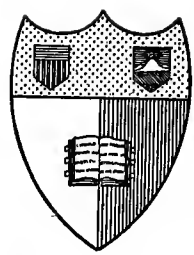

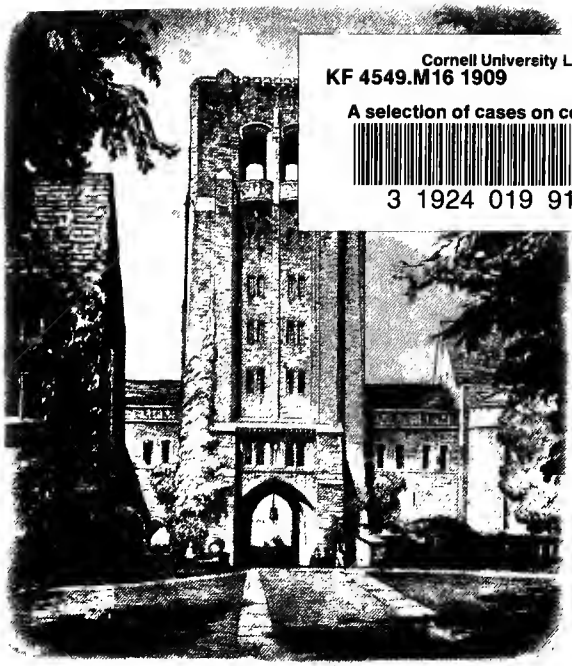

# CASES ON

# CONSTITUTIONAL LAW

*To accompany* THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW. By THOMAS M. COOLEY, LL.D. . . . . *One volume*, 12*mo*.

A

# SELECTION OF CASES

ON

# CONSTITUTIONAL LAW

BY

EMLIN McCLAIN, A.M., LL.D.

SECOND EDITION

BOSTON
LITTLE, BROWN, AND COMPANY
1909

# PREFACE TO SECOND EDITION.

THE changes and additions which have been thought necessary to bring this collection of cases down to the present time are of three classes:

First. Some cases which have been so explained or limited by the Supreme Court of the United States that they have become misleading as present statements of the law have been eliminated and in their places later cases containing the more recent expositions of the same subjects have been substituted.

Second. A considerable number of recent cases illustrating the application of cases in the text have been referred to by brief statements, in the notes, of the points decided.

Third. Some important recent cases relating to Interstate Commerce, the Government of Annexed Territory, Due Process of Law, and Equal Protection of the Laws, have been added in appendices under proper headings. Except as cases have been eliminated from the text by the substitution of more recent cases on the same subjects, there is no substantial change in the text, new groups of cases being put in the appendices.

EMLIN McCLAIN.

IOWA CITY, September, 1909.

# PREFACE.

THE object of this collection of cases is to furnish to the student the means of pursuing the study of constitutional law by the case method. The general outline of the plan of arrangement adopted by Judge Cooley in his "Principles of Constitutional Law" is followed, and in subject-matter the two books correspond chapter by chapter and almost section by section, save that the first two chapters of Judge Cooley's work, which are general and historical, are represented in this collection by two chapters which contain cases relating to the general nature of the Federal Constitution and the relation of the States to the Federal Government; while the scope of the third chapter is extended to cover some questions which it seems proper to bring together, although in the "Principles" they are treated later in connection with other subjects.

This collection of cases may therefore be used as the sole students' book on the subject, the teacher giving such historical matter as to the origin of constitutional principles and as to the adoption of the constitutional system as he deems necessary; or it may be used to supplement Cooley's "Principles" and enable the student to read a series of cases illustrative of the text of that work, and thus do more effectively the case reading which any teacher, using the text-book, would like to have his students do in connection with the study of the text. To make the use of this book as an independent work convenient and satisfactory, the Federal Constitution has been reprinted, and a table of contents, a table of cases, and a full index have been given.

It has not been easy to include those important cases which would be looked for in a collection of this kind and with which every student of this subject should become familiar, and at the same time reasonably cover all the subject-matter which should

come within the scope of a course of instruction. It has been necessary to bear in mind limitations inherent in the fact that only a certain amount of time can be given to the subject in any law-school course. Moreover, many of the important cases are very long, and to print them in full would require not only a large book, but a disproportionate amount of reading on the part of the student. Therefore, while there is a well-founded objection to the abridgment of cases, it has been thought expedient to recognize these limitations, and to put some of the cases into a shorter compass by the omission of the less material parts. In doing this, however, care has been taken not to destroy the essential features of the case or reduce it to a mere statement of abstract principles. The statements of facts have often been shortened by the elimination of matter not necessary to make plain the constitutional questions involved; but sufficient facts have been preserved in each case to enable the student to understand clearly how the question arises from the facts, as well as enough of the opinion to enable him to follow the reasoning of the court with regard to the facts. In other words, the cases as here presented, even when abridged, have the characteristics of the decisions of courts in cases which have come before them, and are not the mere enunciation of general principles. All omissions of parts of the opinions are indicated by points, or by inserting explanatory matter in brackets.

Where a connected line of decisions has been found on one particular question it has often been practicable either to give the early leading case, with short extracts from the later cases exemplifying and illustrating the doctrine, or a later case in which the reasoning of the earlier cases is fully set out; and when a case is thus fully enough stated in another opinion to render it intelligible to the student as a case, it has been included in the table of cases in parentheses, with a reference to the page on which it is thus cited. This will frequently enable one using the table of cases to reach the subject-matter of a leading case which he has in mind, even though that case may not be printed in full. The table of cases, however, does not purport to give all the cases cited, but only those which are so fully cited that the statement of them substantially serves as a reproduction of the case itself.

In the matter of dissenting opinions there has been considerable difficulty in reaching a satisfactory conclusion; but in view of the necessary limits of time and space it has been thought that, on the whole, the reading of the prevailing opinions of the courts is a better exercise for the student than the reading of the dissenting opinions. And while the fact of dissent, if any, is preserved in each case, — and in many cases there is some short extract from the dissenting opinion showing the discrepancy between the reasoning of the majority and the minority of the court, — yet, in general, the opinions of the dissenting judges are not given.

The ground covered by this collection is not restricted to the questions arising under the Federal Constitution, and many subjects are included which involve the usual provisions of State Constitutions as well, the plan of Judge Cooley's book being preserved in this respect as in others. But where opinions of the Supreme Court of the United States bear on the questions which arise under State Constitutions, those decisions have been preferred to the decisions of the State courts on the same questions.

EMLIN McCLAIN.

State University of Iowa,
Iowa City, February, 1900.

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# CONSTITUTION OF THE UNITED STATES.

**We, the people** of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

## ARTICLE I.

SECTION 1. All legislative powers herein granted, shall be vested in a congress of the United States, which shall consist of a senate and house of respresentatives.

SEC. 2. The house of representatives shall be composed of members chosen every second year by the people of the several states; and the electors in each state have the qualifications requisite for electors of the most numerous branch of the state legislature.

No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

[Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.][1] The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative, and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four,

[1] The clause included in brackets is amended by the fourteenth amendment, second section.

Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

The house of representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

SEC. 3. The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen, by resignation or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

The vice-president of the United States shall be president of the senate, but shall have no vote, unless they be equally divided.

The senate shall choose their other officers, and also a president *pro tempore*, in the absence of the vice-president, or when he shall exercise the office of president of the United States.

The senate shall have the sole power to try all impeachments. When sitting for that purpose they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit, under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

SEC. 4. The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof, but the congress may at any time by law make or alter such regulations except as to the places of choosing senators.

The congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SEC. 5. Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each house may provide.

Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SEC. 6. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emolument whereof shall have been increased during such time; and no person holding any office under the United States, shall be a member of either house during his continuance in office.

SEC. 7. All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills.

Every bill which shall have passed the house of representatives and the senate, shall, before it become a law, be presented to the president of the United States; if he approve he shall sign it, but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If, after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and, if approved by two-thirds of that house, it shall become a law. But in all such cases, the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill, shall be entered on the journal of each house respectively. If any bill shall

not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote, to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment) shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.

Sec. 8. The congress shall have power: —

To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities, and current coin of the United States;

To establish post-offices and post-roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the supreme court;

To define and punish piracies and felonies committed on the high seas, and offences against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies; but no appropriation of money, to that use, shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress;

To exercise exclusive legislation in all cases whatsoever, over such

district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings; — And

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

SEC. 9. 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 one thousand eight hundred and eight; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.

No bill of attainder or *ex post facto* law, shall be passed.

No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

No tax or duty shall be laid on articles exported from any state.

No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them, shall, without the consent of the congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

SEC. 10. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything 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.

No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress.

No state shall, without the consent of congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay

## ARTICLE II.

SECTION 1. The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and, together with the vice-president, chosen for the same term, be elected as follows: —

Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress; but no senator or representative or person holding an office of trust or profit under the United States, shall be appointed an elector.

[The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately choose, by ballot, one of them for president; and if no person have a majority, then from the five highest on the list, the said house shall, in like manner, choose the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors shall be the vice-president. But if there should remain two or more who have equal votes, the senate shall choose from them, by ballot, the vice-president.][1]

The congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

No person except a natural-born citizen, or a citizen of the United

[1] This clause has been superseded by the twelfth amendment.

States at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president, and the congress may by law provide for the case of removal, death, resignation, or inability, both of the president and vice-president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president shall be elected.

The president shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States or any of them.

Before he enter on the execution of his office, he shall take the following oath or affirmation: —

"I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect, and defend the constitution of the United States."

Sec. 2. The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion in writing of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and, by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for and which shall be established by law. But the congress may, by law, vest the appointment of such inferior officers as they think proper, in the president alone, in the courts of law, or in the heads of departments.

The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions, which shall expire at the end of their next session.

Sec. 3. He shall from time to time give to the congress information of the state of the union, and recommend to their consideration

such measures as he shall judge necessary and expedient. He may, on extraordinary occasions, convene both houses, or either of them; and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall receive ambassadors and other public ministers. He shall take care that the laws be faithfully executed; and shall commission all the officers of the United States.

SEC. 4. The president, vice-president, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

## ARTICLE III.

SECTION 1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior; and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

SEC. 2. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

SEC. 3. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

## ARTICLE IV.

SECTION 1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SEC. 2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SEC. 3. New states may be admitted by the congress into this union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the congress.

The congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States or of any particular state.

SEC. 4. The United States shall guaranty to every state in this union, a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

## ARTICLE V.

The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the

several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress; *provided*, that no amendment, which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.

## ARTICLE VI.

All debts contracted, and engagements entered into, before the adoption of this constitution, shall be as valid against the United States, under this constitution, as under the confederation.

This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

## ARTICLE VII.

The ratification of the conventions of nine states, shall be sufficient for the establishment of this constitution between the states so ratifying the same.

*Done in convention, by the unanimous consent of the states present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof, we have hereunto subscribed our names.*

[Signed by] GEORGE WASHINGTON, *President, and Deputy from Virginia,*
and by thirty-nine delegates.

# ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

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## ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

## ARTICLE II.

A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

## ARTICLE III.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

## ARTICLE IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## ARTICLE V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

## ARTICLE VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.

## ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

## ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## ARTICLE IX.

The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

## ARTICLE X.

The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

## ARTICLE XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

## ARTICLE XII.

SECTION 1. The electors shall meet in their respective states and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president; and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of

votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate: — the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted; — the person having the greatest number of votes for president, shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disability of the president. The person having the greatest number of votes as vice-president, shall be the vice-president, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list, the senate shall choose the vice-president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of president, shall be eligible to that of vice-president of the United States.

## ARTICLE XIII.

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Sec. 2. Congress shall have power to enforce this article by appropriate legislation.

## ARTICLE XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SEC. 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

SEC. 3. No person shall be a senator or representative in congress, or elector of president and vice-president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may, by a vote of two-thirds of each house, remove such disability.

SEC. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

SEC. 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## ARTICLE XV.

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

SEC. 2. The congress shall have power to enforce this article by appropriate legislation.

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[The first ten of these amendments were proposed by congress (with others which were not ratified by three-fourths of the legislatures of the several states), by resolution of 1789, and were ratified before 1791. The eleventh amendment was proposed by congress by

resolution of the year 1794, and was ratified before 1796. The twelfth article was proposed by congress by resolution of October, 1803, and was ratified before September, 1804. The thirteenth article was proposed by congress, by resolution, of the year 1865, and was ratified before December 18, 1865. The fourteenth article was proposed by congress, by resolution, of the year 1866, and was ratified before the 20th day of July, 1868. The fifteenth article was proposed by congress, by resolution, of the year 1869, and was ratified before the 30th day of March, 1870.]

# CASES

ON

# CONSTITUTIONAL LAW.

## CHAPTER I.

### NATURE OF THE FEDERAL CONSTITUTION AND ITS AMENDMENTS.

### McCULLOCH *v.* MARYLAND.

4 Wheaton, 316; 4 Curtis, 415. 1819.

[This was a suit in the courts of Maryland, by that State against plaintiff in error, as cashier of the Baltimore branch of the Bank of the United States, to recover taxes claimed to be due under a statute of Maryland. Defendant questioned the validity of such statute, and on judgment being rendered against him, brought the case to this court by writ of error.]

Marshall, C. J., delivered the opinion of the court.

In the case now to be determined, the defendant, a sovereign State, denies the obligation of a law enacted by the legislature of the Union; and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that State. The Constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that Constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the supreme court of the United States has the Constitution of our country devolved this important duty.

The first question made in the cause is, has Congress power to incorporate a bank?

It has been truly said, that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

It will not be denied that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted, if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the Constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

The power now contested was exercised by the first Congress elected under the present Constitution. The bill for incorporating the Bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the Constitution gave no countenance.

These observations belong to the cause: but they are not made under the impression that, were the question entirely new, the law would be found irreconcilable with the Constitution.

In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the Constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States. The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.

It would be difficult to sustain this proposition. The convention which framed the Constitution was, indeed, elected by the State

legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each State, by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the convention, by congress, and by the State legislatures, the instrument was submitted to the people. They acted upon it, in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several States; and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

From these conventions the Constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity." The assent of the States, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The Constitution when thus adopted, was of complete obligation, and bound the State sovereignties.

It has been said, that the people had already surrendered all their powers to the State sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government, does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the States. The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the confederation, the State sovereignties were certainly competent. But when, "in order to form a more perfect union," it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.

The government of the Union, then, (whatever may be the influence of this fact on the case,) is, emphatically and truly, a government of

the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise, as long as our system shall exist.

In discussing these questions, the conflicting powers of the general and State governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect it would be this: that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, "this Constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the State legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it.

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, "any thing in the constitution or laws of any State to the contrary notwithstanding."

Among the enumerated powers we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that every thing granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment, had experienced the embarrassments resulting from

the insertion of this word in the articles of confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the 9th section of the 1st article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is a constitution we are expounding.

Although, among the enumerated powers of government, we do not find the word "bank," or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may, with great reason, be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the North should be transported to the South, that raised in the East conveyed to the West, or that this order should be reversed. Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction, (unless the words imperiously require it,) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the Constitu-

tion, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

It is not denied that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation.

On what foundation does this argument rest? On this alone: The power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on Congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever, is a sovereign power; and if the government of the Union is restrained from creating a corporation, as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty; if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of Congress to pass other laws for the accomplishment of the same objects.

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America, the powers of sovereignty are divided between the government of the Union and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. We cannot comprehend that train of reasoning which would maintain that the extent of power granted by the people is to be ascertained, not by the nature and terms of the grant, but by its date. Some State constitutions were formed before, some since that of the United States. We cannot believe that their relation to each other is in any degree dependent upon this circumstance. Their respective powers must, we think, be precisely the same as if they had been formed at the same time. Had they been formed at the same time, and had the people conferred on the general government the power contained in

the Constitution, and on the States the whole residuum of power, would it have been asserted that the government of the Union was not sovereign with respect to those objects which were intrusted to it, in relation to which its laws were declared to be supreme? If this could not have been asserted, we cannot well comprehend the process of reasoning which maintains, that a power appertaining to sovereignty cannot be connected with that vast portion of it which is granted to the general government, so far as it is calculated to subserve the legitimate objects of that government. The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the Constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this Constitution, in the government of the United States, or in any department thereof."

The counsel for the State of Maryland have urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers.

In support of this proposition, they have found it necessary to contend that this clause was inserted for the purpose of conferring on Congress the power of making laws. That, without it, doubts might be entertained, whether Congress could exercise its powers in the form of legislation.

But could this be the object for which it was inserted? A government is created by the people, having legislative, executive, and judicial powers. Its legislative powers are vested in a Congress, which is to consist of a Senate and House of Representatives. Each house may determine the rule of its proceedings; and it is declared that every

bill which shall have passed both houses, shall, before it becomes a law, be presented to the President of the United States. The 7th section describes the course of proceedings, by which a bill shall become a law; and, then, the 8th section enumerates the powers of Congress. Could it be necessary to say that a legislature should exercise legislative powers, in the shape of legislation? After allowing each house to prescribe its own course of proceeding, after describing the manner in which a bill should become a law, would it have entered into the mind of a single member of the convention, that an express power to make laws was necessary to enable the legislature to make them? That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned.

But the argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

Is it true that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means, calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense — in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several

phrases. This comment on the word is well illustrated, by the passage cited at the bar, from the 10th section of the 1st article of the Constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying "imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary," by prefixing the word "absolutely." This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a Constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it. The powers vested in Congress may certainly be carried into execution, without prescribing an oath of office. The power to exact this security for the faithful performance of duty, is not given, nor is it indispensably necessary. The different departments may be established; taxes may be imposed and collected; armies and navies may be raised and maintained; and money may be borrowed, without requiring an oath of office. It might be argued, with as much plausibility as other incidental powers have been assailed, that the convention was not unmindful of this subject. The oath which might be exacted — that of fidelity to the Constitution — is prescribed, and no other can be required. Yet he would be charged with insanity who should contend, that the legislature might not superadd to the oath

directed by the Constitution, such other oath of office as its wisdom might suggest.

So with respect to the whole penal code of the United States. Whence arises the power to punish in cases not prescribed by the Constitution? All admit that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of Congress. The right to enforce the observance of law, by punishing its infraction, might be denied with the more plausibility, because it is expressly given in some cases. Congress is empowered "to provide for the punishment of counterfeiting the securities and current coin of the United States," and "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." The several powers of Congress may exist, in a very imperfect state to be sure, but they may exist and be carried into execution, although no punishment should be inflicted in cases where the right to punish is not expressly given.

Take, for example, the power "to establish post-offices and post-roads." This power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is, indeed, essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offences is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

The baneful influence of this narrow construction on all the operations of the government, and the absolute impracticability of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the Constitution, and from our laws. The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise.

If this limited construction of the word "necessary" must be abandoned in order to punish, whence is derived the rule which would reinstate it, when the government would carry its powers into execution by means not vindictive in their nature? If the word "neces-

sary" means "needful," "requisite," "essential," "conducive to," in order to let in the power of punishment for the infraction of law, why is it not equally comprehensive when required to authorize the use of means which facilitate the execution of the powers of government without the infliction of punishment?

In ascertaining the sense in which the word "necessary" is used in this clause of the Constitution, we may derive some aid from that with which it is associated. Congress shall have power "to make all laws which shall be necessary and proper to carry into execution" the powers of the government. If the word "necessary" was used in that strict and rigorous sense for which the counsel for the State of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation not straitened and compressed within the narrow limits for which gentlemen contend.

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the State of Maryland, is founded on the intention of the convention, as manifested in the whole clause. To waste time and argument in proving that, without it, Congress might carry its powers into execution, would be not much less idle than to hold a lighted taper to the sun. As little can it be required to prove, that in the absence of this clause, Congress would have some choice of means. That it might employ those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional. This clause, as construed by the State of Maryland, would abridge and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too apparent for controversy. We think so for the following reasons: —

1. The clause is placed among the powers of Congress, not among the limitations on those powers.

2. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been or can be assigned, for thus concealing an intention to narrow the discretion of the national legislature, under words which purport to enlarge it. The framers of the Constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and after deep reflection, impress on the mind another, they would rather have disguised the grant of power than its limitation. If, then, their intention had been, by this clause, to restrain

the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these: "In carrying into execution the foregoing powers, and all others," etc., "no laws shall be passed but such as are necessary and proper." Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been sufficiently proved. If we look to the origin of corporations, to the manner in which they have been framed in that government from which we have derived most of our legal principles and ideas, or to the uses to which they have been applied, we find no reason to suppose that a Constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this. Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the government. But being considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it.

The propriety of this remark would seem to be generally acknowledged by the universal acquiescence in the construction which has been uniformly put on the 3d section of the 4th article of the Constitution. The power to "make all needful rules and regulations respecting the territory or other property belonging to the United

States," is not more comprehensive than the power "to make all laws which shall be necessary and proper for carrying into execution" the powers of the government. Yet all admit the constitutionality of a territorial government, which is a corporate body.

If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of Congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing its importance and necessity; and so strongly have they been felt, that statesmen of the first class, whose previous opinions against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. Under the confederation, Congress justifying the measure by its necessity, transcended, perhaps, its powers to obtain the advantage of a bank; and our own legislation attests the universal conviction of the utility of this measure. The time has passed away when it can be necessary to enter into any discussion in order to prove the importance of this instrument, as a means to effect the legitimate objects of the government.

But were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

[Accordingly the court holds the Act of Congress incorporating the Bank of the United States to be valid, and therefore that the Bank and its branches are not subject to State taxation. For the reasoning on this point see cases under Chapter IV, Sec. I, (*b*). The judgment of the Supreme Court of Maryland is therefore reversed.]

## BARRON *v.* BALTIMORE.

7 Peters, 243; 10 Curtis, 464. 1833.

ERROR to the court of appeals of the western shore of the State of Maryland.

Case by the plaintiff in error against the city of Baltimore, to recover damages for injuries to the wharf-property of the plaintiff, arising from the acts of the corporation.

The city, in the asserted exercise of its corporate authority over the harbor, the paving of streets, and regulating grades for paving, and over the health of Baltimore, diverted from their accustomed and natural course, certain streams of water, which flow from the range of hills bordering the city, and diverted them so that they made deposits of sand and gravel near the plaintiff's wharf, and thereby rendered the water shallow, and prevented the access of vessels.

The decision of Baltimore county court was against the defendants, and a verdict for $4,500 was rendered for the plaintiff. The court of appeals reversed the judgment of Baltimore county court, and did not remand the case to that court for a further trial. From this judgment the defendant in the court of appeals, prosecuted a writ of error to this court.

MARSHALL, C. J., delivered the opinion of the court.

The judgment brought up by this writ of error having been rendered by the court of a State, this tribunal can exercise no jurisdiction over it, unless it be shown to come within the provisions of the 25th section of the Judicial Act.[1]

The plaintiff in error contends that it comes within that clause in the 5th amendment to the Constitution, which inhibits the taking of private property for public use, without just compensation. He insists that this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a State, as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause.

The question thus presented is, we think, of great importance, but not of much difficulty.

The Constitution was ordained and established by the people of the United States for themselves, for their own government and not for the government of the individual States. Each State established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by

[1] Stats. at Large, 85.

itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

If these propositions be correct, the 5th amendment must be understood as restraining the power of the general government, not as applicable to the States. In their several constitutions they have imposed such restrictions on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest.

The counsel for the plaintiff in error insists that the Constitution was intended to secure the people of the several States against the undue exercise of power by their respective State governments; as well as against that which might be attempted by their general government. In support of this argument he relies on the inhibitions contained in the 10th section of the 1st article.

We think that section affords a strong if not a conclusive argument in support of the opinion already indicated by the court.

The preceding section contains restrictions which are obviously intended for the exclusive purpose of restraining the exercise of power by the departments of the general government. Some of them use language applicable only to Congress; others are expressed in general terms. The 3d clause, for example, declares that "no bill of attainder or *ex post facto* law shall be passed." No language can be more general; yet the demonstration is complete that it applies solely to the government of the United States. In addition to the general arguments furnished by the instrument itself, some of which have been already suggested, the succeeding section, the avowed purpose of which is to restrain State legislation, contains in terms the very prohibition. It declares that "no State shall pass any bill of attainder or *ex post facto* law." This provision, then, of the 9th section, however comprehensive its language, contains no restriction on State legislation.

The 9th section having enumerated, in the nature of a bill of rights, the limitations intended to be imposed on the powers of the general government, the 10th proceeds to enumerate those which were to operate on the State legislatures. These restrictions are brought together in the same section, and are by express words applied to the States. "No State shall enter into any treaty," etc. Perceiving that in a Constitution framed by the people of the United States for the government of all, no limitation of the action of government on the people would apply to the State government, unless expressed in terms; the restrictions contained in the 10th section are in direct words so applied to the States.

It is worthy of remark, too, that these inhibitions generally restrain State legislation on subjects intrusted to the general government, or in which the people of all the States feel an interest.

A State is forbidden to enter into any treaty, alliance, or confederation. If these compacts are with foreign nations, they interfere with the treaty-making power, which is conferred entirely on the general government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the Constitution. To grant letters of marque and reprisal, would lead directly to war; the power of declaring which is expressly given to Congress. To coin money is also the exercise of a power conferred on Congress. It would be tedious to recapitulate the several limitations on the powers of the States which are contained in this section. They will be found, generally, to restrain State legislation on subjects intrusted to the government of the Union, in which the citizens of all the States are interested. In these alone were the whole people concerned. The question of their application to States is not left to construction. It is averred in positive words.

If the original Constitution, in the 9th and 10th sections of the 1st article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government, and on those of the States; if in every inhibition intended to act on State power, words are employed which directly express that intent; some strong reason must be assigned for departing from this safe and judicious course in framing the amendments, before that departure can be assumed.

We search in vain for that reason.

Had the people of the several States, or any of them, required changes in their constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments; the remedy was in their own hands, and would have been applied by themselves. A convention would have been assembled by the discontented State, and the required improvements would have been made by itself. The unwieldy and cumbrous machinery of procuring a recommendation from two thirds of Congress, and the assent of three fourths of their sister States, could never have occurred to any human being as a mode of doing that which might be effected by the State itself. Had the framers of these amendments intended them to be limitations on the powers of the State governments, they would have imitated the framers of the original Constitution, and have expressed that intention. Had Congress engaged in the extraordinary occupation of improving the constitutions of the several States by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

But it is universally understood, it is a part of the history of the

day, that the great revolution which established the Constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government, not against those of the local governments.

In compliance with a sentiment thus generally expressed to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the States. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.

We are of opinion that the provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the States. We are therefore of opinion, that there is no repugnancy between the several acts of the general assembly of Maryland, given in evidence by the defendants at the trial of this cause, in the court of that State, and the constitution of the United States. This court, therefore, has no jurisdiction of the cause; and it is dismissed.[1]

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## TWINING *v.* STATE OF NEW JERSEY.

211 U. S. 78; 29 Sup. Ct. Rep. 14. 1908.

[THE plaintiff in error and another, designated in the opinion as defendants, were tried in the Monmouth County Court in New Jersey on the charge of exhibiting a false paper as bank directors to the state bank examiner with intent to deceive him as to the condition of the bank of which they were directors, such offense being a misdemeanor by the statutes of the state. During the trial the judge instructed the jurors that they might consider the fact that defendants had not gone upon the stand to testify, as a circumstance against them under the evidence, from which circumstance an inference unfavorable to the defendants might be drawn. The defendants were convicted, and a judgment of imprisonment imposed upon them was affirmed successively in the Supreme Court and the Court of Errors and Appeals of the State.]

[1] *Acc.* Fox *v.* Ohio, 5 How. 410; Walker *v.* Sauvinet, 92 U. S. 90; Presser *v.* Illinois, 116 U. S. 252; Spies *v.* Illinois, 123 U. S. 131.

Mr. Justice Moody delivered the opinion of the court.

[Under the Constitution of New Jersey there is no prohibition against compelling a defendant in a criminal case to be a witness against himself.]

The defendants contend, in the first place, that the exemption from self-incrimination is one of the privileges and immunities of citizens of the United States which the Fourteenth Amendment forbids the States to abridge. It is not argued that the defendants are protected by that part of the Fifth Amendment which provides that "no person . . . shall be compelled in any criminal case to be a witness against himself," for it is recognized by counsel that by a long line of decisions the first ten Amendments are not operative on the States. Barron *v.* Baltimore, 7 Pet. 243 [**14**]; Spies *v.* Illinois, 123 U. S. 131; Brown *v.* New Jersey, 175 U. S. 172; Barrington *v.* Missouri, 205 U. S. 483. But it is argued that this privilege is one of the fundamental rights of National citizenship, placed under National protection by the Fourteenth Amendment.

[The phrase "privileges and immunities of citizens of the United States" is discussed with reference to the Slaughter-House Cases, 16 Wall. 36 [**19**] and other decisions of the court, with the conclusion that exemption from self-crimination is not a privilege or immunity of National citizenship, unless it be by reason of the express reference thereto in the Fifth Amendment.]

But assuming it to be true that the exemption from self-incrimination is not, as a fundamental right of National citizenship, included in the privileges and immunities of citizens of the United States, counsel insist that, as a right specifically granted or secured by the Federal Constitution, it is included in them. This view is based upon the contention which must now be examined, that the safeguards of personal rights which are enumerated in the first eight Articles of amendment to the Federal Constitution, sometimes called the Federal Bill of Rights, though they were by those amendments originally secured only against National action, are among the privileges and immunities of citizens of the United States, which this clause of the Fourteenth Amendment protects against state action. This view has been, at different times, expressed by justices of this court (Mr. Justice Field in O'Niel *v.* Vermont, 144 U. S. 323, 361; Mr. Justice Harlan in the same case, 370, and in Maxwell *v.* Dow, 176 U. S. 606, 617), and was undoubtedly that entertained by some of those who framed the Amendment. It is, however, not profitable to examine the weighty arguments in its favor, for the question is no longer open in this court. The right of trial by jury in civil cases guaranteed by the Seventh Amendment (Walker *v.* Sauvinet, 92 U. S. 90), and the right to bear arms guaranteed by the Second Amendment (Presser *v.* Illinois, 116 U. S. 252), have been distinctly held not to be privileges and immunities of citizens of the United States guaranteed by the Fourteenth Amendment against abridgment

by the States, and in effect the same decision was made in respect of the guarantee against prosecution, except by indictment of a grand jury, contained in the Fifth Amendment (Hurtado *v.* California, 110 U. S. 516 [**905**]), and in respect of the right to be confronted with witnesses, contained in the Sixth Amendment. West *v.* Louisiana, 194 U. S. 258. In Maxwell *v.* Dow, *supra*, where the plaintiff in error had been convicted in a state court of a felony upon an information, and by a jury of eight persons, it was held that the indictment, made indispensable by the Fifth Amendment, and the trial by jury guaranteed by the Sixth Amendment, were not privileges and immunities of citizens of the United States, as those words were used in the Fourteenth Amendment. . . . We conclude, therefore, that the exemption from compulsory self-incrimination is not a privilege or immunity of National citizenship guaranteed by this clause of the Fourteenth Amendment against abridgment by the States.

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Mr. Justice Harlan delivered a dissenting opinion.

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## SLAUGHTER-HOUSE CASES.

[The Butchers' Benevolent Association of New Orleans *v.* The Crescent City Live-Stock Landing and Slaughter-House Company and other cases.]

16 Wallace, 36. 1872.

Mr. Justice Miller delivered the opinion of the court.

These cases are brought here by writs of error to the Supreme Court of the State of Louisiana. They arise out of the efforts of the butchers of New Orleans to resist the Crescent City Live-Stock Landing and Slaughter-House Company in the exercise of certain powers conferred by the charter which created it, and which was granted by the legislature of that State.

[The general legislative power to grant exclusive privileges in slaughtering animals is considered, and held to be within the police power as usually exercised.]

It may, therefore, be considered as established, that the authority of the legislature of Louisiana to pass the present statute is ample, unless some restraint in the exercise of that power be found in the constitution of that State or in the amendments to the Constitution of the United States, adopted since the date of the decisions we have already cited.

If any such restraint is supposed to exist in the constitution of the State, the Supreme Court of Louisiana having necessarily

passed on that question, it would not be open to review in this court.

The plaintiffs in error accepting this issue, allege that the statute is a violation of the Constitution of the United States in these several particulars:

That it creates an involuntary servitude forbidden by the thirteenth article of amendment;

That it abridges the privileges and immunities of citizens of the United States;

That it denies to the plaintiffs the equal protection of the laws; and,

That it deprives them of their property without due process of law; contrary to the provisions of the first section of the fourteenth article of amendment.

This court is thus called upon for the first time to give construction to these articles.

We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, and of the several States to each other and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members. We have given every opportunity for a full hearing at the bar; we have discussed it freely and compared views among ourselves; we have taken ample time for careful deliberation, and we now propose to announce the judgments which we have formed in the construction of those articles, so far as we have found them necessary to the decision of the cases before us, and beyond that we have neither the inclination nor the right to go.

Twelve articles of amendment were added to the Federal Constitution soon after the original organization of the government under it in 1789. Of these all but the last were adopted so soon afterwards as to justify the statement that they were practically contemporaneous with the adoption of the original; and the twelfth, adopted in 1803, was so nearly so as to have become, like all the others, historical and of another age. But within the last eight years three other articles of amendment of vast importance have been added by the voice of the people to that now venerable instrument.

The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. Nor can such doubts, when any reasonably exist, be safely and rationally solved without a reference to that history; for in it is found the occasion and the necessity for recurring again to the great source of power in this country,

the people of the States, for additional guarantees of human rights; additional powers to the Federal government; additional restraints upon those of the States. Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt.

The institution of African slavery, as it existed in about half the States of the Union, and the contests pervading the public mind for many years, between those who desired its curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation, culminated in the effort, on the part of most of the States in which slavery existed, to separate from the Federal government, and to resist its authority. This constituted the war of the rebellion, and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery.

In that struggle slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict. When the armies of freedom found themselves upon the soil of slavery they could do nothing less than free the poor victims whose enforced servitude was the foundation of the quarrel. And when hard pressed in the contest these men (for they proved themselves men in that terrible crisis) offered their services and were accepted by thousands to aid in suppressing the unlawful rebellion, slavery was at an end wherever the Federal government succeeded in that purpose. The proclamation of President Lincoln expressed an accomplished fact as to a large portion of the insurrectionary districts, when he declared slavery abolished in them all. But the war being over, those who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or the proclamation of the Executive, both of which might have been questioned in after times, and they determined to place this main and most valuable result in the Constitution of the restored Union as one of its fundamental articles. Hence the thirteenth article of amendment of that instrument. Its two short sections seem hardly to admit of construction, so vigorous is their expression and so appropriate to the purpose we have indicated.

"1. Neither slavery nor involuntary servitude except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

"2. Congress shall have power to enforce this article by appropriate legislation."

To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government — a declaration designed to establish the freedom of four millions of slaves — and with a

microscopic search endeavor to find in it a reference to servitudes, which may have been attached to property in certain localities, requires an effort, to say the least of it.

That a personal servitude was meant is proved by the use of the word "involuntary," which can only apply to human beings. The exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant. The word servitude is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery. It was very well understood that in the form of apprenticeship for long terms, as it had been practised in the West India Islands, on the abolition of slavery by the English government, or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded, if only the word slavery had been used. The case of the apprentice slave, held under a law of Maryland, liberated by Chief Justice Chase, on a writ of habeas corpus under this article, illustrates this course of observation. Matter of Turner, 1 Abbott United States Reports, 84. And it is all that we deem necessary to say on the application of that article to the statute of Louisiana, now under consideration.

The process of restoring to their proper relations with the Federal government and with the other States those which had sided with the rebellion, undertaken under the proclamation of President Johnson in 1865, and before the assembling of Congress, developed the fact that, notwithstanding the formal recognition by those States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before. Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.

They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.

These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the Federal government in safety through

the crisis of the rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the fourteenth amendment, and they declined to treat as restored to their full participation in the government of the Union the States which had been in insurrection, until they ratified that article by a formal vote of their legislative bodies.

Before we proceed to examine more critically the provisions of this amendment, on which the plaintiffs in error rely, let us complete and dismiss the history of the recent amendments, as that history relates to the general purpose which pervades them all. A few years' experience satisfied the thoughtful men who had been the authors of the other two amendments that, notwithstanding the restraints of those articles on the States, and the laws passed under the additional powers granted to Congress, these were inadequate for the protection of life, liberty, and property, without which freedom to the slave was no boon. They were in all those States denied the right of suffrage. The laws were administered by the white man alone. It was urged that a race of men distinctively marked as was the negro, living in the midst of another and dominant race, could never be fully secured in their person and their property without the right of suffrage.

Hence the fifteenth amendment, which declares that "the right of a citizen of the United States to vote shall not be denied or abridged by any State on account of race, color, or previous condition of servitude." The negro having, by the fourteenth amendment, been declared to be a citizen of the United States, is thus made a voter in every State of the Union.

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction.

Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.

The first section of the fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship — not only citizenship of the United States, but citizenship of the States. No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress. It had been the occasion of much discussion in the courts, by the executive departments, and in the public journals. It had been said by eminent judges that no man was a citizen of the United States, except as he was a citizen of one of the States composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens. Whether this proposition was sound or not had never been judicially decided. But it had been held by this court, in the celebrated Dred Scott case, only a few years before the outbreak of the civil war, that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen, were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution.

To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a State, the first clause of the first section was framed. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The first observation we have to make on this clause is, that it

puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the Dred Scott decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase, "subject to its jurisdiction" was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.

The next observation is more important in view of the arguments of counsel in the present case. It is, that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States. The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.

The language is, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of *the United States.*" It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.

If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.

The first occurrence of the words "privileges and immunities" in our constitutional history, is to be found in the fourth of the articles of the old Confederation.

It declares "that the better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively."

In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in section two of the fourth article, in the following words: "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."

There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

Fortunately we are not without judicial construction of this clause of the Constitution. The first and the leading case on the subject is that of Corfield *v.* Coryell decided by Mr. Justice Washington in the Circuit Court for the District of Pennsylvania in 1823. 4 Washington's Circuit Court, 371.

"The inquiry," he says, "is, what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are *fundamental;* which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."

This definition of the privileges and immunities of citizens of the

States is adopted in the main by this court in the recent case of Ward *v.* The State of Maryland, 12 Wallace, 430, while it declines to undertake an authoritative definition beyond what was necessary to that decision. The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted. They are, in the language of Judge Washington, those rights which are fundamental. Throughout his opinion, they are spoken of as rights belonging to the individual as a citizen of a State. They are so spoken of in the constitutional provision which he was construing. And they have always been held to be the class of rights which the State governments were created to establish and secure. In the case of Paul *v.* Virginia, 8 Wall. 180, the court, in expounding this clause of the Constitution, says that "the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens."

The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens.

Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.

It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments, no claim or pretence was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States — such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government. Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States*, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress

shall have the power to enforce that article,' was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and not by this article placed under the special care of the Federal government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so.

But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal government, its National character, its Constitution, or its laws.

One of these is well described in the case of Crandall *v.* Nevada, 6 Wallace, 36. It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution,

"to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the sub-treasuries, land offices, and courts of justice in the several States." And quoting from the language of Chief Justice Taney in another case, it is said "that *for all the great purposes for which the Federal government* was established, we are one people, with one common country, *we are all citizens of the United States;*" and it is, as such citizens, that their rights are supported in this court in Crandall *v.* Nevada.

Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State. To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth, next to be considered.

But it is useless to pursue this branch of the inquiry, since we are of opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the fourteenth amendment under consideration.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws."

The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law. The first of these paragraphs has been in the Constitution

since the adoption of the fifth amendment, as a restraint upon the Federal power. It is also to be found in some form of expression in the constitutions of nearly all the States, as a restraint upon the power of the States. This law, then, has practically been the same as it now is during the existence of the government, except so far as the present amendment may place the restraining power over the States in this matter in the hands of the Federal government.

We are not without judicial interpretation, therefore, both State and National, of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

"Nor shall any State deny to any person within its jurisdiction the equal protection of the laws."

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

If, however, the States did not conform their laws to its requirements, then by the fifth section of the article of amendment Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a State that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of State oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the amendment.

In the early history of the organization of the government, its statesmen seem to have divided on the line which should separate the powers of the National government from those of the State governments, and though this line has never been very well defined in public opinion, such a division has continued from that day to this.

The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the Federal power. And it cannot be denied that such a jealousy continued to exist with many

patriotic men until the breaking out of the late civil war. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the State, and of contiguous States, for a determined resistance to the General Government.

Unquestionably this has given great force to the argument, and added largely to the number of those who believe in the necessity of a strong National government.

But, however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights — the rights of person and of property — was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation.

But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts.

The judgments of the Supreme Court of Louisiana in these cases are *Affirmed.*[1]

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## UNITED STATES *v.* CRUIKSHANK.

92 United States, 542. 1875.

Mr. Chief Justice Waite delivered the opinion of the court.

This case comes here with a certificate by the judges of the Circuit Court for the District of Louisiana that they were divided in opinion upon a question which occurred at the hearing. It presents for our consideration an indictment containing sixteen counts, divided into two series of eight counts each, based upon sect. 6 of the Enforcement Act of May 31, 1870. That section is as follows: —

"That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of an-

[1] Mr. Justice Field delivered a dissenting opinion, in which Mr. Chief Justice Chase, Mr. Justice Swayne, and Mr. Justice Bradley concurred.

Other cases as to the effect of the Fourteenth Amendment will be found in Chap. XIII., Sect. IV.

other, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States, or because of his having exercised the same, such person shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court, — the fine not to exceed $5,000, and the imprisonment not to exceed ten years; and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the constitution or laws of the United States." 16 Stat. 141.

The question certified arose upon a motion in arrest of judgment after a verdict of guilty generally upon the whole sixteen counts, and is stated to be, whether "the said sixteen counts of said indictment are severally good and sufficient in law, and contain charges of criminal matter indictable under the laws of the United States."

The general charge in the first eight counts is that of "banding," and in the second eight, that of "conspiring" together to injure, oppress, threaten, and intimidate Levi Nelson and Alexander Tillman, citizens of the United States, of African descent and persons of color, with the intent thereby to hinder and prevent them in their free exercise and enjoyment of rights and privileges "granted and secured" to them "in common with all other good citizens of the United States by the constitution and laws of the United States."

The offences provided for by the statute in question do not consist in the mere "banding" or "conspiring" of two or more persons together, but in their banding or conspiring with the intent, or for any of the purposes, specified. To bring this case under the operation of the statute, therefore, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the constitution or laws of the United States. If it does not so appear, the criminal matter charged has not been made indictable by any act of Congress.

We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other. Slaughter-House Cases, 16 Wall. 74.

Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights. In the formation of a government, the people may confer

upon it such powers as they choose. The government, when so formed, may, and when called upon should, exercise all the powers it has for the protection of the rights of its citizens and the people within its jurisdiction; but it can exercise no other. The duty of a government to afford protection is limited always by the power it possesses for that purpose.

Experience made the fact known to the people of the United States that they required a national government for national purposes. The separate governments of the separate States, bound together by the articles of confederation alone, were not sufficient for the promotion of the general welfare of the people in respect to foreign nations, or for their complete protection as citizens of the confederated States. For this reason, the people of the United States, "in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty" to themselves and their posterity (Const. Preamble), ordained and established the government of the United States, and defined its powers by a Constitution, which they adopted as its fundamental law, and made its rule of action.

The government thus established and defined is to some extent a government of the States in their political capacity. It is also, for certain purposes, a government of the people. Its powers are limited in number, but not in degree. Within the scope of its powers, as enumerated and defined, it is supreme and above the States; but beyond, it has no existence. It was erected for special purposes, and endowed with all the powers necessary for its own preservation and the accomplishment of the ends its people had in view. It can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction.

The people of the United States resident within any State are subject to two governments: one State, and the other National; but there need be no conflict between the two. The powers which one possesses, the other does not. They are established for different purposes, and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad. True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. Thus, if a marshal of the United States is unlawfully resisted while executing the process of the courts within a State, and the resistance is accompanied by an assault on the officer, the sovereignty of the United States is violated by the resistance, and that of the State by the breach of peace, in the assault. So, too, if one passes counterfeit coin of the United States within a State, it may be an offence against the United States and the State: the United States, because it discredits the coin; and the State, because of the fraud upon him to whom it is passed. This does not, however, necessarily imply that the two governments pos-

sess powers in common, or bring them into conflict with each other. It is the natural consequence of a citizenship which owes allegiance to two sovereignties, and claims protection from both. The citizen cannot complain, because he has voluntarily submitted himself to such a form of government. He owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return, he can demand protection from each within its own jurisdiction.

The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States.

We now proceed to an examination of the indictment, to ascertain whether the several rights, which it is alleged the defendants intended to interfere with, are such as had been in law and in fact granted or secured by the Constitution or laws of the United States.

The first and ninth counts state the intent of the defendants to have been to hinder and prevent the citizens named in the free exercise and enjoyment of their "lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceful and lawful purpose." The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It "derives its source," to use the language of Chief Justice Marshall, in Gibbons *v.* Ogden, 9 Wheat. 211, "from those laws whose authority is acknowledged by civilized man throughout the world." It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection. As no direct power over it was granted to Congress, it remains, according to the ruling in Gibbons *v.* Ogden, id. 203, subject to State jurisdiction. Only such existing rights were committed by the people to the protection of Congress as came within the general scope of the authority granted to the national government.

The first amendment to the Constitution prohibits Congress from abridging "the right of the people to assemble and to petition the government for a redress of grievances." This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone. Barron *v.* The City of Baltimore, 7 Pet. 250; Lessee of Livingston *v.* Moore, id. 551; Fox *v.* Ohio, 5 How. 434; Smith *v.* Mary-

land, 18 id. 76; Withers v. Buckley, 20 id. 90; Pervear v. The Commonwealth, 5 Wall. 479; Twitchell v. The Commonwealth, 7 id. 321; Edwards v. Elliott, 21 id. 557. It is now too late to question the correctness of this construction. As was said by the late Chief Justice in Twitchell v. The Commonwealth, 7 Wall. 325, "the scope and application of these amendments are no longer subjects of discussion here." They left the authority of the States just where they found it, and added nothing to the already existing powers of the United States.

The particular amendment now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States.

The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States. Such, however, is not the case. The offence, as stated in the indictment, will be made out, if it be shown that the object of the conspiracy was to prevent a meeting for any lawful purpose whatever.

The second and tenth counts are equally defective. The right there specified is that of "bearing arms for a lawful purpose." This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called, in The City of New York v. Miln, 11 Pet. 139, the "powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police," "not surrendered or restrained" by the Constitution of the United States.

The third and eleventh counts are even more objectionable. They

charge the intent to have been to deprive the citizens named, they being in Louisiana, "of their respective several lives and liberty of person without due process of law." This is nothing else than alleging a conspiracy to falsely imprison or murder citizens of the United States, being within the territorial jurisdiction of the State of Louisiana. The rights of life and personal liberty are natural rights of man. "To secure these rights," says the Declaration of Independence, "governments are instituted among men, deriving their just powers from the consent of the governed." The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these "unalienable rights with which they were endowed by their Creator." Sovereignty, for this purpose, rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself.

The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. As was said by Mr. Justice Johnson, in Bank of Columbia *v.* Okely, 4 Wheat. 244, it secures "the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." These counts in the indictment do not call for the exercise of any of the powers conferred by this provision in the amendment.

The fourth and twelfth counts charge the intent to have been to prevent and hinder the citizens named, who were of African descent and persons of color, in "the free exercise and enjoyment of their several right and privilege to the full and equal benefit of all laws and proceedings, then and there, before that time, enacted or ordained by the said State of Lousiana and by the United States; and then and there, at that time, being in force in the said State and District of Louisiana aforesaid, for the security of their respective persons and property, then and there, at that time enjoyed at and within said State and District of Louisiana by white persons, being citizens of said State of Louisiana and the United States, for the protection of the persons and property of said white citizens." There is no allegation that this was done because of the race or color of the persons conspired against. When stripped of its verbiage, the case as presented amounts to nothing more than that the defendants conspired to prevent certain citizens of the United States, being within the State of Louisiana, from enjoying the equal protection of the laws of the State and of the United States.

The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but

this provision does not, any more than the one which precedes it, and which we have just considered, add any thing to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.

[The sufficiency of the counts of the indictment are next considered and they are held to be insufficient under the principles stated or too vague and uncertain to charge a crime.]

*The order of the Circuit Court arresting the judgment upon the verdict is, therefore, affirmed; and the cause remanded, with instructions to discharge the defendants.*[1]

[1] MR. JUSTICE CLIFFORD dissented.

In the CIVIL RIGHTS CASES (U. S. *v.* Stanley, and other cases), 109 U. S. 3 (1883), the validity of an Act of Congress, entitled "An Act to protect all citizens in their civil and legal rights," was called in question. The statute made it criminal for any person to deny to any citizen on account of race or color the full and equal enjoyment of the privileges and accommodations of inns, public conveyances, theatres, and other places of public amusement.

MR. JUSTICE BRADLEY, after quoting the first section of the fourteenth amendment, says: —

"It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the fourteenth amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect: and such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect. A quite full discussion of this aspect of the amendment may be found in United States *v.* Cruikshank, 92 U. S. 542; Virginia *v.* Rives, 100 U. S. 313; and *Ex parte* Virginia, 100 U. S. 339.

"An apt illustration of this distinction may be found in some of the provisions of

the original Constitution. Take the subject of contracts, for example. The Constitution prohibited the States from passing any law impairing the obligation of contracts. This did not give to Congress power to provide laws for the general enforcement of contracts; nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts. It did, however, give the power to provide remedies by which the impairment of contracts by State legislation might be counteracted and corrected: and this power was exercised. The remedy which Congress actually provided was that contained in the 25th section of the Judiciary Act of 1789, 1 Stat. 85, giving to the Supreme Court of the United States jurisdiction by writ of error to review the final decisions of State courts whenever they should sustain the validity of a State statute or authority alleged to be repugnant to the Constitution or laws of the United States. By this means, if a State law was passed impairing the obligation of a contract, and the State tribunals sustained the validity of the law, the mischief could be corrected in this court. The legislation of Congress, and the proceedings provided for under it, were corrective in their character. No attempt was made to draw into the United States courts the litigation of contracts generally; and no such attempt would have been sustained. We do not say that the remedy provided was the only one that might have been provided in that case. Probably Congress had power to pass a law giving to the courts of the United States direct jurisdiction over contracts alleged to be impaired by a State law; and under the broad provisions of the act of March 3d, 1875, ch. 137, 18 Stat. 470, giving to the circuit courts jurisdiction of all cases arising under the Constitution and laws of the United States, it is possible that such jurisdiction now exists. But under that, or any other law, it must appear as well by allegation, as proof at the trial, that the Constitution had been violated by the action of the State legislature. Some obnoxious State law passed, or that might be passed, is necessary to be assumed in order to lay the foundation of any federal remedy in the case; and for the very sufficient reason, that the constitutional prohibition is against *State laws* impairing the obligation of contracts.

"And so in the present case, until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the fourteenth amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity; for the prohibitions of the amendment are against State laws and acts done under State authority. Of course, legislation may, and should be, provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, State laws, or State action of some kind, adverse to the rights of the citizen secured by the amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty and property (which include all civil rights that men have), are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may therefore provide due process of law for their vindication in every case; and that, because the denial by a State to any persons of the equal protection of the laws is prohibited by the amendment, therefore Congress may establish laws for their equal protection. In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking. It is not necessary for us to state, if we could, what legislation would be proper for Congress to adopt. It is sufficient for us to examine whether the law in question is of that character."

The Court concludes that the act in question is not directed against State action, and therefore is not within the power conferred on Congress by the amendment.

The Court further considers whether the act is within any power given to Congress by the thirteenth amendment, and concludes that the denial of privileges forbidden by the Act would not amount to slavery or involuntary servitude within the provisions of that amendment. The Court continues: —

"We must not forget that the province and scope of the thirteenth and fourteenth amendments are different; the former simply abolished slavery: the latter prohibited the States from abridging the privileges or immunities of citizens of the United States; from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other. Under the thirteenth amendment, it has only to do with slavery and its incidents. Under the fourteenth amendment, it has power to counteract and render nugatory all State laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty or property without due process of law, or to deny to any of them the equal protection of the laws. Under the thirteenth amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individnals, whether sanctioned by State legislation or not; under the fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings."

Mr. Justice Harlan delivered a dissenting opinion.

In the case of Rogers *v.* Alabama, 192 U. S. 226, 24 Sup. Ct. Rep. 257 (1904), it was contended for the plaintiff in error that he had been denied in the State court the equal protection of the laws guaranteed by the Fourteenth Amendment, in that the indictment against him had been returned by a grand jury from which the jury commissioners had excluded all colored persons, although largely in the majority of the population of the county in which the indictment was returned, and although otherwise qualified to serve as grand jurors, solely on the ground of their race and color and of their having been disfranchised and deprived of all rights as electors in the State by the provisions of its new constitntion. Mr. Justice Holmes announced the conclusion of the court as follows:

"We are of opinion that the Federal question is raised by the record and is properly before us. That question is disposed of by Carter *v.* Texas, 177 U. S. 442, and it was error not to apply that decision. The result of that and the earlier cases may be summed up in the following words of the judgment delivered by Mr. Justice Gray: 'Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecntion of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fonrteenth Amendment of the Constitution of the United States. Strauder *v.* West Virginia, 100 U. S. 303; Neal *v.* Delaware, 103 U. S. 370, 397; Gibson *v.* Mississippi, 162 U. S. 565.'"

# CHAPTER II.

## RELATION OF THE STATES TO THE FEDERAL GOVERNMENT

### MARTIN *v.* HUNTER'S LESSEE.

1 Wheaton, 304; 3 Curtis, 562. 1816.

[See page 746, *infra.*]

### LANE COUNTY *v.* OREGON.

7 Wallace, 71. 1868.

[After the passage by Congress of the legal tender act, it was provided by statute in Oregon that county officers should collect the State taxes in gold and silver coin, and that the counties should pay such taxes into the State treasury in the same kinds of money. Under this statute the State brought action in a State court against Lane County for a certain number of dollars "in gold and silver coin," alleged to be due from the county as State revenue. Defendant pleaded a tender in United States legal tender notes. A demurrer to this answer was sustained, and judgment rendered against defendant for recovery of the amount claimed in gold and silver coin, and this judgment was affirmed in the State Supreme Court. Defendant brought the case to this court on writ of error.]

Mr. Chief Justice Chase delivered the opinion of the court.

[The legal tender acts of Congress are referred to, providing for the issue of United States notes, which should be receivable in payment of all taxes, debts, and demands due to the United States, except duties on imports, and should be lawful money and legal tender in payment of all debts, public and private, within the United States.]

The first of these was the act of February 25, 1862, which authorized the Secretary of the Treasury to issue, on the credit of the United States, one hundred and fifty millions of dollars in United States notes, and provided that these notes "shall be receivable in payment of all taxes, internal duties, excises, debts and demands due to the United States, except duties on imports, and of all claims and demands against the United States of every kind whatsoever, except interest on bonds and notes, which shall be paid in coin; and shall also be lawful money and legal tender in payment of all debts, public and

private, within the United States, except duties on imports and interest as aforesaid."

The second act contains a provision nearly in the same words with that just recited, and under these two acts two-thirds of the entire issue was authorized. It is unnecessary, therefore, to refer to the third act, by which the notes to be issued under it are not in terms made receivable and payable, but are simply declared to be lawful money and a legal tender.

In the first act no emission was authorized of any notes under five dollars, nor in the other two of any under one dollar. The notes, authorized by different statutes, for parts of a dollar, were never declared to be lawful money or a legal tender. 12 Stat. at Large, 592; ib. 711.

It is obvious, therefore, that a legal tender in United States notes of the precise amount of taxes admitted to be due to the State could not be made. Coin was then, and is now, the only legal tender for debts less than one dollar. In the view which we take of this case, this is not important. It is mentioned only to show that the general words, "all debts," were not intended to be taken in a sense absolutely literal.

We proceed then to inquire whether, upon a sound construction of the acts, taxes imposed by a State government upon the people of the State, are debts within their true meaning.

In examining this question it will be proper to give some attention to the constitution of the States and to their relations as United States.

The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union there could be no such political body as the United States.

Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States. But in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved. The general condition was well stated by Mr. Madison in the Federalist, thus: "The Federal and State governments are in fact but different agents and trustees of the

people, constituted with different powers and designated for different purposes."

Now, to the existence of the States, themselves necessary to the existence of the United States, the power of taxation is indispensable. It is an essential function of government. It was exercised by the Colonies; and when the Colonies became States, both before and after the formation of the Confederation, it was exercised by the new governments. Under the Articles of Confederation the government of the United States was limited in the exercise of this power to requisitions upon the States, while the whole power of direct and indirect taxation of persons and property, whether by taxes on polls, or duties on imports, or duties on internal production, manufacture, or use, was acknowledged to belong exclusively to the States, without any other limitation than that of non-interference with certain treaties made by Congress. The Constitution, it is true, greatly changed this condition of things. It gave the power to tax, both directly and indirectly, to the national government, and, subject to the one prohibition of any tax upon exports and to the conditions of uniformity in respect to indirect and of proportion in respect to direct taxes, the power was given without any express reservation. On the other hand, no power to tax exports, or imports except for a single purpose and to an insignificant extent, or to lay any duty on tonnage, was permitted to the States. In respect, however, to property, business, and persons, within their respective limits, their power of taxation remained and remains entire. It is indeed a concurrent power, and in the case of a tax on the same subject by both governments, the claim of the United States, as the supreme authority, must be preferred; but with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the States commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the State constitutions or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the national government. There is nothing in the Constitution which contemplates or authorizes any direct abridgement of this power by national legislation. To the extent just indicated it is as complete in the States as the like power, within the limits of the Constitution, is complete in Congress. If, therefore, the condition of any State, in the judgment of its legislature, requires the collection of taxes in kind, that is to say, by the delivery to the proper officers of a certain proportion of products, or in gold and silver bullion, or in gold and silver coin, it is not easy to see upon what principle the national legislature can interfere with the exercise, to that end, of this power, original in the States, and never as yet surrendered. If this be so, it is certainly, a reasonable conclusion that Congress did not intend, by the general terms of the currency acts, to restrain the exercise of this power in the manner shown by the statutes of Oregon.

[The Court refers to the language of the acts to show that it was not intended that taxes payable to a State should be included under the term, "debts, public and private." The judgment of the State court is affirmed.]

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## TARBLE'S CASE.

13 Wallace, 397. 1871.

[THIS was a proceeding by *habeas corpus* under the laws of Wisconsin to determine the rightfulness of the detention of a person by an officer of the United States army under the claim that he was a duly enlisted soldier. From a decision of the Supreme Court of the State, sustaining an order of release, the United States prosecuted a writ of error before this court.]

Mr. JUSTICE FIELD, after stating the case, delivered the opinion of the court, as follows:

The important question is thus presented, whether a State court commissioner has jurisdiction, upon *habeas corpus*, to inquire into the validity of the enlistment of soldiers into the military service of the United States, and to discharge them from such service when, in his judgment, their enlistment has not been made in conformity with the laws of the United States. The question presented may be more generally stated thus: Whether any judicial officer of a State has jurisdiction to issue a writ of *habeas corpus*, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of the authority, of the United States, by an officer of that government. For it is evident, if such jurisdiction may be exercised by any judicial officer of a State, it may be exercised by the court commissioner within the county for which he is appointed; and if it may be exercised with reference to soldiers detained in the military service of the United States, whose enlistment is alleged to have been illegally made, it may be exercised with reference to persons employed in any other department of the public service when their illegal detention is asserted. It may be exercised in all cases where parties are held under the authority of the United States, whenever the invalidity of the exercise of that authority is affirmed. The jurisdiction, if it exist at all, can only be limited in its application by the legislative power of the State. It may even reach to parties imprisoned under sentence of the National courts, after regular indictment, trial, and conviction, for offences against the laws of the United States. As we read the opinion of the Supreme Court of Wisconsin in this case, this is the claim of authority asserted by that tribunal for itself and for the judicial officers of that State. It does, indeed, disclaim any

right of either to interfere with parties in custody, under judicial sentence, when the National court pronouncing sentence had jurisdiction to try and punish the offenders, but it asserts, at the same time, for itself and for each of those officers, the right to determine, upon *habeas corpus*, in all cases, whether that court ever had such jurisdiction. In the case of Booth, which subsequently came before this court, it not only sustained the action of one of its justices in discharging a prisoner held in custody by a marshal of the United States, under a warrant of commitment for an offence against the laws of the United States, issued by a commissioner of the United States; but it discharged the same prisoner when subsequently confined under sentence of the District Court of the United States for the same offence, after indictment, trial, and conviction, on the ground that, in its judgment, the act of Congress creating the offence was unconstitutional; and in order that its decision in that respect should be final and conclusive, directed its clerk to refuse obedience to the writ of error issued by this court, under the act of Congress, to bring up the decision for review.

It is evident, as said by this court when the case of Booth was finally brought before it, if the power asserted by that State court existed, no offence against the laws of the United States could be punished by their own tribunals, without the permission and according to the judgment of the courts of the State in which the parties happen to be imprisoned; that if that power existed in that State court, it belonged equally to every other State court in the Union where a prisoner was within its territorial limits; and, as the different State courts could not always agree, it would often happen that an act, which was admitted to be an offence and justly punishable in one State, would be regarded as innocent, and even praiseworthy in another, and no one could suppose that a government, which had hitherto lasted for seventy years, "enforcing its laws by its own tribunals, and preserving the union of the States, could have lasted a single year, or fulfilled the trusts committed to it, if offences against its laws could not have been punished without the consent of the State in which the culprit was found."

The decision of this court in the two cases which grew out of the arrest of Booth, that of Ableman *v.* Booth, and that of The United States *v.* Booth, 21 How., 506, disposes alike of the claim of jurisdiction by a State court, or by a State judge, to interfere with the authority of the United States, whether that authority be exercised by a Federal officer or be exercised by a Federal tribunal. In the first of these cases Booth had been arrested and committed to the custody of a marshal of the United States by a commissioner appointed by the District Court of the United States, upon a charge of having aided and abetted the escape of a fugitive slave. Whilst thus in custody a justice of the Supreme Court of Wisconsin issued a writ of *habeas corpus* directed to the marshal, requiring him to

produce the body of Booth with the cause of his imprisonment. The marshal made a return, stating that he held the prisoner upon the warrant of the commissioner, a copy of which he annexed to and returned with the writ. To this return Booth demurred as insufficient in law to justify his detention, and, upon the hearing which followed, the justice held his detention illegal, and ordered his discharge. The marshal thereupon applied for and obtained a *certiorari*, and had the proceedings removed to the Supreme Court of the State, where, after argument, the order of the justice discharging the prisoner from custody was affirmed. The decision proceeded upon the ground that the act of Congress respecting fugitive slaves was unconstitutional and void.

In the second case, Booth had been indicted for the offence with which he was charged before the commissioner, and from which the State judge had discharged him, and had been tried and convicted in the District Court of the United States for the District of Wisconsin, and been sentenced to pay a fine of $1000, and to be imprisoned for one month. Whilst in imprisonment, in execution of this sentence, application was made by Booth to the Supreme Court of the State, for a writ of *habeas corpus*, alleging in his application that his imprisonment was illegal, by reason of the unconstitutionality of the fugitive slave law, and that the District Court had no jurisdiction to try or punish him for the matter charged against him. The court granted the application, and issued the writ, to which the sheriff, to whom the prisoner had been committed by the marshal, returned that he held the prisoner by virtue of the proceedings and sentence of the District Court, a copy of which was annexed to his return. Upon demurrer to this return, the court adjudged the imprisonment of Booth to be illegal, and ordered him to be discharged from custody, and he was accordingly set at liberty.

For a review in this court of the judgments in both of these cases, writs of error were prosecuted. No return, however, was made to the writs, the clerk of the Supreme Court of Wisconsin having been directed by that court to refuse obedience to them; but copies of the records were filed by the Attorney-General, and it was ordered by this court that they should be received with the same effect and legal operation as if returned by the clerk. The cases were afterwards heard and considered together, and the decision of both was announced in the same opinion. In that opinion the Chief Justice details the facts of the two cases at length, and comments upon the character of the jurisdiction asserted by the State judge and the State court; by the State judge to supervise and annul the proceedings of a commissioner of the United States, and to discharge a prisoner committed by him for an offence against the laws of the United States; and by the State court to supervise and annul the proceedings and judgment of a District Court of the United States, and to discharge a prisoner who had been indicted, tried, and found guilty of an offence against the laws of the United States and sentenced to imprisonment by that court.

