once that question of fact was determined by the City Council, proceeding under the statute, their determination cannot afterwards be challenged in a collateral proceeding; that, while it would not be conclusive in an action by certiorari to set aside the assessment, it is conclusive as against a proceeding by injunction, to prevent the collection of the tax. It is said that the jurisdiction of the City Council attached when, by resolution or ordinance and publication, it gave notice of its intention to make the improvement in question.

We agree with the courts below in thinking that no jurisdiction vested in the City Council to make an assessment or to levy a tax for such an improvement, until and unless the assent of the requisite proportion of the owners of the property to be affected had been obtained, and that the action of the City Council in finding the fact of such assent was not conclusive as against those who duly protested. The fact of consent by the requisite number, in this case, to be manifested by failure to object, is jurisdictional, and in the nature of a condition precedent to the exercise of the power.

"Where the power to pave or improve depends upon the assent or petition of a given number or proportion of the proprietors to be affected, this fact is jurisdictional, and the finding of the city authorities or council that the requisite number had assented or petitioned is not, in the absence of legislative provision to that effect, conclusive. The want of such assent makes the whole proceeding void."

(Dillon's Municipal Corporations, vol. 2, 4th edition, where numerous cases

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from the different states are cited in support of that proposition.)

In Zeigler v. Hopkins, 117 U. S. 683, a similar question was thus stated and decided:

"There is in reality but a single question presented for our consideration in this case, and that is whether, in an action of ejectment brought to recover the possession of lands sold for the nonpayment of taxes levied to defray the expenses of opening Montgomery Avenue generally, and not in obedience to an order of a court of competent jurisdiction to meet some particular liability which had been judicially established, the landowner is estopped from showing, by way of defense, that the petition for the opening presented to the mayor was not signed by the owners of the requisite amount of frontage, and this depends on whether the owner is concluded, (1) by the acceptance of the petition by the mayor and his certificate as to its sufficiency and the action of the board of public works thereunder, or (2) by the judgment of the county court confirming the report of the board of public works."

"This precise question was most elaborately considered by the Supreme Court of California in Mulligan v. Smith, 59 Cal. 206, and decided in the negative, after full argument. With this conclusion we are entirely satisfied. It is supported by both reason and authority."

It is next contended on behalf of the appellant that, if the City Council wrongfully took jurisdiction, in face of the facts shown in or upon the face of its own proceedings, then the tax was absolutely void on its face, and the plaintiffs must seek their remedy at law, and further, if the City Council wrongfully and falsely made its record to show facts sufficient to give it jurisdiction, when such facts never existed, then, in order to get into equity plaintiffs must plead all such facts, and that even in such a case certiorari is, under the laws of Utah, a plain and perfect remedy.

It is doubtless true that the collection of a tax will not be restrained on the ground that it is irregular or erroneous. Errors in the assessment do not render the tax void, and usually there are legal remedies for all such mere irregularities,

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and errors as do not go to the foundation of the tax, and parties complaining must be confined to these. As was held by this Court in Dows v. Chicago, 11 Wall. 108:

"A suit in equity will not lie to restrain the collection of a tax on the sole ground that it is illegal. There must exist, in addition, special circumstances bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant."

But the present case would seem plainly to be one of equitable jurisdiction within the doctrine of that case. What is complained of is no mere irregularity or error in the assessment. As we have seen, there was an entire want of jurisdiction in the Common Council to proceed for want of the assent of the requisite proportion of property owners, and the assessment and tax were therefore void. That there was no plain and adequate remedy by certiorari would seem to be evident. Upon that writ nothing could have been shown by evidence of facts outside of the record. It is true that, in some of the states, provision is made by statute to bring such evidence in, but such is not shown to have been the case here. It is an admitted fact upon the face of the pleadings that the Common Council actually found that the necessary jurisdictional fact existed, and that such a finding was made a matter of record. The plaintiffs alleged in their bill, and the defendants in their answer denied, that the finding of the jurisdictional fact by the Common Council was not a true finding. Such an issue required evidence dehors the record of the proceedings before the council in order to impeach their finding. The record of this case discloses that a large amount of oral evidence was introduced by the complainants, and admitted without objection by the defendants, to show ownership by the protesting parties and to show that the Common Council were mistaken in finding that the requisite number had not protested.

Not only, however, was there a want of an adequate remedy in proceeding by a writ of certiorari, but we think equitable

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jurisdiction was properly invoked to prevent a multiplicity of suits, and also to relieve the plaintiffs from a cloud upon their title.

The finding on this fact of the case was as follows:

"The said plaintiffs are without any speedy and adequate remedy at law for the recovery of said amounts without a great multiplicity of suits, and said assessment constitutes a cloud upon the title of the various plaintiffs to their several parcels of realty, and that said city asserts that it will annually for nine years hereafter lay assessments upon said real estate for the payment of said paving, and collect the same from the said parties plaintiff, and has already caused to be sold the property of certain of the plaintiffs under and by virtue of said assessment."

If a tax is a lien upon lands, it may then constitute a cloud upon the title, and one branch of equity jurisdiction is the removal of apparent clouds upon the title, which may diminish the market value of the land, and possibly threaten a loss of it to the owner. It is doubtless true that it has been held by this and other courts that if the alleged tax has no semblance of legality, and if, upon the face of the proceedings, it is wholly unwarranted by law, or for any reason totally void, as disclosed by a mere inspection of the record, such a tax would not constitute a cloud, and that the jurisdiction which is exercised by courts of equity to relieve parties by removing clouds upon their titles would not attach.

But when the illegality or fatal defect does not appear on the face of the record, but must be shown by evidence aliunde, so that the record would make out a prima facie right in one who should become a purchaser, and the evidence to rebut this case may possibly be lost or become unavailable from death of witnesses, or when the deed given on a sale of the lands for the tax would be presumptive evidence of a good title in the purchaser, so that the purchaser might rely upon the deed for a recovery of the lands until the irregularities were shown, the courts of equity regard the case as coming within their jurisdiction, and have extended relief on the ground that a cloud on the title existed or was imminent.

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Dows v. Chicago, 11 Wall. 108; Hannewinkle v. Georgetown, 15 Wall. 147.

Undoubtedly, for merely irregular assessments, where the authorities have jurisdiction to act, the statutory remedy is also the exclusive remedy. But when the statute, as in this case, leaves open to judicial inquiry all questions of a jurisdictional character, it is well settled that a determination of such questions by an administrative board does not preclude parties aggrieved from resorting to judicial remedies.

Thus, in Emery v. Bradford, 29 Cal. 75, the Supreme Court of California, while holding that the remedy of an owner of a lot in San Francisco assessed for work on a street in front of the same, if dissatisfied with the decision of the superintendent of public streets, is an appeal from such decision to the board of public supervisors, and that, if the proceedings are such that the proper officers have jurisdiction to act, their determinations are valid, and can only be reviewed in the mode provided by the statute, said:

"That where there are acts to be performed of a jurisdictional character essential to the validity of the assessment, it is not to be supposed that the conclusiveness of the decision of the board of supervisors is to extend to that class of cases."

So, in Wright v. Boston, 9 Cush. 233, the Supreme Judicial Court of Massachusetts, in holding that objections to a tax for some defect or irregularity in making the assessment must be taken advantage of by appeal, stated the proposition thus:

"For any defect or irregularity in the course of proceeding in making the assessment -- any ground of objection -- which does not go to show the whole proceeding a nullity, he must take his appeal, if he has one."

In Union Pacific Railway v. Cheyenne, 113 U. S. 516, 113 U. S. 525, this Court, through Mr. Justice Bradley, said:

"But it is contended that the complainant should have sought a remedy at law, and not in equity. It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax, for it must be

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presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremedial damage, or be subjected to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the taxpayer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud cast upon his title by a tax under which a sale could be made would be a grievance which would entitle him to go into a court of equity for relief."

Numerous cases to the same effect may be found cited in Cooley on Taxation 543.

Again, it is contended on behalf of the appellant that the defendants cannot recover the taxes paid by them under protest, because Session Laws of Utah 1890, p. 58, sec. 1, provides that

"any party feeling aggrieved by any such special tax or assessment or proceeding may pay said special tax assessed or levied upon his property, or such installments thereof as may be due at any time before the same shall be delinquent, under protest, and with notice in writing to the city collector that he intends to sue to recover the same, which notice shall particularly state the alleged grievances and grounds thereof, whereupon such party shall have the right to bring a civil action within sixty days thereafter, and not later, to recover so much of the special tax as he shall show to be illegal, inequitable and unjust, the cost to follow the judgment, to be apportioned by the court as may seem proper, which remedy shall be exclusive."

As respects this contention, we agree with the supreme court of the territory that this statute applies to cases where there are only errors, irregularities, overvaluations, or other defects which are not jurisdictional, but that, where the council, not having the jurisdiction to levy the tax, could not proceed under the statute, the taxpayers need not proceed under the statute to recover the money paid. Where the tax was wholly void and illegal, as in this case, the

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statute and its remedies for errors and irregularities have no application.

Our conclusion is that the decree of the Supreme Court of the Territory of Utah, so far as respects the Realty Company of Kittery, is affirmed, and that as to the other appellees the appeal is dismissed.

http://supreme.justia.com/us/214/185/case.html

U.S. Supreme Court
Peck v. Tribune Co., 214 U.S. 185 (1909)
No. 191
Argued April 29, 30, 1909
Decided May 17, 1909
214 U.S. 185

CERTIORARI TO THE CIRCUIT COURT
OF APPEAL FOR THE SEVENTH CIRCUIT

Syllabus

The publication of a portrait with a statement thereunder imports that the original of the portrait makes the statement even if another name be attached to the statement. Wandt v. Hearst's Chicago American, 129 Wis. 419; Morrison v. Smith, 177 N.Y. 366, approved on this point.

Publication of the portrait of one person with statements thereunder as of another, by mistake, and without knowledge of whom the portrait really is, is not an excuse. A libel is harmful on its face, and one publishing manifestly hurtful statements concerning an individual does so at his peril; and, if there is no justification other than that it was news or advertising, he is liable if the statements are false or are true only of some one else. See Morasse v. Brochu, 151 Mass. 567.

An unprivileged falsehood need not entail universal hatred to constitute a cause of action; to be libelous, a statement need not be that the person libelled has done or said something that everyone, or even a majority of persons in the community, may regard as discreditable; it is sufficient if the statement hurts the party alluded to in the estimation of an important and respectable part of the community.

A woman whose portrait is published in connection with an endorsement of a brand of whiskey may be seriously hurt in her standing with a considerable portion of her neighbors, and she is entitled to prove her case and go to the jury.

Quaere, and not decided whether the unauthorized publication of a person's likeness is a tort per se.

154 F.3d 0 reversed.

The facts are stated in the opinion.

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MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an action on the case for a libel. The libel alleged is found in an advertisement printed in the defendant's newspaper, The Chicago Sunday Tribune, and, so far as is material, is as follows:

"Nurse and Patients Praise Duffy's -- Mrs. A. Schuman, One of Chicago's Most Capable and Experienced Nurses, Pays an Eloquent Tribute to the Great Invigorating, Life-Giving, and Curative Properties of Duffy's Pure Malt Whisky."

Then followed a portrait of the plaintiff, with the words, "Mrs. A. Schuman," under it. Then, in quotation marks,

"After years of constant use of your Pure Malt Whisky, both by myself and as given to patients in my capacity as nurse, I have no hesitation in recommending it as the very best tonic and stimulant for all local and run-down conditions,"

etc., etc., with the words, "Mrs. A. Schuman, 1576 Mozart St., Chicago, Ill.," at the end, not in quotation marks, but conveying the notion of a signature, or at least that the words were hers. The declaration alleged that the plaintiff was not Mrs. Schuman, was not a nurse, and was a total abstainer from whisky and all spirituous liquors. There was also a count for publishing the plaintiff's likeness without leave. The defendant pleaded not guilty. At the trial, subject to exceptions, the judge excluded the plaintiff's testimony in support of her allegations just stated, and directed a verdict for the defendant. His action was sustained by the circuit court of appeals, 154 F.3d 0.

Of course, the insertion of the plaintiff's picture in the place and with the concomitants that we have described imported that she was the nurse and made the statements set forth, as

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rightly was decided in Wandt v. Hearst's Chicago American, 129 Wis. 419, 421; Morrison v. Smith, 177 N.Y. 366. Therefore, the publication was of and concerning the plaintiff, notwithstanding the presence of another fact, the name of the real signer of the certificate, if that was Mrs. Schuman, that was inconsistent, when all the facts were known, with the plaintiff's having signed or adopted it. Many might recognize the plaintiff's face without knowing her name, and those who did know it might be led to infer that she had sanctioned the publication under an alias. There was some suggestion that the defendant published the portrait by mistake, and without knowledge that it was the plaintiff's portrait, or was not what it purported to be. But the fact, if it was one, was no excuse. If the publication was libelous, the defendant took the risk. As was said of such matters by Lord Mansfield, "Whenever a man publishes, he publishes at his peril." The King v. Woodfall,

Lofft, 776, 781. See further Hearne v. Stowell, 12 Ad. & El. 719, 726; Shepheard v. Whitaker, L.R. 10 C.P. 502; Clarke v. North American Co., 203 Pa. 346. The reason is plain. A libel is harmful on its face. If a man sees fit to publish manifestly hurtful statements concerning an individual without other justification than exists for an advertisement or a piece of news, the usual principles of tort will make him liable if the statements are false, or are true only of someone else. See Morasse v. Brochu, 151 Mass. 567, 575.

The question, then, is whether the publication was a libel. It was held by the circuit court of appeals not to be, or at most, to entitle the plaintiff only to nominal damages, no special damage being alleged. It was pointed out that there was no general consensus of opinion that to drink whisky is wrong, or that to be a nurse is discreditable. It might have been added that very possibly giving a certificate and the use of one's portrait in aid of an advertisement would be regarded with irony, or a stronger feeling, only by a few. But it appears to us that such inquiries are beside the point. It may

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be that the action for libel is of little use, but, while it is maintained, it should be governed by the general principles of tort. If the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of a majority vote.

We know of no decision in which this matter is discussed upon principle. But obviously an unprivileged falsehood need not entail universal hatred to constitute a cause of action. No falsehood is thought about or even known by all the world. No conduct is hated by all. That it will be known by a large number, and will lead an appreciable fraction of that number to regard the plaintiff with contempt, is enough to do her practical harm. Thus, if a doctor were represented as advertising, the fact that it would affect his standing with other of his profession might make the representation actionable, although advertising is not reputed dishonest, and even seems to be regarded by many with pride. See Martin v. The Picayune, 115 La. 979. It seems to us impossible to say that the obvious tendency of what is imputed to the plaintiff by this advertisement is not seriously to hurt her standing with a considerable and respectable class in the community. Therefore it was the plaintiff's right to prove her case and go to the jury, and the defendant would have got all that it could ask if it had been permitted to persuade them, if it could, to take a contrary view. Culmer v. Canby, 101 Fed.195, 197; Twombly v. Monroe, 136 Mass. 464, 469. See Gates v. New York Recorder Co., 155 N.Y. 228.

It is unnecessary to consider the question whether the publication of the plaintiff's likeness was a tort per se. It is enough for the present case that the law should at least be prompt to recognize the injuries that may arise from an unauthorized use in connection with other facts, even if more subtlety is needed to state the wrong than is needed here. In this instance, we feel no doubt.

Judgment reversed.

http://supreme.justia.com/us/167/624/case.html

U.S. Supreme Court
Peck v. Heurich, 167 U.S. 624 (1897)
No. 289
Argued April 26-27, 1897
Decided May 24, 1897
167 U.S. 624

ERROR TO THE COURT OF APPEALS
OF THE DISTRICT OF COLUMBIA

A judgment cannot be affirmed upon a ground not taken at the trial unless it is made clear beyond doubt that this could not prejudice the rights of the plaintiff in error.

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By the common law, prevailing in the District of Columbia, an agreement by an attorney at law to prosecute at his own expense, a suit to recover land in which he personally has and claims no title or interest, present or contingent, in consideration of receiving a certain proportion of what he may recover is unlawful and void for champerty.

A deed conveying lands in the District of Columbia to an attorney at law and another person in trust that the grantees should sue for, take possession of, and sell the lands, and that the attorney should retain one-third of the proceeds after paying out of it all the costs and expenditures, and that the other two-thirds, clear of any costs or charges whatever, should be paid to the grantors, is void for champerty, and will not sustain an action by the grantees to recover part of the lands from third persons.

This was an action of ejectment brought September 20, 1892, in the Supreme Court of the District of Columbia by Ezra J. Peck and Leo Simmons, trustees, against Christian Heurich, to recover land in the District of Columbia. The defendant pleaded the general issue.

At the trial, the plaintiffs, as stated in the bill of exceptions, offered in evidence a deed dated and recorded November 8, 1828, from William A. Bradley purporting to convey to Ann Bartlett, in fee simple, the real estate described in the declaration, together with other real estate, in consideration of the sum of $2,450,

"and thereupon counsel for plaintiffs announced to the court that they proposed to prove that the plaintiffs and defendant traced their respective titles to the land in controversy from said Ann Bartlett as a common source of title, which defendant, by his counsel, then and there denied."

The plaintiffs then called three witnesses who testified that Anna L. Peck and ten other persons named were the heirs of Ann Bartlett. These witnesses were an uncle and aunt of Anna L. Peck, and her husband, Ezra J. Peck. Upon their cross-examination, it appeared that the heirs of Ann Bartlett were first informed that they had any title to these lands by Leo Simmons in 1890.

The plaintiffs then offered in evidence the record of a deed dated October 20, 1891, from the persons before shown to be the heirs of Ann Bartlett, and from the husbands and wives of those who were married, describing themselves as all the heirs of Ann Bartlett, and reciting that they executed this

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deed, "believing it to be for their interest and convenience to do so," and purporting, for the consideration of five dollars, to convey to Peck and Simmons, trustees, in fee simple, all the real estate in the District of Columbia of which Ann Bartlett died seised, and especially the land conveyed to her by Bradley by the deed of November, 8, 1828. The conveyance by the heirs of Ann Bartlett to the plaintiffs was expressed to be upon the following trusts:

"In trust, nevertheless, to and for the following uses and purposes, namely: to take and hold possession of the said real estate, and to institute and prosecute to a final conclusion in their own names any and every action, suit, or proceeding, in law and in equity, or otherwise however, for the possession of said real estate, if in their judgment expedient, and to compromise, pay for, and purchase any outstanding claim or title against said real estate, if in their judgment expedient, and generally to do any and every thing in their judgment expedient which may be necessary to vest in them a perfect and unencumbered title in fee simple to, and the recovery of possession of, said real estate, and upon the vesting in them of a perfect and unencumbered title in fee simple, and the recovery of the possession of said real estate, or before and without the same, and without such proceedings, acts, and doings as they may think best, and at any time, to sell and convey said real estate, or any part thereof, in fee simple, or in any quantity of estate or estates, to any person or persons, and for such price and upon such terms as they may in their best judgment consider for the interest of the parties concerned, and upon such sale or sales to convey the title sold to the purchaser or purchasers without liability on the part of the purchaser or purchasers to see to the application of the purchase money, and, out of the purchase moneys or the full amount said property may sell for, it is distinctly understood between the parties to this indenture that the said Leo Simmons, one of the trustees or parties of the second part, shall retain 33 1/3 percent, or one-third, after paying all expenses, costs, and expenditures of the said parties of the second part in the execution of this trust out of the same, and the

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other two-thirds, or 66 2/3 percent of said purchase money, clear of any cost or charges whatever, to pay the heirs of said Ann Bartlett, their heirs or assigns, according to their respective interests, and it is further understood between the parties to this indenture that should Leo Simmons die after suit has been begun for the recovery of any said property, and before a settlement shall have been made, then in that case, the court having jurisdiction shall appoint a trustee to act in his stead, and pay over to the heirs or assigns of the said Simmons such profits as he would have been entitled to after paying said costs and expenditures."

The plaintiffs also offered in evidence records of deeds dated June 22, 1892, of the same real estate from Mr. and Mrs. Peck to H. Austin Clark, as trustee, and from Clark to Peck and Simmons, as trustees under the deed of October 20, 1891.

The defendant objected to the admission of the records of the deeds of October 20, 1891, and June 22, 1892, upon three grounds -- first, that they were not recorded until after this suit was brought; second, that the deed of October 20, 1891, was not recorded within six months after its date; third, that both deeds were champertous on their face.

The presiding judge sustained the third objection and declined to admit records of the deeds in evidence, on the ground that they were champertous on their face, and expressed no opinion upon the other objections.

The bill of exceptions stated that

"thereupon the plaintiffs' counsel announced to the court that the refusal of the court to admit the aforesaid records of said three deeds in evidence broke the continuity of plaintiffs' title, and that they would therefore rest their case, whereupon the court instructed the jury to render a verdict for the defendant, which was done."

Judgment was rendered on the verdict, and the plaintiffs duly excepted to the ruling excluding the deeds, and to the instruction to return a verdict for the defendant, and appealed to the Court of Appeals, which, without considering the first and second objections made to the deeds at the trial, affirmed the judgment upon two grounds: first, that the deeds were champertous; second, that the plaintiffs had not introduced

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any evidence that William A. Bradley, the grantor of Ann Bartlett, had any title, or was ever in possession, or had any right to the possession, or that the state had ever granted the property, and the plaintiffs therefore had not been prejudiced by the exclusion of the deeds, even if they were valid. 6 App.D.C. 273. The plaintiffs sued out this writ of error.

MR. JUSTICE GRAY, after stating the facts in the foregoing language, delivered the opinion of the Court.

One ground taken in the opinion of the Court of Appeals, and at the argument in this Court in support of the judgment for the defendant, was that, independently of the question of the validity of the deeds to the plaintiffs, they could not maintain this action because they had not complied with the rule of the law of Maryland, in force in the District of Columbia, by which, in order to maintain an action of ejectment, the plaintiff must show that he has the legal title in the land, and the right of possession, and cannot establish this without first showing that the land had been granted by the state, unless both parties are shown to claim title from the same source. Mitchell v. Mitchell, 1 Md. 44; Anderson v. Smith, 2 Mackey 275.

But this ground is not open to the defendant upon the record. No such objection to the introduction of the deed in evidence was made at the trial. The course of things at the trial, so far as regards this point, was as follows: the plaintiffs gave in evidence, without objection, the deed from William A. Bradley to Ann Bartlett, and said in open court that they proposed to prove the fact that the plaintiffs and the defendant traced their respective titles to the land in controversy from Ann Bartlett as a common source of title, and

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the defendant denied that fact. The plaintiffs, by way of proving their own title under Ann Bartlett, which was a necessary step towards proving the fact so controverted, introduced evidence that the grantors in the deed of October 20, 1891, were the heirs of Ann Bartlett, and then offered that deed in evidence, and, upon the court's ruling it out as void for champerty, declared to the court that this ruling broke the continuity of their title, and that they therefore rested their case. The plaintiffs at the outset having given notice of their intention to prove that Ann Bartlett was the common source of the titles both of themselves and of the defendant, and having been prevented from tracing their own title from her, any amount of proof that the defendant derived his title from her became wholly immaterial, and there was no occasion for the plaintiffs to make a specific offer of such proof. It was more respectful to the presiding judge, and sufficient to preserve the plaintiffs' rights in the appellate court, to take the course which they did -- of resting their case, and taking an exception to the exclusion of evidence without which they could not possibly recover. The plaintiffs, by reason of the ruling excluding the deed

to them, had never been permitted to introduce the first step in the proof of their case, and, so long as that ruling was unreversed, had no interest in offering any evidence of the defendant's source of title. It cannot be assumed that the plaintiffs would not have introduced such evidence if the court had given them a standing in the case which would have made it avail them to do so. A judgment cannot be affirmed upon a ground not taken at the trial unless it is made clear beyond doubt that this could not prejudice the rights of the plaintiff in error. 72 U. S. 808; Vicksburg & Meridian Railroad v. O'Brien, 119 U. S. 99, 119 U. S. 103; Jones v. Sisson, 6 Gray 288; Jones v. Wolcott,@ 15 Gray 541.

We are then brought to the consideration of the principal question in the case -- whether the deeds to the plaintiffs were void for champerty.

In many parts of the United States, and probably in Maryland, and consequently in the District of Columbia, the ancient

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English statutes of champerty and maintenance have either never been adopted or have become obsolete so far as they prohibited all conveyances of lands held adversely. 4 Kent, Com. 447; Roberts v. Cooper, 20 How. 467; Schaferman v. O'Brien, 28 Md. 565; Matthews v. Hevner, 2 App.D.C. 349.

But according to the common law as generally recognized in the United States, wherever it has not been modified by statute, and certainly as prevailing in the District of Columbia, an agreement by an attorney at law to prosecute at his own expense a suit to recover land in which he personally has and claims no title or interest, present or contingent, in consideration of receiving a certain proportion of what he may recover is contrary to public policy, unlawful, and void as tending to stir up baseless litigation. 4 Kent Com. 447, note; McPherson v. Cox, 96 U. S. 404, 96 U. S. 416; Stanton v. Haskin, 1 MacArthur 558; Johnson v. Van Wyck, 4 App.D.C. 294; Brown v. Beauchamp, 5 T. B. Monroe 413; Belding v. Smythe, 138 Mass. 530; Stanley v. Jones, 7 Bing. 369, 377; s.c., 5 Moore & Payne 193, 206.

The trust declared in the deed under which these plaintiffs claim title is to take possession of the real estate, to bring all suits necessary for that purpose, to pay off outstanding claims if deemed by the trustees to be expedient, and to do everything necessary to vest in them a perfect and unencumbered title and the possession of the lands, and after getting, with or without suit, the title and possession, to sell and convey the lands. The deed states that "it is distinctly understood between the parties" that, out of the purchase money received,

"Leo Simmons, one of the trustees or parties of the second part, shall retain 33 1/3 percent, or one-third, after paying all expenses, costs, and expenditures of the said parties of the second part in the execution of the trust out of the same;"

that the other two-thirds of the purchase money, "clear of any costs or charges whatever," shall be paid to the heirs of Ann Bartlett, their heirs or assigns, according to their respective interests, and

"that, should Leo Simmons die after suit has been begun for the recovery of any said property, and before a

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settlement shall have been made, then in that case the court having jurisdiction shall appoint a trustee to act in his stead, and pay over to the heirs or assigns of the said Simmons such profits as he would have been entitled to after paying said costs and expenditures."

The deed clearly expresses the intention of the parties that Simmons shall receive one-third, and the grantors two-thirds, of the gross proceeds of the real estate conveyed. The intention that all costs and expenses of obtaining title and possession of the lands, by suit or purchase or otherwise, shall be borne wholly by Simmons, and in no part by the grantors, is clearly shown, in the first place, by the stipulation that he shall receive one-third of the proceeds "after paying all expenses, costs, and expenditures of" the trustees in the execution of the trust "out of the same" -- evidently meaning out of his third part. But any possible doubt which might arise upon this clause, taken by itself, is removed by the next clause, which stipulates that the two other thirds of the proceeds shall be paid to the heirs of Ann Bartlett, "clear of any costs or charges whatever," as well as by the final clause, which stipulates that, should Simmons die after bringing suit and before making a settlement, there shall be paid to his heirs or assigns "such profits as he would have been entitled to after paying said costs and expenditures."

Upon the nature and effect of the agreement made by the attorney with the grantors in this deed this Court concurs in the opinion expressed by the Court of Appeals of the District of Columbia, as follows:

"He agreed to pay the costs of the litigation. He agreed to take as his compensation a part of the land which was the subject of the suit, or a part of the proceeds of sale of it, which amounts to the same thing. And his compensation was not a fixed sum of money, payable out of the proceeds of sale, but a contingent share of the very thing to be recovered, or of the money that might be received by way of settlement or compromise, and the character of the

enterprise, on the part of the attorney, was so plainly a speculative one that in the deed the net results to him are mentioned as 'profits.' If this be not champerty, we fail to see

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wherein there can be champerty. . . . We must regard an agreement by any attorney to undertake the conduct of a litigation on his own account, to pay the costs and expenses thereof, and to receive as his compensation a portion of the proceeds of the recovery, or of the thing in dispute as obnoxious to the law against champerty, and that this was the character of the arrangement in the present case we are entirely satisfied. The very thing in dispute was conveyed, or sought to be conveyed, in advance to the attorney and an associate for the express purpose of enabling the attorney to conduct the litigation on his own account and at his own cost and expense, and in consideration of this he was to retain at the end of the litigation one-third of what had been conveyed to him, and was to account to his clients for the other two-thirds. This was certainly an agreement on his part to take as his compensation a part of the thing in dispute, and it does not alter the case at all that the land, when recovered, was to be sold. That was only the practical mode for a division of proceeds between the parties to the enterprise."

6 App.D.C. 283-284.

The deed, as appears upon its face, having been made to carry out the champertous agreement, was unlawful and passed no title, and the joinder of Peck as co-trustee in the deed could not give it validity.

The result is that this action cannot be maintained by the trustees claiming under the deed, although a similar action might have been maintained by the grantors in their own names. Burnes v. Scott, 117 U. S. 582, 117 U. S. 590, and Hilton v. Woods, L.R. 4 Eq. 432, 439, there cited.

Judgment affirmed.

http://supreme.justia.com/us/72/497/case.html

U.S. Supreme Court
Hansbrough v. Peck, 72 U.S. 5 Wall. 497 497 (1866)

Syllabus

1. Where in part performance of an agreement a party has advanced money, or done an act, and then stops short and refuses to proceed to its conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, such first-named party will not be permitted to recover back for what has thus been advanced or done.

2. By the statutes of Illinois as existing in January, 1857, a contract for a rate of interest exceeding six percent, did not invalidate the contract.

3. Where a parol promise is in substance but the same with a written one which the party is already bound to perform, and where all that is done on the former is in fact but in fulfillment of the latter, no new consideration passing between the parties, the existence or enforcement of the parol contract cannot be set up as a rescission of the written one.

In January, 1857, Hansbrough and Hardin agreed with one Peck to buy certain lots in Chicago for $134,000. The purchase money was made payable in nine installments, each being for $4,300 except the last, payable April 28, 1861, which was for $90,000. The lots had on them at the time two wooden houses and a barn.

By the contract it was agreed

"that the prompt performance of the covenants, and payment of the money shall be a condition precedent, and that TIME IS OF THE ESSENCE OF THE CONDITION."

And also

"that in case default shall be made in the payment of any or either of said notes or any part thereof at the time or any of the times above specified for the payment thereof, for thirty days thereafter, the agreement, and all the preceding provisions thereof, shall be null and void, and no longer binding, at the option of said vendor. And all the payments which shall have been made absolutely and forever forfeited to said vendor, or at his election the covenants and liability of the purchasers shall continue and remain obligatory."

And also

"That in case of default in the payments promptly on the days named by the purchasers, that it is also the right

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of said vendor to declare the contract ended and prior payments forfeited, and to consider all parties in the possession of the premises at the time of such default tenants at will of said vendor at a rent equal to ten percent on the whole amount of said purchase money. And the vendor from that time is declared to be restored, with the possession and right of possession in the premises, to the exercise of all powers, rights, and remedies provided by law or equity to collect such rent, or remove such tenants, the same as if the relation of landlord and tenant were created by an original, absolute lease for that purpose on a special rent payable quarterly on a tenure at will, and that the said tenants will not commit or suffer any waste or damage to said premises or the appurtenances, but, on the termination of such tenancy will deliver the premises in as good order and repair as they were at the commencement of such tenancy."

By a statute of Illinois: [Footnote 1]

"The rate of interest upon the loan or forbearance of any money, goods, or things in action, shall continue to be six dollars upon one hundred dollars for one year."

"Any person who, for any such loan, discount, or forbearance, shall pay or deliver any greater sum or value than is above allowed to be received may recover in an action against the person who shall have taken or received the same threefold the amount of money so paid, or value delivered above the rate aforesaid, either by an action of debt in any court having jurisdiction thereof, or by bill in chancery in the circuit court, which court is hereby authorized to try the same, provided said action shall be brought or bill filed within two years from when the right thereto accrued."

Under this contract and in the state of the law above stated, the purchasers went into possession and laid out $18,000 in improving the property by building on it. They paid $10,000 also on account of the notes, and about two years' interest. After erecting these improvements, and

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paying the two years' interest, the purchasers, becoming embarrassed or dissatisfied with their contract, were desirous of surrendering it, but were persuaded by the vendor to remain, and they paid the interest for another year, 1859, making in all about $28,000 of interest paid. The last payment of interest was made 31 January, 1860. After that, no further payments were made, and on the 1st April, 1861, the vendor filed a bill in chancery in one of the state courts to prevent the threatened removal of the buildings from the premises and to get possession of the property. On the 23d August, 1862, a decree was entered to this effect and the vendor put into the possession. The decree restrained the purchasers from removing the buildings, declaring them to be fixtures, and for the default in the payment of the purchase money the plaintiff, the vendor, was put in possession and all the tenants were required to attorn to him. It declared further that he was entitled to the estate and interest in the lots the same as before the contract. And to remove any doubt in the title by reason of the contract and the default in the payments, it declared that the premises should be discharged from any encumbrance or charge in respect to the contract of sale and that the purchasers or anyone claiming through them should be forever debarred from having any estate or interest or right of possession in the premises, having lost the same by willful default, and that the articles of agreement were to be held, in relation to the title and possession, as of no effect and void as it respected the vendor and all claiming under or through him.

In this state of facts, the purchasers filed, August 23, 1862, a bill in the Circuit Court for the Northern District of Illinois to recover back the moneys paid upon the contract and also for the value of improvements made on the premises, the ground of the bill being that the contract had been rescinded by the defendant.

In regard to the matter before mentioned of the purchasers' having been desirous of surrendering, and of being persuaded by the vendor to stay, the bill alleged:

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"That the contract became and was so intolerably oppressive that in November, 1859, they proposed a relinquishment of the same unless it should be modified or made less rigorous and exacting. That the vendor thereupon proposed to them that if they would not abandon the same, but would pay certain taxes, assessments, and charges, and interest then accrued, the whole amounting to ten thousand dollars, within sixty days from the first day of December, 1859, he would thereafter so accommodate and indulge them that they could carry on said contract, and to this end he would, until there should be a revival of trade and business in Chicago, take the net income from the property over and above taxes and insurance in lieu of interest on the purchase money until such revival of trade and business. That your orators accepted said proposition, and in accordance with his request, in order to comply with the proposition, sent an agent from Kentucky to reside in Chicago aforesaid, to take charge of the property and collect and get in the rents and pay the same to said vendor, less the taxes and insurance. And also your orators, on or about the

31st day of January, A.D. 1860, paid said taxes, assessments, and other charges and accrued interest, the whole amounting to ten thousand dollars as aforesaid, in compliance with his said proposition, and thereafter were ready and willing and, from time to time offered to pay the vendor the net income from the premises after deducting the taxes and insurance as aforesaid; but he declined to abide by his said proposition, and thereafter continued to enforce the said contract of January 29, 1857, and all its provisions, with the most exacting rigor, notwithstanding there was no considerable increase of income from the property nor a revival of trade and business in Chicago."

Upon this case, which in substance was the one set forth, the defendant in the case, the original vendor, demurred, and the court below dismissed the bill.

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http://www.oyez.org/cases/1792-1850/1798/1798_0/
Calder v. Bull
Citation: 3 U.S. 386 (1798)
Petitioner: Calder
Respondent: Bull
Oral Argument: Thursday, February 8, 1798
Decision: Wednesday, August 8, 1798

Mr. and Mrs. Caleb Bull, the stated beneficiaries of the will of Norman Morrison, were denied an inheritance by a Connecticut probate court. When the Bulls attempted to appeal the decision more than a year and a half later, they found that a state law prohibited appeals not made within 18 months of the original ruling. The Bulls persuaded the Connecticut legislature to change the restriction, which enabled them to successfully appeal the case. Calder, the initial inheritor of Morrison's estate, took the case to the Supreme Court.

Question
Was the Connecticut legislation a violation of Article 1, Section 10, of the Constitution, which prohibits ex post facto laws?

Conclusion
In a unanimous decision, the Court held that the legislation was not an ex post facto law. The Court drew a distinction between criminal rights and "private rights," arguing that restrictions against ex post facto laws were not designed to protect citizens' contract rights. Justice Chase noted that while all ex post facto laws are retrospective, all retrospective laws are not necessarily ex post facto. Even "vested" property rights are subject to retroactive laws.

The Oyez Project, Calder v. Bull, 3 U.S. 386 (1798),
available at: http://www.oyez.org/cases/1792-1850/1798/1798_0/

http://supreme.justia.com/us/3/386/case.html

U.S. Supreme Court
Calder v. Bull, 3 U.S. 3 Dall. 386 386 (1798)

N ERROR FROM THE
STATE OF CONNECTICUT

Syllabus

A resolution or law of the State of Connecticut setting aside a decree of a court and granting a new trial to be had before the same court is not void under the Constitution as an ex post facto law.

The Legislature of Connecticut, on the second Thursday of May, 1795, passed a resolution or law which set aside a decree of the Court of Probate for Hartford County made 21 March, 1793,

disapproving a£ the will of N.M. and refusing to record the will. The act of the legislature authorized a new hearing of the case before the court of probate, and an appeal to the superior court. Afterwards the will of N.M. was confirmed by the court of probate and by the Superior Court at Hartford;, and on an appeal to the Supreme Court of Errors of Connecticut the judgment of the superior court was confirmed. More than eighteen months had elapsed from the first decree of the court of probate, during which the right of appeal had been lost, and there was no law of Connecticut, before the passing of the special act of the legislature, by which a new hearing of the case could have been obtained. Held that the act of May, 1795, was not an ex post facto law prohibited by the Constitution of the United States.

CHASE, JUSTICE.

The decision of one question determines (in my opinion) the present dispute. I shall therefore state from the record no more of the case than I think necessary for the consideration of that question only.

The Legislature of Connecticut, on the 2d Thursday of May, 1795, passed a resolution or law which, for the reasons assigned, set aside a decree of the Court of Probate for Harford on 21 March 1793, which decree disapproved of the will of Normand Morrison (the grandson) made 21 August, 1779, and refused to record the said will, and granted a new hearing by the said court of probate with liberty of appeal therefrom in six months. A new hearing was had in virtue of this resolution or law before the said court of probate, which, on 27 July, 1795, approved the said will and ordered it to be recorded. At August, 1795, appeal was then had to the Superior Court at Hartford, which, at February term, 1796, affirmed the decree of the court of probate. Appeal was had to the Supreme Court of Errors of Connecticut, which, in June, 1796, adjudged that there were no errors. More than 18 months elapsed from the decree of the court of probate (on 1 March, 1793) and thereby Caleb Bull and wife were barred of all right

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of appeal by a statute of Connecticut. There was no law of that state whereby a new hearing or trial before the said court of probate might be obtained. Calder and wife claim the premises in question, in right of his wife as heiress of N. Morrison, physician; Bull and wife claim under the will of N. Morrison, the grandson.

The counsel for the plaintiffs in error contend that the said resolution or law of the Legislature of Connecticut granting a new hearing in the above case is an ex post facto law, prohibited by the Constitution of the United States; that any law of the federal government or of any of the state governments contrary to the Constitution of the United States is void, and that this Court possesses the power to declare such law void.

It appears to me a self-evident proposition that the several state legislatures retain all the powers of legislation delegated to them by the state constitutions which are not expressly taken away by the Constitution of the United States. The establishing of courts of justice, the appointment of judges, and the making regulations for the administration of justice within each state according to its laws on all subjects not entrusted to the federal government appears to me to be the peculiar and exclusive province and duty of the state legislatures. All the powers delegated by the people of the United States to the federal government are defined, and no constructive powers can be exercised by it, and all the powers that remain in the state governments are indefinite except only in the Constitution of Massachusetts.

The effect of the resolution or law of Connecticut above stated is to revise a decision of one of its inferior courts, called the Court of Probate for Hartford, and to direct a new hearing of the case by the same court of probate, that passed the decree against the will of Normand Morrison. By the existing law of Connecticut, a right to recover certain property had vested in Calder and wife (the appellants) in consequence of a decision of a court of justice, but, in virtue of a subsequent resolution or law and the new hearing thereof and the decision in consequence, this right to recover certain property was divested, and the right to the property declared to be in Bull and wife, the appellees. The sole inquiry is whether this resolution or law of Connecticut, having such operation, is an ex post facto law within the prohibition of the federal Constitution.

Whether the legislature of any of the states can revise and correct by law a decision of any of its courts of justice, although not prohibited by the constitution of the state, is a question of very great importance, and not necessary now to be determined, because the resolution or law in question does not go so far. I cannot subscribe to the omnipotence of a state

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legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the constitution or fundamental law of the state. The people of the United States erected their constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact, and as they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the

very nature of our free republican governments that no man should be compelled to do what the laws do not require nor to refrain from acts which the laws permit. There are acts which the federal or state legislature cannot do without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power, as to authorize manifest injustice by positive law or to take away that security for personal liberty or private property for the protection whereof of the government was established. An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact and on republican principles must be determined by the nature of the power on which it is founded.

A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or in other words for an act which when done was in violation of no existing law; a law that destroys or impairs the lawful private contracts of citizens; a law that makes a man a judge in his own cause, or a law that takes property from A. and gives it to B. It is against all reason and justice for a people to entrust a legislature with such powers, and therefore it cannot be presumed that it has done it. The genius, the nature, and the spirit of our state governments amount to a prohibition of such acts of legislation, and the general principles of law and reason forbid them. The legislature may enjoin, permit, forbid, and punish; It may declare new crimes and establish rules of conduct for all its citizens in future cases; it may command what is right and prohibit what is wrong, but it cannot change innocence into guilt or punish innocence as a crime or violate the right of an antecedent lawful private contract or the right of private property. To maintain that our federal or state legislature possesses such powers if it had not been expressly restrained would,

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in my opinion, be a political heresy altogether inadmissible in our free republican governments.

All the restrictions contained in the Constitution of the United States on the power of the state legislatures were provided in favor of the authority of the federal government. The prohibition against its making any ex post facto laws was introduced for greater caution, and very probably arose from the knowledge that the Parliament of Great Britain claimed and exercised a power to pass such laws under the denomination of bills of attainder or bills of pains and penalties, the first inflicting capital and the other less punishment. These acts were legislative judgments and an exercise of judicial power. Sometimes they respected the crime by declaring acts to be treason which were not treason when committed; at other times they violated the rules of evidence (to supply a deficiency of legal proof) by admitting one witness when the existing law required two, by receiving evidence without oath or the oath of the wife against the husband, or other testimony which the courts of justice would not admit; at other times they inflicted punishments where the party was not by law liable to any punishment, and in other cases they inflicted greater punishment than the law annexed to the offense. The ground for the exercise of such legislative power was this, that the safety of the kingdom depended on the death or other punishment of the offender, as if traitors, when discovered, could be so formidable or the government so insecure! With very few exceptions, the advocates of such laws were stimulated by ambition or personal resentment and vindictive malice. To prevent such and similar, acts of violence and injustice, I believe, the federal and state legislatures were prohibited from passing any bill of attainder or any ex post facto law.

The case of the Earl of Strafford in 1641.

The case of Sir John Fenwick in 1696.

The banishment of Lord Clarendon, 1669, 19 Ca. 2, c. 10, and of the Bishop of Atterbury in 1723, 9 Geo. I, c. 17.

The Coventry Act, in 1670, 22 & 23 Car. II, c. 1.

The Constitution of the United States, Article I, section 9, prohibits the Legislature of the United States from passing any ex post facto law, and in section 10 lays several restrictions on the authority of the legislatures of the several states, and among them "that no state shall pass any ex post facto law."

It may be remembered that the legislatures of several of the states, to-wit, Massachusetts, Pennsylvania, Delaware, Maryland, and North and South Carolina, are expressly prohibited, by their state Constitutions from passing any ex post facto law.

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I shall endeavor to show what law is to be considered an ex post facto law within the words and meaning of the prohibition in the federal Constitution. The prohibition "that no state shall pass any ex post facto law" necessarily requires some explanation, for naked and without explanation it is unintelligible and means nothing. Literally, it is only that a law shall not be passed concerning and after the fact or thing done or action committed. I would ask, what fact, of what nature, or kind, and by whom done? That Charles I, King of England, was beheaded, that Oliver Cromwell was Protector of England, that Louis XVI, late King of France, was guillotined, are all facts that have happened, but it would be nonsense to suppose that the states were prohibited

from making any law after either of these events and with reference thereto. The prohibition in the letter is not to pass any law concerning and after the fact, but the plain and obvious meaning and intention of the prohibition is this -- that the legislatures of the several states shall not pass laws after a fact done by a subject or citizen which shall have relation to such fact and shall punish him for having done it. The prohibition, considered in this light, is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts having a retrospective operation. I do not think it was inserted to secure the citizen in his private rights of either property or contracts. The prohibitions not to make anything but gold and silver coin a tender in payment of debts and not to pass any law impairing the obligation of contracts were inserted to secure private rights, but the restriction not to pass any ex post facto law was to secure the person of the subject from injury or punishment in consequence of such law. If the prohibition against making ex post facto laws was intended to secure personal rights from being affected, or injured by such laws, and the prohibition is sufficiently extensive for that object, the other restraints I have enumerated were unnecessary, and therefore improper, for both of them are retrospective.

I will state what laws I consider ex post facto laws within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law and which was innocent when done, criminal and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender.

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All these and similar laws are manifestly unjust and oppressive. In my opinion, the true distinction is between ex post facto laws and retrospective laws. Every ex post facto law must necessarily be retrospective, but every retrospective law is not an ex post facto law. The former only are prohibited. Every law that takes away or impairs rights vested agreeably to existing laws is retrospective, and is generally unjust and may be oppressive, and it is a good general rule that a law should have no retrospect; but there are cases in which laws may justly, and for the benefit of the community and also of individuals, relate to a time antecedent to their commencement, as statutes of oblivion or of pardon. They are certainly retrospective, and literally both concerning and after the facts committed. But I do not consider any law ex post facto within the prohibition that mollifies the rigor of the criminal law, but only those that create or aggravate the crime or increase the punishment or change the rules of evidence for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time or to save time from the statute of limitations or to excuse acts which were unlawful, and before committed, and the like, is retrospective. But such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an unlawful act lawful and the making an innocent action criminal and punishing it as a crime. The expressions "ex post facto laws" are technical; they had been in use long before the Revolution, and had acquired an appropriate meaning, by legislators, lawyers, and authors.

The celebrated and judicious Sir William Blackstone, in his commentaries, considers an ex post facto law precisely in the same light I have done. His opinion is confirmed by his successor, Mr. Wooddeson, and by the author of the Federalist, who I esteem superior to both for his extensive and accurate knowledge of the true principles of government.

I also rely greatly on the definition, or explanation of ex post facto laws as given by the Conventions of Massachusetts, Maryland, and North Carolina in their several constitutions or forms of government.

In the declaration of rights by the convention of Massachusetts, part 1st, sec. 24, "Laws made to punish actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust. . . ."

In the declaration of rights by the convention of Maryland, art. 15, "Retrospective laws punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive. . . ."

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In the declaration of rights by the Convention of North Carolina, art. 24, I find the same definition, precisely in the same words, as in the Maryland Constitution.

In the declaration of Rights by the convention of Delaware, art. 11, the same definition was clearly intended, but inaccurately expressed by saying "laws punishing offenses [instead of actions, or facts] committed before the existence of such laws are oppressive. . . ."