And in answer to this assumption of judicial power by the judges and by the Supreme Court of Wisconsin thus made, the Chief Justice said as follows: If they "possess the jurisdiction they claim, they must derive it either from the United States or the State. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the State to confer it, even if it had attempted to do so; for no State can authorize one of its judges or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent government. And although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the General government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States, is as far beyond the reach of the judicial process issued by a State judge or a State court as if the line of division was traced by landmarks and monuments visible to the eye. And the State of Wisconsin had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other State of the Union, for an offence against the laws of the State in which he was imprisoned."

It is in the consideration of this distinct and independent character of the government of the United States, from that of the government of the several States, that the solution of the question presented in this case, and in similar cases, must be found. There are within the territorial limits of each State two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other. The two governments in each State stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments. The Constitution and the laws passed in pursuance of it, are declared by the Constitution itself to be the supreme law of the land, and the judges of every State are bound thereby, "anything in the constitution or laws of any State to the contrary notwithstanding." Whenever, therefore, any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the National government must have supremacy until the

validity of the different enactments and authorities can be finally determined by the tribunals of the United States. This temporary supremacy until judicial decision by the National tribunals, and the ultimate determination of the conflict by such decision, are essential to the preservation of order and peace, and the avoidance of forcible collision between the two governments. "The Constitution," as said by Mr. Chief Justice Taney, "was not framed merely to guard the States against danger from abroad, but chiefly to secure union and harmony at home; and to accomplish this end it was deemed necessary, when the Constitution was framed, that many of the rights of sovereignty which the States then possessed should be ceded to the General government; and that in the sphere of action assigned to it, it should be supreme and strong enough to execute its own laws by its own tribunals without interruption from a State, or from State authorities." And the judicial power conferred extends to all cases arising under the Constitution, and thus embraces every legislative act of Congress, whether passed in pursuance of it, or in disregard of its provisions. The Constitution is under the view of the tribunals of the United States when any act of Congress is brought before them for consideration.

Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National government to preserve its rightful supremacy in cases of conflict of authority. In their laws, and mode of enforcement, neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion, or whether any at all shall be vested in their officers, are matters subject to their own control, and in the regulation of which neither can interfere with the other.

Now, among the powers assigned to the National government, is the power to "raise and support armies," and the power "to provide for the government and regulation of the land and naval forces." The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any State authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offences, and prescribe their punishment. No interference with the execution of this power of the National government in the formation, organization, and government of its armies by any State officials could be permitted

without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service. Probably in every county and city in the several States there are one or more officers authorized by law to issue writs of *habeas corpus* on behalf of persons alleged to be illegally restrained of their liberty; and if soldiers could be taken from the army of the United States, and the validity of their enlistment inquired into by any one of these officers, such proceeding could be taken by all of them, and no movement could be made by the National troops without their commanders being subjected to constant annoyance and embarrassment from this source. The experience of the late rebellion has shown us that, in times of great popular excitement, there may be found in every State large numbers ready and anxious to embarrass the operations of the government, and easily persuaded to believe every step taken for the enforcement of its authority illegal and void. Power to issue writs of *habeas corpus* for the discharge of soldiers in the military service, in the hands of parties thus disposed, might be used, and often would be used, to the great detriment of the public service. In many exigencies the measures of the National government might in this way be entirely bereft of their efficacy and value. An appeal in such cases to this court, to correct the erroneous action of these officers, would afford no adequate remedy. Proceedings on *habeas corpus* are summary, and the delay incident to bringing the decision of a State officer, through the highest tribunal of the State, to this court for review, would necessarily occupy years, and in the meantime, where the soldier was discharged, the mischief would be accomplished. It is manifest that the powers of the National government could not be exercised with energy and efficiency at all times, if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty.

It is true similar embarrassment might sometimes be occasioned, though in a less degree, by the exercise of the authority to issue the writ possessed by judicial officers of the United States, but the ability to provide a speedy remedy for any inconvenience following from this source would always exist with the National legislature.

State judges and State courts, authorized by laws of their States to issue writs of *habeas corpus*, have undoubtedly a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, unless it appear upon his application that he is confined under the authority, or claim and color of the authority, of the United States, by an officer of that government. If such fact appear upon the application the writ should be refused. If it do not appear, the judge or court issuing the writ has a right to inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the State; and it is the duty of the marshal, or other officer having the custody of the prisoner, to give, by a proper return, information in this respect. His return

should be sufficient, in its detail of facts, to show distinctly that the imprisonment is under the authority, or claim and color of the authority, of the United States, and to exclude the suspicion of imposition or oppression on his part. And the process or orders, under which the prisoner is held, should be produced with the return and submitted to inspection, in order that the court or judge issuing the writ may see that the prisoner is held by the officer, in good faith, under the authority, or claim and color of the authority, of the United States, and not under the mere pretence of having such authority.

This right to inquire by process of *habeas corpus*, and the duty of the officer to make a return, "grows necessarily," says Mr. Chief Justice Taney, "out of the complex character of our government and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its power, and each within its sphere of action, prescribed by the Constitution of the United States, independent of the other. But, after the return is made, and the State judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus* nor any other process issued under State authority can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offence against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress."

Some attempt has been made in adjudications, to which our attention has been called, to limit the decision of this court in Ableman *v.* Booth, and the United States *v.* Booth, to cases where a prisoner is held in custody under undisputed lawful authority of the United States, as distinguished from his imprisonment under claim and color of such authority. But it is evident that the decision does not admit of any such limitation. It would have been unnecessary to enforce, by any extended reasoning, such as the Chief Justice uses, the position that when it appeared to the judge or officer issuing the writ, that the prisoner was held under undisputed lawful authority, he should proceed no further. No Federal judge even could, in such case, release the party from imprisonment, except upon bail when that was allowable. The detention being by admitted lawful authority, no judge could set the prisoner at liberty, except in that way, at any stage of the proceeding. All that is meant by the language used is, that the State judge or State court should proceed no further when it appears, from the application of the party, or the return made, that the prisoner is held by an officer of the United States under what, in truth, purports to be the authority of the United States; that is, an authority, the validity of which is to

be determined by the Constitution and laws of the United States. If a party thus held be illegally imprisoned it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release.

This limitation upon the power of State tribunals and State officers furnishes no just ground to apprehend that the liberty of the citizen will thereby be endangered. The United States are as much interested in protecting the citizen from illegal restraint under their authority, as the several States are to protect him from the like restraint under their authority, and are no more likely to tolerate any oppression. Their courts and judicial officers are clothed with the power to issue the writ of *habeas corpus* in all cases, where a party is illegally restrained of his liberty by an officer of the United States, whether such illegality consist in the character of the process, the authority of the officer, or the invalidity of the law under which he is held. And there is no just reason to believe that they will exhibit any hesitation to exert their power, when it is properly invoked. Certainly there can be no ground for supposing that their action will be less prompt and efficient in such cases than would be that of State tribunals and State officers. In the matter of Severy, 4 Clifford. In the matter of Keeler, Hempstead, 306.

It follows, from the views we have expressed, that the court commissioner of Dane County was without jurisdiction to issue the writ of *habeas corpus* for the discharge of the prisoner in this case, it appearing, upon the application presented to him for the writ, that the prisoner was held by an officer of the United States, under claim and color of the authority of the United States, as an enlisted soldier mustered into the military service of the National government; and the same information was imparted to the commissioner by the return of the officer. The commissioner was, both by the application for the writ and the return to it, apprised that the prisoner was within the dominion and jurisdiction of another government, and that no writ of *habeas corpus* issued by him could pass over the line which divided the two sovereignties.

The conclusion we have reached renders it unnecessary to consider how far the declaration of the prisoner as to his age, in the oath of enlistment, is to be deemed conclusive evidence on that point on the return to the writ.

*Judgment reversed.*[1]

[1] Mr. Chief Justice Chase delivered a dissenting opinion.

## TENNESSEE *v.* DAVIS.

100 United States, 257. 1879.

[Davis was indicted in the State Court of Tennessee for murder. He petitioned for removal of the prosecution to the Circuit Court of the United States. The judges of that court were divided in opinion upon the following questions, which are certified to this court]: —

*First*, Whether an indictment of a revenue officer (of the United States) for murder, found in a State court, under the facts alleged in the petition for removal in this case, is removable to the Circuit Court of the United States, under sect. 643 of the Revised Statutes.

*Second*, Whether, if removable from the State court, there is any mode and manner of procedure in the trial prescribed by the act of Congress.

*Third*, Whether, if not, a trial of the guilt or innocence of the defendant can be had in the United States Circuit Court.

Mr. Justice Strong delivered the opinion of the court.

The first of the questions certified is one of great importance, bringing as it does into consideration the relation of the general government to the government of the States, and bringing also into view not merely the construction of an act of Congress, but its constitutionality. That in this case the defendant's petition for removal of the cause was in the form prescribed by the act of Congress admits of no doubt. It represented that he had been indicted for murder in the Circuit Court of Grundy County, and that the indictment and criminal prosecution were still pending. It represented further, that no murder was committed, but that, on the other hand, the killing was committed in the petitioner's own necessary self-defence, to save his own life; that at the time when the alleged act for which he was indicted was committed he was, and still is, an officer of the United States, to wit, a deputy collector of internal revenue, and that the act for which he was indicted was performed in his own necessary self-defence while engaged in the discharge of his duties as deputy collector; that he was acting by and under the authority of the internal revenue laws of the United States; that what he did was done under and by right of his office, to wit, as deputy collector of internal revenue; that it was his duty to seize illicit distilleries and the apparatus that is used for the illicit and unlawful distillation of spirits; and that while so attempting to enforce the revenue laws of the United States, as deputy collector, as aforesaid, he was assaulted and fired upon by a number of armed men, and that in defence of his life he returned the fire. The petition was verified by oath, and the certificate required by the act of Congress to be given by the petitioner's legal counsel was appended

thereto. There is, therefore, no room for reasonable doubt that a case was made for the removal of the indictment into the Circuit Court of the United States, if sect. 643 of the Revised Statutes embraces criminal prosecutions in a State court, and makes them removable, and if that act of Congress was not unauthorized by the Constitution. The language of the statute (so far as it is necessary at present to refer to it) is as follows: "When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under, or acting by authority of, any revenue law of the United States, now or hereafter enacted, or against any person acting by or under authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law," the case may be removed into the Federal court. Now, certainly the petition for the removal represented that the act for which the defendant was indicted was done not merely under color of his office as a revenue collector, or under color of the revenue laws, not merely while he was engaged in performing his duties as a revenue officer, but that it was done under and by right of his office, and while he was resisted by an armed force in his attempts to discharge his official duty. This is more than a claim of right and authority under the law of the United States for the act for which he has been indicted. It is a positive assertion of the existence of such authority. But the act of Congress authorizes the removal of any cause, when the acts of the defendant complained of were done, or claimed to have been done, in the discharge of his duty as a Federal officer. It makes such a claim a basis for the assumption of Federal jurisdiction of the case, and for retaining it, at least until the claim proves unfounded.

That the act of Congress does provide for the removal of criminal prosecutions for offences against the State laws, when there arises in them the claim of the Federal right or authority, is too plain to admit of denial. Such is its positive language, and it is not to be argued away by presenting the supposed incongruity of administering State criminal laws by other courts than those established by the State. It has been strenuously urged that murder within a State is not made a crime by any act of Congress, and that it is an offence against the peace and dignity of the State alone. Hence it is inferred that its trial and punishment can be conducted only in State tribunals, and it is argued that the act of Congress cannot mean what it says, but that it must intend only such prosecutions in State courts as are for offences against the United States, — offences against the revenue laws. But there can be no criminal prosecution initiated in any State court for that which is merely an offence against the general government. If, therefore, the statute is to be allowed any meaning, when it speaks of criminal prosecutions in State courts, it must intend those that are instituted for alleged

violations of State laws, in which defences are set up or claimed under United States laws or authority.

We come, then, to the inquiry, most discussed during the argument, whether sect. 643 is a constitutional exercise of the power vested in Congress. Has the Constitution conferred upon Congress the power to authorize the removal, from a State court to a Federal court, of an indictment against a revenue officer for an alleged crime against the State, and to order its removal before trial, when it appears that a Federal question or a claim to a Federal right is raised in the case, and must be decided therein? A more important question can hardly be imagined. Upon its answer may depend the possibility of the general government's preserving its own existence. As was said in Martin *v.* Hunter, 1 Wheat. 363, "the general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers." It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection, — if their protection must be left to the action of the State court, — the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the State court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested.

We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it.

By the last clause of the eighth section of the first article of the Constitution, Congress is invested with power to make all laws necessary and proper for carrying into execution not only all the

powers previously specified, but also all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. Among these is the judicial power of the government. That is declared by the second section of the third article to "extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority," &c. This provision embraces alike civil and criminal cases arising under the Constitution and laws. Cohens *v.* Virginia, 6 Wheat. 264, 399. Both are equally within the domain of the judicial powers of the United States, and there is nothing in the grant to justify an assertion that whatever power may be exerted over a civil case may not be exerted as fully over a criminal one. And a case arising under the Constitution and laws of the United States may as well arise in a criminal prosecution as in a civil suit. What constitutes a case thus arising was early defined in the case cited from 6 Wheaton. It is not merely one where a party comes into court to demand something conferred upon him by the Constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defence of the party, in whole or in part, by whom they are asserted. Story on the Constitution, sect. 1647; 6 Wheat. 379. It was said in Osborne *v.* The Bank of the United States, 9 Wheat. 738, 823, "When a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it." And a case arises under the laws of the United States, when it arises out of the implication of the law. Mr. Chief Justice Marshall said, in the case last cited: "It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of Congress to imply, without expressing, this very exemption from State control." . . . "The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted that all who are employed in them are protected while in the line of their duty; and yet this protection is not expressed in any act of Congress. It is incidental to, and is implied in, the several acts by which those institutions are created; and is secured to the individuals employed in them by the judicial power alone;

that is, the judicial power is the instrument employed by the government in administering this security."

[The court considers various provisions as to removal of causes and finds that the power to provide for such removal has been understood to extend to criminal prosecutions, as well as to civil cases.]

It ought, therefore, to be considered as settled that the constitutional powers of Congress to authorize the removal of criminal cases for alleged offences against State laws from State courts to the circuit courts of the United States, when there arises a Federal question in them, is as ample as its power to authorize the removal of a civil case. Many of the cases referred to, and others, set out with great force the indispensability of such a power to the enforcement of Federal law.

It follows that the first question certified to us from the Circuit Court of Tennessee must be answered in the affirmative.

The second question is, "Whether, if the case be removable from the State court, there is any mode and manner of procedure in the trial prescribed by the act of Congress."

Whether there is or not is totally immaterial to the inquiry whether the case is removable; and this question can hardly have arisen on the motion to remand the case. The imaginary difficulties and incongruities supposed to be in the way of trying in the Circuit Court an indictment for an alleged offence against the peace and dignity of a State, if they were real, would be for the consideration of Congress. But they are unreal. While it is true there is neither in sect. 643, nor in the act of which it is a re-enactment, any mode of procedure in the trial of a removed case prescribed, except that it is ordered the cause when removed shall proceed as a cause originally commenced in that court, yet the mode of trial is sufficiently obvious. The circuit courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law. They are not foreign courts. The Constitution has made them courts within the States to administer the laws of the States in certain cases; and, so long as they keep within the jurisdiction assigned to them, their general powers are adequate to the trial of any case. The supposed anomaly of prosecuting offenders against the peace and dignity of a State, in tribunals of the general government, grows entirely out of the division of powers between that government and the government of a State, that is, a division of sovereignty over certain matters. When this is understood (and it is time it should be), it will not appear strange that, even in cases of criminal prosecutions for alleged offences against a State, in which arises a defence under United States law, the general government should take cognizance of the case and try it in its own courts, according to its own forms of proceeding.

The third question certified has been sufficiently answered in what we have said respecting the second. It must be answered in the affirmative.

[The first question is therefore answered in the affirmative, and the second is answered as indicated in the opinion.[1]]

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## Ex parte SIEBOLD.

100 United States, 371. 1879.

Mr. Justice Bradley delivered the opinion of the court.

The petitioners in this case were judges of election at different voting precincts in the city of Baltimore, at the election held in that city and in the State of Maryland, on the fifth day of November, 1878, at which representatives to the Forty-sixth Congress were voted for.

At the November Term of the Circuit Court of the United States for the District of Maryland, an indictment against each of the petitioners was found in said court, for offences alleged to have been committed by them respectively at their respective precincts whilst being such judges of election; upon which indictments they were severally tried, convicted, and sentenced by said court to fine and imprisonment. They now apply to this court for a writ of *habeas corpus* to be relieved from imprisonment.

. . . . . .

These indictments were framed partly under sect. 5515 and partly under sect. 5522 of the Revised Statutes of the United States; and the principal questions raised by the application are, whether those sections, and certain sections of the title of the Revised Statutes relating to the elective franchise, which they are intended to enforce, are within the constitutional power of Congress to enact. If they are not, then it is contended that the Circuit Court has no jurisdiction of the cases, and that the convictions and sentences of imprisonment of the several petitioners were illegal and void.

[The court holds that the case is within its appellate jurisdiction. On the merits of the case, the sections of the Revised Statutes (§§ 2011–2022 and 5515–5522) relating to elections are stated and in part set out, and the first Clause of Sec. 4, Art. 1 of the Constitution relating to election of representatives is quoted, and emphasis is laid on the authority given to Congress "to alter" State regulations on the subject.]

[1] Mr. Justice Clifford delivered a dissenting opinion in which Mr. Justice Field concurred.

Congress has partially regulated the subject heretofore. In 1842, it passed a law for the election of representatives by separate districts; and, subsequently, other laws fixing the time of election, and directing that the elections shall be by ballot. No one will pretend, at least at the present day, that these laws were unconstitutional because they only partially covered the subject.

The peculiarity of the case consists in the concurrent authority of the two sovereignties, State and National, over the same subject-matter. This, however, is not entirely without a parallel. The regulation of foreign and interstate commerce is conferred by the Constitution upon Congress. It is not expressly taken away from the States. But where the subject-matter is one of a national character, or one that requires a uniform rule, it has been held that the power of Congress is exclusive. On the contrary, where neither of these circumstances exist, it has been held that State regulations are not unconstitutional. In the absence of congressional regulation, which would be of paramount authority when adopted, they are valid and binding.

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So in the case of laws for regulating the elections of representatives to Congress. The State may make regulations on the subject; Congress may make regulations on the same subject, or may alter or add to those already made. The paramount character of those made by Congress has the effect to supersede those made by the State, so far as the two are inconsistent, and no farther. There is no such conflict between them as to prevent their forming a harmonious system perfectly capable of being administered and carried out as such.

As to the supposed conflict that may arise between the officers appointed by the State and National governments for superintending the election, no more insuperable difficulty need arise than in the application of the regulations adopted by each respectively. The regulations of Congress being constitutionally paramount, the duties imposed thereby upon the officers of the United States, so far as they have respect to the same matters, must necessarily be paramount to those to be performed by the officers of the State. If both cannot be performed, the latter are *pro tanto* superseded and cease to be duties. If the power of Congress over the subject is supervisory and paramount, as we have seen it to be, and if officers or agents are created for carrying out its regulations, it follows as a necessary consequence that such officers and agents must have the requisite authority to act without obstruction or interference from the officers of the State. No greater subordination, in kind or degree, exists in this case than in any other. It exists to the same extent between the different officers appointed by the State, when the State alone regulates the election. One officer cannot interfere with the duties of another, or obstruct or hinder him in the perform-

ance of them. Where there is a disposition to act harmoniously, there is no danger of disturbance between those who have different duties to perform. When the rightful authority of the general government is once conceded and acquiesced in, the apprehended difficulties will disappear. Let a spirit of national as well as local patriotism once prevail, let unfounded jealousies cease, and we shall hear no more about the impossibility of harmonious action between the national and State governments in a matter in which they have a mutual interest.

As to the supposed incompatibility of independent sanctions and punishments imposed by the two governments, for the enforcement of the duties required of the officers of election, and for their protection in the performance of those duties, the same considerations apply. While the State will retain the power of enforcing such of its own regulations as are not superseded by those adopted by Congress, it cannot be disputed that if Congress has power to make regulations it must have the power to enforce them, not only by punishing the delinquency of officers appointed by the United States, but by restraining and punishing those who attempt to interfere with them in the performance of their duties; and if, as we have shown, Congress may revise existing regulations, and add to or alter the same as far as it deems expedient, there can be as little question that it may impose additional penalties for the prevention of frauds committed by the State officers in the elections, or for their violation of any duty relating thereto, whether arising from the common law or from any other law, State or National. Why not? Penalties for fraud and delinquency are part of the regulations belonging to the subject. If Congress, by its power to make or alter the regulations, has a general supervisory power over the whole subject, what is there to preclude it from imposing additional sanctions and penalties to prevent such fraud and delinquency?

It is objected that Congress has no power to enforce State laws or to punish State officers, and especially has no power to punish them for violating the laws of their own State. As a general proposition, this is undoubtedly true; but when, in the performance of their functions, State officers are called upon to fulfil duties which they owe to the United States as well as to the State, has the former no means of compelling such fulfilment? Yet that is the case here. It is the duty of the States to elect representatives to Congress. The due and fair election of these representatives is of vital importance to the United States. The government of the United States is no less concerned in the transaction than the State government is. It certainly is not bound to stand by as a passive spectator, when duties are violated and outrageous frauds are committed. It is directly interested in the faithful performance, by the officers of election, of their respective duties. Those duties are owed as well to the United States as to the State. This necessarily follows from the mixed

character of the transaction, — State and National. A violation of duty is an offence against the United States, for which the offender is justly amenable to that government. No official position can shelter him from this responsibility. In view of the fact that Congress has plenary and paramount jurisdiction over the whole subject, it seems almost absurd to say that an officer who receives or has custody of the ballots given for a representative owes no duty to the national government which Congress can enforce; or that an officer who stuffs the ballot-box cannot be made amenable to the United States. If Congress has not, prior to the passage of the present laws, imposed any penalties to prevent and punish frauds and violations of duty committed by officers of election, it has been because the exigency has not been deemed sufficient to require it, and not because Congress had not the requisite power.

The objection that the laws and regulations, the violation of which is made punishable by the acts of Congress, are State laws and have not been adopted by Congress, is no sufficient answer to the power of Congress to impose punishment. It is true that Congress has not deemed it necessary to interfere with the duties of the ordinary officers of election, but has been content to leave them as prescribed by State laws. It has only created additional sanctions for their performance, and provided means of supervision in order more effectually to secure such performance. The imposition of punishment implies a prohibition of the act punished. The State laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress. It simply demands their fulfilment. Content to leave the laws as they are, it is not content with the means provided for their enforcement. It provides additional means for that purpose; and we think it is entirely within its constitutional power to do so. It is simply the exercise of the power to make additional regulations.

That the duties devolved on the officers of election are duties which they owe to the United States as well as to the State, is further evinced by the fact that they have always been so regarded by the House of Representatives itself. In most cases of contested elections, the conduct of these officers is examined and scrutinized by that body as a matter of right; and their failure to perform their duties is often made the ground of decision. Their conduct is justly regarded as subject to the fullest exposure; and the right to examine them personally, and to inspect all their proceedings and papers, has always been maintained. This could not be done if the officers were amenable only to the supervision of the State government which appointed them.

Another objection made is, that, if Congress can impose penalties for violation of State laws, the officer will be made liable to double punishment for delinquency, — at the suit of the State, and at the suit of the United States. But the answer to this is, that each

government punishes for violation of duty to itself only. Where a person owes a duty to two sovereigns, he is amenable to both for its performance; and either may call him to account. Whether punishment inflicted by one can be pleaded in bar to a charge by the other for the same identical act, need not now be decided; although considerable discussion bearing upon the subject has taken place in this court, tending to the conclusion that such a plea cannot be sustained.

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If the officers of election, in elections for representatives, owe a duty to the United States, and are amenable to that government as well as to the State, — as we think they are, — then, according to the cases just cited, there is no reason why each should not establish sanctions for the performance of the duty owed to itself, though referring to the same act.

To maintain the contrary proposition, the case of Commonwealth of Kentucky *v.* Dennison, 24 How. 66, is confidently relied on by the petitioners' counsel. But there, Congress had imposed a duty upon the governor of the State which it had no authority to impose. The enforcement of the clause in the Constitution requiring the delivery of fugitives from service was held to belong to the government of the United States, to be effected by its own agents; and Congress had no authority to require the governor of a State to execute this duty.

We have thus gone over the principal reasons of a special character relied on by the petitioners for maintaining the general proposition for which they contend; namely, that in the regulation of elections for representatives the National and State governments cannot co-operate, but must act exclusively of each other; so that, if Congress assumes to regulate the subject at all, it must assume exclusive control of the whole subject. The more general reason assigned, to wit, that the nature of sovereignty is such as to preclude the joint co-operation of two sovereigns, even in a matter in which they are mutually concerned, is not, in our judgment, of sufficient force to prevent concurrent and harmonious action on the part of the national and State governments in the election of representatives. It is at most an argument *ab inconveniente*. There is nothing in the Constitution to forbid such co-operation in this case. On the contrary, as already said, we think it clear that the clause of the Constitution relating to the regulation of such elections contemplates such co-operation whenever Congress deems it expedient to interfere merely to alter or add to existing regulations of the State. If the two governments had an entire equality of jurisdiction, there might be an intrinsic difficulty in such co-operation. Then the adoption by the State government of a system of regulations might exclude the action of Congress. By first taking jurisdiction of the subject, the State would acquire exclusive jurisdiction in virtue of a well-known principle applicable to courts having co-ordinate juris-

diction over the same matter. But no such equality exists in the present case. The power of Congress, as we have seen, is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.

As a general rule, it is no doubt expedient and wise that the operations of the State and National governments should, as far as practicable, be conducted separately, in order to avoid undue jealousies and jars and conflicts of jurisdiction and power. But there is no reason for laying this down as a rule of universal application. It should never be made to override the plain and manifest dictates of the Constitution itself. We cannot yield to such a transcendental view of state sovereignty. The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity. There are very few subjects, it is true, in which our system of government, complicated as it is, requires or gives room for conjoint action between the State and national sovereignties. Generally, the powers given by the Constitution to the government of the United States are given over distinct branches of sovereignty from which the State governments, either expressly or by necessary implication, are excluded. But in this case, expressly, and in some others, by implication, as we have seen in the case of pilotage, a concurrent jurisdiction is contemplated, that of the State, however, being subordinate to that of the United States, whereby all question of precedency is eliminated.

In what we have said, it must be remembered that we are dealing only with the subject of elections of representatives to Congress. If for its own convenience a State sees fit to elect State and county officers at the same time and in conjunction with the election of representatives, Congress will not be thereby deprived of the right to make regulations in reference to the latter. We do not mean to say, however, that for any acts of the officers of election, having exclusive reference to the election of State or county officers, they will be amenable to Federal jurisdiction; nor do we understand that the enactments of Congress now under consideration have any application to such acts.

It must also be remembered that we are dealing with the question of power, not of the expediency of any regulations which Congress has made. That is not within the pale of our jurisdiction. In exercising the power, however, we are bound to presume that Congress has done so in a judicious manner; that it has endeavored to guard as far as possible against any unnecessary interference with State laws and regulations, with the duties of State officers, or with local prejudices. It could not act at all so as to accomplish any beneficial object in preventing frauds and violence, and securing the faithful performance of duty at the elections, without providing

for the presence of officers and agents to carry its regulations into effect. It is also difficult to see how it could attain these objects without imposing proper sanctions and penalties against offenders.

The views we have expressed seem to us to be founded on such plain and practical principles as hardly to need any labored argument in their support. We may mystify anything. But if we take a plain view of the words of the Constitution, and give to them a fair and obvious interpretation, we cannot fail in most cases of coming to a clear understanding of its meaning. We shall not have far to seek. We shall find it on the surface, and not in the profound depths of speculation.

The greatest difficulty in coming to a just conclusion arises from mistaken notions with regard to the relations which subsist between the State and National governments. It seems to be often overlooked that a national constitution has been adopted in this country, establishing a real government therein, operating upon persons and territory and things; and which, moreover, is, or should be, as dear to every American citizen as his State government is. Whenever the true conception of the nature of this government is once conceded, no real difficulty will arise in the just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the State governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority. No greater jealousy is required to be exercised towards this government in reference to the preservation of our liberties, than is proper to be exercised towards the State governments. Its powers are limited in number, and clearly defined; and its action within the scope of those powers is restrained by a sufficiently rigid bill of rights for the protection of its citizens from oppression. The true interest of the people of this country requires that both the national and State governments should be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the Constitution. State rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions. But, in endeavoring to vindicate the one, we should not allow our zeal to nullify or impair the other.

Several other questions bearing upon the present controversy have been raised by the counsel of the petitioners. Somewhat akin to the argument which has been considered is the objection that the deputy marshals authorized by the act of Congress to be created and to attend the elections are authorized to keep the peace; and that this is a duty which belongs to the State authorities alone. It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the States. Here again we are met with the theory that the government of the United States does

not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.

This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the Constitution itself show which is to yield. "This Constitution, and all laws which shall be made in pursuance thereof, . . . shall be the supreme law of the land."

This concurrent jurisdiction which the national government necessarily possesses to exercise its powers of sovereignty in all parts of the United States is distinct from that exclusive power which, by the first article of the Constitution, it is authorized to exercise over the District of Columbia, and over those places within a State which are purchased by consent of the legislature thereof, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings. There its jurisdiction is absolutely exclusive of that of the State, unless, as is sometimes stipulated, power is given to the latter to serve the ordinary process of its courts in the precinct acquired.

Without the concurrent sovereignty referred to, the national government would be nothing but an advisory government. Its executive power would be absolutely nullified.

Why do we have marshals at all, if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform, if they cannot use force? In executing the processes of the courts, must they call on the nearest constable for protection? must they rely on him to use the requisite compulsion, and to keep the peace whilst they are soliciting and entreating the parties and bystanders to allow the law to take its course? This is the necessary consequence of the positions that are assumed. If we indulge in such impracticable views as these, and keep on refining and re-refining, we shall drive the national government out of the United States, and relegate it to the District of Columbia, or perhaps to some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old confederation.

The argument is based on a strained and impracticable view of the nature and powers of the national government. It must execute its powers, or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to

do this, it must necessarily have power to command obedience, preserve order, and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction. Without specifying other instances in which this power to preserve order and keep the peace unquestionably exists, take the very case in hand. The counsel for the petitioners concede that Congress may, if it sees fit, assume the entire control and regulation of the election of representatives. This would necessarily involve the appointment of the places for holding the polls, the times of voting, and the officers for holding the election; it would require the regulation of the duties to be performed, the custody of the ballots, the mode of ascertaining the result, and every other matter relating to the subject. Is it possible that Congress could not, in that case, provide for keeping the peace at such elections, and for arresting and punishing those guilty of breaking it? If it could not, its power would be but a shadow and a name. But, if Congress can do this, where is the difference in principle in its making provision for securing the preservation of the peace, so as to give to every citizen his free right to vote without molestation or injury, when it assumes only to supervise the regulations made by the State, and not to supersede them entirely? In our judgment, there is no difference; and, if the power exists in the one case it exists in the other.

[The Court holds that Congress had power to vest the appointment of supervisors of elections in the Circuit Courts.]

The doctrine laid down at the close of counsel's brief, that the State and National governments are co-ordinate and altogether equal, on which their whole argument, indeed, is based, is only partially true.

The true doctrine as we conceive, is this, that whilst the States are really sovereign as to all matters which have not been granted to the jurisdiction and control of the United States, the Constitution and constitutional laws of the latter are, as we have already said, the supreme law of the land; and, when they conflict with the laws of the States, they are of paramount authority and obligation. This is the fundamental principle on which the authority of the Constitution is based; and unless it be conceded in practice, as well as theory, the fabric of our institutions, as it was contemplated by its founders, cannot stand. The questions involved have respect not more to the autonomy and existence of the States, than to the continued existence of the United States as a government to which every American citizen may look for security and protection in every part of the land.

We think that the cause of commitment in these cases was lawful, and that the application for the writ of *habeas corpus* must be denied.

*Application denied.*[1]

[1] MR. JUSTICE FIELD delivered a dissenting opinion, in which MR. JUSTICE CLIFFORD concurred.

## In re NEAGLE.

135 United States, 1. 1889.

This is an appeal by Cunningham, sheriff of the county of San Joaquin, in the State of California, from a judgment of the Circuit Court of the United States for the Northern District of California, discharging David Neagle from the custody of said sheriff, who held him a prisoner on a charge of murder.

On the 16th day of August, 1889, there was presented to Judge Sawyer, the Circuit Judge of the United States for the Ninth Circuit, embracing the Northern District of California, a petition signed David Neagle, deputy United States marshal, by A. L. Farrish on his behalf. This petition represented that the said Farrish was a deputy marshal duly appointed for the Northern District of California by J. C. Franks, who was the marshal of that district. It further alleged that David Neagle was, at the time of the occurrences recited in the petition and at the time of filing it, a duly appointed and acting deputy United States marshal for the same district. It then proceeded to state that said Neagle was imprisoned, confined and restrained of his liberty in the county jail in San Joaquin County, in the State of California, by Thomas Cunningham, sheriff of said county, upon a charge of murder, under a warrant of arrest.

. . . . . .

The petition then recites the circumstances of a rencontre between said Neagle and David S. Terry, in which the latter was instantly killed by two shots from a revolver in the hands of the former. The circumstances of this encounter and of what led to it will be considered with more particularity hereafter. The main allegation of this petition was that Neagle, as United States deputy marshal, acting under the orders of Marshal Franks, and in pursuance of instructions from the Attorney General of the United States, had, in consequence of an anticipated attempt at violence on the part of Terry against the Honorable Stephen J. Field, a justice of the Supreme Court of the United States, been in attendance upon said justice, and was sitting by his side at a breakfast table when a murderous assault was made by Terry on Judge Field, and in defence of the life of the judge the homicide was committed for which Neagle was held by Cunningham. The allegation was very distinct that Justice Field was engaged in the discharge of his duties as circuit justice of the United States for that circuit, having held court at Los Angeles, one of the places at which the court is by law held, and, having left that court, was on his way to San Francisco for the purpose of holding the Circuit Court at that place. The allegation was also very full that Neagle was directed by Marshal Franks to accompany him for the purpose of protecting him, and that these orders of Franks were given in antici-

pation of the assault which actually occurred. It was also stated, in more general terms, that Marshal Neagle, in killing Terry under the circumstances, was in the discharge of his duty as an officer of the United States, and was not, therefore, guilty of a murder, and that his imprisonment under the warrant held by Sheriff Cunningham is in violation of the laws and Constitution of the United States, and that he is in custody for an act done in pursuance of the laws of the United States.

[The statement further shows the issuing of the writ and the return of the sheriff thereto alleging that he detained Neagle by virtue of a warrant issued out of the justice's court, Spokane township, County of San Joaquin, State of California, a copy of which was annexed; that Cunningham filed a demurrer to the writ and Neagle filed a traverse to the return of the sheriff; and that upon a hearing in the Circuit Court before Circuit Judge Sawyer and District Judge Sabin, it was found that the allegations of the petitioner in his traverse to the return of the sheriff were true and that Neagle was in custody for an act done in pursuance of a law of the United States and was in custody in violation of the Constitution and laws of the United States, and was therefore ordered to be discharged from custody. From this order an appeal was allowed to this court.]

Mr. Justice Miller delivered the opinion of the Court.

. . . . . .

We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death, and we think it clear that where this protection is to be afforded through the civil power, the Department of Justice is the proper one to set in motion the necessary means of protection. The correspondence already recited in this opinion between the marshal of the Northern District of California, and the Attorney General, and the district attorney of the United States for that district, although prescribing no very specific mode of affording this protection by the Attorney General, is sufficient, we think, to warrant the marshal in taking the steps which he did take, in making the provisions which he did make, for the protection and defence of Mr. Justice Field.

. . . . . .

That there is a peace of the United States; that a man assaulting a judge of the United States while in the discharge of his duties violates that peace; that in such case the marshal of the United States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the State of California; are questions too clear to need argument to prove them. That it would be the duty of a sheriff, if one had been present at this assault by Terry upon Judge Field, to prevent this breach of the peace, to prevent this assault, to prevent the murder which was con-

templated by it, cannot be doubted. And if, in performing this duty, it became necessary for the protection of Judge Field, or of himself, to kill Terry, in a case where, like this, it was evidently a question of the choice of who should be killed, the assailant and violator of the law and disturber of the peace, or the unoffending man who was in his power, there can be no question of the authority of the sheriff to have killed Terry. So the marshal of the United States, charged with the duty of protecting and guarding the judge of the United States court against this special assault upon his person and his life, being present at the critical moment, when prompt action was necessary, found it to be his duty, a duty which he had no liberty to refuse to perform, to take the steps which resulted in Terry's death. This duty was imposed on him by the section of the Revised Statutes which we have recited [R. S., § 788], in connection with the powers conferred by the State of California upon its peace officers, which become, by this statute, in proper cases, transferred as duties to the marshals of the United States.

But all these questions being conceded, it is urged against the relief sought by this writ of *habeas corpus*, that the question of the guilt of the prisoner of the crime of murder is a question to be determined by the laws of California, and to be decided by its courts, and that there exists no power in the government of the United States to take away the prisoner from the custody of the proper authorities of the State of California and carry him before a judge of the court of the United States, and release him without a trial by jury according to the laws of the State of California. That the statute of the United States authorizes and directs such a proceeding and such a judgment in a case where the offence charged against the prisoner consists in an act done in pursuance of a law of the United States and by virtue of its authority, and where the imprisonment of the party is in violation of the Constitution and laws of the United States, is clear by its express language.

The enactments now found in the Revised Statutes of the United States on the subject of the writ of *habeas corpus* are the result of a long course of legislation forced upon Congress by the attempt of the States of the Union to exercise the power of imprisonment over officers and other persons asserting rights under the Federal government or foreign governments, which the States denied. The original act of Congress on the subject of the writ of *habeas corpus*, by its 14th section, authorized the judges and the courts of the United States, in the case of prisoners in jail or in custody under or by color of the authority of the United States, or committed for trial before some court of the same, or when necessary to be brought into court to testify, to issue the writ, and the judge or court before whom they were brought was directed to make inquiry into the cause of commitment. 1 Stat. 81, c. 20, § 14. This did not present the question, or, at least, it gave rise to no question which came before the courts, as

to releasing by this writ parties held in custody under the laws of the States. But when, during the controversy growing out of the nullification laws of South Carolina, officers of the United States were arrested and imprisoned for the performance of their duties in collecting the revenue of the United States in that State, and held by the State authorities, it became necessary for the Congress of the United States to take some action for their relief. Accordingly the act of Congress of March 2, 1833, 4 Stat. 634, c. 57, § 7, among other remedies for such condition of affairs, provided, by its 7th section, that the Federal judges should grant writs of *habeas corpus* in all cases of a prisoner in jail or confinement, where he should be committed or confined on or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof.

The next extension of the circumstances on which a writ of *habeas corpus* might issue by the Federal judges arose out of the celebrated McLeod Case, in which McLeod, charged with murder, in a State court of New York, had pleaded that he was a British subject, and that what he had done was under and by the authority of his government, and should be a matter of international adjustment, and that he was not subject to be tried by a court of New York under the laws of that State. The Federal government acknowledged the force of this reasoning, and undertook to obtain from the government of the State of New York the release of the prisoner, but failed. He was, however, tried and acquitted, and afterwards released by the State of New York. This led to an extension of the powers of the Federal judges under the writ of *habeas corpus*, by the act of August 29, 1842, 5 Stat. 539, c. 257, entitled "An act to provide further remedial justice in the courts of the United States." It conferred upon them the power to issue a writ of *habeas corpus* in all cases where the prisoner claimed that the act for which he was held in custody was done under the sanction of any foreign power, and where the validity and effect of this plea depended upon the law of nations. In advocating the bill, which afterwards became a law, on this subject, Senator Berrien, who introduced it into the Senate, observed: "The object was to allow a foreigner, prosecuted in one of the States of the Union for an offence committed in that State, but which he pleads has been committed under authority of his own sovereign or the authority of the law of nations, to be brought up on that issue before the only competent judicial power to decide upon matters involved in foreign relations or the law of nations. The plea must show that it has reference to the laws or treaties of the United States or the law of nations, and showing this, the writ of *habeas corpus* is awarded to try that issue. If it shall appear that the accused has a bar on the plea alleged, it is right and proper that he should not be delayed in prison awaiting the proceedings of the State jurisdiction on the preliminary issue of his plea at bar. If satisfied of the exist-

ence in fact and validity in law of the bar, the Federal jurisdiction will have the power of administering prompt relief." No more forcible statement of the principle on which the law of the case now before us stands can be made.

The next extension of the powers of the court under the writ of *habeas corpus* was the act of February 5, 1867, 14 Stat. 385, c. 28, and this contains the broad ground of the present Revised Statutes, under which the relief is sought in the case before us, and includes all cases of restraint of liberty in violation of the Constitution or a law or treaty of the United States, and declares that "the said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested, and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the Constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty."

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The same answer is given in the present case. To the objection made in argument, that the prisoner is discharged by this writ from the power of the State court to try him for the whole offence, the reply is, that if the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act he did no more than what was necessary and proper for him to do, he *cannot* be guilty of a crime under the law of the State of California. When these things are shown, it is established that he is innocent of any crime against the laws of the State, or of any other authority whatever. There is no occasion for any further trial in the State court, or in any court. The Circuit Court of the United States was as competent to ascertain these facts as any other tribunal, and it was not at all necessary that a jury should be impanelled to render a verdict on them. It is the exercise of a power common under all systems of criminal jurisprudence. There must always be a preliminary examination by a committing magistrate, or some similar authority, as to whether there is an offence to be submitted to a jury, and if this is submitted in the first instance to a grand jury, that is still not the right of trial by jury which is insisted on in the present argument.

We have thus given, in this case, a most attentive consideration to all the questions of law and fact which we have thought to be properly involved in it. We have felt it to be our duty to examine into the facts with a completeness justified by the importance of the case, as well as from the duty imposed upon us by the statute, which we think requires of us to place ourselves, as far as possible, in the place of the Circuit Court and to examine the testimony and the arguments in it, and to dispose of the party as law and justice require.

The result at which we have arrived upon this examination is, that in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that without prompt action on his part the assault of Terry upon the judge would have ended in the death of the latter; that such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction.

*We therefore affirm the judgment of the Circuit Court authorizing his discharge from the custody of the sheriff of San Joaquin County.*

Mr. Justice Lamar (with whom concurred Mr. Chief Justice Fuller) dissenting.

The Chief Justice and myself are unable to assent to the conclusion reached by the majority of the court.

Our dissent is not based on any conviction as to the guilt or innocence of the appellee. The view which we take renders that question immaterial to the inquiry presented by this appeal. That inquiry is, whether the appellee, Neagle, shall in this *ex parte* proceeding be discharged and delivered from any trial or further inquiry in any court, State or Federal, for what he has been accused of in the forms prescribed by the constitution and laws of the State in which the act in question was committed. Upon that issue we hold to the principle announced by this court in the case of *Ex parte* Crouch, 112 U. S., 178, 180, in which Mr. Chief Justice Waite, delivering the opinion of the court, said: "It is elementary learning that, if a prisoner is in the custody of a State court of competent jurisdiction, not illegally asserted, he cannot be taken from that jurisdiction and discharged on *habeas corpus* issued by a court of the United States, simply because he is not guilty of the offence for which he is held. All questions which may arise in the orderly course of the proceeding against him are to be determined by the court to whose jurisdiction he has been subjected, and no other court is authorized to interfere to prevent it. Here the right of the prisoner to a discharge depends alone on the sufficiency of his defence to the information under which he is held. Whether his defence is sufficient or not is for the court which tries him to determine. If, in this determination, errors are committed, they can only be corrected in an appropriate form of proceeding for that purpose. The office of a writ of *habeas corpus* is neither to correct such errors, nor to take the prisoner away from the court which holds him for trial, for fear, if he remains,

they may be committed. Authorities to this effect in our own reports are numerous. *Ex parte* Watkins, 3 Pet. 202; *Ex parte* Lange, 18 Wall. 163, 166; *Ex parte* Parks, 92 U. S. 18, 23; *Ex parte* Siebold, 100 U. S. 371, 374; *Ex parte* Virginia, 100 U. S. 339, 343; *Ex parte* Rowland, 104 U. S. 604, 612; *Ex parte* Curtis, 106 U. S. 371, 375; *Ex parte* Yarbrough, 110 U. S. 651, 653."

Many of the propositions advanced in behalf of the appellee and urged with impressive force we do not challenge. We do not question, for instance, the soundness of the elaborate discussion of the history of the office and function of the writ of *habeas corpus*, its operation under and by virtue of section 753 of the Revised Statutes, or the propriety of its use in the manner and for the purposes for which it has been used, in any case where the prisoner is under arrest by a State for an act done "in pursuance of a law of the United States." Nor do we contend that any objection arises to such use of the writ, and based merely on that fact, in cases where no provision is made by the Federal law for the trial and conviction of the accused. Nor do we question the general propositions, that the Federal government established by the Constitution is absolutely sovereign over every foot of soil, and over every person, within the national territory, within the sphere of action assigned to it; and that within that sphere its constitution and laws are the supreme law of the land, and its proper instrumentalities of government can be subjected to no restraint, and can be held to no accountability whatever. Nor, again, do we dispute the proposition that whatever is necessarily implied in the Constitution and laws of the United States is as much a part of them as if it were actually expressed. All these questions we pretermit.

The recognition by this court, including ourselves, of their soundness does not in the least elucidate the case; for they lie outside of the true controversy. The ground on which we dissent, and which in and by itself seems to be fatal to the case of the appellee, is this: That in treating section 753 of the Revised Statutes as an act of authority for this particular use of the writ a wholly inadmissible construction is placed on the word "law," as used in that statute, and a wholly inadmissible application is made of the clause "in custody in violation of the Constitution . . . of the United States."

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## HAUENSTEIN *v.* LYNHAM.

100 United States, 483. 1879.

Mr. Justice Swayne delivered the opinion of the court.

Solomon Hauenstein died in the city of Richmond in the year 1861 or 1862, intestate, unmarried, and without children. The precise date of his death is not material. At that time he owned and held considerable real estate in the city of Richmond. An inquisition of escheat was prosecuted by the escheator for that district. A verdict and judgment were rendered in his favor. When he was about to sell the property, the plaintiffs in error, pursuant to a law of the State, filed their petition, setting forth that they were the heirs-at-law of the deceased, and praying that the proceeds of the sale of the property should be paid over to them. Testimony was taken to prove their heirship as alleged, but the court was of opinion that, conceding that fact to be established, they could have no valid claim, and dismissed the petition. They removed the case to the Court of Appeals. That court, entertaining the same views as the court below, affirmed the judgment. They thereupon sued out this writ of error..

The plaintiffs in error are all citizens of Switzerland. The deceased was also a citizen of that country, and removed thence to Virginia, where he lived and acquired the property to which this controversy relates, and where he died. The validity of his title is not questioned. There is no proof that he denationalized himself or ceased to be a citizen and subject of Switzerland. His original citizenship is, therefore, to be presumed to have continued. Best on Presumptions, 186. According to the record his domicile, not his citizenship, was changed. The testimony as to the heirship of the plaintiffs in error is entirely satisafctory. There was no controversy on this subject in the argument here. The parties were at one as to all the facts. Their controversy was rested entirely upon legal grounds.

The common law as to aliens, except so far as it has been modified by her legislature, is the local law of Virginia. 2 Tucker's Blackst., App., Note C. By that law "aliens are incapable of taking by descent or inheritance, for they are not allowed to have any inheritable blood in them." 2 Bla. Com., 249. But they may take by grant or devise though not by descent. In other words, they may take by the act of a party, but not by operation of law; and they may convey or devise to another, but such a title is always liable to be devested at the pleasure of the sovereign by office found. In such cases the sovereign, until entitled by office found or its equivalent, cannot pass the title to a grantee. In these respects there is

no difference between an alien friend and an alien enemy. Fairfax's Devisee *v.* Hunter's Lessee, 7 Cranch, 603.

The law of nations recognizes the liberty of every government to give to foreigners only such rights, touching immovable property within its territory, as it may see fit to concede. Vattel, book 2, c. 8, sect. 114. In our country, this authority is primarily in the States where the property is situated.

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This brings us to the consideration of the treaty between the United States and the Swiss Confederation, of the 25th of November, 1850. The fifth article, 11 Stat. 590, has been earnestly pressed upon our attention, and is the hinge of the controversy between the parties.

The first part of the article is devoted to personal property, and gives to the citizens of each country the fullest power touching such property belonging to them in the other, including the power to dispose of it as the owner may think proper. It then proceeds as follows: —

"The foregoing provisions shall be applicable to real estate situate within the States of the American Union, or within the cantons of the Swiss Confederation, in which foreigners shall be entitled to hold or inherit real estate.

"But in case real estate situated within the territories of one of the contracting parties should fall to a citizen of the other party, who, on account of his being an alien, could not be permitted to hold such property in the State or in the canton in which it may be situated, there shall be accorded to the said heir, or other successor, such term as the laws of the State or canton will permit to sell such property; he shall be at liberty at all times to withdraw and export the proceeds thereof without difficulty, and without paying to the government any other charges than those which, in a similar case, would be paid by an inhabitant of the country in which the real estate may be situated."

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It remains to consider the effect of the treaty thus construed upon the rights of the parties.

That the laws of the State, irrespective of the treaty, would put the fund into her coffers, is no objection to the right or the remedy claimed by the plaintiffs in error.

The efficacy of the treaty is declared and guaranteed by the Constitution of the United States. That instrument took effect on the fourth day of March, 1789. In 1796, but a few years later, this court said: "If doubts could exist before the adoption of the present national government, they must be entirely removed by the sixth article of the Constitution, which provides that 'all treaties made or which shall be made under the authority of the United States, shall be *the supreme law of the land*, and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.' There can be no limitation on the power of the people of the United States. By

their authority the State constitutions were made, and by their authority the Constitution of the United States was established; and they had the power to change or abolish the State constitutions or to make them yield to the general government and to treaties made by their authority. A treaty cannot be *the supreme law of the land,* that is, of all the United States, if any act of a State legislature can stand in its way. If the constitution of a State (which is the fundamental law of the State and paramount to its legislature) must give way to a treaty and fall before it, can it be questioned whether the less power, an act of the State legislature, must not be prostrate? It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the constitution and laws of any individual State, and their will alone is to decide. If a law of a State contrary to a treaty is not void, but voidable only, by a repeal or nullification by a State legislature, this certain consequence follows, — that the will of a small part of the United States may control or defeat the will of the whole." Ware *v.* Hylton, 3 Dall. 199.

It will be observed that the treaty-making clause is retroactive as well as prospective. The treaty in question, in Ware *v.* Hylton, was the British treaty of 1783, which terminated the war of the American Revolution. It was made while the Articles of Confederation subsisted. The Constitution, when adopted, applied alike to treaties "made and to be made."

We have quoted from the opinion of Mr. Justice Chase in that case, not because we concur in every thing said in the extract, but because it shows the views of a powerful legal mind at that early period, when the debates in the convention which framed the Constitution must have been fresh in the memory of the leading jurists of the country.

In Chirac *v.* Chirac, 2 Wheat. 259, it was held by this court that a treaty with France gave to her citizens the right to purchase and hold land in the United States, removed the incapacity of alienage and placed them in precisely the same situation as if they had been citizens of this country. The State law was hardly adverted to, and seems not to have been considered a factor of any importance in this view of the case. The same doctrine was reaffirmed touching this treaty in Carneal *v.* Banks, 10 Wheat. 181, 189, and with respect to the British treaty of 1794, in Hughes *v.* Edwards, 9 Wheat. 489. A treaty stipulation may be effectual to protect the land of an alien from forfeiture by escheat under the laws of a State. Orr *v.* Hodgeson, 4 Wheat. 453. By the British treaty of 1794, "all impediment of alienage was absolutely levelled with the ground despite the laws of the States. It is the direct constitutional question in its fullest conditions. Yet the Supreme Court held that the stipulation was within the constitutional powers of the Union. Fairfax's Devisees *v.* Hunter's Lessee, 7 Cranch, 627; see Ware *v.* Hylton, 3 Dall. 242."

8 Op. Att'ys-Gen. 417. Mr. Calhoun, after laying down certain exceptions and qualifications which do not affect this case says: "Within these limits all questions which may arise between us and other powers, be the subject-matter what it may, fall within the treaty-making power and may be adjusted by it." Treat. on the Const. and Gov. of the U. S. 204.

If the national government has not the power to do what is done by such treaties, it cannot be done at all, for the States are expressly forbidden to "enter into any treaty, alliance, or confederation." Const., art. 1, sec. 10.

It must always be borne in mind that the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and constitution. This is a fundamental principle in our system of complex national polity. See also Shanks *v.* Dupont, 3 Pet. 242; Foster & Elam *v.* Neilson, 2 id. 253; The Cherokee Tobacco, 11 Wall. 616; Mr. Pinkney's Speech, 3 Elliots' Constitutional Debates, 231; The People, *ex rel.* *v.* Gerke & Clark, 5 Cal. 381.

We have no doubt that this treaty is within the treaty-making power conferred by the Constitution. And it is our duty to give it full effect. We forbear to pursue the topic further. In the able argument before us, it was insisted upon one side, and not denied on the other, that, if the treaty applies, its efficacy must necessarily be complete. The only point of contention was one of construction. There are doubtless limitations of this power as there are of all others arising under such instruments; but this is not the proper occasion to consider the subject. It is not the habit of this court, in dealing with constitutional questions, to go beyond the limits of what is required by the exigencies of the case in hand. What we have said is sufficient for the purposes of this opinion.

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The judgment of the Court of Appeals of Virginia, so far as it concerns the claim of the plaintiffs in error, will be reversed, and the cause remanded for further proceedings in conformity with this opinion; and it is *So ordered.*[1]

[1] As to the effect of treaties upon the special provisions of inheritance laws with respect to aliens, see Rixner's Succession, 48 La. Ann. 552; Opel *v.* Shoup, 100 Iowa, 407; Wunderle *v.* Wunderle, 144 Ill. 40. As to the treaty making power of the United States in such cases, see People *v.* Gerke, 5 Cal. 381, *infra*, p. 583, and note.

## DAVIS *v.* ELMIRA SAVINGS BANK.

161 United States, 275. 1895.

In March, 1893, the Elmira National Bank, a banking association organized under the laws of the United States, and doing business in the State of New York, suspended payment, and the Comptroller of the Currency of the United States appointed Charles Davis, plaintiff in error, the receiver thereof. The Elmira Savings Bank, which was incorporated under the laws of the State of New York, from November, 1890, kept a deposit account with the Elmira National Bank, and at the time of the appointment of the receiver of the latter corporation there was to the credit of this account of the Savings Bank the sum of $42,704.67. The opening of the deposit account by the Savings Bank was sanctioned by the general banking laws of the State of New York.

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In the process of liquidating the affairs and realizing the assets of the National Bank all its circulating notes were provided for, and the receiver had on hand in cash for distribution among its creditors a sum exceeding the amount due as aforesaid to the Savings Bank. Thereupon the latter demanded of the receiver payment of the sum to the credit of its deposit account in preference to the other creditors of the National Bank, basing its demand on a provision of the general banking law of the State of New York, which [gives savings banks a preference in the distribution of the assets of any insolvent bank, to the extent of its deposits, so far as such deposits are authorized].

The receiver, under the authority of the Comptroller of the Currency of the United States, declined to accede to this demand, predicating his refusal on the provisions of sections 5236 and 5242 of the Revised Statutes of the United States, which [direct ratable distribution of the assets of an insolvent National Bank among all creditors].

In consequence of this refusal the Savings Bank brought an action in the Supreme Court of the State of New York to enforce the payment by preference, which action was resisted by the receiver. Ultimately the case was taken to the Court of Appeals of the State of New York, where the claim of preference, asserted by the Savings Bank, was maintained. The case is reported in 142 N. Y. 590. To that judgment the present writ of error is prosecuted.

Mr. Justice White, after stating the case, delivered the opinion of the court.

National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of

their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties, for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court.

The question which the record presents is, does the law of the State of New York on which the Savings Bank relies conflict with the law of the United States upon which the Comptroller of the Currency rests to sustain his refusal? If there be no conflict, the two laws can coexist and be harmoniously enforced, but if the conflict arises, the law of New York is from the nature of things inoperative and void as against the dominant authority of the Federal statute. In examining the question it is well to put in juxtaposition a summary statement of the Federal and State statutes. The first directs the Comptroller "from time to time, after full provision has been made for the refunding to the United States of any deficiency in redeeming the notes of such association, . . . to make a ratable dividend of the money paid over to him . . . on all such claims as may have been proved." The second, the State law, directs "the trustee, assignee or receiver" of "any bank or trust company which shall become insolvent" to apply the assets received by him, "in the first place to the payment in full of any sum or sums of money deposited therewith by any savings bank, but not to an amount exceeding that authorized" by law.

It is clear that these two statutes cover exactly the same subject-matter. Both relate to insolvent banks; both ordain that the right of preference on the one side and the duty of ratable distribution on the other shall only result from insolvency; both cover the assets of such banks coming, after insolvency, into the hands of the officer or person authorized to administer them. It is equally certain that both statutes relate to the same duty on the part of the officer of the insolvent bank; the one directs the representative to make a ratable distribution; the other requires, if necessary, the application of the entire assets to payment in full, by preference and priority over all others of a particular and selected class of creditors therein named. We have, therefore, on the one hand, the statute of the United States, directing that the assets of an insolvent national bank shall be distributed by the Comptroller of the Currency in the manner therein pointed out, that is, ratably among the creditors. We have on the other hand, the statute of the State of New York giving a contrary command. To hold that the State statute is operative is to decide that it overrides the plain text of the act of Congress. This results, not only from the fact that the two statutes, as we have said, cover the same subject-matter, and relate to the same duty, but also because there is an absolute repugnancy between their provisions,

that is, between the ratable distribution, commanded by Congress, and the preferential distribution directed by the law of the State of New York.

The conflict between the spirit and purpose of the two statutes is as pronounced as that which exists between their unambiguous letter. It cannot be doubted that one of the objects of the national bank system was to secure, in the event of insolvency, a just and equal distribution of the assets of national banks among all unsecured creditors, and to prevent such banks from creating preferences in contemplation of insolvency. This public aim in favor of all the citizens of every State of the Union is manifested by the entire context of the national bank act.

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*Judgment reversed and case remanded to the Court of Appeals of the State of New York with instructions to remit the cause to the court in which it originated with directions to dismiss the action.*

# CHAPTER III.

## DEPARTMENTS OF GOVERNMENT.

## SECTION I. — THE LEGISLATIVE DEPARTMENT.

### TAYLOR *v.* PLACE.

4 Rhode Island, 324. 1856.

AMES, C. J. The substance of this case is, that after the plaintiffs had, in the regular course of judicial proceeding in the Court of Common Pleas for the County of Providence, obtained a verdict against the defendants for a sum sufficient to pay their first judgment against the Oneco Manufacturing Company, and within the amount ascertained to be in the hands of the defendants by their affidavits as garnishees, the General Assembly interfered by their vote; ordered the judgments in the former suits to be opened for the purpose of allowing, and allowed the defendants to make new affidavits as garnishees therein with effect, on the ground that the old ones were incorrectly made through accident or mistake; and set aside the verdict in this cause, and granted a new trial therein, in order that the garnishees might avail themselves of their new affidavits upon the new trial thus granted to them. By force of this vote of the Assembly, the verdict of the plaintiffs was set aside; a new trial of this cause was had by the defendants; new affidavits were filed by them, exonerating themselves from the liability which they had incurred by the old ones; and the consequence has been, that the same court under whose direction, and according to law, a verdict in this cause was obtained by the plaintiffs, has been obliged to render a judgment therein for the defendants.

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It is hardly necessary, perhaps, after stating the purpose and effect of this vote, to use arguments or to cite authorities to show that thus to set aside a verdict and grant a new trial in a suit at law, which the frame of statutes, or even binding rules of practice place beyond the power of the court in which the cause is pending, or of any court of *law*, is the exercise of judicial power; that to deprive one party

to such a suit of an advantage that he has obtained over the other from the mistake of the latter, or from an accident that has befallen him, is the exercise of judicial power; and that, finally, as the means to such relief, to open judgments or decrees obtained in a court, and to allow the substitution of a new, or the amendment of an old sworn answer, either in proceedings at law or in equity, for the purpose and with the effect of reversing the relative condition of the parties to a pending suit, dependent upon the effect of that answer, is an exercise of judicial power. In the cause before us, *all* this has been done by a vote of the General Assembly; and, in the analysis of this vote just given, we have described, most aptly, the substance of a decree of a court of chancery, when exercising, in a case of accident or mistake, and after solemn hearing, its high judicial functions over proceedings at law. The difference between the decree, as it would be in such a case, if a proper one for relief, and the vote in question, is not in favor of the latter; for, whereas the *decree* could act only upon the *parties* to the suit, the *vote* directs and controls the action of the legal tribunal itself.

In some cases, it is difficult to draw and apply the precise line separating the different powers of government which, under our political systems, Federal and State, are, without exception, carefully distributed between the legislative, the executive, and the judicial departments. To some extent, and in some sense, each of the powers appropriated to different departments in the above distribution, must be exercised by every other department of the government, in order to the proper performance of its duty. As illustrated by Mr. Justice McLean, in giving the judgment of the supreme court of the United States, in the case of Watkins *v.* Holman *et al.* 16 Pet. 60, 61 — "The executive, in acting upon claims for services rendered, may be said to exercise, if not in form, in substance, judicial power. And so a court, in the use of a discretion essential to its existence, by the adoption of rules or otherwise, may be said to legislate. A legislature, too, in providing for the payment of a claim, exercises a power in its nature judicial; but this is coupled with the paramount and remedial power." In an early case, which we shall have occasion hereafter to use for another purpose, the question came before the courts of the United States, under the clause of the Constitution of the United States distributing the different powers of the Federal government amongst its different departments, whether a power, lodged, by an act of Congress, in the Circuit Courts of the United States, to inquire into and to take evidence of the claims of invalid pensioners, and to transmit the result of their inquiries to the secretary of war, for his action and that of Congress thereon, was *judicial* power, and so the exercise of it imperative upon the circuit judges. The unanimous opinion of the Circuit Court for the District of New York, then consisting of Jay, chief justice, Cushing, justice, and Duane, district judge; of the Circuit Court for the District of Penn-

sylvania, then consisting of Wilson and Blair, justices, and of Peters, district judge; and of the Circuit Court for the District of North Carolina, then consisting of Iredell, justice, and of Sitgreaves, district justice; — was, that the power thus vested was *not* judicial, and that consequently they were not bound to exercise it. The reasons given by them were, in substance, that the act of Congress did not contemplate this power as judicial, inasmuch as it subjected the decisions of the courts, in the matter to which it related, to the consideration and suspension of the secretary of war, and again to the revision of Congress; whereas, by the Constitution, neither the secretary of war, nor any other executive officer, *nor even the legislature*, were authorized to sit, as a court of errors, on the *judicial* acts or opinions of the courts of the United States. The judges composing the Circuit Court of New York, however, consented, on account of the benevolence which had dictated the passage of the pension act in question, *personally* to execute the duties imposed upon them in the character of *commissioners* appointed by *official* instead of personal descriptions; deeming themselves at liberty, as individuals, to accept or decline the office thus tendered to them. See the opinions in the note illustrating Hayburn's Case, 2 Dallas, 410, 411, 412, and in 1 Curtis's Decis. Sup. Ct. U. S. 9, 10, and 11. In Watkins *v.* Holman *et al.* before quoted, the question arose before the Supreme Court of the United States, under the constitution of Alabama, containing a like distribution of powers with our own, whether an act of the legislature of that state, authorizing an administratrix residing in another State, to sell and convey, by certain attorneys named in the act, the real estate of her intestate husband in Alabama, for the payment of his debts, her attorneys giving bond with sureties for the faithful payment of the proceeds of sale to the administratrix, "to be appropriated to the payment of the debts of the deceased," was a *judicial* act, and so within the inhibition of the constitution of Alabama. The court held the act to be valid, as the exercise, not of *judicial*, but of *legislative* power; the act providing a special remedy, merely, for a case which, on account of its circumstances, though within the spirit, was not within the *letter* of the general statute of Alabama, which directed the mode in which the real estate of a deceased debtor should be sold and applied to the payment of his debts. Again, in the late case of United States *v.* Ferreira, 13 How. 40, 48, the same court held that an act of Congress, empowering the district *judge* of Florida, under the treaty with Spain of 1819, commonly called the Florida treaty, to examine and adjudge claims for injuries made by the Spanish inhabitants of Florida, provided for by a clause in that treaty, and to report his decisions, if favorable to the claimants, with the evidence, to the secretary of the treasury, for *his* discretionary action thereon, did not confer upon the district *court* of Florida *judicial* power, in the sense of the Constitution of the United States, in that matter; and hence, that no appeal from the award of

the judge, thus acting merely as a commissioner, could be brought to the Supreme Court of the United States. The court followed precisely the line of reasoning which must have been adopted by the judges in Hayburn's Case, in 1792, as illustrated by the opinions given in the note to that case, which the court recite at large. In the opinion of the court, delivered by the present venerable chief justice, he says: "The powers conferred by these acts of Congress upon the judge, as well as the secretary, are, it is true, judicial in their nature; for judgment and discretion must be exercised by both of them. But it is nothing more than the power ordinarily given by law to a commissioner appointed to adjust claims to lands or money, under a treaty; or special powers to inquire into or decide any other particular class of controversies in which the public or individuals may be concerned. A power of this description may constitutionally be conferred on a secretary as well as a commissioner, but is not *judicial* in either case, in the sense in which judicial power is granted by the Constitution to the courts of the United States;" and see American Ins. Co. *v.* Canter, 1 Pet. 511; Benner *v.* Porter, 9 How. 235; United States *v.* Ritchie, 17 How. 533, 534.

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On the other hand, it may safely be said, that to hear and decide adversary suits at law and in equity, with the power of rendering judgments and entering up decrees according to the decision, to be executed by the process and power of the tribunal deciding, or of another tribunal acting under its orders and according to its direction, *is* the exercise of *judicial* power, in the constitutional sense; and that it is so, whether the decision be final, or subject to reversal on error or appeal. It is precisely thus that the great exemplar of constitutional law, the Constitution of the United States, defines this power; for, after vesting, by the first section of its third article, "the judicial power of the United States," in "one supreme court, and in such inferior courts as Congress may, from time to time, order and establish"; and after, in the same section, fixing the tenure and mode of compensating the judges of the courts of the United States; it proceeds, in the second section of the same article, to define this power, by stating the *cases* and *controversies* in law and equity, and of admiralty and maritime jurisdiction, to which, from the nature of the questions involved in them, or of the principles of decision to be applied to them, or from the character or citizenship of the parties to them, or to be affected by them, this power, whether original or appellate, shall extend. In Osborn *v.* The Bank of the United States, 9 Wheat. 319, Chief Justice Marshall, in delivering the opinion of the court, after saying that the second article of the Constitution vests the whole executive power in the President, and that the third article, among other things, declares, "that the judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which

shall be made under their authority," thus speaks of the effect and extent of the latter: "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, *when any question respecting them shall assume such a form that the judicial power is capable of acting upon it. That power is capable of acting only* when the subject is submitted to it *by a party who asserts his rights in the form prescribed by law.* It then becomes a *case;* and the Constitution declares that the judicial power shall extend to all CASES arising under the Constitution, laws, and treaties of the United States." The judicial power is exercised in the decision of *cases;* the legislative, in making general regulations, by the enactment of laws. The latter acts from considerations of public policy; the former is guided by the pleadings and evidence in *the case.* Per Mr. Justice McLean. State of Pennsylvania *v.* Wheeling and Belmont Bridge Co., 18 How. 440. Indeed, laws and courts have their origin in the necessity of rules and means to enforce them, to be applied to cases and controversies within their jurisdiction; and our whole idea of judicial power is, the power of the latter to apply the former to the decision of those cases and controversies. To affect to decide, or to control the decision, of a case or controversy which has arisen at law or in equity, or to interfere with its progress, or to alter its condition in any way, is to assume the exercise of judicial power; and that, too, although the subject of the case or controversy might have been such in its nature, that the legislature could have acted upon it, had it seen fit, without the aid of the courts.

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Such a jurisdiction was familiarly exercised by the General Assembly, during the Colonial period of our history, and after we became a State, down to the adoption of our Constitution in 1843, and even, though more unfrequently, since. That the Assembly may not have pursued the principles, or adopted the precise mode of relief in such a court; that it acted directly upon the court, instead of upon the parties plaintiff proceeding in it, might have arisen either from forgetfulness of the principles and practice of a court of chancery, or from that forceful disposition which a departed statesman deemed would naturally accompany a legislative body, vested with, or assuming to exercise, judicial power. Alexander Hamilton, Federalist, No. 83, page 325, 6th edition.

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Has the General Assembly of this State, under the constitution, the right to exercise *judicial* power? or, is the exercise of such power prohibited to it by the constitution?

If the law-making department in our government, has also the power to interpret and to enforce their interpretation of the laws, either acting wholly by itself, or by directing and controlling, as a superior tribunal, all other tribunals of the State, every friend to

a settled and well-ordered administration of justice amongst us — every lover of free government itself — has, indeed, cause to mourn. It was the celebrated maxim of Montesquieu, that "there can be no liberty where the legislative and executive powers are united in the same person or body of magistrates;" or, "if the power of judging be not separated from the legislative and executive powers." For the first part of this maxim, the reason, tersely given, is, "because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws, to *execute* them in a tyrannical manner;" and for the latter portion of the maxim, "if the power to judge be joined with the power to legislate, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator; if, to the executive power, the judge might behave with all the violence of an oppressor." If this distinguished political critic derived this maxim from the British Constitution, "as," to use his own expression, "the mirror of political liberty" in his day, how are we to regard it, illustrated and enforced, as it has been, in the Federal Constitution, and in every State constitution of these United States, whether framed and adopted by those who sat by the cradle, or by those who have ministered to the generous manhood of our freedom.

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The question before us is, substantially, whether, when in 1843, the people of this State adopted a constitution, they attended to this truth, and heeded this warning so long before given, and constantly standing before them; or whether, leaving the General Assembly in the possession of full judicial power, as well as of legislative, and nearly of executive, this constitution — declared in the *first* paragraph of its *first* article to be of paramount obligation in all legislative, as well as judicial and executive proceedings — was set up by them as a mere "parchment barrier" against the enterprising ambition of the legislative department of the government, which *as a court*, could expound away every restriction imposed upon it *as a legislature?*

This can properly be ascertained only by attention to the clauses of the constitution bearing upon this subject; by taking into view their origin and received construction when adopted, if they had any; and by the application to them of the usual rules of interpretation.

These clauses are, —

*First.* Section 1, article 4; which declares, that "this constitution shall be the supreme law of the State, and *any law* inconsistent therewith shall be void."

*Second.* Section 1, article 3; which provides, that "the powers of the government shall be distributed into three departments; the legislative, executive, and judicial."

*Third.* Section 2, article 4; which vests "the legislative power, *under this constitution,*" "in two houses, the one to be called the

Senate, and the other the House of Representatives; and both together, the General Assembly."

*Fourth.* Section 1, article 7; which vests "the chief executive power of this State" "in a governor, who, together with a lieutenant governor, shall be annually elected by the people."

*Fifth.* Section 1, article 10; which is in these words: "The judicial power of this State shall be vested in one supreme court, and in such inferior courts as the General Assembly may, from time to time, ordain and establish." Also, in the same connection, sections 4 and 6 of this article, declaring in substance, that the judges of the supreme court "shall be elected by the two houses in grand committee;" that "each judge shall hold his office until his place be declared vacant by a resolution of the General Assembly to that effect, which resolution shall be voted for by a majority of all the members elected to the house in which it may originate, and be concurred in by the same majority of the other house;" and which declare that "such resolution shall not be entertained *at any other than the annual session for the election of public officers;* and, in default of the passage thereof *at said session*, the judge shall hold his place as is herein provided; but a judge of any court shall be removed from office, if, upon impeachment, he shall be found guilty of any official misdemeanor;" and which further provide, that "the judges of the supreme court shall receive a compensation for their services, which shall not be *diminished* during their continuance in office." Also, section 3, article 14, giving to the supreme court established by the constitution, the jurisdiction of the supreme judicial court, existing at the adoption of the constitution.

*Sixth.* And in special reference to the vote before us, section 2, article 10, "The several courts shall have such jurisdiction as may, from time to time, be prescribed by law. Chancery powers *may be conferred* on the supreme court, but on no other court to any greater extent than is now provided by law;" and

*Lastly.* Section 10, article 4; which declares, that "the general assembly shall continue to exercise the powers they have heretofore exercised, *unless prohibited in this constitution.*"

We have purposely arranged these clauses of the constitution together, because they all relate to the subject we are considering, and must be viewed and construed in their bearings upon each other, if we would arrive at the result, — their true meaning as a whole. Looking at them in this way, no one at all familiar with such subjects, and the established principles which govern them, can, we think, fail to perceive the unity of design and purpose manifested in them. The powers of government, which, under the old charter, as under all the old Colonial charters in this country, had been aggregated in the general *assembly*, as it was called in most of them, and in ours, and in the general *court*, as in some, were distributed among the appropriate departments, that thus a just balance of power might

obtain among all; the judiciary, the weakest, and therefore, the safest depository of such power, to control the tendency to excess of action in every other department, and especially to check encroachment upon the just limits of its own. The charter, which was well enough for the feeble colony of doubly persecuted Independents to whom it was granted, — nay, in the noble purpose of "the experiment" which it announced, a boon of freedom to all, — had been outgrown by the necessities of the crowded, rich, and flourishing State. The immense amount of property here *in action*, as it is technically called, complicated with contracts, trust settlements, and special equities, required, for the purposes of justice, a much nicer and more systematic judicial administration than the comparative poverty and simplicity of the sparse population of Colonial days. In the meantime, the world-famous maxim of Montesquieu concerning the distribution of the powers of government in order to freedom, of which we have spoken, had not only been announced by that great political critic, and been received with acclamation by the enlightened statesmen of Europe and our own country, but, what is of more importance to the matter before us, *had been acted upon* in every one of the numerous State constitutions of the United States, as well as in the Federal Constitution, for the avowed purpose of securing, and as necessary to secure, the safety of the life, liberty, and property of the citizens. Such a separation of the powers of government, between its different departments, had, when our constitution was adopted in 1843, and long previous, its well-known history, and its long and firmly established meaning and purpose; and he who shuts his eyes to these, in construing the comprehensive and apothegmatic clauses of such an instrument, shuts his eyes to the only light which is strong and diffused enough to enable him to perceive their just interpretation. It is quite evident, too, that this distribution of powers was, in our constitution, made for the special purpose of depriving the general assembly of their long exercised judicial power, which, rightly or wrongly, that body had assumed under the charter. The executive power had been nominal, merely, under the charter; and the constitution extends it very little. No jealousy of it, or of its assumption by the enterprising and all-absorbing legislative department of the government, did or could exist. It was the assumption of judicial power by the General Assembly, which *must* have been specially aimed at by this clause of distribution; — a power grown to be of great importance, as controlling the large and increasing property amassed in the State, and the complicated interests in it, which, from time to time, required to be judicially ascertained and adjusted. As a groundwork for this deprivation, and to meet the new exigency, the judges of the supreme court, who under the charter, had, like all other officers, been of annual appointment by the general assembly, were endowed with a firmer tenure, — that of good behavior, — unless removed by the joint vote, in separate

houses, of a majority *of those elected* to the general assembly in each, passed at the May session, when the members came to the Assembly fresh from the people, and before legislative factions could have time to be formed, or to grow unscrupulous in their action against the judges. To the firmer tenure of the members of the court, was united, by the constitution, for the sole purpose of making them independent of the legislative body, this quality in their compensation; that whatever the compensation was, upon which they had consented to accept office, it could not be *diminished* by the general assembly, during their continuance in office. Again the assembly might *increase* the jurisdiction of this court, under the general provision, "that the supreme court shall have such jurisdiction as may, from time to time, be prescribed *by law;*" but that body was forbidden to *diminish* it. As we have seen, this court was endowed, *by the constitution*, with "the same jurisdiction as the supreme judicial court" had, at the time of the adoption of the constitution, as well as with jurisdiction over all causes pending in, or which might, by existing laws, be appealed to it. In the same direction, and for the same purpose, the General Assembly, though empowered to confer *full chancery powers* upon this court, were expressly prohibited from conferring them upon any other. The plain import of all this, when compared, as it should be to understand it, with the state of things it was intended to remedy, is, that the people of the State, when they adopted this constitution, desired to have, in their court of last resort, so far as such better constitutional provision would enable it, an educated and independent judiciary, with a comparatively stable tenure of office, and with a jurisdiction, which whilst it could not be diminished by the legislature, so as to be powerless to resist it, might be increased by it to any extent which the wants of the people might require.

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We have thus carefully and fully gone through with the reasons and authorities which bear, or are deemed to bear, upon two of the questions raised in this case; because, as we have had occasion to say before, at this very term, we should not feel justified in declaring the act of a coördinate branch of the State government unconstitutional and void, unless it *plainly so appeared* to us; and because we are solicitous, that upon so important a subject, and one in which we are asserting the constitutional power of our *own* department against the encroachments of another, not only *to be*, but to *seem* to be, in the right. In a case so clear from doubt as this is, we should be equally unworthy of the post of duty in which we are placed by the Constitution, if we swerved from the duty which that post devolves upon us, either from want of a just attention to, or a just sense of, the rights of litigants before us, oppressed by an unlawful exercise of power by the assembly, or from a false delicacy growing out of the conflict of power involved in the case between the legislative de-

partment of the government and our own. It is the *constitution* which speaks through us, and not we alone, when we declare, as we now do, that the vote and resolution of the General Assembly, passed at the January session, 1854, upon the petition of Raymond G. Place and Jason T. Place, and certified to us by the court of common pleas, for the county of Providence, is *unconstitutional* and *void;* and we hereby remand this cause to said Court of Common Pleas, now in session at Providence, with directions to said court to proceed therein according to this decision; and order the clerk of this court forthwith to certify to said court this, our decision, together with the costs of the cause in this court.

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## GEEBRICK *v.* STATE.

5 Iowa, 491. 1857.

INDICTMENT for selling intoxicating liquors, without having obtained a license, in accordance with the act entitled "an act to license and regulate the sale of malt, spirituous, and vinous liquors, in the State of Iowa," approved January 29, 1857. A demurrer to the indictment was overruled, and defendant having pleaded not guilty, and submitted his cause to the court, was found guilty, and adjudged to pay a fine of fifty dollars and costs of suit. Defendant appeals.

STOCKTON, J. The question made upon the demurrer to the indictment, is whether the facts alleged constitute a public offence. The defendant is charged with vending and retailing spirituous liquors and intoxicating drinks, without having first complied with the conditions and obtained license, as required by the first section of the act entitled "an act to license and regulate the sale of malt, spirituous and vinous liquors in the State of Iowa," approved January 29, 1857.

This act authorizes the county judge of any county, to issue a license to any person, making application according to its provisions, for the sale of malt, spirituous and vinous liquors; and provides for the punishment of any person selling without a license. By the seventeenth and eighteenth sections, it is provided, that the act entitled "An act for the suppression of intemperance," approved January 22, 1855, is not repealed in any county of the State, unless the people of such county shall, by vote taken upon the question of licensing the sale of spirituous or vinous liquors, adopt the said act of January 29, 1857; and if a majority of the legal voters in any county shall vote in favor of the act, then the county judge shall proceed to issue license, as by the said act is provided.

It is not averred in the indictment, nor does it in any manner appear in the pleadings or evidence, that the act of January 29, 1857

(the license law), has been adopted by a majority of the legal voters of Des Moines County; nor that the question of adopting the same, has ever been submitted in said county to a vote of the people. No question is, however, made in the argument, upon the fact that it is not averred or shown by the record that the act had been adopted. The constitutionality of the act, is the only question argued before us, and the only one we are called upon to decide.

In Santo *v.* The State, 2 Iowa, 203, it was held that the eighteenth section of "the act for the suppression of intemperance," approved January 22, 1855, which provided for submitting to the people of the State the question of prohibiting the sale of intoxicating liquors, was not a submission in its largest and broadest sense of the question, whether the act aforesaid should become a law; that such a submission would have been unconstitutional and void; that "the General Assembly cannot legally submit to the people the proposition whether an act shall become a law or not; and that the people have no power, in their primary or individual capacity, to make laws. They must do this by their representatives."

This decision is in conformity with that of Rice *v.* Foster, 4 Harrington, 492, in which it is said: "The legislature is invested with no power to pass an act which is not a law in itself, when passed, and has no authority as such, and is not to become or be a law, until it shall have been created and established by the will and act of some other persons or body, by whose will, also, existing laws are to be repealed or altered and supplied."

To the same purport is the decision in Thorne *v.* Kramer, 15 Barb. 112. The constitution of the State of New York provided that "the legislative power of the State should be vested in a Senate and Assembly." The court say: "The law making power being thus intrusted to the Senate and Assembly by the Constitution, it cannot, according to any fair construction of that instrument, be also lodged with, or transferred to, any other body. The members of the Senate and Assembly are elected by their constituents for the important duty of making laws. It is to be presumed they are chosen for their wisdom, integrity, experience, and fitness. Upon what principle, then, can the representatives transfer to any other person or persons the power of making, or what is tantamount, the power of breathing life and efficacy into laws?" See also Parker *v.* Commonwealth, 6 Barr, 507; Bradley *v.* Baxter, 15 Barb. 122.

The position seems to us too clear to admit of any doubt, that if the act of January 29, 1857, receives its vitality and force from a vote of the people, such vote is an exercise of legislative power, and the law is unconstitutional and void. The legislative power is vested in the General Assembly, and can be exercised by that body alone. It is to be observed, that the question of the adoption of the act is not submitted to a vote of the people of the whole State, and is only to be voted upon by the people of any county, upon the order aud direc-

tion of the county judge, on the petition of one hundred of the legal voters of the county. Two effects are given to a vote in its favor: 1. If the act is adopted by a majority of the legal voters of any county, then the "act for the suppression of intemperance," approved January 22, 1855, is repealed in such county. 2. The county judge is to issue licenses for the sale of malt, spirituous and vinous liquors, to any one making the necessary application.

Under the "act for the suppression of intemperance," approved January 22, 1855, the rule of law was total prohibition of the manufacture or sale of intoxicating liquors. This had become the established policy of the State; the prohibitory law had received the sanction of each department of the State government, legislative, executive and judicial. If any other indorsement was requisite it was not wanting, when it received at the hands of the people of the State, by their vote in its favor at the April election, 1855, the emphatic impress of their approval. The act of January 29, 1857, undertakes to change this rule of law, and to inaugurate a different policy. It attempts to abrogate the uniform operation, and, consequently, the force and validity, of a law general in its nature, and intended to secure the entire prohibition of the sale of intoxicating liquors in the State, and to provide for licensing the sale thereof, in any county of the State desiring the change, not by virtue of an act of the legislature passed into a law, according to the forms of the constitution, but by the vote of a majority of the people of such county expressed at the polls.

We cannot be mistaken in interpreting this act, and the proceedings authorized by it, to be in effect the repeal of one law, and the enactment of another, by a vote of the people. The question does not differ essentially from that decided in Rice *v.* Foster, *supra,* in which it is held that a reference to the decision of the people at the polls, of the question whether license shall be granted or not, and according to their decision in any county, continuing or repealing therein the former law, and substituting the new one in its place, is a plain surrender to the people of the law making power. A law can no more be repealed than it can be made by the vote of the people, and the fact of a majority of the votes being cast in favor of license can have no more effect in repealing the prohibitory liquor law, than it can have in authorizing the county judge to issue license. It is true that the vote, authorized under the act of 1857, is not to be taken directly upon the question, whether the act shall or shall not become a law. It is to be taken, however, upon a question, the adoption of which by the people of a county, is to give all its force and operation to the law, whether for the repeal of the former prohibition, or for authorizing the issuing of license by the county judge. No rule of conduct in reference to the subject matter of the act is established or changed by it, until it is adopted by the people of any county. It does not occur, as was held by a majority of the court, in Santo *v.* The State, under the act of January 22, 1855, that the law is to take effect

and be in full force. Whatever may be the result of the vote, and even without such vote, it receives its vital force in this case from something outside of the will of the legislature.

[The remainder of the opinion deals with the objection to the statute that it is not of uniform operation, and WRIGHT, C. J., dissents from the opinion of the majority on that point.]

It results from the foregoing considerations, that the act entitled, "An act to license and regulate the sale of malt, spirituous and vinous liquors, in the State of Iowa," approved January 29, 1857, is unconstitutional and void. The defendant's demurrer to the indictment against him for selling liquors, without having first obtained a license, as required by such act, was improperly overruled, and the judgment of the District Court will be *Reversed.*[1]

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## DALBY *v.* WOLF.

14 Iowa, 228. 1862.

WRIGHT, J. Plaintiff declares in trespass for that defendants wrongfully took and drove away certain personal property, belonging to said plaintiff, of the value, &c. The second clause of the answer, justifying, avers that the county of Jones, on the first Monday in April, 1855, did, by a majority vote, on a question duly submitted, decided in favor of restraining swine and sheep from running at large; that after this, the property in question (swine) was found running at large, upon the premises of the defendant, Palmer, who gave notice to his co-defendant, Wolf, a constable, that Palmer took them into possession; and Wolf, after due notice, advertised and sold them. To this part of the answer there was a demurrer, which was sustained, and defendants appeal.

The vote referred to was taken under § 114 of the Code, which provides that the county judge may submit to the people of his county the question, whether stock shall be permitted to run at large, or at what time it shall be prohibited. By the act of January, 28, 1857, ch. 193, the manner of enforcing this law, after an affirmative vote, is pointed out; and it was under this that defendants proceeded in selling this stock.

Plaintiff claims that this law is in conflict with § 6, art. 1, of the Constitution, which declares, that "all laws of a general nature shall have a uniform operation;" and for the further reason, that it depends for its validity upon the vote of the people, and is not the expressed will of the legislature.

Neither of these positions is tenable. They utterly mistake the

[1] *Acc.* Barto *v.* Himrod, 8 N. Y. 483.

intention of the constitutional provision quoted, and misapprehend the scope and spirit of the decisions, in this and other States, which hold that the legislature cannot refer to the people the question whether a particular act shall become a law. In all the cases referred to, it will be found, that as in Thorne *v.* Cramer, 15 Barb. 112, and Bradley *v.* Baxter and others, id. 112, the question submitted was whether or not a proposed law should become operative. Thus, in the first case cited, it was provided by the statute that "the electors shall determine, by ballot, at the annual election to be held in November next, whether this act shall, or not, become a law." If a majority voted against it, then it was to be null and void; if for it, then it was to take effect on a day named. And such legislation was expressly condemned by this court in Santo *v.* The State, 2 Iowa, 165, which was recognized and followed in Geebrick *v.* The State, 5 id. 491. The law in question, however, is not obnoxious to this objection. The popular will is expressed under and by virtue of a law that is in force and effect, and the people neither make nor repeal it. They only determine whether a certain thing shall be done under the law, and not whether said law shall take effect. The law had full and absolute vitality, when it passed from the hands of the legislature and the people, under the "rule of action" therein given for their government, proceeded to act. The same rule — the same law — was given to all the people of the State, to all parts of it; the same method for taking the vote was presented for all the counties; the same penalties were attached. As a result of the vote, a different regulation, of a police nature, might exist in one county from what existed in another; just as, under the same section (114), one county might determine, by a popular vote, that a higher rate of tax should be levied than that provided by the general law, when the county warrants were depreciated, while another voted against it. So it is in principle like the provision which submits the question, whether money should be borrowed to aid in the erection of public buildings. One county might decide in favor of such loan, while another rejected it; and yet the law, under which they vote, is operative, and in full effect. Not only so, but it gives a uniform rule to all the people, and all the counties alike.

The case of Geebrick *v.* The State, *supra*, is principally relied upon to maintain this ruling. The writer of this opinion dissented from some of the views expressed in that case; and, without now examining it in detail, it is sufficient to say that it cannot fairly be construed into an authority for declaring this vote invalid. The substance of that decision, when divested of some of its reasoning (not necessary to the decision of the cause), is "that a law can no more be repealed than it can be made by a vote of the people." As to this proposition, we entertain no doubt. But § 114 of the Code does not give the people the power, by their vote, to do either. It simply declares that they may determine for themselves, in the several counties, whether

a particular police regulation shall, or shall not, be adopted. The law is entirely complete, in all its parts; and whatever their vote, it still has operative force and effect. The distinction, to our minds, is clear, broad and unquestionable.

The law does not contemplate that the officer shall have a *process* to make the sale contemplated. As he does not justify under a written process, therefore, there was none to attach to his plea of justification.

The second section of the act of 1857 is retrospective in its operation, and applies to votes taken before, as well as after, its passage. *Reversed.*

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## STONE *v.* CITY OF CHARLESTOWN.

114 Massachusetts, 214. 1873.

GRAY, C. J. These petitions are filed under the concluding sections of the Sts. of 1873, cc. 286, 314, respectively, annexing the city of Charlestown and the town of West Roxbury to the city of Boston. The petitioners seek to have the election and balloting by which those acts have been accepted by the municipalities immediately affected declared void, for various reasons, many of which apply equally to both petitions, and the two cases may be conveniently disposed of in one opinion.

1. One of the principal objections made to the validity of the proceedings in each case is that the statute in question, being in terms to take full effect only upon the condition of its approval and acceptance, in the one case by the cities of Boston and Charlestown, and in the other by the city of Boston and the town of West Roxbury, was an attempted delegation of legislative power, and therefore unconstitutional and invalid.

The power to alter the boundaries of the counties, towns, and cities, into which the territory of the Commonwealth has been divided for political and municipal purposes, is an inherent attribute of the Legislature, to be exercised according to its own views of public expediency, unless restrained by express constitutional provision.

The Legislature has equal power to change the boundaries of counties, as of cities and towns. Opinion of Justices, 6 Cush. 578. The boundaries of counties being arranged rather for the distribution of members of the Legislature, and of the jurisdiction of the courts, than for purposes of local government, the Legislature of Massachusetts has never, we believe, submitted to the vote of the people of a county an act which changed its boundaries, either by dividing a

county, or by setting off a town from one county to another, or part of a town from one county to the county containing another part.

In the early years of the Commonwealth, there were no cities, and it was not usual to make any statute dividing a town, or otherwise altering its boundaries, depend upon a vote of all its inhabitants. The power to erect city governments was first conferred upon the Legislature in 1821, by the second article of the amendments of the Constitution, with a proviso that no such government should be erected in any town of less than twelve thousand inhabitants, nor without the consent and application of a majority of the inhabitants of the town. That article does not indeed apply in all its provisions to the annexation of one city or town to another city already established by the Legislature, nor affect the power of the Legislature to change the boundaries of existing towns and cities at its discretion. Chandler *v.* Boston, 112 Mass. 200. But since the adoption of that amendment to the Constitution, it has been the usage of the Legislature, acting in accordance with the spirit of the amendment, to submit acts dividing or uniting towns, or annexing a considerable part of the territory of one town or city to another, to the acceptance of the inhabitants of one or both of the towns or cities whose boundaries are thus altered.

In all such cases, the Legislature gives great weight to the wishes of the inhabitants of the territory to be immediately affected by the change; and if not satisfied by the petitions and remonstrances addressed to it, or by the reports of its committees, as to what is the deliberate wish of the majority of such inhabitants, it may well, after determining in all other respects upon the measure to be adopted, and framing it into the form of a statute, provide for ascertaining the sense of such inhabitants at meetings held by its authority for the purpose, and declare that the act should take effect if thereupon accepted by a majority of their votes, and not otherwise. In doing so, the Legislature does not in any sense delegate its constitutional authority, but, in the exercise of that authority, determines that, if the inhabitants of that part of the State to be immediately affected by the proposed change assent to it, public policy requires it to be made, and that, without such assent, the other considerations offered in support of it are not sufficient to justify its adoption by the Legislature. The question whether the act should take effect at once, or only upon such acceptance by the inhabitants, is within the discretion of the Legislature to determine.

The act of Congress of 1846, c. 35, made the retrocession of the county of Alexandria to the State of Virginia to depend upon the vote of the county, and its constitutionality has never been impugned. 9 U. S. Sts. at Large, 35. M'Laughlin *v.* Bank of Potomac, 7 Gratt. 68. Bull *v.* Read, 13 Gratt. 78, 92. In Wales *v.* Belcher, 3 Pick. 508, it was held by this court that the act establishing the Justices' Court in the county of Suffolk was not unconstitu-

tional because its going into effect was made to depend upon the acceptance of the city charter by the inhabitants of the city of Boston. Amid all the diversity of opinion upon the much vexed question, how far statutes may be made contingent upon being accepted by popular vote without violating the principle that the legislative power cannot be delegated, there is a complete harmony of adjudication in favor of the authority of the Legislature, unless controlled by a special constitutional provision upon the subject, to submit statutes dividing or uniting counties or towns, or establishing or enlarging a city, to a vote of the inhabitants of the territory immediately affected. Commonwealth *v.* Quarter Sessions, 8 Penn. St. 391 ; Smith *v.* McCarthy, 56 Penn. St. 359 ; Bank of Chenango *v.* Brown, 26 N. Y. 467 ; Clarke *v.* Rochester, 28 N. Y. 605, 634 ; Paterson *v.* Society for Manufactures, 4 Zab. 385 ; People *v.* Reynolds, 5 Gilman, 1 ; People *v.* Salomon, 51 Ill. 37 ; St. Louis *v.* Russell, 9 Mo. 503 ; State *v.* Scott, 17 Mo. 521 ; State *v.* Elwood, 11 Wis. 17 ; Morford *v.* Unger, 8 Iowa, 82 ; Bull *v.* Read, 13 Gratt. 78 ; Manly *v.* Raleigh, 4 Jones Eq. 370.

The Legislature, having the exclusive power of determining whether such an act shall or shall not be submitted to popular vote at all, may also determine how the vote shall be taken upon any act so submitted, and, when the municipality in question is a city, whether the vote upon its acceptance shall be by the city council, as representing the whole city, or by the inhabitants themselves, and in the latter alternative, whether their votes shall be taken in a general meeting or by wards. The power of the Legislature in this respect is not restricted by any constitutional provision.

[After considering many other objections to the statute the court continues.]

The result of the whole matter is, that none of the objections suggested to the validity of either statute, or of the proceedings under it, can be sustained, and that each

*Petition must be dismissed.*

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## FIELD *v.* CLARK.

143 United States, 649. 1892.

[This case and others considered with it arose on appeals by certain importers of woolens, laces, and cotton goods from the decision of the Board of General Appraisers sustaining the Revenue Collectors in the exaction of certain duties under the tariff act of 1890, 26 stat. 567, c. 1244. The decision of the Board being sustained in the Circuit Court, the cases were brought to the Supreme Court for review. Among other objections to the validity of the tariff act

under which the duties in question were collected, it was claimed that the whole act was void by reason of the invalidity of sec. 3 thereof authorizing the President of the United States, for the purpose of securing reciprocal trade with countries producing sugar, coffee, tea, and hides, to suspend the free importation of those articles and impose a tariff thereon at rates provided by the act.]

MR. JUSTICE HARLAN delivered the opinion of the court.

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The plaintiffs in error contend that this section, so far as it authorizes the President to suspend the provisions of the act relating to the free introduction of sugar, molasses, coffee, tea, and hides, is unconstitutional, as delegating to him both legislative and treaty-making powers, and, being an essential part of the system established by Congress, the entire act must be declared null and void. On behalf of the United States it is insisted that legislation of this character is sustained by an early decision of this court and by the practice of the government for nearly a century, and that, even if the third section were unconstitutional, the remaining parts of the act would stand.

The decision referred to is "The Brig Aurora," 7 Cranch, 382, 388. What was that case? The non-intercourse act of March 1, 1809, c. 24, secs. 4, 11, forbidding the importation, after May 20, 1809, of goods, wares, or merchandise from any port or place in Great Britain or France, provided that "the President of the United States be, and he hereby is, authorized, in case either France or Great Britain shall so revoke or modify her edicts as that they shall cease to violate the neutral commerce of the United States, to declare the same by proclamation;" after which the trade suspended by that act and the act laying an embargo could be "renewed with the nation so doing." 2 Stat. 528. The act of 1809 expired on the 1st of May, 1810, on which day Congress passed another act, c. 39, § 4, declaring that in case either Great Britain or France, before a named day, *so* revoked or modified her edicts "as that they shall cease to violate the neutral commerce of the United States, which fact the President of the United States shall declare by proclamation, and if the other nation shall not" within a given time revoke or modify her edicts in like manner, then certain sections of the act of 1809 "shall from and after the expiration of three months from the date of the proclamation aforesaid, be revived and have full force and effect, so far as relates to the dominions, colonies, and dependencies, and to the articles the growth, produce, or manufacture of the dominions, colonies, and dependencies of the nation thus refusing or neglecting to revoke or modify her edicts in the manner aforesaid. And the restrictions imposed by this act shall, from the date of such proclamation, cease and be discontinued in relation to the nation revoking or modifying her decrees in the manner aforesaid." 2 Stat. 605, 606. On the 2d of November, 1810, President Madison issued his proclamation declar-

ing that France had so revoked or modified her edicts as that they ceased to violate the neutral commerce of the United States. In the argument of that case, it was contended by Mr. Joseph R. Ingersoll that Congress could not transfer legislative power to the President, and that to make the revival of a law depend upon the President's proclamation was to give that proclamation the force of a law. To this it was replied that the legislature did not transfer any power of legislation to the President; that they only prescribed the evidence which should be admitted of a fact, upon which the law should go into effect. Mr. Justice Johnson, speaking for the whole court, said: "We can see no sufficient reason why the legislature should not exercise its discretion in reviving the act of March 1, 1809, either expressly or conditionally, as their judgment should direct. The 19th section of that act, declaring that it should continue in force to a certain time, and no longer, could not restrict their power of extending its operation without limitation upon the occurrence of any subsequent combination of events." This certainly is a decision that it was competent for Congress to make the revival of an act depend upon the proclamation of the President, showing the ascertainment by him of the fact that the edicts of certain nations had been *so* revoked or modified that they did not violate the neutral commerce of the United States. The same principle would apply in the case of the suspension of an act upon a contingency to be ascertained by the President, and made known by his proclamation.

To what extent do precedents in legislation sustain the validity of the section under consideration, so far as it makes the suspension of certain provisions and the going into operation of other provisions of an act of Congress depend upon the action of the President based upon the occurrence of subsequent events, or the ascertainment by him of certain facts, to be made known by his proclamation? If we find that Congress has frequently, from the organization of the government to the present time, conferred upon the President powers, with reference to trade and commerce, like those conferred by the third section of the act of October 1, 1890, that fact is entitled to great weight in determining the question before us.

[Various statutes are set out at considerable length.]

It would seem to be unnecessary to make further reference to acts of Congress to show that the authority conferred upon the President by the third section of the act of October 1, 1890, is not an entirely new feature in the legislation of Congress, but has the sanction of many precedents in legislation. While some of these precedents are stronger than others, in their application to the case before us, they all show that, in the judgment of the legislative branch of the government, it is often desirable, if not essential for the protection of the interests of our people, against the unfriendly or discriminating regulations established by foreign governments, in the interests of their people, to invest the President with large discretion in matters

arising out of the execution of statutes relating to trade and commerce with other nations. If the decision in the case of "The Brig Aurora" had never been rendered, the practical construction of the Constitution, as given by so many acts of Congress, and embracing almost the entire period of our national existence, should be not overruled, unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land. Stuart *v.* Laird, 1 Cranch, 299, 309; Martin *v.* Hunter, 1 Wheat. 304, 351; Cooley *v.* Port Wardens, 12 How. 299, 315; Lithographic Co. *v.* Sarony, 111 U. S. 53, 57; The Laura, 114 U. S. 411, 416.

The authority given to the President by the act of Juue 4, 1794, to lay an embargo on all ships and vessels in the ports of the United States, "whenever, in his opinion, the public safety shall so require," and under regulations, to be continued or revoked "whenever he shall think proper;" by the act of February 9, 1799, to remit and discontinue, for the time being, the restraints and prohibitions which Congress had prescribed with respect to commercial intercourse with the French Republic, "if he shall *deem* it expedient and consistent with the interest of the United States," and "to revoke such order, whenever, in his opinion, the interest of the United States shall require;" by the act of December 19, 1806, to suspend, for a named time, the operation of the non-importation act of the same year, "if in his judgment the public interest should require it;" by the act of May 1, 1810, to revive a former act, as to Great Britain or France, if either country had not, by a named day, *so* revoked or modified its edicts as not "to violate the neutral commerce of the United States;" by the acts of March 3, 1815, and May 31, 1830, to declare the repeal, as to any foreign nation, of the several acts imposing duties on the tonnage of ships and vessels, and on goods, wares, and merchandise imported into the United States, when he should be "satisfied" that the discriminating duties of such foreign nations, "so far as they operate to the disadvantage of the United States," had been abolished; by the act of March 6, 1866, to declare the provisions of the act forbidding the importation into this country of neat cattle and the hides of neat cattle to be inoperative, "whenever in his judgment" their importation "may be made without danger of the introduction or spread of contagious or infectious disease among the cattle of the United States;" must be regarded as unwarranted by the Constitution, if the contention of the appellants, in respect to the third section of the act of October 1, 1890, be sustained.

That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The act of October 1, 1890, in the particular under consideration, is not inconsistent with that principle. It does not, in any real sense, invest the President with the power of legislation. For the purpose of securing reciprocal trade with countries producing and

exporting sugar, molasses, coffee, tea, and hides, Congress itself determined that the provisions of the act of October 1, 1890, permitting the free introduction of such articles, should be suspended as to any country producing and exporting them, that imposed exactions and duties on the agricultural and other products of the United States, which the President deemed, that is, which he found to be, reciprocally unequal and unreasonable. Congress itself prescribed, in advance, the duties to be levied, collected, and paid, on sugar, molasses, coffee, tea, or hides, produced by or exported from such designated country, while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. The words, "he may deem," in the third section, of course, implied that the President would examine the commercial regulations of other countries producing and exporting sugar, molasses, coffee, tea, and hides, and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products. But when he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea, or hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea, and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspensions, certain duties should be imposed.

"The true distinction," as Judge Ranney, speaking for the Supreme Court of Ohio, has well said, "is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." Cincinnati, Wilmington, &c. R. R. Co. *v.* Commissioners, 1 Ohio St. 88. In Moers *v.*

City of Reading, 21 Penn. St. 188, 202, the language of the court was: "Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law." So, in Locke's Appeal, 72 Penn. St. 491, 498: "To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know." The proper distinction the court said was this: "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation."

What has been said is equally applicable to the objection that the third section of the act invests the President with treaty making power.

The court is of opinion that the third section of the act of October 1, 1890, is not liable to the objection that it transfers legislative and treaty making power to the President. Even if it were, it would not, by any means, follow that other parts of the act, those which directly imposed duties upon articles imported, would be inoperative. But we need not in this connection enter upon the consideration of that question.

*Third.* The act of October 1, 1890, c. 1244, sec. 1, par. 231, "Schedule E — Sugar," provides that "on and after July first, eighteen hundred and ninety-one, and until July first, nineteen hundred and five, there shall be paid, from any moneys in the Treasury not otherwise appropriated, under the provisions of section three thousand six hundred and eighty-nine of the Revised Statutes, to the producer of sugar testing not less than ninety degrees by the polariscope, from beets, sorghum, or sugar-cane grown within the United States, or from maple sap produced within the United States, a bounty of two cents per pound; and upon such sugar testing less than ninety degrees by the polariscope, and not less than eighty degrees, a bounty of one and three-fourths cents per pound, under such rules and regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe." 26 Stat. 567, 583.

Appellants contend that Congress has no power to appropriate money from the Treasury for the payment of these bounties, and that the provisions for them have such connection with the system

established by the act of 1890 that the entire act must be held inoperative and void. The question of constitutional power thus raised depends principally, if not altogether, upon the scope and effect of that clause of the Constitution giving Congress power "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States." Art. 1, sec. 8. It would be difficult to suggest a question of larger importance, or one the decision of which would be more far-reaching. But the argument that the validity of the entire act depends upon the validity of the bounty clause is so obviously founded in error that we should not be justified in giving the question of constitutional power, here raised, that extended examination which a question of such gravity would, under some circumstances, demand. Even if the position of the appellants with respect to the power of Congress to pay these bounties were sustained, it is clear that the parts of the act in which they are interested, namely, those laying duties upon articles imported, would remain in force. "It is an elementary principle," this court has said, "that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected." Allen *v.* Louisiana, 103 U. S. 80, 83. And in Huntington *v.* Worthen, 120 U. S. 97, 102, Mr. Justice Field, speaking for the court, said: "It is only when different clauses of an act are so dependent upon each other that it is evident the legislature would not have enacted one of them without the other — as when the two things provided are necessary parts of one system — that the whole act will fall with the invalidity of one clause. When there is no such connection and dependency, the act will stand, though different parts of it are rejected." It cannot be said to be evident that the provisions imposing duties on imported articles are so connected with or dependent upon those giving bounties upon the production of sugars in this country that the former would not have been adopted except in connection with the latter. Undoubtedly, the object of the act was not only to raise revenue for the support of the government, but to so exert the power of laying and collecting taxes and duties as to encourage domestic manufactures and industries of different kinds, upon the success of which, the promoters of the act claimed, materially depended the national prosperity and the national safety. But it cannot be assumed, nor can it be made to appear from the act, that the provisions imposing duties on imported articles would not have been adopted except in connection with the clause giving bounties on the production of sugar in this country. These different parts of the act, in respect to their operation, have no legal connection whatever with each other. They are entirely separable in their nature, and, in law, are wholly dependent of each other. One relates to the imposition of duties upon imported articles; the other, to the appropriation

of money from the Treasury for bounties on articles produced in this country. While, in a general sense, both may be said to be parts of a system, neither the words nor the general scope of the act justifies the belief that Congress intended they should operate as a whole, and not separately for the purpose of accomplishing the objects for which they were respectively designed. Unless it be impossible to avoid it, a general revenue statute should never be declared inoperative in all its parts because a particular part relating to a distinct subject may be invalid. A different rule might be disastrous to the financial operations of the government, and produce the utmost confusion in the business of the entire country.

We perceive no error in the judgments below, and each is

*Affirmed.*[1]

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## SECTION II. — THE EXECUTIVE DEPARTMENT.

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### MISSISSIPPI *v.* JOHNSON.

4 Wallace, 475. 1866.

MR. CHIEF JUSTICE CHASE delivered the opinion of the court.

A motion was made, some days since, in behalf of the State of Mississippi, for leave to file a bill in the name of the State, praying this court perpetually to enjoin and restrain Andrew Johnson, President of the United States, and E. O. C. Ord, general commanding in the District of Mississippi and Arkansas, from executing, or in any manner carrying out, certain acts of Congress therein named.

The acts referred to are those of March 2d and March 23d, 1867, commonly known as the Reconstruction Acts.

The Attorney-General objected to the leave asked for, upon the ground that no bill which makes a President a defendant, and seeks an injunction against him to restrain the performance of his duties as President, should be allowed to be filed in this court.

This point has been fully argued, and we will now dispose of it.

We shall limit our inquiry to the question presented by the objection, without expressing any opinion on the broader issues discussed in argument, whether in any case, the President of the United States may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime.

[1] MR. JUSTICE LAMAR delivered a dissenting opinion, in which MR. CHIEF JUSTICE FULLER concurred.

The single point which requires consideration is this: Can the President be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional?

It is assumed by the counsel for the State of Mississippi, that the President, in the execution of the Reconstruction Acts, is required to perform a mere ministerial duty. In this assumption there is, we think, a confounding of the terms ministerial and executive, which are by no means equivalent in import.

A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.

The case of Marbury *v.* Madison, Secretary of State, 1 Cranch, 137, furnishes an illustration. A citizen had been nominated, confirmed, and appointed a justice of the peace for the District of Columbia, and his commission had been made out, signed, and sealed. Nothing remained to be done except delivery, and the duty of delivery was imposed by law on the Secretary of State. It was held that the performance of this duty might be enforced by *mandamus* issuing from a court having jurisdiction.

So in the case of Kendall, Postmaster-General *v.* Stockton & Stokes, 12 Pet. 527, an act of Congress had directed the Postmaster-General to credit Stockton & Stokes with such sums as the Solicitor of the Treasury should find due to them; and that officer refused to credit them with certain sums, so found due. It was held that the crediting of this money was a mere ministerial duty, the performance of which might be judicially enforced.

In each of these cases nothing was left to discretion. There was no room for the exercise of judgment. The law required the performance of a single specific act; and that performance, it was held, might be required by *mandamus*.

Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill. By the first of these acts he is required to assign generals to command in the several military districts, and to detail sufficient military force to enable such officers to discharge their duties under the law. By the supplementary act, other duties are imposed on the several commanding generals, and these duties must necessarily be performed under the supervision of the President as commander-in-chief. The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political.

An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as "an absurd and excessive extravagance."

It is true that in the instance before us the interposition of the court is not sought to enforce action by the Executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of Executive discretion.

It was admitted in the argument that the application now made to us is without a precedent; and this is of much weight against it.

Had it been supposed at the bar that this court would, in any case, interpose by injunction, to prevent the execution of an unconstitutional act of Congress, it can hardly be doubted that applications with that object would have been heretofore addressed to it.

Occasions have not been wanting.

The constitutionality of the act for the annexation of Texas was vehemently denied. It made important and permanent changes in the relative importance of States and sections, and was by many supposed to be pregnant with disastrous results to large interests in particular States. But no one seems to have thought of an application for an injunction against the execution of the act by the President.

And yet it is difficult to perceive upon what principle the application now before us can be allowed and similar applications in that and other cases have been denied.

The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained.

It will hardly be contended that Congress can interpose, in any case, to restrain the enactment of an unconstitutional law; and yet how can the right to judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished, in principle, from the right to such interposition against the execution of such a law by the President?

The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.

The impropriety of such interference will be clearly seen upon consideration of its possible consequences.

Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the Acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its

mandate and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court?

These questions answer themselves.

It is true that a State may file an original bill in this court. And it may be true, in some cases, that such a bill may be filed against the United States. But we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us.

It has been suggested that the bill contains a prayer that, if the relief sought cannot be had against Andrew Johnson, as President, it may be granted against Andrew Johnson as a citizen of Tennessee. But it is plain that relief as against the execution of an act of Congress by Andrew Johnson, is relief against its execution by the President. A bill praying an injunction against the execution of an act of Congress by the incumbent of the Presidential office cannot be received, whether it describes him as President or as a citizen of a State.

The motion for leave to file the bill is, therefore, *Denied.*

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## STATE EX REL. *v.* STONE.

120 Missouri, 428. 1894.

SHERWOOD, J. The relator in this case, Edward J. Robb, was employed by David R. Francis, then Governor of the State, as counsel on behalf of the State in the case of The State of Missouri *v.* Louis Ulrich, at that time pending in the Supreme Court of the United States. This employment had its origin in an act of the thirty-sixth General Assembly, approved March 25, 1891, which authorized and empowered such employment to be made, at and for a sum not exceeding the sum of $500; all disbursements out of the fund thus created to be made upon the order of the Governor. By an act approved March 31, 1893, the General Assembly reappropriated said amount for the purpose aforesaid, which act provided that all disbursements under this section should be made by order of the Governor, and that counsel fees should be paid only on determination of suit.

The sum which David R. Francis, then Governor, agreed to pay relator for his services as counsel in that cause was the said sum of $500, in consideration of which sum relator agreed to represent the State as counsel in said cause until the determination thereof. After

thus entering into such contract, relator duly performed all of its conditions on his part and discharged his duty as counsel for the State thereunder, until the final determination of said cause, which resulted in Ulrich dismissing his appeal therein on the fifteenth of May, 1893.

No part of the amount appropriated by the General Assembly for the payment of counsel fees and agreed to be paid relator, has ever been paid him. On the twenty-second of August, 1893, relator presented his said contract with, and claim against, the State of Missouri to Governor Wm. J. Stone, exhibiting to him at the same time all necessary papers, etc., and asked that said sum of $500 be paid to relator, but which sum said Governor neglected and refused to order to be paid to relator. Upon these facts thus presented to the petition, relator prays that an alternative writ of *mandamus* issue directed to the Governor, commanding him, etc. Waiving the issuance of the alternative writ, the Governor has entered his appearance herein, and by his counsel has filed a general demurrer to relator's petition, to the effect that the petition does not state facts sufficient, etc.

As the petition states a good contract with, and cause of action against, the State, and the demurrer admits the allegations of the petition to be true, the only question for determination is, whether the respondent is amenable to the process of this court in a case of this sort; in other words, whether this court has *jurisdiction* to entertain this application made by relator. The inquiry thus suggested brings into prominence article 3 of our constitution by which it is provided that: "The powers of government shall be divided into three distinct departments — the legislative, executive, and judicial — each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted."

In this instance we, constituting a portion of the judicial department of the government, are called upon to exercise, or what amounts to the same thing, to *control* the exercise of powers belonging exclusively to the *executive* department of that government. To such action on our part the organic law interposes an insuperable barrier. In addition to the provisions of the organic law quoted, that instrument also declares that: "The supreme executive power shall be vested in a chief magistrate, who shall be styled 'the Governor of the State of Missouri.'" Const., art. 5, sec. 4. Section 6 of the same article requires that "the Governor shall take care that the laws are . . . faithfully executed." Of the same article, section 1 provides that the Governor "shall perform such duties as may be prescribed by law." And section 6 of article 14 as a prerequisite to his entering on the duties of his office, prescribes that he "take and subscribe an

oath to support the Constitution of the United States and of this State, and to demean himself faithfully in office."

Under these plain and comprehensive provisions, it must be apparent that any duty "*prescribed by law*" for the Governor to perform, is as much part and parcel of his *executive* duties as though made so by the most solemn language of the Constitution itself.

Conceding the validity of any given law, the fact that the duties which it prescribes are merely *ministerial* cannot take them out of the domain of *executive* duties nor make them any the less those which "properly belong" to the executive department of the government. And should we by our process be able to compel the performance by the Governor of such duties, we would in effect and to all intents and purposes *be performing those duties ourselves;* for there can be no substantial distinction drawn between our assumption of duties pertaining to another department of the government, and our intervention resulting in the compulsory performance of such duties; *qui facit per alium,* etc.

Nor does the fact that any duty which the law prescribes for the Governor to perform, *might* have been assigned to some other officer *who would have been* amenable to the process of this court, alter the conclusion to be reached or vary the result; for the fact would still remain that the act required to be done was nevertheless an *official* one, assigned by the legislative department of the government to be performed by the executive department, *eo nomine* by the *Governor* and by him alone, and therefore if he is not bound to obey the law in question *as Governor, he is not bound to act at all,* since he only assumed to obey the laws in his *gubernatorial capacity* and not otherwise or elsewhere. See Rice *v.* Austin, *infra.* So that we should manifestly be trenching on the exclusive powers of *two* separate magistracies of the government, should we assume to exercise jurisdiction in this case.

Abundant authority establishes the position here taken that *mandamus* will not issue to the Governor to compel the performance of *any* duty pertaining to his office, whether political or merely ministerial; whether commanded by the constitution or by some law passed on the subject. People *ex rel. v.* Governor, 29 Mich. 320; Hawkins *v.* Governor, 1 Ark. 570; State *ex rel. v.* Warmoth, 22 La. Ann. 1; State *ex rel. v.* Warmoth, 24 La. Ann. 351; State *ex rel. v.* Board, 42 La. Ann. 647; Mauran *v.* Governor, 8 R. I. 192; Rice *v.* Austin, 19 Minn. 103; Dennett, Petitioner, 32 Me. 508; Railroad *v.* Lowry, 61 Miss. 102; State *v.* Governor, 25 N. J. L. 331; State *ex rel. v.* Drew, 17 Fla. 67; Hovey *v.* State *ex rel.,* 127 Ind. 588 (which distinguishes or virtually overrules Gray *v.* State *ex rel.,* 72 Ind. 567); People *ex rel. v.* Bissell, 19 Ill. 229; People *ex rel. v.* Yates, 40 Ill. 126; People *ex rel. v.* Cullom, 100 Ill. 472; Turnpike Co. *v.* Brown, 8 Baxt. (Tenn.) 490; Bates *v.* Taylor, 87 Tenn. 319; State *ex rel. v.* Towns, 8 Ga. 360; Railroad *v.* Randolph, 24 Tex.

317; Appeal of Hartranft, Governor, 85 Penn. St. 433; Mississippi *v.* Johnson, 4 Wall. 475.[1]

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There are many respectable authorities, however, which maintain views diametrically opposed to those here advanced. Most of them will be found collated in the brief filed for relator. Railroad *v.* Moore, 36 Ala. 371; Middleton *v.* Low, 30 Cal. 596; Land Co. *v.* Routt, 17 Col. 156; Gray *v.* State *ex rel.*, 72 Ind. 567; Magruder *v.* Swann, 25 Md. 173; Groome *v.* Gwinn, 43 Md. 572; Chumasero *v.* Potts, 2 Mont. 242; State *ex rel. v.* Blasdel, 4 Nev. 241; State *ex rel. v.* Governor, 5 Ohio St. 528; State *ex rel. v.* Nicholls, 7 S. Rep. (La.) 738. In addition to those cited, see Martin *v.* Ingham, 38 Kan. 641; State *v.* Thayer, 47 N. W. Rep. 704.[2]

The fact that the Governor has voluntarily submitted himself to the jurisdiction of this court has been pressed upon our attention as a reason why we should pass on or adjudicate the question submitted; and cases have been cited, among them Railroad *v.* Governor, 23 Mo. 360, as showing that where the Governor does not *claim* his exemption, then this court may adjudicate the matters at issue and leave the Governor to claim his exemption *afterwards*. But we regard such cases as wrong in theory and unsafe and unsound in practice. If we have authority to render a judgment, then we have jurisdiction to enforce that judgment by all appropriate process, and need not inquire whether any exemption from that process will be pleaded. If, however, we have no jurisdiction over the chief magistrate, his consent will not confer it on us. We will not "assume a jurisdiction if we have it not;" we will not sit as a *moot court* and pass upon questions and enter a judgment thereon which we are powerless to enforce. "For all jurisdiction implies superiority of power; authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it." 1 Cooley's Blackstone, 242.

As we do not possess any jurisdiction over the Governor, we shall decline any further discussion of this cause, hold the demurrer well taken, and deny the issuance of the peremptory writ.

*All concur.*

[1] To these citations may now be added People *ex rel. v.* Morton, 156 N. Y. 136 (1898). — [ED.].

[2] Among these cases should be cited Harpendig *v.* Haight, 39 Cal. 189 (1870). — [ED.].

## UNITED STATES EX REL. v. BLACK.

128 United States, 40. 1888.

[THIS case came up on writ of error to the Supreme Court of the District of Columbia to review a judgment of that court refusing an order on the Commissioner of Pensions to show cause why a writ of mandamus should not issue, requiring him to increase the pension of the petitioner. The opinion is not based on the particular facts of the case.]

MR. JUSTICE BRADLEY delivered the opinion of the court.

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The amenability of an executive officer to the writ of mandamus to compel him to perform a duty required of him by law was discussed by Chief Justice Marshall in his great opinion in the case of Marbury *v.* Madison, 1 Cranch, 137; and the radical distinction was there pointed out between acts performed by such officers in the exercise of their executive functions, which the Chief Justice calls political acts, and those of a mere ministerial character; and the rule was distinctly laid down that the writ will not be issued in the former class of cases, but will be issued in the latter. In that case, President Adams had nominated, and the Senate had confirmed Marbury as a justice of the peace of the District of Columbia; and a commission in due form was signed by the President appointing him such justice, and the seal of the United States was duly affixed thereto by the Secretary of State; but the commission had not been handed to Marbury when the offices of the government were transferred to the administration of President Jefferson. Mr. Madison, the new Secretary of State, refused to deliver the commission, and a mandamus was applied for to this court to compel him to do so. The court held that the appointment had been made and completed, and that Marbury was entitled to his commission, and that the delivery of it to him was a mere ministerial act, which involved no further official discretion on the part of the Secretary, and could be enforced by mandamus. But the court did not issue the writ, because it would have been an exercise of original jurisdiction which it did not possess. Whilst this opinion will always be read by the student with interest and profit, it has not been considered as invested with absolute judicial authority except on the question of the original jurisdiction of this court. The decision on this point has made it necessary for parties desiring to compel an officer of the government to perform an act in which they are interested to resort to the highest court of the District of Columbia for redress. It has been held in numerous cases, and was held after special discussion in the cases of Kendall *v.* The United States, 12 Pet. 524, and

United States *v.* Schurz, 102 U. S. 378, that the former Circuit Court of the District, and the present Supreme Court of the District respectively, were invested with plenary jurisdiction on the subject. On this point there is no further question.

The two leading cases which authoritatively show when the Supreme Court of the District may, and when it may not, grant a mandamus against an executive officer, are the above cited cases of Kendall *v.* United States on the Relation of Stokes, 12 Pet. 524, and Decatur *v.* Paulding, 14 Pet. 497. The subsequent cases have followed the principles laid down in these, and do little more than illustrate and apply them. In the former case the mandamus was granted, and the decision was affirmed by this court. The case was shortly this: Stockton & Stokes, as contractors for carrying the mails, had certain claims against the government for extra services, which they insisted should be credited in their accounts, and a controversy rose between them and the Post Office Department on the subject. Congress passed an act for their relief, by which the Solicitor of the Treasury was authorized and directed to settle and adjust their claims, and make them such allowances as upon a full examination of all the evidence might seem to be equitable and right; and the Postmaster General was directed to credit them with whatever sums the Solicitor should decide to be due them. The Solicitor, after due investigation, made his report, and stated the sums due to Stockton & Stokes on the claims made by them; but the Postmaster General, Mr. Kendall, refused to give them credit as directed by the law. This the court held he could be compelled to do by mandamus, because it was simply a ministerial duty to be performed, and not an official act requiring any exercise of judgment or discretion. This court, through Mr. Justice Thompson, said: "The act required by the law to be done by the Postmaster General is simply to credit the relators with the full amount of the award of the Solicitor. This is a precise, definite act, purely ministerial; and about which the Postmaster General had no discretion whatever. The law upon its face shows the existence of accounts between the relators and the Post Office Department. No money was required to be paid; and none could be drawn from the Treasury without further legislative provision, if this credit should overbalance the debit standing against the relators. But this was a matter with which the Postmaster General had no concern. He was not called upon to furnish the means of paying such balance, if any should be found. He was simply required to give the credit. This was not an official act in any other sense than being a transaction in the department where the books and accounts were kept; and was an official act in the same sense that an entry in the minutes of a court, pursuant to an order of the court, is an official act. There is no room for the exercise of any discretion, official or otherwise; all that is shut out by the direct and positive command of the law,

and the act required to be done is, in every just sense, a mere ministerial act."

In the other case, Decatur *v.* Paulding, the mandamus was refused by the Circuit Court, and that decision was also affirmed by this court. The case was this: On the 3d of March, 1837, Congress passed an act giving to the widow of any officer who had died in the naval service a pension equal to half of his monthly pay from the time of his death until her death or marriage. On the same day Congress passed a resolution granting a pension to Mrs. Decatur, widow of Stephen Decatur, for five years, commencing June 30, 1834, and the arrearages of the half pay of a post captain from Commodore Decatur's death to the 30th of June, 1834. Mrs. Decatur applied for and received her pension under the general law, with a reservation of her rights under the resolution, claiming the pension granted by that also. The Secretary of the Navy, acting under the opinion of the Attorney General, decided that she could not have both. Thereupon she applied for a mandamus to compel the Secretary to comply with the resolution in her favor. Chief Justice Taney delivered the opinion of the court, and laid down the law in terms that have never been departed from. We can only quote a single passage from this opinion. The Chief Justice says: "The duty required by the resolution was to be performed by him [the Secretary of the Navy] as the head of one of the executive departments of the government, in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is from time to time required to act. If he doubts, he has a right to call on the Attorney General to assist him with his counsel; and it would be difficult to imagine why a legal adviser was provided by law for the heads of the departments, as well as for the President, unless their duties were regarded as executive, in which judgment and discretion were to be exercised.

"If a suit should come before this court, which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a department. And if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of Congress, in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judg-

ment. Nor can it by mandamus act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties. The case before us illustrates these principles and shows the difference between executive and ministerial acts." The Chief Justice then goes on to show that the decision of the Secretary of the Navy in that case was entirely executive and official in its character, and that, in this respect, the case differed entirely from that of Kendall *v.* Stokes.

The principle of law deducible from these two cases is not difficult to enounce. The court will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in a case at all, or when by special statute, or otherwise, a mere ministerial duty is imposed upon them, that is, a service which they are bound to perform without further question, then, if they refuse, a mandamus may be issued to compel them.

Judged by this rule the present case presents no difficulty. The Commissioner of Pensions did not refuse to act or decide. He did act aud decide. He adopted an interpretation of the law adverse to the relator, and his decision was confirmed by the Secretary of the Interior, as evidenced by his signature of the certificate. Whether if the law were properly before us for consideration, we should be of the same opinion, or of a different opinion, is of no consequence in the decision of this case. We have no appellate power over the Commissioner, and no right to review his decision. That decision and his action taken thereon were made and done in the exercise of his official functions. They were by no means merely ministerial acts.

The decisions of this court, which have been rendered since the cases referred to, corroborate and confirm all that has been said. The following are the most important, to wit: Brashear *v.* Mason, 6 How. 92; United States *ex rel.* Goodrich *v.* Guthrie, 17 How. 284; Commissioner of Patents *v.* Whiteley, 4 Wall. 522; Georgia *v.* Stanton, 6 Wall. 50; Gaines *v.* Thompson, 7 Wall. 347; United States *ex rel.* McBride *v.* Schurz, 102 U. S. 378; Butterworth *v.* Hoe, 112 U. S. 50.

In the two last cases cited, the mandamus was granted; and they were cases in which it was held that a mere ministerial duty was to be performed by the officer. In United States *ex rel.* McBride *v.* Schurz, the question related to a patent for land claimed by a preemptor. All the proceedings had been gone through, the right of the applicant had been affirmed, the patent had been made out in the Land Office, signed by the President, sealed with the Land Office seal, countersigned by the recorder of the Land Office, recorded in the proper book, and transmitted to the local land officers for deliv-

ery; but delivery was refused because instructions had been received from the Commissioner to return the patent. The plea was, that it had been discovered that the lands belonged to a town site. The court held that this was an insufficient plea; that the title had passed to the applicant, and he was entitled to his patent, subject to any equity which other parties might have to the land, or to a proceeding for setting the patent aside; and that the duty of the Commissioner, or Secretary of the Interior, had become a mere ministerial duty to deliver the instrument — as was held in Marbury *v.* Madison, in relation to the commission of Marbury as justice of the peace. Of course, this case is entirely different from the case now under consideration.

The case of Butterworth *v.* Hoe was very similar in principle to that of United States *v.* Schurz. The Commissioner of Patents had decided in favor of the right of one Gill, an applicant for a patent in a case of interference, and adjudged that a patent should issue to his assigns accordingly. An appeal was taken to the Secretary of the Interior, who reversed the decision of the Commissioner. The latter thereupon and for that reason, refused to issue a patent. It was a question whether an appeal lay to the Secretary of the Interior, and this court held that it did not, and that he had no jurisdiction in the matter. The court, therefore, held that the patent ought to be issued in accordance with the decision of the Commissioner, and that the mere issue of the patent was a ministerial matter for which a mandamus would lie. This case, like that of United States *v.* Schurz, is unlike the present. All deliberation had ceased; the right of Gill, the applicant, was adjudged; there was nothing to be done but to deliver to the party the documentary evidence of his title. That was a mere ministerial matter. We think that the mandamus was properly refused and the judgment of the Supreme Court of the District is *Affirmed.*

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## SECTION III. — THE JUDICIAL DEPARTMENT.

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### CASE OF SUPERVISORS OF ELECTIONS.

114 Massachusetts, 247. 1873.

GRAY, C. J. This application [for appointment of supervisors of election] is made under the St. of 1873, c. 376, § 1, which provides as follows: "Whenever, prior to an election, five legal voters of any ward of a city shall make known in writing to a justice of the Supreme Judicial Court, in term time or vacation, their desire to

have such election guarded and scrutinized, it shall be the duty of such justice, upon such notice as he shall deem meet, or without notice, prior to such election, to appoint and commission two legal voters of such ward, who shall be of different political parties, and shall be known and designated as supervisors of election. Before entering upon the duties of their office, the said supervisors shall be duly sworn to the faithful and impartial discharge of the same."

As the application appeared to involve a grave question of constitutional law, and a similar application might according to the terms of the statute be presented to a justice of this court at any time, the matter has been argued before five of the judges, and our brethren who could not attend at the argument have taken part in the consultation.

The intention of the Legislature is clearly expressed that supervisors of election should be appointed by the justices of this court. The question is whether the statute is constitutional.