I am of opinion that the fact contemplated by the prohibition, and not to be affected by a subsequent law, was some fact to be done by a citizen or subject.

In 2d Lord Raymond 1352, Raymond, Justice, called the stat. 7 Geo. I, stat. 2 par. 8, about registering contracts for South Sea Stock, an ex post facto law because it affected contracts made before the statute.

In the present case there is no fact done by Bull and wife plaintiffs in error, that is in any manner affected by the law or resolution of Connecticut. It does not concern or relate to any act done by them. The decree of the Court of Probate of Hartford (on 21 March) in consequence of which Calder and wife claim a right to the property in question was given before the said law or resolution, and in that sense was affected and set aside by it, and in consequence of the law allowing a hearing and the decision in favor of the will, they have lost what they would have been entitled to if the law or resolution, and the decision in consequence thereof, had not been made. The decree of the court of probate is the only fact on which the law or resolution operates. In my judgment, the case of the plaintiffs in error is not within the letter of the prohibition, and for the reasons assigned I am clearly of opinion that it is not within the intention of the prohibition, and if within the intention but out of the letter, I should not, therefore, consider myself justified to continue it within the prohibition, and therefore that the whole was void.

It was argued by the counsel for the plaintiffs in error that the Legislature of Connecticut had no constitutional power to make the resolution (or law) in question granting a new hearing, etc.

Without giving an opinion at this time whether this Court has jurisdiction to decide that any law made by Congress contrary to the Constitution of the United States is void, I am fully satisfied that this Court has no jurisdiction to determine that any law of any state legislature contrary to the Constitution of such state is void. Further, if this Court had such jurisdiction, yet it does not appear to me that the resolution (or law) in question, is contrary to the charter of Connecticut or its constitution, which is said by counsel to be composed of its charter,

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acts of assembly, and usages and customs. I should think that the courts of Connecticut are the proper tribunals to decide whether laws contrary to the Constitution thereof are void. In the present case they have, both in the inferior and superior courts, determined that the resolution (or law) in question was not contrary to either their state or the federal Constitution.

To show that the resolution was contrary to the Constitution of the United States, it was contended that the words "ex post facto law" have a precise and accurate meaning and convey but one idea to professional men, which is "by matter of after fact; by something after the fact." Co.Litt. 241; Fearnes Con.Rem. (Old Ed) 175 and 203; Powell on Devises 113, 133-134 were cited, and the table to Coke's Reports (by Wilson) title ex post facto, was referred to. There is no doubt that a man may be a trespasser from the beginning, by matter of after fact, as where an entry is given by law and the party abuses it, or where the law gives a distress and the party kills or works the distress.

I admit an act unlawful in the beginning may, in some cases, become lawful by matter of after fact.

I also agree that the words "ex post facto" have the meaning contended for, and no other, in the cases cited and in all similar cases, where they are used unconnected with and without relation to legislative acts or laws.

There appears to me a manifest distinction between the case where one fact relates to and affects, another fact, as where an after fact, by operation of law, makes a former fact, either lawful or unlawful, and the case where a law made after a fact done, is to operate on and to affect such fact. In the first case, both the acts are done by private persons. In the second case, the first act is done by a private person and the second act is done by the legislature to affect the first act.

I believe that but one instance can be found in which a British judge called a statute that affected contracts made before the statute an ex post facto law, but the judges of Great Britain always considered penal statutes that created crimes or increased the punishment of them as ex post facto laws.

If the term "ex post facto law" is to be construed to include and to prohibit the enacting any law after a fact, it will greatly restrict the power of the federal and state legislatures, and the consequences of such a construction may not be foreseen.

If the prohibition to make no ex post facto law extends to all laws made after the fact, the two prohibitions not to make anything but gold and silver coin a tender in payment of debts and not to pass any law impairing the obligation of contracts were improper and unnecessary.

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It was further urged that if the provision does not extend to prohibit the making any law after a fact, then all choses in action, all lands by devise, all personal property by bequest, or distribution, by elegit, by execution, by judgments, particularly on torts, will be unprotected from the legislative power of the states; rights vested may be divested at the will and pleasure of the state legislatures, and therefore that the true construction and meaning of the

prohibition is that the states pass no law to deprive a citizen of any right vested in him by existing laws.

It is not to be presumed that the federal or state legislatures will pass laws to deprive citizens of rights vested in them by existing laws unless for the benefit of the whole community and on making full satisfaction. The restraint against making any ex post facto laws was not considered by the framers of the Constitution as extending to prohibit the depriving a citizen even of a vested right to property or the provision "that private property should not be taken for public use, without just compensation" was unnecessary.

It seems to me that the right of property, in its origin, could only arise from compact express or implied, and I think it the better opinion that the right as well as the mode or manner of acquiring property and of alienating or transferring, inheriting, or transmitting it is conferred by society, is regulated by civil institution, and is always subject to the rules prescribed by positive law. When I say that a right is vested in a citizen, I mean that he has the power to do certain actions or to possess certain things according to the law of the land.

If anyone has a right to property, such right is a perfect and exclusive right; but no one can have such right before he has acquired a better right to the property than any other person in the world; a right, therefore, only to recover property cannot be called a perfect and exclusive right. I cannot agree that a right to property vested in Calder and wife, in consequence of the decree (of 21 March, 1783) disapproving of the will of Morrison, the grandson. If the will was valid, Mrs. Calder could have no right as heiress of Morrison, the physician, but if the will was set aside, she had an undoubted title.

The resolution (or law) alone had no manner of effect on any right whatever vested in Calder and wife. The resolution (or law) combined with the new hearing, and the decision in virtue of it took away their right to recover the property in question. But when combined, they took away no right of property vested in Calder and wife, because the decree against the will (21 March, 1783) did not vest in or transfer any property to them.

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I am under a necessity to give a construction or explanation of the words "ex post facto law" because they have not any certain meaning attached to them. But I will not go further than I feel myself bound to do, and if I ever exercise the jurisdiction, I will not decide any law to be void but in a very clear case.

I am of opinion that the decree of the Supreme Court of Errors of Connecticut be affirmed with costs.

PATERSON, JUSTICE.

The Constitution of Connecticut is made up of usages, and it appears that its legislature has from the beginning exercised the power of granting new trials. This has been uniformly the case till the year 1762, when this power was by a legislative act imparted to the superior and county courts. But the act does not remove or annihilate the preexisting power of the legislature in this particular; it only communicates to other authorities a concurrence of jurisdiction as to the awarding of new trials. And the fact is that the legislature has in two instances exercised this power since the passing of the law in 1762. It acted in a double capacity, as a house of legislation with undefined authority and also as a court of judicature in certain exigencies. Whether the latter arose from the indefinite nature of their legislative powers or in some other way it is not necessary to discuss. From the best information, however, which I have been able to collect on this subject, it appears that the legislature, or General Court of Connecticut, originally possessed and exercised all legislative, executive, and judicial authority, and that from time to time it distributed the two latter in such manner as it thought proper, but without parting with the general superintending power or the right of exercising the same whenever it should judge it expedient.

But be this as it may, it is sufficient for the present to observe that it has on certain occasions exercised judicial authority from the commencement of its civil polity. This usage makes up part of the Constitution of Connecticut, and we are bound to consider it as such unless it be inconsistent with the Constitution of the United States. True it is that the awarding of new trials falls properly within the province of the judiciary; but if the Legislature of Connecticut has been in the uninterrupted exercise of this authority in certain cases, we must in such cases respect its decisions as flowing from a competent jurisdiction or constitutional organ. And therefore we may, in the present instance, consider the legislature of the state as having acted in its customary judicial capacity. If so, there is an end of the question. For if the power, thus exercised comes more properly within the description of a judicial than of a legislative power, and if by usage or the

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constitution, which, in Connecticut, are synonymous terms, the legislature of that state acted in both capacities, then in the case now before us it would be fair to consider the awarding of a new trial as an act emanating from the judiciary side of the department.

But as this view of the subject militates against the plaintiffs in error, their counsel has contended for a reversal of the judgment on the ground that the awarding of a new trial was the effect of a legislative act, and that it is unconstitutional because an ex post

facto law. For the sake of ascertaining the meaning of these terms, I will consider the resolution of the General Court of Connecticut as the exercise of a legislative, and not a judicial, authority. The question, then, which arises on the pleadings in this cause is whether the resolution of the Legislature of Connecticut be an ex post facto law within the meaning of the Constitution of the United States. I am of opinion that it is not. The words "ex post facto," when applied to a law, have a technical meaning, and in legal phraseology refer to crimes, pains, and penalties. Judge Blackstone's description of the terms is clear and accurate. "There is," says he,

"a still more unreasonable method than this, which is called making of laws, ex post facto, when after an action, indifferent in itself, is committed, the legislator then, for the first time, declares it to have been a crime and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had, therefore, no cause to abstain from it, and all punishment for not abstaining, must of consequence be cruel and unjust."

1 Bl.Com. 46. Here the meaning annexed to the terms "ex post facto laws" unquestionably refers to crimes and nothing else. The historic page abundantly evinces that the power of passing such laws should be withheld from legislators, as it is a dangerous instrument in the hands of bold, unprincipled, aspiring, and party men, and has been two often used to effect the most detestable purposes.

On inspecting such of our state constitutions as take notice of laws made ex post facto, we shall find that they are understood in the same sense.

The Constitution of Massachusetts, article 24th of the Declaration of rights.

"Laws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government."

The Constitution of Delaware, article 11 of the Declaration of Rights:

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"That retrospective laws punishing offenses committed before the existence of such laws are oppressive and unjust, and ought not to be made."

The Constitution of Maryland, article 15 of the Declaration of Rights:

"That retrospective laws punishing facts committed before the existence of such laws and by them only declared criminal are oppressive, unjust, and incompatible with liberty, wherefore no ex post facto law ought to be made."

The Constitution of North Carolina, article 24 of the Declaration of Rights:

"That retrospective laws punishing facts committed before the existence of such laws and by them only declared criminal are oppressive, unjust, and incompatible with liberty, wherefore no ex post facto law ought to be made."

From the above passages it appears that ex post facto laws have an appropriate signification; they extend to penal statutes, and no further; they are restricted in legal estimation to the creation, and perhaps enhancement of crimes, pains, and penalties. The enhancement of a crime or penalty seems to come within the same mischief as the creation of a crime or penalty, and therefore they may be classed together.

Again, the words of the Constitution of the United States are "That no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts." Article I, section 10.

Where is the necessity or use of the latter words if a law impairing the obligation of contracts be comprehended within the terms "ex post facto law?" It is obvious from the specification of contracts in the last member of the clause that the framers of the Constitution did not understand or use the words in the sense contended for on the part of the plaintiffs in error. They understood and used the words in their known and appropriate signification, as referring to crimes, pains, and penalties, and no further. The arrangement of the distinct members of this section necessarily points to this meaning.

I had an ardent desire to have extended the provision in the Constitution to retrospective laws in general. There is neither policy nor safety in such laws, and therefore I have always had a strong aversion against them. It may in general be truly observed of retrospective laws of every description that they neither accord with sound legislation nor the fundamental principles of the social compact. But on full consideration I am convinced that ex post facto laws must be limited in the manner already expressed; they must be taken in their technical, which is also their common and general, acceptation, and are not to be understood in their literal sense.

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IREDELL, JUSTICE.

Though I concur in the general result of the opinions which have been delivered, I cannot entirely adopt the reasons that are assigned upon the occasion.

From the best information to be collected, relative to the Constitution of Connecticut, it appears that the legislature of that state has been in the uniform uninterrupted habit of exercising a general superintending power over its courts of law by granting new trials. It may indeed appear strange to some of us that in any form there should exist a power to grant, with respect to suits depending or adjudged, new rights of trial, new privileges of proceeding not previously recognized and regulated by positive institutions, but such is the established usage of Connecticut, and it is obviously consistent with the general superintending authority of her legislature. Nor is it altogether without some sanction for a legislature to act as a court of justice. In England, we know that one branch of the Parliament, the House of Lords, not only exercises a judicial power in cases of impeachment and for the trial of its own members, but as the court of dernier resort, takes cognizance of many suits at law, and in equity. And that in construction of law, the jurisdiction there exercised is by the King in full Parliament, which shows that in its origin, the causes were probably heard before the whole Parliament. When Connecticut was settled, the right of empowering her legislature to superintend the courts of justice was, I presume, early assumed, and its expediency, as applied to the local circumstances and municipal policy of the state, is sanctioned by a long and uniform practice. The power, however, is judicial in its nature, and whenever it is exercised, as in the present instance, it is an exercise of judicial, not of legislative, authority.

But, let us for a moment suppose, that the resolution granting a new trial was a legislative act, it will by no means follow that it is an act affected by the constitutional prohibition that "no state shall pass any ex post facto law." I will endeavor to state the general principles which influence me on this point succinctly and clearly, though I have not had an opportunity to reduce my opinion to writing.

If, then, a government, composed of legislative, executive and judicial departments, were established by a constitution which imposed no limits on the legislative power, the consequence would inevitably be that whatever the legislative power chose to enact would be lawfully enacted, and the judicial power could never interpose to pronounce it void. It is true that some speculative jurists have held that a legislative act against natural justice must in itself be void, but I cannot think that under such a government any court of justice would possess a power to declare it so. Sir William Blackstone, having put the strong case of an act of Parliament which should

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authorize a man to try his own cause, explicitly adds that even in that case,

"there is no court that has power to defeat the intent of the legislature when couched in such evident and express words as leave no doubt whether it was the intent of the legislature or no."

1 Bl.Com. 91.

In order, therefore, to guard against so great an evil, it has been the policy of all the American states which have individually framed their state constitutions since the Revolution, and of the people of the United States when they framed the federal Constitution, to define with precision the objects of the legislative power and to restrain its exercise within marked and settled boundaries. If any act of Congress or of the legislature of a state violates those constitutional provisions, it is unquestionably void, though I admit that as the authority to declare it void is of a delicate and awful nature, the court will never resort to that authority but in a clear and urgent case. If, on the other hand, the legislature of the Union or the legislature of any member of the Union shall pass a law within the general scope of its constitutional power, the court cannot pronounce it to be void merely because it is in its judgment contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and the purest men have differed upon the subject, and all that the court could properly say in such an event would be that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.

There are then but two lights in which the subject can be viewed: 1st. If the legislature pursue the authority delegated to it, its acts are valid. 2d. If it transgresses the boundaries of that authority, its acts are invalid. In the former case, it exercises the discretion vested in it by the people, to whom alone it is responsible for the faithful discharge of its trust, but in the latter case it violates a fundamental law which must be our guide whenever we are called upon as judges to determine the validity of a legislative act.

Still, however, in the present instance, the act or resolution of the Legislature of Connecticut cannot be regarded as an ex post facto law, for the true construction of the prohibition extends to criminal, not to civil, cases. It is only in criminal cases, indeed, in which the danger to be guarded against is greatly to be apprehended. The history of every country in Europe will furnish flagrant instances of tyranny exercised under the pretext of penal dispensations. Rival

factions, in their efforts to crush each other, have superseded all the forms and suppressed all the sentiments of justice, while attainders, on the principle of retaliation and proscription, have marked all the

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vicissitudes of party triumph. The temptation to such abuses of power is unfortunately too alluring for human virtue, and therefore the framers of the American Constitutions have wisely denied to the respective legislatures, federal as well as state, the possession of the power itself. They shall not pass any ex post facto law, or, in other words, they shall not inflict a punishment for any act, which was innocent at the time it was committed, nor increase the degree of punishment previously denounced for any specific offense.

The policy, the reason and humanity, of the prohibition do not, I repeat, extend to civil cases, to cases that merely affect the private property of citizens. Some of the most necessary and important acts of legislation are, on the contrary, founded upon the principle that private rights must yield to public exigencies. Highways are run through private grounds. Fortifications, lighthouses, and other public edifices are necessarily sometimes built upon the soil owned by individuals. In such and similar cases, if the owners should refuse voluntarily to accommodate the public, they must be constrained, as far as the public necessities require, and justice is done by allowing them a reasonable equivalent. Without the possession of this power, the operations of government would often be obstructed and society itself would be endangered. It is not sufficient to urge that the power may be abused, for such is the nature of all power, such is the tendency of every human institution, and it might as fairly be said that the power of taxation, which is only circumscribed by the discretion of the body in which it is vested, ought not to be granted, because the legislature, disregarding its true objects, might, for visionary and useless projects, impose a tax to the amount of nineteen shillings in the pound. We must be content to limit power where we can, and where we cannot, consistently with its use, we must be content to repose a salutary confidence. It is our consolation that there never existed a government in ancient or modern times more free from danger in this respect than the governments of America.

Upon the whole, though there cannot be a case in which an ex post facto law in criminal matters is requisite or justifiable (for providence never can intend to promote the prosperity of any country by bad means), yet in the present instance, the objection does not arise, because, 1st, if the act of the Legislature of Connecticut was a judicial act, it is not within the words of the Constitution, and 2d, even if it was a legislative act, it is not within the meaning of the prohibition.

CUSHING, JUSTICE.

The case appears to me to be clear of all difficulty, taken either way. If the act is a judicial act, it is not touched by the federal Constitution, and if it is a legislative

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act, it is maintained and justified by the ancient and uniform practice of the State of Connecticut.

Judgment affirmed.

http://www.oyez.org/cases/1792-1850/1824/1824_0/
Gibbons v. Ogden
Docket: None
Citation: 22 U.S. 1 (1824)
Petitioner: Gibbons
Respondent: Ogden
Case Media
Oral Argument: Wednesday, February 4, 1824
Decision: Tuesday, March 2, 1824

A New York state law gave two individuals the exclusive right to operate steamboats on waters within state jurisdiction. Laws like this one were duplicated elsewhere which led to friction as some states would require foreign (out-of-state) boats to pay substantial fees for navigation privileges. In this case a steamboat owner who did business between New York and New Jersey challenged the monopoly that New York had granted, which forced him to obtain a special operating permit from the state to navigate on its waters.

Question
Did the State of New York exercise authority in a realm reserved exclusively to Congress, namely, the regulation of interstate commerce?

Conclusion
The Court found that New York's licensing requirement for out-of-state operators was inconsistent with a congressional act regulating the coasting trade. The New York law was invalid by virtue of the Supremacy Clause. In his opinion, Chief Justice Marshall developed a clear definition of the word commerce, which included navigation on interstate waterways. He also gave meaning to the phrase "among the several states" in the Commerce Clause. Marshall's was one of the earliest and most influential opinions concerning this important clause. He concluded that regulation of navigation by steamboat operators and others for purposes of conducting interstate commerce was a power reserved to and exercised by the Congress.

http://supreme.justia.com/us/22/1/case.html

U.S. Supreme Court
Gibbons v. Ogden, 22 U.S. 9 Wheat. 1 1 (1824)

APPEAL FROM THE COURT FOR THE TRIAL OF IMPEACHMENTS AND CORRECTION OF ERRORS OF THE STATE OF NEW YORK

Syllabus

The laws of New York granting to Robert R. Livingston and Robert Fulton the exclusive right of navigating the waters of that State with steamboats are in collision with the acts of Congress regulating the coasting trade, which, being made in pursuance of the Constitution, are supreme, and the State laws must yield to that supremacy, even though enacted in pursuance of powers acknowledged to remain in the States.

The power of regulating commerce extends to the regulation of navigation.

The power to regulate commerce extends to every species of commercial intercourse between the United States and foreign nations, and among the several States. It does not stop at the external boundary of a State.

But it does not extend to a commerce which is completely internal.

The power to regulate commerce is general, and has no limitations but such as are prescribed in the Constitution itself.

The power to regulate commerce, so far as it extends, is exclusively bested in Congress, and no part of it can be exercised by a State.

A license under the acts of Congress for regulating the coasting trade gives a permission to carry on that trade.

State inspection laws, health laws, and laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c. are not within the power granted to Congress.

The license is not merely intended to confer the national character.

The power of regulating commerce extends to navigation carried on by vessels exclusively employed in transporting passengers.

The power of regulating commerce extends to vessels propelled by steam or fire as well as to those navigated by the instrumentality of wind and sails.

Aaron Ogden filed his bill in the Court of Chancery of that State, against Thomas Gibbons, setting forth the several acts of the Legislature thereof, enacted for the purpose of securing to Robert R. Livingston and Robert Fulton the

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exclusive navigation of all the waters within the jurisdiction of that State, with boats moved by fire or steam, for a term of years which has not yet expired, and authorizing the Chancellor to award an injunction restraining any person whatever from navigating those waters with boats of that description. The bill stated an assignment from Livingston and Fulton to one John R. Livingston,

and from him to the complainant, Ogden, of the right to navigate the waters between Elizabethtown, and other places in New Jersey, and the City of New York, and that Gibbons, the defendant below, was in possession of two steamboats, called the Stoudinger and the Bellona, which were actually employed in running between New York and Elizabethtown, in violation of the exclusive privilege conferred on the complainant, and praying an injunction to restrain the said Gibbons from using the said boats, or any other propelled by fire or steam, in navigating the waters within the territory of New York. The injunction having been awarded, the answer of Gibbons was filed, in which he stated that the boats employed by him were duly enrolled and licensed to be employed in carrying on the coasting trade under the Act of Congress, passed the 18th of February, 1793, c. 3. entitled, "An act for enrolling and licensing ships and vessels to be employed in the coasting trade and fisheries, and for regulating the same." And the defendant insisted on his right, in virtue of such licenses, to navigate the waters between Elizabethtown and the City of New York, the said acts of the Legislature of the

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State of New York to the contrary notwithstanding. At the hearing, the Chancellor perpetuated the injunction, being of the opinion that the said acts were not repugnant to the Constitution and laws of the United States, and were valid. This decree was affirmed in the Court for the Trial of Impeachments and Correction of Errors, which is the highest Court of law and equity in the State, before which the cause could be carried, and it was thereupon brought to this Court by appeal.

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Mr. Chief Justice MARSHALL delivered the opinion of the Court, and, after stating the case, proceeded as follows:

The appellant contends that this decree is erroneous because the laws which purport to give the exclusive privilege it sustains are repugnant to the Constitution and laws of the United States.

They are said to be repugnant:

1st. To that clause in the Constitution which authorizes Congress to regulate commerce.

2d. To that which authorizes Congress to promote the progress of science and useful arts.

The State of New York maintains the Constitutionality of these laws, and their Legislature, their Council of Revision, and their Judges, have repeatedly concurred in this opinion. It is supported by great names -- by names which have all the titles to consideration that virtue, intelligence, and office can bestow. No tribunal can approach the decision of this question without feeling a just and real respect for that opinion which is sustained by such authority, but it is the province of this Court, while it respects, not to bow to it implicitly, and the Judges must exercise, in the examination of the subject, that understanding which Providence has bestowed upon them, with that independence which the people of the United

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States expect from this department of the government.

As preliminary to the very able discussions of the Constitution which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these States anterior to its formation. It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their league into a government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns and to recommend measures of general utility, into a Legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants expressly the means for carrying all others into execution, Congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used is not extended to the powers which are conferred, nor is there one sentence in

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the Constitution which has been pointed out by the gentlemen of the bar or which we have been able to discern that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean by a "strict construction?" If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support or some theory not to be found in the Constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent

with the general views and objects of the instrument; for that narrow construction which would cripple the government and render it unequal to the object for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded. As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule that the objects

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for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor if retained by himself, or which can enure solely to the benefit of the grantee, but is an investment of power for the general advantage, in the hands of agents selected for that purpose, which power can never be exercised by the people themselves, but must be placed in the hands of agents or lie dormant. We know of no rule for construing the extent of such powers other than is given by the language of the instrument which confers them, taken in connexion with the purposes for which they were conferred.

The words are, "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The subject to be regulated is commerce, and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial

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intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals in the actual employment of buying and selling or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense, and the attempt to restrict it comes too late.

If the opinion that "commerce," as the word is used in the Constitution, comprehends navigation

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also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself.

It is a rule of construction acknowledged by all that the exceptions from a power mark its extent, for it would be absurd, as well as useless, to except from a granted power that which was not granted -- that which the words of the grant could not comprehend. If, then, there are in the Constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.

The 9th section of the 1st article declares that "no preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another." This clause cannot be understood as applicable to those laws only which are passed for the purposes of revenue, because it is expressly applied to commercial regulations, and the most obvious preference which can be given to one port over another in regulating commerce relates to navigation. But the subsequent part of the sentence is still more explicit. It is, "nor shall vessels bound to or from one

State be obliged to enter, clear, or pay duties, in another." These words have a direct reference to navigation.

The universally acknowledged power of the government to impose embargoes must also be considered as showing that all America is united

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in that construction which comprehends navigation in the word commerce. Gentlemen have said in argument that this is a branch of the war-making power, and that an embargo is an instrument of war, not a regulation of trade.

That it may be, and often is, used as an instrument of war cannot be denied. An embargo may be imposed for the purpose of facilitating the equipment or manning of a fleet, or for the purpose of concealing the progress of an expedition preparing to sail from a particular port. In these, and in similar cases, it is a military instrument, and partakes of the nature of war. But all embargoes are not of this description. They are sometimes resorted to without a view to war, and with a single view to commerce. In such case, an embargo is no more a war measure than a merchantman is a ship of war because both are vessels which navigate the ocean with sails and seamen.

When Congress imposed that embargo which, for a time, engaged the attention of every man in the United States, the avowed object of the law was the protection of commerce, and the avoiding of war. By its friends and its enemies, it was treated as a commercial, not as a war, measure. The persevering earnestness and zeal with which it was opposed in a part of our country which supposed its interests to be vitally affected by the act, cannot be forgotten. A want of acuteness in discovering objections to a measure to which they felt the most deep-rooted hostility will not be imputed to those who were arrayed in opposition

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to this. Yet they never suspected that navigation was no branch of trade, and was therefore not comprehended in the power to regulate commerce. They did, indeed, contest the constitutionality of the act, but, on a principle which admits the construction for which the appellant contends. They denied that the particular law in question was made in pursuance of the Constitution not because the power could not act directly on vessels, but because a perpetual embargo was the annihilation, and not the regulation, of commerce. In terms, they admitted the applicability of the words used in the Constitution to vessels, and that in a case which produced a degree and an extent of excitement calculated to draw forth every principle on which legitimate resistance could be sustained. No example could more strongly illustrate the universal understanding of the American people on this subject.

The word used in the Constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning, and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

To what commerce does this power extend? The Constitution informs us, to commerce "with foreign nations, and among the several States, and with the Indian tribes."

It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be

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carried on between this country and any other to which this power does not extend. It has been truly said that "commerce," as the word is used in the Constitution, is a unit every part of which is indicated by the term.

If this be the admitted meaning of the word in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied is to commerce "among the several States." The word "among" means intermingled with. A thing which is among others is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose, and the enumeration of the particular classes of commerce to which the power was to be extended would not have been made had the intention

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been to extend the power to every description. The enumeration presupposes something not enumerated, and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally, but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State.

This principle is, if possible, still more clear, when

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applied to commerce "among the several States." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other States lie between them. What is commerce "among" them, and how is it to be conducted? Can a trading expedition between two adjoining States, commence and terminate outside of each? And if the trading intercourse be between two States remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the States must, of necessity, be commerce with the States. In the regulation of trade with the Indian tribes, the action of the law, especially when the Constitution was made, was chiefly within a State. The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several States. The sense of the nation on this subject is unequivocally manifested by the provisions made in the laws for transporting goods by land between Baltimore and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore.

We are now arrived at the inquiry -- What is this power?

It is the power to regulate, that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the

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questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often they solely, in all representative governments.

The power of Congress, then, comprehends navigation, within the limits of every State in the Union, so far as that navigation may be in any manner connected with "commerce with foreign nations, or among the several States, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York and act upon the very waters to which the prohibition now under consideration applies.

But it has been urged with great earnestness that, although the power of Congress to regulate commerce with foreign nations and among the several States be coextensive with the subject itself, and have no other limits than are prescribed in the Constitution, yet the States may severally

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exercise the same power, within their respective jurisdictions. In support of this argument, it is said that they possessed it as an inseparable attribute of sovereignty, before the formation of the Constitution, and still retain it except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the tenth amendment; that an affirmative grant of power is not exclusive unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description.

The appellant, conceding these postulates except the last, contends that full power to regulate a particular subject implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it.

Both parties have appealed to the Constitution, to legislative acts, and judicial decisions, and have drawn arguments from all these sources to support and illustrate the propositions they respectively maintain.

The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the State, and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly

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exercised by the States are transferred to the government of the Union, yet the State governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to see it placed, for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division, and a power in one to take what is necessary for certain purposes is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, &c. to pay the debts and provide for the common defence and general welfare of the United States. This does not interfere with the power of the States to tax for the support of their own governments, nor is the exercise of that power by the States an exercise of any portion of the power that is granted to the United States. In imposing taxes for State purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress,

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and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.

In discussing the question whether this power is still in the States, in the case under consideration, we may dismiss from it the inquiry whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry because it has been exercised, and the regulations which Congress deemed it proper to make are now in full operation. The sole question is can a State regulate commerce with foreign nations and among the States while Congress is regulating it?

The counsel for the respondent answer this question in the affirmative, and rely very much on the restrictions in the 10th section as supporting their opinion. They say very truly that limitations of a power furnish a strong argument in favour of the existence of that power, and that the section which prohibits the States from laying duties on imports or exports proves that this power might have been exercised had it not been expressly forbidden, and consequently that any other commercial regulation, not expressly forbidden, to which the original power of the State was competent may still be made.

That this restriction shows the opinion of the Convention that a State might impose duties on exports and imports, if not expressly forbidden, will be conceded, but that it follows as a consequence

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from this concession that a State may regulate commerce with foreign nations and among the States cannot be admitted.

We must first determine whether the act of laying "duties or imposts on imports or exports" is considered in the Constitution as a branch of the taxing power, or of the power to regulate commerce. We think it very clear that it is considered as a branch of the taxing power. It is so treated in the first clause of the 8th section: "Congress shall have power to lay and collect taxes, duties, imposts, and excises;" and, before commerce is mentioned, the rule by which the exercise of this power must be governed is declared. It is that all duties, imposts, and excises shall be uniform. In a separate clause of the enumeration, the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts and as being a new power, not before conferred. The Constitution, then, considers these powers as substantive, and distinct from each other, and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy taxes, and that seems to be its natural place. But the power to levy taxes could never be considered as abridging the right of the States on that subject, and they might, consequently, have exercised it by levying duties on imports or exports, had the Constitution

contained no prohibition on this subject. This prohibition, then, is an exception from the acknowledged power of the States

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to levy taxes, not from the questionable power to regulate commerce.

"A duty of tonnage" is as much a tax as a duty on imports or exports, and the reason which induced the prohibition of those taxes extends to this also. This tax may be imposed by a State, with the consent of Congress, and it may be admitted that Congress cannot give a right to a State in virtue of its own powers. But a duty of tonnage being part of the power of imposing taxes, its prohibition may certainly be made to depend on Congress, without affording any implication respecting a power to regulate commerce. It is true that duties may often be, and in fact often are, imposed on tonnage with a view to the regulation of commerce, but they may be also imposed with a view to revenue, and it was therefore a prudent precaution to prohibit the States from exercising this power. The idea that the same measure might, according to circumstances, be arranged with different classes of power was no novelty to the framers of our Constitution. Those illustrious statesmen and patriots had been, many of them, deeply engaged in the discussions which preceded the war of our revolution, and all of them were well read in those discussions. The right to regulate commerce, even by the imposition of duties, was not controverted, but the right to impose a duty for the purpose of revenue produced a war as important, perhaps, in its consequences to the human race as any the world has ever witnessed.

These restrictions, then, are on the taxing power,

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not on that to regulate commerce, and presuppose the existence of that which they restrain, not of that which they do not purport to restrain.

But the inspection laws are said to be regulations of commerce, and are certainly recognised in the Constitution as being passed in the exercise of a power remaining with the States.

That inspection laws may have a remote and considerable influence on commerce will not be denied, but that a power to regulate commerce is the source from which the right to pass them is derived cannot be admitted. The object of inspection laws is to improve the quality of articles produced by the labour of a country, to fit them for exportation, or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the General Government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass.

No direct general power over these objects is granted to Congress, and, consequently, they remain subject to State legislation. If the legislative power of the Union can reach them, it must be for national purposes, it must be where the

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power is expressly given for a special purpose or is clearly incidental to some power which is expressly given. It is obvious that the government of the Union, in the exercise of its express powers -- that, for example, of regulating commerce with foreign nations and among the States -- may use means that may also be employed by a State in the exercise of its acknowledged powers -- that, for example, of regulating commerce within the State. If Congress license vessels to sail from one port to another in the same State, the act is supposed to be necessarily incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a State or to act directly on its system of police. So, if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the State and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers, but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

In our complex system, presenting the rare and difficult scheme of one General Government whose

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action extends over the whole but which possesses only certain enumerated powers, and of numerous State governments which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers would often be of the same description,

and might sometimes interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other.

The acts of Congress passed in 1796 and 1799, 2 U.S.L. 345, 3 U.S.L. 126, empowering and directing the officers of the General Government to conform to and assist in the execution of the quarantine and health laws of a State proceed, it is said, upon the idea that these laws are constitutional. It is undoubtedly true that they do proceed upon that idea, and the constitutionality of such laws has never, so far as we are informed, been denied. But they do not imply an acknowledgment that a State may rightfully regulate commerce with foreign nations or among the States, for they do not imply that such laws are an exercise of that power, or enacted with a view to it. On the contrary, they are treated as quarantine and health laws, are so denominated in the acts of Congress, and are considered as flowing from the acknowledged power of a State to provide for the health of its citizens. But as it was apparent that some of the provisions made for this purpose and in virtue of this power might

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interfere with and be affected by the laws of the United States made for the regulation of commerce, Congress, in that spirit of harmony and conciliation which ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the States bear to each other, has directed its officers to aid in the execution of these laws, and has, in some measure, adapted its own legislation to this object by making provisions in aid of those of the States. But, in making these provisions, the opinion is unequivocally manifested that Congress may control the State laws so far as it may be necessary to control them for the regulation of commerce. The act passed in 1803, 3 U.S.L. 529, prohibiting the importation of slaves into any State which shall itself prohibit their importation, implies, it is said, an admission that the States possessed the power to exclude or admit them, from which it is inferred that they possess the same power with respect to other articles.

If this inference were correct, if this power was exercised not under any particular clause in the Constitution, but in virtue of a general right over the subject of commerce, to exist as long as the Constitution itself, it might now be exercised. Any State might now import African slaves into its own territory. But it is obvious that the power of the States over this subject, previous to the year 1808, constitutes an exception to the power of

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Congress to regulate commerce, and the exception is expressed in such words, as to manifest clearly the intention to continue the preexisting right of the States to admit or exclude, for a limited period. The words are

"the migration or importation of such persons as any of the States, now existing, shall think proper to admit shall not be prohibited by the Congress prior to the year 1808."

The whole object of the exception is to preserve the power to those States which might be disposed to exercise it, and its language seems to the Court to convey this idea unequivocally. The possession of this particular power, then, during the time limited in the Constitution, cannot be admitted to prove the possession of any other similar power.

It has been said that the act of August 7, 1789, acknowledges a concurrent power in the States to regulate the conduct of pilots, and hence is inferred an admission of their concurrent right with Congress to regulate commerce with foreign nations and amongst the States. But this inference is not, we think, justified by the fact.

Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject. When the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every State. The act which has been mentioned adopts this system, and gives it the same validity as if its provisions had been specially made by Congress. But the act, it may be said, is prospective also, and the adoption of laws to be made

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in future presupposes the right in the maker to legislate on the subject.

The act unquestionably manifests an intention to leave this subject entirely to the States until Congress should think proper to interpose, but the very enactment of such a law indicates an opinion that it was necessary, that the existing system would not be applicable to the new state of things unless expressly applied to it by Congress. But this section is confined to pilots within the "bays, inlets, rivers, harbours, and ports of the United States," which are, of course, in whole or in part, also within the limits of some particular state. The acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens may enable it to legislate on this subject to a considerable extent, and the adoption of its system by Congress, and the application of it to the whole subject of commerce, does not seem to the Court to imply a right in the States so to apply it of their own authority. But the adoption of the State system being temporary, being only "until further legislative provision shall be made by Congress," shows conclusively an opinion that Congress could

control the whole subject, and might adopt the system of the States or provide one of its own.

A State, it is said, or even a private citizen, may construct light houses. But gentlemen must be aware that if this proves a power in a State to regulate commerce, it proves that the same power is in the citizen. States or individuals who own lands may, if not forbidden by law,

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erect on those lands what buildings they please, but this power is entirely distinct from that of regulating commerce, and may, we presume, be restrained if exercised so as to produce a public mischief.

These acts were cited at the bar for the purpose of showing an opinion in Congress that the States possess, concurrently with the Legislature of the Union, the power to regulate commerce with foreign nations and among the States. Upon reviewing them, we think they do not establish the proposition they were intended to prove. They show the opinion that the States retain powers enabling them to pass the laws to which allusion has been made, not that those laws proceed from the particular power which has been delegated to Congress.

It has been contended by the counsel for the appellant that, as the word "to regulate" implies in its nature full power over the thing to be regulated, it excludes necessarily the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole which is as much disturbed and deranged by changing what the regulating power designs to leave untouched as that on which it has operated.

There is great force in this argument, and the Court is not satisfied that it has been refuted.

Since, however, in exercising the power of regulating their own purely internal affairs, whether

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of trading or police, the States may sometimes enact laws the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the Constitution, the Court will enter upon the inquiry whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an act of Congress and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several States" or in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of Congress, and the decision sustaining the privilege they confer against a right given by a law of the Union must be erroneous.

This opinion has been frequently expressed in this Court, and is founded as well on the nature of the government as on the words of the Constitution. In argument, however, it has been contended that, if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject and each other like equal opposing powers.

But the framers of our Constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act

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inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties is to such acts of the State Legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to, the laws of Congress made in pursuance of the Constitution or some treaty made under the authority of the United States. In every such case, the act of Congress or the treaty is supreme, and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.

In pursuing this inquiry at the bar, it has been said that the Constitution does not confer the right of intercourse between State and State. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The Constitution found it an existing right, and gave to Congress the power to regulate it. In the exercise of this power, Congress has passed "an act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." The counsel for the respondent contend that this act does not give the right to sail from port to port, but confines itself to regulating a preexisting right so far only as to confer certain privileges on enrolled and licensed vessels in its exercise.

It will at once occur that, when a Legislature

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attaches certain privileges and exemptions to the exercise of a right over which its control is absolute, the law must imply a power to exercise the right. The privileges are gone if the right itself be annihilated. It would be contrary to all reason, and to the course of human affairs, to say that a State is unable to strip a vessel of the particular privileges attendant on the exercise of a right, and yet may annul the right itself; that the State of New York cannot prevent an enrolled and licensed vessel, proceeding from Elizabethtown, in New Jersey, to New York, from enjoying, in her course, and on her entrance into port, all the privileges conferred by the act of Congress, but can shut her up in her own port, and prohibit altogether her entering the waters and ports of another State. To the Court, it seems very clear that the whole act on the subject of the coasting trade, according to those principles which govern the construction of statutes, implies unequivocally an authority to licensed vessels to carry on the coasting trade.

But we will proceed briefly to notice those sections which bear more directly on the subject.

The first section declares that vessels enrolled by virtue of a previous law, and certain other vessels enrolled as described in that act, and having a license in force, as is by the act required,

"and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade."

This section seems to the Court to contain a positive enactment that the the vessels it describes shall

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be entitled to the privileges of ships or vessels employed in the coasting trade. These privileges cannot be separated from the trade and cannot be enjoyed unless the trade may be prosecuted. The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached and in the exercise of which its whole value consists. To construe these words otherwise than as entitling the ships or vessels described to carry on the coasting trade would be, we think, to disregard the apparent intent of the act.

The fourth section directs the proper officer to grant to a vessel qualified to receive it, "a license for carrying on the coasting trade," and prescribes its form. After reciting the compliance of the applicant with the previous requisites of the law, the operative words of the instrument are,

"license is hereby granted for the said steamboat Bellona to be employed in carrying on the coasting trade for one year from the date hereof, and no longer."

These are not the words of the officer, they are the words of the legislature, and convey as explicitly the authority the act intended to give, and operate as effectually, as if they had been inserted in any other part of the act, than in the license itself.

The word "license" means permission or authority, and a license to do any particular thing is a permission or authority to do that thing, and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to

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him all the right which the grantor can transfer, to do what is within the terms of the license.

Would the validity or effect of such an instrument be questioned by the respondent, if executed by persons claiming regularly under the laws of New York?

The license must be understood to be what it purports to be, a legislative authority to the steamboat Bellona "to be employed in carrying on the coasting trade, for one year from this date."

It has been denied that these words authorize a voyage from New Jersey to New York. It is true that no ports are specified, but it is equally true that the words used are perfectly intelligible, and do confer such authority as unquestionably as if the ports had been mentioned. The coasting trade is a term well understood. The law has defined it, and all know its meaning perfectly. The act describes with great minuteness the various operations of a vessel engaged in it, and it cannot, we think, be doubted that a voyage from New Jersey to New York is one of those operations.

Notwithstanding the decided language of the license, it has also been maintained that it gives no right to trade, and that its sole purpose is to confer the American character.

The answer given to this argument that the American character is conferred by the enrollment, and not by the license, is, we think, founded too clearly in the words of the law to require the support of any additional observations. The enrollment of vessels designed for the coasting trade corresponds precisely with the registration of vessels

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designed for the foreign trade, and requires every circumstance which can constitute the American character. The license can be granted only to vessels already enrolled, if they be of the burthen of twenty tons and upwards, and requires no circumstance

essential to the American character. The object of the license, then, cannot be to ascertain the character of the vessel, but to do what it professes to do -- that is, to give permission to a vessel already proved by her enrollment to be American, to carry on the coasting trade.

But if the license be a permit to carry on the coasting trade, the respondent denies that these boats were engaged in that trade, or that the decree under consideration has restrained them from prosecuting it. The boats of the appellant were, we are told, employed in the transportation of passengers, and this is no part of that commerce which Congress may regulate.

If, as our whole course of legislation on this subject shows, the power of Congress has been universally understood in America to comprehend navigation, it is a very persuasive, if not a conclusive, argument to prove that the construction is correct, and if it be correct, no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire and property for hire. The subject is transferred to Congress, and no exception to the grant can be admitted which is not proved by the words or the nature of the thing. A coasting vessel employed in the transportation of passengers is as much a portion of the American marine as one employed

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in the transportation of a cargo, and no reason is perceived why such vessel should be withdrawn from the regulating power of that government which has been thought best fitted for the purpose generally. The provisions of the law respecting native seamen and respecting ownership are as applicable to vessels carrying men as to vessels carrying manufactures, and no reason is perceived why the power over the subject should not be placed in the same hands. The argument urged at the bar rests on the foundation that the power of Congress does not extend to navigation as a branch of commerce, and can only be applied to that subject incidentally and occasionally. But if that foundation be removed, we must show some plain, intelligible distinction, supported by the Constitution or by reason, for discriminating between the power of Congress over vessels employed in navigating the same seas. We can perceive no such distinction.

If we refer to the Constitution, the inference to be drawn from it is rather against the distinction. The section which restrains Congress from prohibiting the migration or importation of such persons as any of the States may think proper to admit until the year 1808 has always been considered as an exception from the power to regulate commerce, and certainly seems to class migration with importation. Migration applies as appropriately to voluntary as importation does to involuntary arrivals, and, so far as an exception from a power proves its existence, this section proves that the power to regulate commerce applies equally

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to the regulation of vessels employed in transporting men, who pass from place to place voluntarily, and to those who pass involuntarily.

If the power reside in Congress, as a portion of the general grant to regulate commerce, then acts applying that power to vessels generally must be construed as comprehending all vessels. If none appear to be excluded by the language of the act, none can be excluded by construction. Vessels have always been employed to a greater or less extent in the transportation of passengers, and have never been supposed to be, on that account, withdrawn from the control or protection of Congress. Packets which ply along the coast, as well as those which make voyages between Europe and America, consider the transportation of passengers as an important part of their business. Yet it has never been suspected that the general laws of navigation did not apply to them.

The duty act, sections 23 and 46, contains provisions respecting passengers, and shows that vessels which transport them have the same rights, and must perform the same duties, with other vessels. They are governed by the general laws of navigation.

In the progress of things, this seems to have grown into a particular employment, and to have attracted the particular attention of government. Congress was no longer satisfied with comprehending vessels engaged specially in this business, within those provisions which were intended for vessels generally, and, on the 2d of March, 1819, passed "an act regulating passenger ships and

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vessels." This wise and humane law provides for the safety and comfort of passengers, and for the communication of everything concerning them which may interest the government, to the Department of State, but makes no provision concerning the entry of the vessel or her conduct in the waters of the United States. This, we think, shows conclusively the sense of Congress (if, indeed, any evidence to that point could be required) that the preexisting regulations comprehended passenger ships among others, and, in prescribing the same duties, the Legislature must have considered them as possessing the same rights.

If, then, it were even true that the Bellona and the Stoudinger were employed exclusively in the conveyance of passengers between New York and New Jersey, it would not follow that this occupation did not constitute a part of the coasting trade of the United States,

and was not protected by the license annexed to the answer. But we cannot perceive how the occupation of these vessels can be drawn into question in the case before the Court. The laws of New York, which grant the exclusive privilege set up by the respondent, take no notice of the employment of vessels, and relate only to the principle by which they are propelled. Those laws do not inquire whether vessels are engaged in transporting men or merchandise, but whether they are moved by steam or wind. If by the former, the waters of New York are closed against them, though their cargoes be dutiable goods, which the laws of the

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United States permit them to enter and deliver in New York. If by the latter, those waters are free to them though they should carry passengers only. In conformity with the law is the bill of the plaintiff in the State Court. The bill does not complain that the Bellona and the Stoudinger carry passengers, but that they are moved by steam. This is the injury of which he complains, and is the sole injury against the continuance of which he asks relief. The bill does not even allege specially that those vessels were employed in the transportation of passengers, but says generally that they were employed "in the transportation of passengers, or otherwise." The answer avers only that they were employed in the coasting trade, and insists on the right to carry on any trade authorized by the license. No testimony is taken, and the writ of injunction and decree restrain these licensed vessels not from carrying passengers, but from being moved through the waters of New York by steam for any purpose whatever.

The questions, then, whether the conveyance of passengers be a part of the coasting trade and whether a vessel can be protected in that occupation by a coasting license are not, and cannot be, raised in this case. The real and sole question seems to be whether a steam machine in actual use deprives a vessel of the privileges conferred by a license.

In considering this question, the first idea which presents itself is that the laws of Congress for the regulation of commerce do not look to the

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principle by which vessels are moved. That subject is left entirely to individual discretion, and, in that vast and complex system of legislative enactment concerning it, which embraces everything that the Legislature thought it necessary to notice, there is not, we believe, one word respecting the peculiar principle by which vessels are propelled through the water, except what may be found in a single act granting a particular privilege to steamboats. With this exception, every act, either prescribing duties or granting privileges, applies to every vessel, whether navigated by the instrumentality of wind or fire, of sails or machinery. The whole weight of proof, then, is thrown upon him who would introduce a distinction to which the words of the law give no countenance.

If a real difference could be admitted to exist between vessels carrying passengers and others, it has already been observed that there is no fact in this case which can bring up that question. And, if the occupation of steamboats be a matter of such general notoriety that the Court may be presumed to know it, although not specially informed by the record, then we deny that the transportation of passengers is their exclusive occupation. It is a matter of general history that, in our western waters, their principal employment is the transportation of merchandise, and all know that, in the waters of the Atlantic, they are frequently so employed.