The constitution, being the fundamental law of the Commonwealth, established by the people, binds and controls all their servants, legislative, executive and judicial. Every person chosen or appointed to any office is expressly required, before entering upon the discharge of its duties, to take an oath to support the constitution. And by the eighteenth article of the Declaration of Rights a frequent recurrence to the fundamental principles of the constitution is declared to be absolutely necessary to preserve the advantages of liberty and to maintain a free government.

The Legislature is vested by the constitution with full power and authority from time to time to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions, "so as the same be not repugnant or contrary to this constitution," as they shall judge to be for the good and welfare of this Commonwealth, and for the governing and ordering thereof, and of the subjects of the same. Every reasonable inference is to be drawn in favor of the validity of the acts of each branch of the government. But whenever application is made to the judiciary to carry into effect any statute in a particular case, and the statute in question appears to be clearly repugnant to the constitution, it is the duty of the judges to obey the constitution and disregard the statute.

The people of Massachusetts, warned by experience of the inconveniences and dangers arising from the vesting of incompatible powers in the same persons under the royal government while this state was an English province, have made most careful provision for separating the three great departments of government, and for removing the judiciary, and especially this court, from political influences of every kind, as far as possible.

The final article of the Declaration of Rights declares that "in the government of this Commonwealth the legislative department shall

never exercise the executive and judicial powers or either of them; the executive shall never exercise the legislative or judicial powers, or either of them; the judicial shall never exercise the executive or legislative powers, or either of them; to the end it may be a government of laws and not of men." The constitution further expressly prohibits the judges of this court to hold a seat in the House of Representatives, Senate or Council, or any other office or place under the authority of this Commonwealth, except that of justices of the peace through the State; and requires all commissions to be signed by the Governor, and attested by the secretary or his deputy, and to have the great seal of the Commonwealth affixed thereto.

The justices of this court, as incidental to the large and varied judicial powers and jurisdiction conferred upon them by the constitution and laws, embracing cases criminal and civil, in common law, equity, probate, and divorce, may be and have been by many statutes authorized to appoint subordinate officers of various kinds to assist in the performance of their judicial duties, such as auditors, special masters in chancery, commissioners to take depositions in other States in cases pending here, commissioners to take bail, commissioners for the partition of lands, division of flats, or the setting off of dower, commissioners of sewers, or for the improvement of meadows and low lands, and commissioners to adjust the rights of transportation and modes of connection between connecting lines of railroad, or to assess the expenses, as between different counties, towns and other corporations, of maintaining roads or bridges. Parts of the duties performed by some of these officers in carrying out their functions are executive in their nature, and of a class which might be imposed by law upon strictly executive officers. But all the officers above enumerated, when appointed by the court, are by express requirement or necessary implication obliged to return a report of their doings to the court for its judicial action.

The judges may also be authorized by law, except so far as otherwise expressly provided by the constitution, to appoint clerks of courts. But the duties of such clerks are in no sense executive; they are merely ministerial, and incident to the administration of justice. On like grounds, the courts are authorized, in the absence of the official prosecutor, to appoint a suitable person to perform his duties; and to appoint all officers necessary to the transaction of their business.

The courts may also try the title to many offices by *mandamus*, *quo warranto*, or other proper process. But the title to an office is a right that has always been held to be a proper subject of judicial decision, except when the constitution has committed it to other hands. Analogous to this is the power conferred on this court by statute to remove certain officers, and thus to declare a forfeiture of their rights and a determination of their offices.

The power of naturalization may perhaps be considered as one of

the powers that may be entrusted by the Legislature in its discretion to one or another department of the government. Before the adoption of the federal Constitution, it was habitually exercised by the General Court of Massachusetts. Since the adoption of that Constitution, it has been vested by the Congress of the United States, with the assent of the State legislatures, in the judicial tribunals of the States, as well as in those of the nation. As it requires a final determination of all matters of law and fact involved in the admission of the applicant to citizenship, it may appropriately be made a subject of judicial investigation and decision.

The St. of 1873, c. 376, §§ 2, 3, declares that it shall be the duty of the supervisors of election to attend the ward meetings, to challenge the vote of any person whose qualifications they doubt; to remain where the ballot boxes are kept, from the opening of the polls until all the votes are cast, counted, canvassed and sealed up, and the certificates and returns made out; to inspect and scrutinize the manner of voting and the method of keeping and marking the check list; to count and canvass every ballot cast, and, in the event of a disagreement between their count and canvass and those of the ward officers, to make a return of their count and canvass to the mayor and aldermen.

These supervisors, although entrusted with a certain discretion in the performance of their duties, are strictly executive officers. They make no report or return to the court or to any judge thereof. Their duties relate to no judicial suit or proceeding, but solely to the exercise by the citizens of political rights and privileges.

We are unanimously of opinion that the power of appointing such officers cannot be conferred upon the justices of this court without violating the constitution of the Commonwealth. We cannot exercise this power as judges, because it is not a judicial function; nor as commissioners, because the constitution does not allow us to hold any such office.

The statute in question can find no support in the act of Congress of 1871, c. 99, conferring power to appoint similar officers upon the judges of the Circuit Court of the United States, or in the action of those judges pursuant thereto; because the Constitution of the United States does not so explicitly restrain the judges from exercising executive or political functions as does the constitution of this Commonwealth; and because the circuit judges acted individually and without opportunity of conference, and, so far as we are informed, without any question of constitutional power being raised or argued. *Petition denied.*[1]

[1] Under the provisions of U. S. Const., Art. II., Sec. 2, ¶ 2, Congress may authorize appointment of supervisors of elections by circuit courts. *Ex parte* Siebold, 100 U. S. 371, 397.

## STATE EX REL. v. SIMONS.

32 Minnesota, 540. 1884.

MITCHELL, J. This is an application for a writ of prohibition to restrain the respondent, a judge of the District Court, from further action in proceedings now pending before him for the incorporation of certain territory as a village under the provisions of chapter 73, Gen. Laws 1883. The contention of the relator is that the act referred to is unconstitutional, because it assumes to delegate purely legislative powers to the District Courts or the judges thereof. Section 3 of this act provides that any district, sections, or parts of sections which have been duly surveyed and platted into lots and blocks, and lands adjacent thereto, which said plat has been duly and legally certified and filed, may become incorporated as a village in the following manner, upon application to the judge of the District Court of the county in which such lands are situated. Section 4 provides that this application shall be by petition of at least 25 electors, — residents upon the lands to be incorporated, — setting forth the boundaries of such territory, the quantity of land embraced therein, the name of such village, and the resident population, as near as may be. Section 5 provides for the posting of copies of such petition, and of notices of the time and place when and where it will be presented to the court. Section 6 provides that "at the time and place fixed in said notice, upon the filing of the petition and proof of posting as aforesaid, and the map or plat of said premises, *the court may proceed to hear proofs for or against the incorporation of said village, and upon such hearing may take such evidence as he shall deem necessary.*" Section 7 provides: "If the court, after such hearing, shall be satisfied of the correctness of such survey and of the legality of said plat, and that all of the requirements of the statute have been complied with; *that the lands embraced in such petition . . . ought justly to be included in said proposed village; that the interests of the inhabitants will be promoted thereby,* — it shall make an order declaring that such territory, the boundaries of which shall be therein set forth by metes and bounds, *and which may be enlarged or diminished by such court from the boundaries specified in said application as justice may require,* shall be an incorporated village by the name specified in said application; and in such order it shall designate three persons, — electors residing on said territory, — whose duty it shall be to give notice of an election in said incorporated village, as provided by section 10 of this act." Section 8 requires that such petition and order shall be filed in the office of the clerk of the court, and that he shall forthwith notify the persons designated in said order of the filing thereof, and that a certified copy thereof shall be filed in the office of the register of deeds, and

be by him recorded, "*and thereupon said village shall be duly incorporated by the name designated in said order.*" Section 9 provides that any district which may be set apart by an order of the district court, and shall organize as such municipal corporation by the action of the inhabitants thereof in the manner and form hereafter provided, shall be endowed with all the powers incident to municipal corporations. Section 10 requires the three persons designated for that purpose in the order of the court, to give notice to the electors to meet to organize under the provisions of the act, and to elect officers for the ensuing year. It also provides for the manner of holding and conducting such elections.

It will be observed that under the provisions of this act the legislature has not, except as to certain preliminaries, determined or defined the facts or things upon the existence of which the territory shall be incorporated as a village. It will also be observed that the duty of the court is not simply to inquire and ascertain whether certain specified facts exist, or whether certain specified conditions have been complied with, but to proceed and determine whether the interests of the inhabitants will be promoted by the incorporation of the village, and, if so, what land ought in justice to be included within its limits. In short, it is left to the court to decide whether public interests will be subserved by creating a municipal corporation, and the determination of this question is left wholly to his views of expediency and public policy.

That the determination of such questions involves the exercise of purely and exclusively legislative powers seems to us too clear to admit of argument. The granting of all charters of incorporation involves the exercise of legislative functions. The proposition (says Dillon) which lies at the foundation of the law of corporations of the country is that they all, public or private, exist and can exist only by virtue of express legislative enactment, creating or authorizing the creation of the corporate body. All municipal corporations are mere auxiliaries to the State government in the business of municipal rule. The act of deciding when and under what circumstances the public interests require the creation of these auxiliaries or aids to the State government is one of the highest and most important legislative powers and duties.

By section 1, article 4, of the constitution of the State, the legislative department of the government is made to consist of a Senate and House of Representatives. In them all legislative power is exclusively vested. One of the settled maxims of constitutional law is that legislative powers cannot be delegated. Where the constitution has located the law making power it must remain. The department to whose judgment and wisdom it has been intrusted cannot abdicate this power and relieve itself of the responsibility, by choosing other agencies upon whom it shall be devolved. Cooley, Const. Lim. 139. As said by this court in State *v.* Young, 29 Minn.

474, 551, it is a principle not questioned that, except when authorized by the constitution, as in respect to municipal corporations, the legislature cannot delegate legislative power. The power of local legislation commonly bestowed on municipal corporations does not trench upon the maxim, since this is authorized, impliedly at least, by the constitution itself; and the maxim itself is to be understood in the light of an immemorial practice which has always recognized the policy and propriety of vesting in such corporations these powers. As before remarked, municipal corporations are created for this purpose, as aids to the State government in the business of municipal rule. Cooley, Const. Lim. 140.

Had the legislature, by the act in question, fixed and specified all the conditions and facts upon which the incorporation of certain territory should depend, we do not question their right to refer to some tribunal or body the question of ascertaining and determining the existence of these facts and conditions. Neither do we decide that they might not delegate certain legislative powers regarding the organization and incorporation of villages to some appropriate municipal body which might constitutionally exercise local legislative powers. The delegation of certain powers of local legislation to municipal bodies, for reasons already suggested, is permissible. Boards of county commissioners are already, under certain limitations, invested with somewhat similar powers in the organization and change of boundaries of towns and school-districts. But the present act assumes to delegate these legislative powers to the District Court, — a tribunal not authorized to exercise them, its jurisdiction under the constitution being purely *judicial*. Cases may be found where it has been held that powers similar to those conferred by this act were properly delegated to certain so-called courts, but we think it will be found in almost every instance that these courts were not exclusively *judicial*, but also *quasi* municipal bodies, invested with certain powers of local legislation. Such are the county courts in some States, which take the place of our boards of county commissioners in the municipal government of the county. As bearing upon the question here considered, see City of Galesburg *v.* Hawkinson, 75 Ill. 152; Shumway *v.* Bennett, 29 Mich. 451.

The only remaining question is whether a writ of prohibition is the appropriate remedy. Although the powers attempted to be conferred by this act are not judicial in the strict sense of the term, yet they are, in many of their features and results, *quasi judicial*, and are conducted under judicial forms. The exercise of these powers is unlawful. Their exercise will result in injury for which there seems to be no other adequate remedy. Under this state of facts the writ will lie. State *v.* Young, 29 Minn. 474.

Let the writ issue.

## CITY OF WAHOO *v.* DICKINSON.

23 Nebraska, 426. 1888.

MAXWELL, J. In October, 1886, the proper authorities of the city of Wahoo passed a resolution that, "We favor and demand as a matter of right the annexation of the territory contiguous to the city of Wahoo," etc., and described the territory sought to be annexed. The city thereupon filed a petition in the District Court of Saunders county, setting forth the facts required by the statute, and attached an accurate map of the territory sought to be annexed to the said petition, and prayed for a decree of the court annexing the territory set forth in the petition to the city of Wahoo. There were nearly one hundred persons who owned the land sought to be annexed, all of whom were made defendants, and service duly had upon them. The appellants answered the petition, and upon a decree being rendered against them, appealed to this court. There is no bill of exceptions, and the only question before this court is, whether or not the district court had jurisdiction.

This question is to be determined from the construction to be placed upon section 99, chap. 14 of the Comp. Stat.

. . . . . .

The court in its decree found "that the city council of the plaintiff has heretofore adopted a resolution to annex the territory described in the petition herein by a two-thirds vote of all the members of said council, and the court further finds that such of said territory as is hereinafter described will receive material benefit by its annexation to the said city of Wahoo, and that justice and equity require the annexation of said portion of said territory hereinafter described" [describing the territory].

The appellants contend that the power to annex territory to a city is legislative and not judicial, and if delegated must be given to some body possessing legislative powers and not to a court, citing Shumway *v.* Bennett, 29 Mich. 452. People *v.* Carpenter, 24 N. Y. 86. Galesburg *v.* Hawkinson, 75 Ill. 152. Turner *v.* Althaus, 6 Neb. 69. The case of Shumway *v.* Bennett arose under a statute very different from ours, and need not be considered. The case of Galesburg *v.* Hawkinson is under a similar statute to our own, but we are unable to give our assent to the reasoning of the court in that case.

It will be conceded that an arbitrary annexation of territory to a city or town, where the benefits to be received by the territory annexed are not considered, can only be accomplished by legislation, either by the legislature itself, or by a tribunal clothed with power for that purpose, and that a court under our constitution could not be invested with such legislative power. We do not understand the

statute, however, as clothing the courts with the power to legislate in the premises — that is, to determine in the first instance what territory should be annexed. This power is bestowed upon the city council. The evident purpose is to protect the owners of the property from being forcibly brought within the corporation, unless one of two facts is made to appear. First, that the territory, or a part of it, will receive material benefit from its annexation to such corporation — that is, if all the territory sought to be annexed will receive material benefits, then a decree will be entered accordingly; if but part receives material benefit, then a decree will be entered only for such part. Second, where justice and equity require such annexation of said territory, or a part thereof, then a decree will be entered according to the facts as found.

The determination of these questions is a judicial act, and the courts are duly empowered and the question is proper for the courts to consider. The statute makes the right depend upon one of the two conditions named. If neither condition exists, then there is no right to annex. The court, therefore, hears the allegations of the parties interested in the property sought to be annexed, and determines from the testimony what their rights are in the premises. Thus in one action, before any complications have arisen in regard to the annexation of the territory, the court determines the rights of the parties, with the right of either party to appeal from the decree. Such powers are judicial and not legislative. The same powers are conferred upon the courts to change the names of persons, cities, and towns, and like cases which have been treated as a legitimate exercise of judicial power. This question was very fully considered by the Supreme Court of Iowa in Burlington *v.* Leebrick, 43 Iowa, 252, where a statute very similar to that under consideration was sustained, and the power of the court to determine the conditions upon which contiguous territory should be annexed to a city was held to be judicial and not legislative. See also Kayser *v.* Trustees, 16 Mo. 88. Blanchard *v.* Bissell, 11 O. S. 96. Borough of Little Meadows, 35 Penn. St. 335.

Our constitution prohibits special legislation as applied to any particular municipal corporation. The legislature, therefore, cannot, by special act, extend the boundaries of any city or town. This, therefore, must be done by general law, and the most practical way of accomplishing this purpose is to provide by general statute the conditions under which contiguous territory may be attached to such city or town, and to clothe some local tribunal with power to determine, in the first instance, whether such conditions exist. If such local tribunal is convinced of the existence of one or both of the conditions named, and pass a resolution annexing such territory, it must still convince the court of the existence of at least one of said conditions and obtain a decree of the existence of the same. These questions are so far of a judicial character that they may

properly be vested in the judicial department of the State. As there is no bill of exceptions, and no question as to the sufficiency of the evidence to sustain the decree, we hold that the court below had jurisdiction, and the decree is affirmed.

*Decree affirmed.*

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## Ex parte GRIFFITHS.

118 Indiana, 83. 1889.

Elliott, C. J. The reporter of the decisions of this court files this petition invoking judgment upon the validity of the act of March, 1889. Among other provisions that act contains the following: "Opinions involving no disputed principles of law or equity or rule of practice, and no question except as to whether the verdict or decision is sustained by sufficient evidence or is contrary to the evidence, shall be printed in brevier type, without analysis or syllabus. . . . The index and tables of cases shall be subject to the supervision and direction of the Supreme Court. . . . It shall be the duty of the Supreme Court to make a syllabus of each opinion recorded by said court, except as hereinbefore otherwise provided." Acts of 1889, p. 87.

If the act assumed to require the judges of the Supreme Court to perform the duties of the clerk by preparing entries, or to discharge the duties of the sheriff by preparing returns for him, we suppose no one would hesitate to declare it void. The fact that the officer whose duties the act assumes to direct the judges to perform is the reporter, and not the clerk or the sheriff, can make no difference. Neither shade nor semblance of difference can be discerned by the keenest vision between the cases instanced by way of illustration and the real case. The principle which rules is this: Judges cannot be required to perform any other than judicial duties. This is a rudimental principle of constitutional law. To the science of jurisprudence, it is as the axiom that the whole is equal to all its parts is to the science of mathematics. There is no contrariety of opinion upon this subject. There is no tinge of reason for asserting a different doctrine. We quote Judge Cooley's statement of the principle, although it is found in a book intended for beginners, because it expresses the rule clearly and tersely. This is his statement: "Upon judges, as such, no functions can be imposed except those of a judicial nature." Principles of Const. Law, 53. The authorities upon this point are many and harmonious. Hayburn's Case, 2 Dall. 409, n.; United States *v.* Ferreira, 13 How. 40, n.; Auditor *v.* Atchison, etc., R. R. Co., 6 Kan. 500; Supervisors of

Election, 114 Mass. 247; Rees *v.* City of Watertown, 19 Wall. 107; Heine *v.* Levee Commrs., 19 Wall. 655; Smith *v.* Strother, 68 Cal. 194; Burgoyne *v.* Supervisors, 5 Cal. 9; People *v.* Town of Nevada, 6 Cal. 143; Hardenburgh *v.* Kidd, 10 Cal. 402; McLean County Precinct *v.* Deposit Bank, 81 Ky. 254; State *v.* Young, 29 Minn. 474; Shepherd *v.* City of Wheeling, 4 S. E. Rep. 35.

The preparation of the *syllabi* is an essential part of the reporter's work. Head-notes may be copyrighted, but the opinions of the court cannot be. The *syllabi*, or head-notes, may be copyrighted because they are the work of the reporter and not of the judges. The work is essentially and intrinsically ministerial, and, therefore, cannot be performed by the judges or the court.

The soundness of the rule stated by Judge Cooley is beyond controversy, and it is hardly necessary to go further, since it is conclusive here, but the provisions of our Constitution are so clear and decisive that we cannot forbear referring to them. These provisions are found in article 7, and read thus:

"Section 5. The Supreme Court shall, upon the decision of every case, give a statement in writing of each question arising in the record of such case and the decision of the court thereon.

"Section 6. The General Assembly shall provide, by law, for the speedy publication of the decisions of the Supreme Court made under this Constitution; but no judge shall be allowed to report such decisions."

These provisions, when read in connection with section 1 of article 3, distributing the powers of government, and section 1 of article 7, lodging the whole judicial power of the State in the courts, make it perfectly clear that the Legislature cannot impose any of the duties of the reporter upon the judges of the Supreme Court. Section 5 defines the duties of the court, and to these duties the Legislature can make no additions. The last clause of section 6 is a positive prohibition, and no judge can, without an open defiance of the Constitution he has sworn to support, take upon himself the duties of the reporter.

The principle which controls here has been asserted and applied by this court. By force of this principle the act of 1875, concerning the office of reporter, was overthrown. Judge Buskirk, in speaking of the decision, says it was the unanimous judgment of the court. Buskirk, Practice, 12. That learned judge discusses the question at length and very clearly proves that the Legislature has no power to require the judges to exercise any of the functions of the office of reporter. There are many decisions asserting and enforcing the general principle involved here. It is, indeed, everywhere agreed that constitutional courts are not subject to the will of the Legislature, for, as said in Wright *v.* Defrees, 8 Ind. 298, "The powers of the three departments are not merely equal, — they are exclusive, in respect to the duties assigned to each. They are absolutely inde-

pendent of each other." In the case of Houston *v.* Williams, 13 Cal. 24, the court, speaking by FIELD, J. (now one of the justices of the Supreme Court of the United States), said: "The truth is, no such power can exist in the legislative department, or be sanctioned by any court which has the least respect for its own dignity and independence. In its own sphere of duties, this court cannot be trammelled by any legislative restrictions. Its constitutional duty is discharged by the rendition of decisions." The Supreme Court of Arkansas, discussing the general subject, cites with approval the case of Houston *v.* Williams, *supra*, and says, of the constitutional right of the court, that: "The legislative department is incompetent to touch it." Vaughan *v.* Harp, 49 Ark. 160. In a recent decision of our own it was said: "It is true that the judiciary is an independent department of the government, exclusively invested by the Constitution with one element of sovereignty, and that this court receives its essential and inherent powers, rights, and jurisdiction from the Constitution and not from the Legislature." Smythe *v.* Boswell, 117 Ind. 365. Of the many other cases sustaining this doctrine, we cite Little *v.* State, 90 Ind. 338 (46 Am. Rep. 224), and authorities cited; Sanders *v.* State, 85 Ind. 318; Shoultz *v.* McPheeters, 79 Ind. 373; Nealis *v.* Dicks, 72 Ind. 374; Greenough *v.* Greenough, 11 Pa. St. 489; Chandler *v.* Nash, 5 Mich. 410; Hawkins *v.* Governor, 1 Ark. 570; *In re* Janitor of Supreme Court, 35 Wis. 410; Speight *v.* People, 87 Ill. 595; *Ex Parte* Randolph, 2 Brock. 447.

It is our judgment that the petition brings before us these three questions: (1st) Can the Legislature impose ministerial duties upon the court? (2d) Can the Legislature add duties to those devolved upon the judges by the Constitution? (3d) Can the Legislature, in violation of the constitutional inhibition, authorize the judges to discharge the essential duties of a reporter? Upon these questions we express our judgment and sustain the petitioner's contention, but we neither express nor intimate an opinion upon any others, although others are discussed.

We have no doubt that it is our right and our duty to give judgment upon the questions we have stated, because they directly concern the rights, powers, and functions of the court, and no other tribunal can determine for us what our rights, duties and functions are under the Constitution.[1]

[1] On account of these unconstitutional provisions, the whole statute providing for reporting the opinions of the Supreme Court was held to be invalid. Griffin *v.* State, *ex rel.*, 119 Ind. 520 (1889).

## UNITED STATES EX REL. *v.* DUELL.

172 United States, 576. 1898.

In an interference proceeding in the Patent Office between Bernardin and Northall, the Commissioner, Seymour, decided in favor of Bernardin, whereupon Northall prosecuted an appeal to the Court of Appeals of the District of Columbia. That court awarded Northall priority and reversed the Commissioner's decision. 7 App. D. C. 452. Bernardin, notwithstanding, applied to the Commissioner to issue the patent to him and tendered the final fee, but the Commissioner refused to do this in view of the decision of the Court of Appeals, which had been duly certified to him. Bernardin then applied to the Supreme Court of the District of Columbia for a mandamus to compel the Commissioner to issue the patent in accordance with his prior decision on the ground that the statute providing for an appeal was unconstitutional and the judgment of the Court of Appeals void for want of jurisdiction. The application was denied, and Bernardin appealed to the Court of Appeals, which affirmed the judgment. 10 App. D. C. 294.

Seymour resigned as Commissioner and was succeeded by Butterworth, and Bernardin recommenced his proceeding, which again went to judgment in the Supreme Court, and the Court of Appeals. 11 App. D. C. 91. The case was brought to this court, but abated in consequence of the death of Butterworth. United States *v.* Butterworth, 169 U. S. 600. Bernardin thereupon brought his action against Duell, Butterworth's successor, and judgment against him was again rendered in the District Supreme Court, that judgment affirmed by the Court of Appeals, and the cause brought here on writ of error.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

The Court of Appeals for the District of Columbia adjudged that Northall was entitled to the patent. By section 8 of the act establishing that court, 27 Stat. 434 c. 74, it is provided that any final judgment or decree thereof may be revised by this court on appeal or error in cases wherein the validity of a statute of the United States is drawn in question. The validity of the act of Congress allowing an appeal to the Court of Appeals in interference cases was necessarily determined when that court went to judgment, yet no attempt was made to bring the case directly to this court, but the relator applied to the District Supreme Court to compel the Commissioner to issue the patent in disregard of the judgment of the Court of Appeals to the contrary, and, the application having been denied, the Court of Appeals was called on to readjudicate the question of its own jurisdiction.

The ground of this unusual proceeding, by which the lower court was requested to compel action to be taken in defiance of the court above, and the latter court was called on to rejudge its own judgment, was that the decree of the Court of Appeals was utterly void because of the unconstitutionality of the statute by which it was empowered to exercise jurisdiction.

Nothing is better settled than that the writ of mandamus will not ordinarily be granted if there is another legal remedy, nor unless the duty sought to be enforced is clear and indisputable; and we think that, under the circumstances, the remedy by appeal existed; and that it is not to be conceded that it was the duty of the Commissioner to disobey the decree because in his judgment the statute authorizing it was unconstitutional, or that it would have been consistent with the orderly and decorous administration of justice for the District Supreme Court to hold that the Court of Appeals was absolutely destitute of the jurisdiction which it had determined it possessed. Even if we were of opinion that the act of Congress was not in harmony with the Constitution, every presumption was in favor of its validity, and we cannot assent to the proposition that it would have been competent for the Commissioner to treat the original decree as absolutely void, and without force and effect as to all persons and for all purposes.

But as, in our opinion, the Court of Appeals had jurisdiction, we prefer to affirm the judgment on that ground.

The contention is that Congress had no power to authorize the Court of Appeals to review the action of the Commissioner in an interference case, on the theory that the Commissioner is an executive officer; that his action in determining which of two claimants is entitled to a patent is purely executive; and that, therefore, such action cannot be subjected to the revision of a judicial tribunal.

Doubtless, as was said in Murray *v.* Hoboken Land & Improvement Co., 18 How. 272, 284, Congress cannot bring under the judicial power a matter which, from its nature, is not a subject for judicial determination, but at the same time, as Mr. Justice Curtis, delivering the opinion of the court, further observed, "there are matters involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." The instances in which this has been done are numerous, and many of them are referred to in Fong Yue Ting *v.* United States, 149 U. S. 698, 714, 715, 728.

Since, under the Constitution, Congress has power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries," and to make all laws which shall be necessary and proper for carrying that expressed power into execution, it

follows that Congress may provide such instrumentalities in respect of securing to inventors the exclusive right to their discoveries as in its judgment will be best calculated to effect that object.

And by reference to the legislation on the subject, a comprehensive sketch of which was given by Mr. Justice Matthews in Butterworth *v.* Hoe, 112 U. S. 50, it will be seen that from 1790 Congress has selected such instrumentalities, varying them from time to time, and, since 1870, has asserted the power to avail itself of the courts of the District of Columbia in that connection.

[The provisions of successive acts of Congress on the subject are briefly stated.]

As one of the instrumentalities designated by Congress in execution of the power granted, the office of Commissioner of Patents was created, and though he is an executive officer, generally speaking, matters in the disposal of which he exercises functions judicial in their nature may properly be brought within the cognizance of the courts.

Now, in deciding whether a patent shall issue or not, the Commissioner acts on evidence, finds the facts, applies the law and decides questions affecting not only public but private interests; and so as to reissue, or extension, or on interference between contesting claimants; and in all this he exercises judicial functions.

In Butterworth *v.* Hoe, *supra*, Mr. Justice Matthews, referring to the constitutional provision, well said:

"The legislation based on this provision regards the right of property in the inventor as the medium of the public advantage derived from his invention; so that in every grant of the limited monopoly two interests are involved, that of the public, who are the grantors, and that of the patentee. There are thus two parties to every application for a patent, and more, when, as in case of interfering claims or patents, other private interests compete for preference. The questions of fact arising in this field find their answers in every department of physical science, in every branch of mechanical art; the questions of law, necessary to be applied in the settlement of this class of public and private rights, have founded a special branch of technical jurisprudence. The investigation of every claim presented involves the adjudication of disputed questions of fact, upon scientific or legal principles, and is, therefore, essentially judicial in its character, and requires the intelligent judgment of a trained body of skilled officials, expert in the various branches of science and art, learned in the history of invention, and proceeding by fixed rules to systematic conclusions."

That case is directly in point and the *ratio decidendi* strictly applicable to that before us. The case was a suit in mandamus brought by the claimant of a patent in whose favor the Commissioner had found in an interference case, to compel the Commissioner to issue the patent to him. The Commissioner had refused to do

this on the ground that the defeated party had appealed to the Secretary of the Interior, who had reversed the Commissioner's action, and found in appellant's favor. This court held that while the Commissioner of Patents was an executive officer and subject in administrative or executive matters to the supervision of the head of the department, yet that his action in deciding patent cases was essentially judicial in its nature and not subject to review by the executive head, an appeal to the courts having been provided for. And among other things it was further said:

"It is evident that the appeal thus given to the Supreme Court of the District of Columbia from the decision of the Commissioner, is not the exercise of ordinary jurisdiction at law or in equity on the part of that court, but is one in the statutory proceeding under the patent laws whereby that tribunal is interposed in aid of the Patent Office, though not subject to it. Its adjudication, though not binding upon any who choose by litigation in courts of general jurisdiction to question the validity of any patent thus awarded, is, nevertheless, conclusive upon the Patent Office itself, for, as the statute declares, Rev. Stat. § 4914, it 'shall govern the further proceedings in the case.' The Commissioner cannot question it. He is bound to record and obey it. His failure or refusal to execute it by appropriate action would undoubtedly be corrected and supplied by suitable judicial process. The decree of the court is the final adjudication upon the question of right; everything after that dependent upon it is merely in execution of it; it is no longer matter of discretion, but has become imperative and enforceable. It binds the whole Department, the Secretary as well as the Commissioner, for it has settled the question of title, so that a demand for the signatures necessary to authenticate the formal instrument and evidence of grant may be enforced. It binds the Secretary by acting directly upon the Commissioner, for it makes the action of the latter final, by requiring it to conform to the decree.

"Congress has thus provided four tribunals for hearing applications for patents, with three successive appeals, in which the Secretary of the Interior is not included, giving jurisdiction in appeals from the Commissioner to a judicial body, independent of the Department, as though he were the highest authority on the subject within it. And to say that under the name of direction and superintendence, the Secretary may annul the decision of the Supreme Court of the District, sitting on appeal from the Commissioner, by directing the latter to disregard it, is to construe a statute so as to make one part repeal another, when it is evident both were intended to coexist without conflict."

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"No reason can be assigned for allowing an appeal from the Commissioner to the Secretary in cases in which he is by law required to exercise his judgment on disputed questions of law and fact, and in

which no appeal is allowed to the courts that would not equally extend it to those in which such appeals are provided, for all are equally embraced in the general authority of direction and superintendence. That includes all or does not extend to any. The true conclusion, therefore, is, that in matters of this description, in which the action of the Commissioner is quasi-judicial, the fact that no appeal is expressly given to the Secretary is conclusive that none is to be implied."

We perceive no ground for overruling that case or dissenting from the reasoning of the opinion; and as the proceeding in the Court of Appeals on an appeal in an interference controversy presents all the features of a civil case, a plaintiff, a defendant and a judge, and deals with a question judicial in its nature in respect of which the judgment of the court is final so far as the particular action of the Patent Office is concerned, such judgment is none the less a judgment "because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by Congress in execution of a power granted by the Constitution." Interstate Commerce Commission *v.* Brimson, 154 U. S. 447.

It will have been seen that in the gradual development of the policy of Congress in dealing with the subject of patents, the recognition of the judicial character of the questions involved became more and more pronounced.

By the acts of 1839 and 1852 an appeal was given, not to the Circuit Court of the District of Columbia, but to the chief judge or one of the assistant judges thereof, who was thus called on to act as a special judicial tribunal. The competency of Congress to make use of such an instrumentality or to create such a tribunal in the attainment of the ends of the Patent Office seems never to have been questioned, and we think could not have been successfully. The nature of the thing to be done being judicial, Congress had power to provide for judicial interference through a special tribunal, United States *v.* Coe, 155 U. S. 76; and *a fortiori* existing courts of competent jurisdiction might be availed of.

We agree that it is of vital importance that the line of demarcation between the three great departments of government should be observed, and that each should be limited to the exercise of its appropriate powers, but in the matter of this appeal we find no such encroachment of one department on the domain of another as to justify us in holding the act in question unconstitutional.

*Judgment affirmed.*

## HARWOOD *v.* WENTWORTH.

162 United States, 547. 1896.

[This was an appeal from the judgment of the Supreme Court of the territory of Arizona in a proceeding to determine a right to an office, which was claimed under an act of the territorial legislature.]

Mr. Justice Harlan, after stating the facts, delivered the opinion of the court.

That which purports to be an act of the legislature of the Territory of Arizona, entitled "An act classifying the counties of the Territory and fixing the compensation of officers therein," and to have been approved by the Governor on the 21st day of May, 1895, not only appears in the published laws of the Territory, but is filed with and in the custody of the secretary of the Territory, and is signed, the parties agree, by the Governor, the President of the territorial Legislative Council, and the Speaker of the territorial House of Representatives.

Is it competent to show, by evidence derived from the journals of the Council and House of Representatives, as kept by their respective chief clerks, from the indorsements or minutes made by those clerks on the original bill while it was in the possession of the two branches of the legislature, and from the recollection of the officers of each body, that this act, thus in the custody of the territorial Secretary, and authenticated by the signatures of the Governor, President of the Council, and the Speaker of the House of Representatives, contained, at the time of its final passage, provisions that were omitted from it without authority of the Council or the House, before it was presented to the Governor for his approval?

Upon the authority of Field *v.* Clark, 143 U. S. 649, 671 *et seq.*, this question must be answered in the negative. That case in its essential features, does not differ from the one now before the court. It was claimed in that case that a certain provision or section was in the act of Congress of October 1, 1890, c. 1244, 26 Stat. 567, as it passed, but was omitted without authority from the bill or act authenticated by the signatures of the presiding officers of the two houses of Congress and approved by the President. What was said in that case is directly applicable in principle to the present case. After observing that the Constitution expressly required certain matters to be entered on the journal, and, waiving any expression of opinion as to the validity of a legislative enactment passed in disregard of that requirement, the court said: "But it is clear that, in respect to the particular mode in which, or with what fulness, shall be kept the proceedings of either house relating to matters not expressly required to be entered on the journals; whether bills, orders, resolutions, reports and amendments shall be entered at large

on the journal, or only referred to and designated by their titles or by numbers; these and like matters were left to the discretion of the respective houses of Congress. Nor does any clause of that instrument, either expressly or by necessary implication, prescribe the mode in which the fact of the original passage of a bill by the House of Representatives and the Senate shall be authenticated, or preclude Congress from adopting any mode to that end which its wisdom suggests. Although the Constitution does not expressly require bills that have passed Congress to be attested by the signature of the presiding officers of the two houses, usage, the orderly conduct of legislative proceedings and the rules under which the two bodies have acted since the organization of the government, require that mode of authentication." Again: "The signing by the Speaker of the House of Representatives and by the President of the Senate in open session, of an enrolled bill is an official attestation by the two houses of such bill as one that has passed Congress. It is a declaration by the two houses through their presiding officers to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. As the President has no authority to approve a bill not passed by Congress, an enrolled act in the custody of the Secretary of State and having the official attestations of the Speaker of the House of Representatives, of the President of the Senate and of the President of the United States, carries, on its face, a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Congress. The respect due to coequal and independent departments requires the judicial department to act upon that assurance and to accept, as having passed Congress, all bills authenticated in the manner stated, leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution."

It is said that, although an enrolled act properly authenticated is sufficient, nothing to the contrary appearing on its face, to show that it was passed by the territorial Legislature, it cannot possibly be — that public policy forbids — that the judiciary should be required to accept as a statute of the Territory that which may be shown not to have been passed in the form in which it was when authenticated by the signatures of the presiding officers of the territorial Legislature, and of the Governor. This, it is contended, makes it possible for these officers to impose upon the people, as a law, something that never, in fact, received legislative sanction. Considering a similar contention in Field v. Clark, the court said: "But this possibility is too

remote to be seriously considered in the present inquiry. It suggests a deliberate conspiracy to which the presiding officers, the committees on enrolled bills and the clerks of the two houses must necessarily be parties, all acting with a common purpose to defeat an expression of the popular will in the mode prescribed by the Constitution. Judicial action based upon such a suggestion is forbidden by the respect due to a coördinate branch of the government. The evils that may result from the recognition of the principle that an enrolled act, in the custody of the Secretary of State, attested by the signatures of the presiding officers of the two houses of Congress, and the approval of the President, is conclusive evidence that it was passed by Congress, according to the forms of the Constitution, would be far less than those that would certainly result from a rule making the validity of Congressional enactments depend upon the manner in which the journals of the respective houses are kept by the subordinate officers charged with the duty of keeping them." These observations are entirely applicable to the present case.

But it may be added that, if the principle announced in Field *v.* Clark involves any element of danger to the public, it is competent for Congress to meet that danger by declaring under what circumstances, or by what kind of evidence, an enrolled act of Congress or of a territorial Legislature, authenticated as required by law, and in the hands of the officer or department to whose custody it is committed by statute, may be shown not to be in the form in which it was when passed by Congress or by the territorial Legislature.

It is difficult to imagine a case that would more clearly demonstrate the soundness of the rule recognized in Field *v.* Clark than the case now under examination. The President of the Council and the Speaker of the House of Representatives state that it was not "the custom," when an enrolled bill was presented for signature, to call the attention of their respective bodies to the fact that such bill was about to be signed; that the bill was simply handed up, when it would be signed and handed back, without formality and without interrupting legislative proceedings. The Speaker of the House of Representatives, in addition, stated that he was certain that the original bill when it passed that body contained a clause that it should go into effect on the 1st day of January, 1897. But what made him so certain of, or how he was able to recall, that fact, is not stated.

Equally unsatisfactory, as proof of what occurred in the territorial Legislature, are the indorsements made by the chief clerks of the council and the house upon the original bill. . . . These indorsements, in themselves, throw no light upon the inquiry as to whether the particular clause, alleged to have been omitted, was, in fact, stricken out by the direction of the Council and House. They show, it is true, that amendments of the original bill were made, but not what were the nature of those amendments. If it be said that certain

amendments are attached to the original bill, and are attested by one of the clerks, the answer is, that other amendments may have been made that were not thus preserved. It was not required that each amendment should be entered at large on the journal.

If there be danger, under the principles announced in Field *v.* Clark, that the Governor and the presiding officers of the two houses of a territorial Legislature may impose upon the people an act that was never passed in the form in which it is preserved by the Secretary of the Territory, and as it appears in the published statutes, how much greater is the danger of permitting the validity of a legislative enactment to be questioned by evidence furnished by the general indorsements made by clerks upon bills previous to their final passage and enrolment — indorsements usually so expressed as not to be intelligible to any one except those who made them, and the scope and effect of which cannot in many cases be understood unless supplemented by the recollection of clerks as to what occurred in the hurry and confusion often attendant upon legislative proceedings.

We see no reason to modify the principles announced in Field *v.* Clark, and, therefore, hold that, having been officially attested by the presiding officers of the territorial Council and House of Representatives, having been approved by the Governor, and having been committed to the custody of the Secretary of the territory, as an act passed by the territorial Legislature, the act of March 21, 1895, is to be taken to have been enacted in the mode required by law, and to be unimpeachable by the recitals, or omission of recitals, in the journals of legislative proceedings which are not required by the fundamental law of the territory to be so kept as to show everything done in both branches of the legislature while engaged in the consideration of bills presented for their action.

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The judgment of the Supreme Court of the Territory is

*Affirmed.*

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## TURNBULL *v.* GIDDINGS.

95 Michigan, 314. 1893.

Relators applied for *mandamus* to compel respondents to receive certain protests and enter the same on the journals of their respective bodies. The facts are stated in the opinion.

McGrath, J. These cases may be considered together. The relator in the first case is a member of the Senate. Respondent Giddings is Lieutenant Governor and *ex officio* president of the Senate, and respondent Alward is the secretary of the Senate. The relator in the other case is a member of the House of Representatives.

Respondent Tateum is also a member of the House and Speaker thereof, and respondent Miller is clerk of that body. Senator Turnbull, on the 15th day of February, 1893, asked leave to present a protest against certain proceedings of the Senate, and to have the same spread upon the journal; but the president of the Senate, respondent Giddings, ruled that the protest offered was out of order, as reflecting on the honor of the Senate. The decision of the president was appealed from on the ground that the ruling was "contrary to the constitutional guaranty." Upon vote taken, the ruling of the president was sustained.

On February 9, 1893, during a session of the House of Representatives, the relator in the second case, Representative Barkworth, presented his protest against the passage of a certain resolution; but the speaker, respondent Tateum, declared the protest to be out of order, as reflecting on the House, and refused to receive the same or print it in the journal. Mr. Barkworth appealed from the decision of the speaker on the ground that the ruling was "contrary to the constitutional guaranty." Upon a vote had by yeas and nays, the decision of the speaker was sustained. On the 3d day of March following, Mr. Barkworth reoffered his protest, but the speaker repeated his ruling, and the same was not received; and thereupon Mr. Barkworth requested respondent Miller to receive said protest, and print the same as a part of the journal, but said Miller, "relying upon the decision of the said speaker of the House, refused and neglected to receive the protest."

Orders to show cause were issued, and respondents appear without answer, and move to dismiss the proceedings.

The motion to dismiss must be granted. Section 10, art. 4, of the constitution provides that —

"Each house shall keep a journal of its proceedings, and publish the same, except such parts as may require secrecy. The yeas and nays of the members of either house, on any question, shall be entered on the journal at the request of one fifth of the members elected. Any member of either house may dissent from and protest against any act, proceeding, or resolution which he may deem injurious to any person or the public, and have the reason of his dissent entered on the journal."

It will be observed that the constitution imposes the duty of keeping the journal upon the house, and not upon president or speaker, secretary or clerk. In both cases an appeal to the house was taken, and each house adopted the ruling of its presiding officer, refusing to receive the protest, or to print it in the journal. It is true that the rules make it the duty of the secretary and clerk to keep the journal, but this is not a delegation of the control of the journal to either officer. The rules also provide for the reading of each day's journal, and the correction thereof. The corrections are made at the instance and direction of the body to which the journal

is read. The duty imposed by the rules is the mere clerical duty of placing upon the journal such matter as each house may determine shall be placed thereon. The secretary and clerk are therefore the mere creatures of the respective bodies.

It is not sought by this proceeding to reach something which is in the possession of the agent, who defends his possession by setting up title in his principal, nor is it a proceeding to restrain an agent from doing an unlawful act under an order from his principal, and who sets up the immunity of his superior. It is not the existence in another of mere interest that is here pleaded. It is affirmative action that is sought to be enforced and it is want of power to comply with or give effect to an order, if made, that is pleaded. It is sought to compel persons, whose duties are purely clerical to perform duties which are imposed upon their superiors. We are asked to compel the secretary of the Senate and clerk of the House to insert in the journals matter which the Senate and House have not only refused to allow to be printed therein, but have refused to consider or receive.

The writ of *mandamus* neither creates nor confers authority upon the officer to whom it is directed. It merely directs the exercise of existing powers. It should be directed to those who are to execute it, or whose duty it is to do the thing required. It must also clearly appear that the person to whom it is directed has the absolute power to execute it; otherwise, it will not be issued. Mos. Mand. 199; High, Extr. Rem. § 32; Merrill, Mand. §§ 57, 58, 60, and cases cited.

The duty sought to be enforced is imposed by the constitution upon the Senate and House, and, those bodies having refused to receive or enter the protests, neither the president of the Senate nor the speaker of the House has the power, without the concurrence of the body over which he presides, to execute the order if made.

It is unnecessary to discuss the other questions raised.

Inasmuch as the proper parties are not before the Court, the proceedings must be dismissed, and the writs denied, but without costs.

# CHAPTER IV.

## THE LEGISLATIVE DEPARTMENT.

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### SECTION I. — TAXATION.

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#### a. *Subjects of Taxation.*

#### STATE TAX ON FOREIGN HELD BONDS.

[RAILROAD CO. *v.* PENNSYLVANIA.]

15 Wallace, 300. 1872.

[THE State of Pennsylvania sought to collect from the Railroad Company, incorporated in the State, a tax on interest payable by the Railroad Company to bondholders who were not citizens or residents of the State. Judgment was rendered against the Company, and affirmed by the Supreme Court of the State, and the Company brought the case to this court for review.]

MR. JUSTICE FIELD, after stating the facts of the case, delivered the opinion of the court as follows:

The question presented in this case for our determination is whether the eleventh section of the act of Pennsylvania of May, 1868, so far as it applies to the interest on bonds of the railroad company, made and payable out of the State, issued to and held by non-residents of the State, citizens of other states, is a valid and constitutional exercise of the taxing power of the State, or whether it is an interference, under the name of a tax, with the obligation of the contracts between the non-resident bondholders and the corporation. If it be the former, this court cannot arrest the judgment of the State court; if it be the latter, the alleged tax is illegal, and its enforcement can be restrained.

The case before us is similar in its essential particulars to that of The Railroad Company *v.* Jackson, reported in 7 Wallace, 262. There, as here, the company was incorporated by the legislatures of two States, Pennsylvania and Maryland, under the same name, and its road extended in a continuous line from Baltimore in one State to Sunbury in the other. And the company had issued bonds for a large amount, drawing interest, and executed a mortgage for their

security upon its entire road, its franchises and fixtures, including the portion lying in both States. Coupons for the different instalments of interest were attached to each bond. There was no apportionment of the bonds to any part of the road lying in either State. The whole road was bound for each bond. The law of Pennsylvania, as it then existed, imposed a tax on money owing by solvent debtors of three mills on the dollar of the principal, payable out of the interest. An alien resident in Ireland was the holder of some of the bonds of the railroad company, and when he presented his coupons for the interest due thereon, the company claimed the right to deduct the tax imposed by the law of Pennsylvania, and also an alleged tax to the United States. The non-resident refused to accept the interest with these deductions, and brought suit for the whole amount in the Circuit Court of the United States for the District of Maryland. That court, the chief justice presiding, instructed the jury that if the plaintiff, when he purchased the bonds, was a British subject, resident in Ireland, and still resided there, he was entitled to recover the amount of the coupons without deduction. The verdict and judgment were in accordance with this instruction, and the case was brought here for review.

This court held that the tax under the law of Pennsylvania could not be sustained, as to permit its deduction from the coupons held by the plaintiff would be giving effect to the acts of her legislature upon property and effects lying beyond her jurisdiction. The reasoning by which the learned justice, who delivered the opinion of the court, reached this conclusion, may be open, perhaps, to some criticism. It is not perceived how the fact that the mortgage given for the security of the bonds in that case covered that portion of the road which extended into Maryland could affect the liability of the bonds to taxation. If the entire road upon which the mortgage was given had been in another State, and the bonds had been held by a resident of Pennsylvania, they would have been taxable under her laws in that State. It was the fact that the bonds were held by a non-resident which justified the language used, that to permit a deduction of the tax from the interest would be giving effect to the laws of Pennsylvania upon property beyond her jurisdiction, and not the fact assigned by the learned justice. The decision is, nevertheless, authority for the doctrine that property lying beyond the jurisdiction of the State is not a subject upon which her taxing power can be legitimately exercised. Indeed, it would seem that no adjudication should be necessary to establish so obvious a proposition.

The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the

taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction.

Corporations may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be in the nature of things in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities, and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement.

The bonds issued by the railroad company in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-residents of the State, they are property beyond the jurisdiction of the State. The law which requires the treasurer of the company to retain five per cent of the interest due to the non-resident bondholder is not, therefore, a legitimate exercise of the taxing power. It is a law which interferes between the company and the bondholder, and under the pretence of levying a tax commands the company to withhold a portion of the stipulated interest and pay it over to the State. It is a law which thus impairs the obligation of the contract between the parties. The obligation of a contract depends upon its terms and the means which the law in existence at the time affords for its enforcement. A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation, for, as stated on another occasion, such a law relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement. The Act of Pennsylvania of May 1st, 1868, falls within this description. It directs the treasurer of every incorporated company to retain from the interest stipulated to its bondholders five per cent. upon every dollar and pay it into the treasury of the Commonwealth. It thus sanctions and commands a disregard of the express provisions

of the contracts between the company and its creditors. It is only one of many cases where, under the name of taxation, an oppressive exaction is made without constitutional warrant, amounting to little less than an arbitrary seizure of private property. It is, in fact, a forced contribution levied upon property held in other States, where it is subjected, or may be subjected, to taxation upon an estimate of its full value.

The case of Maltby *v.* The Reading and Columbia Railroad Company, decided by the Supreme Court of Pennsylvania in 1866, was referred to by the Common Pleas in support of its ruling, and is relied upon by counsel in support of the tax in question. The decision in that case does go to the full extent claimed, and holds that bonds of corporations held by non-residents are taxable in that State. But it is evident from a perusal of the opinion of the court that the decision proceeded upon the idea that the bond of the non-resident was itself property in the State because secured by a mortgage on property there. "It is undoubtedly true," said the court, "that the legislature of Pennsylvania cannot impose a personal tax upon the citizen of another State, but the constant practice is to tax property within our jurisdiction which belongs to non-residents." And again: "There must be jurisdiction over either the property or the person of the owner, else the power cannot be exercised; but when the property is within our jurisdiction, and enjoys the protection of our State government, it is justly taxable, and it is of no moment that the owner, who is required to pay the tax, resides elsewhere." There is no doubt of the correctness of these views. But the court then proceeds to state that the principle of taxation as the correlative of protection is as applicable to a non-resident as to a resident; that the loan to the non-resident is made valuable by the franchises which the company derived from the Commonwealth, and as an investment rests upon State authority, and, therefore, ought to contribute to the support of the State government. It also adds that, though the loan is for some purposes subject to the law of the domicile of the holder, "yet, in a very high sense," it is also property in Pennsylvania, observing, in support of this position, that the holder of a bond of the company could not enforce it except in that State, and that the mortgage given for its security was upon property and franchises within her jurisdiction. The amount of all which is this: that the State which creates and protects a corporation ought to have the right to tax the loans negotiated by it, though taken and held by non-residents, a proposition which it is unnecessary to controvert. The legality of a tax of that kind would not be questioned if in the charter of the company the imposition of the tax were authorized, and in the bonds of the company, or its certificates of loan, the liability of the loan to taxation were stated. The tax in that case would be in the nature of a license tax for negotiating the loan, for in whatever manner made payable it would ultimately fall on the

company as a condition of effecting the loan, and parties contracting with the company would provide for it by proper stipulations. But there is nothing in the observations of the court, nor is there anything in the opinion, which shows that the bond of the non-resident was property in the State, or that the non-resident had any property in the State which was subject to taxation within the principles laid down by the court itself, which we have cited.

The property mortgaged belonged entirely to the company, and so far as it was situated in Pennsylvania was taxable there. If taxation is the correlative of protection, the taxes which it there paid were the correlative for the protection which it there received. And neither the taxation of the property, nor its protection, was augmented or diminished by the fact that the corporation was in debt or free from debt. The property in no sense belonged to the non-resident bondholder or to the mortgagee of the company. The mortgage transferred no title; it created only a lien upon the property. Though in form a conveyance, it was both at law and in equity a mere security for the debt. That such is the nature of a mortgage in Pennsylvania has been frequently ruled by her highest court. In Witmer's Appeal, 45 Penn. St., 463, the court said: "The mortgagee has no estate in the land, any more than the judgment creditor. Both have liens upon it, and no more than liens." And in that State all possible interests in lands, whether vested or contingent, are subject to levy and sale on execution, yet it has been held, on the ground that a mortgagee has no estate in the lands, that the mortgaged premises cannot be taken in execution for his debt. In Rickert *v.* Madeira, 1 Rawle, 329, the court said: "A mortgage must be considered either as a chose in action or as giving title to the land and vesting a real interest in the mortgagee. In the latter case it would be liable to execution; in the former it would not, as it would fall within the same reason as a judgment bond or simple contract. If we should consider the interest of the mortgagee as a real interest, we must carry the principle out and subject it to a dower and to the lien of a judgment; and that it is but a chose in action, a mere evidence of debt, is apparent from the whole current of decisions." Wilson *v.* Shoenberger's Executors, 31 Penn. St., 295.

Such being the character of a mortgage in Pennsylvania, it cannot be said, as was justly observed by counsel, that the non-resident holder and owner of a bond secured by a mortgage in that State owns any real estate there. A mortgage being there a mere chose in action, it only confers upon the holder, or the party for whose benefit the mortgage is given, a right to proceed against the property mortgaged, upon a given contingency, to enforce, by its sale, the payment of his demand. This right has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the State when held by a resident therein, but when held by a non-resident it is as much beyond the jurisdiction of the State as the person of the owner.

It is undoubtedly true that the actual *situs* of personal property which has a visible and tangible existence, and not the domicile of its owner, will, in many cases, determine the State in which it may be taxed. The same thing is true of public securities consisting of State bonds and bonds of municipal bodies, and circulating notes of banking institutions; the former, by general usage, have acquired the character of, and are treated as, property in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are. But other personal property, consisting of bonds, mortgages, and debts generally, has no *situs* independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt, are not separated from the possession of the owners.

Cases were cited by counsel on the argument from the decisions of the highest courts of several States, which accord with the views we have expressed. In Davenport *v.* The Mississippi and Missouri Railroad Company, 12 Iowa, 539, the question arose before the Supreme Court of Iowa whether mortgages on property in that State held by non-residents could be taxed under a law which provided that all property, real and personal, within the State, with certain exceptions not material to the present case, should be subject to taxation, and the court said:

"Both in law and equity the mortgagee has only a chattel interest. It is true that the *situs* of the property mortgaged is within the jurisdiction of the State, but, the mortgage itself being personal property, a chose in action, attaches to the person of the owner. It is agreed by the parties that the owners and holders of the mortgages are non-residents of the State. If so, and the property of the mortgage attaches to the person of the owner, it follows that these mortgages are not property within the State, and if not they are not the subject of taxation."

In People *v.* Eastman, 25 Cal., 603, the question arose before the Supreme Court of California whether a judgment of record in Mariposa County upon the foreclosure of a mortgage upon property situated in that county could be taxed there, the owner of the judgment being a resident of San Francisco, and the law of California requiring all property to be taxed in the county where situated; and it was held that it was not taxable there. "The mortgage," said the court, "has no existence independent of the thing secured by it; a payment of the debt discharges the mortgage. The thing secured is intangible, and has no *situs* distinct and apart from the residence of the holder. It pertains to and follows the person. The same debt may, at the same time, be secured by a mortgage upon land in every county in the State; and if the mere fact that the mortgage exists in a particular county gives the property in the mortgage a *situs* subjecting it to taxation in that county, a party, without further legislation, might

be called upon to pay the tax several times, for the lien for taxes attaches at the same time in every county in the State, and the mortgage in one county may be a different one from that in another, although the debt secured is the same."

Some adjudications in the Supreme Court of Pennsylvania were also cited on the argument, which appear to recognize doctrines inconsistent with that announced in Maltby *v.* Reading and Columbia Railroad Company, particularly the case of McKeen *v.* The County of Northampton, 49 Penn. St., 519, and the case of Short's Estate, 16 Id. 63, but we do not deem it necessary to pursue the matter further. We are clear that the tax cannot be sustained; that the bonds, being held by non-residents of the State, are only property in their hands, and that they are thus beyond the jurisdiction of the taxing power of the State. Even where the bonds are held by residents of the State the retention by the company of a portion of the stipulated interest can only be sustained as a mode of collecting a tax upon that species of property in the State. When the property is out of the State there can then be no tax upon it for which the interest can be retained. The tax laws of Pennsylvania can have no extra-territorial operation; nor can any law of that State inconsistent with the terms of a contract, made with or payable to parties out of the State, have any effect upon the contract whilst it is in the hands of such parties or other non-residents. The extra-territorial invalidity of State laws discharging a debtor from his contracts with citizens of other States, even though made and payable in the State after the passage of such laws, has been judicially determined by this court. Ogden *v.* Saunders, 12 Wheaton, 214; Baldwin *v.* Hale, 1 Wallace, 223. A like invalidity must, on similar grounds, attend State legislation which seeks to change the obligation of such contracts in any particular, and on stronger grounds where the contracts are made and payable out of the State.

Judgment reversed, and the cause remanded for further proceedings, *In conformity with this opinion.*[1]

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## KIRTLAND *v.* HOTCHKISS.

100 United States, 491. 1879.

ERROR to the Supreme Court of Errors, Litchfield County, State of Connecticut.

The plaintiff in error, a citizen of Connecticut, instituted this action for the purpose of restraining the enforcement of certain tax-warrants levied upon his real estate in the town in which he

[1] MR. JUSTICE DAVIS delivered a dissenting opinion in which MR. JUSTICE CLIFFORD, MR. JUSTICE MILLER and MR. JUSTICE HUNT concurred.

resided, in satisfaction of certain State taxes, assessed against him for the years 1869 and 1870. The assessment was by reason of his ownership, during those years, of certain bonds executed in Chicago, and made payable to him, his executors, administrators, or assigns in that city, at such place as he or they should by writing appoint, and, in default of such appointment, at the Manufacturers' National Bank of Chicago. Each bond declared that "it is made under, and is, in all respects, to be construed by the laws of Illinois, and is given for an actual loan of money, made at the city of Chicago, by the said Charles W. Kirtland to the said Edwin A. Cummins, on the day of the date hereof." They were secured by deeds of trust, executed by the obligor to one Perkins, of that city, upon real estate there situated, the trustee having power by the terms of the deed to sell and convey the property and apply the proceeds in payment of the loan, in case of default on the part of the obligor to perform the stipulations of the bond.

The statute of Connecticut, under which the assessment was made, declares, among other things, that personal property in that State "or elsewhere" should be deemed, for purposes of taxation, to include all moneys, credits, choses in action, bonds, notes, stocks (except United States stocks), chattels, or effects, or any interest thereon; and that such personal property or interest thereon, being the property of any person resident in the State, should be valued and assessed at its just and true value in the tax-list of the town where the owner resides. The statute expressly exempts from its operation money or property actually invested in the business of merchandizing or manufacturing, when located out of the State. Conn. Revision of 1866, p. 709, tit. 64, c. 1, sect. 8.

The highest court of the State held that the assessments complained of were in conformity to the State law, and that the law itself did not infringe any constitutional right of the plaintiff.

This writ of error is prosecuted upon the ground, as asserted by plaintiff, that the statute of Connecticut thus interpreted and sustained by its highest court is repugnant to the Constitution of the United States.

Mr. Justice Harlan, after stating the facts, delivered the opinion of the court.

In McCulloch *v.* State of Maryland, 4 Wheat. 428, this court considered very fully the nature and extent of the original right of taxation which remained with the States after the adoption of the Federal Constitution. It was there said "that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it." Tracing the right of taxation to the source from which it was derived, the court further said: "It is obvious that it is an incident of sovereignty, and is coextensive with

that to which it is an incident. All subjects over which the sovereign power of a State extends are objects of taxation, but those over which it does not extend are, upon the soundest principles, exempt from taxation."

"This vital power," said this court in Providence Bank *v.* Billings, 4 Pet. 563, "may be abused; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the State governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, when there is no express contract, against unjust and excessive taxation, as well as against unwise legislation."

In St. Louis *v.* The Ferry Company, 11 Wall. 423, and in State Tax on Foreign-held Bonds, 15 Id. 300, 319, the language of the court was equally emphatic.

In the last-named case we said that, "unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

We perceive no reason to modify the principles announced in these cases or to question their soundness. They are fundamental and vital in the relations which, under the Constitution, exist between the United States and the several States. Upon their strict observance depends, in no small degree, the harmonious and successful working of our complex system of government, Federal and State. It may, therefore, be regarded as the established doctrine of this court, that so long as the State, by its laws, prescribing the mode and subjects of taxation, does not entrench upon the legitimate authority of the Union, or violate any right recognized, or secured, by the Constitution of the United States, this court, as between the State and its citizen, can afford him no relief against State taxation, however unjust, oppressive, or onerous.

Plainly, therefore, our only duty is to inquire whether the Constitution prohibits a State from taxing, in the hands of one of its resident citizens, a debt held by him upon a resident of another State, and evidenced by the bond of the debtor, secured by deed of trust or mortgage upon real estate situated in the State in which the debtor resides.

The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the State imposing the tax. The debt which he holds against the resident of Illinois is property in his hands. 15 Wall. 320. It constitutes a portion of his wealth, and from that wealth he is under the very highest obligation, in common with his fellow-citizens of the same State, to contribute for the support of the government whose protection he enjoys.

That debt, although a species of intangible property, may, for pur-

poses of taxation, if not for all others, be regarded as situated at the domicile of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is only evidence of the debt, not the debt itself. The bond may be destroyed, the debt — the right to demand payment of the money loaned, with the stipulated interest — remains. Nor is the locality of the debt, for the purposes of taxation, affected by the fact that it is secured by mortgage upon real estate situated in Illinois. The mortgage is but a security for the debt, and, as held by this court in 15 Wall. 320, already cited, the right of the creditor "to proceed against the property mortgaged, upon a given contingency, to enforce by its sale the payment of his demand, . . . has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the State when held by a resident therein," &c. Cooley on Taxation, 15, 63, 134, 270. The debt in question, then, having its *situs* at the creditor's residence, and constituting a portion of his estate there, both he and the debt are, for the purposes of taxation, within the jurisdiction of the State. It is, consequently, for the State to determine, consistently with its own fundamental law, whether such property owned by one of its residents shall contribute, by way of taxation, to maintain its government. Its discretion in that regard is beyond the power of the Federal government or any of its departments to supervise or control, for the reason, too obvious to require argument in its support, that such taxation violates no provision of the Federal Constitution. Manifestly it does not, as is supposed by counsel, interfere in any true sense with the exercise by Congress of the power to regulate commerce among the several States. Nathan *v.* Louisiana, 8 How. 73, 80; Cooley on Taxation, 62. Nor does it, as is further supposed, abridge the privileges or immunities of citizens of the United States, or deprive the citizen of life, liberty, or property, without due process of law, or violate the constitutional guaranty that the citizens of each State shall be entitled to all privileges of citizeus in the several States.

Whether the State of Connecticut shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes in return for the protection it affords them, by the value of the credits, choses in action, bonds, or stocks which they may own (other than such as are exempted or protected from taxation under the Constitution and laws of the United States), is a matter which concerns only the people of that State, and with which the Federal government cannot rightfully interfere. *Judgment affirmed.*

## SAVINGS AND LOAN SOCIETY *v.* MULTNOMAH COUNTY.

169 United States, 421. 1898.

Mr. Justice Gray delivered the opinion of the court.

This was a bill in equity, filed in the Circuit Court of the United States for the District of Oregon, by the Savings and Loan Society, a corporation and citizen of the State of California, against Multnomah County, a public corporation in the State of Oregon, and one Kelly, the sheriff and *ex officio* the tax collector of that county, and a citizen of that State, showing that in 1891 and 1892 various persons, all citizens of Oregon, severally made their promissory notes to secure the payment of various sums of money, with interest, to the plaintiff at its office in the city of San Francisco and State of California, amounting in all to the sum of $531,000; and, to further secure the same debts, executed to the plaintiff mortgages of divers parcels of land owned by them in Multnomah County; that the mortgages were duly recorded in the office of the recorder of conveyances of that county; that the notes and mortgages were immediately delivered to the plaintiff, and had ever since been without the State of Oregon, and in the possession of the plaintiff at San Francisco; that afterwards, in accordance with the statute of Oregon of October 26, 1882, taxes were imposed upon all the taxable property in Multnomah County, including the debts and mortgages aforesaid; that, the taxes upon these debts and mortgages not having been paid, a list thereof was placed in the hands of the sheriff, with a warrant directing him to collect the same as upon execution, and he advertised for sale all the debts and mortgages aforesaid; and that the statute was in violation of the Fourteenth Amendment of the Constitution of the United States, as depriving the plaintiff of its property without due process of law, and denying to it the equal protection of the laws. The bill prayed for an injunction against the sale; and for a decree declaring that the statute was contrary to the provisions of the Constitution of the United States and therefore of no effect, and that all the proceedings before set out were null and void; and for further relief.

The defendants demurred generally; and the court sustained the demurrer, and dismissed the bill. 60 Fed. Rep. 31. The plaintiff appealed to this court.

The ground upon which the plaintiff seeks to maintain this suit is that the tax act of the State of Oregon of 1882, as applied to the mortgages, owned and held by the plaintiff in California, of lands in Oregon, is contrary to the Fourteenth Amendment of the Constitution of the United States, as depriving the plaintiff of its property

without due process of law, and denying to it the equal protection of the laws.

The statute in question makes the following provisions for the taxation of mortgages: By § 1, "a mortgage, deed of trust, contract or other obligation whereby land or real property, situated in no more than one county in this State, is made security for the payment of a debt, together with such debt, shall, for the purposes of assessment and taxation, be deemed and treated as land or real property." By § 2, the mortgage, "together with such debt, shall be assessed and taxed to the owner of such security and debt in the county, city or district in which the land or real property affected by such security is situated;" and may be sold, like other real property, for the payment of taxes due thereon. By § 3, that person is to be deemed the owner, who appears to be such on the record of the mortgage, either as the original mortgagee, or as an assignee by transfer made in writing upon the margin of the record. By § 4, no payment on the debt so secured is to be taken into consideration in assessing the tax, unless likewise stated upon the record; and the debt and mortgage are to be assessed for the full amount appearing by the record to be owing, unless in the judgment of the assessor the land is not worth so much, in which case they are to be assessed at their real cash value. By §§ 5, 6, 7, it is made the duty of each county clerk to record, in the margin of the record of any mortgage, when requested so to do by the mortgagee or owner of the mortgage, all assignments thereof and payments thereon; and to deliver annually to the assessor abstracts containing the requisite information as to unsatisfied mortgages recorded in his office. By § 8, a debt secured by mortgage of land in a county of this State "shall, for the purposes of taxation, be deemed and considered as indebtedness within this State, and the person or persons owing such debt shall be entitled to deduct the same from his or their assessments in the same manner that other indebtedness within the State is deducted." And by § 9, "no promissory note, or other instrument of writing, which is the evidence of a debt that is wholly or partly secured by land or real property situated in no more than one county in this State, shall be taxed for any purpose in this State; but the debt evidenced thereby, and the instrument by which it is secured shall, for the purpose of assessment and taxation, be deemed and considered as land or real property, and together be assessed and taxed as hereinbefore provided." Oregon Laws of 1882, p. 64. All these sections are embodied in Hill's Annotated Code of Oregon, §§ 2730, 2735–2738, 2753–2756.

The statute applies only to mortgages of land in not more than one county. By the last clause of § 3, all mortgages, "hereafter executed, whereby land situated in more than one county in this State is made security for the payment of a debt, shall be void." The mortgages now in question were all made since the statute, and

were of land in a single county; and it is not suggested in the bill that there existed any untaxed mortgage of lands in more than one county.

The statute, in terms, provides that "no promissory note or other instrument in writing, which is the evidence of" the debt secured by the mortgage, "shall be taxed for any purpose within this State;" but that the debt and mortgage "shall, for the purposes of assessment and taxation, be deemed and treated as land or real property" in the county in which the land is situated, and be there taxed, not beyond their real cash value, to the person appearing of record to be the owner of the mortgage.

The statute authorizes the amount of the mortgage debt to be deducted from any assessment upon the mortgagor; and does not provide for both taxing to the mortgagee the money secured by the mortgage, and also taxing to the mortgagor the whole mortgaged property, as did the statutes of other States, the validity of which was affirmed in Augusta Bank *v.* Augusta, 36 Maine, 255, 259; Alabama Ins. Co. *v.* Lott, 54 Alabama, 499; Appeal Tax Court *v.* Rice, 50 Maryland, 302; and Goldgart *v.* People, 106 Illinois, 25.

The right to deduct from his assessment any debts due from him within the State is secured as well to the mortgagee, as to the mortgagor, by a provision of the statute of Oregon of October 25, 1880, (unrepealed by the statute of 1882, and evidently assumed by § 8 of this statute to be in force,) by which "it shall be the duty of the assessor to deduct the amount of indebtedness, within the State, of any person assessed, from the amount of his or her taxable property." Oregon Laws of 1880, p. 52; Hill's Code, § 2752.

Taking all the provisions of the statute into consideration, its clear intent and effect are as follows: The personal obligation of the mortgagor to the mortgagee is not taxed at all. The mortgage and the debt secured thereby are taxed, as real estate, to the mortgagee, not beyond their real cash value, and only so far as they represent an interest in the real estate mortgaged. The debt is not taxed separately, but only together with the mortgage; and is considered as indebtedness within the State for no other purpose than to enable the mortgagor to deduct the amount thereof from the assessment upon him, in the same manner as other indebtedness within the State is deducted. And the mortgagee, as well as the mortgagor, is entitled to have deducted from his own assessment the amount of his indebtedness within the State.

The result is that nothing is taxed but the real estate mortgaged, the interest of the mortgagee therein being taxed to him, and the rest to the mortgagor. There is no double taxation. Nor is any such discrimination made between mortgagors and mortgagees, or between resident and non-resident mortgagees, as to deny to the latter the equal protection of the laws.

No question between the mortgagee and the mortgagor, arising

out of the contract between them, in regard to the payment of taxes, or otherwise, is presented or can be decided upon this record.

The case, then, reduces itself to the question whether this tax act, as applied to mortgages owned by citizens of other States and in their possession outside of the State of Oregon, deprives them of their property without due process of law.

By the law of Oregon, indeed, as of some other States of the Union, a mortgage of real property does not convey the legal title to the mortgagee, but creates only a lien or incumbrance as security for the mortgage debt; and the right of possession, as well as the legal title, remains in the mortgagor, both before and after condition broken, until foreclosure. Oregon General Laws of 1843–1872, § 323; Hill's Code, § 326; Anderson *v.* Baxter, 4 Oregon, 105, 110; Semple *v.* Bank of British Columbia, 5 Sawyer, 88, 394; Teal *v.* Walker, 111 U. S. 242; Sellwood *v.* Gray, 11 Oregon, 534; Watson *v.* Dundee Mortgage Co., 12 Oregon, 474; Thompson *v.* Marshall, 21 Oregon, 171; Adair *v.* Adair, 22 Oregon, 115.

Notwithstanding this, it has been held, both by the Supreme Court of the State, and by the Circuit Court of the United States for the District of Oregon, that the State has the power to tax mortgages, though owned and held by citizens and residents of other States, of lands in Oregon. Mumford *v.* Sewell, 11 Oregon, 67; Dundee Mortgage Co. *v.* School District, 10 Sawyer, 52; Crawford *v.* Linn County, 11 Oregon, 482; Dundee Mortgage Co. *v.* Parrish, 11 Sawyer, 92; Poppleton *v.* Yamhill County, 18 Oregon, 377, 383; Savings & Loan Society *v.* Multnomah County, 60 Fed. Rep. 31.

In Mumford *v.* Sewell, Judge Waldo, delivering the opinion of the court, said: "All subjects, things as well as persons, over which the power of the State extends, may be taxed." "A mortgage, as such, is incorporeal property. It may be the subject of taxation." "Concede that the debt accompanies the respondent's person and is without the jurisdiction of the State. But the security she holds is Oregon security. It cannot be enforced in any other jurisdiction. It is local in Oregon absolutely as the land which it binds." "Since the power of the State over the mortgage is as exclusive and complete as over the land mortgaged, the mortgage is subject to taxation by the State, unless there is constitutional limitation to the contrary." 11 Oregon, 68, 69.

"In Mumford *v.* Sewell," said Judge Deady, in Dundee Mortgage Co. *v.* School District, "the court held that a mortgage upon real property in this State is taxable by the State, without reference to the domicil of the owner, or the *situs* of the debt or note secured thereby. And this conclusion is accepted by this court as the law of this case. Nor do I wish to be understood as having any doubt about the soundness of the decision. A mortgage upon real property in this State, whether considered as a conveyance of the same, giving the creditor an interest in or right to the same, or merely a

contract giving him a lien thereon for his debt and the power to enforce the payment thereof by the sale of the premises, is a contract affecting real property in the State, and dependent for its existence, maintenance and enforcement upon the laws and tribunals thereof, and may be taxed here as any other interest in, right to, or power over land. And the mere fact that the instrument has been sent out of the State for the time being, for the purpose of avoiding taxation thereon or otherwise, is immaterial." 10 Sawyer, 63, 64.

The authority of every State to tax all property, real and personal, within its jurisdiction, is unquestionable. McCulloch *v.* Maryland, 4 Wheat. 316, 429. Personal property, as this court has declared again and again, may be taxed, either at the domicil of its owner, or at the place where the property is situated, even if the owner is neither a citizen nor a resident of the State which imposes the tax. Tappan *v.* Merchants' Bank, 19 Wall. 490, 499; State Railroad Tax cases, 92 U. S. 575, 607; Coe *v.* Errol, 116 U. S. 517, 524; Pullman's Car Co. *v.* Pennsylvania, 141 U. S. 18, 22, 27. The State may tax real estate mortgaged, as it may all other property within its jurisdiction, at its full value. It may do this, either by taxing the whole to the mortgagor, or by taxing to the mortgagee the interest therein represented by the mortgage, and to the mortgagor the remaining interest in the land. And it may, for the purposes of taxation, either treat the mortgage debt as personal property, to be taxed, like other choses in action, to the creditor at his domicil; or treat the mortgagee's interest in the land as real estate, to be taxed to him, like other real property, at its *situs*. Firemen's Ins. Co. *v.* Commonwealth, 137 Mass. 80, 81; State *v.* Runyon, 12 Vroom, (41 N. J. Law,) 98, 105; Darcy *v.* Darcy, 22 Vroom, (51 N. J. Law,) 140, 145; People *v.* Smith, 88 N. Y. 576, 585; Common Council *v.* Assessors, 91 Michigan, 78, 92.

The plaintiff much relied on the opinion delivered by Mr. Justice Field in Cleveland, Painesville & Ashtabula Railroad *v.* Pennsylvania, reported under the name of Case of the State Tax on Foreign-held Bonds, 15 Wall. 300, 323. It becomes important therefore to notice exactly what was there decided. In that case, a railroad company, incorporated both in Ohio and in Pennyslvania, had issued bonds secured by a mortgage of its entire road in both States; and the tax imposed by the State of Pennsylvania, which was held by a majority of this court to be invalid, was a tax upon the interest due to the bondholders upon the bonds, and was not a tax upon the railroad, or upon the mortgage thereof, or upon the bondholders solely by reason of their interest in that mortgage. The remarks in the opinion, supported by quotations from opinions of the Supreme Court of Pennsylvania, that a mortgage, being a mere security for the debt, confers upon the holder of the mortgage no interest in the land, and when held by a non-resident is as much beyond the jurisdiction of the State as the person of the owner, went beyond what

was required for the decision of the case, and cannot be reconciled with other decisions of this court and of the Supreme Court of Pennsylvania.

This court has always held that a mortgage of real estate, made in good faith by a debtor to secure a private debt, is a conveyance of such an interest in the land, as will defeat the priority given to the United States by act of Congress in the distribution of the debtor's estate. United States *v.* Hooe, 3 Cranch, 73; Thelusson *v.* Smith, 2 Wheat. 396, 426; Conard *v.* Atlantic Ins. Co., 1 Pet. 386, 441.

In Hutchins *v.* King, 1 Wall. 53, 58, Mr. Justice Field, delivering the opinion of the court, said that "the interest of the mortgagee is now generally treated by the courts of law as real estate, only so far as it may be necessary for the protection of the mortgagee and to give him the full benefit of his security." See also Waterman *v.* Mackenzie, 138 U. S. 252, 258. If the law treats the mortgagee's interest in the land as real estate for his protection, it is not easy to see why the law should forbid it to be treated as real estate for the purpose of taxation.

The leading quotation, in 15 Wall. 323, from the Pennsylvania Reports, is this general statement of Mr. Justice Woodward: "The mortgagee has no estate in the land, more than the judgment creditor. Both have liens upon it, and no more than liens." Witmer's Appeal, 45 Penn. St. 455, 463. Yet the same judge, three years later, treated it as unquestionable that a mortgage of real estate in Pennsylvania was taxable there, without regard to the domicil of the mortgagee. Maltby *v.* Reading & Columbia Railroad, 52 Penn. St. 140, 147.

The effect of a mortgage as a conveyance of an interest in real estate in Pennsylvania has been clearly brought out in two judgments delivered by Mr. Justice Strong, the one in the Supreme Court of Pennsylvania, and the other in this court.

Speaking for the same judges who decided Witmer's Appeal, above cited, and in a case decided less than two months previously, reported in the same volume, and directly presenting the question for adjudication, Mr. Justice Strong said, of mortgages of real estate: "They are in form defeasible sales, and in substance grants of specific security, or interests in land for the purpose of security. Ejectment may be maintained by a mortgagee, or he may hold possession on the footing of ownership, and with all its incidents. And though it is often decided to be a security or lien, yet, so far as it is necessary to render it effective as a security, there is always a recognition of the fact that it is a transfer of the title." Britton's Appeal, 45 Penn. St. 172, 177, 178. It should be remembered that in the courts of the State of Pennsylvania, for want of a court of chancery, an equitable title was always held sufficient to sustain an action of ejectment. Simpson *v.* Ammons, 1 Binney, 175; Youngman *v.* Elmira & Williamsport Railroad, 65 Penn. St. 278, 285, and cases there cited.

Again, in an action of ejectment, commenced in the Circuit Court

of the United States for the District of Pennsylvania, Mr. Justice Strong, delivering the unanimous opinion of this court, said: "It is true that a mortgage is in substance but a security for a debt, or an obligation, to which it is collateral. As between the mortgagor and all others than the mortgagee, it is a lien, a security, and not an estate. But as between the parties to the instrument, or their privies, it is a grant which operates to transmit the legal title to the mortgagee, and leaves the mortgagor only a right to redeem." "Courts of equity," he went on to say, "as fully as courts of law, have always regarded the legal title to be in the mortgagee until redemption, and bills to redeem are entertained upon the principle that the mortgagee holds for the mortgagor when the debt secured by the mortgage has been paid or tendered. And such is the law of Pennsylvania. There, as elsewhere, the mortgagee, after breach of the condition, may enter or maintain ejectment for the land." Applying these principles, it was held that one claiming under the mortgagor, having only an equitable title, could not maintain an action of ejectment against one in possession under the mortgagee, while the mortgage remained in existence, or until there had been a redemption; because an equitable title would not sustain an action of ejectment in the courts of the United States. Brobst *v.* Brock, 10 Wall. 519, 529, 530.

In a later case in Pennsylvania, Chief Justice Agnew, upon a full review of the authorities in that State, said: "Ownership of the debt carries with it that of the mortgage; and its assignment, or succession in the event of death, vests the right to the mortgage in the assignee or the personal representative of the deceased owner. But there is a manifest difference between the debt, which is a mere chose in action, and the land which secures its payment. Of the former there can be no possession, except that of the writing, which evidences the obligation to pay; but of the latter, the land or pledge, there may be. The debt is intangible, the land tangible. The mortgage passes to the mortgagee the title and right of possession to hold till payment shall be made." Tryon *v.* Munson, 77 Penn. St. 250, 262.

In Kirtland *v.* Hotchkiss, 42 Conn. 426, affirmed by this court in 100 U. S. 491, the point adjudged was that debts to persons residing in one State, secured by mortgage of land in another State, might, for the purposes of taxation, be regarded as situated at the domicil of the creditor. But the question, whether the mortgage could be taxed there only, was not involved in the case, and was not decided, either by the Supreme Court of Connecticut or by this Court.

In many other cases cited by the appellant, there was no statute expressly taxing mortgages at the *situs* of the land; and, although the opinions in some of them took a wider range, the only question in judgment in any of them was one of the construction, not of the constitutionality, of a statute — of the intention, not of the power,

of the legislature. Such were: Davenport *v.* Mississippi & Missouri Railroad, 12 Iowa, 539; Latrobe *v.* Baltimore, 19 Maryland, 13; People *v.* Eastman, 25 California, 601; State *v.* Earl, 1 Nevada, 394; Arapahoe *v.* Cutter, 3 Colorado, 349; People *v.* Smith, 88 N. Y. 576; Grant *v.* Jones, 39 Ohio St. 506; State *v.* Smith, 68 Mississippi, 79; Holland *v.* Silver Bow Commissioners, 15 Montana, 460.

The statute of Oregon, the constitutionality of which is now drawn in question, expressly forbids any taxation of the promissory note, or other instrument of writing, which is the evidence of the debt secured by the mortgage; and, with equal distinctness, provides for the taxation, as real estate, of the mortgage interest in the land. Although the right which the mortgage transfers in the land covered thereby is not the legal title, but only an equitable interest and by way of security for the debt, it appears to us to be clear upon principle, and in accordance with the weight of authority, that this interest, like any other interest legal or equitable, may be taxed to its owner (whether resident or non-resident) in the State where the land is situated, without contravening any provision of the Constitution of the United States. *Decree affirmed.*[1]

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### b. *Taxation of Government Agencies.*

## THE COLLECTOR *v.* DAY.

11 Wallace, 113. 1870.

[Suit was brought by Day in the Circuit Court of the United States for Massachusetts to recover from the United States Revenue Collector the amount of income tax exacted by the latter from plaintiff on his salary as a judicial officer of the State. Judgment being rendered for plaintiff, defendant brings the case to this Court for review.]

Mr. Justice Nelson delivered the opinion of the court.

The case presents the question whether or not it is competent for Congress, under the Constitution of the United States, to impose a tax upon the salary of a judicial officer of a State?

In Dobbins *v.* The Commissioners of Erie County, 16 Pet. 435, it was decided that it was not competent for the legislature of a State to levy a tax upon the salary or emoluments of an officer of the United States. The decision was placed mainly upon the ground that the officer was a means or instrumentality employed for carrying into effect some of the legitimate powers of the government, which could not be interfered with by taxation or otherwise by the

[1] Mr. Justice Harlan and Mr. Justice White dissented.

States, and that the salary or compensation for the service of the officer was inseparably connected with the office; that if the officer, as such, was exempt, the salary assigned for his support or maintenance while holding the office was also, for like reasons, equally exempt.

The cases of McCulloch *v.* Maryland, 4 Wheat. 316, and Weston *v.* Charleston, 2 Pet. 449, were referred to as settling the principle that governed the case, namely, "that the State governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers."

The soundness of this principle is happily illustrated by the Chief Justice in McCulloch *v.* Maryland, 4 Wheat. 432. "If the States," he observes, "may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government." "This," he observes, "was not intended by the American people. They did not design to make their government dependent on the States." Again, (Ib. 427,) "That the power of taxing it (the bank) by the States may be exercised so far as to destroy it, is too obvious to be denied." And, in Weston *v.* The City of Charleston, 2 Pet. 466, he observes: "If the right to impose the tax exists, it is a right which, in its nature, acknowledges no limits. It may be carried to any extent within the jurisdiction of the State or corporation which imposes it which the will of each State and corporation may prescribe."

It is conceded in the case of McCulloch *v.* Maryland, that the power of taxation by the States was not abridged by the grant of a similar power to the government of the Union; that it was retained by the States, and that the power is to be concurrently exercised by the two governments; and also that there is no express constitutional prohibition upon the States against taxing the means or instrumentalities of the general government. But, it was held, and, we agree properly held, to be prohibited by necessary implication; otherwise the States might impose taxation to an extent that would impair, if not wholly defeat, the operations of the Federal authorities when acting in their appropriate sphere.

These views, we think, abundantly establish the soundness of the decision of the case of Dobbins *v.* The Commissioners of Erie, which determined that the States were prohibited, upon a proper construction of the Constitution, from taxing the salary or emoluments of an officer of the government of the United States. And we shall now proceed to show that, upon the same construction of that instrument, and for like reasons, that government is prohibited from taxing the salary of the judicial officer of a State.

It is a familiar rule of construction of the Constitution of the

Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: "The powers not delegated to the United States are reserved to the States respectively, or, to the people." The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the States.

The relations existing between the two governments are well stated by the present Chief Justice in the case of Lane County *v.* Oregon, 7 Wall. 76. "Both the States and the United States," he observed, "existed before the Constitution. The people, through that instrument, established a more perfect union, by substituting a National government, acting with ample powers directly upon the citizens, instead of the Confederate government, which acted with powers greatly restricted, only upon the States. But, in many of the articles of the Constitution, the necessary existence of the States, and within their proper spheres, the independent authority of the States, are distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them, and to the people, all powers, not expressly delegated to the National government, are reserved." Upon looking into the Constitution it will be found that but a few of the articles in that instrument could be carried into practical effect without the existence of the States.

Two of the great departments of the government, the executive and legislative, depend upon the exercise of the powers, or upon the people of the States. The Constitution guarantees to the States a republican form of government, and protects each against invasion or domestic violence. Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for

preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence. A despotic government might. We have said that one of the reserved powers was that to establish a judicial department; it would have been more accurate, and in accordance with the existing state of things at the time, to have said the power to maintain a judicial department. All of the thirteen States were in the possession of this power, and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the general government is found in that instrument. It is, therefore, one of the sovereign powers vested in the States by their constitutions, which remained unaltered and unimpaired, and in respect to which the State is as independent of the general government as that government is independent of the States.

The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality, and the question is whether the power "to lay and collect taxes" enables the general government to tax the salary of a judicial officer of the State, which officer is a means or instrumentality employed to carry into execution one of its most important functions, the administration of the laws, and which concerns the exercise of a right reserved to the States?

We do not say the mere circumstance of the establishment of the judicial department, and the appointment of officers to administer the laws, being among the reserved powers of the State, disables the general government from levying the tax, as that depends upon the express power "to lay and collect taxes," but it shows that it is an original inherent power never parted with, and, in respect to which, the supremacy of that government does not exist, and is of no importance in determining the question; and further, that being an original and reserved power, and the judicial officers appointed under it being a means or instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the general government stand upon as solid a ground, and are maintained by principles and reasons as cogent as those which led to the exemption of the Federal officer in Dobbins *v.* The Commissioners of Erie from

taxation by the State; for, in this respect, that is, in respect to the reserved powers, the State is as sovereign and independent as the general government. And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?

But we are referred to the Veazie Bank *v.* Fenno, 8 Wall. 533, in support of this power of taxation. That case furnishes a strong illustration of the position taken by the Chief Justice in McCulloch *v.* Maryland, namely, "That the power to tax involves the power to destroy."

The power involved was one which had been exercised by the States since the foundation of the government, and had been, after the lapse of three-quarters of a century, annihilated from excessive taxation by the general government, just as the judicial office in the present case might be, if subject, at all, to taxation by that government. But, notwithstanding the sanction of this taxation by a majority of the court, it is conceded, in the opinion, that "the reserved rights of the States, such as the right to pass laws; to give effect to laws through executive action; to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress." This concession covers the case before us, and adds the authority of this court in support of the doctrine which we have endeavored to maintain. *Judgment affirmed.*[1]

[1] Mr. Justice Bradley dissented.

In South Carolina *v.* United States, 199 U. S. 437, 26 Sup. Ct. Rep. 110 (1905), it was held that "the exemption of State agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business," such as that of selling intoxicating liquors.

## UNITED STATES *v.* RAILROAD COMPANY.

17 Wallace, 322. 1873.

[This suit was brought in the Circuit Court of the United States for Maryland, to recover as internal revenue five per cent of the interest payable on its bonds by the railroad company to the city of Baltimore, as owner of such bonds. Judgment having been rendered for the Railroad Company, the United States brought the case to this court for review.]

Mr. Justice Hunt delivered the opinion of the court.

. . . . . .

The creditor here is the city of Baltimore, and the question then arises whether this tax can be collected from the revenues of that municipal corporation.

There is no dispute about the general rules of law applicable to this subject. The power of taxation by the Federal government upon the subjects and in the manner prescribed by the act we are considering, is undoubted. There are, however, certain departments which are excepted from the general power. The right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal government from its organization. This carries with it an exemption of those agencies and instruments, from the taxing power of the Federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted. Hence, the beginning of such taxation is not allowed on the one side, is not claimed on the other.

In the "Compendium of Internal Revenue Law," by Davidge & Kimball, it is said at p. 505: "Congress may not tax the revenues of a State" (citing Sayles *v.* Davis, 22 Wis. 225). And again, "A national bank cannot be called to account for a tax upon dividends due a State on stock owned by the State" (p. 485; citing 12 Op. Att'y-Gen. 402).

Again, "The term corporation as used in the acts of Congress touching internal revenue does not include a State, consequently the income of the State of Georgia from the Western and Atlantic railroad, property owned, controlled, and managed by that State, has not been made by law a subject of taxation" (p. 471; citing State of Georgia *v.* Atkins, Collector, 8 Int. Rev. Rec. 113).

Again, "The term person as used in §§ 9 and 44 does not include a State. The receipts or certificates issued by the State of Alabama are not subject to the tax of 10 per cent imposed by the act of Con-

gress of March 25th, 1867." 12 Opinions of the Attorneys-General, 176.

The inquiry then arises, what is the nature and character of municipal corporations, and what is their connection with the government of the State.

A writer on corporations says (Angel & Ames on Corporations, § 16 *et seq.*) that inferior and subordinate communities, *imperia in imperio*, such as cities and towns, . . . are allowed to assume to themselves some of the duties of the State in a partial or detailed form, but having neither property nor power for the purposes of personal aggrandizement, they can be considered in no other light than as auxiliaries of the government, and as the secondary deputies and trustees and servants of the people. 2 Kent, 4th ed. 274, and De Tocqueville, Démocratie, 1, 64, 96.

It is said further by the same authority, the main distinction between public and private corporations is, that over the former the legislature, as guardian of the public interests, has the exclusive and unrestrained control; and acting as such, as it may create, so it may modify or destroy, as public exigency requires or recommends, or the public interest will be best subserved. It possesses the right to alter, abolish, or destroy all such institutions, as mere municipal regulations must, from the nature of things, be subject to the absolute control of the government. Angel & Ames on Corporations, § 31. "Such institutions (it is added) are auxiliaries of the government in the important business of municipal rule."

A municipal corporation like the city of Baltimore, is a representative not only of the State, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State. The State may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory as it governs the State at large. It may enlarge or contract its powers or destroy its existence. As a portion of the State in the exercise of a limited portion of the powers of the State, its revenues, like those of the State, are not subject to taxation. This proposition is very properly admitted by the counsel for the government. In their brief it is said, "We admit that municipal corporations, acting merely within the scope of their duties as such, are not to be included within general words imposing taxes upon persons or corporations." In support of this view is cited the proviso to the amendment in 1866, in these words: "Provided that it is the intent hereby to exempt from liability to taxation such State, county, town, or other municipal corporation, in the exercise only of functions strictly belonging to them in their ordinary governmental and municipal capacity."

Assuming for the argument that this qualification is well made, let us look at the facts of the case before us. The city of Balti-

more, with a view to its commercial prosperity, was desirous of aiding in the construction of a railroad, by which the commerce and business of the Western States would be brought to that city. For this purpose it was authorized by the legislature to issue its corporate bonds for $5,000,000, on which it was to obtain the money. The proceeds of these bonds, reserving 10 per cent as a sinking fund, were to be paid to the railroad company. To secure the city against loss and to provide for the payment of the interest on the bonds of the city as it should from time to time mature, and of the principal when payable, the railroad company were to execute a mortgage to the city upon its road and franchises and revenues. All this was done as agreed upon. The interest, secured by this mortgage, has, from time to time, been paid by the railroad company to the city, and it is a tax (under the 122d section before referred to) upon the interest thus paid, that the plaintiff now seeks to recover.

That the State possessed the power to confer this authority upon the city, we see no reason to doubt. Gelpcke *v.* Dubuque, 1 Wall. 202; Rogers *v.* Burlington, 3 Wall. 664.

Was it exercised for the benefit of the municipality, that is in the course of its municipal business or duties? In other words, was it acting in its capacity of an agent of the State, delegated to exercise certain powers for the benefit of the municipality called the city of Baltimore? Did it act as an auxiliary servant and trustee of the supreme legislative power? The legislature and the authorities of the city of Baltimore decided that the investment of $5,000,000 in aid of the construction of a railroad, which should bring to that city the unbounded harvests of the West, would be a measure for the benefit of the inhabitants of Baltimore and of the municipality. This vast business was a prize for which the States north of Maryland were contending. Should it endeavor by the expenditure of this money or this credit to bring this vast business into its own State, and make its commercial metropolis great and prosperous, or should it refuse to incur hazard, allow other States to absorb this commerce, and Baltimore to fall into an inferior position? This was a question for the decision of the city under the authority of the State. It was a question to be decided solely with reference to public and municipal interests. The city had authority to expend its money in opening squares, in widening streets, in deepening rivers, in building common roads or railways. The State could do these things by the direct act of its legislature or it could empower the city to do them. It could act directly or through the agency of others. It is not a question to be here discussed, whether the action proposed would in the end result to the benefit of the city. It might be wise, or it might prove otherwise. The city was to reap the fruits in the advanced prosperity of all its material interests, if successful. If unsuccessful, the city was to bear the load of debt and taxation, which would surely follow. The city had the power

given it by the legislature to decide the question. It was within the scope of its municipal powers.

This advance of the city bonds was not a donation. It was an investment supposed to be judiciously made and adequately secured. It was not for the individual benefit of those managing the business. No one received advantage except as he was a citizen or his property was within the city. It was not a loan for the benefit of the railroad; it was for the benefit of the city solely. That the railroad company was also benefited did not affect the purpose of the transaction.

It is said by the counsel for the United States that municipal corporations are those that are created irrespective of those who are associated therein, and that the powers are given and withheld upon grounds which concern the public at large. It is not necessary to discuss the question whether this city is a municipal corporation. If there can exist a municipal corporation, as that expression is generally understood, the cities of this country, like Baltimore, Philadelphia, and New York, fall within the definition. The power in question was conferred because its exercise concerned the public and to benefit that public. This power could no doubt have been imposed upon the city as a duty, and its exercise directed without the assent or against the wish of the corporation or its citizens. The State could do it directly for and on behalf of the city, and without its intervention. The city could act only by authority from the State. The State is itself supreme, and needs no assent or authority from the city. It is not perceived that the act is less public and municipal in its character than if the State had compelled the city to lay the tax and to make the appropriation of the proceeds to the railroad company. In The Town of Guilford *v.* The Board of Supervisors of Chenango County, 3 Kernan, 143, it was held:

1. That the legislature has power to levy a tax upon the taxable property of a town, and appropriate the same to the payment of a claim made by an individual against the town.

2. That it is not a valid objection to the exercise of such power, that the claim to satisfy which the tax is levied is not recoverable by action against the town.

3. That it does not alter the case that the claim has been rejected by the voters of the town, when submitted to them at a town meeting, under an act of the legislature authorizing such submission and declaring that their decision should be final and conclusive.

The action is no less a portion of the sovereign authority, when it is done through the agency of a town or city corporation.

We admit the proposition of the counsel, that the revenue must be municipal in its nature to entitle it to the exemption claimed. Thus, if an individual should make the city of Baltimore his agent and trustee to receive funds, and to distribute them in aid of science,

literature, or the fine arts, or even for the relief of the destitute and infirm, it is quite possible that such revenues would be subject to taxation. The corporation would therein depart from its municipal character, and assume the position of a private trustee. It would occupy a place which an individual could occupy with equal propriety. It would not in that action be an auxiliary or servant of the State, but of the individual creating the trust.

There is nothing of a governmental character in such a position. It is not necessary, however, to speculate upon hypothetical cases. We are clear in the opinion that the present transaction is within the range of the municipal duties of the city, and that the tax cannot be collected. *Judgment affirmed.*[1]

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## THOMSON *v.* PACIFIC RAILROAD.

9 Wallace, 579. 1869.

[Suit in the United States Circuit Court for the District of Kansas by stockholders of the Union Pacific Railroad Company, Eastern Division, to restrain the company from paying and county officers of the State of Kansas from collecting State taxes on the property of the company in that State. On a division of opinion by the judges of that court the case was certified to this court.]

Mr. Chief Justice Chase delivered the opinion of the court.

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The main argument for the complainants, however, is that the road, being constructed under the direction and authority of Congress, for the uses and purposes of the United States, and being a part of a system of roads thus constructed, is therefore exempt from taxation under State authority. It is to be observed that this exemption is not claimed under any act of Congress. It is not asserted that any act declaring such exemption has ever received the sanction of the National legislature. But it is earnestly insisted that the right of exemption arises from the relations of the road to the General Government. It is urged that the aids granted by Congress to the road were granted in the exercise of its constitutional powers to regulate commerce, to establish post-offices and post-roads, to raise and support armies, and to suppress insurrection and invasion; and that by the legislation which supplied aid, required security, imposed duties, and finally exacted, upon a certain contingency, a percentage of income, the road was adopted as an instrument of the government, and as such was not subject to taxation by the State.

[1] Mr. Justice Bradley concurred on other grounds, and Mr. Justice Clifford delivered a dissenting opinion in which Mr. Justice Miller concurred.

The case of McCulloch v. Maryland is much relied on in support of this position. But we apprehend that the reasoning of the court in that case will hardly warrant the conclusion which counsel deduce from it in this. In that case the main questions were, Whether the incorporation of the Bank of the United States, with power to establish branches, was an act of legislation within the constitutional powers of Congress, and, whether the bank and its branches, as actually established, were exempt from taxation by State legislation. Both questions were resolved in the affirmative. In deciding the first the court did not hold, as counsel suppose, that Congress, under the Constitution, has absolute and exclusive power to determine whether an act of legislation is or is not necessary and proper as a means for carrying into effect one or more of its enumerated powers. It defined the words "necessary and proper" as equivalent in meaning to the words "appropriate, plainly adapted, not prohibited, but consistent with the letter and spirit of the Constitution," and held that the incorporation of a bank with branches was a necessary and proper means to the effectual exercise of granted power within the definition thus given. It held further that Congress was, within this limit, the exclusive judge as to the means best adapted to the end proposed, and that its choice of any means of the defined character was restricted only by its own discretion. But the question whether the particular means adopted was within the general grant of incidental powers was determined by the court. A great part of the argument was directed to the proposition that the incorporation of a bank was an exercise of incidental power within the true meaning of the terms "necessary and proper," as explained by the court — an argument which would have been quite superfluous if that question was to be determined finally by the legislative and not by the judicial department of the government.

We do not doubt, however, that upon the principles settled by that judgment, Congress may, in the exercise of powers incidental to the express powers mentioned by counsel, make or authorize contracts with individuals or corporations for services to the government; may grant aids, by money or land, in preparation for, and in the performance of, such services; may make any stipulation and conditions in relation to such aids not contrary to the Constitution; and may exempt, in its discretion, the agencies employed in such services from any State taxation which will really prevent or impede the performance of them.

But can the right of this road to exemption from such taxation be maintained in the absence of any legislation by Congress to that effect.

It is unquestionably true that the court, in determining the second general question, already stated, did hold that the Bank of the United States, with its branches, was exempt from taxation by the State of Maryland, although no express exemption was found in

the charter. But it must be remembered that the Bank of the United States was a corporation created by the United States; and, as an agent in the execution of the constitutional powers of the government, was endowed by the act of creation will all its faculties, powers, and functions. It did not owe its existence, or any of its qualities, to State legislation. And its exemption from taxation was put upon this ground. Nor was the exemption itself without important limitations. It was declared not to extend to the real property of the bank within the State; nor to interests held by citizens of the State in the institution.

In like manner other means and operations of the government have been held to be exempt from State taxation: as bonds issued for money borrowed, Weston *v.* City of Charleston, 2 Pet. 467; certificates of indebtedness issued for money or supplies, The Banks *v.* The Mayor, 7 Wall. 24; bills of credit issued for circulation, Bank *v.* Supervisors, Ib. 28. There are other instances in which exemption, to the extent it is established in McCulloch *v.* Maryland, might have been held to arise from the simple creation and organization of corporations under acts of Congress, as in the case of the National banking associations; but in which Congress thought fit to prescribe the extent to which State taxation may be applied. Van Allen *v.* The Assessors, 3 Id. 573; Bradley *v.* The People, 4 Id. 459; People *v.* Commissioners, Ib. 244. In all these cases, as in the case of the Bank of the United States, exemption from liability to taxation was maintained upon the same ground. The State tax held to be repugnant to the Constitution was imposed directly upon an operation or an instrument of the government. That such taxes cannot be imposed on the operations of the government, is a proposition which needs no argument to support it. And the same reasoning will apply to instruments of the government, created by itself for public and constitutional ends. But we are not aware of any case in which the real estate, or other property of a corporation not organized under an act of Congress, has been held to be exempt, in the absence of express legislation to that effect, to just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the government.

It is true that some of the reasoning in the case of McCulloch *v.* Maryland seems to favor the broader doctrine. But the decision itself is limited to the case of the bank, as a corporation created by a law of the United States, and responsible, in the use of its franchises, to the government of the United States.

And even in respect to corporations organized under the legislation of Congress, we have already held, at this term, that the implied limitation upon State taxation, derived from the express permission to tax shares in the National banking associations, is to be so construed as not to embarrass the imposition or collection of State taxes to the

extent of the permission fairly and liberally interpeted. National Bank *v.* Commonwealth, *supra*, 353; Lionberger *v.* Rowse, *supra*, 488.

We do not think ourselves warranted, therefore, in extending the exemption established by the case of McCulloch *v.* Maryland beyond its terms. We cannot apply it to the case of a corporation deriving its existence from State law, exercising its franchise under State law, and holding its property within State jurisdiction and under State protection.

We do not doubt the propriety or the necessity, under the Constitution, of maintaining the supremacy of the General Government within its constitutional sphere. We fully recognize the soundness of the doctrine, that no State has a "right to tax the means employed by the government of the Union for the execution of its powers." But we think there is a clear distinction between the means employed by the government and the property of agents employed by the government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always, or generally, taxation of the means.

No one questions that the power to tax all property, business, and persons, within their respective limits, is original in the States and has never been surrendered. It cannot be so used, indeed, as to defeat or hinder the operations of the National government; but it will be safe to conclude, in general, in reference to persons and State corporations employed in government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection. Lane County *v.* Oregon, 7 Wall. 77; National Bank *v.* Commonwealth, *supra*, 353.

We perceive no limits to the principle of exemption which the complainants seek to establish. It would remove from the reach of State taxation all the property of every agent of the government. Every corporation engaged in the transportation of mails, or of government property of any description, by land or water, or in supplying materials for the use of the government, or in performing any service of whatever kind, might claim the benefit of the exemption. The amount of property now held by such corporations, and having relations more or less direct to the National government and its service, is very great. And this amount is continually increasing; so that it may admit of question whether the whole income of the property which will remain liable to State taxation, if the principle contended for is admitted and applied in its fullest extent, may not ultimately be found inadequate to the support of the State governments.

The nature of the claims to exemption which would be set up, is well illustrated by that which is advanced in behalf of the complainants in the case before us. The very ground of claim is in the bounties of the General Government. The allegation is, that the government has advanced large sums to aid in construction of

the road; has contented itself with the security of a second mortgage; has made large grants of land upon no condition of benefit to itself, except that the company will perform certain services for full compensation, independently of those grants; and will admit the government to a very limited and wholly contingent interest in remote net income. And because of these advances and these grants, and this fully compensated employment, it is claimed that this State corporation, owing its being to State law, and indebted for these benefits to the consent and active interposition of the State legislature, has a constitutional right to hold its property exempt from State taxation; and this without any legislation on the part of Congress which indicates that such exemption is deemed essential to the full performance of its obligations to the government.

We are unable to find in the Constitution any warrant for the exemption from State taxation claimed in behalf of the complainants; and must, therefore, answer the question certified to us

*In the affirmative.*[1]

[1] In RAILROAD COMPANY *v.* PENISTON, 18 Wall. 5 (1873), the same question arose in regard to the taxation by the State officers of Nebraska, of the property of the Union Pacific Railroad Company. MR. JUSTICE STRONG, delivering the opinion of the Court, uses this language: —

"It is, however, insisted that the case of Thompson *v.* The Union Pacific Railroad Company differs from the case we have now in hand in the fact that it was incorporated by the Territorial legislature and the legislature of the State of Kansas, while these complainants were incorporated by Congress. We do not perceive that this presents any reason for the application of a rule different from that which was applied in the former case. It is true that, in the opinion delivered by the Chief Justice, reference was made to the fact that the defendants were a State corporation, and an argument was attempted to be drawn from this to distinguish the case from McCulloch *v.* The State of Maryland, 4 Wheat. 316. But when the question is, as in the present case, whether the taxation of property is taxation of means, instruments, or agencies by which the United States carries out its powers, it is impossible to see how it can be pertinent to inquire whence the property originated, or from whom its present owners obtained it. The United States have no more ownership of the road authorized by Congress than they had in the road authorized by Kansas. If the taxation of either is unlawful, it is because the States cannot obstruct the exercise of National powers. As was said in Weston *v.* Charleston, 2 Pet. 467, they cannot, by taxation or otherwise, "retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government." The implied inhibition, if any exists, is against such obstruction, and that must be the same whether the corporation whose property is taxed was created by Congress or by a State legislature.

. . . . . .

"It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers.

"In this case the tax is laid upon the property of the railroad company precisely as was the tax complained of in Thompson *v.* Union Pacific. It is not imposed upon the

## CALIFORNIA *v.* CENTRAL PACIFIC RAILROAD COMPANY.

127 United States, 1. 1887.

[THIS case, with others decided at the same time, involved the validity of taxes assessed by the State of California upon the property of the respective companies, *including franchises conferred by the United States*, which it was insisted by the companies are not taxable without the consent of Congress. All the suits were commenced in the State Courts and removed by the various defendants to the Circuit Court of the United States, and, in each, judgment was rendered for defendant, to review which the plaintiff below in each case sued out a writ of error.]

MR. JUSTICE BRADLEY delivered the opinion of the court.

. . . . . .

Assuming, then, that the Central Pacific Railroad Company has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the State. They were granted to the company for national purposes and to subserve national ends. It seems very clear that the State of California can neither take them away, nor destroy nor abridge them, nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the company, situated within the State. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment, it cannot. What is a franchise? Under the English law Blackstone defines it as "a royal privilege or branch of the king's prerogative, subsisting in the hands of a subject." 2 Bl. Com. 37. Generalized, and divested of the special form which it assumes under a monarchial government based on feudal traditions, a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must

franchises or the right of the company to exist and perform the functions for which it was brought into being. Nor is it laid upon any act which the company has been authorized to do. It is not the transmission of dispatches, nor the transportation of United States mails, or troops, or munitions of war that is taxed, but it is exclusively the real and personal property of the agent, taxed in common with all other property in the State of a similar character. It is impossible to maintain that this is an interference with the exercise of any power belonging to the General Government, and if it is not, it is prohibited by no constitutional implication."

MR. JUSTICE SWAYNE concurred specially, and MR. JUSTICE BRADLEY delivered a dissenting opinion in which MR. JUSTICE FIELD concurred.

exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely.

In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said in McCulloch *v.* Maryland, "the power to tax involves the power to destroy." Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it, is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this subject. The principles laid down by this court in McCulloch *v.* Maryland, 4 Wheat. 316; Osborn *v.* The Bank of the United States, 9 Wheat. 738; and Brown *v.* Maryland, 12 Wheat. 419; and in numerous cases since which have followed in their lead, abundantly sustain the views we have expressed. It may be added that these views are not in conflict with the decisions of this court in Thomson *v.* Pacific Railroad, 9 Wall. 579, and Railroad Co. *v.* Peniston, 18 Wall. 5. As explained in the opinion of the court in the latter case, the tax there was upon the property of the company and not upon its franchises or operations. 18 Wall. 35, 37.

The taxation of a corporate franchise merely as such, unless pursuant to a stipulation in the original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no limitation but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be ten thousand or ten hundred thousand dollars, as the legislature may choose. Or, without any valuation of the franchise at all, the tax may be arbitrarily laid. It is not an idle objection, therefore, made by the company against the tax imposed in the present cases.

[The court then considers the case of the Southern Pacific Railroad, which it finds to be also a corporation created under the statutes of California but enjoying important franchises granted to it by the United States. The judgments in all the cases are affirmed.[1]]

[1] In CENTRAL PACIFIC RAILROAD COMPANY *v.* CALIFORNIA, 162 U. S. 91 (1895), further question was made as to the validity of State taxes. The following extracts from the opinion by MR. CHIEF JUSTICE FULLER will sufficiently show the views of the court.

"Although the Central Pacific company is not a Federal corporation, it is nevertheless true that important franchises were conferred upon the company by Congress, including that of constructing a railroad from the Pacific ocean to Ogden in the Territory of Utah. But as remarked in California *v.* Central Pacific Railroad, 127 U. S. 1, 38, 40, 'this important grant, though in part collateral to, was independent of, that made to the company by the State of California, and has ever since been possessed and enjoyed.' That case came up from the Circuit Court of the United States for the Northern District of California, and the Circuit Court found that the assessment made by the State Board of Equalization 'included the full value of all franchises and corporate powers, held and exercised by the defendant'; and as it could not be denied that that embraced franchises conferred by the United States, it was held that the assessment was invalid, but it was not held nor intimated that if the Board of Equalization had only included the State franchise, the same result would have followed.

[After quoting from the opinion of MR. JUSTICE BRADLEY the Court continues:]

"Thus it was reaffirmed that the property of a corporation of the United States might be taxed, though its franchises, as for instance its corporate capacity and its power to transact its appropriate business and charge therefor, could not be. It may be regarded as firmly settled that although corporations may be agents of the United States, their property is not the property of the United States, but the property of the agents, and that a State may tax the property of the agents, subject to the limitations pointed out in Railroad Co. *v.* Peniston. Van Brocklin *v.* Tennessee, 117 U. S. 151, 177.

"Of course, if Congress should think it necessary for the protection of the United States to declare such property exempted, that would present a different question. Congress did not see fit to do so here, and unless we are prepared to overrule a long line of well considered decisions the case comes within the rule therein laid down. Although in Thomson's case it was tangible property that was taxed, that can make no difference in principle, and the reasoning of the opinion applies.

"Under the laws of California plaintiff in error obtained from the State the right and privilege of corporate capacity; to construct, maintain, and operate; to charge and collect fares and freights; to exercise the power of eminent domain; to acquire and maintain right of way; to enter upon lands or waters of any person to survey route; to construct road across, along, or upon any stream, watercourse, roadstead, bay, navigable stream, street, avenue, highway or across any railway, canal, ditch or flume; to cross, intersect, join or unite its railroad with any other railroad at any point on its route; to acquire right of way, roadbed, and material for construction; to take material from the lands of the State, etc., etc. Stat. Cal. 1861, c. 532, 607; 2 Deering's Annotated Codes and Stat. Cal. 114.

"It is not to be denied that such rights and privileges have value and constitute taxable property."

This result was specially concurred in by MR. JUSTICE WHITE, while MR. JUSTICE FIELD and MR. JUSTICE HARLAN rendered dissenting opinions.

## BANK OF COMMERCE *v.* NEW YORK CITY.

2 Black, 620. 1862.

Mr. Justice Nelson. This is a writ of error to the Court of Appeals of the State of New York.

The question involved in this case is, whether or not the stock of the United States, constituting a part or the whole of the capital stock of a bank organized under the banking laws of New York, is subject to State taxation. The capital of the bank is taxed under existing laws in that State upon valuation like the property of individual citizens, and not as formerly on the amount of the nominal capital, without regard to loss or depreciation.

According to that system of taxation it was immaterial as to the character or description of property which constituted the capital as the tax imposed was wholly irrespective of it. The tax was like one annexed to the franchise as a royalty for the grant. But since the change of this system it is agreed the tax is upon the property constituting the capital.

This stock then is held by the bank the same as such stocks are held by individuals and alike subject to taxation, or exemption by State authority. On the part of the bank it is claimed that the question was decided in the case of Weston, *et als. v.* The City Councils of Charleston, 2 Pet. 449, in favor of exemption. In that case the stocks were in the hands of individuals which were taxed by the city authorities under a law of the State. The Court held the law imposing the tax unconstitutional. This decision would seem not only to cover the case before us, but to determine the very point involved in it.

It has been argued, however, that the form or mode of levying the tax under the ordinance of the city of Charleston was different from that of the law of New York, and hence may well distinguish the case and its principles from the present one. This difference consists in the circumstance that the tax in the former case was imposed on the stock, *eo nomine*, whereas in the present it is taxed in the aggregate of the tax-payer's property, and to be valued at its real worth in the same manner as all other items of his taxable property. The stock is not taxed by name, and no discrimination is made in favor or against it, but is regarded like any other security for money or chose in action.

It is true that the ordinance imposing the tax in the case of Weston *v.* The City of Charleston, did discriminate between the stock of the United States and other property — that is, the ordinance did not purport to impose a tax upon all the property owned by the tax-payers of the city, and specially excepted certain property alto-

gether from taxation. The only uniformity in the taxation was, that it was levied equally upon the articles enumerated, and which were taxed. To this extent it might be regarded as a tax on the stock *eo nomine.*

But does this distinction thus put forth between the two cases distinguish them in principle? The argument admits that a tax *eo nomine,* or one that distinguishes unfavorably the stock of the United States from the other property of the tax payer, cannot be upheld. Why? Because, as is said, if this power to discriminate be admitted to belong to the State it might be exercised to the destruction of the value of the stock, and consequently of the power or function of the Federal Government to issue it for any practical uses.

It will be seen, therefore, that the distinction claimed rests upon a limitation of the exercise of the taxing power of the State; that if the tax is imposed indiscriminately upon all the property of the individual or corporation, the stock may be included in the valuation; if not, it must be excluded or cannot be reached. The argument concedes that the Federal stock is not subject to the general taxing power of the State, a power resting in the discretion of its constituted authorities as to the objects of taxation, and the amount imposed. It is true that in many, if not in all of the constitutions of the States, provisions will be found confining the power of the Legislature to the passage of uniform laws in the taxation of the real and personal property within her jurisdiction. But this is a restraint upon the power imposed by the State itself. In the absence of any such restriction discrimination in the tax would rest in the discretion of the Legislature. Whether regulated by the constitution or by the act of the Legislature is a question of State policy, to be determined by the people in convention or by the Legislature. In either case the power to discriminate or not is in the State. How then can this limitation upon the taxing power of a State, which the argument assumes may be used to discriminate against the Federal stocks, be enforced? The power to enforce it must be independent of the State to be effectual. There can be but one answer to this question, and that is: by the supreme judicial tribunal of the Union. But is this Court a fit tribunal to sit in judgment upon the question whether the Legislature of a State has exercised its taxing power wisely or unwisely over objects of taxation confessedly, as the argument assumes, within its discretion?

And is the question a judicial question? We think not. There is and must always be a considerable latitude of discretion in every wise government in the exercise of the taxing power, both as to the objects and the amount, and of discrimination in respect to both. Property invested in religious institutions, seminaries of learning, charitable institutions, and the like, are examples. Can any court say that these are discriminations which, upon the argument that

seeks to distinguish the present from the case of Weston *v.* The City of Charleston, would or would not take it out of that case? A court may appropriately determine whether property taxed was or was not within the taxing power, but if within, not that the power has or has not been discreetly exercised. We cannot, therefore, yield our assent to the soundness of the distinction taken by the counsel between this case and the one referred to.

Upon looking at the case of Weston *v.* The City of Charleston, it will be seen that the decision of a majority of the Court was not at all placed upon the distinction we have been considering, but upon ground much broader and wholly independent of it.

The tax upon the stocks was regarded as a tax upon the exercise of the power of Congress "to borrow money on the credit of the United States." The exercise of this power was interfered with to the extent of the tax imposed by the city authorities, that the liability of the certificates of stock to taxation by a State in the hands of an individual affected their value in the market, and the free and unrestrained exercise of the power. The Chief Justice observes, that "if the right to impose a tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the State or corporation which imposes it, which the will of each State or corporation may prescribe."

He then refers to the taxing power of the State, its importance, and extensive operation, and the delicacy and difficulty of fixing any limit to its exercise; and that in the performance of this duty which had, in other cases, devolved on the court it was considered as a necessary consequence of the supremacy of the Federal Government that its action in the exercise of its legitimate powers should be free and unembarrassed by any conflicting powers of the States, and that the powers of a State cannot rightfully be so exercised as to impede and obstruct the free course of those measures which this Government may rightfully adopt.

He further observed, that "the sovereignty of a State extends to every thing which exists by its own authority or is introduced by its permission, but not to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States. The attempt to use the power of taxation on the means employed by the Government of the Union in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give," and the Chief Justice then adds, "a contract made by the Government in the exercise of its powers to borrow money on the credit of the United States is undoubtedly independent of the will of any State in which the individual who lends may reside, and is undoubtedly an operation essential to the important objects for which the Government was created."

It is apparent in studying this opinion in connection with the

opinions of the Court in the cases of McCulloch *v.* The State of Maryland, 4 Wheat. 316, and of Osborne *v.* The United States, 9 Wheat. 732, that it is but a corollary from the doctrines so ably expounded by the Chief Justice in the two previous cases in the interpretation of an analogous power in the Constitution.

The doctrine maintained in those cases is, that the powers granted by the people of the States to the General Government, and embodied in the Constitution, are supreme within their scope and operation, and that this Government may exercise these powers in its appropriate departments, free and unobstructed by any State legislation or authority. That within this limit this Government is sovereign and independent, and any interference by the State governments, tending to the interruption of the full legitimate exercise of the powers thus granted, is in conflict with that clause of the Constitution which makes the Constitution and the Laws of the United States passed in pursuance thereof "the supreme law of the land."

The results of this doctrine is, that the exercise of any authority by a State government trenching upon any of the powers granted to the General Government is, to the extent of the interference, an attempt to resume the grant in defiance of constitutional obligation; and more than this, if the encroachment or usurpation to any extent is admitted, the principle involved would carry the exercise of the authority of the State to an indefinite limit, even to the destruction of the power. For, as truly said by the Chief Justice in the case of Weston *v.* The City of Charleston, in respect to the taxing power of the State, "if the right to impose the tax exists, it is a right which, in its nature, acknowledges no limit, it may be carried to any extent within the jurisdiction of the State or corporation which imposes it, which the will of each State and corporation may prescribe."

An illustration of this principle in respect to the powers of the judicial department of this Government is found in the case of the United States *v.* Pet., 5 Cranch, 115. There the Legislature of the State of Pennsylvania attempted to annul the judgment of a Court of the United States, and destroy all rights acquired under it. It was quite apparent if the exercise of that power could be admitted, the principle involved might annihilate the whole power of the Federal Judiciary within the State. The act of the Legislature did not profess to exercise this power generally, but only in the particular case, on the ground that the Court had no jurisdiction. But the Chief Justice, in giving the opinion of the Court, very naturally observes, that the right to determine the jurisdiction of the Courts was not placed by the Constitution in the State Legislatures, but in the supreme judicial tribunal of the nation. If time allowed, many other cases might be referred to, illustrating the principle in respect to other departments of this Government.

The conclusive answer to the attempted exercise of State authority

in all these cases is, that the exercise is in derogation of the powers granted to the General Government, within which, it is admitted, it is supreme. That government whose powers, executive, legislative, or judicial, whether it is a government of enumerated powers like this one, or not, are subject to the control of another distinct government, cannot be sovereign or supreme, but subordinate and inferior to the other. This is so palpable a truth that argument would be superfluous. Its functions and means essential to the administration of the Government, and the employment of them, are liable to constant interruption and possible annihilation. The case in hand is an illustration. The power to borrow money on the credit of the United States is admitted. It is one of the most important and even vital functions of the General Government, and its exercise a means of supplying the necessary resources to meet exigencies in times of peace or war. But of what avail is the function or the means if another government may tax it at discretion. It is apparent that the power, function, or means, however important and vital, are at the mercy of that government. And it must be always remembered, if the right to impose a tax at all exists on the part of the other government, "it is a right which in its nature acknowledges no limits." And the principle is equally true in respect to every other power or function of a government subject to the control of another.

In our complex system of government it is oftentimes difficult to fix the true boundary between the two systems, State and Federal. The Chief Justice, in McCulloch *v.* The State of Maryland, endeavored to fix this boundary upon the subject of taxation. He observed, "if we measure the power of taxation residing in a State by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property unimpaired, which leaves to a State the command of all its resources, and which places beyond its reach all those powers which are conferred by the people of the United States on the Government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States and safe for the Union."

All will agree that this is the enunciation of a true principle, and it is only by a wise and forbearing application of it that the operation of the powers and functions of the two Governments can be harmonized. Their powers are so intimately blended and connected that it is impossible to define or fix the limit of the one without at the same time that of the other in respect to any one of the great departments of Government. When the limit is ascertained and fixed, all perplexity and confusion disappear. Each is sovereign and independent in its sphere of action, and exempt from the interference or con-

trol of the other, either in the means employed or functions exercised, and influenced by a public and patriotic spirit on both sides, a conflict of authority need not occur or be feared.

*Judgment of the Court below is reversed.*

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## BANK *v.* SUPERVISORS.

7 Wallace, 26. 1868.

[This case and another one just preceding it in the same volume of reports relate to State taxes upon banks, upon a valuation of their capital stock including certain obligations of the United States known as certificates of indebtedness and also certain other obligations denominated United States Legal Tender Notes. In the first of the two cases the certificates of indebtedness were held not subject to State taxation.]

Mr. Chief Justice Chase delivered the opinion of the court.

The general question requiring consideration is whether United States notes come under another rule in respect of taxation than that which applies to certificates of indebtedness.

The issue of United States notes were authorized by three successive acts. The first was the act of February 25, 1862, 12 Stat. at Large, 345; the second, the act of July 11, 1862, 12 Stat. at Large, 532; and the third, that of March 3, 1863, 12 Stat. at Large, 709.

Before either of these acts received the sanction of Congress the Secretary of the Treasury had been authorized by the act of July 17, 1861, Stat. at Large, 259, § 6, to issue treasury notes not bearing interest, but payable on demand by the assistant treasurers at New York, Philadelphia, or Boston; and about three weeks later these notes, by the act of August 5, 1861, Stat. at Large, 313, § 5, had been made receivable generally for public dues. The amount of notes to be issued of this description was originally limited to fifty millions, but was afterwards, by the act of February 12, 1862, Stat. at Large, 338, increased to sixty millions.

These notes, made payable on demand, and receivable for all public dues, including duties on imports always payable in coin, were, practically, equivalent to coin; and all public disbursements, until after the date of the act last mentioned, were made in coin or these notes.

In December, 1861, the State banks (and no others then existed) suspended payment in coin; and it became necessary to provide by law for the use of State bank notes, or to authorize the issue of notes for circulation under the authority of the national government. The latter alternative was preferred, and in the necessity thus recognized originated the legislation providing at first for the emission of United

States notes, and at a later period for the issue of the national bank currency.

Under the exigencies of the times it seems to have been thought inexpedient to attempt any provision for the redemption of the United States notes in coin. The law, therefore, directed that they should be made payable to bearer at the treasury of the United States, but did not provide for payment on demand. The period of payment was left to be determined by the public exigencies. In the meantime the notes were receivable in payment of all loans, and were, until after the close of our civil war, always practically convertible into bonds of the funded debt, bearing not less than five per cent. interest, payable in coin.

The act of February 25, 1862, provided for the issue of these notes to the amount of one hundred and fifty millions of dollars. The act of July 11, 1862, added another hundred and fifty millions of dollars to the circulation, reserving, however, fifty millions for the redemption of temporary loan, to be issued and used only when necessary for that purpose. Under the act of March 3, 1863, another issue of one hundred and fifty millions was authorized, making the whole amount authorized four hundred and fifty millions, and contemplating a permanent circulation, until resumption of payment in coin, of four hundred millions of dollars.

It is unnecessary here to go further into the history of these notes, or to examine their relation to the national bank currency. That history belongs to another place, and the quality of these notes, as legal tenders, belongs to another discussion. It has been thought proper only to advert to the legislation by which these notes were authorized, in order that their true character may be clearly perceived.

That these notes were issued under the authority of the United States, and as a means to ends entirely within the constitutional power of the government, was not seriously questioned upon the argument.

But it was insisted that they were issued as money; that their controlling quality was that of money, and that therefore they were subject to taxation in the same manner, and to the same extent, as coin issued under like authority.

And there is certainly much force in the argument. It is clear that these notes were intended to circulate as money, and, with the national bank notes, to constitute the credit currency of the country.

Nor is it easy to see that taxation of these notes, used as money, and held by individual owners, can control or embarrass the power of the government in issuing them for circulation, more than like taxation embarrasses its power in coining and issuing gold and silver money for circulation.

Apart from the quality of legal tender impressed upon them by

acts of Congress, of which we now say nothing, their circulation as currency depends on the extent to which they are received in payment, on the quantity in circulation, and on the credit given to the promises they bear. In these respects they resemble the bank notes formerly issued as currency.

But, on the other hand, it is equally clear that these notes are obligations of the United States. Their name imports obligation. Every one of them expresses upon its face an engagement of the nation to pay to the bearer a certain sum. The dollar note is an engagement to pay a dollar, and the dollar intended is the coined dollar of the United States; a certain quantity in weight and fineness of gold or silver, authenticated as such by the stamp of the government. No other dollars had before been recognized by the legislation of the national government as lawful money.

Would, then, their usefulness and value as means to the exercise of the functions of government, be injuriously affected by State taxation?

It cannot be said, as we have already intimated, that the same inconveniences as would arise from the taxation of bonds and other interest-bearing obligations of the government, would attend the taxation of notes issued for circulation as money. But we cannot say that no embarrassment would arise from such taxation. And we think it clearly within the discretion of Congress to determine whether, in view of all the circumstances attending the issue of the notes, their usefulness, as a means of carrying on the government, would be enhanced by exemption from taxation; and within the constitutional power of Congress, having resolved the question of usefulness affirmatively, to provide by law for such exemption.

There remains, then, only this question, Has Congress exercised the power of exemption?

A careful examination of the acts under which they were issued, has left no doubt in our minds upon that point.

The act of February, 1862, 12 Stat. 346, § 2, declares that "all United States bonds, and other securities of the United States, held by individuals, associations, or corporations, within the United States, shall be exempt from taxation by or under State authority."

We have already said that these notes are obligations. They bind the national faith. They are, therefore, strictly securities. They secure the payment stipulated to the holders, by the pledge of the national faith, the only ultimate security of all national obligations, whatever form they may assume.

And this provision is re-enacted in application to the second issue of United States notes by the act of July 11, 1862, 12 Stat. 546.

And, as if to remove every possible doubt from the intention of Congress, the act of March 3, 1863, 12 Stat. 709, which provides for the last issue of these notes, omits, in its exemption clause, the word "stocks," and substitutes for "other securities," the words "treasury

notes or United States notes issued under the provisions of this act."

It was insisted at the bar, that a measure of exemption in respect to the notes issued under this — different from that provided in the former acts, in respect to the notes authorized by them — was intended; but we cannot yield our assent to this view. The rule established in the last act is in no respect inconsistent with that previously established. It must be regarded, therefore, as explanatory. It makes specific what was before expressed in general terms.

Our conclusion is, that United States notes are exempt; and, at the time the New York statutes were enacted, were exempt from taxation by or under State authority. The judgment of the Court of Appeals must therefore be *Reversed.*[1]

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## WISCONSIN CENTRAL RAILROAD COMPANY *v.* PRICE COUNTY.

133 United States, 496. 1890.

In April, 1884, the plaintiff in this suit, the Wisconsin Central Railroad Company, a corporation created under the laws of Wisconsin, was the owner of certain lands situated in the town of Worcester, in the county of Price, in that State, and had a patent for them from the State bearing date on the 25th of February, 1884, upon which taxes had, in the year 1883, been assessed by that county, although, as claimed by the plaintiff, the title to a part of these lands was at that time in the United States, and to the remainder of them in the State of Wisconsin. Upon a claim that the lands were thus exempt from taxation, the plaintiff, in April, 1884, brought the present suit in a Circuit Court of the State, to obtain its judgment that the State taxes were illegal, and to enjoin proceedings for their enforcement.

Mr. Justice Field, after stating the case, delivered the opinion of the court.

It is familiar law that a State has no power to tax the property of the United States within its limits. This exemption of their property from State taxation — and by State taxation we mean any taxation by authority of the State, whether it it be strictly for State purposes or for mere local and special objects — is founded upon that principle which inheres in every independent government, that it must be free from any such interference of another government as may tend to destroy its powers or impair their efficiency.

[1] By act of Congress United States treasury notes are now subject to State taxation as other property. Act of Congress, August 13th, 1894, 28 Stat. 278.