But all inquiry into this subject seems to the Court to be put completely at rest by the act already

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mentioned, entitled, "An act for the enrolling and licensing of steamboats."

This act authorizes a steamboat employed, or intended to be employed, only in a river or bay of the United States, owned wholly or in part by an alien, resident within the United States, to be enrolled and licensed as if the same belonged to a citizen of the United States.

This act demonstrates the opinion of Congress that steamboats may be enrolled and licensed, in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating waters and entering ports which are free to such vessels than if they were wafted on their voyage by the winds, instead of being propelled by the agency of fire. The one element may be as legitimately used as the other for every commercial purpose authorized by the laws of the Union, and the act of a State inhibiting the use of either to any vessel having a license under the act of Congress comes, we think, in direct collision with that act.

As this decides the cause, it is unnecessary to enter in an examination of that part of the Constitution which empowers Congress to promote the progress of science and the useful arts.

The Court is aware that, in stating the train of reasoning by which we have been conducted to this result, much time has been consumed in the attempt to demonstrate propositions which may have been thought axioms. It is felt that the tediousness inseparable from the endeavour to prove that which is already clear is imputable to

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a considerable part of this opinion. But it was unavoidable. The conclusion to which we have come depends on a chain of principles which it was necessary to preserve unbroken, and although some of them were thought nearly self-evident, the magnitude of the question, the weight of character belonging to those from whose judgment we dissent, and the argument at the bar demanded that we should assume nothing.

Powerful and ingenious minds, taking as postulates that the powers expressly granted to the government of the Union are to be contracted by construction into the narrowest possible compass and that the original powers of the States are retained if any possible construction will retain them may, by a course of well digested but refined and metaphysical reasoning founded on these premises, explain away the Constitution of our country and leave it a magnificent structure indeed to look at, but totally unfit for use. They may so entangle and perplex the understanding as to obscure principles which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case, it is peculiarly necessary to recur to safe and fundamental principles to sustain those principles, and when sustained, to make them the tests of the arguments to be examined.

Mr. Justice JOHNSON.

The judgment entered by the Court in this cause, has my entire approbation, but, having adopted my conclusions on views

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of the subject materially different from those of my brethren, I feel it incumbent on me to exhibit those views. I have also another inducement: in questions of great importance and great delicacy, I feel my duty to the public best discharged by an effort to maintain my opinions in my own way.

In attempts to construe the Constitution, I have never found much benefit resulting from the inquiry whether the whole or any part of it is to be construed strictly or literally. The simple, classical, precise, yet comprehensive language in which it is couched leaves, at most, but very little latitude for construction, and when its intent and meaning is discovered, nothing remains but to execute the will of those who made it in the best manner to effect the purposes intended. The great and paramount purpose was to unite this mass of wealth and power, for the protection of the humblest individual, his rights, civil and political, his interests and prosperity, are the sole end; the rest are nothing but the means. But the principal of those means, one so essential as to approach nearer the characteristics of an end, was the independence and harmony of the States that they may the better subserve the purposes of cherishing and protecting the respective families of this great republic.

The strong sympathies, rather than the feeble government, which bound the States together during a common war dissolved on the return of peace, and the very principles which gave rise to the war of the revolution began to threaten the

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Confederacy with anarchy and ruin. The States had resisted a tax imposed by the parent State, and now reluctantly submitted to, or altogether rejected, the moderate demands of the Confederation. Everyone recollects the painful and threatening discussions which arose on the subject of the five percent. duty. Some States rejected it altogether; others insisted on collecting it themselves; scarcely any acquiesced without reservations, which deprived it altogether of the character of a national measure; and at length, some repealed the laws by which they had signified their acquiescence.

For a century, the States had submitted, with murmurs, to the commercial restrictions imposed by the parent State; and now, finding themselves in the unlimited possession of those powers over their own commerce which they had so long been deprived of and so earnestly coveted, that selfish principle which, well controlled, is so salutary, and which, unrestricted, is so unjust and tyrannical, guided by inexperience and jealousy, began to show itself in iniquitous laws and impolitic measures from which grew up a conflict of commercial regulations destructive to the harmony of the States and fatal to their commercial interests abroad.

This was the immediate cause that led to the forming of a convention.

As early as 1778, the subject had been pressed upon the attention of Congress by a memorial from the State of New Jersey, and in 1781, we find a resolution presented to that body by one of

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the most enlightened men of his day, Dr. Witherspoon, affirming that

"it is indispensably necessary that the United States, in Congress assembled, should be vested with a right of superintending the commercial regulations of every State that none may take place that shall be partial or contrary to the common interests."

The resolution of Virginia, January 21, 1781, appointing her commissioners to meet commissioners from other States, expresses their purpose to be

"to take into consideration the trade of the United States, to consider how far an uniform system in their commercial regulations may be necessary to their common interests and their permanent harmony."

And Mr. Madison's resolution, which led to that measure, is introduced by a preamble entirely explicit to this point:

"Whereas, the relative situation of the United States has been found, on trial, to require uniformity in their commercial regulations as the only effectual policy for obtaining, in the ports of foreign nations, a stipulation of privileges reciprocal to those enjoyed by the subjects of such nations in the ports of the United States, for preventing animosities, which cannot fail to arise among the several States, from the interference of partial and separate regulations,"

&c. "therefore, resolved," &c.

The history of the times will therefore sustain the opinion that the grant of power over commerce, if intended to be commensurate with the evils existing and the purpose of remedying those

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evils, could be only commensurate with the power of the States over the subject. And this opinion is supported by a very remarkable evidence of the general understanding of the whole American people when the grant was made.

There was not a State in the Union in which there did not at that time exist a variety of commercial regulations; concerning which it is too much to suppose that the whole ground covered by those regulations was immediately assumed by actual legislation under the authority of the Union. But where was the existing statute on this subject that a State attempted to execute? or by what State was it ever thought necessary to repeal those statutes? By common consent, those laws dropped lifeless from their statute books for want of the sustaining power that had been relinquished to Congress.

And the plain and direct import of the words of the grant is consistent with this general understanding.

The words of the Constitution are, "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

It is not material, in my view of the subject, to inquire whether the article a or the should be prefixed to the word "power." Either or neither will produce the same result: if either, it is clear that the article "the" would be the proper one, since the next preceding grant of power is certainly exclusive, to-wit: "to borrow money on the credit

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of the United States." But mere verbal criticism I reject.

My opinion is founded on the application of the words of the grant to the subject of it.

The "power to regulate commerce" here meant to be granted was that power to regulate commerce which previously existed in the States. But what was that power? The States were unquestionably supreme, and each possessed that power over commerce which is acknowledged to reside in every sovereign State. The definition and limits of that power are to be sought among the features of international law, and, as it was not only admitted but insisted on by both parties in argument that, "unaffected by a state of war, by treaties, or by municipal regulations, all commerce among independent States was legitimate," there is no necessity to appeal to the oracles of the jus commune for the correctness of that doctrine. The law of nations, regarding man as a social animal, pronounces all commerce legitimate in a state of peace until prohibited by positive law. The power of a sovereign state over commerce therefore amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom necessarily implies the power to determine what shall remain unrestrained, it follows that the power must be exclusive; it can reside but in one potentate, and hence the grant of this power carries with it the whole subject, leaving nothing for the State to act upon.

And such has been the practical construction of

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the act. Were every law on the subject of commerce repealed tomorrow, all commerce would be lawful, and, in practice, merchants never inquire what is permitted, but what is forbidden commerce. Of all the endless variety of branches of foreign commerce now carried on to every quarter of the world, I know of no one that is permitted by act of Congress any otherwise than by not being forbidden. No statute of the United States that I know of was ever passed to permit a commerce unless in consequence of its having been prohibited by some previous statute.

I speak not here of the treaty-making power, for that is not exercised under the grant now under consideration. I confine my

observation to laws properly so called. And even where freedom of commercial intercourse is made a subject of stipulation in a treaty, it is generally with a view to the removal of some previous restriction, or the introduction of some new privilege, most frequently, is identified with the return to a state of peace. But another view of the subject leads directly to the same conclusion. Power to regulate foreign commerce is given in the same words, and in the same breath, as it were, with that over the commerce of the States and with the Indian tribes. But the power to regulate foreign commerce is necessarily exclusive. The States are unknown to foreign nations, their sovereignty exists only with relation to each other and the General Government. Whatever regulations foreign commerce should be subjected to in the ports of the Union, the General Government would be

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held responsible for them, and all other regulations but those which Congress had imposed would be regarded by foreign nations as trespasses and violations of national faith and comity.

But the language which grants the power as to one description of commerce grants it as to all, and, in fact, if ever the exercise of a right or acquiescence in a construction could be inferred from contemporaneous and continued assent, it is that of the exclusive effect of this grant.

A right over the subject has never been pretended to in any instance except as incidental to the exercise of some other unquestionable power.

The present is an instance of the assertion of that kind, as incidental to a municipal power; that of superintending the internal concerns of a State, and particularly of extending protection and patronage, in the shape of a monopoly, to genius and enterprise.

The grant to Livingston and Fulton interferes with the freedom of intercourse, and on this principle, its constitutionality is contested.

When speaking of the power of Congress over navigation, I do not regard it as a power incidental to that of regulating commerce; I consider it as the thing itself, inseparable from it as vital motion is from vital existence.

Commerce, in its simplest signification, means an exchange of goods, but in the advancement of society, labour, transportation, intelligence, care, and various mediums of exchange become commodities, and enter into commerce, the subject,

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the vehicle, the agent, and their various operations become the objects of commercial regulation. Shipbuilding, the carrying trade, and propagation of seamen are such vital agents of commercial prosperity that the nation which could not legislate over these subjects would not possess power to regulate commerce.

That such was the understanding of the framers of the Constitution is conspicuous from provisions contained in that instrument.

The first clause of the 9th section not only considers the right of controlling personal ingress or migration, as implied in the powers previously vested in Congress over commerce, but acknowledges it as a legitimate subject of revenue. And, although the leading object of this section undoubtedly was the importation of slaves, yet the words are obviously calculated to comprise persons of all descriptions, and to recognise in Congress a power to prohibit where the States permit, although they cannot permit when the States prohibit. The treaty-making power undoubtedly goes further. So the fifth clause of the same section furnishes an exposition of the sense of the Convention as to the power of Congress over navigation: "nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another."

But it is almost labouring to prove a self-evident proposition, since the sense of mankind, the practice of the world, the contemporaneous assumption and continued exercise of the power, and universal acquiescence, have so clearly established

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the right of Congress over navigation, and the transportation of both men and their goods, as not only incidental to, but actually of the essence of, the power to regulate commerce. As to the transportation of passengers, and passengers in a steamboat, I consider it as having been solemnly recognised by the State of New York as a subject both of commercial regulation and of revenue. She has imposed a transit duty upon steamboat passengers arriving at Albany, and unless this be done in the exercise of her control over personal intercourse, as incident to internal commerce, I know not on what principle the individual has been subjected to this tax. The subsequent imposition upon the steamboat itself appears to be but a commutation, and operates as an indirect, instead of a direct, tax upon the same subject. The passenger pays it at last.

It is impossible, with the views which I entertain of the principle on which the commercial privileges of the people of the United States among themselves rests, to concur in the view which this Court takes of the effect of the coasting license in this cause. I do not regard it as the foundation of the right set up in behalf of the appellant. If there was any one object riding over every other in

the adoption of the Constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints. And I cannot overcome the conviction that, if the licensing act was repealed tomorrow, the rights of the appellant to a reversal of the decision complained of would be as

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strong as it is under this license. One half the doubts in life arise from the defects of language, and if this instrument had been called an exemption instead of a license, it would have given a better idea of its character. Licensing acts, in fact, in legislation, are universally restraining acts, as, for example, acts licensing gaming houses, retailers of spiritous liquors, &c. The act in this instance is distinctly of that character, and forms part of an extensive system the object of which is to encourage American shipping and place them on an equal footing with the shipping of other nations. Almost every commercial nation reserves to its own subjects a monopoly of its coasting trade, and a countervailing privilege in favour of American shipping is contemplated in the whole legislation of the United States on this subject. It is not to give the vessel an American character that the license is granted; that effect has been correctly attributed to the act of her enrollment. But it is to confer on her American privileges, as contradistinguished from foreign, and to preserve the government from fraud by foreigners in surreptitiously intruding themselves into the American commercial marine, as well as frauds upon the revenue in the trade coastwise, that this whole system is projected. Many duties and formalities are necessarily imposed upon the American foreign commerce which would be burdensome in the active coasting trade of the States, and can be dispensed with. A higher rate of tonnage also is imposed, and this license entitles the vessels that take it to those exemptions, but to nothing more.

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A common register equally entitles vessels to carry on the coasting trade, although it does not exempt them from the forms of foreign commerce or from compliance with the 16th and 17th sections of the enrolling act. And even a foreign vessel may be employed coastwise upon complying with the requisitions of the 24th section. I consider the license therefore as nothing more than what it purports to be, according to the first section of this act, conferring on the licensed vessel certain privileges in that trade not conferred on other vessels; but the abstract right of commercial intercourse, stripped of those privileges, is common to all.

Yet there is one view in which the license may be allowed considerable influence in sustaining the decision of this Court.

It has been contended that the grants of power to the United States over any subject do not necessarily paralyze the arm of the States or deprive them of the capacity to act on the same subject. The this can be the effect only of prohibitory provisions in their own Constitutions, or in that of the General Government. The vis vitae of power is still existing in the States, if not extinguished by the Constitution of the United States. That, although as to all those grants of power which may be called aboriginal, with relation to the Government, brought into existence by the Constitution, they, of course, are out of the reach of State power, yet, as to all concessions of powers which previously existed in the States, it was otherwise. The practice of our Government certainly

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has been, on many subjects, to occupy so much only of the field opened to them as they think the public interests require. Witness the jurisdiction of the Circuit Courts, limited both as to cases and as to amount, and various other instances that might to cited. But the license furnishes a full answer to this objection, for, although one grant of power over commerce, should not be deemed a total relinquishment of power over the subject, but amounting only to a power to assume, still the power of the States must be at an end, so far as the United States have, by their legislative act, taken the subject under their immediate superintendence. So far as relates to the commerce coastwise, the act under which this license is granted contains a full expression of Congress on this subject. Vessels, from five tons upwards, carrying on the coasting trade are made the subject of regulation by that act. And this license proves that this vessel has complied with that act, and been regularly ingrafted into one class of the commercial marine of the country.

It remains, to consider the objections to this opinion, as presented by the counsel for the appellee. On those which had relation to the particular character of this boat, whether as a steamboat or a ferry boat, I have only to remark that, in both those characters, she is expressly recognised as an object of the provisions which relate to licenses.

The 12th section of the Act of 1793 has these words: "That when the master of any ship or vessel, ferry boats excepted, shall be changed," &c. And the act which exempts licensed steamboats

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from the provisions against alien interests shows such boats to be both objects of the licensing act and objects of that act when employed exclusively within our bays and rivers.

But the principal objections to these opinions arise,

1st. From the unavoidable action of some of the municipal powers of the States upon commercial subjects.

2d. From passages in the Constitution which are supposed to imply a concurrent power in the States in regulating commerce.

It is no objection to the existence of distinct, substantive powers that, in their application, they bear upon the same subject. The same bale of goods, the same cask of provisions, or the same ship that may be the subject of commercial regulation may also be the vehicle of disease. And the health laws that require them to be stopped and ventilated are no more intended as regulations on commerce than the laws which permit their importation are intended to innoculate the community with disease. Their different purposes mark the distinction between the powers brought into action, and while frankly exercised, they can produce no serious collision. As to laws affecting ferries, turnpike roads, and other subjects of the same class, so far from meriting the epithet of commercial regulations, they are, in fact, commercial facilities for which, by the consent of mankind, a compensation is paid upon the same principle that the whole commercial world submit to pay light money to the Danes. Inspection laws are of a more equivocal nature, and it is obvious that

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the Constitution has viewed that subject with much solicitude. But so far from sustaining an inference in favour of the power of the States over commerce, I cannot but think that the guarded provisions of the 10th section on this subject furnish a strong argument against that inference. It was obvious that inspection laws must combine municipal with commercial regulations, and, while the power over the subject is yielded to the States, for obvious reasons, an absolute control is given over State legislation on the subject, as far as that legislation may be exercised, so as to affect the commerce of the country. The inferences to be correctly drawn from this whole article appear to me to be altogether in favour of the exclusive grants to Congress of power over commerce, and the reverse of that which the appellee contends for.

This section contains the positive restrictions imposed by the Constitution upon State power. The first clause of it specifies those powers which the States are precluded from exercising, even though the Congress were to permit them. The second, those which the States may exercise with the consent of Congress. And here the sedulous attention to the subject of State exclusion from commercial power is strongly marked. Not satisfied with the express grant to the United States of the power over commerce, this clause negatives the exercise of that power to the States as to the only two objects which could ever tempt them to assume the exercise of that power, to-wit, the collection of a revenue from imposts and duties on imports and exports, or from a tonnage duty. As

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to imposts on imports or exports, such a revenue might have been aimed at directly, by express legislation, or indirectly, in the form of inspection laws, and it became necessary to guard against both. Hence, first, the consent of Congress to such imposts or duties is made necessary, and, as to inspection laws, it is limited to the minimum of expenses. Then the money so raised shall be paid into the Treasury of the United States, or may be sued for, since it is declared to be for their use. And lastly, all such laws may be modified or repealed by an act of Congress. It is impossible for a right to be more guarded. As to a tonnage duty that could be recovered in but one way, and a sum so raised, being obviously necessary for the execution of health laws and other unavoidable port expenses, it was intended that it should go into the State treasuries, and nothing more was required therefore than the consent of Congress. But this whole clause, as to these two subjects, appears to have been introduced ex abundanti cautela, to remove every temptation to an attempt to interfere with the powers of Congress over commerce, and to show how far Congress might consent to permit the States to exercise that power. Beyond those limits, even by the consent of Congress, they could not exercise it. And thus we have the whole effect of the clause. The inference which counsel would deduce from it is neither necessary nor consistent with the general purpose of the clause.

But instances have been insisted on with much confidence in argument in which, by municipal

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laws, particular regulations respecting their cargoes have been imposed upon shipping in the ports of the United States, and one in which forfeiture was made the penalty of disobedience.

Until such laws have been tested by exceptions to their constitutionality, the argument certainly wants much of the force attributed to it; but, admitting their constitutionality, they present only the familiar case of punishment inflicted by both governments upon the same individual. He who robs the mail may also steal the horse that carries it, and would unquestionably be subject to punishment at the same time under the laws of the State in which the crime is committed and under those of the United States. And these punishments may interfere, and one render it impossible to inflict the other, and yet the two governments would be acting under powers that have no claim to identity.

It would be in vain to deny the possibility of a clashing and collision between the measures of the two governments. The line cannot be drawn with sufficient distinctness between the municipal powers of the one and the commercial powers of the other. In some points, they meet and blend so as scarcely to admit of separation. Hitherto, the only remedy has been applied which the case admits of -- that of a frank and candid cooperation for the general good. Witness the laws of Congress requiring its officers to respect the inspection laws of the States and to aid in enforcing their health laws, that which surrenders to the States the superintendence of pilotage, and the

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many laws passed to permit a tonnage duty to be levied for the use of their ports. Other instances could be cited abundantly to prove that collision must be sought to be produced, and when it does arise, the question must be decided how far the powers of Congress are adequate to put it down. Wherever the powers of the respective governments are frankly exercised, with a distinct view to the ends of such powers, they may act upon the same object, or use the same means, and yet the powers be kept perfectly distinct. A resort to the same means therefore is no argument to prove the identity of their respective powers.

I have not touched upon the right of the States to grant patents for inventions or improvements generally, because it does not necessarily arise in this cause. It is enough for all the purposes of this decision if they cannot exercise it so as to restrain a free intercourse among the States.

DECREE. This cause came on to be heard on the transcript of the record of the Court for the Trial of Impeachments and Correction of Errors of the State of New York, and was argued by counsel. On consideration whereof, this Court is of opinion that the several licenses to the steamboats the Stoudinger and the Bellona to carry on the coasting trade, which are set up by the appellant Thomas Gibbons in his answer to the bill of the respondent, Aaron Ogden, filed in the Court of Chancery for the State of New York, which were granted under an act of Congress, passed in pursuance of the Constitution of the

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United States, gave full authority to those vessels to navigate the waters of the United States, by steam or otherwise, for the purpose of carrying on the coasting trade, any law of the State of New York to the contrary notwithstanding, and that so much of the several laws of the State of New York as prohibits vessels, licensed according to the laws of the United States, from navigating the waters of the State of New York by means of fire or steam is repugnant to the said Constitution, and void. This Court is therefore of opinion that the decree of the Court of New York for the Trial of Impeachments and the Correction of Errors affirming the decree of the Chancellor of that State, which perpetually enjoins the said Thomas Gibbons, the appellant, from navigating the waters of the State of New York with the steamboats the Stoudinger and the Bellona by steam or fire, is erroneous, and ought to be reversed, and the same is hereby reversed and annulled, and this Court doth further DIRECT, ORDER, and DECREE that the bill of the said Aaron Ogden be dismissed, and the same is hereby dismissed accordingly.

http://www.oyez.org/cases/1792-1850/1827/1827_0/

Ogden v. Saunders
Citation: 25 U.S. 213 (1827)
Petitioner: Ogden
Respondent: Saunders
Oral Argument: Thursday, January 18, 1827
Decision: Monday, February 19, 1827

Saunders, a Kentucky citizen, sued Ogden, a Louisiana citizen, on a contract which Odgen, then a citizen of New York, had accepted in 1806. Saunders claimed that Odgen had not made payment on his obligation. Odgen claimed bankruptcy as his defense under the New York bankruptcy law enacted in 1801.

Question
Does a state bankruptcy law applying to contracts made after the law's passage violate the Obligation of Contracts Clause of the Constitution?

Conclusion
No. This is not a violation of the Contracts Clause. The state law remainscontrolling. The obligation of a contract made after the enactment of a bankruptcy statute is subject to the bankruptcy statute provisions. In effect, the bankruptcy statute becomes part of all subsequent contracts, limiting their obligation but not impairing them.

http://supreme.justia.com/us/25/213/case.html

U.S. Supreme Court
Ogden v. Saunders, 25 U.S. 12 Wheat. 213 213 (1827)

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA

Syllabus

A bankrupt or insolvent law of any state which discharges both the person of the debtor and his future acquisitions of property is not "a law impairing the obligation of contracts" so far as respects debts contracted subsequent to the passage of such law in those cases where the contract was made between citizens of the state under whose laws the discharge was obtained and in whose courts the discharge may be pleaded.

The power given to the United States by the Constitution, "to establish uniform laws on the subject of bankruptcies throughout the United States" is not exclusive of the right of the states to legislate on the same subject except when the power is actually in exercise by Congress and the laws of the state are in conflict with the law of the United States.

But when in the exercise of that power the states pass beyond their own limits and the rights of their own citizens and act upon the rights of citizens of other states, there arise a conflict of sovereign power and a collision with the judicial powers granted to the United States which render the exercise of such a power incompatible with the rights of other states and with the Constitution of the United States.

This was an action of assumpsit, brought in the court below

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by the defendant in error, Saunders, a citizen of Kentucky, against the plaintiff in error, Ogden, a citizen of Louisiana. The plaintiff below declared upon certain bills of exchange drawn on the 30 September, 1806, by one Jordan, at Lexington, in the State of Kentucky, upon the defendant below, Ogden, in the City of New York, the defendant then being a citizen and resident of the State of New York, accepted by him at the City of New York and protested for nonpayment.

The defendant below pleaded several pleas, among which was a certificate of discharge under the act of the Legislature of the State of New York of April 3, 1801, for the relief of insolvent debtors, commonly called the Three-Fourths Act.

The jury found the facts in the form of a special verdict, on which the court rendered a judgment for the plaintiff below, and the cause was brought by writ of error before this Court.

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The learned judges delivered their opinions as follows:

MR. JUSTICE WASHINGTON.

The first and most important point to be decided in this cause turns essentially upon the question, whether the obligation of a contract is impaired by a state bankrupt or insolvent law which discharges the person and the future acquisitions of the debtor from his liability under a contract entered into in that state after the passage of the act.

This question has never before been distinctly presented to the consideration of this Court and decided, although it has been supposed by the judges of a highly respectable state court, that it was decided in the case of McMillan v. McNiel, 4 Wheat. 209. That was the case of a debt contracted by two citizens of South Carolina in that state, the discharge of which had a view to no other state. The debtor afterwards removed to the Territory of Louisiana, where he was regularly discharged as an insolvent

from all his debts under an act of the legislature of that state passed prior to the time when the debt in question was contracted. To an action brought by the creditor in the District Court of Louisiana, the defendant plead in bar his discharge under the law of that territory, and it was contended by the counsel for the debtor in this Court that the law under which the debtor was discharged having passed before the contract was made, it could not be said to impair its obligation. The cause was argued on one side only, and it would seem from the report of the case that no written opinion was prepared by the Court. THE CHIEF JUSTICE stated that the circumstance of the state law under which the debt was attempted to be discharged having been passed before the debt was contracted made no difference in the application of the principle, which had been asserted by the

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Court in the case of Sturges v. Crowninshield. The correctness of this position is believed to be incontrovertible. The principle alluded to was that a state bankrupt law which impairs the obligation of a contract is unconstitutional in its application to such contract. In that case, it is true, the contract preceded in order of time the act of assembly under which the debtor was discharged, although it was not thought necessary to notice that circumstance in the opinion which was pronounced. The principle, however, remained in the opinion of the Court delivered in McMillan v. McNiel, unaffected by the circumstance that the law of Louisiana preceded a contract made in another state, since that law, having no extraterritorial force, never did at any time govern or affect the obligation of such contract. It could not, therefore, be correctly said to be prior to the contract in reference to its obligation, since if, upon legal principles, it could affect the contract, that could not happen until the debtor became a citizen of Louisiana, and that was subsequent to the contract. But I hold the principle to be well established that a discharge under the bankrupt laws of one government does not affect contracts made or to be executed under another, whether the law be prior or subsequent in the date to that of the contract, and this I take to be the only point really decided in the case alluded to. Whether THE CHIEF JUSTICE was correctly understood by the reporter when he is supposed to have said "that this case was not distinguishable in principle from the preceding case of Sturges v. Crowninshield" it is not material at this time to inquire, because I understand the meaning of these expressions to go no further than to intimate that there was no distinction between the cases as to the constitutional objection, since it professed to discharge a debt contracted in another state, which, at the time it was contracted, was not within its operation nor subject to be discharged by it. The case now to be decided is that of a debt contracted in the State of New York by a citizen of that state, from which he was discharged, so far as he constitutionally could be, under a bankrupt law of that state in force at the time when the debt was contracted. It is a case, therefore, that bears no resemblance to the one just noticed.

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I come now to the consideration of the question, which for the first time has been directly brought before this Court for judgment. I approach it with more than ordinary sensibility not only on account of its importance, which must be acknowledged by all, but of its intrinsic difficulty, which every step I have taken in arriving at a conclusion with which my judgment could in any way be satisfied has convinced me attends it. I have examined both sides of this great question with the most sedulous care and the most anxious desire to discover which of them, when adopted, would be most likely to fulfill the intentions of those who framed the Constitution of the United States. I am far from asserting that my labors have resulted in entire success. They have led me to the only conclusion by which I can stand with any degree of confidence, and yet I should be disingenuous were I to declare from this place that I embrace it without hesitation and without a doubt of its correctness. The most that candor will permit me to say upon the subject is that I see, or think I see, my way more clear on the side which my judgment leads me to adopt than on the other, and it must remain for others to decide whether the guide I have chosen has been a safe one or not.

It has constantly appeared to me throughout the different investigations of this question to which it has been my duty to attend that the error of those who controvert the constitutionality of the bankrupt law under consideration, in its application to this case, if they be in error at all, has arisen from not distinguishing accurately between a law which impairs a contract and one which impairs its obligation. A contract is defined by all to be an agreement to do or not to do some particular act, and in the construction of this agreement, depending essentially upon the will of the parties between whom it is formed, we seek for their intention with a view to fulfill it. Any law, then, which enlarges, abridges, or in any manner changes this intention, when it is discovered, necessarily impairs the contract itself, which is but the evidence of that intention. The manner, or the degree in which this change is effected can in no respect influence this conclusion, for whether the law affect the validity, the construction, the duration, the mode of

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discharge, or the evidence of the agreement, it impairs the contract, though it may not do so to the same extent in all the supposed cases. Thus, a law which declares that no action shall be brought whereby to charge a person upon his agreement to pay the debt of another, or upon an agreement relating to lands, unless the same be reduced to writing impairs a contract made by

parol, whether the law precede or follow the making of such contract, and if the argument that this law also impairs, in the former case, the obligation of the contract be sound, it must follow that the statute of frauds, and all other statutes which in any manner meddle with contracts, impair their obligation and are consequently within the operation of this section and article of the Constitution. It will not do to answer that in the particular case put and in others of the same nature, there is no contract to impair, since the preexisting law denies all remedy for its enforcement, or forbids the making of it, since it is impossible to deny that the parties have expressed their will in the form of a contract notwithstanding the law denies to it any valid obligation.

This leads us to a critical examination of the particular phraseology of that part of the above section which relates to contracts. It is a law which impairs the obligation of contracts, and not the contracts themselves, which is interdicted. It is not to be doubted that this term "obligation," when applied to contracts, was well considered and weighed by those who framed the Constitution and was intended to convey a different meaning from what the prohibition would have imported without it. It is this meaning of which we are all in search.

What is it, then, which constitutes the obligation of a contract? The answer is given by THE CHIEF JUSTICE in the case of Sturges v. Crowninshield, to which I readily assent now as I did then; it is the law which binds the parties to perform their agreement. The law, then, which has this binding obligation, must govern and control the contract in every shape in which it is intended to bear upon it, whether it affect its validity, construction, or discharge.

But the question which law is referred to in the above

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definition still remains to be solved. It cannot for a moment be conceded that the mere moral law is intended, since the obligation which that imposes is altogether of the imperfect kind, which the parties to it are free to obey or not as they please. It cannot be supposed that it was with this law the grave authors of this instrument were dealing.

The universal law of all civilized nations which declares that men shall perform that to which they have agreed has been supposed by the counsel who have argued this cause for the defendant in error to be the law which is alluded to, and I have no objection to acknowledging its obligation, whilst I must deny that it is that which exclusively governs the contract. It is upon this law that the obligation which nations acknowledge to perform their compacts with each other is founded, and I therefore feel no objection to answer the question asked by the same counsel -- what law it is which constitutes the obligation of the compact between Virginia and Kentucky? -- by admitting that it is this common law of nations which requires them to perform it. I admit further that it is this law which creates the obligation of a contract made upon a desert spot, where no municipal law exists, and (which was another case put by the same counsel) which contract, by the tacit assent of all nations, their tribunals are authorized to enforce.

But can it be seriously insisted that this, any more than the moral law upon which it is founded, was exclusively in the contemplation of those who framed this Constitution? What is the language of this universal law? It is simply that all men are bound to perform their contracts. The injunction is as absolute as the contracts to which it applies. It admits of no qualification and no restraint, either as to its validity, construction, or discharge, further than may be necessary to develop the intention of the parties to the contract. And if it be true that this is exclusively the law to which the Constitution refers us, it is very apparent that the sphere of state legislation upon subjects connected with the contracts of individuals would be abridged beyond what it can for a moment be believed the sovereign states of this Union would have consented to, for it will be found upon examination that there are few laws which concern the general

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police of a state or the government of its citizens in their intercourse with each other or with strangers which may not in some way or other affect the contracts which they have entered into or may thereafter form. For what the laws of evidence, or which concern remedies -- frauds and perjuries -- laws of registration, and those which affect landlord and tenant, sales at auction, acts of limitation, and those which limit the fees of professional men, and the charges of tavern keepers, and a multitude of others which crowed the codes of every state, but laws which may affect the validity, construction, or duration, or discharge of contracts? Whilst I admit, then, that this common law of nations, which has been mentioned, may form in part the obligation of a contract, I must unhesitatingly insist that this law is to be taken in strict subordination to the municipal laws of the land where the contract is made or is to be executed. The former can be satisfied by nothing short of performance; the latter may affect and control the validity, construction, evidence, remedy, performance and discharge of the contract. The former is the common law of all civilized nations and of each of them; the latter is the peculiar law of each, and is paramount to the former whenever they come in collision with each other.

It is, then, the municipal law of the state, whether that be written or unwritten, which is emphatically the law of the contract made within the state, and must govern it throughout wherever its performance is sought to be enforced.

It forms, in my humble opinion, a part of the contract and travels with it wherever the parties to it may be found. It is so regarded by all the civilized nations of the world, and is enforced by the tribunals of those nations according to its own forms unless the parties to it have otherwise agreed, as where the contract is to be executed in or refers to the laws of some other country than that in which it is formed or where it is of an immoral character or contravenes the policy of the nation to whose tribunals the appeal is made, in which latter cases the remedy which the comity of nations affords for enforcing the obligation of contracts wherever formed is denied. Free from these objections, this law, which accompanies the contract as forming a part of

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it, is regarded and enforced everywhere, whether it affect the validity, construction, or discharge of the contract. It is upon this principle of universal law that the discharge of the contract, or of one of the parties to it, by the bankrupt laws of the country where it was made operates as a discharge everywhere.

If then, it be true that the law of the country where the contract is made or to be executed forms a part of that contract and of its obligation, it would seem to be somewhat of a solecism to say that it does, at the same time, impair that obligation.

But it is contended that if the municipal law of the state where the contract is so made forms a part of it, so does that clause of the Constitution which prohibits the states from passing laws to impair the obligation of contracts, and consequently that the law is rendered inoperative by force of its controlling associate. All this I admit, provided it be first proved that the law so incorporated with and forming a part of the contract does in effect impair its obligation, and before this can be proved, it must be affirmed and satisfactorily made out that if, by the terms of the contract, it is agreed that on the happening of a certain event -- as upon the future insolvency of one of the parties and his surrender of all his property for the benefit of his creditors -- the contract shall be considered as performed and at an end, this stipulation would impair the obligation of the contract. If this proposition can be successfully affirmed, I can only say that the soundness of it is beyond the reach of my mind to understand.

Again it is insisted that if the law of the contract forms a part of it, the law itself cannot be repealed without impairing the obligation of the contract. This proposition I must be permitted to deny. It may be repealed at any time at the will of the legislature, and then it ceases to form any part of those contracts which may afterwards be entered into. The repeal is no more void than a new law would be which operates upon contracts to affect their validity, construction, or duration. Both are valid (if the view which I take of this case be correct), as they may affect contracts afterwards formed; but neither are so if it bears upon existing contracts, and in the former case, in which the repeal

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contains no enactment, the Constitution would forbid the application of the repealing law to past contracts, and to those only.

To illustrate this argument, let us take four laws, which, either by new enactments, or by the repeal of former laws, may affect contracts as to their validity, construction, evidence, or remedy.

Laws against usury are of the first description.

A law which converts a penalty stipulated for by the parties as the only atonement for a breach of the contract into a mere agreement for a just compensation, to be measured by the legal rate of interest, is of the second.

The statute of frauds and the statute of limitations may be cited as examples of the two last.

The validity of these laws can never be questioned by those who accompany me in the view which I take of the question under consideration, unless they operate, by their express provisions, upon contracts previously entered into, and even then they are void only so far as they do so operate, because in that case and in that case only do they impair the obligation of those contracts. But if they equally impair the obligation of contracts subsequently made, which they must do if this be the operation of a bankrupt law upon such contracts, it would seem to follow that all such laws, whether in the form of new enactments, or of repealing laws producing the same legal consequences, are made void by the Constitution, and yet the counsel for the defendants in error have not ventured to maintain so alarming a proposition.

If it be conceded that those laws are not repugnant to the Constitution so far as they apply to subsequent contracts, I am yet to be instructed how to distinguish between those laws and the one now under consideration. How has this been attempted by the learned counsel who have argued this cause upon the ground of such a distinction?

They have insisted that the effect of the law first supposed is to annihilate the contract in its birth, or rather to prevent it from having a legal existence, and consequently that there is no obligation to be impaired. But this is clearly not so, since it may legitimately avoid all contracts afterwards

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entered into which reserve to the lender a higher rate of interest than this law permits.

The validity of the second law is admitted, and yet this can only be in its application to subsequent contracts, for it has not and I think it cannot for a moment be maintained that a law which in express terms varies the construction of an existing contract or which, repealing a former law, is made to produce the same effect does not impair the obligation of that contract.

The statute of frauds and the statute of limitations, which have been put as examples of the third and fourth classes of laws, are also admitted to be valid because they merely concern the modes of proceeding in the trial of causes. The former, supplying a rule of evidence, and the latter, forming a part of the remedy given by the legislature to enforce the obligation and likewise providing a rule of evidence.

All this I admit. But how does it happen that these laws, like those which affect the validity and construction of contracts, are valid as to subsequent, and yet void as to prior and subsisting contracts? For we are informed by the learned judge who delivered the opinion of this Court in the case of Sturges v. Crowninshield that

"if, in a state where six years may be pleaded in bar to an action of assumpsit, a law should pass declaring that contracts already in existence, not barred by the statute, should be construed within it, there could be little doubt of its unconstitutionality."

It is thus most apparent that whichever way we turn, whether to laws affecting the validity, construction, or discharges of contracts or the evidence or remedy to be employed in enforcing them, we are met by this overruling and admitted distinction between those which operate retrospectively and those which operate prospectively. In all of them the law is pronounced to be void in the first class of cases and not so in the second.

Let us stop, then, to make a more critical examination of the act of limitations, which, although it concerns the remedy, or, if it must be conceded, the evidence, is yet void or otherwise, as it is made to apply retroactively, or prospectively, and see if it can, upon any intelligible principle, be distinguished

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from a bankrupt law when applied in the same manner. What is the effect of the former? The answer is to discharge the debtor and all his future acquisitions from his contract, because he is permitted to plead it in bar of any remedy which can be instituted against him, and consequently in bar or destruction of the obligation which his contract imposed upon him. What is the effect of a discharge under a bankrupt law? I can answer this question in no other terms than those which are given to the former question. If there be a difference, it is one which, in the eye of justice at least, is more favorable to the validity of the latter than of the former, for in the one, the debtor surrenders everything which he possesses towards the discharge of his obligation, and in the other he surrenders nothing, and sullenly shelters himself behind a legal objection with which the law has provided him for the purpose of protecting his person and his present as well as his future acquisitions against the performance of his contract.

It is said that the former does not discharge him absolutely from his contract, because it leaves a shadow sufficiently substantial to raise a consideration for a new promise to pay. And is not this equally the case with a certificated bankrupt, who afterwards promises to pay a debt from which his certificate had discharged him? In the former case, it is said, the defendant must plead the statute in order to bar the remedy and to exempt him from his obligation. And so, I answer, he must plead his discharge under the bankrupt law and his conformity to it in order to bar the remedy of his creditor and to secure to himself a like exemption. I have, in short, sought in vain for some other grounds on which to distinguish the two laws from each other than those which were suggested at the bar. I can imagine no other, and I confidently believe that none exists which will bear the test of a critical examination.

To the decision of this Court made in the case of Sturges v. Crowninshield, and to the reasoning of the learned judge who delivered that opinion, I entirely submit, although I did not then, nor can I now bring my mind to concur in that part of it which admits the constitutional power of the state legislatures to pass bankrupt laws, by which I understand those laws which discharge the person and the future

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acquisitions of the bankrupt from his debts. I have always thought that the power to pass such a law was exclusively vested by the Constitution in the Legislature of the United States. But it becomes me to believe that this opinion was and is incorrect, since it stands condemned by the decision of a majority of this Court, solemnly pronounced.

After making this acknowledgment, I refer again to the above decision with some degree of confidence, in support of the opinion to which I am now inclined to come that a bankrupt law which operates prospectively, or insofar as it does so operate, does not violate the Constitution of the United States. It is there stated

"that until the power to pass uniform laws on the subject of bankruptcies be exercised by Congress, the states are not forbidden to pass a bankrupt law, provided it contain no principle

which violates the tenth section of the first article of the Constitution of the United States."

The question in that case was whether the law of New York passed on the third of April, 1811, which liberates not only the person of the debtor but discharges him from all liability for any debt contracted previous as well as subsequent to his discharge on his surrendering his property for the use of his creditors was a valid law under the Constitution in its application to a debt contracted prior to its passage? The Court decided that it was not upon the single ground that it impaired the obligation of that contract. And if it be true that the states cannot pass a similar law to operate upon contracts subsequently entered into, it follows inevitably either that they cannot pass such laws at all, contrary to the express declaration of the Court as before quoted, or that such laws do not impair the obligation of contracts subsequently entered into; in fine, it is a self-evident proposition that every contract that can be formed must either precede or follow any law by which it may be affected.

I have, throughout the preceding part of this opinion, considered the municipal law of the country where the contract is made as incorporated with the contract, whether it affects its validity, construction, or discharge. But I think it quite immaterial to stickle for this position if it be conceded to me what can scarcely be denied -- that this munich pal

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law constitutes the law of the contract so formed, and must govern it throughout. I hold the legal consequences to be the same, in whichever view the law, as it affects the contract, is considered.

I come now to a more particular examination and construction of the section under which this question arises, and I am free to acknowledge that the collocation of the subjects for which it provides has made an irresistible impression upon my mind, much stronger, I am persuaded, than I can find language to communicate to the minds of others.

It declares that "no state shall coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts." These prohibitions, associated with the powers granted to Congress "to coin money, and to regulate the value thereof, and of foreign coin," most obviously constitute members of the same family, being upon the same subject and governed by the same policy.

This policy was to provide a fixed and uniform standard of value throughout the United States by which the commercial and other dealings between the citizens thereof, or between them and foreigners, as well as the monied transactions of the government, should be regulated. For it might well be asked why vest in Congress the power to establish a uniform standard of value by the means pointed out if the states might use the same means, and thus defeat the uniformity of the standard, and, consequently, the standard itself? And why establish a standard at all, for the government of the various contracts which might be entered into, if those contracts might afterwards be discharged by a different standard, or by that which is not money, under the authority of state tender laws? It is obvious, therefore, that these prohibitions in the 10th section are entirely homogeneous, and are essential to the establishment of a uniform standard of value in the formation and discharge of contracts. It is for this reason, independent of the general phraseology which is employed, that the prohibition in regard to state tender laws will admit of no construction which would confine it to state laws which have a retrospective operation.

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The next class of prohibitions contained in this section consists of bills of attainder, ex post facto laws, and laws impairing the obligation of contracts.

Here, too, we observe, as I think, members of the same family brought together in the most intimate connection with each other. The states are forbidden to pass any bill of attainder or ex post facto law, by which a man shall be punished criminally or penally by loss of life of his liberty, property, or reputation for an act which, at the time of its commission, violated no existing law of the land. Why did the authors of the Constitution turn their attention to this subject, which, at the first blush, would appear to be peculiarly fit to be left to the discretion of those who have the police and good government of the state under their management and control? The only answer to be given is because laws of this character are oppressive, unjust, and tyrannical, and as such are condemned by the universal sentence of civilized man. The injustice and tyranny which characterizes ex post facto laws consists altogether in their retrospective operation, which applies with equal force, although not exclusively, to bills of attainder.

But if it was deemed wise and proper to prohibit state legislation as to retrospective laws, which concern almost exclusively the citizens and inhabitants of the particular state in which this legislation takes place, how much more did it concern the private and political interests of the citizens of all the states in their commercial and ordinary intercourse with each other that the same prohibition should be extended civilly to the contracts which they might enter into?

If it were proper to prohibit a state legislature to pass a retrospective law which should take from the pocket of one of its own citizens a single dollar as a punishment for an act which was

innocent at the time it was committed, how much more proper was it to prohibit laws of the same character precisely which might deprive the citizens of other states, and foreigners, as well as citizens of the same state, of thousands to which by their contracts they were justly entitled and which they might possibly have realized but for such state interference? How natural, then, was it, under

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the influence of these considerations, to interdict similar legislation in regard to contracts by providing that no state should pass laws impairing the obligation of past contracts? It is true that the two first of these prohibitions applies to laws of a criminal, and the last to laws of a civil, character, but if I am correct in my view of the spirit and motives of these prohibitions, they agree in the principle which suggested them. They are founded upon the same reason, and the application of it is at least as strong to the last as it is to the two first prohibitions.

But these reasons are altogether inapplicable to laws of a prospective character. There is nothing unjust or tyrannical in punishing offenses prohibited by law and committed in violation of that law. Nor can it be unjust or oppressive to declare by law that contracts subsequently entered into may be discharged in a way different from that which the parties have provided but which they know, or may know, are liable under certain circumstances to be discharged in a manner contrary to the provisions of their contract.

Thinking, as I have always done, that the power to pass bankrupt laws was intended by the authors of the Constitution to be exclusive in Congress, or at least that they expected the power vested in that body would be exercised so as effectually to prevent its exercise by the states, it is the more probable that in reference to all other interferences of the state legislatures upon the subject of contracts, retrospective laws were alone in the contemplation of the convention.

In the construction of this clause of the tenth section of the Constitution, one of the counsel for the defendant supposed himself at liberty so to transpose the provisions contained in it, as to place the prohibition to pass laws impairing the obligation of contracts in juxtaposition with the other prohibition to pass laws making anything but gold and silver coin a tender in payment of debts, inasmuch as the two provisions relate to the subject of contracts.

That the derangement of the words and even sentences of a law may sometimes be tolerated in order to arrive at the apparent meaning of the legislature, to be gathered from

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other parts or from the entire scope of the law I shall not deny. But I should deem it a very hazardous rule to adopt in the construction of an instrument so maturely considered as this Constitution was by the enlightened statesmen who framed it, and so severely examined and criticized by its opponents in the numerous state conventions which finally adopted it. And if, by the construction of this sentence, arranged as it is, or as the learned counsel would have it to be, it could have been made out that the power to pass prospective laws affecting contracts was denied to the states, it is most wonderful that not one voice was raised against the provision in any of those conventions by the jealous advocates of state rights, nor even an amendment proposed to explain the clause and to exclude a construction which trenches so extensively upon the sphere of state legislation.

But although the transposition which is contended for may be tolerated in cases where the obvious intention of the legislature can in no other way be fulfilled, it can never be admitted in those where consistent meaning can be given to the whole clause as it authors thought proper to arrange it, and where the only doubt is whether the construction which the transposition countenances, or that which results from the reading which the legislature has thought proper to adopt, is most likely to fulfill the supposed intention of the legislature. Now although it is true that the prohibition to pass tender laws of a particular description and laws impairing the obligation of contracts relate, both of them, to contracts, yet the principle which governs each of them, clearly to be inferred from the subjects with which they stand associated, is altogether different; that of the first forming part of a system for fixing a uniform standard of value, and of the last being founded on a denunciation of retrospective laws. It is therefore the safest course, in my humble opinion, to construe this clause of the section according to the arrangement which the convention has thought proper to make of its different provisions. To insist upon a transposition, with a view to warrant one construction rather than the other, falls little short, in my opinion, of a begging of the whole question in controversy.

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But why, it has been asked, forbid the states to pass laws making anything but gold and silver coin a tender in payment of debts contracted subsequent as well as prior to the law which authorizes it, and yet confine the prohibition to pass laws impairing the obligation of contracts to past contracts, or in other words to future bankrupt laws, when the consequence resulting from each is the same, the latter being considered by the counsel as being in truth nothing less than tender laws in disguise.

An answer to this question has in part been anticipated by some of the preceding observations. The power to pass bankrupt laws having been vested in Congress, either as an exclusive power or under the belief that it would certainly be exercised, it is highly probable that state legislation upon that subject was not within the contemplation of the convention, or if it was it is quite unlikely that the exercise of the power by the state legislatures would have been prohibited by the use of terms which, I have endeavored to show, are inapplicable to laws intended to operate prospectively. For had the prohibition been to pass laws impairing contracts, instead of the obligation of contracts, I admit that it would have borne the construction which is contended for, since it is clear that the agreement of the parties in the first case would be impaired as much by a prior as it would be by a subsequent bankrupt law. It has, besides, been attempted to be shown that the limited restriction upon state legislation imposed by the former prohibition might be submitted to by the states, whilst the extensive operation of the latter would have hazarded, to say the least of it, the adoption of the Constitution by the state conventions.

But an answer still more satisfactory to my mind is this: tender laws of the description stated in this section, are always unjust, and where there is an existing bankrupt law at the time the contract is made, they can seldom be useful to the honest debtor. They violate the agreement of the parties to it without the semblance of an apology for the measure, since they operate to discharge the debtor from his undertaking upon terms variant from those by which he bound himself, to the injury of the creditor and unsupported

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in many cases by the plea of necessity. They extend relief to the opulent debtor, who does not stand in need of it, as well as to the one who is, by misfortunes, often unavoidable, reduced to poverty and disabled from complying with his engagements. In relation to subsequent contracts, they are unjust when extended to the former class of debtors and useless to the second, since they may be relieved by conforming to the requisitions of the state bankrupt law where there is one. Being discharged by this law from all his antecedent debts, and having his future acquisitions secured to him an opportunity is afforded him to become once more a useful member of society.

If this view of the subject be correct, it will be difficult to prove that a prospective bankrupt law resembles in any of its features a law which should make anything but gold and silver coin a tender in payment of debts.

I shall now conclude this opinion by repeating the acknowledgment which candor compelled me to make in its commencement that the question which I have been examining is involved in difficulty and doubt. But if I could rest my opinion in favor of the constitutionality of the law on which the question arises on no other ground than this doubt so felt and acknowledged, that alone would in my estimation be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt. This has always been the language of this Court when that subject has called for its decision, and I know that it expresses the honest sentiments of each and every member of this bench. I am perfectly satisfied that it is entertained by those of them from whom it is the misfortune of the majority of the Court to differ on the present occasion, and that they feel no reasonable doubt of the correctness of the conclusion to which their best judgment has conducted them.

My opinion is that the judgment of the court below ought to be reversed, and judgment given for the plaintiff in error.

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MR. JUSTICE JOHNSON.

This suit was instituted in Louisiana in the Circuit Court of the United States by Saunders, the defendant here, against Ogden upon certain bills of exchange. Ogden, the defendant there, pleads in bar to the action a discharge obtained in due form of law from the courts of the State of New York, which discharge purports to release him from all debts and demands existing against him on a specified day. This demand is one of that description, and the act under which the discharge was obtained was the act of New York of 1801, a date long prior to that of the cause of action on which this suit was instituted. The discharge is set forth in the plea, and represents Ogden as "an insolvent debtor, being, on the day and year therein after mentioned, in prison, in the City and County of New York on execution issued against him on some civil action," &c. It does not appear that any suit had ever been instituted against him by this party or on this cause of action prior to the present. The cause below was decided upon a special verdict, in which the jury finds

1st. That the acceptance of the bills on which the action was instituted was made by Ogden in the City of New York on the days they severally bear date, the said defendant then residing in the City of New York and continuing to reside there until a day not specified.

2d. That under the laws of the State of New York in such case provided, and referred to in the discharge (which laws are specially found, &c., meaning the state law of 1801), application

was made for and the defendant obtained the discharge hereunto annexed.

3d. That by the laws of New York, actions on bills of exchange, and acceptances thereof are limited to the term of six years, and

4th. That at the time the said bills were drawn and accepted, the drawee and the drawer of the same were residents and citizens of the State of Kentucky.

On this state of facts, the court below gave judgment against Ogden, the discharged debtor.

We are not in possession of the grounds of the decision below, and it has been argued here as having been given upon the general nullity of the discharge on the ground of its unconstitutionality. But it is obvious that it might also have

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proceeded upon the ground of its nullity as to citizens of other states who have never, by any act of their own, submitted themselves to the lex fori of the state that gives the discharge -- considering the right given by the Constitution to go into the courts of the United States upon any contracts, whatever be their lex loci, as modifying and limiting the general power which states are acknowledged to possess over contracts formed under control of their peculiar laws.

This question, however, has not been argued, and must not now be considered as disposed of by this decision.

The abstract question of the general power of the states to pass laws for the relief of insolvent debtors will be alone considered. And here, in order to ascertain with precision what we are to decide, it is first proper to consider what this Court has already decided on this subject. And this brings under review the two cases of Sturges v. Crowninshield and McMillan v. McNeal, adjudged in the year 1819 and contained in the 4th vol. of the reports. If the marginal note to the report, or summary of the effect of the case of McMillan v. McNeal, presented a correct view of the report of that decision, it is obvious that there would remain very little if anything for this Court to decide. But by comparing the note of the reporter with the facts of the case, it will be found that there is a generality of expression admitted into the former which the case itself does not justify. The principle recognized and affirmed in McMillan v. McNeal is one of universal law, and so obvious and incontestable that it need be only understood to be assented to. It is nothing more than this,

"That insolvent laws have no extraterritorial operation upon the contracts of other states; that the principle is applicable as well to the discharges given under the laws of the states as of foreign countries; and that the anterior or posterior character of the law under which the discharge is given with reference to the date of the contract makes no discrimination in the application of that principle."

The report of the case of Sturges v. Crowninshield needs also some explanation. The Court was, in that case, greatly divided in its views of the doctrine, and the judgment partakes as much of a compromise as of a legal adjudication.

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The minority thought it better to yield something than risk the whole. And, its their course of reasoning led it to the general maintenance of the state power over the subject, controlled and limited alone by the oath administered to all their public functionaries to maintain the Constitution of the United States, yet, as denying the power to act upon anterior contracts could do no harm, but in fact imposed a restriction conceived in the true spirit of the Constitution, it was satisfied to acquiesce in it, provided the decision were so guarded as to secure the power over posterior contracts, as well from the positive terms of the adjudication as from inferences deducible from the reasoning of the Court.

The case of Sturges v. Crowninshield, then, must, in its authority, be limited to the terms of the certificate, and that certificate affirms two propositions.

1. That a state has authority to pass a bankrupt law provided such law does not impair the obligation of contracts within the meaning of the Constitution and provided there be no act of Congress in force to establish an uniform system of bankruptcy conflicting with such law.

2. That a law of this description, acting upon prior contracts, is a law impairing the obligation of contracts within the meaning of the Constitution.

Whatever inferences or whatever doctrines the opinion of the Court in that case may seem to support, the concluding words of that opinion were intended to control and to confine the authority of the adjudication to the limits of the certificate.

I should therefore have supposed that the question of exclusive power in Congress to pass a bankrupt law was not now open, but it has been often glanced at in argument, and I have no objection to express my individual opinion upon it. Not having recorded my views on this point in the case of Crowninshield, I avail myself of this occasion to do so.

So far, then, am I from admitting that the Constitution affords any ground for this doctrine that I never had a doubt that the leading object of the Constitution was to bring in aid of the states a power over this subject, which their individual powers never could attain to; so far from limiting, modifying,

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and attenuating legislative power in its known and ordinary exercise in favor of unfortunate debtors that its sole object was to extend and perfect it as far as the combined powers of the states, represented by the general government, could extend it. Without that provision, no power would have existed that could extend a discharge beyond the limits of the state in which it was given, but with that provision it might be made coextensive with the United States. This was conducing to one of the great ends of the Constitution -- one which it never loses sight of in any of its provisions -- that of making an American citizen as free in one state as he was in another. And when we are told that this instrument is to be construed with a view to its federative objects, I reply that this view alone of the subject is in accordance with its federative character.

Another object in perfect accordance with this may have been that of exercising a salutary control over the power of the states whenever that power should be exercised without due regard to the fair exercise of distributive justice. The general tendency of the legislation of the states at that time to favor the debtor was a consideration which entered deeply into many of the provisions of the Constitution. And as the power of the states over the law of their respective forums remained untouched by any other provision of the Constitution, when vesting in Congress the power to pass a bankrupt law, it was worthy of the wisdom of the convention to add to it the power to make that system uniform and universal. Yet on this subject the use of the term "uniform," instead of "general," may well raise a doubt whether it meant more than that such a law should not be partial, but have an equal and uniform application in every part of the Union. This is in perfect accordance with the spirit in which various other provisions of the Constitution are conceived.

For these two objects there appears to have been much reason for vesting this power in Congress; but for extending to the grant the effect of exclusiveness over the power of the states appears to me not only without reason, but to be repelled by weighty considerations.

1. There is nothing which, on the face of the Constitution, bears the semblance of direct prohibition on the states to

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exercise this power, and it would seem strange that if such a prohibition had been in the contemplation of the convention when appropriating an entire section to the enumeration of prohibitions on the states, they had forgotten this if they had intended to enact it.

The antithetical language adopted in that section as to every other subject to which the power of Congress had been previously extended affords a strong reason to conclude that some direct and express allusion to the power to pass a bankrupt law would have been here inserted also if they had not intended that this power should be concurrently or at least subordinately exercised by the states. It cannot be correct reasoning to rely upon this fact as a ground to infer that the prohibition must be found in some provision not having that antithetical character, since this supposes an intention to insert the prohibition, which intention can only be assumed. Its omission is a just reason for forming no other conclusion than that it was purposely omitted. But

2. It is insisted that though not express, the prohibition is to be inferred from the grant to Congress to establish uniform laws on the subject of bankruptcies throughout the United States, and that this grant, standing in connection with that to establish an uniform rule of naturalization, which is, in its nature, exclusive, must receive a similar construction.

There are many answers to be given to this argument, and the first is that a mere grant of a state power does not in itself necessarily imply an abandonment or relinquishment of the power granted, or we should be involved in the absurdity of denying to the states the power of taxation and sundry other powers ceded to the general government. But much less can such a consequence follow from vesting in the general government a power which no state possessed, and which, all of them combined, could not exercise to meet the end proposed in the Constitution. For if every state in the Union were to pass a bankrupt law in the same unvarying words, although this would undoubtedly be an uniform system of bankruptcy in its literal sense, it would be very far from answering the grant to Congress. There would still need some act of Congress or some treaty

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under sanction of an act of Congress to give discharges in one state a full operation in the other. Thus then the inference which we are called upon to make will be found not to rest upon any actual cession of state power, but upon the creation of a new power which no state ever pretended to possess -- a power which, so far from necessarily diminishing or impairing the state power over the subject, might find its full exercise in simply recognizing as valid in every state all discharges which shall be honestly obtained under the existing laws of any state.

Again, the inference proposed to be deduced from this grant to Congress will be found much broader than the principle in which the deduction is claimed. For in this as in many other instances in the Constitution, the grant implies only the right to assume and exercise a power over the subject. Why then should the state powers cease before Congress shall have acted upon the subject, or why should that be converted into a present and absolute relinquishment of power, which is, in its nature, merely potential, and dependent on the discretion of Congress whether, and when, to enter on the exercise of a power that may supersede it?

Let anyone turn his eye back to the time when this grant was made and say if the situation of the people admitted of an abandonment of a power so familiar to the jurisprudence of every state, so universally sustained in its reasonable exercise by the opinion and practice of mankind, and so vitally important to a people overwhelmed in debt and urged to enterprise by the activity of mind that is generated by revolutions and free governments.

I will with confidence affirm that the Constitution had never been adopted had it then been imagined that this question would ever have been made or that the exercise of this power in the states should ever have depended upon the views of the tribunals to which that Constitution was about to give existence. The argument proposed to be drawn from a comparison of this power with that of Congress over naturalization is not a fair one, for the cases are not parallel, and if they were it is by no means settled that the states would have been precluded from this power

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if Congress had not assumed it. But admitting argumenti gratia that they would, still there are considerations bearing upon the one power which have no application to the other. Our foreign intercourse being exclusively committed to the general government, it is peculiarly their province to determine who are entitled to the privileges of American citizens and the protection of the American government. And the citizens of any one state being entitled by the Constitution to enjoy the rights of citizenship in every other state, that fact creates an interest in this particular in each other's acts which does not exist with regard to their bankrupt laws, since state acts of naturalization would thus be extraterritorial in their operation and have an influence on the most vital interests of other states.

On these grounds state laws of naturalization may be brought under one of the four heads or classes of powers precluded to the states, to-wit, that of incompatibility, and on this ground alone, if any, could the states be debarred from exercising this power had Congress not proceeded to assume it. There is therefore nothing in that argument.

The argument deduced from the commercial character of bankrupt laws is still more unfortunate. It is but necessary to follow it out, and the inference, if any, deducible from it will be found to be direct and conclusive in favor of the state rights over this subject. For if, in consideration of the power vested in Congress over foreign commerce and the commerce between the states, it was proper to vest a power over bankruptcies that should pervade the states, it would seem that by leaving the regulation of internal commerce in the power of the states, it became equally proper to leave the exercise of this power within their own limits unimpaired.

With regard to the universal understanding of the American people on this subject there cannot be two opinions. If ever contemporaneous exposition and the clear understanding of the contracting parties or of the legislating power (it is no matter in which light it be considered) could be resorted to as the means of expounding an instrument, the continuing and unimpaired existence of this power in the states ought never to have been controverted. Nor was it controverted

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until the repeal of the bankrupt act of 1800 or until a state of things arose in which the means of compelling a resort to the exercise of this power by the United States became a subject of much interest. Previously to that period, the states remained in the peaceable exercise of this power, under circumstances entitled to great consideration. In every state in the Union was the adoption of the Constitution resisted by men of the keenest and most comprehensive minds, and if an argument such as this, so calculated to fasten on the minds of a people jealous of state rights and deeply involved in debt, could have been imagined, it never would have escaped them. Yet nowhere does it appear to have been thought of, and after adopting the Constitution in every part of the Union, we find the very framers of it everywhere among the leading men in public life, and legislating or adjudicating under the most solemn oath to maintain the Constitution of the United States, yet nowhere imagining that in the exercise of this power they violated their oaths or transcended their rights. Everywhere, too, the principle was practically acquiesced in that taking away the power to pass a law on a particular subject was equivalent to a repeal of existing laws on that subject. Yet in no instance was it contended that the bankrupt laws of the states were repealed, while those on navigation, commerce, the admiralty jurisdiction, and various others, were at once abandoned without the formality of a repeal. With regard to their bankrupt or insolvent laws, they went on carrying them into effect and abrogating and reenacting them without a doubt of their full and unimpaired power over the subject. Finally, when the bankrupt law of 1800 was enacted, the

only power that seemed interested in denying the right to the states formally pronounced a full and absolute recognition of that right. It is impossible for language to be more full and explicit on the subject than is the sixth section of this act of Congress. It acknowledges both the validity of existing laws and the right of passing future laws. The practical construction given by that act to the Constitution is precisely this that it amounts only to a right to assume the power to legislate on the subject, and therefore abrogates or suspends the existing laws only so far as they may

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clash with the provisions of the act of Congress. This construction was universally acquiesced in, for it was that on which there had previously prevailed but one opinion from the date of the Constitution.

Much alarm has been expressed respecting the inharmonious operation of so many systems, all operating at the same time. But I must say that I cannot discover any real ground for these apprehensions. Nothing but a future operation is here contended for, and nothing is easier than to avoid those rocks and quicksands which are visible to all. Most of the dangers are imaginary, for the interests of each community, its respect for the opinion of mankind, and a remnant of moral feeling which will not cease to operate in the worst of times will always present important barriers against the gross violation of principle. How is the general government itself made up but of the same materials which separately make up the governments of the states?

It is a very important fact, and calculated to dissipate the fears of those who seriously apprehend danger from this quarter, that the powers assumed and exercised by the states over this subject did not compose any part of the grounds of complaint by Great Britain, when negotiating with our government on the subject of violations of the treaty of peace. Nor is it immaterial as an historical fact to show the evils against which the Constitution really intended to provide a remedy. Indeed it is a solecism to suppose that the permanent laws of any government, particularly those which relate to the administration of justice between individuals, can be radically unequal or even unwise. It is scarcely ever so in despotic governments, much less in those in which the good of the whole is the predominating principle. The danger to be apprehended is from temporary provisions and desultory legislation, and this seldom has a view to future contracts.

At all events, whatever be the degree of evil to be produced by such laws, the limits of its action are necessarily confined to the territory of those who inflict it. The ultimate object in denying to the states this power would seem to be to give the evil a wider range, if it be one, by extending the benefit of discharges over the whole of the Union.

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But it is impossible to suppose that the framers of the Constitution could have regarded the exercise of this power as an evil in the abstract, else they would hardly have engrafted it upon that instrument which was to become the great safeguard of public justice and public morals.

And had they been so jealous of the exercise of this power in the states, it is not credible that they would have left unimpaired those unquestionable powers over the administration of justice which the states do exercise, and which, in their immoral exercise, might leave to the creditor the mere shadow of justice. The debtor's person, no one doubts, may be exempted from execution. But there is high precedent for exempting his lands, and public feeling would fully sustain an exemption of his slaves. What is to prevent the extension of exemption until nothing is left but the mere mockery of a judgment, without the means of enforcing its satisfaction?

But it is not only in their execution laws that the creditor has been left to the justice and honor of the states for his security. Every judiciary in the Union owes its existence to some legislative act; what is to prevent a repeal of that act? and then, what becomes of his remedy, if he has not access to the courts of the Union? Or what is to prevent the extension of the right to imparl? of the time to plead? of the interval between the sittings of the state courts? Where is the remedy against all this? and why were not these powers taken also from the states, if they could not be trusted with the subordinate and incidental power here denied them? The truth is, the convention saw all this, and saw the impossibility of providing an adequate remedy for such mischiefs if it was not to be found ultimately in the wisdom and virtue of the state rulers under the salutary control of that republican form of government which it guarantees to every state. For the foreigner and the citizens of other states, it provides the safeguard of a tribunal which cannot be controlled by state laws in the application of the remedy, and for the protection of all was interposed that oath which it requires to be administered to all the public functionaries as well of the states as the United States. It may be called the ruling principle of

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the Constitution to interfere as little as possible between the citizen and his own state government, and hence, with a few safeguards of a very general nature, the executive, legislative, and judicial functions of the states are left as they were as to their own citizens and as to all internal concerns. It is not pretended that this discharge could operate upon the rights of the citizen of any other state unless his contract was entered into in the state that gave it

or unless he had voluntarily submitted himself to the lex fori of the state before the discharge, in both which instances he is subjected to its effects by his own voluntary act.

For these considerations, I pronounce the exclusive power of Congress over the relief of insolvents untenable, and the dangers apprehended from the contrary doctrine unreal.

We will next inquire whether the states are precluded from the exercise of this power by that clause in the Constitution which declares that no state shall "pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts."

This law of the State of New York is supposed to have violated the obligation of a contract by releasing Ogden from a debt which he had not satisfied, and the decision turns upon the question, first, in what consists the obligation of a contract? and secondly whether the act of New York will amount to a violation of that obligation in the sense of the Constitution.

The first of these questions has been so often examined and considered in this and other courts of the United States, and so little progress has yet been made in fixing the precise meaning of the words "obligation of a contract," that I should turn in despair from the inquiry were I not convinced that the difficulties the question presents are mostly factitious and the result of refinement and technicality, or of attempts at definition made in terms defective both in precision and comprehensiveness. Right or wrong, I come to my conclusion on their meaning, as applied to executory contracts, the subject now before us, by a simple and shorthanded exposition.

Right and obligation are considered by all ethical writers

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as correlative terms: whatever I by my contract give another a right to require of me, I by that act lay myself under an obligation to yield or bestow. The obligation of every contract will then consist of that right or power over my will or actions which I, by my contract, confer on another. And that right and power will be found to be measured neither by moral law alone, nor universal law alone, nor by the laws of society alone, but by a combination of the three -- an operation in which the moral law is explained and applied by the law of nature, and both modified and adapted to the exigencies of society by positive law. The Constitution was framed for society, and an advanced State of society, in which I will undertake to say that all the contracts of men receive a relative, and not a positive interpretation, for the rights of all must be held and enjoyed in subserviency to the good of the whole. The state construes them, the state applies them, the state controls them, and the state decides how far the social exercise of the rights they give us over each other can be justly asserted. I say the social exercise of these rights because in a state of nature, they are asserted over a fellow creature, but in a state of society over a fellow citizen. Yet it is worthy of observation how closely the analogy is preserved between the assertion of these rights in a state of nature and a state of society in their application to the class of contracts under consideration.

Two men, A. and B., having no previous connection with each other (we may suppose them even of hostile nations), are thrown upon a desert island. The first, having had the good fortune to procure food, bestows a part of it upon the other, and he contracts to return an equivalent in kind. It is obvious here that B. subjects himself to something more than the moral obligation of his contract, and that the law of nature and the sense of mankind, would justify A. in resorting to any means in his power to compel a compliance with this contract. But if it should appear that B., by sickness, by accident, or circumstances beyond human control, however superinduced, could not possibly comply with his contract, the decision would be otherwise, and the exercise of compulsory power over B. would be followed with the indignation of mankind. He has carried the power conferred

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on him over the will or actions of another beyond their legitimate extent, and done injustice in his turn. "Summum jus est summa injuria."

The progress of parties from the initiation to the consummation of their rights is exactly parallel to this in a state of society. With this difference, that in the concoction of their contracts, they are controlled by the laws of the society of which they are members, and for the construction and enforcement of their contracts they rest upon the functionaries of its government. They can enter into no contract which the laws of that community forbid, and the validity and effect of their contracts is what the existing laws give to them. The remedy is no longer retained in their own hands, but surrendered to the community, to a power competent to do justice and bound to discharge towards them the acknowledged duties of government to society according to received principles of equal justice. The public duty in this respect is the substitute for that right which they possessed in a state of nature, to enforce the fulfillment of contracts, and if, even in a state of nature, limits were prescribed by the reason and nature of things, to the exercise of individual power in enacting the fulfillment of contracts, much more will they be in a state of society. For it is among the duties of society to enforce the rights of humanity, and both the debtor and the society have their interests in the administration of justice and in the general good -- interests which must not be swallowed up and lost sight of while yielding attention to the claim of the creditor. The debtor may plead the visitations of providence, and the

society has an interest in preserving every member of the community from despondency -- in relieving him from a hopeless state of prostration in which he would be useless to himself, his family, and the community. When that state of things has arrived in which the community has fairly and fully discharged its duties to the creditor and in which pursuing the debtor any longer would destroy the one without benefiting the other must always be a question to be determined by the common guardian of the rights of both, and in this originates the power exercised by governments in favor of insolvents.

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It grows out of the administration of justice and is a necessary appendage to it.

There was a time when a different idea prevailed, and then it was supposed that the rights of the creditor required the sale of the debtor and his family. A similar notion now prevails on the coast of Africa, and is often exercised there by brute force. It is worthy only of the country in which it now exists and of that state of society in which it once originated and prevailed.

"Lex non cogit ad impossibilia" is a maxim applied by law to the contracts of parties in a hundred ways. And where is the objection, in a moral or political view, to applying it to the exercise of the power to relieve insolvents? It is in analogy with this maxim that the power to relieve them is exercised, and if it never was imagined that in other cases this maxim violated the obligation of contracts, I see no reason why the fair, ordinary, and reasonable exercise of it in this instance should be subjected to that imputation.

If it be objected to these views of the subject that they are as applicable to contracts prior to the law as to those posterior to it and therefore inconsistent with the decision in the case of Sturges v. Crowninshield, my reply is that I think this no objection to its correctness. I entertained this opinion then, and have seen no reason to doubt it since. But if applicable to the case of prior debts, multo fortiori will it be so to those contracted subsequent to such a law; the posterior date of the contract removes all doubt of its being in the fair and unexceptionable administration of justice that the discharge is awarded.

I must not be understood here as reasoning upon the assumption that the remedy is grafted into the contract. I hold the doctrine untenable, and infinitely more restrictive on state power than the doctrine contended for by the opposite party. Since if the remedy enters into the contract, then the states lose all power to alter their laws for the administration of justice. Yet, I freely admit that the remedy enters into the views of the parties when contracting; that the Constitution pledges the states to every creditor for the full, and fair, and candid exercise of state power to the

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ends of justice according to its ordinary administration, uninfluenced by views to lighten or lessen or defer the obligation to which each contract fairly and legally subjects the individual who enters into it. Whenever an individual enters into a contract, I think his assent is to be inferred, to abide by those rules in the administration of justice which belong to the jurisprudence of the country of the contract. And when compelled to pursue his debtor in other states, he is equally bound to acquiesce in the law of the forum to which he subjects himself. The law of the contract remains the same everywhere, and it will be the same in every tribunal; but the remedy necessarily varies, and with it the effect of the constitutional pledge, which can only have relation to the laws of distributive justice known to the policy of each state severally. It is very true that inconveniences may occasionally grow out of irregularities in the administration of justice by the states. But the citizen of the same state is referred to his influence over his own institutions for his security, and the citizens of the other states have the institutions and powers of the general government to resort to. And this is all the security the Constitution ever intended to hold out against the undue exercise of the power of the states over their own contracts and their own jurisprudence.

But since a knowledge of the laws, policy, and jurisprudence of a state is necessarily imputed to everyone entering into contracts within its jurisdiction, of what surprise can he complain, or what violation of public faith, who still enters into contracts under that knowledge? It is no reply to urge that at the same time knowing of the Constitution, he had a right to suppose the discharge void and inoperative, since this would be but speculating on a legal opinion in which, if he proves mistaken, he has still nothing to complain of but his own temerity, and concerning which all that come after this decision, at least, cannot complain of being misled by their ignorance or misapprehensions. Their knowledge of the existing laws of the state will henceforward be unqualified, and was so, in the view of the law, before this decision was made.

It is now about twelve or fourteen years since I was called

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upon on my circuit in the case of Gell, Canonge & Co. v. L. Jacobs, to review all this doctrine. The cause was ably argued by gentlemen whose talents are well known in this capitol, and the opinions which I then formed I have seen no reason since to distrust.

It appears to me that a great part of the difficulties of the cause arise from not giving sufficient weight to the general intent of this clause in the Constitution and subjecting it to a severe literal construction which would be better adapted to special pleadings.

By classing bills of attainder, ex post facto laws, and laws impairing the obligation of contracts together, the general intent becomes very apparent; it is a general provision against arbitrary and tyrannical legislation over existing rights, whether of person or property. It is true that some confusion has arisen from an opinion which seems early and without due examination to have found its way into this Court; that the phrase "ex post facto" was confined to laws affecting criminal acts alone. The fact, upon examination, will be found otherwise, for neither in its signification or uses is it thus restricted. It applies to civil as well as to criminal acts 1 Shep.Touch. 68, 70, 73, and with this enlarged signification attached to that phrase, the purport of the clause would be

"that the states shall pass no law attaching to the acts of individuals other effects or consequences than those attaches to them by the laws existing at their date, and all contracts thus construed shall be enforced according to their just and reasonable purport."

But to assign to contracts universally a literal purport and to exact for them a rigid literal fulfillment could not have been the intent of the Constitution. It is repelled by a hundred examples. Societies exercise a positive control as well over the inception, construction, and fulfillment of contracts as over the form and measure of the remedy to enforce them.

As instances of the first, take the contract imputed to the drawer of a bill or endorser of a note, with its modifications; the deviations of the law from the literal contract of the parties to a penal bond, a mortgage, a policy of insurance, bottomry bond, and various others that might be

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enumerated. And for instances of discretion exercised in applying the remedy, take the time for which executors are exempted from suit; the exemption of members of legislatures; of judges; of persons attending courts, or going to elections; the preferences given in the marshaling of assets; sales on credit for a present debt; shutting of courts altogether against gaming debts and usurious contracts, and above all, acts of limitation. I hold it impossible to maintain the constitutionality of an act of limitation if the modification of the remedy against debtors, implied in the discharge of insolvents, is unconstitutional. I have seen no distinction between the cases that can bear examination.

It is in vain to say that acts of limitation appertain to the remedy only; both descriptions of laws appertain to the remedy, and exactly in the same way; they put a period to the remedy, and upon the same terms, by what has been called, a tender of paper money in the form of a plea, and to the advantage of the insolvent laws, since if the debtor can pay, he has been made to pay. But the door of justice is shut in the face of the creditor in the other instance, without an inquiry on the subject of the debtor's capacity to pay. And it is equally vain to say that the act of limitation raises a presumption of payment, since it cannot be taken advantage of on the general issue without provision by statute, and the only legal form of a plea implies an acknowledgment that the debt has not been paid.

Yet so universal is the assent of mankind in favor of limitation acts that it is the opinion of profound politicians that no nation could subsist without one.

The right, then, of the creditor to the aid of the public arm for the recovery of contracts is not absolute and unlimited, but may be modified by the necessities or policy of societies. And this, together with the contract itself, must be taken by the individual, subject to such restrictions and conditions as are imposed by the laws of the country. The right to pass bankrupt laws is asserted by every civilized nation in the world. And in no writer, I will venture to say, has it ever been suggested that the power of annulling such contracts, universally exercised under their bankrupt or insolvent systems, involves a violation of the obligation of contracts.

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In international law, the subject is perfectly understood and the right generally acquiesced in, and yet the denial of justice is, by the same code, an acknowledged cause of war.

But it is contended that if the obligation of a contract has relation at all to the laws which give or modify the remedy, then the obligation of a contract is ambulatory and uncertain, and will mean a different thing in every state in which it may be necessary to enforce the contract.

There is no question that this effect follows, and yet after this concession it will still remain to be shown how any violation of the obligation of the contract can arise from that cause. It is a casualty well known to the creditor when he enters into the contract, and if obliged to prosecute his rights in another state, what more can he claim of that state than that its courts shall be open to him on the same terms on which they are open to other individuals? It is only by voluntarily subjecting himself to the lex fori of a state that he can be brought within the provisions of its statutes in favor of debtors, since in no other instance does any state pretend to a right to discharge the contracts entered into in another state. He

who enters into a pecuniary contract knowing that he may have to pursue his debtor if he flees from justice casts himself in fact upon the justice of nations.

It has also been urged with an earnestness that could only proceed from deep conviction that insolvent laws were tender laws of the worse description, and that it is impossible to maintain the constitutionality of insolvent laws that have a future operation without asserting the right of the states to pass tender laws, provided such laws are confined to a future operation.

Yet to all this there appears to be a simple and conclusive answer. The prohibition in the Constitution to make anything but gold or silver coin a tender in payment of debts is express and universal. The framers of the Constitution regarded it as an evil to be repelled without modification; they have therefore left nothing to be inferred or deduced from construction on this subject. But the contrary is the fact with regard to insolvent laws; it contains no express

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prohibition to pass such laws, and we are called upon here to deduce such a prohibition from a clause which is anything but explicit and which already has been judicially declared to embrace a great variety of other subjects. The inquiry, then, is open and indispensable in relation to insolvent laws, prospective or retrospective, whether they do, in the sense of the Constitution, violate the obligation of contracts. There would be much in the argument if there was no express prohibition against passing tender laws, but with such express prohibition the cases have no analogy. And independent of the different provisions in the Constitution, there is a distinction existing between tender laws and insolvent laws in their object and policy which sufficiently points out the principle upon which the Constitution acts upon them as several and distinct; a tender law supposes a capacity in the debtor to pay and satisfy the debt in some way, but the discharge of an insolvent is founded in his incapacity ever to pay, which incapacity is judicially determined according to the laws of the state that passes it. The one imports a positive violation of the contract, since all contracts to pay, not expressed otherwise, have relation to payment in the current coin of the country; the other imports an impossibility that the creditor ever can fulfill the contract.

If it be urged that to assume this impossibility is itself an arbitrary act, that parties have in view something more than present possessions, that they look to future acquisitions, that industry, talents and integrity are as confidently trusted as property itself, and to release them from this liability impairs the obligation of contracts, plausible as the argument may seem, I think the answer is obvious and incontrovertible.

Why may not the community set bounds to the will of the contracting parties in this as in every other instance? That will is controlled in the instances of gaming debts, usurious contracts, marriage, brokerage bonds, and various others, and why may not the community also declare that

"look to what you will, no contract formed within the territory which we govern shall be valid as against future acquisitions; . . . we have an interest in the happiness, and services, and families of this community which shall not be superseded by individual

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views."

Who can doubt the power of the state to prohibit her citizens from running in debt altogether? A measure a thousand times wiser than that impulse to speculation and ruin which has hitherto been communicated to individuals by our public policy. And if to be prohibited altogether, where is the limit which may not be set both to the acts and the views of the contracting parties?

When considering the first question in this cause, I took occasion to remark on the evidence of contemporaneous exposition deducible from well known facts. Every candid mind will admit that this is a very different thing from contending that the frequent repetition of wrong will create a right. It proceeds upon the presumption that the cotemporaries of the Constitution have claims to our deference on the question of right, because they had the best opportunities of informing themselves of the understanding of the framers of the Constitution and of the sense put upon it by the people when it was adopted by them, and in this point of view it is obvious that the consideration bears as strongly upon the second point in the cause as on the first. For had there been any possible ground to think otherwise, who could suppose that such men, and so many of them, acting under the most solemn oath and generally acting rather under a feeling of jealousy of the power of the general government than otherwise, would universally have acted upon the conviction that the power to relieve insolvents by a discharge from the debt had not been taken from the states by the article prohibiting the violation of contracts? The whole history of the times up to a time subsequent to the repeal of the bankrupt law indicates a settled knowledge of the contrary.

If it be objected to the views which I have taken of this subject that they imply a departure from the direct and literal meaning of terms in order to substitute an artificial or complicated exposition, my reply is that the error is on the other side; qui haeret in liter a, haeret in cortice. All the notions of society, particularly in its jurisprudence, are more or less artificial; our Constitution nowhere

speaks the language of men in a state of nature; let anyone attempt a literal exposition of the phrase which immediately precedes the one under

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consideration -- I mean "ex post facto" -- and he will soon acknowledge a failure. Or let him reflect on the mysteries that hang around the little slip of paper which lawyers know by the title of a bail piece. The truth is that even compared with the principles of natural law, scarcely any contract imposes an obligation conformable to the literal meaning of terms. He who enters into a contract to follow the plough for the year is not held to its literal performance, since many casualties may intervene which would release him from the obligation without actual performance. There is a very striking illustration of this principle to be found in many instances in the books. I mean those cases in which parties are released from their contracts by a declaration of war or where laws are passed rendering that unlawful, even incidentally, which was lawful at the time of the contract. Now in both these instances it is the government that puts an end to the contract, and yet no one ever imagined that it thereby violates the obligation of a contract.

It is therefore far from being true as a general proposition "that a government necessarily violates the obligation of a contract which it puts an end to without performance." It is the motive, the policy, the object that must characterize the legislative act to affect it with the imputation of violating the obligation of contracts.

In the effort to get rid of the universal vote of mankind in favor of limitation acts and laws against gaming, usury, marriage, brokerage, buying and selling of offices, and many of the same description, we have heard it argued that as to limitation acts, the creditor has nothing to complain of, because time is allowed him of which, if he does not avail himself, it is his own neglect, and as to all others, there is no contract violated because there was none ever incurred. But it is obvious that this mode of answering the argument involves a surrender to us of our whole ground. It admits the right of the government to limit and define the power of contracting and the extent of the creditor's remedy against his debtor; to regard other rights besides his, and to modify his rights so as not to let them override entirely the general interests of society, the interests of the community itself in the talents and services of the debtor, the regard due to his

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happiness and to the claims of his family upon him and upon the government.

No one questions the duty of the government to protect and enforce the just rights of every individual over all within its control. What we contend for is no more than this that it is equally the duty and right of governments to impose limits to the avarice and tyranny of individuals so as not to suffer oppression to be exercised under the semblance of right and justice. It is true that in the exercise of this power, governments themselves may sometimes be the authors of oppression and injustice; but wherever the Constitution could impose limits to such power it has done so, and if it has not been able to impose effectual and universal restraints, it arises only from the extreme difficulty of regulating the movements of sovereign power, and the absolute necessity, after every effort that can be made to govern effectually, that will still exist to leave some space for the exercise of discretion and the influence of justice and wisdom.

MR. JUSTICE THOMPSON.

This action is founded on several bills of exchange bearing date in September, 1806, drawn by J. Jordan upon Ogden, the plaintiff in error, in favor of Saunders, the defendant in error. The drawer and payee, at the date of the bills, were citizens of and resident in Kentucky. Ogden was a citizen of and resident in New York, where the bills were presented and accepted by him, but were not paid when they came to maturity, and are still unpaid. Ogden sets up in bar of this action his discharge under the insolvent law of the state of New York, passed in April, 1801, as one of the revised laws of that state. His discharge was duly obtained on 19 April, 1808, he having assigned all his property for the benefit of his creditors and having in all respects complied with the laws of New York for giving relief in cases of insolvency. These proceedings, according to those laws, discharged the insolvent from all debts due at the time of the assignment or contracted for before that time, though payable afterwards, except in some specified cases which do not affect the present question. From this brief statement it appears that Ogden, being sued upon his acceptances of

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the bills in question, the contract was made and to be executed within the state of New York, and was made subsequent to the passage of the law under which he was discharged. Under these circumstances, the general question presented for decision is whether this discharge can be set up in bar of the present suit. It is not pretended but that if the law under which the discharge was obtained is valid and the discharge is to have its effect according to the provisions of that law, it is an effectual bar to any recovery against Ogden. But it is alleged that this law is void under the prohibition in the Constitution of the United States, Art. I. sec. 10, which declares that "no state shall pass any law impairing the obligation of contracts." So that the inquiry here is whether the law of New York under which the discharge was obtained is repugnant

to this clause in the Constitution, and upon the most mature consideration I have arrived at the conclusion that the law is not void and that the discharge set up by the plaintiff in error is an effectual protection against any liability upon the bills in question.

In considering this question, I have assumed that the point now presented is altogether undecided and entirely open for discussion. Although several cases have been before this Court which may have a bearing upon the question, yet upon the argument the particular point now raised has been treated by the counsel as still open for decision, and so considered by the Court by permitting its discussion. Although the law under which Ogden was discharged appears by the record to have been passed in the year 1801, yet it is proper to notice that this was a mere revision and reenactment of a law which was in force as early, at least, as from the year 1788, and which has continued in force from that time to the present (except from 3 April, 1811, until 14 February, 1812), in all its material provisions which have any bearing upon the present question. To declare a law null and void after such a lapse of time and thereby prostrate a system which has been in operation for nearly forty years ought to be called for by some urgent necessity and founded upon reasons and principles scarcely admitting of doubt. In our complex system of government we must expect that questions involving

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the jurisdictional limits between the general and state governments will frequently arise, and they are always questions of great delicacy and can never be met without feeling deeply and sensibly impressed with the sentiment that this is the point upon which the harmony of our system is most exposed to interruption. Whenever such a question is presented for decision, I cannot better express my views of the leading principles which ought to govern this Court than in the language of the Court itself in the case of Fletcher v. Peck, 6 Cranch 128.

"The question [says the Court] whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy which ought seldom or ever be decided in the affirmative in a doubtful case. The Court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligation which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

If such be the rule by which the examination of this case is to be governed and tried (and that it is no one can doubt), I am certainly not prepared to say that it is not at least a doubtful case, or that I feel a clear conviction that the law in question is incompatible with the Constitution of the United States.

In the discussion at the bar, this has rightly been considered a question relating to the division of power between the general and state governments. And in the consideration of all such questions, it cannot be too often repeated (although universally admitted) or too deeply impressed on the mind that all the powers of the general government are derived solely from the Constitution, and that whatever power is not conferred by that charter is reserved to the states respectively or to the people. The State of New York, when the law in question was passed (for I consider this a mere continuation of the insolvent act of 1788) was

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in the due and rightful exercise of its powers as an independent government, and unless this power has been surrendered by the Constitution of the United States, it still remains in the state. And in this view, whether the law in question be called a bankrupt or an insolvent law is wholly immaterial; it was such a law as a sovereign state had a right to pass, and the simple inquiry is whether that right has been surrendered. No difficulty arises here out of any inquiry about express or implied powers granted by the Constitution. If the states have no authority to pass laws like this, it must be in consequence of the express provision "that no state shall pass any law impairing the obligation of contracts."

It is admitted, and has so been decided by this Court, that a state law discharging insolvent debtors from their contracts, entered into antecedent to the passing of the law, falls within this clause in the Constitution and is void. In the case now before the Court, the contract was made subsequent to the passage of the law, and this, it is believed, forms a solid ground of distinction, whether tested by the letter or the spirit and policy of the prohibition. It was not denied on the argument, and I presume cannot be, but that a law may be void in part and good in part -- or in other words that it may be void so far as it has a retrospective application to past contracts and valid as applied prospectively to future contracts. The distinction was taken by the court in the Third Circuit in the case of Golden v. Prince, 5 Hall's L.J. 502, and which I believe was the first case that brought into discussion the validity of a state law analogous to the one now under consideration. It was there held that the law was unconstitutional in relation to that particular case because it impaired the obligation of the contract by discharging the debtor from the payment of his debts due or contracted for before the passage of the law. But it was admitted that a law, prospective in its operation, under which a contract afterwards made might be avoided in a way different from that provided by the parties, would be clearly constitutional. And how is this distinction to be sustained except on the ground that contracts

are deemed to be made in reference to the existing law and to be governed,

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regulated, and controlled by its provisions? As the question before the court was the validity of an insolvent law which discharged the debtor from all contracts, the distinction must have been made in reference to the operation of the discharge upon contracts made before and such as were made after the passage of the law, and is therefore a case bearing directly upon the question now before the Court. That the power given by the Constitution to Congress to establish uniform laws on the subject of bankruptcies throughout the United States does not withdraw the subject entirely from the states is settled by the case of Sturges v. Crowninshield, 4 Wheat. 191. It is there expressly held that

"until the power to pass uniform laws on the subject of bankruptcies is exercised by Congress, the states are not forbidden to pass a bankrupt law, provided it contain no principle which violates the 10th section of the first article of the Constitution of the United States."

And this case also decides that the right of the states to pass bankrupt laws is not extinguished, but is only suspended by the enactment of a general bankrupt law by Congress, and that a repeal of that law removes disability to the exercise of the power by the states, so that the question now before the Court is narrowed down to the single inquiry whether a state bankrupt law, operating prospectively upon contracts made after its enactment, impairs the obligation of such contract within the sense and meaning of the Constitution of the United States.

This clause in the Constitution has given rise to much discussion, and great diversity of opinion has been entertained as to its true interpretation. Its application to some cases may be plain and palpable, to others more doubtful. But so far as relates to the particular question now under consideration, the weight of judicial opinions in the state courts is altogether in favor of the constitutionality of the law so far as my examination has extended. And indeed, I am not aware of a single contrary opinion. 13 Mass. 1; 16 Johns. 233; 7 Johns.Ch. 299; 5 Binn. 264; 5 Hall's L.J. 520; 6th ed. 475; Niles; Reg. 15th of September, 1821; Townsend v. Townsend.

In proceeding to a more particular examination of the

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true import of the clause "no state shall pass any law impairing the obligation of contracts," the inquiries which seem naturally to arise are what is a contract, what its obligation, and what may be said to impair it. As to what constitutes a contract, no diversity of opinion exists; all the elementary writers on the subject, sanctioned by judicial decisions, consider it briefly and simply an agreement in which a competent party undertakes to do or not to do a particular thing; but all know that the agreement does not always -- nay, seldom, if ever, upon its face -- specify the full extent of the terms and conditions of the contract; many things are necessarily implied and to be governed by some rule not contained in the agreement, and this rule can be no other than the existing law when the contract is made or to be executed. Take, for example, the familiar case of an agreement to pay a certain sum of money with interest. The amount or rate of such interest is to be ascertained by some standard out of the agreement, and the law presumes the parties meant the common rate of interest established in the country where the contract was to be performed. This standard is not looked to for the purpose of removing any doubt or ambiguity arising on the contract itself, but to ascertain the extent of its obligation, or, to put a case more analogous, suppose a statute should declare generally that all contracts for the payment of money should bear interest after the day of payment fixed in the contract, and a note, where such law was in force, should be made payable in a given number of days after date. Such note would surely draw interest from the day it became payable, although the note upon its face made no provision for interest, and the obligation of the contract to pay the interest would be as complete and binding as to pay the principal; but such would not be its operation without looking out of the instrument itself to the law which created the obligation to pay interest.

The same rule applies to contracts of every description, and parties must be understood as making their contracts with reference to existing laws and impliedly assenting that such contracts are to be construed, governed, and controlled by such laws. Contracts absolute and unconditional

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upon their face are often considered subject to an implied condition which the law establishes as applicable to such cases. Suppose a state law should declare that in all conveyances thereafter to be made of real estate, the land should be held as security for the payment of the consideration money and liable to be sold in case default should be made in payment; would such a law be unconstitutional? And yet it would vary the contract from that which was made by the parties, if judged of by the face of the deed alone, and would be making a contract conditional which the parties had made absolute, and would certainly be impairing such contract unless it was deemed to have been made subject to the provisions of such law and with reference thereto and that the law was impliedly adopted as forming the obligation and terms of the

contract. The whole doctrine of the lex loci is founded on this principle.

The language of the court in the Third Circuit in the case of Campanque v. Burnell, 1 Washington C.C. 341, is very strong on this point. Those laws, say the court, which in any manner affect the contract, whether in its construction, the mode of discharging it, or which control the obligation which the contract imposes, are essentially incorporated with the contract itself. The contract is a law which the parties impose upon themselves, subject, however, to the paramount law -- the law of the country where the contract is made. And when to be enforced by foreign tribunals, such tribunals aim only to give effect to the contracts according to the laws which gave them validity. So also in this Court, in the case of Renner v. Bank of Columbia, 9 Wheat. 586, the language of the Court is to the same effect, and shows that we may look out of the contract to any known law or custom with reference to which the parties may be presumed to have contracted in order to ascertain their intention and the legal and binding force and obligation of their contract. Bank of Columbia v. Oakley, 4 Wheat. 235, is another case recognizing the same principle. And in the case of Dartmouth College v. Woodward, 4 Wheat. 695, it is well observed by one of the judges of this Court "that all contracts recognized as valid in any

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country, obtain their obligation and construction jure loci contractus." And this doctrine is universally recognized both in the English and American courts.

If contracts are not made with reference to existing laws and to be governed and regulated by such laws, the agreement of parties under the extended construction now claimed for this clause in the Constitution may control state laws on the subject of contracts altogether. A parol agreement for the sale of land is a contract, and if the agreement alone makes the contract, and it derives its obligation solely from such agreement, without reference to the existing law, it would seem to follow that any law which had declared such contract void or had denied a remedy for breach thereof would impair its obligation. A construction involving such consequences is certainly inadmissible. Any contract not sanctioned by existing laws creates no civil obligation, and any contract discharged in the mode and manner provided by the existing law where it was made cannot upon any just principles of reasoning be said to impair such contract.

It will, I believe, be found on examination that the course of legislation in some of the states between debtor and creditor, which formed the grounds of so much complaint, and which probably gave rise to this prohibition in the Constitution, consisted principally, if not entirely, of laws having a retrospective operation upon antecedent debts.