If the property of the United States could be subjected to taxation by the State, the object and extent of the taxation would be subject to the State's discretion. It might extend to buildings and other property essential to the discharge of the ordinary business of the national government, and in the enforcement of the tax those buildings might be taken from the possession and use of the United States. The Constitution vests in Congress the power to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise. Van Brocklin *v.* State of Tennessee, 117 U. S. 151, 168.

This doctrine of exemption from taxation of the property of the United States, so far as lands are concerned, is in express terms affirmed in the constitution of Wisconsin, which ordains that the State "shall never interfere with the primary disposition of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title in such soil to *bona fide* purchasers thereof; and no tax shall be imposed on land the property of the United States." Constitution of 1848, art. II, sec. 2.

It follows that all the public domain of the United States within the State of Wisconsin was in 1883 exempt from State taxation. Usually the possession of the legal title by the government determines both the fact and the right of ownership. There is, however, an exception to this doctrine with respect to the public domain, which is as well settled as the doctrine itself, and that is, that where Congress has prescribed the conditions upon which portions of that domain may be alienated, and provided that upon the performance of the conditions a patent of the United States shall issue to the donee or purchaser, and all such conditions are complied with, the land alienated being distinctly defined, it only remaining for the govermnent to issue its patent, and until such issue holding the legal title in trust for him, who in the meantime is not excluded from the use of the property — in other words, when the government has ceased to hold any such right or interest in the property as to justify it in withholding a patent from the donee or purchaser, and it does not exclude him from the use of the property — then the donee or purchaser will be treated as the beneficial owner of the land, and the same be held subject to taxation as his property. This exception to the general doctrine is founded upon the principle that he who has the right to property, and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of State taxation.

Thus, in Carroll *v.* Safford, 3 How. 441, 461, the complainant had entered certain lands belonging to the United States, in the local land office, paid for them the required price, and received from the

office a land certificate. Patents were issued for them, but, before their issue, the lands were assessed for taxation and sold for the taxes. The question whether they were subject to taxation by the State after their entry and before the patents were issued was answered in the affirmative. Said the court: "When the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. He held for it a final certificate, which could no more be cancelled by the United States than a patent;" and again: "It is said the fee is not in the purchaser, but in the United States, until the patent shall be issued. This is so, technically, at law, but not in equity. The land in the hands of the purchaser is real estate, descends to his heirs, and does not go to his executors or administrators." And again: "Lands which have been sold by the United States can in no sense be called the property of the United States. They are no more the property of the United States than lands patented. So far as the rights of the purchaser are considered, they are protected under the patent certificate as fully as under the patent. Suppose the officers of the government had sold a tract of land, received the purchase money, and issued a patent certificate: can it be contended that they could sell it again, and convey a good title? They could no more do this than they could sell land a second time which had been previously patented. When sold, the government, until the patent shall issue, holds the mere legal title for the land in trust for the purchaser; and any second purchaser would take the land charged with the trust."

In Witherspoon *v.* Duncan, 4 Wall. 210, 218, a similar question arose and was in like manner answered. Said the court: "In no just sense can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before the entry, after it they are private property. If subject to sale, the government has no power to revoke the entry and withhold the patent. A second sale, if the first was authorized by law, confers no right on the buyer, and is a void act;" and again: "The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser, who has the equitable title." See, also, Railway Co. *v.* Prescott, 16 Wall. 603, 608; Railway Co. *v.* McShane, 22 Wall. 444, 461.

In the light of these decisions, it will be necessary, in order to determine the liability of the property held by the plaintiff to taxation in 1883, to consider the nature and extent of its interest in the property at that time acquired under the grant of Congress of May, 1864, and by its subsequent construction of the road.

Numerous grants of land were made by Congress between 1860 and 1880 to aid in the construction of railroads; some directly to incor-

porated companies, others to different States, the lands to be by them transferred to companies by whom the construction of the roads might be undertaken. The different acts making these grants were similar in their general provisions, and so many of them have been, at different times, before this court for consideration that little can be said of their purport and meaning, the title they transfer, and the conditions upon which the lands could be used and disposed of, which has not already and repeatedly been said in its decisions. Each grant gave a specified quantity of lands, designated by sections along the route of the proposed road, with the exception of such as might, when the line of the road should be definitely fixed, have been disposed of or reserved by the government, or to which a pre-emption or homestead right might then have attached. For these excepted sections, which otherwise would have been taken from those designated along the line of the road, other lands beyond those sections within a specified distance were allowed to be selected. The title conferred was a present one, so as to insure the donation for the construction of the road proposed against any revocation by Congress, except for non-performance of the work within the period designated, accompanied, however, with such restrictions upon the use and disposal of the lands as to prevent their diversion from the purposes of the grant. It was the practice of the Land Department, as shown by the evidence in this record, up to the decision of Leavenworth, Lawrence, & Galveston Railroad Co. *v.* United States, in April, 1876 (92 U. S. 733), to allow deficiencies in the quantity of land intended to be granted, arising from sales or other disposition made before the date of the grant, as well as those made subsequently, and those arising from the attachment of preëmption or homestead rights, to be supplied from lands lying beyond the original sections, within what were termed the indemnity limits. This practice was held in Winona & St. Peter Railroad Co. *v.* Barney to have been correct. 113 U. S. 618, 625. As the court there said: "The policy of the government was to keep the public lands open at all times to sale and preëmption, and thus encourage the settlement of the country, and, at the same time, to advance such settlement by liberal donations to aid in the construction of railways. The acts of Congress, in effect, said: 'We give to the State certain lands to aid in the construction of railways lying along their respective routes, provided they are not already disposed of, or the rights of settlers under the laws of the United States have not already attached to them, or they may not be disposed of or such rights may not have attached when the routes are finally determined. If at that time it be found that of the lands designated any have been disposed of, or rights of settlers have attached to them, other equivalent lands may be selected in their place, within certain prescribed limits.' The encouragement to settlement by aid for the construction of railways was not intended to interfere with the policy of

encouraging such settlement by sales of the land, or the grant of preëmption rights." The court accordingly held that the indemnity clause covered losses from the grant by reason of sales and the attachment of preëmption rights previous to the date of the act, as well as by reason of sales and the attachment of preëmption rights between that date and the final determination of the route of the road.

After the decision of the court in the Leavenworth case the Land Department changed its practice and refused to allow the deficiencies, arising from sales or other disposition made, or from the attachment of preëmption or homestead rights before the date of the act, to be made up from selections within the indemnity limits. But that decision did not warrant the change. The question in that case was not, for what deficiencies indemnity could be had, but what lands could be taken for deficiencies which existed. If what was then said indicated that deficiencies which could be supplied were limited to such as might arise after the passage of the act, it was a mere dictum not essential to the decision, and therefore not authoritative and binding. The refusal of the Land Department, therefore, to allow the deficiencies arising in the sections within the place limits in this case to be supplied by selections from the indemnity lands, and to issue patents of the United States for them, was erroneous.

The question now arises as to how far this refusal affected the legal or equitable title of the company to the lands taxed in 1883, for which it only obtained a patent in 1884. The lands taxed amounted to eleven parcels of forty acres each lying within the original sections named in the grant, that is, within the ten miles limit from the line of the road, and the remainder were within the indemnity limits. Neither were allowed, because, by excluding the deficiencies arising before the date of the grant from indemnity, the whole amount of the lands granted had already been patented. So far as the eleven parcels of forty acres each are concerned, the right of the plaintiff to them and to a patent for them had as early as 1877 become complete under the terms of the granting act. The line of railroad had been definitely fixed on the 7th of October, 1869; and the three twenty-mile sections, numbers five, six, and seven, were all completed in June, 1877, and supplied with the buildings and appurtenances specified in the act to entitle the company to patents for them from the United States. The title conferred by the grant was necessarily an imperfect one, because, until the lands were identified by the definite location of the road, it could not be known what specific lands would be embraced in the sections named. The grant was, therefore, until such location, a float. But when the route of the road was definitely fixed, the sections granted became susceptible of identification, and the title attached to them and took effect as of the date of the grant, so as to cut off all intervening

claims. Schulenberg *v.* Harriman, 21 Wall. 44, 60; Leavenworth, &c. Railroad Co. *v.* United States, 92 U. S. 733, 741; Missouri, Kansas, & Texas Railroad Co. *v.* Kansas Pacific Railway Co., 97 U. S. 491, 496; Railway Co. *v.* Baldwin, 103 U. S. 426, 429. The road having been built as early as June, 1877, and supplied, as required, with the appurtenances specified, the company was entitled to have the restrictions upon the use of the land released. It had then, to the eleven forty-acre parcels which were capable of identification, an indefeasible right or title; it matters not which term be used. The subsequent issue of the patents by the United States was not essential to the right of the company to those parcels, although in many respects they would have been of great service to it. They would have served to identify the lands as coterminous with the road completed; they would have been evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved of possibility of forfeiture for breach of them; they would have obviated the necessity of any other evidence of the grantee's right to the lands; and they would have been evidence that the lands were subject to the disposal of the railroad company with the consent of the government. They would have been in these respects deeds of further assurance of the patentee's title, and, therefore, a source of quiet and peace to it in its possessions.

There are many instances in the reports where such effect as is here stated has been given to patents authorized or directed to be issued to parties, notwithstanding they had previously received a legislative grant of the premises, or their title had been already confirmed. In Langdeau *v.* Hanes, 21 Wall. 521, 529, we have one of that kind. There, this court said: "In the legislation of Congress a patent has a double operation. It is a conveyance by the government, when the government has any interest to convey; but where it is issued upon the confirmation of a claim of a previously existing title, it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously existing rights because it also embodies words of release or transfer from the government." We are of opinion, therefore, that these eleven forty-acre parcels were in 1883 subject to taxation by the State of Wisconsin. The lands had become the property of the railroad company, and there was nothing to hinder their use and enjoyment. For that purpose it is immaterial whether it be held that the company then had a legal and indefeasible title to the lands, or merely an equitable title to them to be subsequently perfected by patents from the government.

But as to the remainder of the lands taxed, which fell within the indemnity limits, the case is different. For such lands no title could

pass to the company not only until the selections were made by the agents of the State appointed by the governor, but until such selections were approved by the Secretary of the Interior. The agent of the State made the selections, and they had been properly authenticated and forwarded to the Secretary of the Interior. But that officer never approved of them. Nor can such approval be inferred from his not formally rejecting them. He refused, as already stated, to issue to the company any patents for any more lands, insisting that it had already received over 40,000 acres too much, and he directed the Commissioner of the General Land Office to require the company to restore this excess to the government. The approval of the Secretary was essential to the efficacy of the selections, and to give to the company any title to the lands selected. His action in that matter was not ministerial but judicial. He was required to determine, in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any preëmption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. And in determining whether a particular selection could be taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands, and determine whether or not any portion of them had been appropriated for any other purpose, and if so, what portion had been thus appropriated, and what portion still remained. This action of the Secretary was required, not merely as supervisory of the action of the agent of the State, but for the protection of the United States against an improper appropriation of their lands. Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then, the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts. The doctrine, that until selection made no title vests in any indemnity lands, has been recognized in several decisions of this court. Thus in Ryan *v.* Railroad Co., 99 U. S. 382, 386, in considering a grant of land by Congress, in aid of the construction of a railroad, similar in its general features to the one in this case, the court said: "Under this statute, when the road was located and the maps were

made, the right of the company to the odd sections first named became *ipso facto* fixed and absolute. With respect to the 'lieu lands,' as they are called, the right was only a float, and attached to no specific tracts until the selection was actually made in the manner prescribed." And again, speaking of a deficiency in the land granted, it said: "It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected, as it was, for that purpose." The selection had been approved by the Secretary.

In St. Paul, &c. Railroad *v.* Winona, &c. Railroad, 112 U. S. 720, 731, the court, speaking of a previous decision, said: "The reason of this is that, as no vested right can attach to the lands in place — the odd-numbered sections within six miles of each side of the road — until these sections are ascertained and identified by a legal location of the line of the road, so in regard to the lands to be selected within a still larger limit, their identification cannot be known until the selection is made. It may be a long time after the line of the road is located before it is ascertained how many sections, or parts of sections, within the primary limits have been lost by sale or preëmption. It may be still longer before a selection is made to supply this loss."

In Sioux City, &c. Railroad *v.* Chicago, &c. Railway, 117 U.S. 406, 408, where the railroad grant as to indemnity lands was substantially similar to the one in this case, and one of the questions was as to the title to the indemnity lands, the court said: "No title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained, and the selection made approved by the Secretary of the Interior."

In Barney *v.* Winona, &c. Railroad, 117 U. S. 228, 232, the court said: "In the construction of land-grant acts, in aid of railroads, there is a well-established distinction observed between 'granted lands' and 'indemnity lands.' The former are those falling within the limits specially designated, and the title to which attaches when the lands are located by an approved and accepted survey of the line of the road filed in the Land Department, as of the date of the act of Congress. The latter are those lands selected in lieu of parcels lost by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their selection." The same view has been held by different Attorneys General of the United States, in their official communications to heads of the departments, where selections of the public lands have been granted, subject to the approval of the Secretary of the Interior, Cape Mendocino Lighthouse Site, 14 Opinions Att'ys Gen. 50, Portage Land Grant, Ib. 645, and such has been the consistent practice of the Land Department. The uniform language is, that no title to indemnity lands becomes vested in any company or in the State until

the selections are made; and they are not considered as made until they have been approved, as provided by statute, by the Secretary of the Interior.

It follows from these views that the indemnity lands described in the complaint were not subject to taxation as the property of the railroad company in 1883. The judgment of the Supreme Court of Wisconsin must, therefore, be

*Reversed, and the cause remanded with directions to enter a decree perpetually enjoining the collection of the taxes levied in the year* 1883 *upon the indemnity lands, and dismissing the complaint as to the eleven parcels of forty acres each; and it is so ordered.*

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## SAYLES *v.* DAVIS.

22 Wisconsin, 225. 1867.

APPEAL from the Circuit Court for Rock County.

Action by the holder of a tax deed of land, to bar the original owner, under secs. 35 *et seq.*, chap. 22, Laws of 1859. The deed was executed April 11, 1863, upon a sale made in 1860 for the taxes of 1859. A judgment for plaintiff having been reversed by this court (20 Wis. 302), on the ground that the record did not show proof of service of summons duly made, the plaintiff, after the cause was remitted, filed due proof of service and took judgment without notice to the defendant. Defendant then obtained an order on plaintiff to show cause why the judgment should not be vacated, and leave given to answer. It appeared from the papers used at the hearing, that the summons and complaint were duly served on defendant personally, May 3d, 1864; that judgment was entered September 16, 1864, defendant not having answered or appeared; and that on the 18th of December, 1865, plaintiff was notified of the retainer of counsel by defendant for the purpose of prosecuting an appeal from the judgment. — The proposed answer alleges that plaintiff's tax deed was defective when made and recorded, for want of a revenue stamp; and that before any stamp was affixed, defendant had deposited with the proper officer the sum necessary to redeem the land; that in November, 1863, a deed of the premises had been executed to defendant by the county treasurer, upon a sale for the taxes of 1858; and that the tax sale under which plaintiff claims was wholly void, "for the reason that the requirements of law, in the assessing and collecting of the taxes of the year 1859, were disregarded in many essential particulars, and especially by reason of the neglect of the county treasurer in not properly giving notices of the proposed sale of said land for delinquent tax, and in omitting to give notice in one

public newspaper of all the lands in Rock county upon which taxes were delinquent for the year 1859; and also by reason of the neglect of said clerk in failing to advertise, as required by law, the time when the period allowed by law to redeem from the tax sales for the delinquent taxes of 1859 would expire; and the said proceedings in the attempted collection of said taxes for 1859, and in the execution of the said instrument to said Sayles, were in other respects informal and insufficient to support the title in said lands claimed by said Sayles," etc. The motion papers included an affidavit of merits.

The order to show cause was discharged, with costs; and from this decision the defendant appealed.

DIXON, C. J. . . . . .

As to the omission to affix an internal revenue stamp to the tax deed under which the plaintiff claims, we think such stamp was unnecessary. The deed was executed before the passage and publication of the act of our State Legislature — Laws of 1863, chap. 159. We are of opinion that Congress possesses no constitutional power, without the assent of the States, to tax the means or instruments devised by the States for the purpose of collecting their own revenues; and for our reasons in the support of this conclusion, we refer to the opinion of this court in the case of Jones *v.* The Estate of Keep, 19 Wis. 389. If the writs and judicial proceedings in the courts of the State cannot be taxed by Congress, it requires no argument to show that the proceedings of the State to collect its own revenue cannot be so taxed. "The power to tax involves the power to destroy; and the power to destroy may defeat and render useless the power to create." The functions of government exercised in the levying and collection of its taxes are more vitally important to its existence and independence than any other. Without the free and unobstructed exercise of such power no State can exist, and all sovereignty and independence are at an end. We cannot but regard this as an obvious departure from the spirit and requirements of our Federal Costitution, and contrary to the intention of the convention which framed, and of the States which ratified it.

The tax deed of the defendant, executed upon a sale made prior to that to the plaintiff, conveys no title as against the plaintiff. A valid sale and conveyance under a junior assessment cuts off all former titles or liens. Jarvis *v.* Peck, 19 Wis. 74. The words "subject, however, to all unpaid taxes and charges," in sec. 25, chap. 22, Laws of 1859, have reference only to such unpaid taxes and charges as may have accrued subsequently to the sale on which the deed is issued.

The other grounds of irregularity relied upon to impeach the deed to the plaintiff are not specifically stated in the answer, as required by law. Laws of 1859, chap. 22, sec. 38; Wakeley *v.* Nicholas, 16 Wis. 588. The "many essential particulars" in which "the requirements of law in the assessing, levying, and collecting of the taxes of the year 1859, were disregarded," are not pointed out at all

by the answer; nor is it stated how or in what manner the county treasurer was negligent "in not properly giving notice of the proposed sale of the said land for delinquent tax." The averment of the treasurer's neglect "in omitting to give notice in one public newspaper of all the lands in Rock County upon which taxes were delinquent for the year 1859," is a *negative pregnant*, and tenders an immaterial issue. It is not material to the validity of the plaintiff's deed, whether *all* the lands in Rock County were advertised or not. It is enough that the proper notice was published as to the lands which were conveyed to him. And the averment that the deed is void by reason of the neglect of the clerk "in failing to advertise, as required by law, the time when the period allowed by law to redeem from the tax-sales for the delinquent taxes of 1859, would expire," is equally faulty. The question is, in what particular or particulars did the clerk fail "to advertise as required by law;" and this must be answered by the pleading, and the specific objections pointed out.

As the answer shows no defence to the action of the plaintiff, it follows that the Circuit Court was right in rejecting the defendant's application to be let in under section 38, chap. 125, R. S. To authorize the granting of relief under that section, upon answer, a valid and meritorious defence must be shown.

*Order affirmed.*[1]

[1] In MOORE *v.* QUIRK, 105 Mass. 49 (1870), it was contended that the record of a mortgage was invalid for want of a revenue stamp under the provisions of the Internal Revenue Act of 1866, ch. 184, sec. 9, which provided that no instrument should be recorded until stamped and that such instrument not stamped should be void. The court (per GRAY, J.) disposed of the objections to the mortgage as follows: —

"1. The want of the stamp required by the Internal Revenue Act of the United States did not affect the validity of the mortgage, in the absence of evidence tending to show that the stamp had been omitted with intent to defraud the revenue. U. S. St. 1866, c. 184, sec. 9; 14 U. S. Sts. at Large, 142–144. Green *v.* Holway, 101 Mass. 243. Campbell *v.* Wilcox, 10 Wall. 421. The plaintiff does not appear to have asked that any question of such fraudulent intent should be submitted to the jury.

"2. The mortgage was recorded as required by the Statutes of the Commonwealth. Gen. Sts. c. 151, secs. 1, 3. The clause of the Internal Revenue Act, which provides that instruments not stamped as therein required shall not be recorded, cannot be construed as prohibiting the performance by the officers of the Commonwealth of the duties imposed upon them by its statutes, but must be limited in interpretation and effect to records required or authorized by Acts of Congress, for the same reasons upon which the prohibition in the same clause against giving unstamped instruments in evidence in any court has been decided to be applicable to the Federal Courts only, and not to extend to the State Courts. Carpenter *v.* Snelling, 97 Mass. 452; Green *v.* Holway, 101 Mass. 243; People *v.* Gates, 43 N. Y. 40; Clemens *v.* Conrad, 19 Mich. 170."

In WARREN *v.* PAUL, 22 Ind. 276 (1864), the question was as to the validity of the provision of the Internal Revenue Act of 1864 requiring writs of State Courts to be stamped and the court (per PERKINS, J.) used the following language: —

"State governments, as we have seen, are to exist with judicial tribunals of their own. This is manifest all the way through the Constitution. This being so, those tribunals must not be subject to be encroached upon or controlled by Congress. This would be incompatible with their free existence. It was held when Congress

### c. *For Public Purpose.*

## LOAN ASSOCIATION *v.* TOPEKA.

20 Wallace, 655. 1874.

[PLAINTIFF brought action in the United States Circuit Court for Kansas against the City of Topeka on coupons for interest attached to bonds of the city issued in pursuance of the provisions of a State statute. Judgment being given for defendant on demurrer, plaintiff took a writ of error.]

MR. JUSTICE MILLER delivered the opinion of the court.

. . . . . .

We find ample reason to sustain the demurrer on the second ground on which it is argued by counsel and sustained by the Circuit Court.

That proposition is that the act authorizes the towns and other municipalities to which it applies, by issuing bonds or loaning their credit, to take the property of the citizen under the guise of taxation to pay these bonds, and use it in aid of the enterprises of others which are not of a public character, thus perverting the right of taxation, which can only be exercised for a public use, to the aid of individual interests and personal purposes of profit and gain.

The proposition as thus broadly stated is not new, nor is the question which it raises difficult of solution.

If these municipal corporations, which are in fact subdivisions of the State, and which for many reasons are vested with quasi legislative powers, have a fund or other property out of which they can pay the debts which they contract, without resort to taxation, it may be within the power of the Legislature of the State to authorize them to use it in aid of projects strictly private or personal, but which would in a secondary manner contribute to the public good; or where there is property or money vested in a corporation of the kind for a particular use, as public worship or charity, the Legislature may pass laws authorizing them to make contracts in reference to this property, and incur debts payable from that source.

But such instances are few and exceptional, and the proposition is a very broad one, that debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully

created a United States bank, and is now decided when the United States has given bonds for borrowed money, that as Congress had rights to create such fiscal agents and issue such bonds, it would be incompatible with the full and free enjoyment of those rights to allow that the States might tax the bank or bonds; because, if the right to so tax them was conceded, the States might exercise the right to the destruction of congressional power. The argument applies with full force to the exemption of State governments from federal legislative interference."

levy, and that all contracts creating debts to be paid in future, not limited to payment from some other source, imply an obligation to pay by taxation.

It follows that in this class of cases the right to contract must be limited by the right to tax, and if in the given case no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it.

If this were not so, these corporations could make valid promises, which they have no means of fulfilling, and on which even the Legislature that created them can confer no such power. The validity of a contract which can only be fulfilled by a resort to taxation, depends on the power to levy the tax for that purpose. Sharpless *v.* Mayor of Philadelphia, 21 Penn. St. 147, 167; Hanson *v.* Vernon, 27 Iowa, 28; Allen *v.* Inhabitants of Jay, 60 Maine, 127; Lowell *v.* Boston, 111 Mass. 454; Whiting *v.* Fond du Lac, 25 Wis. 188.

It is, therefore, to be inferred that when the Legislature of the State authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference.

With these remarks and with the reference to the authorities which support them, we assume that unless the Legislature of Kansas had the right to authorize the counties and towns in that State to levy taxes to be used in aid of manufacturing enterprises, conducted by individuals, or private corporations, for purposes of gain, the law is void, and the bonds issued under it are also void. We proceed to the inquiry whether such a power exists in the Legislature of the State of Kansas.

We have already said the question is not new. The subject of the aid voted to railroads by counties and towns has been brought to the attention of the courts of almost every State in the Union. It has been thoroughly discussed and is still the subject of discussion in those courts. It is quite true that a decided preponderance of authority is to be found in favor of the proposition that the Legislatures of the States, unless restricted by some special provisions of their constitutions, may confer upon these municipal bodies the right to take stock in corporations created to build railroads, and to lend their credit to such corporations. Also to levy the necessary taxes on the inhabitants, and on property within their limits subject to general taxation, to enable them to pay the debts thus incurred. But very few of these courts have decided this without a division among the judges of which they were composed, while others have decided against the existence of the power altogether. The State *v.* Wapello Co., 13 Iowa, 388; Hanson *v.* Vernon, 27 Iowa, 28; Sharpless *v.* Mayor, &c., 21 Penn. St. 147; Whiting *v.* Fond du Lac, 25 Wis. 188.

In all these cases, however, the decision has turned upon the question whether the taxation by which this aid was afforded to the

building of railroads was for a public purpose. Those who came to the conclusion that it was, held the laws for that purpose valid. Those who could not reach that conclusion held them void. In all the controversy this has been the turning-point of the judgments of the courts. And it is safe to say that no court has held debts created in aid of railroad companies, by counties or towns, valid on any other ground than that the purpose for which the taxes were levied was a public use, a purpose or object which it was the right and the duty of State governments to assist by money raised from the people by taxation. The argument in opposition to this power has been, that railroads built by corporations organized mainly for purposes of gain — the roads which they built being under their control, and not that of the State — were private and not public roads, and the tax assessed on the people went to swell the profits of individuals and not to the good of the State, or the benefit of the public, except in a remote and collateral way. On the other hand it was said that roads, canals, bridges, navigable streams, and all other highways had in all times been matter of public concern. That such channels of travel and of carrying on business had always been established, improved, regulated by the State, and that the railroad had not lost this character because constructed by individual enterprise, aggregated into a corporation.

We are not prepared to say that the latter view of it is not the true one, especially as there are other characteristics of a public nature conferred on these corporations, such as the power to obtain right of way, their subjection to the laws which govern common carriers, and the like, which seem to justify the proposition. Of the disastrous consequences which have followed its recognition by the courts and which were predicted when it was first established there can be no doubt.

We have referred to this history of the contest over aid to railroads by taxation, to show that the strongest advocates for the validity of these laws never placed it on the ground of the unlimited power in the State Legislature to tax the people, but conceded that where the purpose for which the tax was to be issued could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power, and was an unauthorized invasion of private right. Olcott *v.* Supervisors, 16 Wall. 689; People *v.* Salem, 20 Mich. 452; Jenkins *v.* Andover, 103 Mass. 94; Dillon on Municipal Corporations, § 587; 2 Redfield's Laws of Railways, 398, rule 2.

It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of

power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.

The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B. who were husband and wife to each other should be so no longer, but that A. should thereafter be the husband of C., and B. the wife of D. Or which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B. Whiting *v.* Fond du Lac, 25 Wis. 188; Cooley on Constitutional Limitations, 129, 175, 487; Dillon on Municipal Corporations, § 587.

Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used and the extent of its exercise is in its very nature unlimited. It is true that express limitation on the amount of tax to be levied or the things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of government, the prosecution of war, the national defence, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government.

The power to tax is, therefore, the strongest, the most prevading of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by Chief Justice Marshall, in the case of McCulloch *v.* The State of Maryland, 4 Wheat. 431, that the power to tax is the power to destroy. A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent. imposed by the United States on the circulation of all other banks than the national banks, drove out of existence every State bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

To lay with one hand the power of the government on the property

of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

Nor is it taxation. A "tax," says Webster's Dictionary, "is a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or state." "Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes." Cooley on Constitutional Limitations, 479.

Coulter, J., in Northern Liberties *v.* St. John's Church (13 Penn. St. 104), says, very forcibly, "I think the common mind has everywhere taken in the understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and operations — that they are imposed for a public purpose." See also Pray *v.* Northern Liberties, 31 Id. 69; Matter of Mayor of New York, 11 Johns. 77; Camden *v.* Allen, 2 Dutch. 398; Sharpless *v.* Mayor of Philadelphia, *supra;* Hanson *v.* Vernon, 27 Iowa, 47; Whiting *v.* Fond du Lac, 25 Wis. 188.

We have established, we think, beyond cavil that there can be no lawful tax which is not laid for *a public purpose.* It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not.

It is undoubtedly the duty of the Legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.

But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital

or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town.

A reference to one or two cases adjudicated by courts of the highest character will be sufficient, if any authority were needed, to sustain us in this proposition.

In the case of Allen *v.* The Inhabitants of Jay, 60 Maine, 124, the town meeting had voted to loan their credit to the amount of $10,000, to Hutchins and Lane, if they would invest $12,000 in a steam saw-mill, grist-mill, and box-factory machinery, to be built in that town by them. There was a provision to secure the town by mortgage on the mill, and the selectmen were authorized to issue town bonds for the amount of the aid so voted. Ten of the taxable inhabitants of the town filed a bill to enjoin the selectmen from issuing the bonds.

The Supreme Judicial Court of Maine, in an able opinion by Chief Justice Appleton, held that this was not a public purpose, and that the town could levy no taxes on the inhabitants in aid of the enterprise, and could, therefore, issue no bonds, though a special act of the legislature had ratified the vote of the town, and they granted the injunction as prayed for.

Shortly after the disastrous fire in Boston, in 1872, which laid an important part of that city in ashes, the governor of the State convened the legislative body of Massachusetts, called the General Court, for the express purpose of affording some relief to the city and its people from the sufferings consequent on this great calamity. A statute was passed, among others, which authorized the city to issue its bonds to an amount not exceeding twenty millions of dollars, which bonds were to be loaned, under proper guards for securing the city from loss, to the owners of the ground whose buildings had been destroyed by fire, to aid them in rebuilding.

In the case of Lowell *v.* The City of Boston, in the Supreme Judicial Court of Massachusetts [111 Mass. 454], the validity of this act was considered. We have been furnished a copy of the opinion, though it is not yet reported in the regular series of that court. The American Law Review for July, 1873, says that the question was elaborately and ably argued. The court, in an able and exhaustive opinion, decided that the law was unconstitutional, as giving a right to tax for other than a public purpose.

The same court had previously decided, in the case of Jenkins *v.* Anderson, 103 Mass. 74, that a statute authorizing the town authorities to aid by taxation a school established by the will of a citizen, and governed by trustees selected by the will, was void because the school was not under the control of the town officers,

and was not, therefore, a public purpose for which taxes could be levied on the inhabitants.

The same principle precisely was decided by the State Court of Wisconsin in the case of Curtis *v.* Whipple, 24 Wis. 350. In that case a special statute which authorized the town to aid the Jefferson Liberal Institute was declared void because, though a school of learning, it was a private enterprise not under the control of the town authorities. In the subsequent case of Whiting *v.* Fond du Lac, already cited, the principle is fully considered and reaffirmed.

These cases are clearly in point, and they assert a principle which meets our cordial approval.

We do not attach any importance to the fact that the town authorities paid one instalment of interest on these bonds. Such a payment works no estoppel. If the Legislature was without power to authorize the issue of these bonds, and its statute attempting to confer such authority is void, the mere payment of interest, which was equally unauthorized, cannot create of itself a power to levy taxes, resting on no other foundation than the fact that they have once been illegally levied for that purpose.

The act of March 2, 1872, concerning internal improvements, can give no assistance to these bonds. If we could hold that the corporation for manufacturing wrought-iron bridges was within the meaning of the statute, which seems very difficult to do, it would still be liable to the objection that money raised to assist the company was not for a public purpose, as we have already demonstrated.

*Judgment affirmed.*[1]

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## KINGMAN *v.* CITY OF BROCKTON.

153 Massachusetts, 255. 1891.

Petition in equity, under the Pub. Sts. c. 27, § 129, by ten taxable inhabitants of the city of Brockton, to prevent the carrying out of an order of the city council appropriating $40,000 for the erection of a memorial hall and public library building. The case was heard by Holmes, J., who ordered the petition to be dismissed; and the petitioners appealed to this court. The facts appear in the opinion.

The case was argued at the bar in October, 1890, and afterwards, in January, 1891, was submitted on the briefs to all the judges.

C. Allen, J. The counsel for the petitioners does not controvert the constitutionality of the statute itself, St. 1890, c. 432, under which the city council has assumed to act. That statute authorizes the city to appropriate a sum of money for the erection of a memorial

[1] Mr. Justice Clifford delivered a dissenting opinion.

hall, to be used and maintained as a memorial to the soldiers and sailors of the war of the Rebellion. This may properly be deemed to be a public purpose, and a statute authorizing the raising of money by taxation for the erection of such a memorial hall may be vindicated on the same grounds as statutes authorizing the raising of money for monuments, statues, gates or archways, celebrations, the publication of town histories, parks, roads leading to points of fine natural scenery, decorations upon public buildings, or other public ornaments or embellishments, designed merely to promote the general welfare, either by providing for fresh air or recreation, or by educating the public taste, or by inspiring sentiments of patriotism or of respect for the memory of worthy individuals. The reasonable use of public money for such purposes has been sanctioned by several different statutes, and the constitutional right of the Legislature to pass such statutes rests on sound principles. Pub. Sts. c. 27, §§ 10, 11; Sts. 1882, cc. 154, 255, § 5; 1883, c. 119; 1884, c. 42; 1886, c. 76; 1889, c. 21. Higginson *v.* Nahant, 11 Allen, 530.

Assuming to act under the authority of the St. of 1890, c. 432, the city council of Brockton proceeded to pass an order appropriating $40,000 for the purpose of erecting a "memorial hall and public library building, . . . a portion of said building to be for the use of Fletcher Webster Post G. A. R. No. 13, so long as it shall exist as an organization, . . . the said plans [of the building] to be approved by . . . the trustees of said G. A. R. Post." By this vote, a portion of the contemplated building is to be devoted to the use of the said Grand Army Post during its existence as an organization and the plans are to be approved by the trustees of said Post. The respondent contends that this vote is within the authority of the statute. This is certainly open to doubt; but assuming it to be so, the question presented for determination is whether the purpose thus expressed is a public purpose for which money can be raised by a town by taxation, even with legislative sanction.

It might perhaps be sufficient to declare, as the petitioners contend, that the statute is not broad enough to cover the vote of the city council, and that the real question to be determined is merely whether money can be lawfully raised by the city for the purpose expressed, in the absence of any statute expressly authorizing it. But it is better to meet the broader question whether the Legislature can authorize a city or town to make such a use of public money; and, in the opinion of a majority of the court, it cannot.

The general rule is well established, and is illustrated by a great variety of decided cases, that taxation must be limited to public purposes. It was accordingly held in the recent case of Mead *v.* Acton, 139 Mass. 341, that a statute authorizing a town to pay bounties to soldiers who re-enlisted in 1864 and were credited to the town was unconstitutional; the purpose being to benefit individuals, and not the public. The Fletcher Webster Post G. A. R. No. 13 is not

a public body, but it is an association of individuals. To support and maintain such an association cannot be deemed to be a public purpose. If a city or town may be authorized to erect a building to be devoted in part to the use of such an association so long as it shall exist as an organization, it is not easy to see why it may not be authorized to erect one exclusively for that purpose, and to provide the necessary furniture, and indeed to bear all the expenses of maintaining the association. If a city or town may be authorized to give such assistance to a body of persons who have been soldiers or sailors in the war, the same principle would seem to extend so far as to include those who have rendered other great and meritorious services, and thus are entitled to public gratitude, such, for example, as societies of disabled or past firemen or policemen. If once the principle is adopted that a city or town may be authorized to raise money by taxation for conferring benefits on individuals merely because in the past they have rendered important and valuable services for the benefit of the general public, occasions will not be wanting which will appeal strongly to the popular sense of gratitude, or to the popular emotion; and the interests and just rights of minorities will be in danger of being disregarded. If the body of persons to be benefited is numerous, the greater is the influence that may probably be brought to bear to secure such an appropriation of the public money.

Under such circumstances, it is necessary to recur and to adhere firmly to fundamental principles. The right of taxation by a city or town extends only to raising money for public purposes and uses. There is no definition of a public purpose or use which can include the maintenance and support of a Grand Army Post.

It is said that, if a city has a public building already erected which is larger than its present needs for municipal purposes require, it may allow portions of such building to be used for other purposes for the time being, either for a stipulated rent or price, or gratuitously; and, further, that in erecting a public building a city need not limit the size of it to actual existing needs, but may make a reasonable provision for probable future wants. All this, within proper limits, is true. Spaulding *v.* Lowell, 23 Pick. 71; French *v.* Quincy, 3 Allen, 9; Worden *v.* New Bedford, 131 Mass. 23. But there may be some danger of extending this doctrine too far. Should a question arise whether a contemplated building exceeded what was allowable, with reference to legitimate prospective needs, such question would have to be determined upon its own merits; and the good faith of the transaction, and the soundness of the judgment shown in providing for future wants, might have to be considered. No such question has arisen heretofore, or arises now. In the present case, it is proposed to erect a building with the express purpose of devoting a portion of it to the use of the G. A. R. Post, not temporarily, but as long as that organization may exist.

The St. of 1885, c. 60, is referred to, which authorizes any city or town to lease, for a period not exceeding five years, to any Post of the Grand Army of the Republic established in such city or town, to be used by such Post solely for the purposes of its organization, any public building or part therof, except schoolhouses in actual use as such, on such terms as the board of aldermen or the selectmen may determine. Without now considering whether in any respect this statute goes too far, or is liable to abuse, it is sufficient to say that it refers only to existing public buildings, and by no means authorizes the erection of a building to be let to a Grand Army Post at a nominal rent.

In addition to Mead *v.* Acton, 139 Mass. 341, and cases there cited, the following, amongst others, may also be referred to as tending to support the views above expressed in respect to the proper limits of the right of taxation. Jenkins *v.* Andover, 103 Mass. 94; Loan Association *v.* Topeka, 20 Wall. 655; Parkersburg *v.* Brown, 106 U. S. 487; Osborne *v.* Adams, 106 U. S. 181; S. C. 109 U. S. 1; Ottawa *v.* Carey, 108 U. S. 110; Cole *v.* La Grange, 113 U. S. 1; Philadelphia Association *v.* Wood, 39 Penn. St. 73; State *v.* Osawkee, 14 Kans. 418, an instructive judgment by Brewer, J.; Mather *v.* Ottawa, 114 Ill. 659; Feldman *v.* City Council, 23 S. C. 57; Coates *v.* Campbell, 37 Minn. 498; State *v.* Tappan, 29 Wis. 664; Brewer Brick Co. *v.* Brewer, 62 Maine, 62. See also Dillon, Mun. Corp. (4th ed.) §§ 159, 508, 736; Cooley on Taxation, c. 4. *Decree for petitioners.*

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## BLAIR *v.* CUMING COUNTY.

111 United States, 363. 1884.

This is an action brought in the Circuit Court of the United States for the District of Nebraska, by the plaintiff in error against the County of Cuming, a body corporate of the State of Nebraska, to recover the money due on coupons cut from certain bonds. The case was tried on a petition and a demurrer thereto, the latter alleging, as cause of demurrer, that the petition did not state facts sufficient to constitute a cause of action.

[The bonds were issued under a statute authorizing counties to issue bonds "to aid in the construction of any railroad or other work of internal improvement," and were for making a water power improvement for the purpose of propelling public grist-mills. Defendant's demurrer was sustained and judgment was rendered in its favor. Plaintiff sued out a writ of error.]

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

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It is also objected that improving the water-power of the river, by constructing a canal for water-power purposes, is merely digging a mill race, and that the doing so, for the purpose of propelling a public grist-mill in the precinct, is not constructing a work of internal improvement, within the statute. We are not referred to any decision of the highest court of Nebraska, made before the plaintiff became, on January 1st, 1876, the *bona fide* owner of these coupons, or even since, holding in accordance with the contention of the defendant.

In Osborne *v.* County of Adams, 106 U. S. 181, this court decided in November, 1882, that, under the same statute that is in question there, bonds issued to aid in the construction of a steam grist-mill were not issued to aid in the construction of a work of internal improvement. There was a suggestion in the opinion in that case, that the statute did not cover the construction of any kind of grist-mill as a work of internal improvement. During the same term a petition for rehearing was filed, and the attention of the court was called to the case of Traver *v.* Merrick County, 14 Neb. 327, in which the Supreme Court of Nebraska had held, at its January Term, 1883, that county bonds issued by county commissioners, under the act of 1869, as a loan to an individual to aid in building a public grist-mill and water-power in the county, were valid. But this court adhered to its view that the act did not cover the construction of a steam grist-mill, and denied the rehearing. Osborne *v.* Adams County, 109 U. S. 1.

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In Traver *v.* Merrick County, before cited, the court considered the act of 1869 and the question whether a water grist-mill was a work of internal improvement, within the meaning of that act. It cited the provisions of an act "relating to mills and mill dams," which passed and took effect February 26th, 1873, Gen. Stat. of 1873, chap. 44, p. 472, and especially sections 1, 2, and 24 to 29 of that act, as authorizing a person who, in good faith, had expended a considerable sum of money towards the erection of a grist-mill on a stream, to obtain an injunction against the making by another person of a dam across the same stream on his own land, the effect of which would be to destroy the water-power of the former; and it stated that, under the cases of Nosser *v.* Seeley, 10 Neb. 460, and Seeley *v.* Bridges, 13 Id. 547, that was the settled law of the State. The act of 1873 provides that all mills for grinding grain, and which shall grind for toll, shall be deemed public mills; that the owner or occupier of every public mill shall grind the grain brought to his mill as well as the nature and condition of his mill will permit, and in due time as the same shall be brought; and that he shall post in the mill his rates of toll, and the county commissioners of the county shall es-

tablish and regulate the amount of toll to be charged. The court held, in Traver *v.* Merrick County, that the legislature had authority to provide that streams capable of being applied to mill purposes should be so utilized for the benefit of the public; that the right to erect a mill and dam, on paying damages for the injury caused, was granted for the better use of the water-power, on considerations of public policy and the general good, with a view to keeping up mills for use; and that, under the act of 1873, water grist-mills were mills for the use of the public. It also held that, under the act of 1869, works of internal improvement were not restricted to railroads and works of like character, such as canals, turnpikes and bridges; that, if an internal improvement was for public use, subject to the control and regulation of the legislature, it was within the act; and that, as the mill in that case was one to be propelled by water, and was for the use of all who might desire to patronize it, at such rates of toll as might be prescribed by the county commissioners of the county, it was a work of internal improvement, within the act.

We concur in these views, and regard them as a sound exposition of the legislation of Nebraska. In Traver *v.* Merrick County the thing aided was the building a public grist-mill and water-power. As we understand the present case, the thing aided is the improving the water-power of a river, by constructing a canal for water-power purposes to propel public grist-mills. This is within the act of 1869. A water grist-mill cannot be run so as to be a public grist-mill, unless it is furnished with water-power, and, if an existing river needs to be improved to furnish such power, the improvement of it is a public work of internal improvement.

In Township of Burlington *v.* Beasley, 94 U. S. 310, this court held that a steam custom grist-mill, not on a water-course or operated by water-power, was a "work of internal improvement," within an act of Kansas authorizing municipal bonds in aid of "the construction of railroads or water-power, . . . or for other works of internal improvement." The decision was based, in part, on the ground, that there was another act which declared that "all water, steam or other mills, whose owners or occupiers grind or offer to grind grain for toll or pay, are hereby declared public mills," and provided for the order in which customers should be served, and prescribed the duties of the miller, and that the rates of toll should be posted; and, as it would also be competent for the legislature to regulate the toll, it was held that aid to the mill was aid of a public work of internal improvement.

Enterprises of a class within which that in the present case falls are so far of a public nature that private property may be appropriated to carry them into effect. Boston & Roxbury Mill Corp. *v.* Newman, 12 Pick. 467; Commonwealth *v.* Essex Company, 13 Gray, 239; Lowell *v.* Boston, 111 Mass. 454, 464; Scudder *v.* Trenton Delaware Falls Co., 1 Saxton Ch. 694; Beekman *v.* Saratoga &

Schenectady Railroad Co., 3 Paige 45. And when the legislature has given to grist-mills and the water-power connected with them such a public character as in the present case, the improvement of the water-power must be regarded as a public work of internal improvement, which may be aided in its construction by the issue of bonds, under the act in question.

These conclusions require that

*The judgment of the Circuit Court should be reversed and the case be remanded to that court, with direction to overrule the demurrer to the petition, and to take such further proceedings in the cause as may be required by law and as shall not be inconsistent with this opinion.*

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## DEERING *v.* PETERSON.

—— Minnesota, ——; 77 N. W. 568. 1898.

APPEAL from District Court, Marshall County; FRANK IVES, Judge.

Action by William Deering & Co. against P. A. Peterson. John Gillespie, Jr., was garnishee, and the board of county commissioners of Marshall county interposed as claimants. From an order overruling a demurrer to the complaint of interveners, plaintiff appeals. Reversed.

CANTY, J. The garnishee herein disclosed that he had in his possession and under his control 142 bushels of wheat, the property of defendant. It is also to be inferred from the disclosure that defendant held the title to this wheat under a chattel mortgage given by one Herman Peterson on his crop. It appeared also on the disclosure that Marshall county made a claim to the wheat. Thereupon the board of county commissioners of that county intervened as claimants, and alleged in their complaint that on March 25, 1893, said Herman Peterson was, and ever since has been, the owner and in actual possession of certain described land in that county, on which the wheat in question was raised; that on said March 25th he applied, under chapters 225, 226, Laws 1893, for money to buy seed grain; and that the money was furnished him. The application, and all the proceedings had in procuring the money, are set out in said complaint, and the interveners claim a lien on the wheat in question for the repayment of the money. Plaintiff demurred to the complaint on the ground that it does not state a cause of action, and on the ground that there is a defect of parties claimant, and appeals from an order overruling the demurrer.

Chapter 225 is entitled "An Act to appropriate money for seed-grain loans to farmers in this State whose crops were destroyed by

hail or storms last year. The act appropriates $75,000 out of the State treasury for such purpose, and provides that any person desiring to avail himself of the benefits of the act shall file his application with the town clerk, who shall forward it to the county auditor, who shall publish a notice that the board of county commissioners will meet at his office on a day named for the purpose of considering the allowance of relief to such applicants. It is further provided that the board shall at such time fix and determine the amount to be allowed to each applicant, the county auditor shall furnish a copy of the resolution to the State auditor, and the governor, State treasurer, and State auditor shall meet and distribute the appropriation among the several counties in which relief is sought. It is further provided "that any person or persons owning more than 160 acres of land free from mortgage incumbrance, whether the same be cultivated or not, shall be deprived from any of the benefits set forth in this act." The act further provides that "the county auditor shall levy a tax against the land for which seed-grain loan may be granted, and on which such loan is hereby declared to be a lien, which shall take precedence over any and all incumbrances." Section 5 provides "that such tax shall be paid in three installments as nearly equal as may be, and be included in the tax levy for the years 1894, 1895, and 1896." Section 6 provides that, to distribute the money appropriated, the State auditor shall draw a warrant on the State treasurer for the amount allowed each county, and the county auditor shall thereupon draw his warrant on the county treasurer for the amount allowed each person. Section 7 provides that all moneys collected on such seed-loan tax shall be paid over to the State treasurer, and section 8 provides that, whenever such tax remains unpaid and becomes delinquent, the board of county commissioners shall order the amount thereof paid to the State treasurer out of the county treasury. Chapter 226 amends chapter 225 in several particulars, and declares the seed-grain loan a lien on the land for which the loan was made, "and upon the crop of grain raised each year by the person receiving such loan until such amount is fully paid." It also provides that such lien "shall take precedence over any and all incumbrances acquired subsequent to the lien of such loan."

[Several grounds of objection to the action of the lower court are considered and held not to be well taken.]

5. But there is one ground on which, in our opinion, this statute is unconstitutional. It appropriates public money for a private purpose. It is well settled that public money may be appropriated for the support of paupers, but the statute in question does not limit the appropriation to those who are paupers. On the contrary, it permits every one who has not more than 160 acres of land, free from mortgage incumbrance, to borrow from the State. A person might have 10,000 acres of land, worth $100,000, subject to a mortgage of only $500, and he would be entitled, under the terms of this act, to borrow

from the State. He might also have $1,000,000 worth of personal property, and still he could borrow from the State. Section 10 of article 9 of the Constitution provides: "The credit of the State shall never be given or loaned in aid of any individual or corporation." If the State cannot loan its credit, it cannot borrow the money on its own bonds, and then loan the money. It cannot do indirectly what it cannot do directly. It was held in Coates *v.* Campbell, 37 Minn. 498, 35 N. W. 366, that a village cannot issue bonds to aid in an enterprise partly public and partly private. Taxation cannot be imposed for a private purpose, and, if the State can appropriate for a private purpose the money in its treasury and then replace it by taxation, it can do indirectly what it cannot do directly. The cases of Lowell *v.* City of Boston, 111 Mass. 454, and State *v.* Osawkee Tp., 14 Kan. 418, are much in point. The latter case holds that no one can obtain such public aid unless he is actually a pauper, however imminent and immediate the danger of his becoming such. It may be that, if this question were before us, we would not go thus far, but would hold that, in the midst of such a great public calamity, a person who is within one degree of being a pauper, and in imminent and immediate danger of becoming such, may, for the purpose of preventing him from becoming such, be given aid by the State or municipality without violating the constitution. Such was the holding in State *v.* Nelson County, 1 N. D. 88, 45 N. W. 33. But that question is not before us in this case. Our statute did not confine its benefits to those who were a public charge and those in imminent and immediate danger of becoming such.

[After considering other matters, the order is reversed on the ground stated in the portion of the opinion given above.]

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## WURTS *v.* HOAGLAND.

114 United States, 606. 1885.

This was a writ of error by the devisees of Mary V. Wurts, to reverse a judgment confirming an assessment of commissioners for the drainage of lands, under the statute of New Jersey, of March 8, 1871.

Mr. Justice Gray, after stating the facts, delivered the opinion of the court.

General laws authorizing the drainage of tracts of swamp and low lands, by commissioners appointed upon proceedings instituted by some of the owners of the lands, and the assessment of the whole expense of the work upon all the lands within the tract in question, have long existed in the State of New Jersey, and have been sus-

tained and acted on by her courts, under the constitution of 1776, as well as under that of 1844. Stats. December 23, 1783, Wilson's Laws, 382; November 29, 1788, and November 24, 1792, Paterson's Laws, 84, 119; Jones *v.* Lore, Pennington, 1048; Doremus *v.* Smith, 1 Southard, 142; Westcott *v.* Garrison, 1 Halsted, 132; State *v.* Frank & Guisbert Creek Co., 2 J. S. Green, 301; State *v.* Newark, 3 Dutcher, 185, 194; Berdan *v.* Riser Drainage Co., cited 3 C. E. Green, 69; Coster *v.* Tide Water Co., 3 C. E. Green, 54, 68, 518, 531; State *v.* Blake, 6 Vroom, 208, and 7 Vroom, 442; Hoagland *v.* Wurts, 12 Vroom, 175, 179.

[The New Jersey cases are discussed at some length.]

This review of the cases clearly shows that general laws for the drainage of large tracts of swamps and low lands, upon proceedings instituted by some of the proprietors of the lands to compel all to contribute to the expense of their drainage, have been maintained by the courts of New Jersey (without reference to the power of taking private property for the public use under the right of eminent domain, or to the power of suppressing a nuisance dangerous to the public health) as a just and constitutional exercise of the power of the legislature to establish regulations by which adjoining lands, held by various owners in severalty, and in the improvement of which all have a common interest, but which, by reason of the peculiar natural condition of the whole tract, cannot be improved or enjoyed by any of them without the concurrence of all, may be reclaimed and made useful to all at their joint expense. The case comes within the principle upon which this court upheld the validity of general mill acts in Head *v.* Amoskeag Manufacturing Co., 113 U. S. 9.

It is also well settled by the decisions of the courts of New Jersey that such proceedings are not within the provision of the constitution of that State securing the right of trial by jury. New Jersey Constitution of 1776, art. 22; Constitution of 1844, art. 1, sec. 7; Scudder *v.* Trenton Delaware Falls Co., Saxton, 694, 721–725; *In re* Lower Chatham Drainage, 7 Vroom, 442; Howe *v.* Plainfield, 8 Vroom, 145.

The statute of 1871 is applicable to any tract of land within the State which is subject to overflow from freshets, or which is usually in low, marshy, boggy or wet condition. It is only upon the application of at least five owners of separate lots of land included in the tract, that a plan of drainage can be adopted. All persons interested have opportunity by public notice to object to the appointment of commissioners to execute that plan, and no commissioners can be appointed against the remonstrance of the owners of the greater part of the lands. All persons interested have also opportunity by public notice to be heard before the court on the commissioners' report of the expense of the work, and of the lands which in their judgment ought to contribute; as well as before the commissioners, and, on any error in law or in the principles of assessment, before the court, upon the amount of the assessment.

As the statute is applicable to all lands of the same kind, and as no person can be assessed under it for the expense of drainage without notice and opportunity to be heard, the plaintiffs in error have neither been denied the equal protection of the laws, nor been deprived of their property without due process of law, within the meaning of the Fourteenth Amendment of the Constitution of the United States. Barbiere *v.* Connolly, 113 U. S. 27, 31; Walker *v.* Sauvinet, 92 U. S. 90; Davidson *v.* New Orleans, 96 U. S. 97; Hagar *v.* Reclamation District, 111 U. S. 701. *Judgment affirmed.*

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## d. *Notice; Uniformity; Special Taxes.*

### KENTUCKY RAILROAD TAX CASES.

[CINCINNATI, NEW ORLEANS, AND TEXAS PACIFIC RAILROAD CO. *v.* COMMONWEALTH OF KENTUCKY, AND OTHER CASES.]

115 United States, 321. 1885.

THE Commonwealth of Kentucky brought its several actions against the railroad companies above named as plaintiffs in error respectively, to recover the amounts of certain taxes levied against each of them, under the provisions of "An act to prescribe the mode of ascertaining the value of the property of railroad companies for taxation, and for taxing the same," approved April 3, 1878. Bullitt & Feland's General Statutes of Kentucky, 1881, 1019.

MR. JUSTICE MATTHEWS delivered the opinion of the court. After stating the facts, he continued:

Two Federal questions arise on the record, in these cases, contained in the following propositions affirmed by the plaintiffs in error:

*First.* That the act of April 3, 1878, and the taxes levied in pursuance of it, if enforced, as it is sought to be, in these judgments, in effect take the property of the defendants below without due process of law; and —

*Second.* That they constitute a denial of the equal protection of the laws: in both particulars violating the Fourteenth Amendment to the Constitution of the United States.

In support of the first of these propositions, it is contended on behalf of the plaintiffs in error, that, by the enforcement of these judgments, they will be deprived of their property without due process of law, because the valuation of their property under the act is made by the board of railroad commissioners without the right on their part to notice of the proceeding, or the right to be heard in opposition to any proposed action of the board in its progress.

It has, however, been repeatedly decided by this court that the proceedings to raise the public revenue by levying and collecting taxes are not necessarily judicial, and that "due process of law," as applied to that subject, does not imply or require the right to such notice and hearing as are considered to be essential to the validity of the proceedings and judgments of judicial tribunals. Notice by statute is generally the only notice given, and that has been held sufficient. "In judging what is 'due process of law,'" said Mr. Justice Bradley, in Davidson *v.* New Orleans, 96 U. S. 97, 107, "respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.'"

In its application to proceedings for the levy and collection of taxes, it was said in McMillen *v.* Anderson, 95 U. S. 37, 42, that it "is not and never has been, considered necessary to the validity of a tax" "that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed." This language, it is true, was used in the decision of a case in reference to a license tax, where all the circumstances of its assessment were declared by statute, and nothing was intrusted to the discretion of public officers; but, in the State Railroad Tax Cases, 92 U. S. 575, 610, where the ascertainment of the taxable value of railroads was the duty of a board, as in the present cases, whose assessment was challenged for the reason that the proceeding was not "due process of law," for want of notice and a hearing, it was said by Mr. Justice Miller, delivering the opinion of the court: "This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong; and in the business of assessing taxes, this is all that can be reasonably asked."

In the proceedings questioned in these cases, there was, in fact and in law, notice and a hearing. The railroad company, by its president or chief officer, is required by law, at a specified time, to return to the auditor of public accounts, under oath, a statement showing "the total length of such railroad, including the length thereof beyond the limits of the State, and designating its length within this State, and in each county, city, and incorporate town therein, together with the average value per mile thereof, for the purpose of being operated as a carrier of freight and passengers, including engines and cars and a list of the depot grounds and improvements and other real estate of the said company, and the value thereof, and the respective counties, cities, and incorporated towns, in which the same are located. That, if any of said railroad companies owns or operates a railroad or

railroads out of this State, but in connection with its road in this State, the president or chief officer of such company shall only be required to return such proportion of the entire value of all its rolling-stock as the number of miles of its railroad in this State bears to the whole number of miles operated by said company in and out of this State."

This return, made by the corporation through its officers, is the statement of its own case, in all the particulars that enter into the question of the value of its taxable property, and may be verified and fortified by such explanations and proofs as it may see fit to insert. It is laid by the auditor of public accounts before the board of railroad commissioners, and constitutes the matter on which they are to act. They are required to meet for that purpose on the first day of September in each year, at the office of the auditor, at the seat of government, when these returns are to be submitted to them. The statute declares that, "should the valuations . . . be either too high or too low, they shall correct and equalize the same by a proper increase or decrease thereof. Said board shall keep a record of their proceedings, to be signed by each member present at any meeting; and the said board is hereby authorized to examine the books and property of any railroad company to ascertain the value of its property, or to have them examined by any suitable disinterested person, to be appointed by them for that purpose." And in the performance of these duties, their sessions are limited to a period of not longer than twenty days in any one year.

These meetings are public, and not secret. The time and place for holding them are fixed by law. The proceedings of the board are required to be made matter of record, and authenticated by the signature of the quorum present. Any one interested has the right to be present. In reference to this point, the Court of Appeals of Kentucky, in its decision in these cases, says (81 Ky. 492, 512): "As we construe this act, although in the nature of an original assessment, the parties had the right to be heard, and were in fact heard before the board passing on the question of valuation." It is averred, in the petitions filed in these actions, that "defendant did appear before said board by its officers, agents, and attorneys, and presented such facts, figures, and information, and argument in relation to the valuation and assessment for taxation of its said property, as it saw proper to;" and "that said board, after a full hearing of defendant by her officers, agents, and attorneys, and a full consideration of said returns, reports, information, and arguments before them, valued and assessed for taxation" the defendant's line of railroad, &c. These averments are not denied, but stand confessed in the record of each case.

It is said, however, in answer to this, by counsel for plaintiffs in error, in argument, that whatever was in fact this alleged hearing, it could only have been accorded as a matter of grace and favor, because

it was not demandable, as of right, under the law, and consequently has no such legal value as attaches to a hearing to which the law gives a right, and to which it compels the attention of the officer, under an imperative obligation, with the sense of official responsibility for impartial and right decision, which is imputed to the discharge of official duty.

But such is not the construction put upon the statute, as we have seen, by the Court of Appeals of the State, nor the practical construction, as we infer from the averments of the pleadings, put upon it by the officers called to act under it. And if the plaintiffs in error have the constitutional right to such hearing, for which they contend, the statute is properly to be construed so as to recognize and respect it, and not to deny it. The constitution and the statute will be construed together as one law. This was the principle of construction applied by this court, following the decisions of the State court, in Neal *v.* Delaware, 103 U. S. 370, where words, denying the right, were regarded as stricken out of the State constitution and statutes, by the controlling language of the Constitution of the United States; and in the case of Cooper *v.* The Wandsworth Board of Works, 14 C. B. N. S. 180, in a case where a hearing was deemed essential, it was said by Byles, J., "that, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature." p. 194.

It is still urged, however, that there is, notwithstanding what has been said, no security that the final action of the board of railroad commissioners, in valuing and assessing railroad property under this statute, may not be unequal, unjust and oppressive, and that either by error of judgment, through caprice, prejudice, or even from an intention to oppress, valuations may be made which are excessive, bearing no reasonable relation to what is fair and just, and fixed arbitrarily, based neither upon actual evidence nor an honest estimate. But the same suppositions may be indulged in, in opposition to all contrary presumptions, with reference to the final action of any tribunal appointed to determine the matter, however carefully constituted, and however carefully guarded in its procedure, and whether judicial or administrative. Such possibilities are but the necessary imperfections of all human institutions, and do not admit of remedy; at least no revisory power to prevent or redress them enters into the judicial system, for, by the supposition, its administration is itself subject to the same imperfections.

But whatever relief courts of justice may afford against the injuries apprehended, when in fact they have resulted, is secured to the plaintiffs in error by the very statute of which they complain. For the valuation of railroad property, under that act, and the assessment of the taxes thereon, are not final, in the sense that they constitute a charge upon the property subject to the tax, or a liability fixed upon the corporation owning it. That result can be attained, and the tax

actually collected, only by suit, as provided in the fifth section of the statute, either against the officers of the companies for penalties incurred by a failure to pay the taxes levied, or for the recovery of the taxes themselves, by action in the Franklin Circuit Court, or in the courts having jurisdiction in the counties, for the taxes payable to them respectively. The case is thus brought directly and distinctly within the decision in Davidson *v.* New Orleans, 96 U. S. 97, 104, where it was held, "that, whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be of the whole State, or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." And this is the principle that was followed in the subsequent case of Hagar *v.* Reclamation District, 111 U. S. 701. In that case, the statute of California, which conferred the jurisdiction, authorized any defence, going either to the validity or to the amount of the tax assessed, to be pleaded. What inquiries may be permitted in such cases, of course, is a matter that depends upon the particular provisions of the law of the jurisdiction. In the absence of such provisions, and as a principle of general jurisprudence, it is safe to say, that any defence is admissible which establishes the illegality of the proceeding resulting in the alleged assessment, whether because it is in violation of the local law which is relied on as conferring the authority upon which it is based, or because it constitutes a denial of a right secured to the party complaining by the Constitution of the United States. The judgments now under review were rendered in just such actions, so that we cannot escape the conclusion that there is no ground for the plaintiffs in error to contend that they have been rendered without due process of law.

The plaintiffs in error, however, did interpose a defence below, legitimate in itself, and arising under the Constitution of the United States, namely, that in the proceedings of the board of railroad commissioners, resulting in the valuation and assessment, under the act of April 3, 1878, they were severally denied the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution. As this defence was overruled by the Court of Appeals of Kentucky, another Federal question is presented which we are bound now to examine and decide.

The discrimination against railroad companies and their property, which is the subject of complaint, as being unjust and unconstitutional, arises from the fact that, in the legislation of Kentucky on the subject, railroad property, though called real estate, is classed by

itself as distinct from other real estate, such as farms and city lots, and subjected to different means and methods for ascertaining its value for purposes of taxation, and differing as well from those applied to the property of corporations chartered for other purposes, such as bridge, mining, street railway, manufacturing, gas and water companies. These latter report to the auditor the total cash value of their property, and pay into the treasury as a tax upon each $100 of its value, a sum equal to the tax collected upon the same value of real estate; and their reports and valuations are treated as complete and perfect assessments, not subject to revision by any board or court, and conclusive upon the taxing officers.

But there is nothing in the constitution of Kentucky that requires taxes to be levied by a uniform method upon all descriptions of property. The whole matter is left to the discretion of the legislative power, and there is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods. The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect which the discretion of the legislature has seen fit to impose.

So, the fact that the legislature has chosen to call a railroad, for purposes of taxation, real estate does not identify it with farming lands and town lots, in such a sense as imperatively to require the employment of the same machinery and methods for all, in the process of valuation for purposes of taxation. Calling them by the same name does not obliterate the essential differences between them, and accordingly it is not insisted on in argument, as an objection to the system that a railroad running through several counties is valued and taxed as a unit and by a special board organized for that purpose, while other real estate is valued in each county by assessors. The final point of objection seems to be reduced to this. In the case of ordinary real estate, it is said, when the assessor has made his valuation, it is submitted to the board of supervisors, who may change the valuation, but not so as to increase it, without notice to the tax-payer, and an opportunity for a formal hearing upon testimony to be adduced under oath, and with a right of appeal on his part, first, to a county judge, and, again, if the amount of the tax is equal to fifty dollars, to the Circuit Court. This is contrasted with the proceeding in the case of railroad property before the board of railroad commissioners, in which it is alleged there is no notice of an intended change in the valuation returned by the company, and no appeal allowed if it is increased.

The discrimination, however, is apparent rather than real. An examination of the statutes shows, that the original valuation of the assessor, in case of ordinary real estate, is conclusive upon the taxpayer, no matter how unsatisfactory; and the appeal allowed is only from the action of the board of supervisors in case they undertake to increase the valuation made by the assessor. But in the case of railroad property, no board has authority to increase the original assessment made by the railroad commissioners, and there is, therefore, no case for an appeal similar to that of the owner of ordinary real estate.