If a contract does not derive its obligation from the positive law of the country where it is made, where is to be found the rule that such obligation does not attach until the contracting party has attained a certain age? In what code of natural law or in what system of universal law out of which it is said at the bar spring the eternal and unalterable principles of right and of justice, will be found a rule that such obligation does not attach so as to bind a party under the age of twenty-one years? No one will pretend that a law exonerating a party from contracts entered into before arriving at such age would be invalid. And yet it would impair the obligation of the contract if such obligation is derived from any other source than the existing law of the place where made. Would it not be within the legitimate

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powers of a state legislature to declare prospectively that no one should be made responsible upon contracts entered into before arriving at the age of twenty-five years. This, I presume, cannot be doubted. But to apply such a law to past contracts entered into when twenty-one years was the limit would clearly be a violation of the obligation of the contract. No such distinction, however, could exist unless the obligation of the contract grows out of the existing law and with reference to which the contract must be deemed to have been made.

The true import of the term "obligation," as used in the Constitution, may admit of some doubt. That it refers to the civil, or legal, and not moral obligation is admitted by all. But whether the remedy upon the contract is entirely excluded from the operation of this provision is a point on which some diversity of opinion has been entertained.

That it is not intended to interfere with or limit state legislation in relation to the remedy in the ordinary prosecution of suits no one can doubt. And indeed such a principle is indispensable to facilitate commercial intercourse between the citizens or subjects of different governments, and is sanctioned by all civilized nations, and if, according to the language of these cases, this principle extends to the obligation as well as the construction of contracts, it would seem to follow as a necessary conclusion that it must embrace all the consequences growing out of the laws of the country where the contract is made, for it is the law which creates the obligation, and whenever, therefore, the lex loci provides for the dissolution of the contract in any prescribed mode, the parties are presumed to have acted subject to such contingency. And hence, in the English courts, wherever the operation of a foreign discharge under a bankrupt law has been brought under consideration, they have given to it the same effect that it would

have had in the country where the contract was made. And the same rule has been recognized and adopted in the courts of this country almost universally, where the question has arisen. But whether a law might not so change the nature and extent of existing remedies, and thereby so materially impair the right as to fall within the scope

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of this prohibition if it extended to remedies upon antecedent contracts is by no means clear. If the law, whatever it may be, relating to the remedy has a prospective operation only, no objection can arise to it under this clause in the Constitution. It is a question that must rest in the sound discretion of the state legislature. But men, when entering into contracts, can hardly be presumed entirely regardless of the remedy which the law provides in case of a breach of the contract, and the means of obtaining satisfaction for such breach enters essentially into consideration in making the contract. If, at the time of making the contract, it be known that the person only of the debtor, and not his property or his personal property only, and not his lands or a certain part of either, is to be resorted to for satisfaction, no ground of complaint can exist, the contract having been made with full knowledge of all these things; but if, at the time the contract is made, not only the person but all the property, both real and personal, of the debtor might be resorted to for satisfaction and a law should be passed placing beyond the reach of the creditor the whole or the principal part of the debtor's property, it would be difficult to sustain the constitutionality of such a law. The statute of limitations is conceded to relate to the remedy. Suppose, when a contract was made, the limitation was six years, and it should be reduced to six months, or any shorter period and applied to antecedent contracts, would it not be repugnant to the Constitution? But if the legislature of a state should choose to adopt, prospectively, six months as the limitation, who could question the authority so to do? And suppose further that the unconstitutionality of the law in question is admitted, could the State of New York pass a law limiting the right of recovery against any insolvent who had been duly discharged according to the provisions of the insolvent act to ten days from the passage of such law. And yet this would be a statute of limitation, and affect the remedy only. The law now in question is nothing more than taking away all remedy, and whether it be the whole or some material part thereof would seem to differ in degree only, and not in principle, and if to have a retrospective operation,

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might well be considered as falling within the spirit and policy of the prohibition.

In the case of Sturges v. Crowninshield, the Court, in explaining the meaning of the terms "obligation of a contract," said,

"A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract."

That is, as I understand it, the law of the contract forms its obligation, and if so, the contract is fulfilled and its obligation discharged by complying with whatever the existing law required in relation to such contract, and it would seem to me to follow that if the law looking to the contingency of the debtor's becoming unable to pay the whole debt should provide for his discharge on payment of a part, this would enter into the law of the contract, and the obligation to pay would, of course, be subject to such contingency.

It is unnecessary, however, on the present occasion, to attempt to draw with precision the line between the right and the remedy or to determine whether the prohibition in the Constitution extends to the former and not to the latter, or whether to a certain extent it embraces both, for the law in question strikes at the very root of the cause of action and takes away both right and remedy, and the question still remains does the prohibition extend to a state bankrupt or insolvent law, like the one in question, when applied to contracts entered into subsequent to its passage. Whether this is technically a bankrupt or an insolvent law is of little importance. Its operation, if valid, is to discharge the debtor absolutely from all future liability on surrendering up his property, and in that respect is a bankrupt law according to the universal understanding in England, where a bankrupt system is in operation. It is not, however, limited to traders, but extends to every class of citizens, and in this respect is more analogous to the English insolvent laws, which only authorize the discharge of the debtor from imprisonment.

If this provision in the Constitution was unambiguous and its meaning entirely free from doubt, there would be no door left open for construction or any proper ground upon which

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the intention of the framers of the Constitution could be inquired into; this Court would be bound to give to it its full operation whatever might be the views entertained of its expediency. But the diversity of opinion entertained of its construction will fairly justly an inquiry into the intention as well as the reason and policy of the provision; all which in my judgment will warrant its being confined to laws affecting contracts made antecedent to the passage of such laws. Such would appear to be the plain and natural interpretation of the words "no state shall pass any law impairing the obligation of contracts."

The law must have a present effect upon some contract in existence, to bring it within the plain meaning of the language employed. There would be no propriety in saying that a law impaired or in any manner whatever modified or altered what did not exist. The most obvious and natural application of the words themselves is to laws having a retrospective operation upon existing contracts, and this construction is fortified by the associate prohibitions "no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts." The two first are confessedly restricted to retrospective laws concerning crimes and penalties affecting the personal security of individuals. And no good reason is perceived why the last should not be restricted to retrospective laws relating to private rights growing out of the contracts of parties. The one provision is intended to protect the person of the citizen from punishment criminally for any act not unlawful when committed, and the other to protect the rights of property as secured by contracts sanctioned by existing laws. No one supposes that a state legislature is under any restriction in declaring prospectively any acts criminal which its own wisdom and policy may deem expedient. And why not apply the same rule of construction and operation to the other provision relating to the rights of property? Neither provision can strictly be considered as introducing any new principle, but only for greater security and safety to incorporate into this charter provisions admitted by all to be among the first principles of our government. No state court would, I presume, sanction and enforce an ex post facto law if no

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such prohibition was contained in the Constitution of the United States; so neither would retrospective laws taking away vested rights be enforced. Such laws are repugnant to those fundamental principles upon which every just system of laws is founded. It is an elementary principle adopted and sanctioned by the courts of justice in this country and in Great Britain whenever such laws have come under consideration, and yet retrospective laws are clearly within this prohibition. It is therefore no objection to the view I have taken of this clause in the Constitution that the provision was unnecessary. The great principle asserted no doubt is, as laid down by the Court in Sturges v. Crowninshield, the inviolability of contracts, and this principle is fully maintained by confining the prohibition to laws affecting antecedent contracts. It is the same principle we find, contemporaneously, 13 July, 1787, 1 L.U.S. 475, asserted by the old Congress in an ordinance for the government of the territory of the United States northwest of the River Ohio. By one of the fundamental articles it is provided that

"In the just preservation of rights and property, it is understood and declared that no law ought ever to be made or have force in the territory that shall in any manner whatever interfere with or affect private contracts or engagements, bona fide and without fraud previously made,"

thereby pointedly making a distinction between laws affecting contracts antecedently and subsequently made, and such a distinction seems to me to be founded upon the soundest principles of justice if there is anything in the argument that contracts are made with reference to and derive their obligation from the existing law.

That the prohibition upon the states to pass laws impairing the obligation of contracts is applicable to private rights merely, without reference to bankrupt laws, was evidently the understanding of those distinguished commentators on the Constitution who wrote the Federalist. In the 44th number of that work, p. 281, it is said that

"Bills of attainder, ex post facto laws, and laws impairing the obligation of contracts are contrary to the first principles of the social compact and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed

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to some of the state constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional defenses against these dangers ought not to be omitted. Very properly, therefore, has the convention added this constitutional bulwark in favor of personal security and private rights."

Had it been supposed that this restriction had for its object the taking from the states the right of passing insolvent laws, even when they went to discharge the contract, it is a little surprising that no intimation of its application to that subject should be found in these commentaries upon the Constitution. And it is still more surprising that if it had been thought susceptible of any such interpretation, that no objection should have been made in any of the states to the Constitution on this ground when the ingenuity of man was on the stretch in many states to defeat its adoption, and particularly in the state of New York, where the law now in question was in full force at the very time the state convention was deliberating upon the adoption of the Constitution. But if the prohibition is confined to retrospective laws, as it naturally imports, it is not surprising that it should have passed without objection, as it is the assertion of a principle universally approved.

It was pressed upon the court with great confidence, and, as it struck me at the time, with much force, that if this restriction could not reach laws existing at the time the contract was made, state legislatures might evade the prohibition (immediately preceding) to make anything but gold and silver a tender in payment of debts by

making the law prospective in its operation, and applicable to contracts thereafter to be made. But on reflection I think, no such consequences are involved. When we look at the whole clause in which these restrictions are contained, it will be seen that the subjects embraced therein are evidently to be divided into two classes, the one of a public and national character, the power over which is entirely taken away from the states, and the other relating to private and personal rights upon which the states may legislate under the restrictions specified. The former are, "no state shall enter any into treaty, alliance, or confederation, grant

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letters of marque and reprisal, coin money, emit bills of credit." Thus far, there can be no question that they relate to powers of a general and national character. The next in order is or "make anything but gold and silver a tender in payment of debts;" this is founded upon the same principles of public and national policy as the prohibition to coin money and emit bills of credit, and is so considered in the commentary on this clause in the number of the Federalist I have referred to. It is there said the power to make anything but gold and silver a tender in payment of debts is withdrawn from the states on the same principles with that of issuing a paper currency.

All these prohibitions, therefore, relate to powers of a public nature and are general and universal in their application and inseparably connected with national policy. The subject matter is entirely withdrawn from state authority and state legislation. But the succeeding prohibitions are of a different character; they relate to personal security and private rights, viz., or "pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts." The subject matter of such laws is not withdrawn from the states, but the legislation thereon must be under the restriction therein imposed. States may legislate on the subject of contracts, but the laws must not impair the obligation of such contracts. A tender of payment necessarily refers to the time when the tender is made, and has no relation to the time when the law authorizing it shall be passed or when the debt was contracted. The prohibition is therefore general and unlimited in its application. It has been urged in argument that this prohibition to the states to pass laws impairing the obligation of contracts had in view an object of great national policy connected with the power to regulate commerce; that the leading purpose was to take from the states the right of passing bankrupt laws. And to illustrate and enforce this position, this clause has been collated with that which gives to Congress the power of passing uniform laws on the subject of bankruptcies, and by transposition of the clause, the Constitution is made to read Congress shall have power to establish uniform laws on the subject of bankruptcies throughout the United States; but no state

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shall pass any law impairing the obligation of contracts, and this prohibition is made to mean no state shall pass any bankrupt law.

No just objection can be made to this collocation if the grant of the power to Congress, and the prohibition in question to the states, relate to the same subject matter, viz., bankrupt laws. But it appears to me very difficult to maintain this proposition. It is, in the first place, at variance with the decision in Sturges v. Crowninshield, where it is held that this power is not taken from the states absolutely, but only in a limited and modified sense. And in the next place it is not reasonable to suppose that a denial of this power to the states would have been couched in such ambiguous terms if, as has been contended, the giving to Congress the exclusive power to pass bankrupt laws, was the great and leading object of this prohibition, and the preservation of private rights followed only as an incident of minor importance, it is difficult to assign any satisfactory reason why the denial of the power to the states was not expressed in plain and unambiguous terms, viz., no state shall pass any bankrupt law. This would have been a more natural and certainly a less doubtful form of expression, and besides, if the object was to take from the states altogether the right of passing bankrupt laws, or insolvent laws having the like operation, why did not the denial of the power extend also to naturalization laws? The grant of the power to Congress on this subject is contained in the same clause, and substantially in the same words, "To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States." If the authority of Congress on the subject of naturalization is exclusive, from the nature of the power, why is it not also with respect to bankruptcies? And if in the one case the denial of the power to the states was necessary, it was equally so in the other.

I cannot think, therefore, that the prohibition to pass laws impairing the obligation of contracts had any reference to a general system of bankrupt or insolvent laws. Such a system, established by the sovereign legislative power of the general or state governments cannot in any just sense be said to

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impair the obligation of contracts. In every government of laws there must be a power somewhere to regulate civil contracts, and where, under our system, is that power vested? It must be either in the general or state governments. There is certainly no such power granted to the general government, and all power not granted is reserved to the states. The whole subject, therefore, of the regulation of contracts must remain with the states, and be governed by their laws respectively; and to deny to them the right of prescribing the terms and conditions upon which persons shall

be bound by their contracts thereafter made, is imposing upon the states a limitation, for which I find no authority in the Constitution; and no contract can impose a civil obligation beyond that prescribed by the existing law when the contract was made; nor can such obligation be impaired by controlling and discharging the contract according to the provisions of such law. Suppose a contract for the payment of money should contain an express stipulation by the creditor to accept a proportional part, in case the debtor should become insolvent, and to discharge the contract, can there be a doubt that such contract would be enforced? And what is the law in question but such contract, when applied to the undertaking of Ogden by accepting these bills. It is no strained construction of the transaction, to consider the contract and the law inseparable, when judging of the obligation imposed upon the debtor, and if so the undertaking was conditional, and the holder of the bills agreed to accept a part in case of the inability of the acceptor, by reason of his insolvency, to pay the whole.

The unconstitutionality of this law is said to arise from its exempting the property of the insolvent, acquired after his discharge, from the payment of his antecedent debts. A discharge of the person of the debtor is admitted to be no violation of the contract. If this objection is well founded, it must be on the ground that the obligation of every contract attaches upon the property of the debtor, and any law exonerating it violates this obligation. I do not mean that the position implies a lien by way of mortgage or pledge on any specific property, but that all the property which a debtor has, when called upon for payment, is liable to be

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taken in execution to satisfy the debt, and that a law releasing any portion of it impairs the obligation of the contract. The force and justice of this position, when applied to contracts existing at the time the law is passed, is not now drawn in question. But its correctness when applied to contracts thereafter made is denied. The mode and manner and the extent to which property may be taken in satisfaction of debts must be left to the sound discretion of the legislature and regulated by its views of policy and expediency in promoting the general welfare of the community, subject to such regulation. It was the policy of the common law under the feudal system to exempt lands altogether from being seized and applied in satisfaction of debts; not even possession could be taken from the tenant. There can be no natural right growing out of the relation of debtor and creditor that will give the latter an unlimited claim upon the property of the former. It is a matter entirely for the regulation of civil society; nor is there any fundamental principle of justice, growing out of such relation, that calls upon government to enforce the payment of debts to the uttermost farthing which the debtor may possess, and that the modification and extent of such liability is a subject within the authority of state legislation, seems to be admitted by the uninterrupted exercise of it. I have not deemed it necessary to look into the statute books of all the states on this subject, but think it may be safely affirmed that in most if not all the states some limitation of the right of the creditor over the property of the debtor has been established. In New York, various articles of personal property are exempted from execution. In Rhode Island, real estate cannot at all be taken on judicial process for satisfaction of a debt so long as the body of the debtor is to be found within the state, and Virginia has adopted the English process of elegit, and a moiety only of the debtor's freehold is delivered to the creditor until, out of the rents and profits thereof, the debt is paid. Do these statute regulations impair the obligation of contracts? I presume this will not be contended for, and yet they would seem to me to fall within the principle urged on the part of the defendant in error.

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It is no satisfactory answer to say that such laws relate to the remedy. The principle asserted is that the creditor has a right to his debtor's property by virtue of the obligation of the contract, to the full satisfaction of the debt, and if so, a law, which in any shape exempts any portion of it, must impair the obligation of the contract. Such a limitation and restriction upon the powers of the state governments cannot, in my judgment, be supported, under the prohibition to pass laws impairing the obligation of contracts.

If the letter of the Constitution does not imperiously demand a construction which denies to the states the power of passing insolvent laws like the one in question, policy and expediency require a contrary construction. Although there may be some diversity of opinion as to the policy of establishing a general bankrupt system in the United States, yet it is generally admitted that such laws are useful, if not absolutely necessary, in a commercial community. That it was the opinion of the framers of the Constitution that the power to pass bankrupt laws ought somewhere to exist, is clearly inferrable from the grant of such power to Congress. A contrary conclusion would involve the greatest absurdity. The specific power, however, granted to Congress never did nor never could exist in the state governments. That power is to establish uniform laws on the subject of bankruptcies throughout the United States, which could only be done by a government having coextensive jurisdiction. Congress not having as yet deemed it expedient to exercise the power of reestablishing a uniform system of bankruptcy, affords no well founded argument against the expediency or necessity of such a system in any particular state. A bankrupt law is most necessary in a commercial community, and as different states in this respect do not stand on the same footing, a system which might be adapted to one, might not suit all, which would naturally present difficulties in forming any uniform system, and Congress

may, as heretofore, deem it expedient to leave each state to establish such system as shall best suit its own local circumstances and views of policy, knowing, at the same time, that if any great public inconvenience shall grow out of the different state laws, the evils

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may be corrected by establishing a uniform system, according to the provision of the Constitution, which will suspend the state laws on the subject. If such should be the views entertained by Congress and induce it to abstain from the exercise of the power, the importance to the State of New York, as well as other states, of establishing the validity of laws like the one in question, is greatly increased. The long continuance of it there clearly manifests the views of the state legislature with respect to the policy and expediency of the law. And I cannot but feel strongly impressed that the length of time which this law has been in undisputed operation, and the repeated sanction it has received from every department of the government, ought to have great weight when judging of its constitutionality.

The provisions of the 61st section of the bankrupt law of 1800 appear to me to contain a clear expression of the opinion of Congress in favor of the validity of this and similar laws in other states. It cannot be presumed they were ignorant of the existence of these laws or their extent and operation. And indeed the section expressly assumes the existence of such laws by declaring that this act shall not repeal or annul the laws of any state now in force, or which may be thereafter enacted for the relief of insolvent debtors, except so far as the same may affect persons within the purview of the bankrupt act, and even with respect to such persons, it provides that if the creditors shall not prosecute a commission of bankruptcy within a limited time, they shall be entitled to relief under the state laws for the relief of insolvent debtors. And what relief did such laws give? Was it merely from imprisonment only? Certainly not. The state laws here ratified and sanctioned, or at least some of them, were such as had the full effect and operation of a bankrupt law, to-wit, to discharge the debtor absolutely from all future responsibility. It is true, if these laws were unconstitutional and void, this section of the bankrupt law could give them no validity. But it is not in this light the argument is used. The reference is only to show the sense of Congress with respect to the validity of such laws, and if it is fair to presume Congress was acquainted with the extent and operation of these laws, this clause is a direct affirmation of their validity.

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For it cannot be presumed that body would have expressly ratified and sanctioned laws which they considered unconstitutional.

In the case of Sturges v. Crowninshield, as I have before remarked, it is said that by this prohibition, Art. 1. sec. 10, in the Constitution, the convention appears to have intended to establish a great principle "that contracts should be inviolable." This was certainly, though a great, yet not a new, principle. It is a principle inherent in every sound and just system of laws, independent of express constitutional restraints. And if the assertion of this principle was the object of the clause (as I think it was), is it reasonable to conclude that the framers of the Constitution supposed that a bankrupt or insolvent law, like the one in question, would violate this principle? Can it be supposed that the Constitution would have reserved the right, and impliedly enjoined the duty upon Congress to pass a bankrupt law, if it had been thought that such law would violate this great principle? If the discharge of a party from the performance of his contracts, when he has, by misfortunes, become incapable of fulfilling them, is a violation of the eternal and unalterable principles of justice, growing out of what has been called at the bar the universal law, can it be that a power drawing after it such consequences has been recognized and reserved in our Constitution? Certainly not. And is the discharge of a contract any greater violation of those sacred principles in a state legislature than in that of the United States? No such distinction will be pretended. But a bankrupt or insolvent law involves no such violation of the great principles of justice, and this is not the light in which it always has been, and ought to be, considered. Such law, in its principle and object, has in view the benefit of both debtor and creditor, and is no more than the just exercise of the sovereign legislative power of the government to relieve a debtor from his contracts, when necessity, and unforeseen misfortunes, have rendered him incapable of performing them; and whether this power is to be exercised by the states individually, or by the United States, can make no difference in principle. In a government like ours, where sovereignty, to a modified extent,

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exists both in the states and in the United States. It was, in the formation of the Constitution, a mere question of policy and expediency where this power should be exercised, and there can be no question but that so far as respects a bankrupt law, properly speaking, the power ought to be exercised by the general government. It is naturally connected with commerce, and should be uniform throughout the United States. A bankrupt system deals with commercial men, but this affords no reason why a state should not exercise its sovereign power in relieving the necessities of men who do not fall within the class of traders and who, from like misfortune, have become incapable of performing their contracts.

Without questioning the constitutional power of Congress to extend a bankrupt law to all classes of debtors, the expediency of

such a measure may well be doubted. There is not the same necessity of uniformity of system as to other classes than traders; their dealings are generally local, and different considerations of policy may influence different states on this subject, and should Congress pass a bankrupt law confined to traders, it would still leave the insolvent law of New York in force as to other classes of debtors, subject to such alteration as that state shall deem expedient.

Upon the whole, therefore, it having been settled by this Court that the states have a right to pass bankrupt laws provided they do not violate the prohibition against impairing the obligation of contracts, and believing as I do, for the reasons I have given, that the insolvent law in question, by which a debtor obtains a discharge from all future responsibility upon contracts entered into after the passage of the law and before his discharge does not impair the obligation of his contracts, I am of opinion, that the judgment of the court below ought to be reversed.

MR. JUSTICE TRIMBLE.

The question raised upon the record in this case and which has been discussed at the bar may be stated thus: has a state, since the adoption of the Constitution of the United States, authority to pass a bankrupt

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or insolvent law discharging the bankrupt or insolvent from all contracts made within the state after the passage of the law upon the bankrupt's or insolvent's surrendering his effects and obtaining a certificate of discharge from the constituted authorities of the state?

The counsel for the defendant in error have endeavored to maintain the negative of the proposition on two grounds:

First. That the power conferred on Congress by the Constitution, "to establish uniform laws on the subject of bankruptcies throughout the United States" is in its nature an exclusive power, that consequently no state has authority to pass a bankrupt law, and that the law under consideration is a bankrupt law.

Secondly. That it is a law impairing the obligation of contracts within the meaning of the Constitution.

In the case of Sturges v. Crowninshield, 4 Wheat. 122, this Court expressly decided

"That since the adoption of the Constitution of the United States, a state has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts within the meaning of the Constitution, and provided there be no act of Congress in force to establish a uniform system of bankruptcy conflicting with such law."

This being a direct judgment of the Court, overruling the first position assumed in argument, that judgment ought to prevail unless it be very clearly shown to be erroneous.

Not having been a member of the Court when that judgment was given, I will content myself with saying the argument has not convinced me it is erroneous, and that on the contrary, I think the opinion is fully sustained by a sound construction of the Constitution.

There being no act of Congress in force to establish a uniform system of bankruptcy, the first ground of argument must fail.

It is argued that the law under consideration is a law impairing the obligation of contracts within the meaning of the Constitution. The 10th section of the 1st Art. of the Constitution is in these words:

"No state shall enter into any treaty, alliance, or confederation, grant letters of marque and reprisal, coin money, emit bills of credit, make anything

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but gold and silver coin a tender in payment of debts, pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

In the case of Sturges v. Crowninshield, the defendant in the original suit had been discharged in New York under an insolvent law of that state which purported to apply to past as well as future contracts, and being sued on a contract made within the state prior to the passage of the law, he pleaded his certificate of discharge in bar of the action. In answer to the 3d and 4th questions certified from the circuit court to this Court for its final decision, drawing in question the constitutionality of the law and the sufficiency of the plea in bar founded upon it, this Court certified its opinion

"that the act of New York pleaded in this case so far as it attempts to discharge the contract on which this suit was instituted, is a law impairing the obligation of contracts within the meaning of the Constitution of the United States, and that the plea of the defendant is not a good and sufficient bar of the plaintiff's action."

In the case of McMillan v. McNeal, 4 Wheat. 209, the defendant in the court below pleaded a discharge obtained by him in Louisiana on 23 August, 1815, under the insolvent law of that state, passed in 1808, in bar of a suit instituted against him upon a contract

made in South Carolina in the year 1813. This Court decided that the plea was no bar to the action and affirmed the judgment given below for the plaintiff.

These cases do not decide the case at bar. In the first, the discharge was pleaded in bar to a contract made prior to the passage of the law, and in the second the discharge in one state under its laws was pleaded to a contract made in another state. They leave the question open whether a discharge obtained in a state under an insolvent law of the state is a good bar to an action brought on a contract made within the state after the passage of the law.

In presenting this inquiry, it is immaterial whether the law purports to apply to past as well as future contracts, or is wholly prospective in its provisions.

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It is not the terms of the law, but its effect that is inhibited by the Constitution. A law may be in part constitutional and in part unconstitutional. It may, when applied to a given case, produce an effect which is prohibited by the Constitution, but it may not, when applied to a case differently circumstanced, produce such prohibited effect. Whether the law under consideration, in its effects and operation upon the contract sued on in this case, be a law impairing the obligation of this contract is the only necessary inquiry.

In order to come to a just conclusion, we must ascertain, if we can, the sense in which the terms "obligation of contracts" is used in the Constitution. In attempting to do this, I will premise that in construing an instrument of so much solemnity and importance, effect should be given, if possible, to every word. No expression should be regarded as a useless expletive, nor should it be supposed without the most urgent necessity that the illustrious framers of that instrument had from ignorance or inattention used different words which are in effect merely tautologous.

I understand it to be admitted in argument and if not admitted, it could not be reasonably contested, that in the nature of things, there is a difference between a contract and the obligation of the contract. The terms "contract" and "obligation," although sometimes used loosely as convertible terms, do not properly impart the same idea. The Constitution plainly presupposes that a contract and its obligation are different things. Were they the same thing, and the terms "contract" and "obligation" convertible, the Constitution, instead of being read as it now is, "that no state shall pass any law impairing the obligation of contracts," might with the same meaning be read "that no state shall pass any law impairing the obligation of obligations," or, "the contract of contracts," and to give to the Constitution the same meaning which either of these readings would import would be ascribing to its framers a useless and palpably absurd tautology. The illustrious framers of the Constitution could not be ignorant that there were or might be many contracts without obligation and many obligations without contracts. "A contract is defined to be an agreement in which a party

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undertakes to do or not to do a particular thing." Sturges v. Crowninshield, 4 Wheat. 197.

This definition is sufficient for all the purposes of the present investigation, and its general accuracy is not contested by either side.

From the very terms of the definition, it results incontestably that the contract is the sole act of the parties, and depends wholly on their will. The same words, used by the same parties with the same objects in view, would be the same contract whether made upon a desert island, in London, Constantinople, or New York. It would be the same contract whether the law of the place where the contract was made recognized its validity and furnished remedies to enforce its performance or prohibited the contract and withheld all remedy for its violation.

The language of the Constitution plainly supposes that the obligation of a contract is something not wholly depending upon the will of the parties. It incontestably supposes the obligation to be something which attaches to and lays hold of the contract and which, by some superior external power, regulates and controls the conduct of the parties in relation to the contract; it evidently supposes that superior external power to rest in the will of the legislature.

What, then, is the obligation of contracts within the meaning of the Constitution? From what source does that obligation arise?

The learned CHIEF JUSTICE, in delivering the opinion of the Court in Sturges v. Crowninshield, after having defined a contract to be "an agreement wherein a party undertakes to do, or not to do, a particular thing," proceeds to define the obligation of the contract in these words: "the law binds him to perform his engagement, and this is, of course, the obligation of the contract."

The Institutes lib. 3. tit. 4 (Cooper's translation), says, "an obligation is the chain of the law by which we are necessarily bound to make some payment according to the law of the land."

Pothier, in his treatise concerning obligations, in speaking of the obligation of contracts, calls it "vinculum legis," the chain of the law. Paley 56 says, "To be obliged is

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to be urged by a violent motive resulting from the command of another." From these authorities, and many more might be cited, it may be fairly concluded that the obligation of the contract consists in the power and efficacy of the law which applies to and enforces performance of the contracts or the payment of an equivalent for nonperformance. The obligation does not inhere and subsist in the contract itself, proprio vigore, but in the law applicable to the contract. This is the sense, I think, in which the Constitution uses the term "obligation."

From what law and how is this obligation derived within the meaning of the Constitution? Even if it be admitted that the moral law necessarily attaches to the agreement, that would not bring it within the meaning of the Constitution. Moral obligations are those arising from the admonitions of conscience and accountability to the Supreme Being. No human lawgiver can impair them. They are entirely foreign from the purposes of the Constitution. The Constitution evidently contemplates an obligation which might be impaired by a law of the state, if not prohibited by the Constitution.

It is argued that the obligation of contracts is founded in and derived from general and universal law; that by these laws the obligation of contracts is coextensive with the duty of performance, and indeed the same thing; that the obligation is not derived from nor depends upon the civil or municipal laws of the state; and that this general universal duty, or obligation is what the Constitution intends to guard and protect against the unjust encroachments of state legislation. In support of this doctrine it is said that no state perhaps ever declared by statute or positive law that contracts shall be obligatory, but that all states, assuming the preexistence of the obligation of contracts, have only superadded by municipal law the means of carrying the preexisting obligation into effect.

This argument struck me at first with great force, but upon reflection I am convinced it is more specious than solid. If it were admitted that in an enlarged and very general sense, obligations have their foundation in natural or what is called, in the argument "universal" law; that this

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natural obligation is in the general assumed by states as preexisting, and upon this assumption they have not thought it necessary to pass declaratory laws in affirmance of the principles of universal law; yet nothing favorable to the argument can result from these admissions unless it be further admitted or proved that a state has no authority to regulate, alter, or in any wise control the operation of this universal law within the state by its own peculiar municipal enactions. This is not admitted, and I think cannot be proved.

I admit that men have, by the laws of nature, the right of acquiring and possessing property and the right of contracting engagements. I admit that these natural rights have their correspondent natural obligations. I admit that in a state of nature, when men have not submitted themselves to the controlling authority of civil government, the natural obligation of contracts is coextensive with the duty of performance. This natural obligation is founded solely in the principles of natural or universal law. What is this natural obligation? All writers who treat on the subject of obligations agree that it consists in the right of the one party to demand from the other party what is due, and if it be withheld, in his right and supposed capacity to enforce performance or to take an equivalent for nonperformance by his own power. This natural obligation exists among sovereign and independent states and nations and amongst men in a state of nature who have no common superior, and over whom none claim or can exercise a controlling legislative authority.

But when men form a social compact and organize a civil government, they necessarily surrender the regulation and control of these natural rights and obligations into the hands of the government. Admitting it, then, to be true that in general men derive the right of private property and of contracting engagements from the principles of natural universal law; admitting that these rights are in the general not derived from or created by society, but are brought into it, and that no express declaratory municipal law be necessary for their creation or recognition, yet, it is equally true that these rights and the obligations resulting

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from them are subject to be regulated, modified, and, sometimes, absolutely restrained by the positive enactions of municipal law. I think it incontestably true that the natural obligation of private contracts between individuals in society ceases and is converted into a civil obligation by the very act of surrendering the right and power of enforcing performance into the hands of the government. The right and power of enforcing performance exists, as I think all must admit, only in the law of the land, and the obligation resulting from this condition is a civil obligation.

As, in a state of nature, the natural obligation of a contract consists in the right and potential capacity of the individual to take or enforce the delivery of the thing due to him by the contract or its equivalent, so in the social state, the obligation of a contract consists in the efficacy of the civil law, which attaches to the contract and enforces its performance or gives an equivalent in lieu of performance. From these principles it seems to result as a

necessary corollary that the obligation of a contract made within a sovereign state must be precisely that allowed by the law of the state, and none other. I say "allowed" because if there be nothing in the municipal law to the contrary, the civil obligation being, by the very nature of government, substituted for and put in the place of natural obligation would be coextensive with it; but if by positive enactions, the civil obligation is regulated and modified so as that it does not correspond with the natural obligation, it is plain the extent of the obligation must depend wholly upon the municipal law. If the positive law of the state declares the contract shall have no obligation, it can have no obligation, whatever may be the principles of natural law in relation to such a contract. This doctrine has been held and maintained by all states and nations. The power of controlling, modifying, and even of taking away all obligation from such contracts as, independent of positive enactions to the contrary, would have been obligatory has been exercised by all independent sovereigns, and it has been universally held that the courts of one sovereign will, upon principles of comity and common justice, enforce contracts made within the dominions of another sovereign so far as they were obligatory by the

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law of the country where made; but no instance is recollected and none is believed to exist where the courts of one sovereign have held a contract, made within the dominions of another, obligatory against or beyond the obligation assigned to it by the municipal law of its proper country. As a general proposition of law it cannot be maintained that the obligation of contracts depends upon and is derived from universal law, independent of and against the civil law of the state in which they are made. In relation to the states of this Union, I am persuaded that the position that the obligation of contracts is derived from universal law, urged by the learned counsel in argument with great force, has been stated by them much too broadly. If true, the states can have no control over contracts. If it be true that the "obligation of contracts," within the meaning of the Constitution, is derived solely from general and universal law, independent of the laws of the state, then it must follow that all contracts made in the same or similar terms must, whenever, or wherever made, have the same obligation. If this universal natural obligation is that intended by the Constitution, as it is the same not only everywhere but at all times, it must follow that every description of contract which could be enforced at any time or place upon the principles of universal law must necessarily be enforced at all other times and in every state upon the same principles in despite of any positive law of the state to the contrary.

The arguments based on the notion of the obligation of universal law, if adopted, would deprive the states of all power of legislation upon the subject of contracts other than merely furnishing the remedies or means of carrying this obligation of universal law into effect. I cannot believe that such consequences were intended to be produced by the Constitution.

I conclude that so far as relates to private contracts between individual and individual, it is the civil obligation of contracts, that obligation which is recognized by, and results from, the law of the state in which the contract is made, which is within the meaning of the Constitution. If

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so, it follows that the states have, since the adoption of the Constitution, the authority to prescribe and declare by their laws prospectively what shall be the obligation of all contracts made within them. Such a power seems to be almost indispensable to the very existence of the states, and is necessary to the safety and welfare of the people. The whole frame and theory of the Constitution seems to favor this construction. The states were in the full enjoyment and exercise of all the powers of legislation on the subject of contracts before the adoption of the Constitution. The people of the states in that instrument transfer to and vest in the Congress no portion of this power except in the single instance of the authority given to pass uniform laws on the subject of bankruptcies throughout the United States, to which may be added, such as results by necessary implication in carrying the granted power into effect. The whole of this power is left with the states as the Constitution found it, with the single exception that in the exercise of their general authority they shall pass no law "impairing the obligation of contracts."

The construction insisted upon by those who maintain that prospective laws of the sort now under consideration are unconstitutional would, as I think, transform a special limitation upon the general powers of the states into a general restriction. It would convert by construction the exception into a general rule, against the best settled rules of construction. The people of the states, under every variety of change of circumstances, must remain unalterably, according to this construction, under the dominion of this supposed universal law and the obligations resulting from it. Upon no acknowledged principle can a special exception, out of a general authority, be extended by construction so as to annihilate or embarrass the exercise of the general authority. But to obviate the force of this view of the subject, the learned counsel admit that the legislature of a state has authority to provide by law what contracts shall not be obligatory, and to declare that no remedy shall exist for the enforcement of such as the legislative wisdom deems injurious. They say the obligation of a contract is coeval with its existence, that the moment an agreement is made,

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obligation attaches to it, and they endeavor to maintain a distinction between such laws as declare that certain contracts shall not be obligatory at all, and such as declare they shall not be obligatory, or (what is the same thing in effect) shall be discharged upon the happening of a future event. The former, they say, were no contracts in contemplation of law, were wholly forbidden, and, therefore, never obligatory; the latter were obligatory at their creation, and that obligation is protected by the Constitution from being impaired by any future operation of the law.

This course of reasoning is ingenious and perplexing, but I am greatly mistaken if it will not be found, upon examination, to be unsatisfactory and inconclusive. If it were admitted that generally the civil obligation of a contract made in a state attaches to it when it is made, and that this obligation, whatever it be, cannot be defeated by any effect or operation of law which does not attach to it at its creation, the admission would avail nothing. It is as well a maxim of political law as of reason that the whole must necessarily contain all the parts, and, consequently a power competent to declare a contract shall have no obligation must necessarily be competent to declare it shall have only a conditional or qualified obligation.

If, as the argument admits, a contract never had any obligation, because the preexisting law of the state declaring it should have none attached to it at the moment of its creation, why will not a preexisting law, declaring it shall have only a qualified obligation, attach to it in like manner at the moment of its creation? A law declaring that a contract shall not be enforced upon the happening of a future event is a law declaring the contract shall have only a qualified or conditional obligation. If such law be passed before the contract is made, does not the same attach to it the moment it is made, and is not the obligation of the contract, whatever may be its terms, qualified from the beginning by force and operation of the existing law? If it is not, then it is absolute in despite of the law, and the obligation does not result from the law of the land, but from some other law.

The passing of a law declaring that a contract shall have no obligation or shall have obligation generally but cease to

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be obligatory in specified events is but the exertion of the same power. The difference exists not in the character of the power, but the degree of its exertion and the manner of its operation.

In the case at bar, the contract was made in the state, and the law of the state at the time it was made, in effect, provided that the obligation of the contract should not be absolute, but qualified by the condition that the party should be discharged upon his becoming insolvent and complying with the requisitions of the insolvent law. This qualification attached to the contract by law the moment the contract was made, became inseparable from it, and traveled with it through all its stages of existence until the condition was consummated by the final certificate of discharge.

It is argued that this cannot be so, because the contract would be enforced and must necessarily be enforced in other states where no such insolvent law exists. This argument is founded upon a misapprehension of the nature of the qualification itself. It is in nature of a condition subsequent, annexed by operation of law to the contract at the moment of its creation.

The condition is that upon the happening of all the events contemplated by the law, and upon their verification in the manner prescribed by the law itself by the constituted authorities of the state, the contract shall not thereafter be obligatory. Unless all these take place; unless the discharge is actually obtained within the state according to its laws, the contingency has not happened, and the contract remains obligatory both in the state and elsewhere.

It has been often said that the laws of a state in which a contract is made, enter into, and make part of the contract, and some who have advocated the constitutionality of prospective laws of the character now under consideration have placed the question on that ground. The advocates of the other side, availing themselves of the infirmity of this argument, have answered triumphantly,

"admitting this to be so, the Constitution is the supreme law of every state, and must therefore, upon the same principle, enter into every contract and overrule the local laws."

My answer to this

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view of both sides of the question is that the argument and the answer to it are equally destitute of truth.

I have already shown that the contract is nothing but the agreement of the parties, and that if the parties, in making their agreement, use the same words with the same object in view where there is no law or where the law recognizes the agreement and furnishes remedies for its enforcement or where the law forbids or withholds all remedy for the enforcement of the agreement, it is the very same contract in all these predicaments. I have endeavored to show, and I think successfully, that the obligation of contracts, in the sense of the Constitution, consists not in the contract itself, but in a superior external force controlling the conduct of the parties in relation to the contract, and that this superior external force is the law of the state, either tacitly or expressly recognizing the contract and furnishing means whereby

it may be enforced. It is this superior external force, existing potentially or actually applied, "which binds a man to perform his engagements;" which, according to Justinian, is "the chain of the law by which we are necessarily bound to make some payment -- according to the law of the land," and which, according to Paley, being "a violent motive, resulting from the command of another," obliges the party to perform his contract. The law of the state, although it constitutes the obligation of the contract, is no part of the contract itself, nor is the Constitution either a part of the contract or the supreme law of the state in the sense in which the argument supposes. The Constitution is the supreme law of the land upon all subjects upon which it speaks. It is the sovereign will of the whole people. Whatever this sovereign will enjoins or forbids must necessarily be supreme, and must counteract the subordinate legislative will of the United States and of the states.

But on subjects in relation to which the sovereign will is not declared or fairly and necessarily implied, the Constitution cannot with any semblance of truth be said to be the supreme law. It could not with any semblance of truth be said that the Constitution of the United States is the supreme law of any state in relation to the solemnities requisite for conveying real estate, or the responsibilities or obligations

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consequent upon the use of certain words in such conveyance. The Constitution contains no law, no declaration of the sovereign will, upon these subjects, and cannot, in the nature of things in relation to them be the supreme law. Even if it were true, then, that the law of a state in which a contract is made is part of the contract, it would not be true that the Constitution would be part of the contract. The Constitution nowhere professes to give the law of contracts or to declare what shall or shall not be the obligation of contracts. It evidently presupposes the existence of contracts by the act of the parties and the existence of their obligation, not by authority of the Constitution, but by authority of law, and the preexistence of both the contracts and their obligation being thus supposed, the sovereign will is announced that "no state shall pass any law impairing the obligation of contracts."

If it be once ascertained that a contract existed and that an obligation, general or qualified, of whatsoever kind, had once attached or belonged to the contract by law, then and not till then does the supreme law speak by declaring that obligation shall not be impaired.

It is admitted in argument that statutes of frauds and perjuries, statutes of usury, and of limitation, are not laws impairing the obligation of contracts. They are laws operating prospectively upon contracts thereafter made. It is said, however, they do not apply in principle to this case, because the statutes of frauds and perjuries apply only to the remedies, and because in that case and under the statutes of usury, the contracts were void from the beginning, were not recognized by law as contracts, and had no obligation, and that the statutes of limitation create rules of evidence only.

Although these observations are true, they do not furnish the true reason, nor indeed any reason, why these laws do not impair the obligation of contracts. The true and only reason is that they operate on contracts made after the passage of the laws, and not upon existing contracts. And hence THE CHIEF JUSTICE very properly remarks of both usury laws and laws of limitation in delivering the opinion in Sturges v. Crowninshield that if they should be made to

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operate upon contracts already entered into, they would be unconstitutional and void. If a statute of frauds and perjuries should pass in a state formerly having no such laws, purporting to operate upon existing contracts, as well as upon those made after its passage, could it be doubted that so far as the law applied to and operated upon existing contracts, it would be a law "impairing the obligation of contracts?" Here, then, we have the true reason and principle of the Constitution. The great principle intended to be established by the Constitution was the inviolability of the obligation of contracts, as the obligation existed and was recognized by the laws in force at the time the contracts were made. It furnished to the legislatures of the states a simple and obvious rule of justice, which, however theretofore violated, should by no means be thereafter violated, and whilst it leaves them at full liberty to legislate upon the subject of all future contracts, and assign to them either no obligation or such qualified obligation as in their opinion may consist with sound policy and the good of the people, it prohibits them from retrospecting upon existing obligations upon any pretext whatever. Whether the law professes to apply to the contract itself, to fix a rule of evidence, a rule of interpretation, or to regulate the remedy, it is equally within the true meaning of the Constitution if it in effect impairs the obligation of existing contracts, and in my opinion is out of its true meaning if the law is made to operate on future contracts only. I do not mean to say that every alteration of the existing remedies would impair the obligation of contracts, but I do say with great confidence that a law taking away all remedy from existing contracts would be manifestly a law impairing the obligation of contracts. The moral obligation would remain, but the legal or civil obligation would be gone if such a law should be permitted to operate. The natural obligation would be gone, because the laws forbid the party to enforce performance by his own power. On the other hand, a great variety of instances may readily be imagined in which the legislature of a state might alter, modify, or repeal existing

remedies and enact others in their stead without the slightest ground for a supposition

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that the new law impaired the obligation of contracts. If there be intermediate cases of a more doubtful character, it will be time enough to decide them when they arise.

It is argued that as the clause declaring that "no state shall pass any law impairing the obligation of contracts" is associated in the same section of the Constitution with the prohibition to "coin money, emit bills of credit," or "make anything but gold and silver coin a legal tender in payment of debts," and as these all evidently apply to legislation in reference to future as well as existing contracts, and operate prospectively, to prohibit the action of the law without regard to the time of its passage, the same construction should be given to the clause under consideration.

This argument admits of several answers. First, as regards the prohibition to coin money and emit bills of credit. The Constitution had already conferred on Congress the whole power of coining money and regulating the current coin. The grant of this power to Congress and the prohibitions upon the states evidently take away from the states all power of legislation and action on the subject, and must of course apply to the future action of laws, either then made or to be made. Indeed the language plainly indicates that it is the act of "coining money" and the act of emitting bills of credit which is forbidden, without any reference to the time of passing the law, whether before or after the adoption of the Constitution. The other prohibition, to "make anything but gold or silver coin a tender in payment of debts," is but a member of the same subject of currency committed to the general government and prohibited to the states. And the same remark applies to it already made as to the other two. The prohibition is not that no state shall pass any law, but that even if a law does exist, the "state shall not make anything but gold and silver coin a legal tender." The language plainly imports that the prohibited tender shall not be made a legal tender, whether a law of the state exists or not. The whole subject of tender, except in gold and silver, is withdrawn from the states. These cases cannot, therefore, furnish a sound rule of interpretation for that clause which prohibits the states from passing laws "impairing the obligation of contracts." This

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clause relates to a subject confessedly left wholly with the states, with a single exception; they relate to subjects wholly withdrawn from the states, with the exception that they may pass laws on the subject of tender in gold and silver coin only.

The principle that the association of one clause with another of like kind may aid in its construction is deemed sound, but I think it has been misapplied in the argument. The principle applied to the immediate associates of the words under consideration, is I think decisive of this question. The immediate associates are the prohibitions to pass bills of attainder and ex post facto laws. The language and order of the whole clause is no state shall "pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts." If the maxim noscitur a sociis be applied to this case, there would seem to be an end of the question. The two former members of the clause undeniably prohibit retroactive legislation upon the existing state of things, at the passage of the prohibited laws. The associated idea is that the latter member of the same clause should have a similar effect upon the subject matter to which it relates. I suppose this was the understanding of the American people when they adopted the Constitution. I am justified in this supposition by the contemporary construction given to the whole of this clause by that justly celebrated work, styled the Federalist, written at the time for the purpose of recommending the Constitution to the favor and acceptance of the people. In No. 44, p. 281, commenting upon this very clause and all its members, the following observations are made:

"Bills of attainder, ex post facto laws, and laws impairing the obligation of contracts are contrary to the first principles of the social compact and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the state Constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters."

Did the American people believe -- could they believe -- these heavy denunciations were leveled against laws which

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fairly prescribed and plainly pointed out to the people rules for their future conduct and the rights, duties and obligations, growing out of their future words or actions? They must have understood that these denunciations were just as regarded bills of attainder and ex post facto laws, because they were exercises of arbitrary power perverting the justice and order of existing things by the reflex action of these laws. And would they not naturally and necessarily conclude the denunciations were equally just as regarded laws passed to impair the obligation of existing contracts for the same reason?

The writer proceeds:

"Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, has the convention added this constitutional bulwark in favor of personal security and private rights, and I am

much deceived if they have not in so doing as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and with indignation that sudden changes and legislative interferences in cases affecting personal rights become jobs in the hands of enterprising and influential speculators, and shares to the more industrious and less informed part of the community. They have seen too that one legislative interference is but the link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society."

I cannot understand this language otherwise than as putting bills of attainder, ex post facto laws, and laws impairing the obligation of contracts all upon the same footing and deprecating them all for the same cause. The language shows clearly that the whole clause was understood at the time of the adoption of the Constitution to have been introduced into the instrument in the very same spirit and for the very same purpose -- namely for the protection of personal

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security and of private rights. The language repels the idea, that the member of the clause immediately under consideration was introduced into the Constitution upon any grand principle of national policy, independent of the protection of private rights, so far as such an idea can be repelled, by the total omission to suggest any such independent grand principle of national policy and by placing it upon totally different ground.

It proves that the sages who formed and recommended the Constitution to the favor and adoption of the American people did not consider the protection of private rights, more than the protection of personal security, as too insignificant for their serious regard, as was urged with great earnestness in argument. In my judgment, the language of the authors of the Federalist proves that they at least understood that the protection of personal security and of private rights from the despotic and iniquitous operation of retrospective legislation was, itself and alone, the grand principle intended to be established. It was a principle of the utmost importance to a free people about to establish a national government "to establish justice" and, "to secure to themselves and their posterity the blessings of liberty." This principle is, I think, fully and completely sustained by the construction of the Constitution which I have endeavored to maintain.

In my judgment, the most natural and obvious import of the words themselves prohibiting the passing of laws "impairing the obligation of contracts," the natural association of that member of the clause with the two immediately preceding members of the same clause, forbidding the passing of "bills of attainder" and "ex post facto laws;" the consecutive order of the several members of the clause; the manifest purposes and objects for which the whole clause was introduced into the Constitution, and the cotemporary exposition of the whole clause all warrant the conclusion that a state has authority, since the adoption of the Constitution, to pass a law whereby a contract made within the state after the passage of the law, may be discharged, upon the party obtaining a certificate of discharge as an insolvent, in the manner prescribed by the law of the state.

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MR. CHIEF JUSTICE MARSHALL.

It is well known that the Court has been divided in opinion on this case. Three judges, MR. JUSTICE DUVALL, MR. JUSTICE STORY, and myself, do not concur in the judgment which has been pronounced. We have taken a different view of the very interesting question which has been discussed with so much talent as well as labor at the bar, and I am directed to state the course of reasoning on which we have formed the opinion that the discharge pleaded by the defendant is no bar to the action.

The single question for consideration is whether the act of the State of New York is consistent with or repugnant to the Constitution of the United States?

This Court has so often expressed the sentiments of profound and respectful reverence with which it approaches questions of this character as to make it unnecessary now to say more than that if it be right that the power of preserving the Constitution from legislative infraction should reside anywhere, it cannot be wrong -- it must be right -- that those whom the delicate and important duty is conferred should perform it according to their best judgment.

Much too has been said concerning the principles of construction which ought to be applied to the Constitution of the United States.

On this subject also, the Court has taken such frequent occasion to declare its opinion as to make it unnecessary, at least, to enter again into an elaborate discussion of it. To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance nor extended to objects not comprehended in them,

nor contemplated by its framers is to repeat what has been already said more at large and is all that can be necessary.

As preliminary to a more particular investigation of the clause in the Constitution on which the case now under consideration is supposed to depend, it may be proper to inquire

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how far it is affected by the former decisions of this Court.

In Sturges v. Crowninshield it was determined that an act which discharged the debtor from a contract entered into previous to its passage was repugnant to the Constitution. The reasoning which conducted the Court to that conclusion might perhaps conduct it further, and with that reasoning (for myself alone this expression is used), I have never yet seen cause to be dissatisfied. But that decision is not supposed to be a precedent for Ogden v. Saunders because the two cases differ from each other in a material fact, and it is a general rule, expressly recognized by the Court in Sturges v. Crowninshield, that the positive authority of a decision is coextensive only with the facts on which it is made. In Sturges v. Crowninshield, the law acted on a contract which was made before its passage; in this case, the contract was entered into after the passage of the law

In McNeil v. McMillan, the contract, though subsequent to the passage of the act, was made in a different state by persons residing in that state, and, consequently, without any view to the law the benefit of which was claimed by the debtor.

Farmers' & Mechanics' Bank of Pennsylvania v. Smith differed from Sturges v. Crowninshield only in this, that the plaintiff and defendant were both residents of the state in which the law was enacted and in which it was applied. The Court was of opinion that this difference was unimportant.

It has then been decided that an act which discharges the debtor from preexisting contracts is void and that an act which operates on future contracts is inapplicable to a contract made in a different state, at whatever time it may have been entered into.

Neither of these decisions comprehends the question now presented to the Court. It is consequently open for discussion.

The provision of the Constitution is that "no state shall pass any law . . . impairing the obligation of contracts." The plaintiff in error contends that this provision inhibits the passage of retrospective laws only -- of such as act on contracts

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in existence at their passage. The defendant in error maintains that it comprehends all future laws, whether prospective or retrospective, and withdraws every contract from state legislation the obligation of which has become complete.

That there is an essential difference in principle between laws which act on past and those which act on future contracts; that those of the first description can seldom be justified, while those of the last are proper subjects of ordinary legislative discretion must be admitted. A constitutional restriction, therefore, on the power to pass laws of the one class may very well consist with entire legislative freedom respecting those of the other. Yet when we consider the nature of our Union; that it is intended to make us, in a great measure, one people, as to commercial objects; that so far as respects the intercommunication of individuals, the lines of separation between states are, in many respects, obliterated, it would not be matter of surprise if on the delicate subject of contracts once formed the interference of state legislation should be greatly abridged or entirely forbidden. In the nature of the provision, then, there seems to be nothing which ought to influence our construction of the words, and in making that construction, the whole clause, which consists of a single sentence, is to be taken together and the intention is to be collected from the whole.

The first paragraph of the tenth section of the first article, which comprehends the provision under consideration, contains an enumeration of those cases in which the action of the state legislature is entirely prohibited. The second enumerates those in which the prohibition is modified. The first paragraph, consisting of total prohibitions, comprehends two classes of powers. Those of the first are political and general in their nature, being an exercise of sovereignty without affecting the rights of individuals. These are the powers "to enter into any treaty, alliance, or confederation; grant letters of marque or reprisal, coin money, emit bills of credit."

The second class of prohibited laws comprehends those whose operation consists in their action on individuals.

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These are laws which make anything but gold and silver coin a tender in payment of debts, bills of attainder, ex post facto laws, or laws impairing the obligation of contracts, or which grant any title of nobility.

In all these cases, whether the thing prohibited be the exercise of mere political power or legislative action on individuals, the prohibition is complete and total. There is no exception from it. Legislation of every description is comprehended within it. A state is as entirely forbidden to pass laws impairing the obligation of

contracts as to make treaties or coin money. The question recurs what is a law impairing the obligation of contracts?

In solving this question, all the acumen which controversy can give to the human mind has been employed in scanning the whole sentence and every word of it. Arguments have been drawn from the context and from the particular terms in which the prohibition is expressed for the purpose, on the one part, of showing its application to all laws which act upon contracts, whether prospectively or retrospectively, and, on the other of limiting it to laws which act on contracts previously formed.

The first impression which the words make on the mind would probably be that the prohibition was intended to be general. A contract is commonly understood to be the agreement of the parties, and if it be not illegal, to bind them to the extent of their stipulations. It requires reflection, it requires some intellectual effort, to efface this impression and to come to the conclusion that the words "contract" and "obligation," as used in the Constitution, are not used in this sense. If, however, the result of this mental effort, fairly made, be the correction of this impression, it ought to be corrected.

So much of this prohibition as restrains the power of the states to punish offenders in criminal cases, the prohibition to pass bills of attainder and ex post facto laws, is in its very terms confined to preexisting cases. A bill of attainder can be only for crimes already committed, and a law is not ex post facto unless it looks back to an act done before its passage. Language is incapable of expressing, in plainer terms that the mind of the convention was directed to retroactive

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legislation. The thing forbidden is retroaction. But that part of the clause which relates to the civil transactions of individuals is expressed in more general terms -- in terms which comprehend, in their ordinary signification, cases which occur after, as well as those which occur before, the passage of the act. It forbids a state to make anything but gold and silver coin a tender in payment of debts or to pass any law impairing the obligation of contracts. These prohibitions relate to kindred subjects. They contemplate legislative interference with private rights, and restrain that interference. In construing that part of the clause which respects tender laws, a distinction has never been attempted between debts existing at the time the law may be passed, and debts afterwards created. The prohibition has been considered as total, and yet the difference in principle between making property a tender in payment of debts contracted after the passage of the act and discharging those debts without payment or by the surrender of property between an absolute right to tender in payment and a contingent right to tender in payment or in discharge of the debt is not clearly discernible. Nor is the difference in language so obvious as to denote plainly a difference of intention in the framers of the instrument. "No state shall make anything but gold and silver coin a tender in payment of debts." Does the word "debts" mean generally those due when the law applies to the case, or is it limited to debts due at the passage of the act? The same train of reasoning which would confine the subsequent words to contracts existing at the passage of the law would go far in confining these words to debts existing at that time. Yet this distinction has never, we believe, occurred to any person. How soon it may occur is not for us to determine. We think it would unquestionably defeat the object of the clause.

The counsel for the plaintiff insist that the word "impairing," in the present tense, limits the signification of the provision to the operation of the act at the time of its passage; that no law can be accurately said to impair the obligation of contracts unless the contracts exist at the time.

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The law cannot impair what does not exist. It cannot act on nonentities.

There might be weight in this argument if the prohibited laws were such only as operated of themselves and immediately on the contract. But insolvent laws are to operate on a future, contingent, unforeseen event. The time to which the word "impairing" applies is not the time of the passage of the act, but of its action on the contract. That is, the time present in contemplation of the prohibition. The law, at its passage, has no effect whatever on the contract. Thus, if a note be given in New York for the payment of money, and the debtor removes out of that state into Connecticut and becomes insolvent, it is not pretended that his debt can be discharged by the law of New York. Consequently that law did not operate on the contract at its formation. When, then, does its operation commence? We answer when it is applied to the contract. Then, if ever, and not till then, it acts on the contract and becomes a law impairing its obligation. Were its constitutionality, with respect to previous contracts to be admitted, it would not impair their obligation until an insolvency should take place and a certificate of discharge be granted. Till these events occur, its impairing faculty is suspended. A law, then, of this description, if it derogates from the obligation of a contract when applied to it, is, grammatically speaking, as much a law impairing that obligation, though made previous to its formation, as if made subsequently.

A question of more difficulty has been pressed with great earnestness. It is what is the original obligation of a contract made after the passage of such an act as the insolvent law of New York? Is it unconditional to perform the very thing stipulated, or is the condition implied that in the event of insolvency, the contract

shall be satisfied by the surrender of property? The original obligation, whatever that may be, must be preserved by the Constitution. Any law which lessens must impair it.

All admit that the Constitution refers to and preserves the legal, not the moral, obligation of a contract. Obligations

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purely moral, are to be enforced by the operation of internal and invisible agents, not by the agency of human laws. The restraints imposed on states by the Constitution are intended for those objects which would, if not restrained, be the subject of state legislation. What, then, was the original legal obligation of the contract now under the consideration of the Court?

The plaintiff insists that the law enters into the contract so completely as to become a constituent part of it. That it is to be construed as if it contained an express stipulation to be discharged should the debtor become insolvent by the surrender of all his property for the benefit of his creditors in pursuance of the act of the legislature.

This is unquestionably pressing the argument very far, and the establishment of the principle leads inevitably to consequences which would affect society deeply and seriously.

Had an express condition been inserted in the contract declaring that the debtor might be discharged from it at any time by surrendering all his property to his creditors, this condition would have bound the creditor. It would have constituted the obligation of his contract, and a legislative act annulling the condition would impair the contract. Such an act would, as is admitted by all, be unconstitutional, because it operates on preexisting agreements. If a law authorizing debtors to discharge themselves from their debts by surrendering their property enters into the contract and forms a part of it, if it is equivalent to a stipulation between the parties, no repeal of the law can affect contracts made during its existence. The effort to give it that effect would impair their obligation. The counsel for the plaintiff perceive and avow this consequence, in effect, when they contend that to deny the operation of the law on the contract under consideration is to impair its obligation. Are gentlemen prepared to say that an insolvent law, once enacted, must, to a considerable extent, be permanent? That the legislature is incapable of varying it so far as respects existing contracts?

So too if one of the conditions of an obligation for the payment of money be that on the insolvency of the obligor

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or on any event agreed on by the parties, he should be at liberty to discharge it by the tender of all or part of his property, no question could exist respecting the validity of the contract or respecting its security from legislative interference. If it should be determined that a law authorizing the same tender on the same contingency enters into and forms a part of the contract, then, a tender law, though expressly forbidden, with an obvious view to its prospective, as well as retrospective operation, would, by becoming the contract of the parties, subject all contracts made after its passage to its control. If it be said that such a law would be obviously unconstitutional and void, and therefore could not be a constituent part of the contract, we answer that if the insolvent law be unconstitutional, it is equally void and equally incapable of becoming by mere implication a part of the contract. The plainness of the repugnancy does not change the question. That may be very clear to one intellect which is far from being so to another. The law now under consideration is, in the opinion of one party, clearly consistent with the Constitution, and in the opinion of the other as clearly repugnant to it. We do not admit the correctness of that reasoning which would settle this question by introducing into the contract a stipulation not admitted by the parties.

This idea admits of being pressed still further. If one law enters into all subsequent contracts, so does every other law which relates to the subject. A legislative act, then, declaring that all contracts should be subject to legislative control and should be discharged as the legislature might prescribe would become a component part of every contract and be one of its conditions. Thus, one of the most important features in the Constitution of the United States, one which the state of the times most urgently required, one on which the good and the wise reposed confidently for securing the prosperity and harmony of our citizens, would lie prostrate and be construed into an inanimate, inoperative, unmeaning clause.

Gentlemen are struck with the enormity of this result, and deny that their principle leads to it. They distinguish, or attempt to distinguish, between the incorporation of a

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general law such as has been stated and the incorporation of a particular law such as the insolvent law of New York into the contract. But will reason sustain this distinction? They say that men cannot be supposed to agree to so indefinite an article as such a general law would be, but may well be supposed to agree to an article, reasonable in itself, and the full extent of which is understood.

But the principle contended for does not make the insertion of this new term or condition into the contract, to depend upon its

reasonableness. It is inserted because the legislature has so enacted. If the enactment of the legislature becomes a condition of the contract because it is an enactment, then it is a high prerogative indeed to decide that one enactment shall enter the contract, while another, proceeding from the same authority, shall be excluded from it.

The counsel for the plaintiff illustrates and supports this position by several legal principles and by some decisions of this Court which have been relied on as being applicable to it.

The first case put is interest on a bond payable on demand which does not stipulate interest. This, he says, is not a part of the remedy, but a new term in the contract.

Let the correctness of this averment be tried by the course of proceeding in such cases.

The failure to pay according to stipulation is a breach of the contract, and the means used to enforce it constitute the remedy which society affords the injured party. If the obligation contains a penalty, this remedy is universally so regulated that the judgment shall be entered for the penalty, to be discharged by the payment of the principal and interest. But the case on which counsel has reasoned is a single bill. In this case, the party who has broken his contract is liable for damages. The proceeding to obtain those damages is as much a part of the remedy as the proceeding to obtain the debt. They are claimed in the same declaration, and as being distinct from each other. The damages must be assessed by a jury, whereas if interest formed a part of the debt, it would be recovered as part of it. The declaration would claim it as a part of the debt, and yet if a suitor were to declare on such a bond as containing this new term

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for the payment of interest, he would not be permitted to give a bond in evidence in which this supposed term was not written. Any law regulating the proceedings of courts on this subject would be a law regulating the remedy.

The liability of the drawer of a bill of exchange stands upon the same principle with every other implied contract. He has received the money of the person in whose favor the bill is drawn, and promises that it shall be returned by the drawee. If the drawee fail to pay the bill, then the promise of the drawer is broken, and for this breach of contract he is liable. The same principle applies to the endorser. His contract is not written, but his name is evidence of his promise that the bill shall be paid, and of his having received value for it. He is in effect a new drawer, and has made a new contract. The law does not require that this contract shall be in writing, and in determining what evidence shall be sufficient to prove it, does not introduce new conditions not actually made by the parties. The same reasoning applies to the principle which requires notice. The original contract is not written at large. It is founded on the acts of the parties, and its extent is measured by those acts. A. draws on B. in favor of C. for value received. The bill is evidence that he has received value and has promised that it shall be paid. He has funds in the hands of the drawer, and has a right to expect that his promise will be performed. He has also a right to expect notice of its nonperformance because his conduct may be materially influenced by this failure of the drawee. He ought to have notice that his bill is disgraced, because this notice enables him to take measures for his own security. It is reasonable that he should stipulate for this notice, and the law presumes that he did stipulate for it.

A great mass of human transactions depends upon implied contracts; upon contracts which are not written, but which grow out of the acts of the parties. In such cases, the parties are supposed to have made those stipulations which, as honest, fair, and just men, they ought to have made. When the law assumes that they have made these stipulations, it does not vary their contract or introduce new terms into it, but declares that certain acts, unexplained by compact, impose

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certain duties and that the parties had stipulated for their performance. The difference is obvious between this and the introduction of a new condition into a contract drawn out in writing, in which the parties have expressed everything that is to be done by either.

The usage of banks by which days of grace are allowed on notes payable and negotiable in bank is of the same character. Days of grace, from their very term, originate partly in convenience and partly in the indulgence of the creditor. By the terms of the note, the debtor has to the last hour of the day on which it becomes payable to comply with it, and it would often be inconvenient to take any steps after the close of day. It is often convenient to postpone subsequent proceedings till the next day. Usage has extended this time of grace generally to three days, and in some banks to four. This usage is made a part of the contract, not by the interference of the legislature but by the act of the parties. The case cited from 22 U. S. 9 Wheat. 581 is a note discounted in bank. In all such cases, the bank receives and the maker of the note pays interest for the days of grace. This would be illegal and usurious if the money was not lent for these additional days. The extent of the loan, therefore, is regulated by the act of the parties, and this part of the contract is founded on their act. Since, by contract, the maker is not liable for his note until the days of grace are expired, he has not broken his contract until they expire. The duty of giving notice to the endorser of his failure, does not arise

until the failure has taken place, and consequently the promise of the bank to give such notice is performed if it be given when the event has happened.

The case of Bank of Columbia v. Oakley, 4 Wheat. 235, was one in which the legislature had given a summary remedy to the bank for a broken contract and had placed that remedy in the hands of the bank itself. The case did not turn on the question whether the law of Maryland was introduced into the contract, but whether a party might not by his own conduct renounce his claim to the trial by jury in a particular case. The Court likened it to submissions to arbitration and to stipulation and forthcoming bonds. The principle settled

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in that case is that a party may renounce a benefit and that Oakley had exercised this right.

The cases from Strange and East turn upon a principle which is generally recognized but which is entirely distinct from that which they are cited to support. It is that a man who is discharged by the tribunals of his own country, acting under its laws, may plead that discharge in any other country. The principle is that laws act upon a contract, not that they enter into it and become a stipulation of the parties. Society affords a remedy for breaches of contract. If that remedy has been applied, the claim to it is extinguished. The external action of law upon contracts by administering the remedy for their breach or otherwise is the usual exercise of legislative power. The interference with those contracts by introducing conditions into them not agreed to by the parties would be a very unusual and a very extraordinary exercise of the legislative power which ought not to be gratuitously attributed to laws that do not profess to claim it. If the law becomes a part of the contract, change of place would not expunge the condition. A contract made in New York would be the same in any other state as in New York, and would still retain the stipulation originally introduced into it that the debtor should be discharged by the surrender of his estate.

It is not, we think, true that contracts are entered into in contemplation of the insolvency of the obligor. They are framed with the expectation that they will be literally performed. Insolvency is undoubtedly a casualty which is possible but is never expected. In the ordinary course of human transactions, if even suspected, provision is made for it by taking security against it. When it comes unlooked for, it would be entirely contrary to reason to consider it as a part of the contract.

We have, then, no hesitation in saying that however law may act upon contracts, it does not enter into them and become a part of the agreement. The effect of such a principle would be a mischievous abridgment of legislative power over subjects within the proper jurisdiction of states by arresting their power to repeal or modify such laws with respect to existing contracts.

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But although the argument is not sustainable in this form, it assumes another in which it is more plausible. Contract, it is said, being the creature of society, derives its obligation from the law, and although the law may not enter into the agreement so as to form a constituent part of it, still it acts externally upon the contract and determines how far the principle of coercion shall be applied to it, and this being universally understood, no individual can complain justly of its application to himself in a case where it was known when the contract was formed.

This argument has been illustrated by references to the statutes of frauds, of usury, and of limitations. The construction of the words in the Constitution respecting contracts for which the defendants contend would, it has been said, withdraw all these subjects from state legislation. The acknowledgment that they remain within it is urged as an admission that contract is not withdrawn by the Constitution, but remains under state control, subject to this restriction only -- that no law shall be passed impairing the obligation of contracts in existence at its passage.

The defendants maintain that an error lies at the very foundation of this argument. It assumes that contract is the mere creature of society, and derives all its obligation from human legislation. That it is not the stipulation an individual makes which binds him, but some declaration of the supreme power of a state to which he belongs that he shall perform what he has undertaken to perform. That though this original declaration may be lost in remote antiquity, it must be presumed as the origin of the obligation of contracts. This postulate the defendants deny, and we think with great reason.

It is an argument of no inconsiderable weight against it that we find no trace of such an enactment. So far back as human research carries us, we find the judicial power as a part of the executive, administering justice by the application of remedies to violated rights or broken contracts. We find that power applying these remedies on the idea of a preexisting obligation on every man to do what he has promised on consideration to do; that the breach of this obligation is an injury for which the injured party has a just claim

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to compensation, and that society ought to afford him a remedy for that injury. We find allusions to the mode of acquiring property, but

we find no allusion, from the earliest time, to any supposed act of the governing power giving obligation to contracts. On the contrary, the proceedings respecting them of which we know anything evince the idea of a preexisting intrinsic obligation which human law enforces. If on tracing the right to contract and the obligations created by contract to their source we find them to exist anterior to and independent of society, we may reasonably conclude that those original and preexisting principles are, like many other natural rights, brought with man into society, and although they may be controlled, are not given by human legislation.

In the rudest state of nature, a man governs himself, and labors for his own purposes. That which he acquires is his own, at least while in his possession, and he may transfer it to another. This transfer passes his right to that other. Hence the right to barter. One man may have acquired more skins than are necessary for his protection from the cold; another more food than is necessary for his immediate use. They agree each to supply the wants of the other from his surplus. Is this contract without obligation? If one of them, having received and eaten the food he needed, refuses to deliver the skin, may not the other rightfully compel him to deliver it? Or two persons agree to unite their strength and skill to hunt together for their mutual advantage, engaging to divide the animal they shall master. Can one of them rightfully take the whole? or, should he attempt it, may not the other force him to a division? If the answer to these questions must affirm the duty of keeping faith between these parties and the right to enforce it if violated, the answer admits the obligation of contracts, because upon that obligation depends the right to enforce them. Superior strength may give the power, but cannot give the right. The rightfulness of coercion must depend on the preexisting obligation to do that for which compulsion is used. It is no objection to the principle that the injured party may be the weakest. In society, the

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wrongdoer may be too powerful for the law. He may deride its coercive power, yet his contracts are obligatory, and, if society acquire the power of coercion, that power will be applied without previously enacting that his contract is obligatory.

Independent nations are individuals in a state of nature. Whence is derived the obligation of their contracts? They admit the existence of no superior legislative power which is to give them validity, yet their validity is acknowledged by all. If one of these contracts be broken, all admit the right of the injured party to demand reparation for the injury and to enforce that reparation if it be withheld. He may not have the power to enforce it, but the whole civilized world concurs in saying that the power, if possessed, is rightfully used.

In a state of nature, these individuals may contract, their contracts are obligatory, and force may rightfully be employed to coerce the party who has broken his engagement.

What is the effect of society upon these rights? When men unite together and form a government, do they surrender their right to contract as well as their right to enforce the observance of contracts? For what purpose should they make this surrender? Government cannot exercise this power for individuals. It is better that they should exercise it for themselves. For what purpose, then, should the surrender be made? It can only be that government may give it back again. As we have no evidence of the surrender or of the restoration of the right, as this operation of surrender and restoration would be an idle and useless ceremony, the rational inference seems to be that neither has ever been made; that individuals do not derive from government their right to contract, but bring that right with them into society; that obligation is not conferred on contracts by positive law, but is intrinsic, and is conferred by the act of the parties. This results from the right which every man retains to acquire property, to dispose of that property according to his own judgment and to pledge himself for a future act. These rights are not given by society, but are brought into it. The right of coercion is necessarily

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surrendered to government, and this surrender imposes on government the correlative duty of furnishing a remedy. The right to regulate contracts, to prescribe rules by which they shall be evidenced, to prohibit such as may be deemed mischievous, is unquestionable, and has been universally exercised. So far as this power has restrained the original right of individuals to bind themselves by contract, it is restrained, but beyond these actual restraints, the original power remains unimpaired.

This reasoning is undoubtedly much strengthened by the authority of those writers on natural and national law whose opinions have been viewed with profound respect by the wisest men of the present and of past ages.

Supposing the obligation of the contract to be derived from the agreement of the parties, we will inquire how far law acts externally on it, and may control that obligation. That law may have, on future contracts, all the effect which the counsel for the plaintiff in error claim will not be denied. That it is capable of discharging the debtor under the circumstances, and on the conditions prescribed in the statute which has been pleaded in this case, will not be controverted. But as this is an operation which was not intended by the parties nor contemplated by them, the particular act can be entitled to this operation only when it has the full force of law. A law may determine the obligation of a contract on the happening of a contingency, because it is the law. If it be

not the law, it cannot have this effect. When its existence as law is denied, that existence cannot be proved by showing what are the qualities of a law. Law has been defined by a writer, whose definitions especially have been the theme of almost universal panegyric, "to be a rule of civil conduct prescribed by the supreme power in a state." In our system, the legislature of a state is the supreme power in all cases where its action is not restrained by the Constitution of the United States. Where it is so restrained, the legislature ceases to be the supreme power, and its acts are not law. It is, then, begging the question to say that because contracts may be discharged by a law previously enacted, this contract may be discharged by this act of the Legislature of New York, for the question returns

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upon us is this act a law? Is it consistent with or repugnant to the Constitution of the United States? This question is to be solved only by the Constitution itself.

In examining it, we readily admit that the whole subject of contracts is under the control of society, and that all the power of society over it resides in the state legislatures except in those special cases where restraint is imposed by the Constitution of the United States. The particular restraint now under consideration is on the power to impair the obligation of contracts. The extent of this restraint cannot be ascertained by showing that the legislature may prescribe the circumstances on which the original validity of a contract shall be made to depend. If the legislative will be that certain agreements shall be in writing, that they shall be sealed, that they shall be attested by a certain number of witnesses, that they shall be recorded, or that they shall assume any prescribed form before they become obligatory, all these are regulations which society may rightfully make and which do not come within the restrictions of the Constitution because they do not impair the obligation of the contract. The obligation must exist before it can be impaired, and a prohibition to impair it, when made, does not imply an inability to prescribe those circumstances which shall create its obligation. The statutes of frauds, therefore, which have been enacted in the several states and which are acknowledged to flow from the proper exercise of state sovereignty, prescribe regulations which must precede the obligation of the contract, and, consequently cannot impair that obligation. Acts of this description, therefore, are most clearly not within the prohibition of the Constitution.

The acts against usury are of the same character. They declare the contract to be void in the beginning. They deny that the instrument ever became a contract. They deny it all original obligation, and cannot impair that which never came into existence.

Acts of limitations approach more nearly to the subject of consideration, but are not identified with it. They defeat a contract once obligatory, and may therefore be supposed to partake of the character of laws which impair its

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obligation. But a practical view of the subject will show us that the two laws stand upon distinct principles.

In the case of Sturges v. Crowninshield, it was observed by the Court that these statutes relate only to the remedies which are furnished in the courts, and their language is generally confined to the remedy. They do not purport to dispense with the performance of a contract, but proceed on the presumption that a certain length of time, unexplained by circumstances, is reasonable evidence of a performance. It is on this idea alone that it is possible to sustain the decision that a bare acknowledgment of the debt, unaccompanied with any new promise, shall remove the bar created by the act. It would be a mischief not to be tolerated if contracts might be set up at any distance of time, when the evidence of payment might be lost and the estates of the dead, or even of the living, be subjected to these stale obligations. The principle is, without the aid of a statute, adopted by the courts as a rule of justice. The legislature has enacted no statute of limitations as a bar to suits on sealed instruments. Yet twenty years of unexplained silence on the part of the creditor is evidence of payment. On parol contracts or on written contracts not under seal, which are considered in a less solemn point of view than sealed instruments, the legislature has supposed that a shorter time might amount to evidence of performance, and has so enacted. All have acquiesced in these enactments, but have never considered them as being of that class of laws which impair the obligation of contracts. In prescribing the evidence which shall be received in its courts and the effect of that evidence, the state is exercising its acknowledged powers. It is likewise in the exercise of its legitimate powers when it is regulating the remedy and mode of proceeding in its courts.

The counsel for the plaintiff in error insist that the right to regulate the remedy and to modify the obligation of the contract are the same; that obligation and remedy are identical; that they are synonymous -- two words conveying the same idea.

The answer given to this proposition by the defendant's counsel seems to be conclusive. They originate at different times. The obligation to perform is coeval with the

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undertaking to perform; it originates with the contract itself and operates anterior to the time of performance. The remedy acts upon a broken contract and enforces a preexisting obligation.

If there be anything in the observations made in a preceding part of this opinion respecting the source from which contracts derive their obligation, the proposition we are now considering cannot be true. It was shown, we think, satisfactorily that the right to contract is the attribute of a free agent, and that he may rightfully coerce performance from another free agent who violates his faith. Contracts have consequently an intrinsic obligation. When men come into society, they can no longer exercise this original and natural right of coercion. It would be incompatible with general peace, and is therefore surrendered. Society prohibits the use of private individual coercion, and gives in its place a more safe and more certain remedy. But the right to contract is not surrendered with the right to coerce performance. It is still incident to that degree of free agency which the laws leave to every individual, and the obligation of the contract is a necessary consequence of the right to make it. Laws regulate this right, but, where not regulated, it is retained in its original extent. Obligation and remedy, then, are not identical; they originate at different times and are derived from different sources.

But although the identity of obligation and remedy be disproved, it may be and has been urged that they are precisely commensurate with each other, and are such sympathetic essences, if the expression may be allowed, that the action of law upon the remedy is immediately felt by the obligation -- that they live, languish, and die together. The use made of this argument is to show the absurdity and self-contradiction of the construction which maintains the inviolability of obligation while it leaves the remedy to the state governments.

We do not perceive this absurdity or self-contradiction.

Our country exhibits the extraordinary spectacle of distinct and in many respects independent governments over the same territory and the same people. The local governments are restrained from impairing the obligation of contracts,

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but they furnish the remedy to enforce them, and administer that remedy in tribunals constituted by themselves. It has been shown that the obligation is distinct from the remedy, and it would seem to follow that law might act on the remedy without acting on the obligation. To afford a remedy is certainly the high duty of those who govern to those who are governed. A failure in the performance of this duty subjects the government to the just reproach of the world. But the Constitution has not undertaken to enforce its performance. That instrument treats the states with the respect which is due to intelligent beings understanding their duties and willing to perform them; not as insane beings who must be compelled to act for self-preservation. Its language is the language of restraint, not of coercion. It prohibits the states from passing any law impairing the obligation of contracts; it does not enjoin them to enforce contracts. Should a state be sufficiently insane to shut up or abolish its courts, and thereby withhold all remedy, would this annihilation of remedy annihilate the obligation also of contracts? We know it would not. If the debtor should come within the jurisdiction of any court of another state, the remedy would be immediately applied and the inherent obligation of the contract enforced. This cannot be ascribed to a renewal of the obligation for passing the line of a state cannot recreate an obligation which was extinguished. It must be the original obligation derived from the agreement of the parties and which exists unimpaired though the remedy was withdrawn.

But we are told that the power of the state over the remedy may be used to the destruction of all beneficial results from the right, and hence it is inferred that the construction which maintains the inviolability of the obligation must be extended to the power of regulating the remedy.

The difficulty which this view of the subject presents does not proceed from the identity or connection of right and remedy, but from the existence of distinct governments acting on kindred subjects. The Constitution contemplates restraint as to the obligation of contracts, not as to the application of remedy. If this restraint affects a power which the Constitution did not mean to touch, it can

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only be when that power is used as an instrument of hostility to invade the inviolability of contract, which is placed beyond its reach. A state may use many of its acknowledged powers in such manner as to come in conflict with the provisions of the Constitution. Thus the power over its domestic police, the power to regulate commerce purely internal, may be so exercised as to interfere with regulations of commerce with foreign nations, or between the states. In such cases, the power which is supreme must control that which is not supreme when they come in conflict. But this principle does not involve any self-contradiction or deny the existence of the several powers in the respective governments. So if a state shall not merely modify or withhold a particular remedy, but shall apply it in such manner as to extinguish the obligation without performance, it would be an abuse of power which could scarcely be misunderstood, but which would not prove that remedy could not be regulated without regulating obligation.

The counsel for the plaintiff in error put a case of more difficulty, and urge it as a conclusive argument against the existence of a distinct line dividing obligation from remedy. It is this. The law affords remedy by giving execution against the person or the property or both. The same power which can withdraw the remedy against the person, can withdraw that against the property or that against both, and thus effectually defeat the obligation. The Constitution, we are told, deals not with form, but with substance, and cannot be presumed, if it designed to protect the obligation of contracts from state legislation, to have left it thus obviously exposed to destruction.

The answer is that if the law goes further and annuls the obligation without affording the remedy which satisfies it, if its action on the remedy be such as palpably to impair the obligation of the contract, the very case arises which we suppose to be within the Constitution. If it leaves the obligation untouched but withholds the remedy or affords one which is merely nominal, it is like all other cases of misgovernment, and leaves the debtor still liable to his creditor, should he be found, or should his property be found, where the laws afford a remedy. If that high sense of duty

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which men selected for the government of their fellow citizens must be supposed to feel furnishes no security against a course of legislation which must end in self-destruction; if the solemn oath taken by every member to support the Constitution of the United States furnishes no security against intentional attempts to violate its spirit while evading its letter, the question how far the Constitution interposes a shield for the protection of an injured individual who demands from a court of justice that remedy which every government ought to afford will depend on the law itself which shall be brought under consideration. The anticipation of such a case would be unnecessarily disrespectful, and an opinion on it would be at least premature. But however the question might be decided, should it be even determined that such a law would be a successful evasion of the Constitution, it does not follow that an act which operates directly on the contract after it is made is not within the restriction imposed on the states by that instrument. The validity of a law acting directly on the obligation is not proved by showing that the Constitution has provided no means for compelling the states to enforce it.

We perceive, then, no reason for the opinion that the prohibition "to pass any law impairing the obligation of contracts" is incompatible with the fair exercise of that discretion which the state legislatures possess in common with all governments to regulate the remedies afforded by their own courts. We think that obligation and remedy are distinguishable from each other. That the first is created by the act of the parties, the last is afforded by government. The words of the restriction we have been considering countenance, we think, this idea. No state shall "pass any law impairing the obligation of contracts." These words seems to us to import that the obligation is intrinsic, that it is created by the contract itself, not that it is dependent on the laws made to enforce it. When we advert to the course of reading generally pursued by American statesmen in early life, we must suppose that the framers of our Constitution were intimately acquainted with the writings of those wise and learned men whose treatises on the laws of

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nature and nations have guided public opinion on the subjects of obligation and contract. If we turn to those treatises, we find them to concur in the declaration that contracts possess an original intrinsic obligation, derived from the acts of free agents and not given by government. We must suppose that the framers of our Constitution took the same view of the subject, and the language they have used confirms this opinion.

The propositions we have endeavored to maintain of the truth of which we are ourselves convinced are these:

That the words of the clause in the Constitution which we are considering, taken in their natural and obvious sense admit of a prospective, as well as of a retrospective operation.

That an act of the legislature does not enter into the contract and become one of the conditions stipulated by the parties, nor does it act externally on the agreement unless it have the full force of law.

That contracts derive their obligation from the act of the parties, not from the grant of government, and that the right of government to regulate the manner in which they shall be formed or to prohibit such as may be against the policy of the state is entirely consistent with their inviolability after they have been formed.

That the obligation of a contract is not identified with the means which government may furnish to enforce it, and that a prohibition to pass any law impairing it does not imply a prohibition to vary the remedy, nor does a power to vary the remedy imply a power to impair the obligation derived from the act of the parties.

We cannot look back to the history of the times when the august spectacle was exhibited of the assemblage of a whole people by their representatives in convention in order to unite thirteen independent sovereignties under one government so far as might be necessary for the purposes of union without being sensible of the great importance which was at that time attached to the tenth section of the first article. The power of changing the relative situation of debtor and creditor, of interfering with contracts, a

power which comes home to every man, touches the interest of all,

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and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the state legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse and threaten the existence of credit, but to sap the morals of the people and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise as well as the virtuous of this great community, and was one of the important benefits expected from a reform of the government.

To impose restraints on state legislation as respected this delicate and interesting subject was thought necessary by all those patriots who could take an enlightened and comprehensive view of our situation, and the principle obtained an early admission into the various schemes of government which were submitted to the convention. In framing an instrument which was intended to be perpetual, the presumption is strong that every important principle introduced into it is intended to be perpetual also; that a principle expressed in terms to operate in all future time is intended so to operate. But if the construction for which the plaintiff's counsel contend be the true one, the Constitution will have imposed a restriction in language indicating perpetuity which every state in the Union may elude at pleasure. The obligation of contracts in force at any given time is but of short duration, and if the inhibition be of retrospective laws only, a very short lapse of time will remove every subject on which the act is forbidden to operate and make this provision of the Constitution so far useless. Instead of introducing a great principle prohibiting all laws of this obnoxious character, the Constitution will only suspend their operation for a moment or except from it preexisting cases. The object would scarcely seem to be of sufficient importance to have found a place in that instrument.

This construction would change the character of the provision and convert an inhibition to pass laws impairing the obligation of contracts into an inhibition to pass retrospective

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laws. Had this been the intention of the convention, is it not reasonable to believe that it would have been so expressed? Had the intention been to confine the restriction to laws which were retrospective in their operation, language could have been found and would have been used to convey this idea. The very word would have occurred to the framers of the instrument, and we should have probably found it in the clause. Instead of the general prohibition to pass any "law impairing the obligation of contracts," the prohibition would have been to the passage of any retrospective law. Or if the intention had been not to embrace all retrospective laws, but those only which related to contracts, still the word would have been introduced and the state legislatures would have been forbidden "to pass any retrospective law impairing the obligation of contracts," or "to pass any law impairing the obligation of contracts previously made." Words which directly and plainly express the cardinal intent always present themselves to those who are preparing an important instrument, and will always be used by them. Undoubtedly there is an imperfection in human language which often exposes the same sentence to different constructions. But it is rare indeed for a person of clear and distinct perceptions, intending to convey one principal idea, so to express himself as to leave any doubt respecting that idea. It may be uncertain whether his words comprehend other things not immediately in his mind, but it can seldom be uncertain whether he intends the particular thing to which his mind is specially directed. If the mind of the convention in framing this prohibition had been directed not generally to the operation of laws upon the obligation of contracts, but particularly to their retrospective operation, it is scarcely conceivable that some word would not have been used indicating this idea. In instruments prepared on great consideration, general terms comprehending a whole subject are seldom employed to designate a particular, we might say a minute, portion of that subject. The general language of the clause is such as might be suggested by a general intent to prohibit state legislation on the subject to which that language is applied -- the obligation of

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contracts, not such as would be suggested by a particular intent to prohibit retrospective legislation.

It is also worthy of consideration that those laws which had effected all that mischief the Constitution intended to prevent were prospective as well as retrospective in their operation. They embraced future contracts as well as those previously formed. There is the less reason for imputing to the convention an intention not manifested by their language to confine a restriction intended to guard against the recurrence of those mischiefs to retrospective legislation. For these reasons, we are of opinion that on this point the District Court of Louisiana has decided rightly.

Judgment having been entered in favor of the validity of a certificate of discharge under the state laws in those cases (argued in connection with Ogden v. Saunders) where the contract was made between citizens of the state under whose law the discharge was obtained and in whose courts the certificate was

pleaded, the cause was further argued by the same counsel upon the points reserved as to the effect of such a discharge in respect to a contract made with a citizen of another state, and where the certificate was pleaded in the courts of another state, or of the United States.

To render the judgment which was finally pronounced in the cause intelligible, it is necessary to state that in addition to the plea of the certificate of discharge under the insolvent law of the state of New York of 1801, the defendant below, Ogden, pleaded the statute of limitations (of New York), nonassumpsit infra sex annos.

To this plea, the plaintiff below, Saunders replied, that previous to the running of the statute, to-wit, in April, 1810, the defendant, Ogden, removed from the state of New York to New Orleans in the State of Louisiana, where he continued to reside until the commencement of this suit.

The jury found the facts of the drawing and acceptance of the bills, of the discharge under the insolvent law of New York, and of the defendant's removing to Louisiana at the time stated in the plaintiff's replication, in the form

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of what was probably intended to be a special verdict, submitting the law to the court:

"If the law be for the plaintiff, then it finds for the plaintiff the amount of the several acceptances, with the interest and costs; but if the law on the said facts be for the defendant, then the jury finds for the defendant, with costs."

A judgment was rendered by the court below upon this verdict. And the cause being brought by writ of error before this Court, among the errors assigned was the following:

"That the judgment of the court is for a greater sum than is found by the jury; the whole amount of the bills set forth in the petition being $2,183, amounting, with interest from the time of the judicial demand, to $2,652.34. Whereas the judgment is for the sum of $4,017,64 damages,"

&c.

MR. JUSTICE JOHNSON.

I am instructed by the majority of the Court finally to dispose of this cause. The present majority is not the same which determined the general question on the constitutionality of state insolvent laws with reference to the violation of the obligation of contracts. I now stand united with the minority on the former question, and therefore feel it due to myself and the community to maintain my consistency.

The question now to be considered is whether a discharge of a debtor under a state insolvent law would be valid against a creditor or citizen of another state, who has never voluntarily subjected himself to the state laws otherwise than by the origin of his contract.

As between its own citizens, whatever be the origin of the contract, there is now no question to be made on the effect of such a discharge; nor is it to be questioned that a discharge not valid under the Constitution in the courts of the United States is equally invalid in the state courts. The question to be considered goes to the invalidity of the discharge altogether, and therefore steers clear of that provision in the Constitution which purports to give validity in every state to the records, judicial proceedings, and so forth, of each state.

The question now to be considered was anticipated in

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the case of Sturges v. Crowninshield, when the Court, in the close of the opinion delivered, declared that it means to confine its views to the case then under consideration, and not to commit itself as to those in which the interests and rights of a citizen of another state are implicated.

The question is one partly international, partly constitutional. My opinion on the subject is briefly this:

That the provision in the Constitution which gives the power to the general government to establish tribunals of its own in every state in order that the citizens of other states or sovereignties might therein prosecute their rights under the jurisdiction of the United States had for its object an harmonious distribution of justice throughout the Union; to confine the states, in the exercise of their judicial sovereignty, to cases between their own citizens; to prevent, in fact, the exercise of that very power over the rights of citizens of other states which the origin of the contract might be supposed to give to each state; and thus to obviate that conflictus legum which has employed the pens of Huberus and various others and which anyone who studies the subject will plainly perceive it is infinitely more easy to prevent than to adjust.

These conflicts of power and right necessarily arise only after contracts are entered into. Contracts, then, become the appropriate subjects of judicial cognizance, and if the just claims which they give rise to are violated by arbitrary laws, or if the course of distributive justice be turned aside or obstructed by

legislative interference, it becomes a subject of jealousy, irritation, and national complaint or retaliation.

It is not unimportant to observe that the Constitution was adopted at the very period when the courts of Great Britain were engaged in adjusting the conflicts of right which arose upon their own bankrupt law among the subjects of that Crown in the several dominions of Scotland, Ireland, and the West Indies. The first case we have on the effect of foreign discharges, that of Ballantine v. Golding, occurred in 1783, and the law could hardly be held settled before the case of Hunter v. Potts, which was decided in 1791.

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Anyone who will take the trouble to investigate the subject will, I think, be satisfied that although the British courts profess to decide upon a principle of universal law when adjudicating upon the effect of a foreign discharge, neither the passage in Vattel to which they constantly refer nor the practice and doctrines of other nations will sustain them in the principle to the extent in which they assert it. It was all-important to a great commercial nation, the creditors of all the rest of the world, to maintain the doctrine as one of universal obligation that the assignment of the bankrupt's effects under a law of the country of the contract should carry the interest in his debts, wherever his debtor may reside, and that no foreign discharge of his debtor should operate against debts contracted with the bankrupt in his own country. But I think it perfectly clear that in the United States a different doctrine has been established, and since the power to discharge the bankrupt is asserted on the same principle with the power to assign his debts, that the departure from it in the one instance carries with it a negation of the principle altogether.

It is vain to deny that it is now the established doctrine in England that the discharge of a bankrupt shall be effectual against contracts of the state that give the discharge, whatsoever be the allegiance or country of the creditor. But I think it equally clear that this is a rule peculiar to her jurisprudence, and that reciprocity is the general rule of other countries; that the effect given to such discharge is so much a matter of comity, that the states of the European continent, in all cases reserve the right of deciding whether reciprocity will not operate injuriously upon their own citizens.

Huberus, in his third axiom on this subject, puts the effect of such laws upon the ground of courtesy, and recognizes the reservation that I have mentioned; other writers do the same.

I will now examine the American decisions on this subject, and first, in direct hostility with the received doctrines of the British courts, it has been solemnly adjudged in this Court, and I believe in every state court of the Union, that notwithstanding the laws of bankruptcy in

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England, a creditor of the bankrupt may levy an attachment on a debt due the bankrupt in this country and appropriate the proceeds to his own debt.

In the case of @ 9 U. S. 302, a case decided in this Court in 1809 upon full argument and great deliberation and in which all the English cases were quoted, it is expressly adjudged

"that in the case of a contract made with foreigners in a foreign country, the bankrupt laws of the foreign country are incapable of operating a legal transfer of property in the United States,"

and judgment was given in favor of the attaching creditors against the claim of the foreign assignees.

In that case also another important doctrine is established in hostility with the British doctrine. For the United States had interposed a claim against the English assignees in order to obtain satisfaction from the proceeds of the bankrupt's effects in this country for a debt contracted in Great Britain. And this Court decreed accordingly, expressly restricting the power of the country of the contract to its concoction and exposition.

The language of the Court is

"The law of the place where a contract is made is, generally speaking, the law of the contract -- that is, it is the law by which the contract is expounded. But the right of priority forms no part of the contract itself. It is extrinsic, and is rather a personal privilege, dependent on the laws of the place where the property lies and where the court sits which decides the cause."