But were it otherwise, the objection would not be tenable. We have already decided that the mode of valuing railroad property for taxation under this statute is due process of law. That being so, the provision securing the equal protection of the laws does not require, in any case, an appeal, although it may be allowed in respect to other persons, differently situated. This was expressly decided by this court in the case of Missouri *v.* Lewis, 101 U. S. 22, 30. It was there said by MR. JUSTICE BRADLEY, delivering the opinion of the court and speaking to this point, that, "the last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective juisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress." The right to classify railroad property, as a separate class, for purposes of taxation, grows out of the inherent nature of the property, and the discretion vested by the constitution of the State in its legislature, and necessarily involves the right, on its part, to devise and carry into effect a distinct scheme, with different tribunals, in the proceeding to value it. If such a scheme is due process of law, the details in which it differs from the mode of valuing other descriptions and classes of property cannot be considered as a denial of the equal protection of the laws.

We see no error in the several judgments of the Court of Appeals of Kentucky in these cases, and they are accordingly

*Affirmed.*

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## KELLY *v.* PITTSBURGH.

104 United States, 78. 1881.

ERROR to the Supreme Court of the State of Pennsylvania.

MR. JUSTICE MILLER delivered the opinion of the court.

The plaintiff in error, James Kelly, is the owner of eighty acres of land, which, prior to the year 1867, was a part of the township of Collins, in the county of Alleghany and State of Pennsylvania. In

that year the legislature passed an act by virtue of which, and the subsequent proceedings under it, this township became a part of the city of Pittsburgh. The authorities of the city assessed the land for the taxes of the year 1874 at a sum which he asserts is enormously beyond its value, and almost destructive of his interest in the property. They are divisible into two classes; namely, those assessed for State and county purposes by the county of Alleghany, within which Pittsburgh is situated, and those assessed by the city for city purposes.

Kelly took an appeal, allowed by the laws of Pennsylvania, from the original assessment of taxes to a board of revision, but with what success does not distinctly appear. The result, however, was unsatisfactory to him, and he brought suit in the Court of Common Pleas to restrain the city from collecting the tax. That court dismissed the bill, and the decree having been affirmed on appeal by the Supreme Court, he sued out this writ of error.

The transcript of the record is accompanied by seven assignments of error. All of them except two have reference to matters of which this court has no jurisdiction. Those two, however, assail the decree on the ground that it violates rights guaranteed by the Constitution of the United States. As the same points were relied on in the Supreme Court of the State, it becomes our duty to inquire whether they are well founded. They are as follows: —

*First*, The Supreme Court of Pennsylvania erred in sustaining the authority of the city of Pittsburgh to assess and collect taxes from complainant's farm lands for municipal or city purposes, such exercise of the taxing power being a violation of rights guaranteed to him by article 5 of amendments to the Constitution of the United States.

*Second*, The Supreme Court of Pennsylvania erred in sustaining the authority of the city of Pittsburgh to assess and collect taxes from complainant's farm lands for municipal or city purposes, such exercise of the taxing power being a violation of rights guaranteed to him by art. 14, sect. 1, of the amendments to the Constitution of the United States.

As regards the effect of the fifth amendment of the Constitution, it has always been held to be a restriction upon the powers of the Federal government, and to have no reference to the exercise of such powers by the State governments. See Withers *v.* Buckley, 20 How. 84; Davidson *v.* New Orleans, 96 U. S. 97. We need, therefore, give the first assignment no further consideration. But this is not material, as the provision of sect. 1, art. 14, of the amendments relied on in the second assignment contains a prohibition on the power of the States in language almost identical with that of the fifth amendment. That language is that "no State shall . . . deprive any person of life, liberty, or property without due process of law."

The main argument for the plaintiff in error — the only one to

which we can listen — is that the proceeding in regard to the taxes assessed on his land deprives him of his property without due process of law.

It is not asserted that in the methods by which the value of his land was ascertained for the purpose of this taxation there was any departure from the usual modes of assessment, nor that the manner of apportioning and collecting the tax was unusual or materially different from that in force in all communities where land is subject to taxation. In these respects there is no charge that the method pursued is not due process of law. Taxes have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceedings. The necessities of government, the nature of the duty to be performed, and the customary usages of the people, have established a different procedure, which, in regard to that matter, is, and always has been, due process of law.

The tax in question was assessed, and the proper officers were proceeding to collect it in this way.

The distinct ground on which this provision of the Constitution of the United States is invoked is, that as the land in question is, and always has been, used as farm land, for agricultural use only, subjecting it to taxation for ordinary city purposes deprives the plaintiff in error of his property without due process of law. It is alleged, and probably with truth, that the estimate of the value of the land for taxation is very greatly in excess of its true value. Whether this be true or not we cannot here inquire. We have so often decided that we cannot review and correct the errors and mistakes of the State tribunals on that subject, that it is only necessary to refer to those decisions without a restatement of the argument on which they rest. State Railroad Tax Cases, 92 U. S. 575; Kennard *v.* Louisiana, Id. 480; Davidson *v.* New Orleans, 96 Id. 97; Kirtland *v.* Hotchkiss, 100 Id. 491; Missouri *v.* Lewis, 101 Id. 22; National Bank *v.* Kimball, 103 Id. 732.

But, passing from the question of the administration of the law of Pennsylvania by her authorities, the argument is, that in the matter already mentioned the law itself is in conflict with the Constitution.

It is not denied that the Legislature could rightfully enlarge the boundary of the city of Pittsburgh so as to include the land. If this power were denied, we are unable to see how such denial could be sustained. What portion of a State shall be within the limits of a city and be governed by its authorities and its laws has always been considered to be a proper subject of legislation. How thickly or how sparsely the territory within a city must be settled is one of the matters within legislative discretion. Whether territory shall be governed for local purposes by a county, a city, or a township organization, is one of the most usual and ordinary subjects of State legislation.

It is urged, however, with much force, that land of this character, which its owner has not laid off into town lots, but insists on using for agricultural purposes, and through which no streets are run or used, cannot be, even by the Legislature, subjected to the taxes of a city, — the water tax, the gas tax, the street tax, and others of similar character. The reason for this is said to be that such taxes are for the benefit of those in a city who own property within the limits of such improvements, and who use or might use them if they chose, while he reaps no such benefit. Cases are cited from the higher courts of Kentucky and Iowa where this principle is asserted, and where those courts have held that farm lands in a city are not subject to the ordinary city taxes.

It is no part of our duty to inquire into the grounds on which those courts have so decided. They are questions which arise between the citizens of those States and their own city authorities, and afford no rule for construing the Constitution of the United States.

We are also referred to the case of Loan Association *v.* Topeka, 20 Wall. 655, which asserts the doctrine that taxation, though sanctioned by State statutes, if it be not for a public use, is an unauthorized taking of private property.

We are unable to see that the taxes levied on this property were not for a public use. Taxes for schools, for the support of the poor, for protection against fire, and for water-works, are the specified taxes found in the list complained of. We think it will not be denied by any one that these are public purposes in which the whole community have an interest, and for which, by common consent, property owners everywhere in this country are taxed.

There are items styled city tax and city buildings, which, in the absence of any explanation, we must suppose to be for the good government of the city, and for the construction of such buildings as are necessary for municipal purposes. Surely these are all public purposes; and the money so to be raised is for public use. No item of the tax assessed against the plaintiff in error is pointed out as intended for any other than a public use.

It may be true that he does not receive the same amount of benefit from some or any of these taxes as do citizens living in the heart of the city. It probably is true, from the evidence found in this record, that his tax bears a very unjust relation to the benefits received as compared with its amount. But who can adjust with precise accuracy the amount which each individual in an organized civil community shall contribute to sustain it, or can insure in this respect absolute equality of burdens, and fairness in their distribution among those who must bear them?

We cannot say judicially that Kelly received no benefit from the city organization. These streets, if they do not penetrate his farm, lead to it. The water-works will probably reach him some day, and may be near enough to him now to serve him on some occasion. The

schools may receive his children, and in this regard he can be in no worse condition than those living in the city who have no children, and yet who pay for the support of the schools. Every man in a county, a town, a city, or a State is deeply interested in the education of the children of the community, because his peace and quiet, his happiness and prosperity, are largely dependent upon the intelligence and moral training which it is the object of public schools to supply to the children of his neighbors and associates, if he has none himself.

The officers whose duty it is to punish and prevent crime are paid out of the taxes. Has he no interest in maintaining them, because he lives further from the court-house and police-station than some others?

Clearly, however, these are matters of detail within the discretion, and therefore the power, of the law-making body within whose jurisdiction the parties live. This court cannot say in such cases, however great the hardship or unequal the burden, that the tax collected for such purposes is taking the property of the taxpayer without due process of law.

These views have heretofore been announced by this court in the cases which have been cited, and in McMillen *v.* Anderson, 95 U. S. 37.

In the case of Davidson *v.* New Orleans, 96 U. S. 97, the whole of this subject was very fully considered, and we think it is decisive of the one before us. *Decree affirmed.*

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## FRENCH *v.* BARBER ASPHALT PAVING COMPANY.

181 U. S. 324; 21 Sup. Ct. Rep. 625. 1901.

[This was a suit in a court of Missouri by the Barber Asphalt paving Co. against owners of lots in Kansas City to enforce the lien on a tax bill issued by that city in part payment of the cost of paving the street on which said lots abutted. In accordance with the provisions of the Kansas City charter the cost of the pavement had been apportioned and charged against the lots fronting thereon according to the frontage of the several lots abutting on the improvement, the charge against each lot being represented by a tax bill, made a lien upon the lot and prima facie evidence of the validity of the charge, such lien to be enforced by suit in a court against the owner of the lot, without liability to personal judgment. The lot owners contended in the trial court that the provisions of the Kansas City charter authorizing the cost of paving to be charged upon abutting property according to the frontage without reference to any benefits to the property on which the charge was made was in violation of the Fourteenth Amendment to the Constitution of the United States. The trial court upheld the

assessment and on appeal the Supreme Court of the State decided that the assessment was in accordance with the laws of Missouri and not in violation of the provisions of the Fourteenth Amendment. The plaintiff in error, one of the lot owners, appealed from this decision contending that the assessment was in violation of "due process of law" guaranteed by the Fourteenth Amendment.]

Mr. Justice Shiras delivered the opinion of the court.

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The question thus raised has been so often and so carefully discussed, both in the decisions of this court and of the State courts, that we do not deem it necessary to again enter upon a consideration of the nature and extent of the taxing power, nor to attempt to discover and define the limitations upon that power that may be found in constitutional principles. It will be sufficient for our present purpose to collate our previous decisions and to apply the conclusions reached therein to the present case.

It may prevent confusion, and relieve from repetition, if we point out that some of our cases arose under the provisions of the Fifth and others under those of the Fourteenth Amendment to the Constitution of the United States. While the language of those amendments is the same, yet as they were engrafted upon the Constitution at different times and in widely different circumstances of our national life, it may be that questions may arise in which different constructions and applications of their provisions may be proper. Slaughter-House Cases, 16 Wall. 36, 77, 80. [**18**]

[After quoting from Davidson *v.* New Orleans, 96 U. S. 97, 103, the opinion continues.]

However, we shall not attempt to define what it is for a State to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, but shall proceed, in the present case, on the assumption that the legal import of the phrase "due process of law," is the same in both Amendments. Certainly, it cannot be supposed that, by the Fourteenth Amendment, it was intended to impose on the States, when exercising their powers of taxation, any more rigid or stricter curb than that imposed on the Federal government, in a similar exercise of power, by the Fifth Amendment.

Let us, then, inquire, as briefly as possible, what has been decided by this court as to the scope and effect of the phrase "due process of law," as applied to legislative power.

[Various other cases relating to the meaning of the term "due process of law" are then cited with quotations from the opinions and the opinion continues.]

In Mattingly *v.* District of Columbia, 97 U. S. 687, 692, there was called in question the validity of the act of Congress of June 19, 1878, 20 Stat. 166, c. 309, entitled "An act to provide for the revi-

sion and correction of assessments for special improvements in the District of Columbia and for other purposes," and it was said by this court, through Mr. Justice Strong: "It may be that the burden laid upon the property of the complainants is onerous. Special assessments for special road or street improvements very often are oppressive. But that the legislative power may authorize them, and may direct them to be made in proportion to the frontage, area, or market value of the adjoining property, at its discretion, is, under the decisions, no longer an open question."

[After a quotation from Kelly *v.* Pittsburg, 104 U. S. 78 [**211**] the opinion continues.]

In Spencer *v.* Merchant, 125 U. S. 345, a judgment of the Court of Appeals of the State of New York, upholding the validity of an assessment upon lands to cover the expense of a local improvement, was brought to this court for review upon the allegation that the State statute was unconstitutional.

[After quoting from the opinion of the New York Court of Appeals the opinion continues.]

This definition of legislative power was approved by this court, and the judgment of the Court of Appeals was affirmed. The following extract is from the opinion of this court:

"In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the State, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either, like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax, and the class of lands which will receive the benefit and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners. When the determination of the lands to be benefited is entrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited. In determining what lands are benefited by the improvement, the legislature may avail itself of such information as it deems sufficient, either through investigations by its committees, or by adopting as its own the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction."

[After citation of other cases the opinion continues.]

In Bauman *v.* Ross, 167 U. S. 548, on appeal from the Court of Appeals of the District of Columbia, it was held that Congress may direct that, when part of a parcel of land is appropriated to the public use for a highway in the District of Columbia, the tribunal vested by law with the duty of assessing the compensation or damages due to the owner, whether for the value of the part taken, or for any injury to the rest, shall take into consideration, by way of lessening the whole or either part of the sum due him, any special and direct benefits, capable of present estimate and reasonable computation, caused by the establishment of the highway to the part not taken; that the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury, but may be entrusted to commissioners appointed by a court, or to an inquest consisting of more or fewer men than an ordinary jury; that Congress, in the exercise of the right of taxation in the District of Columbia, may direct that half of the amount of the compensation or damages awarded to the owners of lands appropriated to the public use for a highway shall be assessed and charged upon the District of Columbia, and the other half upon the lands benefited thereby within the District, in proportion to the benefit; and may commit the ascertainment of the lands to be assessed, and the apportionment of the benefits among them, to the same tribunal which assesses the compensation or damages; that if the legislature in taxing lands benefited by a highway, or other public improvement, makes provision for notice, by publication or otherwise, to each owner of land, and for hearing him, at some state of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, his property is not taken without due process of law.

In the opinion of the court in that case, delivered by Mr. Justice Gray, it was said that the provisions of the statute under consideration, which regulated the assessment of damages, are to be referred, not to the right of eminent domain, but to the right of taxation, and that the legislature, in the exercise of the right of taxation, has the authority to direct the whole or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading, or the repair of a street, to be assessed upon the owners of lands benefited thereby; and that such authority has been repeatedly exercised in the District of Columbia by Congress, with the sanction of this court — citing Willard *v.* Presbury, 14 Wall. 676; Mattingly *v.* District of Columbia, 97 U. S. 687; Shoemaker *v.* United States, 147 U. S. 282, 302. It was also said that the class of lands to be assessed for the purpose may be either determined by the legislature itself, by defining a territorial district, or by other designation; or it may be left by the legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited; that the rule of

apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area, or the market value of the lands, or in proportion to the benefits as estimated by commissioners.

This subject has been recently considered by this court in the case of Parsons v. District of Columbia, 170 U. S. 45, and it was there held, after a review of the authorities, that the enactment by Congress that assessments levied for laying water mains in the District of Columbia should be at the rate of $1.25 per linear foot front against all lots or land abutting on the street, road or alley, in which a water main shall be laid, was constitutional, and was conclusive alike of the necessity of the work and of its benefit as against abutting property.

We do not deem it necessary to extend this opinion by referring to the many cases in the state courts, in which the principles of the foregoing cases have been approved and applied. It will be sufficient to state the conclusions reached, after a review of the state decisions, by two text-writers of high authority for learning and accuracy:

"The major part of the cost of a local work is sometimes collected by general tax, while a smaller portion is levied upon the estates specially benefited.

"The major part is sometimes assessed on estates benefited, while the general public is taxed a smaller portion in consideration of a smaller participation in the benefits.

"The whole cost in other cases is levied on lands in the immediate vicinity of the work.

"In a constitutional point of view, either of these methods is admissible, and one may sometimes be just and another at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever. The question is legislative, and, like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible and arbitrary rule." Cooley on Taxation, 447.

"The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. . . . Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is according to the present weight of authority considered to be a question of legislative expediency." Dillon's Municipal Corporations, vol. 2, § 752, 4th ed.

This array of authority was confronted, in the courts below, with the decision of this court in the case of Norwood v. Baker, 172 U. S.

269, which was claimed to overrule our previous cases, and to establish the principle that the cost of a local improvement cannot be assessed against abutting property according to frontage, unless the law, under which the improvement is made, provides for a preliminary hearing as to the benefits to be derived by the property to be assessed.

But we agree with the Supreme Court of Missouri in its view that such is not the necessary legal import of the decision in Norwood *v.* Baker. That was a case where by a village ordinance, apparently aimed at a single person, a portion of whose property was condemned for a street, the entire cost of opening the street, including not only the full amount paid for the strip condemned, but the costs and expenses of the condemnation proceedings, was thrown upon the abutting property of the person whose land was condemned. This appeared, both to the court below and to a majority of the judges of this court, to be an abuse of the law, an act of confiscation, and not a valid exercise of the taxing power. This court, however, did not affirm the decree of the trial court awarding a perpetual injunction against the making and collection of any special assessments upon Mrs. Baker's property, but said:

"It should be observed that the decree did not relieve the abutting property from liability for such amount as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question. It left the village, in its discretion, to take such steps as were within its power to take, either under existing statutes or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property for so much of the expense of the opening of the street as was found upon due and proper inquiry to be equal to the special benefits accruing to the property. By the decree rendered the court avoided the performance of functions appertaining to an assessing tribunal or body, and left the subject under the control of the local authorities designated by the State."

That this decision did not go the extent claimed by the plaintiff in error in this case is evident, because in the opinion of the majority it is expressly said that the decision was not inconsistent with our decisions in Parsons *v.* District of Columbia, 170 U. S. 45, 56, and in Spencer *v.* Merchant, 125 U. S. 345, 357.

It may be conceded that courts of equity are always open to afford a remedy where there is an attempt, under the guise of legal proceedings, to deprive a person of his life, liberty, or property, without due process of law. And such, in the opinion of a majority of the judges of this court, was the nature and effect of the proceedings in the case of Norwood *v.* Baker.

But there is no such a state of facts in the present case. Those facts are thus stated by the court of Missouri.

"The work done consisted of paving with asphaltum the roadway

of Forest avenue in Kansas City, thirty-six feet in width, from Independence avenue to Twelfth street, a distance of one half a mile. Forest avenue is one of the oldest and best improved residence streets in the city, and all of the lots abutting thereon front the street and extend back therefrom uniformly to the depth of an ordinary city lot to an alley. The lots are all improved and used for residence purposes, and all of the lots are substantially on the grade of the street as improved, and are similarly situated with respect to the asphalt pavement. The structure of the pavement along its entire extent is uniform in distance and quality. There is no showing that there is any difference in the value of any of the lots abutting on the improvement."

What was complained of was an orderly procedure under a scheme of local improvements prescribed by the legislature and approved by the courts of the State as consistent with constitutional principles.

The judgment of the Supreme Court of Missouri is *Affirmed*.[1]

[1] MR. JUSTICE HARLAN (with whom concurred MR. JUSTICE WHITE and MR. JUSTICE MCKENNA) dissenting, stated his conclusion as follows:

"I do not doubt — indeed, the opinion in *Norwood* v. *Baker* concedes — that the legislature has a wide discretion in cases of special assessments to meet the cost of improving or opening public highways. But I deny that the owner of abutting property can be precluded from showing that the amount assessed upon him is in substantial excess of special benefits accruing to his property. To the extent of such excess the burden should be borne by the community for whose benefit the improvement is made. I entirely concur in the views of Church, C. J., as expressed in *Guest* v. *Brooklyn*, 69 N. Y. 506. He said: 'The right to make a public street is based upon public necessity, and the public should pay for it. To force an expensive improvement [against the consent of the owners, or a majority of them] upon a few property owners against their consent, and compel them to pay the entire expense, under the delusive pretense of a corresponding specific benefit conferred upon their property, is a species of despotism that ought not to be perpetuated under a government which claims to protect property equally with life and liberty. Besides its manifest injustice, it deprives the citizen practically of the principal protection [aside from constitutional restraints] against unjust taxation, viz., the responsibility of the representative for his acts to his constituents. As respects general taxation where all are equally affected, this operates, but it has no beneficial application in preventing local taxation for public improvements. The majority are never backward in consenting to, or even demanding, improvements which they may enjoy without expense to themselves.' 2 Dillon's Mun. Corp. 934, 4th ed. note 1.

"In my opinion the judgment in the present case should be reversed upon the ground that the assessment in question was made under a statutory *rule* excluding all inquiry as to special benefits and requiring the property abutting on the avenue in question to meet the entire cost of paving it, even if such cost was in substantial excess of the special benefits accruing to it; leaving Kansas City to obtain authority to make a new assessment upon the abutting property for so much of the cost of paving as may be found upon due inquiry to be not in excess of the special benefits accruing to such property. Any other judgment will, I think, involve a grave departure from the principles that protect private property against arbitrary legislative power exerted under the guise of taxation."

## VEAZIE BANK *v.* FENNO.

8 Wallace, 533. 1869.

[This suit was brought in the United States Circuit Court for Maine by the Bank, a corporation chartered by the State of Maine, against defendant as United States Internal Revenue Collector, to recover a sum of money paid by the Bank under protest as a tax on its circulation under the provisions of act of Congress of July 13, 1866, § 9, 14 Stat. 146. The judges of the Circuit Court certified a division of opinion as to the constitutionality of the provision.]

Mr. Chief Justice Chase delivered the opinion of the court.

[The portions of the opinion in which it is decided that the provision was not unconstitutional as a direct tax, nor as a Federal tax on a State franchise, are omitted.]

It cannot be doubted that under the Constitution the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit. It is not important here to decide whether the quality of legal tender, in payment of debts, can be constitutionally imparted to these bills; it is enough to say that there can be no question of the power of the government to emit them; to make them receivable in payment of debts to itself; to fit them for use by those who see fit to use them in all the transactions of commerce; to provide for their redemption; to make them a currency, uniform in value and description, and convenient and useful for circulation. These powers, until recently, were only partially and occasionally exercised. Lately, however, they have been called into full activity, and Congress has undertaken to supply a currency for the entire country.

The methods adopted for the supply of this currency were briefly explained in the first part of this opinion. It now consists of coin, of United States notes, and of the notes of the national banks. Both descriptions of notes may be properly described as bills of credit, for both are furnished by the government; both are issued on the credit of the government; and the government is responsible for the redemption of both; primarily as to the first description, and immediately upon default of the bank, as to the second. When these bills shall be made convertible into coin, at the will of the holder, this currency will perhaps satisfy the wants of the community, in respect to a circulating medium, as perfectly as any mixed currency that can be devised.

Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has

denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile.

Viewed in this light, as well as in the other light of a duty on contracts or property, we cannot doubt the constitutionality of the tax under consideration.[1]

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## e. *Direct Taxes.*

## POLLOCK *v.* FARMERS' LOAN AND TRUST COMPANY.

157 United States, 429; and 158 United States, 601. 1895.

[This suit was brought in the Circuit Court of the United States for the Southern District of New York by Pollock and others as stockholders in defendant company, and in behalf of all the stockholders, to restrain that company from paying to the United States a tax on its income according to the provisions of secs. 27 to 37 of act of Congress of Aug. 15, 1894, relating to the collection of an income tax. It was alleged that the income of the company was derived from real estate, bonds and stocks of corporations, and municipal bonds. On demurrer to plaintiff's bill the question was argued whether the statutory provisions in question were unconstitutional in view of the third clause of sec. 2 and the fourth clause of sec. 9 of art. 1 of the Constitution relating to the levy and apportionment of direct taxes by Congress. The demurrer was sustained and the bill dismissed, whereupon complainant appealed to this court, and it was held by a majority of the judges that the statute was unconstitutional so far as it levied a tax on the rents or income of real estate. On other questions involved the judges who heard the argument were equally divided in opinion (157 U. S. 429). A rehearing was subsequently granted by the court and the following opinion was delivered (158 U. S. 601).]

Mr. Chief Justice Fuller delivered the opinion of the court.

Whenever this court is required to pass upon the validity of an act of Congress as tested by the fundamental law enacted by the people, the duty imposed demands in its discharge the utmost deliberation and care, and invokes the deepest sense of responsi-

[1] Mr. Justice Nelson delivered a dissenting opinion, in which Mr. Justice Davis concurred.

bility. And this is especially so when the question involves the exercise of a great governmental power, and brings into consideration, as vitally affected by the decision, that complex system of government, so sagaciously framed to secure and perpetuate "an indestructible Union, composed of indestructible States."

We have, therefore, with an anxious desire to omit nothing which might in any degree tend to elucidate the questions submitted, and aided by further able arguments embodying the fruits of elaborate research, carefully reëxamined these cases, with the result that, while our former conclusions remain unchanged, their scope must be enlarged by the acceptance of their logical consequences.

The very nature of the Constitution, as observed by Chief Justice Marshall, in one of his greatest judgments, "requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." "In considering this question, then, we must never forget, that it is *a Constitution* that we are expounding." McCulloch *v.* Maryland, 4 Wheat. 316, 407.

As heretofore stated, the Constitution divided Federal taxation into two great classes, the class of direct taxes, and the class of duties, imposts, and excises; and prescribed two rules which qualified the grant of power as to each class.

The power to lay direct taxes apportioned among the several States in proportion to their representation in the popular branch of Congress, a representation based on population as ascertained by the census, was plenary and absolute; but to lay direct taxes without apportionment was forbidden. The power to lay duties, imposts, and excises was subject to the qualification that the imposition must be uniform throughout the United States.

Our previous decision was confined to the consideration of the validity of the tax on the income from real estate, and on the income from municipal bonds. The question thus limited was whether such taxation was direct or not, in the meaning of the Constitution; and the court went no farther, as to the tax on the income from real estate, than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct; while as to the income from municipal bonds, that could not be taxed because of want of power to tax the source, and no reference was made to the nature of the tax as being direct or indirect.

We are now permitted to broaden the field of inquiry, and to determine to which of the two great classes a tax upon a person's entire income, whether derived from rents, or products, or otherwise, of real estate, or from bonds, stocks, or other forms of personal property, belongs; and we are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property, in the manner prescribed, is so different from a tax upon the

property itself, that it is not a direct, but an indirect tax, in the meaning of the Constitution.

The words of the Constitution are to be taken in their obvious sense, and to have a reasonable construction. In Gibbons *v.* Ogden, Mr. Chief Justice Marshall, with his usual felicity, said: "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." 9 Wheat. 1, 188. And in Rhode Island *v.* Massachusetts, where the question was whether a controversy between two States over the boundary between them was within the grant of judicial power, Mr. Justice Baldwin, speaking for the court, observed: "The solution of this question must necessarily depend on the words of the Constitution; the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions of the people of and in the several States; together with a reference to such sources of judicial information as are resorted to by all courts in construing statutes, and to which this court has always resorted in construing the Constitution." 12 Pet. 657, 721.

We know of no reason for holding otherwise than that the words "direct taxes," on the one hand, and "duties, imposts and excises," on the other, were used in the Constitution in their natural and obvious sense. Nor, in arriving at what those terms embrace, do we perceive any ground for enlarging them beyond, or narrowing them within, their natural and obvious import at the time the Constitution was framed and ratified.

And, passing from the text, we regard the conclusion reached as inevitable, when the circumstances which surrounded the convention and controlled its action and the views of those who framed and those who adopted the Constitution are considered.

We do not care to retravel ground already traversed; but some observations may be added.

In the light of the struggle in the convention as to whether or not the new Nation should be empowered to levy taxes directly on the individual until after the States had failed to respond to requisitions — a struggle which did not terminate until the amendment to that effect, proposed by Massachusetts and concurred in by South Carolina, New Hampshire, New York, and Rhode Island, had been rejected — it would seem beyond reasonable question that direct taxation, taking the place as it did of requisitions, was purposely restrained to apportionment according to representation, in order that the former system as to ratio might be retained, while the mode of collection was changed.

This is forcibly illustrated by a letter of Mr. Madison of January

29, 1789, recently published (by Mr. Worthington C. Ford in The Nation, April 25, 1895; republished in 51 Albany Law Journal, 292), written after the ratification of the Constitution, but before the organization of the government and the submission of the proposed amendment to Cougress, which, while opposing the amendment as calculated to impair the power, only to be exercised in extraordinary emergencies, assigns adequate ground for its rejection as substantially unnecessary, since, he says, "every State which chooses to collect its own quota may always prevent a Federal collection, by keeping a little beforehand in its finances, and making its payment at once into the Federal treasury."

The reasons for the clauses of the Constitution in respect of direct taxation are not far to seek. The States, respectively, possessed plenary powers of taxation. They could tax the property of their citizens in such manner and to such extent as they saw fit; they had unrestricted powers to impose duties or imposts on imports from abroad, and excises on manufactures, consumable commodities, or otherwise. They gave up the great sources of revenue derived from commerce; they retained the concurrent power of levying excises, and duties if covering anything other than excises; but in respect of them the range of taxation was narrowed by the power granted over interstate commerce, and by the danger of being put at disadvantage in dealing with excises on manufactures. They retained the power of direct taxation, and to that they looked as their chief resource; but even in respect of that, they granted the concurrent power, and if the tax were placed by both governments on the same subject, the claim of the United States had preference. Therefore, they did not grant the power of direct taxation without regard to their own condition and resources as States; but they granted the power of apportioned direct taxation, a power just as efficacious to serve the needs of the general government, but securing to the States the opportunity to pay the amount apportioned, and to recoup from their own citizens in the most feasible way, and in harmony with their systems of local self-government. If, in the changes of wealth and population in particular States, apportionment produced inequality, it was an inequality stipulated for, just as the equal representation of the States, however small, in the Senate, was stipulated for. The Constitution ordains affirmatively that each State shall have two members of that body, and negatively that no State shall by amendment be deprived of its equal suffrage in the Senate without its consent. The Constitution ordains affirmatively that representatives and direct taxes shall be apportioned among the several States according to numbers, and negatively that no direct tax shall be laid unless in proportion to the enumeration.

The founders anticipated that the expenditures of the States, their counties, cities, and towns, would chiefly be met by direct taxation on accumulated property, while they expected that those

of the Federal government would be for the most part met by indirect taxes. And in order that the power of direct taxation by the general government should not be exercised, except on necessity; and, when the necessity arose, should be so exercised as to leave the States at liberty to discharge their respective obligations, and should not be so exercised, unfairly and discriminatingly, as to particular States or otherwise, by a mere majority vote, possibly of those whose constituents were intentionally not subjected to any part of the burden, the qualified grant was made. Those who made it knew that the power to tax involved the power to destroy, and that, in the language of Chief Justice Marshall, in McCulloch *v.* Maryland, "the only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation." 4 Wheat. 428. And they retained this security by providing that direct taxation and representation in the lower house of Congress should be adjusted on the same measure.

Moreover, whatever the reasons for the constitutional provisions, there they are, and they appear to us to speak in plain language.

It is said that a tax on the whole income of property is not a direct tax in the meaning of the Constitution, but a duty, and, as a duty, leviable without apportionment, whether direct or indirect. We do not think so. Direct taxation was not restricted in one breath, and the restriction blown to the winds in another.

Cooley (On Taxation, p. 3) says that the word "*duty*" ordinarily "means an indirect tax imposed on the importation, exportation or consumption of goods;" having "a broader meaning than *custom*, which is a duty imposed on imports or exports;" that "the term *impost* also signifies any tax, tribute or duty, but it is seldom applied to any but the indirect taxes. An *excise* duty is an inland impost, levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades or to deal in certain commodities."

In the Constitution, the words "duties, imposts and excises" are put in antithesis to direct taxes. Gouverneur Morris recognized this in his remarks in modifying his celebrated motion, as did Wilson in approving of the motion as modified. 5 Ell. Deb. (Madison Papers) 302. And Mr. Justice Story, in his Commentaries on the Constitution, (§ 952,) expresses the view that it is not unreasonable to presume that the word "duties" was used as equivalent to "customs" or "imposts" by the framers of the Constitution, since in other clauses it was provided that "No tax or duty shall be laid on articles exported from any State," and that "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws;" and he refers to a letter of Mr. Madison to Mr. Cabell, of September 18, 1828, to that effect. 3 Madison's Writings, 636.

In this connection it may be useful, though at the risk of repetition, to refer to the views of Hamilton and Madison as thrown into relief in the pages of the Federalist, and in respect of the enactment of the carriage tax act, and again to briefly consider the Hylton case, 3 Dall. 171, so much dwelt on in argument.

The act of June 5, 1794, c. 45, 1 Stat. 373, laying duties upon carriages for the conveyance of persons, was enacted in a time of threatened war. Bills were then pending in Congress to increase the military force of the United States, and to authorize increased taxation in various directions. It was, therefore, as much a part of a system of taxation in war times, as was the income tax of the war of the Rebellion. The bill passed the House on the twenty-ninth of May, apparently after a very short debate. Mr. Madison and Mr. Ames are the only speakers on that day reported in the Annals. "Mr. Madison objected to this tax on carriages as an unconstitutional tax; and, as an unconstitutional measure, he would vote against it." Mr. Ames said: "It was not to be wondered at if he, coming from so different a part of the country, should have a different idea of this tax from the gentleman who spoke last. In Massachusetts, this tax had been long known; and there it was called an excise. It was difficult to define whether a tax is direct or not. He had satisfied himself that this was not so."

On the first of June, 1794, Mr. Madison wrote to Mr. Jefferson: "The carriage tax, which only struck at the Constitution, has passed the House of Representatives." 3 Madison's Writings, 18. The bill then went to the Senate, where, on the third day of June, it "was considered and adopted," and on the following day it received the signature of President Washington. On the same third day of June the Senate considered "an act laying certain duties upon snuff and refined sugar;" "an act making further provisions for securing and collecting the duties on foreign and domestic distilled spirits, stills, wines, and teas;" "an act for the more effectual protection of the Southwestern frontier;" "an act laying additional duties on goods, wares, and merchandise, etc.;" "an act laying duties on licenses for selling wines and foreign distilled spirituous liquors by retail;" and "an act laying duties on property sold at auction."

It appears then that Mr. Madison regarded the carriage tax bill as unconstitutional, and accordingly gave his vote against it, although it was to a large extent, if not altogether, a war measure.

Where did Mr. Hamilton stand? At that time he was Secretary of the Treasury, and it may therefore be assumed, without proof, that he favored the legislation. But upon what ground? He must, of course, have come to the conclusion that it was not a direct tax. Did he agree with Fisher Ames, his personal and political friend, that the tax was an excise? The evidence is overwhelming that he did.

In the thirtieth number of the Federalist, after depicting the helpless and hopeless condition of the country growing out of the inability of the confederation to obtain from the States the moneys assigned to its expenses, he says: "The more intelligent adversaries of the new Constitution admit the force of this reasoning; but they qualify their admission, by a distinction between what they call *internal* and *external* taxations. The former they would reserve to the State governments; the latter, which they explain into commercial imposts, or rather duties on imported articles, they declare themselves willing to concede to the Federal head." In the thirty-sixth number, while still adopting the division of his opponents, he says: "The taxes intended to be comprised under the general denomination of internal taxes, may be subdivided into those of the *direct* and those of the *indirect* kind. . . . As to the latter, *by which must be understood duties and excises on articles of consumption*, one is at a loss to conceive, what can be the nature of the difficulties apprehended." Thus we find Mr. Hamilton, while writing to induce the adoption of the Constitution, *first*, dividing the power of taxation into *external* and *internal*, putting into the former the power of imposing duties on imported articles and into the latter all remaining powers; and, *second*, dividing the latter into *direct* and *indirect*, putting into the latter, duties and excises on articles of consumption.

It seems to us to inevitably follow that in Mr. Hamilton's judgment at that time all internal taxes, except duties and excises on articles of consumption, fell into the category of direct taxes.

Did he, in supporting the carriage tax bill, change his views in this respect? His argument in the Hylton case in support of the law enables us to answer this question. It was not reported by Dallas, but was published in 1851 by his son in the edition of all Hamilton's writings except the Federalist. After saying that we shall seek in vain for any legal meaning of the respective terms "direct and indirect taxes," and after forcibly stating the impossibility of collecting the tax if it is to be considered as a direct tax, he says, doubtingly: "The following are presumed to be the only direct taxes. Capitation or poll taxes. Taxes on lands and buildings. General assessments, whether on the whole property of individuals, or on their whole real or personal estate; all else must of necessity be considered as indirect taxes." "*Duties, imposts and excises* appear to be contradistinguished from *taxes*." "If the meaning of the word *excise* is to be sought in the British statutes, it will be found to include the duty on carriages, which is there considered as an *excise*." "Where so important a distinction in the Constitution is to be realized, it is fair to seek the meaning of terms in the statutory language of that country from which our jurisprudence is derived." 7 Hamilton's Works, 848. Mr. Hamilton therefore clearly supported the law which Mr. Madison opposed, for the same

reason that his friend Fisher Ames did, because it was an excise, and as such was specifically comprehended by the Constitution. Any loose expressions in definition of the word "direct," so far as conflicting with his well-considered views in the Federalist, must be regarded as the liberty which the advocate usually thinks himself entitled to take with his subject. He gives, however, it appears to us, a definition which covers the question before us. A tax upon one's whole income is a tax upon the annual receipts from his whole property, and as such falls within the same class as a tax upon that property, and is a direct tax, in the meaning of the Constitution. And Mr. Hamilton in his report on the public credit, in referring to contracts with citizens of a foreign country, said: "This principle, which seems critically correct, would exempt as well the income as the capital of the property. It protects the use, as effectually as the thing. What, in fact, is property, but a fiction, without the beneficial use of it? In many cases, indeed, the *income* or *annuity* is the property itself." 3 Hamilton's Works, 34.

We think there is nothing in the Hylton case [3 Dall. 171] in conflict with the foregoing. The case is badly reported. The report does not give the names of both the judges before whom the case was argued in the Circuit Court. The record of that court shows that Mr. Justice Wilson was one and District Judge Griffin of Virginia was the other. Judge Tucker in his appendix to the edition of Blackstone published in 1803, (Tucker's Blackstone, vol. 1, part 1, p. 294,) says: "The question was tried in this State, in the case of United States *v.* Hylton, and the court being divided in opinion, was carried to the Supreme Court of the United States by consent. It was there argued by the proposer of it, (the first Secretary of the Treasury,) on behalf of the United States, and by the present Chief Justice of the United States, on behalf of the defendant. Each of those gentlemen was supposed to have defended his own private opinion. That of the Secretary of the Treasury prevailed, and the tax was afterwards submitted to, universally, in Virginia."

We are not informed whether Mr. Marshall participated in the two days' hearing at Richmond, and there is nothing of record to indicate that he appeared in the case in this court; but it is quite probable that Judge Tucker was aware of the opinion which he entertained in regard to the matter.

Mr. Hamilton's argument is left out of the report, and in place of it it is said that the argument turned entirely upon the point whether the tax was a direct tax, while his brief shows that, so far as he was concerned, it turned upon the point whether it was an excise, and therefore not a direct tax.

Mr. Justice Chase thought that the tax was a tax on expense, because a carriage was a consumable commodity, and in that view the tax on it was on the expense of the owner. He expressly declined

to give an opinion as to what were the direct taxes contemplated by the Constitution. Mr. Justice Paterson said: "All taxes on expenses or consumption are indirect taxes; a tax on carriages is of this kind." He quoted copiously from Adam Smith in support of his conclusions, although it is now asserted that the justices made small account of that writer. Mr. Justice Iredell said: "There is no necessity, or propriety, in determining what is or is not, a direct, or indirect, tax, in all cases. It is sufficient, on the present occasion, for the court to be satisfied, that this is not a direct tax contemplated by the Constitution."

What was decided in the Hylton case was, then, that a tax on carriages was an excise, and, therefore, an indirect tax. The contention of Mr. Madison in the House was only so far disturbed by it, that the court classified it where he himself would have held it constitutional, and he subsequently as President approved a similar act. 3 Stat. 40. The contention of Mr. Hamilton in the Federalist was not disturbed by it in the least. In our judgment, the construction given to the Constitution by the authors of the Federalist (the five numbers contributed by Chief Justice Jay related to the danger from foreign force and influence, and to the treaty-making power) should not and cannot be disregarded.

The Constitution prohibits any direct tax, unless in proportion to numbers as ascertained by the census; and, in the light of the circumstances to which we have referred, is it not an evasion of that prohibition to hold that a general unapportioned tax, imposed upon all property owners as a body for or in respect of their property, is not direct, in the meaning of the Constitution, because confined to the income therefrom?

Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the Constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds?

There can be but one answer unless the constitutional restriction is to be treated as utterly illusory and futile, and the object of its framers defeated. We find it impossible to hold that a fundamental requisition, deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to property, and the property itself.

Nor can we perceive any ground why the same reasoning does not apply to capital in personalty held for the purpose of income or ordinarily yielding income, and to the income therefrom. All the

real estate of the country, and all its invested personal property, are open to the direct operation of the taxing power if an apportionment be made according to the Constitution. The Constitution does not say that no direct tax shall be laid by apportionment on any other property than land; on the contrary, it forbids all unapportioned direct taxes; and we know of no warrant for excepting personal property from the exercise of the power, or any reason why an apportioned direct tax cannot be laid and assessed, as Mr. Gallatin said in his report when Secretary of the Treasury in 1812, "upon the same objects of taxation on which the direct taxes levied under the authority of the State are laid and assessed."

Personal property of some kind is of general distribution; and so are incomes, though the taxable range thereof might be narrowed through large exemptions.

The Congress of the Confederation found the limitation of the sources of the contributions of the States to "land, and the buildings and improvements thereon," by the eighth article of July 9, 1778, so objectionable that the article was amended April 28, 1783, so that the taxation should be apportioned in proportion to the whole number of white and other free citizens and inhabitants, including those bound to servitude for a term of years and three-fifths of all other persons, except Indians not paying taxes; and Madison, Ellsworth, and Hamilton in their address, in sending the amendment to the States, said: "This rule, although not free from objections, is liable to fewer than any other that could be devised." 1 Ell. Deb. 93, 95, 98.

Nor are we impressed with the contention that, because in the four instances in which the power of direct taxation has been exercised, Congress did not see fit, for reasons of expediency, to levy a tax upon personalty, this amounts to such a practical construction of the Constitution that the power did not exist, that we must regard ourselves bound by it. We should regret to be compelled to hold the powers of the general government thus restricted, and certainly cannot accede to the idea that the Constitution has become weakened by a particular course of inaction under it.

The stress of the argument is thrown, however, on the assertion that an income tax is not a property tax at all; that it is not a real estate tax, or a crop tax, or a bond tax; that it is an assessment upon the taxpayer on account of his money-spending power as shown by his revenue for the year preceding the assessment; that rents received, crops harvested, interest collected, have lost all connection with their origin, and although once not taxable have become transmuted in their new form into taxable subject-matter; in other words, that income is taxable irrespective of the source from whence it is derived.

This was the view entertained by Mr. Pitt, as expressed in his celebrated speech on introducing his income tax law of 1799, and he

did not hesitate to carry it to its logical conclusion. The English loan acts provided that the public dividends should be paid "free of all taxes and charges whatsoever;" but Mr. Pitt successfully contended that the dividends for the purposes of the income tax were to be considered simply in relation to the recipient as so much income, and that the fund holder had no reason to complain. And this, said Mr. Gladstone, fifty-five years after, was the rational construction of the pledge. Financial Statements, 32.

The dissenting justices proceeded in effect upon this ground in Weston *v.* Charleston, 2 Pet. 449, but the court rejected it. That was a State tax, it is true; but the States have power to lay income taxes, and if the source is not open to inquiry, constitutional safeguards might be easily eluded.

We have unanimously held in this case that, so far as this law operates on the receipts from municipal bonds, it cannot be sustained, because it is a tax on the power of the States, and on their instrumentalities to borrow money, and consequently repugnant to the Constitution. But if, as contended, the interest when received has become merely money in the recipient's pocket, and taxable as such without reference to the source from which it came, the question is immaterial whether it could have been originally taxed at all or not. This was admitted by the Attorney General with characteristic candor; and it follows that, if the revenue derived from municipal bonds cannot be taxed because the source cannot be, the same rule applies to revenue from any other source not subject to the tax; and the lack of power to levy any but an apportioned tax on real and personal property equally exists as to the revenue therefrom.

Admitting that this act taxes the income of property irrespective of its source, still we cannot doubt that such a tax is necessarily a direct tax in the meaning of the Constitution.

. . . . . .

We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such.

Being of opinion that so much of the sections of this law as lays a tax on income from real and personal property is invalid, we are brought to the question of the effect of that conclusion upon these sections as a whole.

It is elementary that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected. And in the case before us there is no question as to the validity of this act, except sections twenty-seven to thirty-seven, inclusive, which relate to the

subject which has been under discussion; and as to them we think the rule laid down by Chief Justice Shaw in Warren *v.* Charlestown, 2 Gray, 84, is applicable, that if the different parts "are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them." Or, as the point is put by Mr. Justice Matthews in Poindexter *v.* Greenhow, 114 U. S. 270, 304: "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute, for the law intended by the legislature, one they may never have been willing by itself to enact." And again, as stated by the same eminent judge in Spraigue *v.* Thompson, 118 U. S. 90, 95, where it was urged that certain illegal exceptions in a section of a statute might be disregarded, but that the rest could stand: "The insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions."

According to the census, the true valuation of real and personal property in the United States in 1890 was $65,037,091,197, of which real estate with improvements thereon made up $39,544,544,333. Of course, from the latter must be deducted, in applying these sections, all unproductive property and all property whose net yield does not exceed four thousand dollars; but, even with such deductions, it is evident that the income from realty formed a vital part of the scheme for taxation embodied therein. If that be stricken out, and also the income from all invested personal property, bonds, stocks, investments of all kinds, it is obvious that by far the largest part of the anticipated revenue would be eliminated, and this would leave the burden of the tax to be borne by professions, trades, employments, or vocations; and in that way what was intended as a tax on capital would remain in substance a tax on occupations and labor. We cannot believe that such was the intention of Congress. We do not mean to say that an act laying by apportionment a direct tax on all real estate and personal property, or the income thereof,

might not also lay excise taxes on business, privileges, employments, and vocations. But this is not such an act; and the scheme must be considered as a whole. Being invalid as to the greater part, and falling, as the tax would, if any part were held valid, in a direction which could not have been contemplated except in connection with the taxation considered as an entirety, we are constrained to conclude that sections twenty-seven to thirty-seven, inclusive, of the act, which became a law without the signature of the President on August 28, 1894, are wholly inoperative and void.

Our conclusions may, therefore, be summed up as follows:

*First.* We adhere to the opinion already announced, that, taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes.

*Second.* We are of opinion that taxes on personal property, or on the income of personal property, are likewise direct taxes.

*Third.* The tax imposed by sections twenty-seven to thirty-seven, inclusive, of the act of 1894, so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation, all those sections, constituting one entire scheme of taxation, are necessarily invalid.

*The decrees hereinbefore entered in this court will be vacated; the decrees below will be reversed, and the cases remanded, with instructions to grant the relief prayed.*[1]

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## Section II. — Regulation of Commerce.

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### a. *Extent of Federal Power.*

### GIBBONS *v.* OGDEN.

9 Wheaton, 1; 6 Curtis, 1. 1824.

Error to the court for the trial of impeachments and correction of errors of the State of New York. 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 exclusive navigation of all the waters within the jurisdiction of that

[1] Dissenting opinions were delivered by Mr. Justice Harlan, Mr. Justice Brown, Mr. Justice Jackson, and Mr. Justice White.

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 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. 8 (1 Stats. at Large, 305), 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 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 writ of error.

MARSHALL, C. J., 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 —

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

2. 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 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 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 of 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 objects 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 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 connection 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 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 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 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 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 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 commence "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 com-

merce 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 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 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 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 rely 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.

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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 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. . . .

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, 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.

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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 endeavor to prove that which is already clear, is imputable to 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, ex-

plain 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.[1]

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## HENDERSON *v.* MAYOR OF THE CITY OF NEW YORK.

92 United States, 259. 1875.

[APPEALS from decisions of Federal courts, one in New York and one in Louisiana, involving the validity of State immigration laws. The provisions of the statutes in question are sufficiently stated in the opinion.]

MR. JUSTICE MILLER delivered the opinion of the court.

In the case of the City of New York *v.* Miln, reported in 11 Pet. 103, the question of the constitutionality of a statute of the State concerning passengers in vessels coming to the port of New York was considered by this court. It was an act passed Feb. 11, 1824, consisting of several sections. The first section, the only one passed upon by the court, required the master of every ship or vessel arriving in the port of New York from any country out of the United States, or from any other State of the United States, to make report in writing, and on oath, within twenty-four hours after his arrival, to the mayor of the city, of the name, place of birth, last legal settlement, age, and occupation of every person brought as a passenger from any country out of the United States, or from any of the United States into the port of New York, or into any of the United States, and of all persons landed from the ship, or put on board, or suffered to go on board, any other vessel during the voyage, with intent of proceeding to the city of New York. A penalty was prescribed of seventy-five dollars for each passenger not so reported, and for every person whose name, place of birth, last legal settlement, age, and occupation should be falsely reported.

The other sections required him to give bond, on the demand of the mayor, to save harmless the city from all expense of support and maintenance of such passenger, or to return any passenger, deemed liable to become a charge, to his last place of settlement; and re-

[1] MR. JUSTICE JOHNSON delivered a concurring opinion.

quired each passenger, not a citizen of the United States, to make report of himself to the mayor, stating his age, occupation, the name of the vessel in which he arrived, the place where he landed, and name of the commander of the vessel. We gather from the report of the case that the defendant, Miln, was sued for the penalties claimed for refusing to make the report required in the first section. A division of opinion was certified by the judges of the Circuit Court on the question, whether the act assumes to regulate commerce between the port of New York and foreign ports, and is unconstitutional and void.

This Court, expressly limiting its decision to the first section of the act, held that it fell within the police powers of the States, and was not in conflict with the Federal Constitution.

From this decision Mr. Justice Story dissented, and in his opinion stated that Chief Justice Marshall, who had died between the first and the second argument of the case, fully concurred with him in the view that the statute of New York was void, because it was a regulation of commerce forbidden to the States.

In the Passenger Cases, reported in 7 How. 283, the branch of the statute not passed upon in the preceding case came under consideration in this court. It was not the same statute, but was a law relating to the marine hospital of Staten Island. It authorized the health commissioner to demand, and, if not paid, to sue for and recover, from the master of every vessel arriving in the port of New York from a foreign port one dollar and fifty cents for each cabin passenger, and one dollar for each steerage passenger, mate, sailor, or mariner, and from the master of each coasting vessel twenty-five cents for each person on board. These moneys were to be appropriated to the use of the hospital.

The defendant, Smith, who was sued for the sum of $295 for refusing to pay for 295 steerage passengers on board the British ship "Henry Bliss," of which he was master, demurred to the declaration on the ground that the act was contrary to the Constitution of the United States, and void. From a judgment against him, affirmed in the Court of Errors of the State of New York, he sued out a writ of error, on which the question was brought to this court.

It was here held, at the January Term, 1849, that the statute was "repugnant to the Constitution and laws of the United States, and therefore void." 7 How. 572.

Immediately after this decision, the State of New York modified her statute on that subject, with a view, no doubt, to avoid the constitutional objection; and amendments and alterations have continued to be made up to the present time.

As the law now stands, the master or owner of every vessel landing passengers from a foreign port is bound to make a report similar to the one recited in the statute held to be valid in the case of New York *v.* Miln; and on this report the mayor is to indorse a demand

upon the master or owner that he give a bond for every passenger landed in the city, in the penal sum of $300, conditioned to indemnify the Commissioners of Emigration, and every county, city, and town in the State, against any expense for the relief or support of the person named in the bond for four years thereafter; but the owner or consignee may commute for such bond, and be released from giving it, by paying, within twenty-four hours after the landing of the passengers, the sum of one dollar and fifty cents for each one of them. If neither the bond be given nor the sum paid within the twenty-four hours, a penalty of $500 for each pauper is incurred, which is made a lien on the vessel, collectible by attachment at the suit of the Commissioner of Emigration.

Conceding the authority of the Passenger Cases which will be more fully considered hereafter, it is argued that the change in the statute now relied upon requiring primarily a bond for each passenger landed, as an indemnity against his becoming a future charge to the State or county, leaving it optional with the ship-owner to avoid this by paying a fixed sum for each passenger, takes it out of the principle of the case of Smith *v.* Turner, — the Passenger Case from New York. It is said that the statute in that case was a direct tax on the passenger, since the act authorized the shipmaster to collect it of him, and that on that ground alone was it held void; while in the present case the requirement of the bond is but a suitable regulation under the power of the State to protect its cities and towns from the expense of supporting persons who are paupers or diseased, or helpless women and children, coming from foreign countries.

In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore, and landed at the port of New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the Passenger Cases.

To require a heavy and almost impossible condition to the exercise of this right, with the alternative of payment of a small sum of money, is, in effect, to demand payment of that sum. To suppose that a vessel, which once a month lands from three hundred to one thousand passengers, or from three thousand to twelve thousand per annum, will give that many bonds of $300 with good sureties, with a covenant for four years, against accident, disease, or poverty of the passenger named in such bond, is absurd, when this can be avoided by the payment of one dollar and fifty cents collected of the passenger before he embarks on the vessel.

Such bonds would amount in many instances, for every voyage, to more than the value of the vessel. The liability on the bond

would be, through a long lapse of time, contingent on circumstances which the bondsman could neither foresee nor control. The cost of preparing the bond and approving sureties, with the trouble incident to it in each case, is greater than the sum required to be paid as commutation. It is inevitable, under such a law, that the money would be paid for each passenger, or the statute resisted or evaded. It is a law in its purpose and effect imposing a tax on the owner of the vessel for the privilege of landing in New York passengers transported from foreign countries.

It is said that the purpose of the act is to protect the State against the consequences of the flood of pauperism immigrating from Europe, and first landing in that city.

But it is a strange mode of doing this to tax every passenger alike who comes from abroad. The man who brings with him important additions to the wealth of the country, and the man who is perfectly free from disease, and brings to aid the industry of the country a stout heart and a strong arm, are as much the subject of the tax as the diseased pauper who may become the object of the charity of the city the day after he lands from the vessel.

No just rule can make the citizen of France landing from an English vessel on our shore liable for the support of an English or Irish pauper who lands at the same time from the same vessel.

So far as the authority of the cases of New York *v.* Miln and Passenger Cases can be received as conclusive, they decide that the requirement of a catalogue of passengers, with statements of their last residence, and other matters of that character, is a proper exercise of State authority and that the requirement of the bond, or the alternative payment of money for each passenger, is void, because forbidden by the Constitution and laws of the United States. But the Passenger Cases (so called because a similar statute of the State of Massachusetts was the subject of consideration at the same term with that of New York) were decided by a bare majority of the court. Justices McLean, Wayne, Catron, McKinley, and Grier held both statutes void; while Chief Justice Taney, and Justices Daniel, Nelson, and Woodbury, held them valid. Each member of the court delivered a separate opinion, giving the reasons for his judgment, except Judge Nelson, none of them professing to be the authoritative opinion of the court. Nor is there to be found, in the reasons given by the judges who constituted the majority, such harmony of views as would give that weight to the decision which it lacks by reason of the divided judgments of the members of the court. Under these circumstances, with three cases before us arising under statutes of three different States on the same subject, which have been discussed as though open in this court to all considerations bearing upon the question, we approach it with the hope of attaining a unanimity not found in the opinions of our predecessors.

As already indicated, the provisions of the Constitution of the United States, on which the principal reliance is placed to make void the statute of New York, is that which gives to Congress the power "to regulate commerce with foreign nations." As was said in United States *v.* Holliday, 3 Wall. 417, "commerce with foreign nations means commerce between citizens of the United States and citizens or subjects of foreign governments." It means trade, and it means intercourse. It means commercial intercourse between nations, and parts of nations, in all its branches. It includes navigation, as the principal means by which foreign intercourse is effected. To regulate this trade and intercourse is to prescribe the rules by which it shall be conducted. "The mind," says the great Chief Justice, "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 one nation into the ports of another;" and he might have added, with equal force, which prescribed no terms for the admission of their cargo or their passengers. Gibbons *v.* Ogden, 9 Wheat. 190.

Since the delivery of the opinion in that case, which has become the accepted canon of construction of this clause of the Constitution, as far as it extends, the transportation of passengers from European ports to those of the United States has attained a magnitude and importance far beyond its proportion at that time to other branches of commerce. It has become a part of our commerce with foreign nations, of vast interest to this country, as well as to the immigrants who come among us to find a welcome and a home within our borders. In addition to the wealth which some of them bring, they bring still more largely the labor which we need to till our soil, build our railroads, and develop the latent resources of the country in its minerals, its manufactures, and its agriculture. Is the regulation of this great system a regulation of commerce? Can it be doubted that a law which prescribes the terms on which vessels shall engage in it is a law regulating this branch of commerce?

The transportation of a passenger from Liverpool to the city of New York is one voyage. It is not completed until the passenger is disembarked at the pier in the latter city. A law or a rule emanating from any lawful authority, which prescribes terms or conditions on which alone the vessel can discharge its passengers, is a regulation of commerce; and, in case of vessels and passengers coming from foreign ports, is a regulation of commerce with foreign nations.

The accuracy of these definitions is scarcely denied by the advocates of the State statutes. But assuming that, in the formation of our government, certain powers necessary to the administration of their internal affairs are reserved to the States, and that among these powers are those for the preservation of good order, of the health and comfort of the citizens, and their protection against pau-

perism and against contagious and infectious diseases, and other matters of legislation of like character, they insist that the power here exercised falls within this class, and belongs rightfully to the States.

This power, frequently referred to in the decisions of this court, has been, in general terms, somewhat loosely called the police power. It is not necessary for the course of this discussion to attempt to define it more accurately than it has been defined already. It is not necessary, because whatever may be the nature and extent of that power, where not otherwise restricted, no definition of it, and no urgency for its use, can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.

Nothing is gained in the argument by calling it the police power. Very many statutes, when the authority on which their enactments rest is examined, may be referred to different sources of power and supported equally well under any of them. A statute may at the same time be an exercise of the taxing power and of the power of eminent domain. A statute punishing counterfeiting may be for the protection of the private citizen against fraud, and a measure for the protection of the currency and for the safety of the government which issues it. It must occur very often that the shading which marks the line between one class of legislation and another is very nice, and not easily distinguishable.

But, however difficult this may be, it is clear, from the nature of our complex form of government, that whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the States.

"It has been contended," says Marshall, C. J., "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 thereof. The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is supreme." Where the Federal Government has acted, he says, "In every such case the act of Congress or the treaty is supreme; and the laws of the State, though enacted in the exercise of powers not controverted must yield to it." 9 Wheat. 210.

It is said, however, that, under the decisions of this court, there is a kind of neutral ground, especially in that covered by the regulation of commerce, which may be occupied by the State, and its legislation be valid so long as it interferes with no act of Congress,

or treaty of the United States. Such a proposition is supported by the opinions of several of the judges in the Passenger Cases; by the decisions of this court in Cooly *v.* The Board of Wardens, 12 How. 299; and by the cases of Crandall *v.* Nevada, 6 Wall. 35, and Gilman *v.* Philadelphia, 3 Wall. 713. But this doctrine has always been controverted in this court, and has seldom, if ever, been stated without dissent. These decisions, however, all agree, that under the commerce clause of the Constitution, or within its compass, there are powers, which, from their nature, are exclusive in Congress; and, in the case of Cooly *v.* The Board of Wardens, it was said, that "whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." A regulation which imposes onerous, perhaps impossible, conditions on those engaged in active commerce with foreign nations, must of necessity be national in its character. It is more than this; for it may properly be called *international.* It belongs to that class of laws which concern the exterior relation of this whole nation with other nations and governments. If our government should make the restrictions of these burdens on commerce the subject of a treaty, there could be no doubt that such a treaty would fall within the power conferred on the President and the Senate by the Constitution. It is in fact, in an eminent degree, a subject which concerns our international relations, in regard to which foreign nations ought to be considered and their rights respected, whether the rule be established by treaty or by legislation.

It is equally clear that the matter of these statutes may be, and ought to be, the subject of a uniform system or plan. The laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans, and San Francisco. A striking evidence of the truth of this proposition is to be found in the similarity, we might almost say in the identity, of the statutes of New York, of Louisiana, and California, now before us for consideration in these three cases.

It is apparent, therefore, that, if there be a class of laws which may be valid when passed by the States until the same ground is occupied by a treaty or an act of Congress, this statute is not of that class.

The argument has been pressed with some earnestness, that inasmuch as this statute does not come into operation until twenty-four hours after the passenger has landed, and has mingled with, or has the right to mingle with, the mass of the population, he is withdrawn from the influence of any laws which Congress might pass on the subject, and remitted to the laws of the State as its own citizens are. It might be a sufficient answer to say that this is a mere evasion of the protection which the foreigner has a right to expect from the Federal Government when he lands here a stranger, owing

allegiance to another government, and looking to it for such protection as grows out of his relation to that government.

But the branch of the statute which we are considering is directed to and operates directly on the ship-owner. It holds him responsible for what he has done before the twenty-four hours commence. He is to give the bond or pay the money because he *has* landed the passenger, and he is given twenty-four hours' time to do this before the penalty attaches. When he is sued for this penalty, it is not because the man has been here twenty-four hours, but because he brought him here, and failed to give the bond or pay one dollar and fifty cents.

The effective operation of this law commences at the other end of the voyage. The master requires of the passenger, before he is admitted on board, as a part of the passage-money, the sum which he knows he must pay for the privilege of landing him in New York. It is, as we have already said, in effect, a tax on the passenger, which he pays for the right to make the voyage, — a voyage only completed when he lands on the American shore. The case does not even require us to consider at what period after his arrival the passenger himself passes from the sole protection of the Constitution, laws, and treaties of the United States, and becomes subject to such laws as the State may rightfully pass, as was the case in regard to importations of merchandise in Brown *v.* Maryland, 12 Wheat. 417, and in the License Cases, 5 How. 504.

It is too clear for argument that this demand of the owner of the vessel for a bond or money on account of every passenger landed by him from a foreign shore is, if valid, an obligation which he incurs by bringing the passenger here, and which is perfect the moment he leaves the vessel.

We are of opinion that this whole subject has been confided to Congress by the Constitution; that Congress can more appropriately and with more acceptance exercise it than any other body known to our law, State or national; that by providing a system of laws in these matters, applicable to all ports and to all vessels, a serious question, which has long been matter of contest and complaint, may be effectually and satisfactorily settled.

Whether, in the absence of such action, the States can, or how far they can, by appropriate legislation, protect themselves against actual paupers, vagrants, criminals, and diseased persons, arriving in their territory from foreign countries, we do not decide. The portions of the New York statute which concern persons who, on inspection, are found to belong to these classes are not properly before us, because the relief sought is to the part of the statute applicable to all passengers alike, and is the only relief which can be given on this bill.

The decree of the Circuit Court of New York, in the case of Henderson *et al. v.* Mayor of the City of New York *et al.*, is reversed,

and the case remanded, with direction to enter a decree for an injunction in accordance with this opinion.

The statute of Louisiana, which is involved in the case of Commissioners of Immigration *v.* North German Lloyd, is so very similar to, if not an exact copy of, that of New York, as to need no separate consideration. In this case the relief sought was against exacting the bonds or paying the commutation-money as to all passengers, which relief the Circuit Court granted by an appropriate injunction; and the decree in that case is accordingly affirmed.[1]

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## PENSACOLA TELEGRAPH COMPANY *v.* WESTERN UNION TELEGRAPH COMPANY.

96 United States, 1. 1877.

[PLAINTIFF sought in the Circuit Court of the United States for Florida to enjoin the defendant from constructing a line of telegraph through the State to Pensacola, claiming an exclusive privilege to maintain such a line by virtue of State legislation. The bill being dismissed, plaintiff appealed to this Court.]

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

Congress has power "to regulate commerce with foreign nations and among the several States" (Const. art. 1, sect. 8, par. 3); and "to establish post-offices and post-roads" (id., par. 7). The Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land. Art. 6, par. 2. A law of Congress made in pursuance of the Constitution suspends or overrides all State statutes with which it is in conflict.

Since the case of Gibbons *v.* Ogden, 9 Wheat. 1, it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post-offices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the

[1] A tax on passengers cannot be exacted under a State law purporting to provide for inspection. The provisions of U. S. Const. Art. 1, sec. 10, cl. 2, as to State inspection do not apply to persons. People *v.* Compagnie Generale Transatlantique, 107 U. S. 59.