And accordingly, the law of the United States was sustained which gave the debts due the bankrupt here to satisfy a debt contracted in England, to the prejudice of the law of England, which gave the same debt to the assignees of the bankrupt.

It cannot be necessary to go further than this case to establish that, so far as relates to the foreign creditor, this country does not recognize the English doctrine that the bankrupt law of the country of the contract is paramount in disposing of the rights of the bankrupt.

The United States passes a law which asserts the right to

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appropriate a debt due a foreign bankrupt to satisfying a debt due itself, and incurred by that bankrupt in his own country. The assignees of that bankrupt question this right and claim the debt as legally vested in them by the law of the country of the contract, and maintain that the debt due the United States, being contracted in Great Britain, was subject to the laws of Great Britain, and therefore entitled only to share in common with other creditors in the proceeds of the bankrupt's effects; that the debt so appropriated by the law of the United States to its exclusive benefit was, as to all the bankrupt's contracts, or certainly as to all English contracts, vested in the assignees, on international principles, principles which gave effect to the English bankrupt laws so vesting that debt paramount to the laws of other countries.

In giving effect to the law of the United States, this Court overrules that doctrine and, in the act of passing that law, this government asserts both the power over the subject and the right to exercise that power without a violation of national comity, or has at least taken its stand against that comity and asserted a right to protect its own interests which, in principle, is equally applicable to the interests of its own citizens.

It has had, in fact, regard to the lex loci rei sitae as existing in the person and funds of the debtor of the bankrupt, and the rights of self-preservation, and duty of protection to its own citizens, and the actual allegiance of the creditor and debtor, not the metaphysical allegiance of the contract, on which the foreign power is asserted.

It would be in vain to assign the decision of this Court in Harrison v. Sterry or the passing of the law of the United States to the general preference which the government may assert in the payment of its own debt, since that preference can only exist to the prejudice of its own citizens, whereas the precedence there claimed and conceded operated to the prejudice of British creditors.

The case of Baker v. Wheaton, adjudged in the courts of Massachusetts in the time of Chief Justice Parsons, 5 Mass. 509, is a very strong case upon this subject. That also was argued with great care, and all the British cases

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reviewed; the court took time to deliberate, and the same doctrine was maintained, in the same year and the same month with Harrison v. Sterry, and certainly without any communication between the two courts.

The case was this: one Wheaton gave a promissory note to one Chandler, both being at that time citizens and inhabitants of Rhode Island. Wheaton was discharged under the bankrupt laws of Rhode Island, both still continuing citizens and inhabitants of the same state, and the note remaining the property of Chandler. Subsequent to the discharge, Chandler endorses the note to Baker, and Wheaton is arrested in Massachusetts. He pleads the discharge in bar, and the court, in deciding, expresses itself thus.

"When, therefore, the defendant was discharged from that contract, lege loci, the promisee was bound by that discharge, as he was a party to the laws of that state, and assenting to their operation. But if, when the contract was made, the promisee had not been a citizen of Rhode Island, he would not have been bound by the laws of it or any other state, and holding this note at the time of the discharge, he might afterwards maintain an action upon it in the courts of this state."

And again, page 311:

"If the note had been transferred to the plaintiff, a citizen of this state, whilst it remained due and undischarged by the insolvent laws of Rhode Island, those laws could not affect his rights in the courts of law in this state, because he is not bound by them."

This, it will be observed, regards a contract acknowledged to be of Rhode Island origin.

There is another case reported in the decisions of the same state, 10 vol., p. 337, which carries this doctrine still further, and, I apprehend, to a length which cannot be maintained.

This was the case of Watson v. Bourne, in which Watson, a citizen of Massachusetts, had sued Bourne in a state court and obtained judgment. Bourne was discharged under the insolvent laws of that state, and being afterwards found in Massachusetts, was arrested on an action of debt upon the judgment. He pleads the discharge; plaintiff replies that he, plaintiff, was a citizen of Massachusetts, and therefore, not precluded by the discharge. The origin of the

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debt does not appear from the report, and the argument turned wholly on the question whether by entering judgment in the court of the state, he had not subjected his rights to the state laws pro tanto.

The court overruled the plea and recognized the doctrine in Baker v. Wheaton by declaring

"that a discharge of that nature can only operate where the law is made by an authority common to the creditor and debtor in all respects, where both are citizens or subjects."

I have little doubt that the court was wrong in denying the effect of the discharge as against judgments rendered in the state courts, when the party goes voluntarily and unnecessarily into those courts, but the decision shows in other respects how decidedly the British doctrine is repelled in the courts of that state.

The British doctrine is also unequivocally repelled in a very learned opinion delivered by Mr. Justice Nott in the court of the last resort in South Carolina, and in which the whole court, consisting of the common law judges of the state, concurred. This was in the case of Assignees of Topham v. Chapman, in which the rights of the attaching creditor were maintained against those of the assignees of the bankrupt, 1 Constitutional Reports 253, and that the same rule was recognized at an early day in the court of Pennsylvania appears from the leading case of Phillips v. Hunter, 2 H.Black. 402, in which a British creditor who had recovered of a debtor of the bankrupt in Pennsylvania was compelled by the British courts to refund to the assignees in England as for money had and received to their use.

I think it, then, fully established that in the United States, a creditor of the foreign bankrupt may attach the debt due the foreign bankrupt and apply the money to the satisfaction of his peculiar debt, to the prejudice of the rights of the assignees or other creditors.

I do not here speak of assignees or rights created under the bankrupt's own deed; those stand on a different ground, and do not affect this question. I confine myself to assignments or transfers resting on the operation of the laws of the country independent of the bankrupt's deed, to the

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rights and liabilities of debtor, creditor, bankrupt, and assignees as created by law.

What is the actual bearing of this right to attach so generally recognized by our decisions?

It imports a general abandonment of the British principles, for according to their laws, the assignee alone has the power to release the debtor. But the right to attach necessarily implies the right to release the debtor, and that right is here asserted under the laws of a state which is not the state of the contract.

So also the creditor of the bankrupt is, by the laws of his country, entitled to no more than a ratable participation in the bankrupt's effects. But the right to attach imports a right to exclusive satisfaction if the effects so attached should prove adequate to make satisfaction.

The right to attach also imports the right to sue the bankrupt, and who would impute to the bankrupt law of another country the power to restrain the citizens of these states in the exercise of their right to go into the tribunals of their own country for the recovery of debts, wherever they may have originated? Yet universally, after the law takes the bankrupt into its own hands, his creditors are prohibited from suing.

Thus much for the law of this case in an international view. I will consider it with reference to the provisions of the Constitution.

I have said above that I had no doubt the erection of a distinct tribunal for the resort of citizens of other states was introduced ex industria into the Constitution to prevent, among other evils, the assertion of a power over the rights of the citizens of other states upon the metaphysical ideas of the British courts on the subject of jurisdiction over contracts. And there was good reason for it, for upon that principle it is that a power is asserted over the rights of creditors which involves a mere mockery of justice.

Thus in the case of Burrows v. Jemino, reported in 2 Strange and better reported in Moseley, and some other books, the creditor, residing in England, was cited, probably by a placard on a door-post in Leghorn, to appear there to

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answer to his debtor, and his debt passed upon by the court perhaps without his having ever heard of the institution of legal process to destroy it.

The Scotch, if I remember correctly, attach the summons on the flagstaff, or in the market place at the shore of Leith, and the civil law process by proclamation, or viis et modis, is not much better as the means of subjecting the rights of foreign creditors to their tribunals.

All this mockery of justice, and the jealousies, recriminations, and, perhaps retaliations which might grow out of it, are avoided if the power of the states over contracts, after they become the subject exclusively of judicial cognizance, is limited to the controversies of their own citizens.

And it does appear to me almost incontrovertible that the states cannot proceed one step further without exercising a power incompatible with the acknowledged powers of other states or of the United States, and with the rights of the citizens of other states.

Every bankrupt or insolvent system in the world must partake of the character of a judicial investigation. Parties whose rights are to be affected are entitled to a hearing. Hence every system, in

common with the particular system now before us, professes to summon the creditors before some tribunal to show cause against granting a discharge to the bankrupt.

But on what principle can a citizen of another state be forced into the courts of a state for this investigation? The judgment to be passed is to prostrate his rights, and on the subject of these rights the Constitution exempts him from the jurisdiction of the state tribunals, without regard to the place where the contract may originate. In the only tribunal to which he owes allegiance, the state insolvent or bankrupt laws, cannot be carried into effect; they have a law of their own on the subject, and a certificate of discharge under any other law would not be acknowledged as valid even in the courts of the state in which the court of the United States that grants it, is held. Where is the reciprocity? Where the reason upon which the state courts

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can thus exercise a power over the suitors of that court when that court possesses no such power over the suitors of the state courts?

In fact, the Constitution takes away the only ground upon which this eminent dominion over particular contracts can be claimed, which is that of sovereignty. For the constitutional suitors in the courts of the United States are not only exempted from the necessity of resorting to the state tribunals, but actually cannot be forced into them. If, then, the law of the English courts had ever been practically adopted in this country in the state tribunals, the Constitution has produced such a radical modification of state power over even their own contracts, in the hands of individuals not subject to their jurisdiction, as to furnish ground for excepting the rights of such individuals from the power which the states unquestionably possess over their own contracts and their own citizens.

Follow out the contrary doctrine in its consequences and see the absurdity it will produce.

The Constitution has constituted courts professedly independent of state power in their judicial course, and yet the judgments of those courts are to be vacated and their prisoners set at large under the power of the state courts or of the state laws, without the possibility of protecting themselves from its exercise.

I cannot acquiesce in an incompatibility so obvious.

No one has ever imagined that a prisoner in confinement under process from the courts of the United States could avail himself of the insolvent laws of the state in which the court sits. And the reason is that those laws are municipal and peculiar and appertaining exclusively to the exercise of state power in that sphere in which it is sovereign -- that is, between its own citizens, between suitors subjected to state power exclusively, in their controversies between themselves.

In the courts of the United States no higher power is asserted than that of discharging the individual in confinement under its own process. This affects not to interfere with the rights of creditors in the state courts against the same individual. Perfect reciprocity would seem to indicate

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that no greater power should be exercised under state authority over the rights of suitors who belong to the United States jurisdiction. Even although the principle asserted in the British courts of supreme and exclusive power over their own contracts had obtained in the courts of the United States, I must think that power has undergone a radical modification by the judicial powers granted to the United States.

I therefore consider the discharge under a state law as incompetent to discharge a debt due a citizen of another state, and it follows that the plea of a discharge here set up is insufficient to bar the rights of the plaintiff.

It becomes necessary, therefore, to consider the other errors assigned in behalf of the defendant, and first as to the plea of the act of limitations.

The statute pleaded here is not the act of Louisiana, but that of New York, and the question is not raised by the facts or averments whether he could avail himself of that law if the full time had run out before his departure from New York, as was supposed in argument. The plea is obviously founded on the idea that the statute of the state of the contract was generally pleadable in any other state, a doctrine that will not bear argument.

The remaining error assigned has regard to the sum for which the judgment is entered, it being for a greater amount than the nominal amount of the bills of exchange on which the suit was brought and which are found by the verdict.

There has been a defect of explanation on this subject, but from the best information afforded us, we consider the amount for which judgment is entered as made up of principal, interest, and damages, and the latter as being legally incident to the finding of the bills of exchange and their nonpayment, and assessed by the court under a local practice consonant with that by which the amount of written contracts is determined, by reference to the

prothonotary, in many other of our courts. We therefore see no error in it. The judgment below will therefore, be affirmed.

And the purport of this adjudication, as I understand it, is that as between citizens of the same state, a discharge of a bankrupt by the laws of that state is valid as it affects posterior

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contracts; that as against creditors, citizens of other states, it is invalid as to all contracts.

The propositions which I have endeavored to maintain in the opinion which I have delivered are these:

1st. That the power given to the United States to pass bankrupt laws is not exclusive.

2d. That the fair and ordinary exercise of that power by the states does not necessarily involve a violation of the obligation of contracts, multo fortiori of posterior contracts.

3d. But when, in the exercise of that power, the states pass beyond their own limits and the rights of their own citizens and act upon the rights of citizens of other states, there arises a conflict of sovereign power and a collision with the judicial powers granted to the United States which renders the exercise of such a power incompatible with the rights of other states and with the Constitution of the United States.

MR. JUSTICE WASHINGTON, MR. JUSTICE THOMPSON, and MR. JUSTICE TRIMBLE dissented.

MR. CHIEF JUSTICE MARSHALL, MR. JUSTICE DUVALL, and MR. JUSTICE STORY assented to the judgment, which was entered for the defendant in error.

Judgment affirmed.

http://www.oyez.org/cases/1792-1850/1810/1810_0/

Fletcher v. Peck
Citation: 10 U.S. 87 (1810)
Petitioner: Fletcher
Respondent: Peck
Oral Argument: Thursday, February 15, 1810
Decision: Friday, March 16, 1810

In 1795, the Georgia state legislature passed a land grant awarding territory to four companies. The following year, however, the legislature voided the law and declared all rights and claims under it to be invalid. In 1800, John Peck acquired land that was part of the original legislative grant. He then sold the land to Robert Fletcher three years later, claiming that past sales of the land had been legitimate. Fletcher argued that since the original sale of the land had been declared invalid, Peck had no legal right to sell the land and thus committed a breach of contract.

Question
Could the contract between Fletcher and Peck be invalidated by an act of the Georgia legislature?

Conclusion
In a unanimous opinion, the Court held that since the estate had been legally "passed into the hands of a purchaser for a valuable consideration," the Georgia legislature could not take away the land or invalidate the contract. Noting that the Constitution did not permit bills of attainder or ex post facto laws, the Court held that laws annulling contracts or grants made by previous legislative acts were constitutionally impermissible.

http://supreme.justia.com/us/10/87/case.html

U.S. Supreme Court
Fletcher v. Peck, 10 U.S. 6 Cranch 87 87 (1810)

ERROR TO THE CIRCUIT COURT FOR THE DISTRICT OF MASSACHUSETTS

Syllabus

If the breach of covenant assigned be that the State had no authority to sell and dispose of the land, it is not a good plea in bar to say that the Governor was legally empowered to sell and convey the premises, although the facts stated in the plea as inducement are sufficient to justify a direct negative of the breach assigned.

It is not necessary that a breach of covenant be assigned in the very words of the covenant. It is sufficient if it show a substantial breach.

The Court will not declare a law to be unconstitutional unless the opposition between the Constitution and the law be clear and plain.

The Legislature of Georgia, in 1795, had the power of disposing of the unappropriated lands within its own limits.

In a contest between two individuals claiming under an act of a legislature, the Court cannot inquire into the motives which actuated the members of that legislature. If the legislature might constitutionally pass such an act; if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit between individuals founded on the allegation that the act is a nullity in consequence of the impure motives which influenced certain members of the legislature which passed the law.

When a law is in the nature of a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest those rights.

A party to a contract cannot pronounce its own deed invalid, although that party be a sovereign State. A grant is a contract executed.

A law annulling conveyances is unconstitutional because it is a law impairing the obligation of contracts within the meaning of the Constitution of the United States.

The proclamation of the King of Great Britain in 1763 did not alter the boundaries of Georgia.

The nature of the Indian title is not such as to absolutely repugnant to seisin in fee on the part of the State.

The question whether a law is void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in a doubtful case. The Court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its act to be considered void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

One individual who holds lands in the State of Georgia under a deed covenanting that the title of Georgia was in the grantor brings an action of covenant on this deed, and assigns as a breach that some of the members of the Legislature were induced to vote in favour of the law which constituted the contract by being promised an interest in it, and that therefore the act is a mere nullity. This solemn question cannot be brought thus collaterally and incidentally before the Court. It would be indecent in the extreme, upon a private contract between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of the State. If the title be plainly deduced from a legislative act which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity in consequence of the impure motives which influenced certain members of the legislature which passed the acts.

If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside as between the parties, but the rights of third persons who are purchasers without notice for a valuable consideration cannot be disregarded.

The principle asserted is that one legislature is competent to repeal any act which a former legislature was competent to pass, and that one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle so far as it respects general legislation cannot be controverted. But if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power.

The State legislatures can pass no ex post facto law. An ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties upon the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared by some previous law to render him liable for punishment.

It was doubted whether a State can be seised in fee of lands subject to the Indian title, and whether a decision that they were seised in fee might not be construed to amount to a decision that their grantee might maintain an ejectment for them notwithstanding that title. The majority of the Court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts until it be legitimately extinguished, is not such as to be absolutely repugnant to a seisin in fee on the part of the State.

Error to the Circuit Court for the District of Massachusetts in an action of covenant brought by Fletcher against Peck.

The first count of the declaration states that Peck, by his deed of bargain and sale dated the 14th of May, 1803, in consideration of 3,000 dollars, sold and conveyed to Fletcher 15,000 acres of land

lying in common and undivided in a tract described as follows: beginning on the river Mississippi, where the latitude 32 deg. 40 min. north of the equator intersects the same, running thence along the same parallel of latitude a due east course to the Tombigby river, thence up the said Tombigby river to where the latitude of 32 deg. 43 min. 52 sec. intersects the same, thence along the same parallel of latitude a due west course to the Mississippi; thence down the said river, to the place of beginning; the said described tract containing 500,000 acres, and is the same which was conveyed by Nathaniel Prime to Oliver Phelps by deed dated the 27th of February, 1796, and of which the said Phelps conveyed four-fifths to Benjamin Hichborn, and the said Peck by deed dated the 8th of December, 1800; the said tract of 500,000 acres being part of a tract which James Greenleaf conveyed to the said N. Prime, by deed dated the 23d of September, 1795, and is parcel of that tract which James Gunn, Mathew M'Allister, George Walker, Zachariah Cox, Jacob Walburger, William Longstreet and Wade Hampton, by deed dated 22d of August, 1795, conveyed to the said James Greenleaf; the same being part of that tract which was granted by letters patent under the great seal of the State of Georgia, and the signature of George Matthews, Esq. Governor of that State, dated the 13th of January, 1795, to the said James Gunn and others, under the name of James Gunn, Mathew M'Allister, and George

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Walker and their associates, and their heirs and assigns in fee simple, under the name of the Georgia company; which patent was issued by virtue of an Act of the Legislature of Georgia, passed the 7th of January, 1795, entitled

"An act supplementary to an act for appropriating part of the unlocated territory of this State for the payment of the late State troops, and for other purposes therein mentioned, and declaring the right of this State to the unappropriated territory thereof, for the protection and support of the frontiers of this State, and for other purposes."

That Peck, in his deed to Fletcher, covenanted

"that the State of Georgia aforesaid was, at the time of the passing of the act of the legislature thereof (entitled as aforesaid), legally seised in fee of the soil thereof, subject only to the extinguishment of part of the Indian title thereon. And that the Legislature of the said State at the time of passing the act of sale aforesaid had good right to sell and dispose of the same in manner pointed out by the said Act. And that the Governor of the said State had lawful authority to issue his grant aforesaid, by virtue of the said Act. And further, that all the title which the said State of Georgia ever had in the aforegranted premises has been legally conveyed to the said John Peck by force of the conveyances aforesaid. And further, that the title to the premises so conveyed by the State of Georgia, and finally vested in the said Peck, has been in no way Constitutionally or legally impaired by virtue of any subsequent act of any subsequent Legislature of the said State of Georgia."

The breaches assigned in the first count was that, at the time the said Act of 7th of January, 1795, was passed,

"the said Legislature had no authority to sell and dispose of the tenements aforesaid, or of any part thereof, in the manner pointed out in the said Act."

In the second count,

"that at Augusta, in the said State of Georgia, on the 7th day of January, 1795, the said James Gunn, Mathew M'Allister

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and George Walker, promised and assured divers members of the Legislature of the said State then duly and legally sitting in General Assembly of the said State, that if the said members would assent to and vote for the passing of the act of the said General Assembly, entitled as aforesaid, the same then being before the said General Assembly in the form of a bill, and if the said bill should pass into a law, that such members should have a share of, and be interested in, all the lands which they the said Gunn, M'Allister and Walker and their associates should purchase of the said State by virtue of and under authority of the same law, and that divers of the said members to whom the said promise and assurance was so made as aforesaid were unduly influenced thereby, and, under such influence, did then and there vote for the passing the said bill into a law, by reason whereof the said law was a nullity, and, from the time of passing, the same as aforesaid was, ever since has been, and now is, absolutely void and of no effect whatever; and that the title which the said State of Georgia had in the aforegranted premises at any time whatever was never legally conveyed to the said Peck, by force of the conveyances aforesaid."

The third count, after repeating all the averments and recitals contained in the second, further averred that, after the passing of the said act, and of the execution of the patent aforesaid, the General Assembly of the State of Georgia, being a legislature of that State subsequent to that which passed the said act, at a session thereof, duly and legally holden at Augusta in the said State, did, on the 13th of February, 1796, because of the undue influence used as aforesaid in procuring the said act to be passed, and for other causes, pass another certain act in the words following that is to say,

"An act declaring null and void a certain usurped act passed by the last legislature of this State at Augusta, the 7th day of January, 1795, under the pretended title of"

"An act supplementary to an act entitled an act for appropriating a part of the unlocated

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territory of the State for the payment of the late State troops, and for other purposes therein mentioned, declaring the right of this State to the unappropriated territory thereof for the protection of the frontiers, and for other purposes,"

"and for expunging from the public records the said usurped act, and declaring the right of this State to all lands lying within the boundaries therein mentioned."

By which, after a long preamble, it is enacted

"That the said usurped act passed on the 7th of January, 1795, entitled, &c. be, and the same is hereby declared, null and void, and the grant or grants right or rights, claim or claims, issued, deduced, or derived therefrom, or from any clause, letter or spirit of the same, or any part of the same, is hereby also annulled, rendered void, and of no effect, and as the same was made without constitutional authority, and fraudulently obtained, it is hereby declared of no binding force or effect on this State, or the people thereof, but is and are to be considered, both law and grant, as they ought to be, ipso facto, of themselves, void, and the territory therein mentioned is also hereby declared to be the sole property of the State, subject only to the right of treaty of the United States to enable the State to purchase, under its preemption right, the Indian title to the same."

The second section directs the enrolled law, the grant, and all deeds, contracts, &c. relative to the purchase to be expunged from the records of the State, &c.

The third section declares that neither the law nor the grant nor any other conveyance, or agreement relative thereto shall be received in evidence in any court of law or equity in the State so far as to establish a right to the territory or any part thereof, but they may be received in evidence in private actions between individuals for the recovery of money paid upon pretended sales, &c.

The fourth section provides for the repayment of money, funded stock, &c. which may have been paid into the treasury, provided it was then remaining

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therein, and provided the repayment should be demanded within eight months from that time.

The fifth section prohibits any application to Congress, or the General Government of the United States for the extinguishment of the Indian claim.

The sixth section provides for the promulgation of the act.

The count then assigns a breach of the covenant in the following words, viz.:

"And by reason of the passing of the said last-mentioned act, and by virtue thereof, the title which the said Peck had, as aforesaid, in and to the tenements aforesaid, and in and to any part thereof, was constitutionally and legally impaired, and rendered null and void."

The fourth count, after reciting the covenants as in the first, assigned as a breach

"that at the time of passing of the Act of the 7th of January, 1795, the United States of America were seised in fee simple of all the tenements aforesaid, and of all the soil thereof, and that, at that time the State of Georgia was not seised in fee simple of the tenements aforesaid, or of any part thereof, nor of any part of the soil thereof, subject only to the extinguishment of part of the Indian title thereon."

The defendant pleaded four pleas, viz.:

First plea. As to the breach assigned in the first count, he says,

That, on the 6th of May, 1789, at Augusta, in the State of Georgia, the people of that State by their delegates, duly authorized and empowered to form, declare, ratify, and confirm a constitution for the government of the said State, did form, declare, ratify, and confirm such constitution, in the words following:

[Here was inserted the whole Constitution, the sixteenth section of which declares that the General Assembly hall have power to make all laws and ordinances

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which they shall deem necessary and proper for the good of the State which shall not be repugnant to this constitution.] The plea then avers that, until and at the ratification and confirmation aforesaid of the said constitution, the people of the said State were seised, among other large parcels of land, and tracts of country, of all the tenements described by the said Fletcher in his

said first count, and of the soil thereof in absolute sovereignty, and in fee simple (subject only to the extinguishment of the Indian title to part thereon), and that, upon the confirmation and ratification of the said Constitution, and by force thereof, the said State of Georgia became seised in absolute sovereignty, and in fee simple, of all the tenements aforesaid, with the soil thereof, subject as aforesaid, the same being within the territory and jurisdiction of the said State, and the same State continued so seised in fee simple until the said tenements and soil were conveyed by letters patent under the great seal of the said State, and under the signature of George Matthews, Esq., Governor thereof, in the manner and form mentioned by the said Fletcher in his said first count. And the said Peck further saith that on the 7th of January, 1795, at a session of the General Assembly of the said State duly holden at Augusta within the same, according to the provisions of the said constitution, the said General Assembly, then and there possessing all the powers vested in the Legislature of the said State by virtue of the said Constitution, passed the Act above mentioned by the said Fletcher in the assignment of the breach aforesaid, which Act is in the words following that is to say, "An Act supplementary," &c.

[Here was recited the whole act, which, after a long preamble, declares the jurisdictional and territorial rights, and the fee simple to be in the State, and then enacts that certain portions of the vacant lands should be sold to four distinct associations of individuals, calling themselves respectively, "The Georgia Company," "The Georgia Mississippi Company," "The Upper Mississippi Company," and "The Tennessee Company."]

The tract ordered to be sold to James Gunn and

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others (the Georgia Company) was described as follows:

"All that tract or parcel of land, including islands, situate, lying and being within the following boundaries, that is to say, beginning on the Mobile bay where the latitude 31 deg. north of the equator, intersects the same, running thence up the said bay to the mouth of Lake Tensaw; thence up the said Lake Tensaw to the Alabama River, including Curry's, and all other islands therein; thence up the said Alabama River to the junction of the Coosa and Oakfushee Rivers; thence up the Coosa River above the big shoals to where it intersects the latitude of thirty-four degrees north of the equator; thence a due west course to the Mississippi River; thence down the middle of the said river to the latitude 32 deg. 40 min.; thence, a due east course to the Don or Tombigby River; thence down the middle of the said river to its junction with the Alabama River; thence down the middle of the said river to Mobile Bay; thence down the Mobile Bay to the place of beginning."

Upon payment of fifty thousand dollars, the Governor was required to issue and sign a grant for the same, taking a mortgage to secure the balance, being two hundred thousand dollars, payable on the first of November, 1795.

The plea then avers that all the tenements described in the first count are included in, and parcel of, the lands in the said Act to be sold to the said Gunn, M'Allister, and Walker and their associates, as in the Act is mentioned. And that, by force and virtue of the said Act, and of the Constitution aforesaid, of the said State, the said Matthews, Governor of the said State, was fully and legally empowered to sell and convey the tenements aforesaid, and the soil thereof, subject as aforesaid, in fee simple by the said patent under the seal of the said State, and under his signature, according to the terms, limitations, and conditions in the said Act mentioned. And all this he is ready to verify; wherefore, &c.

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To this plea there was a general demurrer and joinder.

Second plea. To the second count, the defendant,

"protesting that the said Gunn, M'Allister, and Walker did not make the promises and assurances to divers members of the Legislature of the said State of Georgia, supposed by the said Fletcher in his second count, for plea saith that, until after the purchase by the said Greenleaf, as is mentioned in the said second count, neither he the said defendant, nor the said Prime, nor the said Greenleaf, nor the said Phelps, nor the said Hichborn, nor either of them, had any notice nor knowledge that any such promises and assurances were made by the said Gunn, M'Allister and Walker, or either of them, to any of the members of the Legislature of the said State of Georgia, as is supposed by the said Fletcher in his said second count, and this he is ready to verify,"

&c.

To this plea also there was a general demurrer and joinder.

The third plea to the third count was the same as the second plea, with the addition of an averment that Greenleaf, Prince, Phelps, Hichborn and the defendant were, until and after the purchase by Greenleaf, on the 22d of August, 1795, and ever since have been, citizens of some of the United States other than the State of Georgia.

To this plea also there was a general demurrer and joinder.

Fourth plea. To the fourth count, the defendant pleaded that, at the time of passing the Act of the 7th of January, 1795, the State of Georgia was seised in fee simple of all the tenements and territories aforesaid, and of all the soil thereof, subject only to the extinguishment of the Indian title to part thereof, and of this he puts himself on the country, and the plaintiff likewise.

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Upon the issue joined upon the fourth plea, the jury found the following special verdict, viz.:

That his late majesty, Charles the second, King of Great Britain, by his letters patent under the great seal of Great Britain, bearing date the thirtieth day of June, in the seventeenth year of his reign, did grant unto Edward Earl of Clarendon, George Duke of Albemarle, William Earl of Craven, John Lord Berkeley, Antony Lord Ashby, Sir George Carteret, Sir John Colleton, and Sir William Berkeley, therein called lords proprietors, and their heirs and assigns, all that Province, territory, or tract of ground, situate, lying and being in North America, and described as follows: extending north and eastward as far as the north end of Carahtuke River or gullet, upon a straight westerly line to Wyonoahe Creek, which lies within or about the degrees of thirty-six and thirty minutes of northern latitude, and so west in a direct line as far as the South Seas, and south and westward as far as the degrees of twenty-nine inclusive, northern latitude, and so west in a direct line as far as the South Seas (which territory was called Carolina), together with all ports, harbours, bays, rivers, soil, land, fields, woods, lakes, and other rights and privileges therein named; that the said lords proprietors, grantees aforesaid, afterwards, by force of said grant, entered upon and took possession of said territory, and established within the same many settlements, and erected therein fortifications and posts of defence.

And the jury further find that the northern part of the said tract of land, granted as aforesaid to the said lords proprietors, was afterwards created a colony by the King of Great Britain, under the name of North Carolina, and that the most northern part of the thirty-fifth degree of north latitude was then and ever afterwards the boundary and line between North Carolina and South Carolina, and that the land, described in the plaintiff's declaration, is situate in that part of said tract, formerly called Carolina, which was afterwards a colony called South Carolina, as aforesaid; that afterwards, on the twenty-sixth day of July, in the

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third year of the reign of his late majesty George the second, King of Great Britain, and in the year of Our Lord one thousand, seven hundred and twenty-nine, the heirs or legal representatives of all the said grantees, except those of Sir George Carteret, by deed of indenture, made between authorized agents of the said King George the second and the heirs and representatives of the said grantees, in conformity to an act of the parliament of said Kingdom of Great Britain, entitled, "An act for establishing an agreement with seven of the lords proprietors of Carolina for the surrender of their title and interest in that Province to his majesty," for and in consideration of the sum of twenty-two thousand five hundred pounds of the money of Great Britain, paid to the said heirs and representatives of the said seven of the lords proprietors, by the said agent of the said King, sold and surrendered to his said majesty, King George the second, all their right of soil, and other privileges to the said granted territory; which deed of indenture was duly executed and was enrolled in the chancery of Great Britain, and there remains in the chapel of the rolls. That afterwards, on the ninth day of December, one thousand, seven hundred and twenty-nine, his said majesty, George the second, appointed Robert Johnson, Esq. to be Governor of the Province of South Carolina, by a commission under the great seal of the said Kingdom of Great Britain, in which commission the said Governor Johnson is authorized to grant lands within the said Province, but no particular limits of the said Province is therein defined.

And the jury further find that the said Governor of South Carolina did exercise jurisdiction in and over the said colony of South Carolina under the commission aforesaid, claiming to have jurisdiction by force thereof as far southward and westward as the southern and western bounds of the aforementioned grant of Carolina by King Charles the second, to the said lords proprietors, but that he was often interrupted therein and prevented therefrom in the southern and western parts of said grants by the public enemies of the King of Great Britain, who at divers times

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had actual possession of the southern and western parts aforesaid. That afterwards the right honourable Lord Viscount Percival, the honourable Edward Digby, the honourable George Carpenter, James Oglethorpe, Esq. with others, petitioned the lords of the committee of his said majesty's Privy Council for a grant of lands in South Carolina, for the charitable purpose of transporting necessitous persons and families from London to that Province, to procure there a livelihood by their industry, and to be incorporated for that purpose; that the lords of the said Privy Council referred the said petition to the Board of Trade, so called, in Great Britain, who, on the seventeenth day of December, in the year of Our Lord one thousand seven hundred and thirty, made report thereon, and therein recommended that his said majesty would be pleased to incorporate the said petitioners as a charitable society, by the name of "The Corporation for the purpose of establishing charitable colonies in America, with perpetual succession." And the said report further recommended

that his said majesty be pleased "to grant to the said petitioners and their successors for ever, all that tract of land in his Province of South Carolina, lying between the rivers Savannah and Alatamaha, to be bounded by the most navigable and largest branches of the Savannah, and the most southerly branch of the Alatamaha." And that they should be separated from the Province of South Carolina, and be made a colony independent thereof, save only in the command of their militia. That afterwards, on the twenty-second day of December, one thousand seven hundred and thirty-one, the said board of trade reported further to the said lords of the Privy Council, and recommended that the western boundary of the new charter of the colony, to be established in South Carolina, should extend as far as that described in the ancient patents granted by King Charles the Second to the late lords proprietors of Carolina, whereby that Province was to extend westward in a direct line as far as the South Seas. That afterwards, on the ninth day of June in the year of Our Lord one thousand seven hundred and thirty-two, his said majesty, George the

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Second, by his letters patent, or royal charter, under the great seal of the said Kingdom of Great Britain, did incorporate the said Lord Viscount Percival and others, the petitioners aforesaid, into a body politic and corporate, by the name of "The trustees for establishing the Colony of Georgia, in America, with perpetual succession;" and did, by the same letters patent, give and grant in free and common socage, and not in capite, to the said corporation and their successors, seven undivided parts (the whole into eight equal parts to be divided) of all those lands, countries and territories, situate, lying and being in that part of South Carolina in America which lies from a northern stream of a river there commonly called the Savannah, all along the seacoast to the southward unto the most southern branch of a certain other great water or river, called the Alatamaha, and westward from the heads of the said rivers respectively in direct lines to the South Seas, and all the lands lying within said boundaries, with the islands in the sea lying opposite to the eastern coast of the same, together with all the soils, grounds, havens, bays, mines, minerals, woods, rivers, waters, fishings, jurisdictions, franchises, privileges, and preeminences within the said territories. That afterwards, in the same year, the right honourable John Lord Carteret, Baron of Hawnes, in the county of Bedford, then Earl Granville, and heir of the late Sir George Carteret, one of the grantees and lords proprietors aforesaid, by deed of indenture between him and the said trustees for establishing the Colony of Georgia in America, for valuable consideration therein mentioned, did give, grant, bargain and sell unto the said trustees for establishing the Colony of Georgia aforesaid, and their successors, all his one undivided eighth part of or belonging to the said John Lord Carteret (the whole into eight equal parts to be divided) of, in, and to the aforesaid territory, seven undivided eight parts of which had been before granted by his said majesty to said trustees.

And the jury further find that one-eighth part of the said territory, granted to the said lords proprietors, and called Carolina as aforesaid, which eighth part belonged

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to Sir George Carteret, and was not surrendered as aforesaid, was afterwards divided and set off in severalty to the heirs of the said Sir George Carteret in that part of said territory which was afterwards made a colony by the name of North Carolina. That afterwards, in the same year, the said James Oglethorpe, Esq. one of the said corporation, for and in the name of and as agent to the said corporation, with a large number of other persons under his authority and control, took possession of said territory, granted as aforesaid to the said corporation, made a treaty with some of the native Indians within said territory, in which, for and in behalf of said corporation, he made purchases of said Indians of their native rights to parts of said territory, and erected forts in several places to keep up marks of possession. That afterwards, on the sixth day of September, in the year last mentioned, on the application of said corporation to the said Board of Trade, they the said Board of Trade, in the name of his said majesty, sent instructions to said Robert Johnson, then Governor of South Carolina, thereby willing and requiring him to give all due countenance and encouragement for the settling of the said Colony of Georgia, by being aiding and assisting to any settlers therein, and further requiring him to cause to be registered the aforesaid charter of the Colony of Georgia, within the said Province of South Carolina, and the same to be entered of record by the proper officer of the said Province of South Carolina.

And the jury further find that the Governor of South Carolina, after the granting the said charter of the Colony of Georgia, did exercise jurisdiction south of the southern limits of said Colony of Georgia, claiming the same to be within the limits of his government; and particularly that he had the superintendency and control of a military post there, and did make divers grants of land there, which lands have ever since been holden under his said grants. That afterwards, in the year of Our Lord one thousand seven hundred and fifty-two, by deed of indenture made between His said Majesty, George the Second, of the one part, and the said trustees for establishing the

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colony in America, of the other part, they the said trustees, for divers valuable considerations therein expressed, did, for themselves and their successors, grant, surrender, and yield up to His said Majesty, George the Second, his heirs and successors,

their said letters patent, and their charter of corporation, and all right, title and authority, to be or continue a corporate body, and all their powers of government, and all other powers, jurisdictions, franchises, preeminences and privileges therein, or thereby granted or conveyed to them, and did also grant and convey to His said Majesty, George the Second, his heirs and successors, all the said lands, countries, territories and premises, as well the said one eighth part thereof granted by the said John Lord Carteret to them as aforesaid, as also the said seven eighth parts thereof, granted as aforesaid by His said Majesty's letters patent or charter as aforesaid, together with all the soils, grounds, havens, ports, bays, mines, woods, rivers, waters, fishings, jurisdictions, franchises, privileges and preeminences, within said territories, with all their right, title, interest, claim or demand whatsoever in and to the premises; and which grant and surrender aforesaid was then accepted by His said Majesty for himself and his successors; and said indenture was duly executed on the part of said trustees, with the privity and by the direction of the common council of the said corporation by affixing the common seal of said corporation thereunto, and on the part of His said Majesty by causing the great seal of Great Britain to be thereunto affixed. That afterwards, on the sixth day of August, one thousand seven hundred and fifty-four, His said Majesty, George the Second, by his royal commission of that date under the great seal of Great Britain, constituted and appointed John Reynolds, Esq. to be Captain General and Commander in Chief in and over said Colony of Georgia in America, with the following boundaries, viz., lying from the most northerly stream of a river there commonly called Savannah, all along the sea coast to the southward unto the most southern stream of a certain other great water or river called the Alatahama, and westward from the heads of the said rivers respectively, in straight lines to the South Seas, and all the space, circuit and precinct of

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land lying within the said boundaries, with the islands in the sea lying opposite to the eastern coast of said lands within twenty leagues of the same. That afterwards, on the tenth day of February, in the year of Our Lord one thousand seven hundred and sixty-three, a definitive treaty of peace was concluded at Paris, between his Catholic Majesty, the King of Spain, and his Majesty, George the third, King of Great Britain, by the twentieth article of which treaty, his said Catholic Majesty did cede and guaranty, in full right to his Britannic Majesty, Florida, with fort St. Augustin, and the bay of Pensacola, as well as all that Spain possessed on the continent of North America, to the east or to the south east of the river Mississippi, and in general all that depended on the said countries and island, with the sovereignty, property, possession, and all rights acquired by treaties or otherwise, which the Catholic King and the Crown of Spain had till then over the said countries, lands, places, and their inhabitants; so that the Catholic King did cede and make over the whole to the said King and said Crown of Great Britain, and that in the most ample manner and form.

That afterwards, on the seventh day of October, in the year of Our Lord one thousand seven hundred and sixty-three, His said Majesty, George the Third, King of Great Britain, by and with the advice of his Privy Council, did issue his royal proclamation, therein publishing and declaring that he, the said King of Great Britain, had, with the advice of his said Privy Council, granted his letters patent, under the great seal of Great Britain, to erect within the countries and islands ceded and confirmed to him by the said treaty, four distinct and separate governments, styled and called by the names of Quebec, East Florida, West Florida and Grenada; in which proclamation the said government of West Florida is described as follows, viz., bounded to the southward by the Gulf of Mexico, including all islands within six leagues of the coast from the river Apalachicola to lake Pontchartrain, to the westward by the said lake, the lake Maurepas, and the River Mississippi; to the northward by

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a line drawn due east from that part of the River Mississippi which lies in thirty one-degrees of north latitude, to the river Apalachicola or Catahouchee; and to the eastward by the said river. And in the same proclamation the said government of East Florida is described as follows, viz., bounded to the westward by the Gulf of Mexico and the Apalachicola river; to the northward by a line drawn from that part of the said river where the Catahouchee and Flint Rivers meet, to the source of St. Mary's River, and by the course of the said river to the Atlantic Ocean; and to the east and south by the Atlantic Ocean and the Gulf of Florida, including all islands within six leagues of the seacoast. And in and by the same proclamation, all lands lying between the Rivers Alatamaha and St. Mary's were declared to be annexed to the said Province of Georgia; and that, in and by the same proclamation, it was further declared by the said King as follows, viz.,

"That it is our royal will and pleasure for the present, as aforesaid, to reserve under our sovereignty, protection and dominion for the use of the said Indians all the land and territories not included within the limits of our said three new governments, or within the limits of the territory granted to the Hudson's Bay Company, as also all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west as aforesaid; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained."

And the jury find that the land described in the plaintiff's declaration did lay to the westward of the sources of the rivers which fall into the sea from the west and northwest as aforesaid. That afterwards, on the twenty-first day of November, in the year of Our Lord one thousand seven hundred and sixty-three, and in the fourth year of the reign of said King George the Third, he the said King, by his royal commission under the great seal of Great Britain, did constitute and appoint

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George Johnstone, Esq. Captain General and Governor in Chief over the said Province of West Florida in America; in which commission the said Province was described in the same words of limitation and extent, as in said proclamation is before set down. That afterwards, on the twentieth day of January, in the year of Our Lord one thousand seven hundred and sixty-four, the said King of Great Britain, by his commission under the great seal of Great Britain, did constitute and appoint James Wright, Esq. to be the Captain General and Governor in chief in and over the Colony of Georgia, by the following bounds, viz., bounded on the north by the most northern stream of a river there commonly called Savannah, as far as the heads of the said river; and from thence westward as far as our territories extend; on the east, by the sea coast, from the said river Savannah to the most southern stream of a certain other river, called St. Mary; (including all islands within twenty leagues of the coast lying between the said river Savannah and St. Mary, as far as the head thereof;) and from thence westward as far as our territories extend by the north boundary line of our Provinces of East and West Florida.

That afterwards, from the year one thousand seven hundred and seventy-five to the year one thousand seven hundred and eighty-three, an open war existed between the colonies of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, called the United States, on the one part, and His said Majesty, George the Third, King of Great Britain, on the other part. And on the third day of September, in the year of Our Lord one thousand seven hundred and eighty-three, a definitive treaty of peace was signed and concluded at Paris by and between certain authorized commissioners on the part of the said belligerent powers, which was afterwards duly ratified and confirmed by the said two respective powers, by the first article of which treaty, the said King George the Third, by the name of his Britannic Majesty, acknowledged the aforesaid United

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States to be free, sovereign and independent States; that he treated with them as such, and for himself, his heirs and successors, relinquishes all claim to the government, propriety and territorial rights of the same, and every part thereof; and by the second article of said treaty, the western boundary of the United States is a line drawn along the middle of the River Mississippi, until it shall intersect the northernmost part of the thirty-first degree of north latitude; and the southern boundary is a line drawn due east from the determination of the said line, in the latitude of thirty-one degrees north of the equator, to the middle of the River Apalachicola or Catahouchee; thence along the middle thereof to its junction with the Flint River; thence straight to the head of St. Mary's River; and thence down along the middle of St. Mary's River to the Atlantic Ocean.

And the jury further find that in the year of Our Lord one thousand seven hundred and eighty-two, the Congress of the United States did instruct the said commissioners, authorized on the part of the United States to negotiate and conclude the treaty aforesaid that they should claim in this negotiation, respecting the boundaries of the United States that the most northern part of the thirty-first degree of north latitude should be agreed to be the southern boundary of the United States, on the ground that that was the southern boundary of the Colony of Georgia; and that the River Mississippi should be agreed to be the western boundary of the United States, on the ground that the Colony of Georgia and other colonies, now States of the United States, were bounded westward by that river; and that the commissioners on the part of the United States did, in said negotiation, claim the same accordingly, and that, on those grounds, the said southern and western boundaries of the United States were agreed to by the commissioners on the part of the King of Great Britain. That afterwards, in the same year, the Legislature of the State of Georgia passed an act declaring her right, and proclaiming her title to all the lands lying within her boundaries to the River Mississippi. And in the year of Our Lord, one thousand seven hundred

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and eighty five, the Legislature of the said State of Georgia established a county, by the name of Bourbon, on the Mississippi, and appointed civil officers for said county, which lies within the boundaries now denominated the Mississippi territory; that thereupon a dispute arose between the State of South Carolina and the State of Georgia concerning their respective boundaries, the said States separately claiming the same territory; and the said State of South Carolina, on the first day of June, in the year of Our Lord one thousand seven hundred and eighty-five, petitioned the Congress of the United States for a hearing and determination of the differences and disputes subsisting between them and the State of Georgia, agreeably to the ninth article of the then Confederation and perpetual Union between the United States of America; that the said Congress of the United States did

thereupon on the same day resolve that the second Monday in May then next following should be assigned for the appearance of the said States of South Carolina and Georgia, by their lawful agents, and did then and there give notice thereof to the said State of Georgia, by serving the Legislature of said State with an attested copy of said petition of the State of South Carolina, and said resolve of Congress. That afterwards, on the eighth day of May, in the year of Our Lord one thousand seven hundred and eighty-six, by the joint consent of the agents of said States of South Carolina and Georgia, the Congress resolved that further day be given for the said hearing, and assigned the fifteenth day of the same month for that purpose. That afterwards, on the eighteenth day of May aforesaid, the said Congress resolved that further day be given for the said hearing, and appointed the first Monday in September, then next ensuing, for that purpose. That afterwards, on the first day of September then next ensuing, authorized agents from the States of Carolina and Georgia attended in pursuance of the order of Congress aforesaid, and produced their credentials, which were read in Congress, and there recorded, together with the acts of their respective legislatures, which acts and credentials authorized the said agents to settle and compromise all the differences

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and disputes aforesaid, as well as to appear and represent the said States respectively before any tribunal that might be created by Congress for that purpose, agreeably to the said ninth article of the Confederation. And in conformity to the powers aforesaid, the said commissioners of both the said States of South Carolina and Georgia, afterwards, on the 28th day of April, in the year of Our Lord one thousand seven hundred and eighty-seven, met at Beaufort, in the State of South Carolina, and then and there entered into, signed, and concluded a convention between the States of South Carolina and Georgia aforesaid. By the first article of which convention it was mutually agreed between the said States that the most northern branch or stream of the River Savannah from the sea or mouth of such stream to the fork or confluence of the Rivers then called Tugaloo and Keowee; and from thence the most northern branch or stream of said River Tugaloo, till it intersects the northern boundary line of South Carolina, if the said branch or stream of Tugaloo extends so far north, reserving all the islands in the said Rivers Savannah and Tugaloo, to Georgia; but if the head, spring, or source of any branch or stream of the said River Tugaloo does not extend to the north boundary line of South Carolina, then a west course to the Mississippi, to be drawn from the head, spring, or source of the said branch or stream of Tugaloo River, which extends to the highest northern latitude, shall forever thereafter form the separation, limit, and boundary between the States of South Carolina and Georgia. And by the third article of the convention aforesaid, it was agreed by the said States of South Carolina and Georgia that the said State of South Carolina should not thereafter claim any lands to the eastward, southward, southeastward, or west of the said boundary above established; and that the said State of South Carolina did relinquish and cede to the said State of Georgia all the right, title, and claim which the said State of South Carolina had to the government, sovereignty, and jurisdiction in and over the same, and also the right and preemption of soil from the native Indians, and all the estate, property, and claim which the said State of South Carolina had in or to the said lands.

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And the jury further find that the land described in the plaintiff's declaration is situate southwest of the boundary line last aforesaid; and that the same land lies within the limits of the territory granted to the said lords proprietors of Carolina, by King Charles the second, as aforesaid, and within the bounds of the territory agreed to belong and ceded to the King of Great Britain, by the said treaty of peace made in seventeen hundred and sixty-three, as aforesaid; and within the bounds of the United States, as agreed and settled by the treaty of peace in seventeen hundred and eighty-three, as aforesaid; and north of a line drawn due east from the mouth of the said River Yazoos, where it unites with the Mississippi aforesaid. That afterwards, on the ninth day of August, in the year of Our Lord one thousand seven hundred and eighty-seven, the delegates of said State of South Carolina in Congress moved that the said convention, made as aforesaid, be ratified and conformed, and that the lines and limits therein specified be thereafter taken and received as the boundaries between the said States of South Carolina and Georgia; which motion was by the unanimous vote of Congress committed, and the same convention was thereupon entered of record on the journals of Congress; and on the same day, John Kean and Daniel Huger, by virtue of authority given to them by the Legislature of said State of South Carolina, did execute a deed of cession on the part of said State of South Carolina, by which they ceded and conveyed to the United States, in Congress assembled, for the benefit of all the said States, all their right and title to that territory and tract of land included within the River Mississippi, and a line beginning at that part of the said River which is intersected by the southern boundary line of the State of North Carolina; and continuing along the said boundary line, until it intersects the ridge or chain of mountains which divides the eastern from the western waters; then to be continued along the top of the said ridge of mountains, until it intersects a line to be drawn due west from the head of the southern branch of the Tugaloo River to the said mountains, and thence to run a due west course to the River Mississippi; which deed of cession was

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thereupon received and entered on the journals of Congress, and accepted by them.

The jury further find that the Congress of the United States did, on the sixth day of September, in the year of Our Lord one thousand, seven hundred and eighty, recommend to the several States in the Union having claims to western territory to make a liberal cession to the United States of a portion of their respective claims for the common benefit of the Union. That afterwards, on the ninth day of August, in the year of Our Lord one thousand seven hundred and eighty-six, the said Congress resolved that, whereas the States of Massachusetts, New York, Connecticut, and Virginia had, in consequence of the recommendation of Congress on the sixth day of September aforesaid, made cessions of their claims to western territory to the United States in Congress assembled for the use of the United States, the said subject be again presented to the view of the States of N. Carolina, S. Carolina and Georgia, who had not complied with so reasonable a proposition, and that they be once more solicited to consider with candour and liberality the expectations of their sister States, and the earnest and repeated applications made to them by Congress on this subject. That afterwards, on the twentieth day of October, one thousand seven hundred and eighty-seven, the Congress of the United States passed the following resolve, viz., that it be and hereby is represented to the States of North-Carolina and Georgia that the lands, which have been ceded by the other States in compliance with the recommendation of this body, are now selling in large quantities for public securities; that the deeds of cession from the different States have been made without annexing an express condition that they should not operate till the other States, under like circumstances, made similar cessions; and that Congress have such faith in the justice and magnanimity of the States of North Carolina and Georgia that they only think it necessary to call their attention to these circumstances, not doubting but, upon consideration of the subject, they will fell those obligations which will induce similar cessions, and justify that confidence which has been

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placed in them. That afterwards, on the first day of February, one thousand seven hundred and eighty-eight, and Legislature of said State of Georgia, then duly convened, passed an act for ceding part of the territorial claims of said State to the United States, by which act the State of Georgia authorized her delegates in Congress to convey to the United States the territorial claims of said State of Georgia to a certain tract of country bounded as follows, to-wit: beginning at the middle of the River Catahouchee or Apalachicola, where it is intersected by the thirty-first degree of north latitude, and from thence due north one hundred and forty miles, thence due west to the River Mississippi; thence down the middle of the said River to where it intersects the thirty-first degree of north latitude, and along the said degree to the place of beginning; annexing the provisions and conditions following, to-wit: that the United States in Congress assembled shall guaranty to the citizens of said territory a republican form of government, subject only to such changes as may take place in the Federal Constitution of the United States; secondly that the navigation of all the waters included in the said cession shall be equally free to all the citizens of the United States; nor shall any tonnage on vessels, or any duties whatever, be laid on any goods, wares, or merchandises that pass up or down the said waters, unless for the use and benefit of the United States. Thirdly that the sum of one hundred and and seventy-one thousand and twenty-eight dollars, forty-five cents, which has been expended in quieting the minds of the Indians, and resisting their hostilities, shall be allowed as a charge against the United States, and be admitted in payment of the specie requisition of that State's quotas that have been or may be required by the United States. Fourthly, that in all cases where the State may require defence, the expenses arising thereon shall be allowed as a charge against the United States, agreeably to the Articles of Confederation. Fifthly that Congress shall guaranty and secure all the remaining territorial rights of the State, as pointed out and expressed by the definitive treaty of peace between the United States and Great Britain, the convention between the said

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State and the State of South Carolina, entered into the twenty-eighth day of April, in the year of Our Lord one thousand seven hundred and eighty-seven, and the clause of an act of the said State of Georgia, describing the boundaries thereof, passed the seventeenth day of February, in the year one thousand seven hundred and eighty-three, which act of the said State of Georgia, with said conditions annexed, was by the delegates of said State in Congress presented to the said Congress, and the same was, after being read, committed to a committee of Congress; who, on the fifteenth day of July, in the said year one thousand seven hundred and eighty-eight, made report thereon to Congress, as follows, to-wit:

"The committee, having fully considered the subject referred to them, are of opinion that the cession offered by the State of Georgia cannot be accepted on the terms proposed; first, because it appears highly probable that, on running the boundary line between that State and the adjoining State or States, a claim to a large tract of country extending to the Mississippi, and lying between the tract proposed to be ceded and that lately ceded by South Carolina will be retained by the said State of Georgia; and therefore the land which the State now offers to cede must be too far removed from the other lands hitherto ceded to the Union to be of any immediate advantages to it. Secondly, because there

appears to be due from the State of Georgia, on specie requisitions, but a small part of the sum mentioned in the third proviso or condition before recited; and it is improper in this case to allow a charge against the specie requisitions of Congress which may hereafter be made, especially as the said State stands charged to the United States for very considerable sums of money loaned. And, thirdly, because the fifth proviso or condition before recited contains a special guaranty of territorial rights, and such a guaranty has not been made by Congress to any State, and which, considering the spirit and meaning of the Confederation, must be unnecessary and improper. But the committee are of opinion that the first, second, and fourth provisions, before recited, and also the third, with some variations, may be admitted; and that, should the said State extend the bounds of her cession,

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and vary the terms thereof as herein after mentioned, Congress may accept the same. Whereupon they submit the following resolutions: That the cession of claims to western territory, offered by the State of Georgia, cannot be accepted on the terms contained in her act passed the first of February last. That in case the said State shall authorize her delegates in Congress to make a cession of all her territorial claims to lands west of the River Apalachicola, or west of a meridian line running through or near the point where that River intersects the thirty-first degree of north latitude, and shall omit the last proviso in her said act, and shall so far vary the proviso respecting the sum of one hundred and seventy-one thousand four hundred and twenty-eight dollars, and forty-five cents, expended in quieting and resisting the Indians as that the said State shall have credit in the specie requisitions of Congress, to the amount of her specie quotas on the past requisitions, and for the residue, in her account with the United States for moneys loaned, Congress will accept the cession."

Which report being read, Congress resolved that Congress agree to the said report.

The jury further find that in the year of Our Lord one thousand seven hundred and ninety-three, Thomas Jefferson, Esq. then secretary of State for the United States, made a report to the then President of the United States which was intended to serve as a basis of instructions to the commissioners of the United States for settling the points which were then in dispute between the King of Spain and the government of the United States, one of which points in dispute was the just boundaries between West Florida and the southern line of the United States. On this point, the said secretary of State, in his report aforesaid, expresses himself as follows, to-wit:

"As to boundary that between Georgia and West Florida is the only one which needs any explanation. It (that is, the court of Spain) sets up a claim to possessions within the State of Georgia, founded on her (Spain) having rescued them by force from the British during the late war. The following view of that subject seems to admit of no reply. The several States now composing the United

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States of America were, from their first establishment, separate and distinct societies, dependent on no other society of men whatever. They continued at the head of their respective governments the Executive Magistrate who presided over the one they had left, and thereby secured in effect a constant amity with the nation. In this stage of their government their several boundaries were fixed, and particularly the southern boundary of Georgia, the only one now in question, was established at the thirty first degree of latitude, from the Apalachicola westwardly. The southern limits of Georgia depend chiefly on, first, the charter of South Carolina, &c. Secondly, on the proclamation of the British King, in one thousand seven hundred and sixty-three, establishing the boundary between Georgia and Florida, to begin on the Mississippi, in thirty-one degrees of north latitude, and running eastwardly to the Apalachicola, &c. That afterwards, on the seventh day of December, of the same year, the commissioners of the United States for settling the aforesaid disputes, in their communications with those of the King of Spain, express themselves as follows, to-wit:"

"In this stage of their (meaning the United States) government, the several boundaries were fixed, and particularly the southern boundary of Georgia, the one now brought into question by Spain. This boundary was fixed by the proclamation of the King of Great Britain, their chief magistrate, in the year one thousand seven hundred and sixty-three, at a time when to other power pretended any claim whatever to any part of the country through which it run. The boundary of Georgia was thus established: to begin in the Mississippi, in latitude thirty-one north, and running eastward to the Apalachicola,"

&c. From what has been said, it results, first that the boundary of Georgia, now forming the southern limits of the United States, was lawfully established in the year seventeen hundred and sixty-three. Secondly, that it has been confirmed by the only power that could at any time have pretensions to contest it.

That afterwards, on the tenth day of August, in the year 1795, Thomas Pinckney, Esq. minister plenipotentiary

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of the United States at the Court of Spain, in a communication to the Prince of Peace, Prime Minister of Spain, agreeably to his

instructions from the President of the United States on the subject of said boundaries, expresses himself as follows, to-wit:

"Thirty-two years have elapsed since all the country on the left or eastern bank of the Mississippi, being under the legitimate jurisdiction of the King of England that sovereign thought proper to regulate with precision the limits of Georgia and the two Floridas, which was done by his solemn proclamation, published in the usual form, by which he established between them precisely the same limits that, near twenty years after, he declared to be the southern limits of the United States, by the treaty which the same King of England concluded with them in the month of November, seventeen hundred and eighty two."

That afterwards, on the 27th day of October, in the year seventeen hundred and ninety-five, a treaty of friendship, limits and navigation was concluded between the United States and his Catholic Majesty the King of Spain, in the second article of which treaty it is agreed that the southern boundary of the United States, which divides their territory from the Spanish colonies of East and West Florida, shall be designated by a line beginning on the River Mississippi, at the northernmost part of the thirty-first degree of north latitude, which from thence shall be drawn due east to the middle of the River Apalachicola or Catahouchee, thence along the middle thereof to its junction with the Flint, thence straight to the head of St. Mary's River, and thence down the middle thereof to the Atlantic Ocean.

But whether, upon the whole matter, the State of Georgia, at the time of passing the act aforesaid, entitled as aforesaid, as mentioned by the plaintiff, in his assignment of the breach in the fourth count of his declaration, was seised in fee simple of all the territories and tenements aforesaid, and of all the soil thereof, subject only to the extinguishment of the Indian title

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to part thereof, the jury are ignorant, and pray the advisement of the court thereon; and if the court are of opinion that the said State of Georgia was so seised at the time aforesaid, then the jury find that the said State of Georgia, at the time of passing the act aforesaid, entitled as aforesaid, as mentioned by the said Fletcher, in his assignment of the breach in the fourth count of his declaration, was seised in fee simple of all the territories and tenements aforesaid, and of all the soil thereof, subject only to the extinguishment of the Indian title to part thereof, and the jury thereupon find that the said Peck his covenant aforesaid, the breach whereof is assigned in the plaintiff's fourth count mentioned, hath not broken, but hath kept the same.

But if the court are of opinion that the said State of Georgia was not so seised at the time aforesaid, then the jury find that the said State of Georgia, at the time of passing the act aforesaid, entitled as aforesaid, as mentioned by the said Fletcher, in his assignment of the breach in the fourth count of his declaration, was not seised of all the territories and tenements aforesaid, and of all the soil thereof, subject only to the extinguishment of the Indian title to part thereof, and the jury thereupon find that the said Peck his covenant aforesaid, the breach whereof is assigned in the plaintiff's fourth count mentioned, hath not kept, but broken the same, and assess damages for the plaintiff, for the breach thereof, in the sum of three thousand dollars, and costs of suit.

Whereupon it was considered and adjudged by the court below that, on the issues on the three first counts, the several pleas are good and sufficient, and that the demurrer thereto be overruled; and on the last issue, on which there is a special verdict that the State of Georgia was seised, as alleged by the defendant, and that the defendant recover his costs.

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Mr. Chief Justice MARSHALL delivered the opinion of the Court.

In this cause, there are demurrers to three pleas filed in the Circuit Court, and a special verdict found on an issue joined on the 4th plea. The pleas were all sustained, and judgment was rendered for the defendant.

To support this judgment, this Court must concur in overruling all the demurrers; for, if the plea to any one of the counts be bad, the plaintiff below is entitled to damages on that count.

The covenant, on which the breach in the first count is assigned, is in these words:

"that the Legislature of the said State, (Georgia), at the time of the passing of the act of sale aforesaid, had good right to sell and dispose of the same, in manner pointed out by the said act."

The breach of this covenant is assigned in these words:

"now the said Fletcher saith that, at the time when the said act of the Legislature of Georgia, entitled an act, &c. was passed, the said Legislature had no authority to sell and dispose of the tenements aforesaid, or of any part thereof, in the manner pointed out in the said act. "

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The plea sets forth the Constitution of the State of Georgia, and avers that the lands lay within that State. It then sets forth the act

of the legislature, and avers that the lands, described in the declaration, are included within those to be sold by the said act, and that the Governor was legally empowered to sell and convey the premises.

To this plea the plaintiff demurred; and the defendant joined in the demurrer.

If it be admitted that sufficient matter is shown in this plea to have justified the defendant in denying the breach alleged in the count, it must also be admitted that he has not denied it. The breach alleged is that the Legislature had not authority to sell. The bar set up is that the Governor had authority to convey. Certainly an allegation that the principal has no right to give a power, is not denied by alleging that he has given a proper power to the agent.

It is argued that the plea shows, although it does not, in terms, aver, that the Legislature had authority to convey. The court does not mean to controvert this position, but its admission would not help the case. The matter set forth in the plea, as matter of inducement, may be argumentatively good, may warrant an averment which negatives the averment in the declaration, but does not itself constitute that negative.

Had the plaintiff tendered an issue in fact upon this plea that the Governor was legally empowered to sell and convey the premises, it would have been a departure from his declaration, for the count to which this plea is intended as a bar alleges no want of authority in the Governor. He was therefore under the necessity of demurring.

But it is contended that, although the plea be substantially bad, the judgment overruling the demurrer, is correct because the declaration is defective.

The defect alleged in the declaration is that the

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breach is not assigned in the words of the covenant. The covenant is that the Legislature had a right to convey, and the breach is that the Legislature had no authority to convey.

It is not necessary that a breach should be assigned in the very words of the covenant. It is enough that the words of the assignment show, unequivocally, a substantial breach. The assignment under consideration does show such a breach. If the Legislature had no authority to convey, it had no right to convey.

It is, therefore, the opinion of this Court that the Circuit Court erred in overruling the demurrer to the first plea by the defendant pleaded, and that their judgment ought therefore to be reversed, and that judgment on that plea be rendered for the plaintiff.

After the opinion of the court was delivered, the parties agreed to amend the pleadings, and the cause was continued for further consideration.

The cause having been again argued at this term, as has been stated.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

The pleadings being now amended, this cause comes on again to be heard on sundry demurrers, and on a special verdict.

The suit was instituted on several covenants contained in a deed made by John Peck, the defendant in error, conveying to Robert Fletcher, the plaintiff in error, certain lands which were part of a large purchase made by James Gunn and others, in the year 1795, from the State of Georgia, the contract for which was made in the form of a bill passed by the Legislature of that State.

The first count in the declaration set forth a breach

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in the second covenant contained in the deed. The covenant is

"that the Legislature of the State of Georgia, at the time of passing the act of sale aforesaid, had good right to sell and dispose of the same in manner pointed out by the said act."

The breach assigned is that the Legislature had no power to sell.

The plea in bar sets forth the Constitution of the State of Georgia, and avers that the lands sold by the defendant to the plaintiff were within that State. It then sets forth the granting act, and avers the power of the Legislature to sell and dispose of the premises as pointed out by the act.

To this plea the plaintiff below demurred, and the defendant joined in demurrer.

That the Legislature of Georgia, unless restrained by its own Constitution, possesses the power of disposing of the unappropriated lands within its own limits, in such manner as its own judgment shall dictate, is a proposition not to be controverted. The only question, then, presented by this demurrer, for the consideration of the Court is this: did the then Constitution of the State of Georgia prohibit the Legislature to dispose of the lands which were the subject of this contract in the manner stipulated by the contract?

The question whether a law be void for its repugnancy to the Constitution is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

In this case, the court can perceive no such opposition. In the Constitution of Georgia, adopted in the

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year 1789, the court can perceive no restriction on the legislative power which inhibits the passage of the Act of 1795. The court cannot say that, in passing that Act, the Legislature has transcended its powers and violated the Constitution. In overruling the demurrer, therefore, to the first plea, the Circuit Court committed no error.

The third covenant is that all the title which the State of Georgia ever had in the premises had been legally conveyed to John Peck, the grantor.

The second count assigns, in substance, as a breach of this covenant that the original grantees from the State of Georgia promised and assured divers members of the Legislature, then sitting in General Assembly that if the said members would assent to, and vote for, the passing of the Act, and if the said bill should pass, such members should have a share of, and be interested in, all the lands purchased from the said State by virtue of such law. And that divers of the said members to whom the said promises were made were unduly influenced thereby, and, under such influence, did vote for the passing of the said bill, by reason whereof the said law was a nullity, &c., and so the title of the State of Georgia did not pass to the said Peck, &c.

The plea to this count, after protesting that the promises it alleges were not made, avers that, until after the purchase made from the original grantees by James Greenleaf, under whom the said Peck claims, neither the said James Greenleaf nor the said Peck, nor any of the mesne vendors between the said Greenleaf and Peck, had any notice or knowledge that any such promises or assurances were made by the said original grantees, or either of them, to any of the members of the Legislature of the State of Georgia. To this plea the plaintiff demurred generally, and the defendant joined in the demurrer.

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That corruption should find its way into the governments of our infant republics and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law or the formation of a legislative contract are circumstances most deeply to be deplored. How far a court of justice would, in any case, be competent, on proceedings instituted by the State itself to vacate a contract thus formed, and to annul rights required under that contract by third persons having no notice of the improper means by which it was obtained is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements operating on members of the supreme sovereign power of a State to the formation of a contract by that power are examinable in a court of justice. If the principle be conceded that an act of the supreme sovereign power might be declared null by a court in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means much be applied to produce this effect. Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment?

If the majority of the Legislature be corrupted, it may well be doubted whether it be within the Province of the judiciary to control their conduct, and if less than a majority act from impure motives, the principle by which judicial interference would be regulated is not clearly discerned.

Whatever difficulties this subject might present when viewed under aspects of which it may be susceptible, this Court can perceive none in the particular pleadings now under consideration.

This is not a bill brought by the State of Georgia to annul the contract, nor does it appear to the Court by

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this count that the State of Georgia is dissatisfied with the sale that has been made. The case, as made out in the pleadings, is simply this. One individual who holds lands in the State of Georgia, under a deed covenanting that the title of Georgia was in the grantor, brings an action of covenant upon this deed, and assigns, as a breach that some of the members of the Legislature were induced to vote in favour of the law, which constituted the contract, by being promised an interest in it, and that therefore the act is a mere nullity.

This solemn question cannot be brought thus collaterally and incidentally before the court. It would be indecent in the extreme, upon a private contract, between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a State. If the title be plainly deduced from a legislative act, which the Legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity in consequence of the impure motives which influenced certain members of the Legislature which passed the law.

The Circuit Court, therefore, did right in overruling this demurrer.

The fourth covenant in the deed is that the title to the premises has been in no way constitutionally or legally impaired by virtue of any subsequent act of any subsequent Legislature of the State of Georgia.

The third count recites the undue means practised on certain members of the Legislature, as stated in the second count, and then alleges that, in consequence of these practices and of other causes, a subsequent Legislature passed an act annulling and rescinding the law under which the conveyance to the original grantees was made, declaring that conveyance void, and asserting the title of the State to the lands it contained. The

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count proceeds to recite at large, this rescinding act, and concludes with averring that, by reason of this act, the title of the said Peck in the premises was constitutionally and legally impaired and rendered null and void.

After protesting, as before, that no such promises were made as stated in this count, the defendant again pleads that himself and the first purchaser under the original grantees, and all intermediate holders of the property, were purchasers without notice. To this plea there is a demurrer and joinder.

The importance and the difficulty of the questions, presented by these pleadings are deeply felt by the Court. The lands in controversy vested absolutely in James Gunn and others, the original grantees, by the conveyance of the Governor, made in pursuance of an act of assembly to which the Legislature was fully competent. Being thus in full possession of the legal estate, they, for a valuable consideration, conveyed portions of the land to those who were willing to purchase. If the original transaction was infected with fraud, these purchasers did not participate in it, and had no notice of it. They were innocent. Yet the Legislature of Georgia has involved them in the fate of the first parties to the transaction, and, if the act be valid, has annihilated their rights also.

The Legislature of Georgia was a party to this transaction, and for a party to pronounce its own deed invalid, whatever cause may be assigned for its invalidity, must be considered as a mere act of power which must find its vindication in a train of reasoning not often heard in courts of justice.

But the real party, it is said, are the people, and when their agents are unfaithful, the acts of those agents cases to be obligatory.

It is, however, to be recollected that the people can

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act only by these agents, and that, while within the powers conferred on them, their acts must be considered as the acts of the people. If the agents be corrupt, others may be chosen, and, if their contracts be examinable, the common sentiment, as well as common usage of mankind, points out a mode by which this examination may be made, and their validity determined.

If the Legislature of Georgia was not bound to submit its pretensions to those tribunals which are established for the security of property, and to decide on human rights, if it might claim to itself the power of judging in its own case, yet there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded.

If the Legislature be its own judge in its own case, it would seem equitable that its decision should be regulated by those rules which would have regulated the decision of a judicial tribunal. The question was, in its nature, a question of title, and the tribunal which decided it was either acting in the character of a court of justice, and performing a duty usually assigned to a court, or it was exerting a mere act of power in which it was controlled only by its own will.

If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside as between the parties, but the rights of third persons who are purchasers without notice, for a valuable consideration, cannot be disregarded. Titles, which, according to every legal test, are perfect are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect, arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law; he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties

attached to that guilt. All titles would be insecure, and the intercourse

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between man and man would be very seriously obstructed if this principle be overturned.

A court of chancery, therefore, had a bill been brought to set aside the conveyance made to James Gunn and others as being obtained by improper practices with the Legislature, whatever might have been its decision as respected the original grantees, would have been bound, by its own rules and by the clearest principles of equity, to leave unmolested those who were purchasers without notice for a valuable consideration.

If the Legislature felt itself absolved from those rules of property which are common to all the citizens of the United States, and from those principles of equity which are acknowledged in all our courts, its act is to be supported by its power alone, and the same power may devest any other individual of his lands if it shall be the will of the Legislature so to exert it.

It is not intended to speak with disrespect of the Legislature of Georgia, or of its acts. Far from it. The question is a general question, and is treated as one. For although such powerful objections to a legislative grant as are alleged against this may not again exist, yet the principle on which alone this rescinding act is to be supported may be applied to every case to which it shall be the will of any legislature to apply it. The principle is this: that a legislature may, by its own act, devest the vested estate of any man whatever, for reasons which shall, by itself, be deemed sufficient.

In this case the Legislature may have had ample proof that the original grant was obtained by practices which can never be too much reprobated, and which would have justified its abrogation so far as respected those to whom crime was imputable. But the grant, when issued, conveyed an estate in fee simple to the grantee, clothed with all the solemnities which law can bestow. This estate was transferrable, and those who purchased parts of it were not stained by that

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guilt which infected the original transaction. Their case is not distinguishable from the ordinary case of purchasers of a legal estate without knowledge of any secret fraud which might have led to the emanation of the original grant. According to the well known course of equity, their rights could not be affected by such fraud. Their situation was the same, their title was the same, with that of every other member of the community who holds land by regular conveyances from the original patentee.

Is the power of the Legislature competent to the annihilation of such title, and to a resumption of the property thus held?

The principle asserted is that one Legislature is competent to repeal any act which a former legislature was competent to pass, and that one legislature cannot abridge the powers of a succeeding legislature.

The correctness of this principle, so far as respects general legislation, can never be controverted. But if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estate, and, if those estates may be seized by the sovereign authority, still that they originally vested is a fact, and cannot cease to be a fact.

When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found if the property of an individual, fairly and honestly acquired, may be seized without compensation?

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To the Legislature all legislative power is granted, but the question whether the act of transferring the property of an individual to the public be in the nature of the legislative power is well worthy of serious reflection.

It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power, in cases where the Constitution is silent, never has been, and perhaps never can be, definitely stated.

The validity of this rescinding act, then, might well be doubted, were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own Constitution. She is a part of a large empire; she is a member of the American Union; and that Union has a Constitution

the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several States which none claim a right to pass. The Constitution of the United States declares that no State shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.

Does the case now under consideration come within this prohibitory section of the Constitution?

In considering this very interesting question, we immediately ask ourselves what is a contract? Is a grant a contract?

A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the Governor. A contract executed is one in which the object

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of contract is performed, and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is therefore always estopped by his own grant.

Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the Constitution uses the general term "contract" without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seised of their former estates, notwithstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected.

If, under a fair construction the Constitution, grants are comprehended under the term "contracts," is a grant from the State excluded from the operation of the provision? Is the clause to be considered as inhibiting the State from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself?

The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the State are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed.

Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the Constitution viewed with some apprehension

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the violent acts which might grow out of the feelings of the moment, and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment, and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State.

No State shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.

A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.

In this form, the power of the legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favour of the right to impair the obligation of those contracts into which the State may enter?

The State legislatures can pass no ex post facto law. An ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared by some previous law to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing for public use the estate of an individual in the form of a law annulling the title by which he holds that estate? The Court can perceive no sufficient grounds for making this distinction. This rescinding act would have the effect of an ex post facto law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased.

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This cannot be effected in the form of an ex post facto law or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?

The argument in favour of presuming an intention to except a case not excepted by the words of the Constitution is susceptible of some illustration from a principle originally ingrafted in that instrument, though no longer a part of it. The Constitution, as passed, gave the courts of the United States jurisdiction in suits brought against individual States. A State, then, which violated its own contract was suable in the courts of the United States for that violation. Would it have been a defence in such a suit to say that the State had passed a law absolving itself from the contract? It is scarcely to be conceived that such a defence could be set up. And yet, if a State is neither restrained by the general principles of our political institutions nor by the words of the Constitution from impairing the obligation of its own contracts, such a defence would be a valid one. This feature is no longer found in the Constitution, but it aids in the construction of those clauses with which it was originally associated.

It is, then, the unanimous opinion of the Court that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the State of Georgia was restrained, either by general principles which are common to our free institutions or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.

In overruling the demurrer to the third plea, therefore, there is no error.

The first covenant in the deed is that the State of Georgia, at the time of the act of the Legislature thereof entitled as aforesaid, was legally seised in fee of the soil thereof subject only to the extinguishment of part of the Indian title thereon.

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The fourth count assigns, as a breach of this covenant that the right to the soil was in the United States, and not in Georgia.

To this Court, the defendant pleads that the State of Georgia was seised, and tenders an issue on the fact in which the plaintiff joins. On this issue, a special verdict is found.

The jury find the grant of Carolina by Charles Second to the Earl of Clarondon and others, comprehending the whole country from 36 deg. 30 min. north lat. to 29 deg. north lat., and from the Atlantic to the South Sea.

They find that the northern part of this territory was afterwards erected into a separate colony, and that the most northern part of the 35 deg. of north lat. was the boundary line between North and South Carolina. That seven of the eight proprietors of the Carolinas surrendered to George II in the year 1729, who appointed a Governor of South Carolina. That, in 1732, George II granted to the Lord Viscount Percival and others seven eighths of the territory between the Savannah and the Alatamaha, and extending west to the South Sea, and that the remaining eighth part, which was still the property of the heir of Lord Carteret, one of the original grantees of Carolina, was afterwards conveyed to them. This territory was constituted a colony and called Georgia. That the Governor of South Carolina continued to exercise jurisdiction south of Georgia. That, in 1752, the grantees surrendered to the Crown. That, in 1754, a Governor was appointed by the Crown, with a commission describing the boundaries of the colony. That a treaty of peace was concluded between Great

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Britain and Spain in 1763 in which the latter ceded to the former Florida, with Fort St. Augustin and the bay of Pensacola. That, in October, 1763, the King of Great Britain issued a proclamation creating four new colonies, Quebec, East Florida, West Florida, and Grenada, and prescribing the bounds of each, and further declaring that all the lands between the Alatamaha, and St. Mary's should be annexed to Georgia. The same proclamation contained a clause reserving, under the dominion and protection of the Crown, for the use of the Indians, all the lands on the western waters, and forbidding a settlement on them or a purchase of them from the Indians. The lands conveyed to the plaintiff lie on the western waters. That, in November, 1763, a commission was issued to the Governor of Georgia in which the boundaries of that Province are described as extending westward to the Mississippi. A commission describing boundaries of the same extent was afterwards granted in 1764. That a war broke out between Great Britain and her colonies which terminated in a treaty of peace acknowledging them as sovereign and independent States. That in April, 1787, a convention was entered into between the States of South Carolina and Georgia settling the boundary line between them.

The jury afterwards describe the situation of the lands mentioned in the plaintiff's declaration in such manner that their lying within the limits of Georgia, as defined in the proclamation of 1763, in the treaty of peace, and in the convention between that State and South Carolina, has not been questioned.

The counsel for the plaintiff rest their argument on a single proposition. They contend that the reservation for the use of the Indians, contained in the proclamation

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of 1763, excepts the lands on the western waters from the colonies within whose bounds they would otherwise have been, and that they were acquired by the Revolutionary War. All acquisitions during the War, it is contended, were made by the joint arms, for the joint benefit of the United States, and not for the benefit of any particular State.

The Court does not understand the proclamation as it is understood by the counsel for the plaintiff. The reservation for the use of the Indians appears to be a temporary arrangement suspending for a time the settlement of the country reserved, and the powers of the royal Governor within the territory reserved, but is not conceived to amount to an alteration of the boundaries of the colony. If the language of the proclamation be in itself doubtful, the commissions subsequent thereto which were given to the Governors of Georgia entirely remove the doubt.

The question whether the vacant lands within the United States became a joint property or belonged to the separate States was a momentous question which at one time threatened to shake the American Confederacy to its foundation. This important and dangerous contest has been compromised, and the compromise is not now to be disturbed.

It is the opinion of the Court that the particular land stated in the declaration appears, from this special verdict, to lie within the State of Georgia, and that the State of Georgia had power to grant it.

Some difficulty was produced by the language of the covenant and of the pleadings. It was doubted whether a State can be seised in fee of lands subject to the Indian title, and whether a decision that they were seised in fee might not be construed to amount to a decision that their grantee might maintain an ejectment for them notwithstanding that title.

The majority of the Court is of opinion that the nature of the Indian title, which is certainly to be respected

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by all Courts until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the State.

Judgment affirmed with costs.

JOHNSON, J.

In this case, I entertain, on two points, an opinion different from that which has been delivered by the Court.

I do not hesitate to declare that a State does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the deity.

A contrary opinion can only be maintained upon the ground that no existing legislature can abridge the powers of those which will succeed it. To a certain extent, this is certainly correct, but the distinction lies between power and interest, the right of jurisdiction and the right of soil.

The right of jurisdiction is essentially connected to, or rather identified with, the national sovereignty. To part with it is to commit a species of political suicide. In fact, a power to produce its own annihilation is an absurdity in terms. It is a power as utterly incommunicable to a political as to a natural person. But it is not so with the interests or property of a nation. Its possessions nationally are in nowise necessary to its political existence; they are entirely accidental, and may be parted with in every respect similarly to those of the individuals who compose the community. When the legislature have once conveyed their interest or property in any subject to the individual, they have lost all control over it; have nothing to act upon; it has passed from them; is vested in the individual; becomes intimately blended with his existence, as essentially so as the blood that circulates through his system. The government may indeed demand of him the one or the other, not because they are not his, but because whatever is his is his country's.

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As to the idea that the grants of a legislature may be void because the legislature are corrupt, it appears to me to be subject to insuperable difficulties. The acts of the supreme power of a country must be considered pure for the same reason that all sovereign acts must be considered just -- because there is no power that can declare them otherwise. The absurdity in this case would have been strikingly perceived could the party who passed the act of cession have got again into power and declared themselves pure and the intermediate legislature corrupt.

The security of a people against the misconduct of their rulers must lie in the frequent recurrence to first principles, and the imposition of adequate constitutional restrictions. Nor would it be difficult, with the same view, for laws to be framed which would bring the conduct of individuals under the review of adequate

tribunals, and make them suffer under the consequences of their own immoral conduct.

I have thrown out these ideas that I may have it distinctly understood that my opinion on this point is not founded on the provision in the Constitution of the United States relative to laws impairing the obligation of contracts. It is much to be regretted that words of less equivocal signification, had not been adopted in that article of the Constitution. There is reason to believe, from the letters of Publius, which are well-known to be entitled to the highest respect, that the object of the convention was to afford a general protection to individual rights against the acts of the State legislatures. Whether the words, "acts impairing the obligation of contracts," can be construed to have the same force as must have been given to the words "obligation and effect of contracts," is the difficulty in my mind.

There can be no solid objection to adopting the technical definition of the word "contract," given by Blackstone. The etymology, the classical signification, and the civil law idea of the word will all support it. But the difficulty arises on the word "obligation,"

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which certainly imports an existing moral or physical necessity. Now a grant or conveyance by no means necessarily implies the continuance of an obligation beyond the moment of executing it. It is most generally but the consummation of a contract, is functus officio the moment it is executed, and continues afterwards to be nothing more than the evidence that a certain act was done.

I enter with great hesitation upon this question, because it involves a subject of the greatest delicacy and much difficulty. The States and the United States are continually legislating on the subject of contracts, prescribing the mode of authentication, the time within which suits shall be prosecuted for them, in many cases affecting existing contracts by the laws which they pass, and declaring them to cease or lose their effect for want of compliance, in the parties, with such statutory provisions. All these acts appear to be within the most correct limits of legislative powers, and most beneficially exercised, and certainly could not have been intended to be affected by this constitutional provision, yet where to draw the line, or how to define or limit the words, "obligation of contracts," will be found a subject of extreme difficulty.

To give it the general effect of a restriction of the State powers in favour of private rights is certainly going very far beyond the obvious and necessary import of the words, and would operate to restrict the States in the exercise of that right which every community must exercise, of possessing itself of the property of the individual, when necessary for public uses; a right which a magnanimous and just government will never exercise without amply indemnifying the individual, and which perhaps amounts to nothing more than a power to oblige him to sell and convey, when the public necessities require it.

The other point on which I dissent from the opinion of the Court is relative to the judgment which ought to be given on the first count. Upon that count, we are

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called upon substantially to decide

"that the State of Georgia, at the time of passing the act of cession, was legally seised in fee of the soil [then ceded], subject only to the extinguishment of part of the Indian title."

That is that the State of Georgia was seised of an estate in fee simple in the lands in question, subject to another estate, we know not what, nor whether it may not swallow up the whole estate decided to exist in Georgia. It would seem that the mere vagueness and uncertainty of this covenant would be a sufficient objection to deciding in favour of it, but to me it appears that the facts in the case are sufficient to support the opinion that the State of Georgia had not a fee simple in the land in question.

This is a question of much delicacy, and more fitted for a diplomatic or legislative than a judicial inquiry. But I am called upon to make a decision, and I must make it upon technical principles.

The question is whether it can be correctly predicated of the interest or estate which the State of Georgia had in these lands, "that the State was seised thereof, in fee simple."

To me, it appears that the interest of Georgia in that land amounted to nothing more than a mere possessibility, and that her conveyance thereof could operate legally only as a covenant to convey or to stand seised to a use.

The correctness of this opinion will depend upon a just view of the State of the Indian nations. This will be found to be very various. Some have totally extinguished their national fire, and submitted themselves to the laws of the States; others have, by treaty, acknowledged that they hold their national existence at the will of the State within which they reside; others retain a limited sovereignty and the absolute proprietorship of their soil. The latter is the case of the tribes to the west of Georgia. We legislate upon the conduct of strangers or citizens within their limits, but innumerable treaties formed with them

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acknowledge them to be an independent people, and the uniform practice of acknowledging their right of soil, by purchasing from them and restraining all persons from encroaching upon their territory, makes it unnecessary to insist upon their right of soil. Can, then, one nation be said to be seised of a fee simple in lands, the right of soil of which is in another nation? It is awkward to apply the technical idea of a fee simple to the interests of a nation, but I must consider an absolute right of soil as an estate to them and their heirs. A fee simple estate may be held in reversion, but our law will not admit the idea of its being limited after a fee simple. In fact, if the Indian nations be the absolute proprietors of their soil, no other nation can be said to have the same interest in it. What, then, practically, is the interest of the States in the soil of the Indians within their boundaries? Unaffected by particular treaties, it is nothing more than what was assumed at the first settlement of the country, to-wit, a right of conquest or of purchase, exclusively of all competitors within certain defined limits. All the restrictions upon the right of soil in the Indians amount only to an exclusion of all competitors from their markets, and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves. If the interest in Georgia was nothing more than a preemptive right, how could that be called a fee simple which was nothing more than a power to acquire a fee simple by purchase, when the proprietors should be pleased to sell? And if this ever was any thing more than a mere possibility, it certainly was reduced to that state when the State of Georgia ceded to the United States, by the Constitution, both the power of preemption and of conquest, retaining for itself only a resulting right dependent on a purchase or conquest to be made by the United States.

I have been very unwilling to proceed to the decision of this cause at all. It appears to me to bear strong evidence, upon the face of it, of being a mere feigned case. It is our duty to decide on the rights, but not on the speculations of parties. My confidence,

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however, in the respectable gentlemen who have been engaged for the parties has induced me to abandon my scruples in the belief that they would never consent to impose a mere feigned case upon this Court.

http://legal-dictionary.thefreedictionary.com/Ex+Post+Facto+Laws
[Latin, "After-the-fact" laws.] Laws that provide for the infliction of punishment upon a person for some prior act that, at the time it was committed, was not illegal.

Ex post facto laws retroactively change the rules of evidence in a criminal case, retroactively alter the definition of a crime, retroactively increase the punishment for a criminal act, or punish conduct that was legal when committed. They are prohibited by Article I, Section 10, Clause 1, of the U.S. Constitution. An ex post facto law is considered a hallmark of tyranny because it deprives people of a sense of what behavior will or will not be punished and allows for random punishment at the whim of those in power.

The prohibition of ex post facto laws was an imperative in colonial America. The Framers of the Constitution understood the importance of such a prohibition, considering the historical tendency of government leaders to abuse power. As Alexander Hamilton observed, "[I]t is easy for men … to be zealous advocates for the rights of the citizens when they are invaded by others, and as soon as they have it in their power, to become the invaders themselves." The desire to thwart abuses of power also inspired the Framers of the Constitution to prohibit bills of attainder, which are laws that inflict punishment on named individuals or on easily ascertainable members of a group without the benefit of a trial. Both ex post facto laws and bills of attainder deprive those subject to them of due process of law—that is, of notice and an opportunity to be heard before being deprived of life, liberty, or property.

The Constitution did not provide a definition for ex post facto laws, so the courts have been forced to attach meaning to the concept. In Calder v. Bull, 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798), the U.S. Supreme Court provided a first and lasting interpretation of the Ex Post Facto Clause. The focus of the Calder case was a May 1795 resolution of the Connecticut legislature that specifically set aside a March 1793 probate court decree. The resolution allowed the defeated party in the probate contest a new hearing on the matter of the will. The Court in Calder ruled that the Connecticut resolution did not constitute an ex post facto law because it did not affect a vested property right. In other words, no one had complete ownership of the property in the will, so depriving persons of the property did not violate the ex post facto clause. The Court went on to list situations that it believed the clause did address. It opined that an ex post facto law was one that rendered new or additional criminal punishment for a prior act or changed the rules of evidence in a criminal case.

In Calder, the Court's emphasis on criminal laws seemed to exclude civil laws from a definition of ex post facto—that is, it implied that if a statute did not inflict criminal punishment, it did not violate the Ex Post Facto Clause. Twelve years later, the U.S. Supreme Court held that a civil statute that revoked land grants to purchasers violated the Ex Post Facto Clause (fletcher v. peck, 10 U.S. (6 Cranch) 87, 3 L. Ed. 162 [1810]). However, in 1854, faced with another opportunity to define ex post facto, the Court retreated from Fletcher and limited the prohibition to retroactively applied criminal laws (Carpenter v. Pennsylvania, 58 U.S. (17 How.) 456, 15 L. Ed. 127 [1854]).

In Carpenter, the Court noted that the esteemed legal theorist Sir William Blackstone (1723–80) had described ex post facto in criminal terms. According to Blackstone, an ex post facto law has been created when, "after an action (indifferent in itself) is committed, the legislature then for the first time declares it to have been a crime, and inflicts punishment upon the person who has committed it." Using this as the understanding of ex post facto in 1789, the Court reasoned that it must have been the Framers' intent to limit the clause to criminal laws. However, notes from the Constitutional Convention indicate that the clause should cover the retroactive application of all laws, including civil laws. The only exception for ex post facto laws discussed at the Constitutional Convention was in case of "necessity and public safety" (Farrand, 1937).

Since the Carpenter ruling, the Supreme Court has struck down some retroactive civil laws, but only those intended to have a punitive intent. This construction of the Ex Post Facto Clause has done little more than raise another question: What is punitive intent? The answer lies, invariably, with the U.S. Supreme Court.

Court members have agreed unanimously on ex post facto arguments, but it have also split over the issue. In California Department of Corrections v. Morales, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995), Jose Ramon Morales challenged a 1981 amendment (Cal. Penal Code Ann. Sec. 3041 [West 1982]) to California's Parole statute that allowed the California Board of Prison Terms to defer for three years the parole hearings of multiple murderers (1977 Cal. Stats. ch. 165, sec. 46). Before the amendment, California law stated that a prisoner eligible for parole was entitled to a parole hearing every year. Morales had two convictions for murder, his second conviction coming in 1980, one year before passage of the amendment.

In 1989, the board denied parole to Morales and scheduled Morales's next hearing for 1992. Morales filed suit, arguing that the amendment was retroactive punishment and therefore unconstitutional. The district court disagreed. However, on appeal, the U.S. Court of Appeals for the Ninth Circuit reversed that decision, holding that the law effectively increased punishment for Morales, thus offending the Ex Post Facto Clause.

By a vote of 7 to 2, the U.S. Supreme Court reversed the Ninth Circuit. Justice Clarence Thomas, writing for the majority, noted

that the law only "introduced the possibility" that a convict would receive fewer parole hearings and serve more prison time than he or she expected. The board was required to formally find "no reasonable probability … for parole in the interim period" before it could defer a parole hearing for three years. According to the majority in Morales, the evident focus of the California law was " 'to relieve the [board] from the costly and time consuming responsibility of scheduling parole hearings' " (quoting In re Jackson, 39 Cal. 3d at 473, 216 Cal. Rptr. at 765, 703 P.2d at 106 [quoting legislative history]). The majority noted further that any assertion that the law might actually increase incarceration for those affected by it was largely "speculative."

Justices John Paul Stevens and david h. souter dissented. The dissent warned of legislative overreaching, arguing that "the concerns that animate the Ex Post Facto Clause demand enhanced, and not (as the majority seems to believe) reduced, judicial scrutiny." To Stevens and Souter, the majority's own opinion was speculative, and "not only unpersuasive, but actually perverse."

The Supreme Court has continued to be divided on issues related to this clause. In Carmell v. Texas, 529 U.S. 513, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000), the Court ruled, in a 5 to 4 decision, that several criminal convictions of a sex offender could not stand because the state of Texas had changed the rules of evidence after he had committed the offenses. The defendant, Scott Carmell, was sentenced to life in prison for fifteen counts involving various sexual offenses against his stepdaughter. The victim was twelve- to sixteen-years old during the period that the offenses occurred. In 1993, the Texas Legislature changed its rules of evidence so that a person could be convicted based only on the testimony of the victim if the victim was less than eighteen years old at the time of the offense. The previous age limit in Texas for a victim was fourteen years old.

Carmell challenged the convictions for offenses that occurred when the victim was older than fourteen, but younger than eighteen, because the change in the rules of evidence amounted to an ex post facto law. The Supreme Court, per Justice John Paul Stevens, agreed with the defendant. According to the majority, "laws that lower the Burden of Proof and laws that reduce the quantum of evidence necessary to meet the burden are indistinguishable in all meaningful ways relevant to the concerns of the Ex Post Facto Clause."

The following year, the Court again considered the application of the clause in Rogers v. Tennessee, 532 U.S. 451, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001). The Court examined the relation of the clause to the Fourteenth Amendment's due process clause and to Common Law rules. It ruled that the clause did not apply to a state supreme court decision that abolished a common law rule dating back to medieval England.

The debate over ex post facto interpretation continues. Critics of contemporary ex post facto interpretation argue that legislatures circumvent the ex post facto prohibition by casting in civil terms laws that provide additional punishment for convicted criminals. For example, they have passed laws that require certain convicted sex offenders to register with local authorities and thus make public their continued presence in a community. By virtue of the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C.A. § 14071(a)(1)(A)), such laws are required of states that wish to receive certain anti-drug funds.

Sex offender registration laws, or community notification laws, do not provide for retroactive additional incarceration. They do, however, provide additional consequences for a sex offender who was not, at the time the offense was committed, subject to such a constraint. Courts have held that such laws do not run afoul of the Ex Post Facto Clause, because, in part, the requirement is defined as civil regulation; that is, the law does not require extra prison time or exact an excessive fine. Also, such statutes are enacted for the protection of the public, which is an exception to ex post facto prohibition. Dissenters maintain that sex offender registration laws inflict additional punishment and therefore violate the Ex Post Facto Clause. Only one state, Alaska, has found such a law unconstitutional (Rowe v. Burton, 884 F. Supp. 1372 [D. Alaska 1994]).

The line between punitive measure and civil regulation can be thin. So long as legislatures pass laws that provide extra punishment for, or regulation of, conduct already committed, there will be arguments that the government is abusing its power in violation of the Ex Post Facto Clause.

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