But under the commerce clause Congress has power to regulate immigration, and a statute (August 3, 1882, 22 Stat. 214), providing for the collection by the United States Collector at each port of the sum of fifty cents for each passenger, not a citizen of the United States, who shall come to that port by steam or sailing vessel from a foreign port, to be paid by the master or owner of the vessel, such money to be turned into the United States Treasury to constitute an immigration fund to be used to defray the expense of regulating immigration and for the care of immigrants, and to relieve such as are in distress, was held to be valid as a regulation of commerce and not open to the objection that it is a tax not uniform. Head Money Cases, 112 U. S. 580.

power of Congress, because, being national in their operation, they should be under the protecting care of the national government.

The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that the intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation.

The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of inter-communication, but especially is it so in commercial transactions. The statistics of the business before the recent reduction in rates show that more than eighty per cent of all the messages sent by telegraph related to commerce. Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured, and the movement of ships directed. The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information.

It is not only important to the people, but to the government. By means of it the heads of the departments in Washington are kept in close communication with all the various agencies at home and abroad, and can know at almost any hour, by inquiry, what is transpiring anywhere that affects the interest they have in charge. Under such circumstances, it cannot for a moment be doubted that this powerful agency of commerce and inter-communication comes within the controlling power of Congress, certainly as against hostile State legislation. In fact, from the beginning, it seems to have been assumed that Congress might aid in developing the system; for the first telegraph line of any considerable extent ever erected was built between Washington and Baltimore, only a little more than thirty years ago, with money appropriated by Congress for that purpose (5 Stat. 618); and large donations of land and money have since been made to aid in the construction of other lines (12 id. 489, 772; 13 id. 365; 14 id. 292). It is not necessary now to inquire whether Congress may assume the telegraph as part of the postal service, and

exclude all others from its use. The present case is satisfied, if we find that Congress has power, by appropriate legislation, to prevent the States from placing obstructions in the way of its usefulness.

The government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by State lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all.

The State of Florida has attempted to confer upon a single corporation the exclusive right of transmitting intelligence by telegraph over a certain portion of its territory. This embraces the two westernmost counties of the State, and extends from Alabama to the Gulf. No telegraph line can cross the State from east to west, or from north to south, within these counties, except it passes over this territory. Within it is situated an important seaport, at which business centres, and with which those engaged in commercial pursuits have occasion more or less to communicate. The United States have there also the necessary machinery of the national government. They have a navy-yard, forts, custom-houses, courts, post-offices, and the appropriate officers for the enforcement of the laws. The legislation of Florida, if sustained, excludes all commercial intercourse by telegraph between the citizens of the other States and those residing upon this territory, except by the employment of this corporation. The United States cannot communicate with their own officers by telegraph except in the same way. The State, therefore, clearly has attempted to regulate commercial intercourse between its citizens and those of other States, and to control the transmission of all telegraphic correspondence within its own jurisdiction.

It is unnecessary to decide how far this might have been done if Congress had not acted upon the same subject, for it has acted. The statute of July 24, 1866, in effect, amounts to a prohibition of all State monopolies in this particular. It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the government of the United States and its citizens, that the erection of telegraph lines shall, so far as State interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one State for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the national government for this national privilege. To this extent, certainly, the statute is a legitimate regulation of commercial intercourse among the States, and is appropriate legislation to carry into execution the powers of Congress over the postal service. It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business; but it does

provide, that, whenever the consent of the owner is obtained, no State legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.

It is insisted, however, that the statute extends only to such military and post-roads as are upon the public domain; but this, we think, is not so. The language is, "Through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States." There is nothing to indicate an intention of limiting the effect of the words employed, and they are, therefore, to be given their natural and ordinary signification. Read in this way, the grant evidently extends to the public domain, the military and post-roads, and the navigable waters of the United States. These are all within the dominion of the national government to the extent of the national powers, and are, therefore, subject to legitimate congressional regulation. No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only national privileges are granted.

The State law in question, so far as it confers exclusive rights upon the Pensacola Company, is certainly in conflict with this legislation of Congress. To that extent it is, therefore, inoperative as against a corporation of another State entitled to the privileges of the act of Congress. Such being the case, the charter of the Pensacola Company does not exclude the Western Union Company from the occupancy of the right of way of the Pensacola and Louisville Railroad Company under the arrangement made for that purpose.

We are aware that, in Paul *v.* Virginia, 8 Wall. 168, this court decided that a State might exclude a corporation of another State from its jurisdiction, and that corporations are not within the clause of the Constitution which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Art. 4, sect. 2. That was not, however, the case of a corporation engaged in inter-state commerce; and enough was said by the court to show, that, if it had been, very different questions would have been presented. The language of the opinion is (p. 182): "It is undoubtedly true, as stated by counsel, that the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. . . . This state of facts forbids the supposition that it was intended in the

grant of power to Congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on: it is general, and includes alike commerce by individuals, partnerships, associations, and corporations. . . . The defect of the argument lies in the character of their (insurance companies) business. Issuing a policy of insurance is not a transaction of commerce. . . . Such contracts (policies of insurance) are not inter-state transactions, though the parties are domiciled in different States."

The questions thus suggested need not be considered now, because no prohibitory legislation is relied upon, except that which, as has already been seen, is inoperative. Upon principles of comity, the corporations of one State are permitted to do business in another, unless it conflicts with the law, or unjustly interferes with the rights of the citizens of the State into which they come. Under such circumstances, no citizen of a State can enjoin a foreign corporation from pursuing its business. Until the State acts in its sovereign capacity, individual citizens cannot complain. The State must determine for itself when the public good requires that its implied assent to the admission shall be withdrawn. Here, so far from withdrawing its assent, the State, by its legislation of 1874, in effect, invited foreign telegraph corporations to come in. Whether that legislation, in the absence of congressional action, would have been sufficient to authorize a foreign corporation to construct and operate a line within the two counties named, we need not decide; but we are clearly of the opinion, that, with such action and a right of way secured by private arrangement with the owner of the land, this defendant corporation cannot be excluded by the present complainant.

*Decree affirmed.*

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## LORD *v.* STEAMSHIP COMPANY.

102 United States, 541. 1880.

ERROR to the Circuit Court of the United States for the District of California.

Sects. 4283 and 4289 of the Revised Statutes are as follows: —

"Sect. 4283. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing lost, damage or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount of the value of the interest of such owner in such vessel, and her freight then pending."

"Sect. 4289. The provision of the seven preceding sections relating to the

limitation of the liability of the owners of vessels shall not apply to the owners of any canal-boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation."

Sect. 4283 was one of the seven sections referred to in sect. 4289.

The steamship "Ventura," owned by the defendant in error, the Goodall, Nelson, and Perkins Steamship Company, was employed in navigation between San Francisco and San Diego, in the State of California, touching at the intermediate ports on the coast. In making her voyages she ran a distance of four hundred and eighty miles on the Pacific Ocean. She formed part of a transportation line which was largely engaged in foreign and inter-state commerce, but was herself only employed on her own route, and neither took on nor put off goods outside of the State of California. While on one of her regular voyages from San Francisco to San Diego she was totally lost, with all her pending freight and cargo, on the coast of California, without the privity or knowledge of her owner. This suit was brought against her owner as a common carrier to recover the value of the goods lost. The cargo was mostly owned by retail merchants in San Diego and other places in California who had made purchases for their business from wholesale merchants in San Francisco and was in transit from there. The steamship company pleaded its exemption from liability as owner of the vessel under sect. 4283 of the Revised Statutes. On the trial the court instructed the jury "that if the jury believed that the said losses occurred solely by reason of the negligence of the master of said ship and without the privity or knowledge or neglect of said defendant, that said sect. 4283 of the Revised Statutes fully exonerated the defendant from liability for any such losses, notwithstanding the goods when lost were being transported on a journey, the final termini of which were different points in the State of California." To this charge an exception was duly taken. The jury found in favor of the defendant, and judgment was rendered accordingly. To reverse that judgment the present writ of error was sued out.

Mr. Chief Justice Waite, after stating the facts, delivered the opinion of the court.

The single question presented by the assignment of errors is, whether Congress has power to regulate the liability of the owners of vessels navigating the high seas, but engaged only in the transportation of goods and passengers between ports and places in the same State. It is conceded that while the Ventura carried goods from place to place in California, her voyages were always ocean voyages.

Congress has power "to regulate commerce with foreign nations and among the several States, and with the Indian tribes" (Const., art. 1, sect. 8), but it has nothing to do with the purely internal commerce of the States, that is to say, with such commerce as is carried on between different parts of the same State, if its operations

are confined exclusively to the jurisdiction and territory of that State, and do not affect other nations or States or the Indian tribes. This has never been disputed since the case of Gibbons *v.* Ogden, 9 Wheat. 1, 194. The contracts sued on in the present case were in effect to carry goods from San Francisco to San Diego by the way of the Pacific Ocean. They could not be performed except by going not only out of California, but out of the United States as well.

Commerce includes intercourse, navigation, and not traffic alone. This also was settled in Gibbons *v.* Ogden, *supra*, 189. "Commerce with foreign nations," says Mr. Justice Daniel, for the court, in Veazie *v.* Moor, 14 How. 568, "must signify commerce which, in some sense, is necessarily connected with these nations, transactions which either immediately or at some stage of their progress must be extra-territorial." p. 573.

The Pacific Ocean belongs to no one nation, but is the common property of all. When, therefore, the Ventura went out from San Francisco or San Diego on her several voyages, she entered on a navigation which was necessarily connected with other nations. While on the ocean her national character only was recognized, and she was subject to such laws as the commercial nations of the world had, by usage or otherwise, agreed on for the government of the vehicles of commerce occupying this common property of all mankind. She was navigating among the vessels of other nations and was treated by them as belonging to the country whose flag she carried. True, she was not trading with them, but she was navigating with them, and consequently with them was engaged in commerce. If in her navigation she inflicted a wrong on another country, the United States, and not the State of California, must answer for what was done. In every just sense, therefore, she was, while on the ocean, engaged in commerce with foreign nations, and as such she and the business in which she was engaged were subject to the regulating power of Congress.

Navigation on the high seas is necessarily national in its character. Such navigation is clearly a matter of "external concern," affecting the nation as a nation in its external affairs. It must, therefore, be subject to the national government.

This disposes of the case, since, by sect. 4289 of the Revised Statutes, the provisions of sect. 4283 are not applicable to vessels used in rivers or inland navigation, and this legislation, therefore, is relieved from the objection that proved fatal to the trade-mark law which was considered in Trade-Mark Cases, 100 U. S. 82. The commerce regulated is expressly confined to a kind over which Congress has been given control. There is not here, as in Allen *v.* Newberry, 21 How. 244, a question of admiralty jurisdiction under the law of 1845, but of the power of Congress over the commerce of the United States. The contracts sued on do not relate to the purely internal commerce of a State, but impliedly, at least, connect themselves with the com-

merce of the world, because in their performance the laws of nations on the high seas may be involved, and the United States compelled to respond.

Having found ample authority for the act as it now stands in the commerce clause of the Constitution, it is unnecessary to consider whether it is within the judicial power of the United States over cases of admiralty and maritime jurisdiction.

*Affirmed.*[1]

[1] In the case of HANLEY v. KANSAS CITY SOUTHERN RAILROAD COMPANY, 187 U. S. 617, 23 Sup. Ct. Rep. 214 (1903), the question was whether the State Board of Railroad Commissioners of Arkansas had the right to enforce a State regulation of railroad rates as to a shipment of goods between two points in the State over a line of railroad which for a portion of the distance between those two points was outside of the State. It was conceded that if the transportation of goods between these points over this line of road was interstate commerce it was subject to federal regulation and exempt from regulation by the State.

MR. JUSTICE HOLMES delivering the opinion of the court used the following language:

"It is decided that navigation on the high seas between ports of the same State is subject to regulation by Congress, Lord *v.* Steamship Co., 102 U. S. 541 [**256**], and is not subject to regulation by the State, Pacific Coast Steamship Co. *v.* Railroad Commissioners, 9 Sawyer, 253, and although it is argued that these decisions are not conclusive, the reason given by Mr. Justice Field for his decision in the last cited case disposes equally of the case at bar. 'To bring the transportation within the control of the State, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the State.' 9 Sawyer, 258. Decisions in point are State *v.* Chicago, St. Paul, Minneapolis & Omaha Railway Co., 40 Minnesota, 267; Sternberger *v.* Cape Fear & Yadkin Valley Railroad Co., 29 So. Car. 510. See also Milk Producers' Protective Association *v.* Delaware, Lackawanna & Western Railroad Co., 7 Interstate Commerce Rep. 92, 160, 161.

"There are some later State decisions contrary to those last cited. *Campbell* v. *Chicago, Milwaukee & St. Paul Railway Co.*, 86 Iowa, 587; *Seawell* v. *Kansas City, Ft. Scott & Memphis Railroad Co.*, 119 Missouri, 222; *Railroad Commissioners* v. *Western Union Telegraph Co.*, 113 No. Car. 213. But these decisions were made simply out of deference to conclusions drawn from *Lehigh Valley Railroad Co.* v. *Pennsylvania*, 145 U. S. 192, and we are of opinion that they carry their conclusions too far. That was the case of a tax and was distinguished expressly from an attempt by a State directly to regulate the transportation while outside its borders. 145 U. S. 204. And although it was intimated that, for the purposes before the court, to some extent commerce by transportation might have its character fixed by the relation between the two ends of the transit, the intimation was carefully confined to those purposes. Moreover, the tax 'was determined in respect of receipts for the proportion of the transportation within the State.' 145 U. S. 201. Such a proportioned tax had been sustained in the case of commerce admitted to be interstate. *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217. Whereas it is decided, as we have said, that when a rate is established, it must be established as a whole."

## THE DANIEL BALL.

10 Wallace, 557. 1870.

[This was a proceeding by libel in behalf of the United States in the District Court of the United States for Michigan against a vessel to recover a penalty for the use of the vessel on the navigable waters of the United States without a license as required by act of Congress. It appeared that the vessel was used wholly on Grand River, which is entirely within the State of Michigan, but that the goods transported were destined, in part, for points outside the State. The libel was dismissed, but this decision was reversed on appeal to the Circuit Court and from the decree in that Court an appeal is prosecuted.]

Mr. Justice Field, after stating the case, delivered the opinion of the court, as follows:

Two questions are presented in this case for our determination.

*First:* Whether the steamer was at the time designated in the libel engaged in transporting merchandise and passengers on a navigable water of the United States within the meaning of the acts of Congress; and,

*Second:* Whether those acts are applicable to a steamer engaged as a common carrier between places in the same State, when a portion of the merchandise transported by her is destined to places in other States, or comes from places without the State, she not running in connection with or in continuation of any line of steamers or other vessels, or any railway line leading to or from another State.

Upon the first of these questions we entertain no doubt. The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length. The Genesee Chief, 12 How. 457; Hine *v.* Trevor, 4 Wall. 555. A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over

which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

If we apply this test to Grand River, the conclusion follows that it must be regarded as a navigable water of the United States. From the conceded facts in the case the stream is capable of bearing a steamer of one hundred and twenty-three tons burden, laden with merchandise and passengers, as far as Grand Rapids, a distance of forty miles from its mouth in Lake Michigan. And by its junction with the lake it forms a continued highway for commerce, both with other States and with foreign countries, and is thus brought under the direct control of Congress in the exercise of its commercial power.

That power authorizes all appropriate legislation for the protection or advancement of either interstate or foreign commerce, and for that purpose such legislation as will insure the convenient and safe navigation of all the navigable waters of the United States, whether that legislation consists in requiring the removal of obstructions to their use, in prescribing the form and size of the vessels employed upon them, or in subjecting the vessels to inspection and license, in order to insure their proper construction and equipment. "The power to regulate commerce," this court said in Gilman *v.* Philadelphia, 3 Wall. 724, "comprehends the control for that purpose, and to the extent necessary, of all navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation of Congress."

But it is contended that the steamer Daniel Ball was only engaged in the internal commerce of the State of Michigan, and was not, therefore, required to be inspected or licensed, even if it be conceded that Grand River is a navigable water of the United States; and this brings us to the consideration of the second question presented.

There is undoubtedly an internal commerce which is subject to the control of the States. The power delegated to Congress is limited to commerce "among the several States," with foreign nations, and with the Indian tribes. This limitation necessarily excludes from Federal control all commerce not thus designated, and of course that commerce which is carried on entirely within the limits of a State, and does not extend to or affect other States. Gibbons *v.* Ogden, 9 Wheat. 194, 195. In this case it is admitted that the steamer was engaged in shipping and transporting down Grand River, goods destined and marked for other States than

Michigan, and in receiving and transporting up the river goods brought within the State from without its limits; but inasmuch as her agency in the transportation was entirely within the limits of the State, and she did not run in connection with, or in continuation of, any line of vessels or railway leading to other States, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress.

It is said that if the position here asserted be sustained, there is no such thing as the domestic trade of a State; that Congress may take the entire control of the commerce of the country, and extend its regulations to the railroads within a State on which grain or fruit is transported to a distant market.

We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation. And we answer further, that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the States, when that agency extends through two or more States, and when it is confined in its action entirely within the limits of a single State. If its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a State, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a State, and leaving it at the boundary line at the other end, the Federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter.

We perceive no error in the record, and the decree of the Circuit Court must be *Affirmed.*

## UNITED STATES *v.* E. C. KNIGHT CO.

156 United States, 1. 1895.

[The bill filed in this case in the Circuit Court of the United States for the Eastern District of Pennsylvania charged, in substance, that the American Sugar Refining Company and four other corporations, including the E. C. Knight Company, incorporated under the laws of different States to carry on the business of refining sugar, and producing nearly all the refined sugar manufactured in the United States, had entered into contracts for the purchase by the American Sugar Refining Company of the shares of stock and the property of the other companies, and the issuance in exchange to the other companies of shares of stock in the said American Sugar Refining Company; that these contracts were entered into for the purpose of obtaining control by the last named company of the price of sugar in the United States and monopolizing the manufacture and sale of refined sugar therein; and that such contracts were in violation of the provisions of an act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," 26 Stat. 209, providing "that every contract, combination in the form of trust, or otherwise, or conspiracy in restraint of trade and commerce among the several States is illegal, and that persons who shall monopolize or shall attempt to monopolize or combine or conspire with other persons to monopolize trade and commerce among the several States shall be guilty of a misdemeanor." It was prayed that the agreements referred to be cancelled and declared void and that the defendants be enjoined from carrying them out and from violating said act.]

Mr. Chief Justice Fuller, after stating the facts, delivered the opinion of the court.

By the purchase of the stock of the four Philadelphia refineries, with shares of its own stock, the American Sugar Refining Company acquired nearly complete control of the manufacture of refined sugar within the United States. The bill charged that the contracts under which these purchases were made constituted combinations in restraint of trade, and that in entering into them the defendants combined and conspired to restrain the trade and commerce in refined sugar among the several States and with foreign nations, contrary to the act of Congress of July 2, 1890.

The relief sought was the cancellation of the agreements under which the stock was transferred; the redelivery of the stock to the parties respectively; and an injunction against the further performance of the agreements and further violations of the act. As usual, there was a prayer for general relief, but only such relief could be afforded under that prayer as would be agreeable to the case made by the bill

and consistent with that specifically prayed. And as to the injunction asked, that relief was ancillary to and in aid of the primary equity, or ground of suit, and, if that failed, would fall with it. That ground here was the existence of contracts to monopolize interstate or international trade or commerce, and to restrain such trade or commerce, which, by the provisions of the act, could be rescinded, or operations thereunder arrested.

In commenting upon the statute, 21 James 1, c. 3, at the commencement of chapter 85 of the third Institute, entitled "Against Monopolists, Propounders, and Projectors," Lord Coke, in language often quoted, said:

"It appeareth by the preamble of this act (as a judgment in Parliament) that all grants of monopolies are against the ancient and fundamentall laws of this Kingdome. And therefore it is necessary to define what a monopoly is.

"A monopoly is an institution, or allowance by the King by his grant, commission, or otherwise to any person or persons, bodies politique, or corporate, of or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politique, or corporate, are sought to be restrained of any freedome or liberty that they had before, or hindred in their lawfull trade.

"For the word monopoly, *dicitur* ἀπὸ τοῦ μόνου, (i. *solo,*) καὶ πωλέομαι, (i. *vendere,*) *quod est cum unus solus aliquod genus mercaturæ universum vendit, ut solus vendat, pretium ad suum libitum statuens:* hereof you may read more at large in that case. Trin. 44 Eliz. Lib. 11, f. 84, 85; *le case de monopolies.*" 3 Inst. 181.

Counsel contend that this definition, as explained by the derivation of the word, may be applied to all cases in which "one person sells alone the whole of any kind of marketable thing, so that only he can continue to sell it, fixing the price at his own pleasure," whether by virtue of legislative grant or agreement; that the monopolization referred to in the act of Congress is not confined to the common law sense of the term as implying an exclusive control, by authority, of one branch of industry without legal right of any other person to interfere therewith by competition or otherwise, but that it includes engrossing as well, and covers controlling the market by contracts securing the advantage of selling alone or exclusively all, or some considerable portion, of a particular kind of merchandise or commodity to the detriment of the public; and that such contracts amount to that restraint of trade or commerce declared to be illegal. But the monopoly and restraint denounced by the act are the monopoly and restraint of interstate and international trade or commerce, while the conclusion to be assumed on this record is that the result of the transaction complained of was the creation of a monopoly in the manufacture of a necessary of life.

In the view which we take of the case, we need not discuss whether because the tentacles which drew the outlying refineries into the

dominant corporation were separately put out, therefore there was no combination to monopolize; or, because, according to political economists, aggregation of capital may reduce prices, therefore the objection to concentration of power is relieved; or, because others were theoretically left free to go into the business of refining sugar, and the original stockholders of the Philadelphia refineries after becoming stockholders of the American Company might go into competition with themselves, or, parting with that stock, might set up again for themselves, therefore no objectionable restraint was imposed.

The fundamental question is, whether conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of Congress in the mode attempted by this bill.

It cannot be denied that the power of the State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, "the power to govern men and things within the limits of its dominion," is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. The relief of the citizens of each State from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the States to deal with, and this Court has recognized their possession of that power even to the extent of holding that an employment or business carried on by private individuals, when it becomes a matter of such public interest and importance as to create a common charge or burden upon a citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort and by means of which a tribute can be exacted from the community, is subject to regulation by State legislative power. On the other hand, the power of Congress to regulate commerce among the several States is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraints. Therefore it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several States, and if a law passed by a State in the exercise of its acknowledged powers comes into conflict with that will, the Congress and the State cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof; and that which is not supreme must yield to that which is supreme. "Commerce, undoubtedly, is traffic," said Chief Justice Marshall, "but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse." That which belongs to com-

merce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State. Gibbons *v.* Ogden, 9 Wheat. 1, 189, 210; Brown *v.* Maryland, 12 Wheat. 419, 448; The License Cases, 5 How. 504, 599; Mobile *v.* Kimball, 102 U. S. 691; Bowman *v.* Chicago & N. W. Railway Co., 125 U. S. 465; Leisy *v.* Hardin, 135 U. S. 100; *In re* Rahrer, 140 U. S. 545, 555.

The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the general government in the exercise of the power to regulate commerce may repress such monopoly directly and set aside the instruments which have created it. But this argument cannot be confined to necessaries of life merely, and must include all articles of general consumption. Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce.

It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality.

It will be perceived how far-reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce.

The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce. This was so ruled in Coe *v.* Errol, 116 U. S. 517, 525, in which the question before the court was whether certain logs cut at a place in New Hampshire and hauled to a river town for the purpose of transportation to the State of Maine were liable to be taxed like other property in the State of New Hampshire. Mr. Justice Bradley, delivering the opinion of the court, said: "Does the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution. . . . There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement from the State of their origin to that of their destination."

And again, in Kidd *v.* Pearson, 128 U. S. 1, 20, 21, 24, where the question was discussed whether the right of a State to enact a statute prohibiting within its limits the manufacture of intoxicating liquors, except for certain purposes, could be overthrown by the fact that the manufacturer intended to export the liquors when made, it was held that the intent of the manufacturer did not determine the time when the article or product passed from the control of the State and belonged to commerce, and that, therefore, the statute, in omitting to except from its operation the manufacture of intoxicating liquors within the limits of the State for export, did not constitute an unauthorized interference with the right of Congress to regulate commerce. And Mr. Justice Lamar remarked: "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation — the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. . . If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining — in short, every branch of human industry. For is there one of them that

does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest or the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform and vital interests — interests which in their nature are and must be local in all the details of their successful management. . . . The demands of such a supervision would require, not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable and utterly inconsistent. Any movement toward the establishment of rules of production in this vast country, with its many different climates and opportunities, could only be at the sacrifice of the peculiar advantages of a large part of the localities in it, if not of every one of them. On the other hand, any movement toward the local, detailed and incongruous legislation required by such interpretation would be about the widest possible departure from the declared object of the clause in question. Nor this alone. Even in the exercise of the power contended for, Congress would be confined to the regulation, not of certain branches of industry, however numerous, but to those instances in each and every branch where the producer contemplated an interstate market. These instances would be almost infinite, as we have seen; but still there would always remain the possibility, and often it would be the case, that the producer contemplated a domestic market. In that case the supervisory power must be executed by the State; and the interminable trouble would be presented, that whether the one power or the other should exercise the authority in question would be determined, not by any general or intelligible rule, but by the secret and changeable intention of the producer in each and every act of production. A situation more paralyzing to the State governments, and more provocative of conflicts between the general government and the States, and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine." And see Veazie *v.* Moor, 14 How. 568, 574.

In Gibbons *v.* Ogden, Brown *v.* Maryland, and other cases often cited, the State laws, which were held inoperative, were instances of direct interference with, or regulations of, interstate or international commerce; yet in Kidd *v.* Pearson the refusal of a State to allow articles to be manufactured within her borders even for export was held not to directly affect external commerce, and State legislation which, in a great variety of ways, affected interstate commerce and persons engaged in it, has been frequently sustained because the interference was not direct.

Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its

forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination, or conspiracy.

Again, all the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition. Slight reflection will show that if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for State control.

It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted. Aside from the provisions applicable where Congress might exercise municipal power, what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several States or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennyslvania, and bore no direct relation to commerce between the States or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; but this was no more than to say that trade and commerce served manufacture to fulfil its function. Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other States, and refined sugar was also forwarded by the companies to other States for sale. Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon

trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree. The subject-matter of the sale was shares of manufacturing stock, and the relief sought was the surrender of property which had already passed and the suppression of the alleged monopoly in manufacture by the restoration of the *status quo* before the transfers; yet the act of Congress only authorized the Circuit Courts to proceed by way of preventing and restraining violations of the act in respect of contracts, combinations, or conspiracies in restraint of interstate or international trade or commerce.

[The decree dismissing the bill is affirmed.][1]

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For more recent cases see Appendix A, *infra* 1071.

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## UNITED STATES *v.* HOLLIDAY.
## SAME *v.* HAAS.

3 Wallace, 407. 1865.

THESE were indictments, independent of each other, for violations of the act of Congress of February 13, 1862, 12 Stat. at Large, 339, which declares that if any person shall sell any spirituous liquors "to any *Indian* under the charge of any Indian superintendent or Indian agent appointed by the United States, he shall, on conviction thereof before the proper *District* Court of the United States," be fined and imprisoned.

This act of 1862 was amendatory of an act of June 30, 1834, 4 Stat. at Large, 732, declaring that if any person sold liquor to an Indian in *the Indian country* he should forfeit five hundred dollars.

These indictments were both in *District* Courts of the United States — the one against Haas in the District Court for Minnesota (there not being at the time of the indictment any *Circuit* Court as yet established in Minnesota), and that against Holliday in the District Court for Michigan, — and under the act of August 8, 1846, 9 id. 73, authorizing the remission of indictments from the District to the Circuit Courts, they were both removed into the *Circuit* Courts; the case of Haas, after he had been convicted of the offence charged and while a motion in arrest of judgment was pending and undetermined in the *District* Court.

In Haas's Case, the indictment charged that the defendant had sold the liquor to a Winnebago Indian, in the State of Minnesota, under the charge of an Indian agent of the United States; but it

[1] MR. JUSTICE HARLAN delivered a dissenting opinion.

did not allege that the *locus in quo* was within the reservation belonging to *the Winnebago tribe, or within any Indian reservation, or within the Indian country.*

Upon this indictment the judges of the Circuit Court were divided in opinion on the questions:

1. Whether, under the act of February 13, 1862, the offence for which the defendant is indicted was one of which the *Circuit* Court could have original jurisdiction?

2. Whether, under the facts above stated, *any* court of the United States had jurisdiction of the offence?

. . . . . .

MR. JUSTICE MILLER delivered the opinion of the court.

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The second question in that [the Haas] case is this: whether, under the facts above stated, any court of the United States had jurisdiction of the offence?

The facts referred to are, concisely, that spirituous liquor was sold within the territorial limits of the State of Minnesota and without any Indian reservation, to an Indian of the Winnebago tribe, under the charge of the United States Indian agent for said tribe.

It is denied by the defendant that the act of Congress was intended to apply to such a case; and, if it was, it is denied that it can be so applied under the Constitution of the United States. On the first proposition the ground taken is, that the policy of the act, and its reasonable construction, limit its operation to the Indian country, or to reservations inhabited by Indian tribes. The policy of the act is the protection of those Indians who are, by treaty or otherwise, under the pupilage of the government, from the debasing influence of the use of spirits; and it is not easy to perceive why that policy should not require their preservation from this, to them, destructive poison, when they are outside of a reservation, as well as within it. The evil effects are the same in both cases.

But the act of 1862 is an amendment to the 20th section of the act of June 30, 1834, and, if we observe what the amendment is, all doubt on this question is removed. The first act declared that if any person sold spirituous liquor to an Indian *in the Indian country* he should forfeit five hundred dollars. The amended act punishes any person who shall sell to an Indian under charge of an Indian agent, or superintendent, appointed by the United States. The limitation to the Indian country is stricken out, and that requiring the Indian to be under charge of an agent or superintendent is substituted. It cannot be doubted that the purpose of the amendment was to remove the restriction of the act to the Indian country, and to make parties liable if they sold to Indians under the charge of a superintendent or agent, wherever they might be.

It is next asserted that if the act be so construed it is without any constitutional authority in its application to the case before us.

We are not furnished with any argument by either of the defendants on this branch of the subject, and may not therefore be able to state with entire accuracy the position assumed. But we understand it to be substantially this: that so far as the act is intended to operate as a police regulation to enforce good morals within the limits of a State of the Union, that power belongs exclusively to the State, and there is no warrant in the Constitution for its exercise by Congress. If it is an attempt to regulate commerce, then the commerce here regulated is a commerce wholly within the State, among its own inhabitants or citizens, and is not within the powers conferred on Congress by the commercial clause.

The act in question, although it may partake of some of the qualities of those acts passed by State legislatures, which have been referred to the police powers of the States, is, we think, still more clearly entitled to be called a regulation of commerce. "Commerce," says Chief Justice Marshall, in the opinion in Gibbons *v.* Ogden, to which we so often turn with profit when this clause of the Constitution is under consideration, "commerce undoubtedly is traffic, but it is something more; it is intercourse." The law before us professes to regulate traffic and intercourse with the Indian tribes. It manifestly does both. It relates to buying and selling and exchanging commodities, which is the essence of all commerce, and it regulates the intercourse between the citizens of the United States and those tribes, which is another branch of commerce, and a very important one.

If the act under consideration is a regulation of commerce, as it undoubtedly is, does it regulate that kind of commerce which is placed within the control of Congress by the Constitution? The words of that instrument are: "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Commerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments, as individuals. And so commerce with the Indian tribes means commerce with the individuals composing those tribes. The act before us describes this precise kind of traffic or commerce, and, therefore, comes within the terms of the constitutional provision.

Is there anything in the fact that this power is to be exercised within the limits of a State, which renders the act regulating it unconstitutional?

In the same opinion to which we have just before referred, Judge Marshall, in speaking of the power to regulate commerce with foreign States, says, "The power does not stop at the jurisdictional limits of the several States. It would be a very useless power if it could not pass those lines." "If Congress has power to regulate it, that power must be exercised wherever the subject exists." It follows from these propositions, which seem to be incontrovertible, that

if commerce, or traffic, or intercourse, is carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress, although within the limits of a State. The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of the member of the tribe with whom it is carried on. It is not, however, intended by these remarks to imply that this clause of the Constitution authorizes Congress to regulate any other commerce, originated and ended within the limits of a single State, than commerce with the Indian tribes.

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## b. *Validity of State Regulations.*

### 1. Local Provisions; Control of Harbors, Bridges, Dams, and Ferries.

### WILLSON *v.* BLACKBIRD CREEK MARSH COMPANY.

2 Peters, 245; 8 Curtis, 105. 1829.

ERROR to the High Court of Errors and Appeals of Delaware.

The defendants, having been incorporated by the General Assembly of Delaware, and empowered to hold and improve certain marsh lands, were authorized for that purpose to make a dam across the Blackbird Marsh Creek. They did so, and the plaintiffs, being the owners of a sloop, regularly licensed and enrolled for the coasting trade, broke down the dam, and the defendants sued them in trespass. The plaintiffs pleaded, in substance, that the place where the supposed trespass is alleged to have been committed, was, and still is, part and parcel of said Blackbird Creek, a public and common navigable creek, in the nature of a highway, in which the tides have always flowed and reflowed; in which there was, and of right ought to have been, a certain common and public way, in the nature of highway, for all the citizens of the State of Delaware and of the United States, with sloops or other vessels to navigate, sail, pass, and repass, into, over, through, in, and upon the same, at all times of the year, at their own free will and pleasure.

Therefore, the said defendants, being citizens of the State of Delaware and of the United States, with the said sloop, sailed in and upon the said creek, in which, &c., as they lawfully might for the cause aforesaid; and because the said gum piles, &c., bank and dam,

in the said declaration mentioned, &c., had been wrongfully erected, and were there wrongfully continued standing, and being in and across said navigable creek, and obstructing the same, so that without pulling up, cutting, breaking and destroying the said gum piles, &c., bank and dam respectively, the said defendants could not pass and repass with the said sloop, into, through, over, and along the said navigable creek. And that the defendants, in order to remove the said obstructions, pulled up, cut, broke, &c., as in the said declaration mentioned, doing no unnecessary damage to the said Blackbird Creek Marsh Company; which is the same supposed trespass, &c.

The highest court of the State having rendered a judgment in favor of plaintiffs below, this writ of error was brought.

MARSHALL, C. J., delivered the opinion of the court.

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The jurisdiction of the court being established, the more doubtful question is to be considered, whether the act incorporating the Blackbird Creek Marsh Company is repugnant to the Constitution, so far as it authorizes a dam across the creek. The plea states the creek to be navigable, in the nature of a highway, through which the tide ebbs and flows.

The act of assembly by which the plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks, passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the States. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance.

The counsel for the plaintiffs in error insist that it comes in conflict with the power of the United States "to regulate commerce with foreign nations and among the several States."

If Congress had passed any act which bore upon the case — any act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern States — we should feel not much difficulty in saying that a State law coming in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign

nations and among the several States; a power which has not been so exercised as to affect the question.

We do not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject.

There is no error, and the judgment is affirmed.

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## COOLEY *v.* BOARD OF WARDENS OF THE PORT OF PHILADELPHIA.

12 Howard, 299; 19 Curtis, 143. 1851.

CURTIS, J., delivered the opinion of the court.

These cases are brought here by writs of error to the Supreme Court of the Commonwealth of Pennsylvania.

They are actions to recover half-pilotage fees under the 29th section of the act of the legislature of Pennsylvania, passed on the second day of March, 1803. The plaintiff in error alleges that the highest court of the State has decided against a right claimed by him under the Constitution of the United States. That right is, to be exempted from the payment of the sums of money demanded pursuant to the State law above referred to, because that law contravenes several provisions of the Constitution of the United States.

The particular section of the State law drawn in question is as follows: —

"That every ship or vessel arriving from, or bound to any foreign port or place, and every ship or vessel of the burden of seventy-five tons or more, sailing from, or bound to any port not within the River Delaware, shall be obliged to receive a pilot. And it shall be the duty of the master of every such ship or vessel, within thirty-six hours next after the arrival of such ship or vessel at the city of Philadelphia, to make report to the master-warden of the name of such ship or vessel, her draught of water, and the name of the pilot who shall have conducted her to the port. And when any such vessel shall be outward bound, the master of such vessel shall make known to the wardens the name of such vessel, and of the pilot who is to conduct her to the capes, and her draught of water at that time. And it shall be the duty of the wardens to enter every such vessel in a book to be by them kept for that purpose, without fee or reward. And if the master of any ship or vessel shall neglect to make such report, he shall forfeit and pay the sum of $60. And if the master of any such ship or vessel shall refuse or neglect to take a pilot, the master, owner, or consignee of such vessel, shall forfeit and pay to

the warden aforesaid, a sum equal to the half-pilotage of such ship or vessel, to the use of the Society for the Relief, &c., to be recovered as pilotage in the manner hereinafter directed: Provided always, that where it shall appear to the warden that, in case of an inward bound vessel, a pilot did not offer before she had reached Reedy Island; or, in case of an outward bound vessel, that a pilot could not be obtained for twenty-four hours after such vessel was ready to depart, the penalty aforesaid, for not having a pilot, shall not be incurred." This is one section of "An Act to establish a Board of Wardens for the Port of Philadelphia, and for the Regulation of Pilots and Pilotages, &c.," and the scope of the act is, in conformity with the title, to regulate the whole subject of the pilotage of that port.

We think this particular regulation concerning half-pilotage fees, is an appropriate part of a general system of regulations of this subject. Testing it by the practice of commercial States and countries legislating on this subject, we find it has usually been deemed necessary to make similar provisions. Numerous laws of this kind are cited in the learned argument of the counsel for the defendant in error; and their fitness, as part of a system of pilotage, in many places, may be inferred from their existence in so many different States and countries. Like other laws, they are framed to meet the most usual cases, *quæ frequentius accidunt;* they rest upon the propriety of securing lives and property exposed to the perils of a dangerous navigation, by taking on board a person peculiarly skilled to encounter or avoid them; upon the policy of discouraging the commanders of vessels from refusing to receive such persons on board at the proper times and places; and upon the expediency, and even intrinsic justice, of not suffering those who have incurred labor, and expense, and danger, to place themselves in a position to render important service generally necessary, to go unrewarded, because the master of a particular vessel either rashly refuses their proffered assistance, or, contrary to the general experience, does not need it. There are many cases, in which an offer to perform, accompanied by present ability to perform, is deemed by law equivalent to performance. The laws of commercial States and countries have made an offer of pilotage service one of those cases; and we cannot pronounce a law which does this, to be so far removed from the usual and fit scope of laws for the regulation of pilots and pilotage, as to be deemed, for this cause, a covert attempt to legislate upon another subject under the appearance of legislating on this one.

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It remains to consider the objection, that it is repugnant to the third clause of the eighth section of the first article. "The congress shall have power to regulate commerce with foreign nations and among the several States, and with the Indian tribes."

That the power to regulate commerce includes the regulation of navigation, we consider settled. And when we look to the nature of

the service performed by pilots, to the relations which that service and its compensations bear to navigation between the several States, and between the ports of the United States and foreign countries, we are brought to the conclusion, that the regulation of the qualifications of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights and duties may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the Constitution.

The power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it, as well as to the instruments used. Accordingly, the first Congress assembled under the Constitution passed laws, requiring the masters of ships and vessels of the United States to be citizens of the United States, and established many rules for the government and regulation of officers and seamen. 1 Stats. at Large, 55, 131. These have been from time to time added to and changed, and we are not aware that their validity has been questioned.

Now, a pilot, so far as respects the navigation of the vessel in that part of the voyage which is his pilotage-ground, is the temporary master charged with the safety of the vessel and cargo, and of the lives of those on board, and intrusted with the command of the crew. He is not only one of the persons engaged in navigation, but he occupies a most important and responsible place among those thus engaged. And if Congress has power to regulate the seamen who assist the pilot in the management of the vessel, a power never denied, we can perceive no valid reason why the pilot should be beyond the reach of the same power. It is true that, according to the usages of modern commerce on the ocean, the pilot is on board only during a part of the voyage between ports of different States, or between ports of the United States and foreign countries; but if he is on board for such a purpose and during so much of the voyage as to be engaged in navigation, the power to regulate navigation extends to him while thus engaged, as clearly as it would if he were to remain on board throughout the whole passage, from port to port. For it is a power which extends to every part of the voyage, and may regulate those who conduct or assist in conducting navigation in one part of a voyage as much as in another part, or during the whole voyage.

Nor should it be lost sight of, that this subject of the regulation of pilots and pilotage has an intimate connection with, and an important relation to, the general subject of commerce with foreign nations and among the several States, over which it was one main object of the Constitution to create a national control. Conflicts between the laws of neighboring States, and discriminations favorable or adverse to commerce with particular foreign nations, might be created by State laws regulating pilotage, deeply affecting that equality of commercial

rights, and that freedom from State interference, which those who formed the Constitution were so anxious to secure, and which the experience of more than half a century has taught us to value so highly. The apprehension of this danger is not speculative merely. For, in 1837, Congress actually interposed to relieve the commerce of the country from serious embarrassment, arising from the laws of different States, situate upon waters which are the boundary between them. This was done by an enactment of the 2d of March, 1837, 5 Stats. at Large, 153, in the following words: —

"Be it enacted, that it shall and may be lawful for the master or commander of any vessel coming into or going out of any port situate upon waters which are the boundary between two States, to employ any pilot duly licensed or authorized by the laws of either of the States bounded on the said waters, to pilot said vessel to or from said port, any law, usage, or custom to the contrary notwithstanding."

The act of 1789, 1 Stats. at Large, 54, already referred to, contains a clear legislative exposition of the Constitution by the first Congress, to the effect that the power to regulate pilots was conferred on Congress by the Constitution; as does also the act of March the 2d, 1837, the terms of which have just been given. The weight to be allowed to this contemporaneous construction, and the practice of Congress under it, has, in another connection, been adverted to. And a majority of the court are of opinion, that a regulation of pilots is a regulation of commerce, within the grant to Congress of the commercial power, contained in the third clause of the eighth section of the first article of the Constitution.

It becomes necessary, therefore, to consider whether this law of Pennsylvania, being a regulation of commerce, is valid.

The act of Congress of the 7th of August, 1789, § 4, is as follows:

"That all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States, respectively, wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress."

If the law of Pennsylvania, now in question, had been in existence at the date of this act of Congress, we might hold it to have been adopted by Congress, and thus made a law of the United States, and so valid. Because this act does, in effect, give the force of an act of Congress, to the then existing State laws on this subject, so long as they should continue unrepealed by the State which enacted them.

But the law on which these actions are founded, was not enacted till 1803. What effect then can be attributed to so much of the act of 1789, as declares that pilots shall continue to be regulated in conformity "with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress"?

If the States were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this act could not confer upon them power thus to legislate. If the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the States that power. And yet this act of 1789 gives its sanction only to laws enacted by the States. This necessarily implies a constitutional power to legislate; for only a rule created by the sovereign power of a State acting in its legislative capacity, can be deemed a law, enacted by a State; and if the State has so limited its sovereign power that it no longer extends to a particular subject, manifestly it cannot, in any proper sense, be said to enact laws thereon. Entertaining these views, we are brought directly and unavoidably to the consideration of the question, whether the grant of the commercial power to Congress did *per se* deprive the States of all power to regulate pilots. This question has never been decided by this court, nor, in our judgment, has any case depending upon all the considerations which must govern this one, come before this court. The grant of commercial power to Congress does not contain any terms which expressly exclude the States from exercising an authority over its subject-matter. If they are excluded, it must be because the nature of the power, thus granted to Congress, requires that a similar authority should not exist in the States. If it were conceded on the one side, that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the States, probably no one would deny that the grant of the power to Congress, as effectually and perfectly excludes the States from all future legislation on the subject, as if express words had been used to exclude them. And on the other hand, if it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the States, then it would be in conformity with the contemporary exposition of the Constitution (Federalist, No. 32), and with the judicial construction, given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of congressional regulations. Sturges *v.* Crowninshield, 4 Wheat. 193; Houston *v.* Moore, 5 Wheat. 1; Wilson *v.* Blackbird Creek Co., 2 Pet. 251.

The diversities of opinion, therefore, which have existed on this subject, have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to

the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

Either absolutely to affirm or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, a plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage, is plain. The act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such that until Congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits.

Viewed in this light, so much of this act of 1789 as declares that pilots shall continue to be regulated "by such laws as the States may respectively hereafter enact for that purpose," instead of being held to be inoperative, as an attempt to confer on the States a power to legislate, of which the Constitution had deprived them, is allowed an appropriate and important signification. It manifests the understanding of Congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation. The practice of the States, and of the national government, has been in conformity with this declaration, from the origin of the national government to this time; and the nature of the subject, when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants. How, then, can we say that by the mere grant of power to regulate commerce the States are deprived of all the power to legislate on this subject, because from the nature of the power the legislation of Congress must be exclusive. This would be to affirm that the nature of the power is in this case something different from the nature of the subject to which in such case the power extends, and that the nature of the power necessarily demands in all cases exclusive legislation by Congress, while the nature of one of the subjects of that power not only does not require such exclusive legislation, but may be best

provided for by many different systems enacted by the States, in conformity with the circumstances of the ports within their limits. In construing an instrument designed for the formation of a government, and in determining the extent of one of its important grants of power to legislate, we can make no such distinction between the nature of the power and the nature of the subject on which that power was intended practically to operate, nor consider the grant more extensive, by affirming of the power what is not true of its subject now in question.

It is the opinion of a majority of the court that the mere grant to Congress of the power to regulate commerce, did not deprive the States of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several States. To these precise questions, which are all we are called on to decide, this opinion must be understood to be confined. It does not extend to the question what other subjects, under the commercial power, are within the exclusive control of Congress, or may be regulated by the States in the absence of all congressional legislation; nor to the general question, how far any regulation of a subject by Congress may be deemed to operate as an exclusion of all legislation by the States upon the same subject. We decide the precise questions before us, upon what we deem sound principles, applicable to this particular subject in the State in which the legislation of Congress has left it. We go no further.

We have not adverted to the practical consequences of holding that the States possess no power to legislate for the regulation of pilots, though in our apprehension these would be of the most serious importance. For more than sixty years this subject has been acted on by the States, and the systems of some of them created and of others essentially modified during that period. To hold that pilotage fees and penalties demanded and received during that time, have been illegally exacted, under color of void laws, would work an amount of mischief which a clear conviction of constitutional duty, if entertained, must force us to occasion, but which could be viewed by no just mind without deep regret. Nor would the mischief be limited to the past. If Congress were now to pass a law adopting the existing State laws, if enacted without authority, and in violation of the Constitution, it would seem to us to be a new and questionable mode of legislation.

If the grant of commercial power in the Constitution has deprived the States of all power to legislate for the regulation of pilots, if their laws on this subject are mere usurpations upon the exclusive power of the general government, and utterly void, it may be doubted whether Congress could, with propriety, recognize them as laws, and adopt them as its own acts; and how are the legislatures of the States to proceed in future, to watch over and amend these laws, as

the progressive wants of a growing commerce will require, when the members of those legislatures are made aware that they cannot legislate on this subject without violating the oaths they have taken to support the Constitution of the United States?

We are of opinion that this State law was enacted by virtue of a power residing in the State to legislate; that it is not in conflict with any law of Congress; that it does not interfere with any system which Congress has established by making regulations, or by intentionally leaving individuals to their own unrestricted action; that this law is therefore valid, and the judgment of the Supreme Court of Pennsylvania in each case must be affirmed.

M'Lean, J., and Wayne, J., dissented; and Daniel, J., although he concurred in the judgment of the court, yet dissented from its reasoning.

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## PENNSYLVANIA *v.* WHEELING AND BELMONT BRIDGE COMPANY.

18 Howard, 421. 1855.

This case was one of original jurisdiction in this court, upon the equity side; and may be said to be a continuation of the suit between the same parties reported in 13 How. 518.

Mr. Justice Nelson delivered the opinion of the court.

The motion in this case is founded upon a bill filed to carry into execution a decree of the court, rendered against the defendants at the adjourned term in May, 1852, which decree declared the bridge erected by them across the Ohio River between Wheeling and Zane's Island to be an obstruction of the free navigation of the said river, and thereby occasioned a special damage to the plaintiff, for which there was not an adequate remedy at law, and directed that the obstruction be removed, either by elevating the bridge to a height designated, or by abatement.

Since the rendition of this decree, and on the 31st August, 1852, an act of Congress has been passed as follows: "That the bridges across the Ohio River at Wheeling, in the State of Virginia, and at Bridgeport, in the State of Ohio, abutting on Zane's Island, in said river, are hereby declared to be lawful structures in their present positions and elevations, and shall be so held and taken to be, any thing in the law or laws of the United States to the contrary notwithstanding."

And further: "That the said bridges be declared to be and are established post-roads for the passage of the mails of the United States, and that the Wheeling and Belmont Bridge Company are authorized to have and maintain their bridges at their present site

and elevation; and the officers and crews of all vessels and boats navigating said river are required to regulate the use of their said vessels, and of any pipes or chimneys belonging thereto so as not to interfere with the elevation and construction of said bridges."

The defendants rely upon this act of Congress as furnishing authority for the continuance of the bridge as constructed, and as superseding the effect and operation of the decree of the court previously rendered, declaring it an obstruction to the navigation.

On the part of the plaintiff, it is insisted that the act is unconstitutional and void, which raises the principal question in the case.

In order to a proper understanding of this question it is material to recur to the ground and principles upon which the majority of the court proceeded in rendering the decree now sought to be enforced.

The bridge had been constructed under an act of the legislature of the State of Virginia; and it was admitted that act conferred full authority upon the defendants for the erection, subject only to the power of Congress in the regulation of commerce. It was claimed, however, that Congress had acted upon the subject and had regulated the navigation of the Ohio River, and had thereby secured to the public, by virtue of its authority, the free and unobstructed use of the same; and that the erection of the bridge, so far as it interfered with the enjoyment of this use, was inconsistent with and in violation of the acts of Congress, and destructive of the right derived under them; and that, to the extent of this interference with the free navigation of the river, the act of the legislature of Virginia afforded no authority or justification. It was in conflict with the acts of Congress, which were the paramount law.

This being the view of the case taken by a majority of the court, they found no difficulty in arriving at the conclusion, that the obstruction of the navigation of the river, by the bridge, was a violation of the right secured to the public by the Constitution and laws of Congress, nor in applying the appropriate remedy in behalf of the plaintiff. The ground and principles upon which the court proceeded will be found reported in 13 How. 518.

Since, however, the rendition of this decree, the acts of Congress already referred to, have been passed, by which the bridge is made a post-road for the passage of the mails of the United States, and the defendants are authorized to have and maintain it at its present site and elevation, and requiring all persons navigating the river to regulate such navigation so as not to interfere with it.

So far, therefore, as this bridge created an obstruction to the free navigation of the river, in view of the previous acts of Congress, they are to be regarded as modified by this subsequent legislation; and, although it still may be an obstruction in fact, is not so in the contemplation of law. We have already said, and the principle is undoubted, that the act of the legislature of Virginia conferred full authority

to erect and maintain the bridge, subject to the exercise of the power of Congress to regulate the navigation of the river. That body having in the exercise of this power, regulated the navigation consistent with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers of both governments, State and Federal which, if not sufficient, certainly none can be found in our system of government.

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Upon the whole, without pursuing the examination further, our conclusion is, that, so far as respects that portion of the decree which directs the alteration or abatement of the bridge, it cannot be carried into execution since the act of Congress which regulates the navigation of the Ohio River, consistent with the existence and continuance of the bridge; and that this part of the motion in behalf of the plaintiff must be denied. But that, so far as respects that portion of the decree which directs the costs to be paid by the defendants, the motion must be granted.

A motion has also been made, on behalf of the plaintiff, for attachments againt the president of the Bridge Company and others, for disobedience of an injunction issued by Mr. Justice Grier, in vacation, on the 27th June, 1854.

It appears that since the rendition of the decree of this court and the passage of the act of Congress, and before any proceedings taken to enforce the execution of the decree, notwithstanding this act, the bridge was broken down, in a gale of wind, leaving only some of the cables suspended from the towers across the river. Upon the happening of this event, a bill was filed by the plaintiff, and an application for the injunction above mentioned was made, which was granted, enjoining the defendants, their officers and agents, against a reconstruction of the bridge, unless in conformity with the requirements of the previous decree in the case. The object of the injunction was to suspend the work, together with the great expenses attending it, until the determination of the question by this court as to the force and effect of the act of Congress, in respect to the execution of the decree. The defendants did not appear upon the notice given of the motion for the injunction, and it was, consequently, granted without opposition.

After the writ was served, it was disobeyed, the defendants proceeding in the reconstruction of the bridge, which they had already begun before the issuing or service of the process.

A motion is now made for attachments against the persons mentioned for this disobedience and contempt.

A majority of the court are of the opinion, inasmuch as we have arrived at the conclusion that the act of Congress afforded full authority to the defendants to reconstruct the bridge, and the decree directing its alteration or abatement could not, therefore, be carried into

execution after the enactment of this law, and inasmuch as the granting of an attachment for the disobedience is a question resting in the discretion of the court, that, under all the circumstances of the case, the motion should be denied.

Some of the judges also entertain doubts as to the regularity of the proceedings in pursuance of which the injunction was issued.

MR. JUSTICE WAYNE, MR. JUSTICE GRIER, and MR. JUSTICE CURTIS, are of opinion that, upon the case presented, the attachment for contempt should issue, and in which opinion I concur.

The motion for the attachment is denied and the injunction dissolved.[1]

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## ESCANABA COMPANY *v.* CHICAGO.

107 United States, 678. 1882.

MR. JUSTICE FIELD delivered the opinion of the court.

The Escanaba and Lake Michigan Transportation Company, a corporation created under the laws of Michigan, is the owner of three steam-vessels engaged in the carrying trade between ports and places in different states on Lake Michigan and the navigable waters connecting with it. The vessels are enrolled and licensed for the coasting trade, and are principally employed in carrying iron ore from the port of Escanaba, in Michigan, to the docks of the Union Iron and Steel Company on the south fork of the south branch of the Chicago River in the city of Chicago. In their course up the river and its south branch and fork to the docks they are required to pass through draws of several bridges constructed over the stream by the city of Chicago; and it is of obstructions caused by the closing of the draws, under an ordinance of the city, for a designated hour of the morning and evening during week-days, and by a limitation of the time to ten minutes, during which a draw may be left open for the passage of a vessel, and by some of the piers in the south branch and fork, and the bridges resting on them, that the corporation complains; and to enjoin the city from closing the draws for the morning and evening hours designated, and enforcing the ten minutes' limitation, and to compel the removal of the objectionable piers and bridges, the present bill is filed.

The river and its branches are entirely within the State of Illinois, and all of it, and nearly all of both branches that is navigable, are within the limits of the city of Chicago. The river, from the junction of its two branches to the lake, is about three-fourths of a mile in length. The branches flow in opposite directions and meet

[1] MR. JUSTICE MCLEAN also dissented, delivering an opinion, and other justices explained their views on particular questions.

at its head, nearly at right angles with it. Originally the width of the river and its branches seldom exceeded one hundred and fifty feet; of the branches and fork it was often less than one hundred feet; but it has been greatly enlarged by the city for the convenience of its commerce.

The city fronts on Lake Michigan, and the mouth of the Chicago River is near its centre. The river and its branches divide the city into three sections; one lying north of the main river and east of its north branch, which may be called its northern division; one lying between the north and south branches, which may be called its western division; and one lying south of the main river and east of the south branch, which may be called its southern division. Along the river and its branches the city has grown up into magnificent proportions, having a population of six hundred thousand souls. Running back from them on both sides are avenues and streets lined with blocks of edifices, public and private, with stores and warehouses, and the immense variety of buildings suited for the residence and the business of this vast population. These avenues and streets are connected by a great number of bridges, over which there is a constant passage of foot-passengers and of vehicles of all kinds. A slight impediment to the movement causes the stoppage of a crowd of passengers and a long line of vehicles.

The main business of the city, where the principal stores, warehouses, offices, and public buildings are situated, is in the southern division of the city; and a large number of the persons who do business there reside in the northern or the western division, or in the suburbs.

While this is the condition of business in the city on the land, the river and its branches are crowded with vessels of all kinds, sailing craft and steamers, boats, barges, and tugs, moving backwards and forwards, and loading and unloading. Along the banks there are docks, warehouses, elevators, and all the appliances for shipping and reshipping goods. To these vessels the unrestricted navigation of the river and its branches is of the utmost importance; while to those who are compelled to cross the river and its branches the bridges are a necessity. The object of wise legislation is to give facilities to both, with the least obstruction to either. This the city of Chicago has endeavored to do.

The State of Illinois, within which, as already mentioned, the river and its branches lie, has vested in the authorities of the city jurisdiction over bridges within its limits, their construction, repair, and use, and empowered them to deepen, widen, and change the channel of the stream, and to make regulations in regard to the times at which the bridges shall be kept open for the passage of vessels.

Acting upon the power thus conferred, the authorities have endeavored to meet the wants of commerce with other States, and

the necessities of the population of the city residing or doing business in different sections. For this purpose they have prescribed as follows: that "Between the hours of six and seven o'clock in the morning, and half-past five and half-past six o'clock in the evening, Sundays excepted, it shall be unlawful to open any bridge within the city of Chicago;" and that "During the hours between seven o'clock in the morning and half-past five o'clock in the evening, it shall be unlawful to keep open any bridge within the city of Chicago for the purpose of permitting vessels or other crafts to pass through the same, for a longer period at any one time than ten miuntes, at the expiration of which period it shall be the duty of the bridge-tender or other person in charge of the bridge to display the proper signal, and immediately close the same, and keep it closed for fully ten minutes for such persons, teams, or vehicles as may be waiting to pass over, if so much time shall be required; when the said bridge shall again be opened (if necessary for vessels to pass) for a like period, and so on alternately (if necessary) during the hours last aforesaid; and in every instance where any such bridge shall be open for the passage of any vessel, vessels, or other craft, and closed before the expiration of ten minutes from the time of opening, said bridge shall then, in every such case, remain closed for fully ten minutes, if necessary, in order to allow all persons, teams, and vehicles in waiting to pass over said bridge."

The first of these requirements was called for to accommodate clerks, apprentices, and laboring men seeking to cross the bridges, at the hours named, in going to and returning from their places of labor. Any unusual delay in the morning would derange their business for the day, and subject them to a corresponding loss of wages.

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These decisions have been cited, approved, and followed in many cases, notably in that of Pound *v.* Turck, decided in 1877. 95 U. S. 459. There, a statute of Wisconsin authorized the erection of one or more dams across the Chippewa River, which was a small navigable stream lying wholly within the limits of the State, but emptying its waters into the Mississippi; and also the building and maintaining of booms on the river with sufficient piers to stop and hold floating logs. The dams and booms were to be so built as not to obstruct the running of lumber-rafts on the river. Certain parties were damaged by delay in a lumber-raft and from its breaking, caused by the obstructions in the river; and their assignees in bankruptcy brought an action against those who had placed the obstructions there, and recovered. The case being brought here, this court was of opinion that the somewhat confused instructions of the Circuit Court must have led the jury to understand, that if the structures of the defendant were a material obstruction to the general navigation of the river, the statute of the State afforded no defence, although the structures were built in strict conformity with its pro-

visions. The Circuit Court evidently acted upon the theory that the State possessed no power to pass the statute because of its supposed conflict with the commercial power of Congress. This court thus construing the instructions of that court, held that they were erroneous, that the case was within the decisions of the Black Bird Creek Marsh case, and Gilman *v.* Philadelphia, and that it was competent for the legislature of the State to impose such regulations and limitations upon the erection of obstructions like dams and booms in navigable streams wholly within its limits, as might best accommodate the interests of all concerned, until Congress should interfere and by appropriate legislation control the matter.

The doctrine declared in these several decisions is in accordance with the more general doctrine now firmly established, that the commercial power of Congress is exclusive of State authority only when the subjects upon which it is exercised are national in their character, and admit and require uniformity of regulation affecting alike all the States. Upon such subjects only that authority can act which can speak for the whole country. Its non-action is therefore a declaration that they shall remain free from all regulation. Welton *v.* State of Missouri, 91 U. S. 275; Henderson *v.* Mayor of New York, 92 Id. 259; County of Mobile *v.* Kimball, 102 Id. 691.

On the other hand, where the subjects on which the power may be exercised are local in their nature or operation, or constitute mere aids to commerce, the authority of the State may be exerted for their regulation and management until Congress interferes and supersedes it. As said in the case last cited: "The uniformity of commercial regulations which the grant to Congress was designed to secure against conflicting State provisions, was necessarily intended only for cases where such uniformity is practicable. Where, from the nature of the subject or the sphere of its operation, the case is local and limited, special regulations, adapted to the immediate locality, could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress, for when that acts the State authority is superseded. Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done in respect to them, but is rather to be deemed a declaration that for the time being and until it sees fit to act they may be regulated by State authority." 102 U. S. 699.

Bridges over navigable streams, which are entirely within the limits of a State, are of the latter class. The local authority can better appreciate their necessity, and can better direct the manner in which they shall be used and regulated than a government at a distance. It is, therefore, a matter of good sense and practical wisdom to leave their control and management with the States, Congress having the power at all times to interfere and supersede their

authority whenever they act arbitrarily and to the injury of commerce.

[The effect of the ordinance of 1787 is considered, and it is held that its provisions are not binding on Illinois since her admission into the Union. See Sands *v.* Manistee River Imp. Co., 123 U. S. 288, *infra*, p. 842.]

But aside from these considerations, we do not see that the clause of the ordinance upon which reliance is placed materially affects the question before us. That clause contains two provisions: one, that the navigable waters leading into the Mississippi and the St. Lawrence shall be common highways to the inhabitants; and the other, that they shall be forever free to them without any tax, impost, or duty therefor. The navigation of the Illinois River is free, so far as we are informed, from any tax, impost, or duty, and its character as a common highway is not affected by the fact that it is crossed by bridges. All highways, whether by land or water, are subject to such crossings as the public necessities and convenience may require, and their character as such is not changed, if the crossings are allowed under reasonable conditions, and not so as to needlessly obstruct the use of the highways. In the sense in which the terms are used by publicists and statesmen, free navigation is consistent with ferries and bridges across a river for the transit of persons and merchandise as the necessities and convenience of the community may require. In Palmer *v.* Commissioners of Cuyahoga County we have a case in point. There application was made to the Circuit Court of the United States in Ohio for an injunction to restrain the erection of a drawbridge over a river in that State on the ground that it would obstruct the navigation of the stream and injure the property of the plaintiff. The application was founded on the provision of the fourth article of the ordinance mentioned. The court, which was presided over by Mr. Justice McLean, then having a seat on this bench, refused the injunction, observing that "This provision does not prevent a State from improving the navigableness of these waters, by removing obstructions, or by dams and locks, so increasing the depth of the water as to extend the line of navigation. Nor does the ordinance prohibit the construction of any work on the river which the State may consider important to commercial intercourse. A dam may be thrown over the river, provided a lock is so constructed as to permit boats to pass with little or no delay, and without charge. A temporary delay, such as passing a lock, could not be considered as an obstruction prohibited by the ordinance." And again: "A drawbridge across a navigable water is not an obstruction. As this would not be a work connected with the navigation of the river, no toll, it is supposed, could be charged for the passage of boats. But the obstruction would be only momentary, to raise the draw; and as such a work may be very important in a general intercourse of a community, no doubt is enter-

tained as to the power of the State to make the bridge." 3 McLean, 226. The same observations may be made of the subsequent legislation of Congress declaring that navigable rivers within the Territories of the United States shall be deemed public highways. Sect. 9 of the act of May 18, 1796, c. 29; sect. 6 of the act of March 26, 1804, c. 35 (1 Stat. 468, § 9; 2 Stat. 279, § 6).

As to the appropriations by Congress, no money has been expended on the improvement of the Chicago River above the first bridge from the lake, known as Rush Street Bridge. No bridge, therefore, interferes with the navigation of any portion of the river which has been thus improved. But, if it were otherwise, it is not perceived how the improvement of the navigability of the stream can affect the ordinary means of crossing it by ferries and bridges. The free navigation of a stream does not require an abandonment of those means. To render the action of the State invalid in constructing or authorizing the construction of bridges over one of its navigable streams, the general government must directly interfere so as to supersede its authority and annul what it has done in the matter.

It appears from the testimony in the record that the money appropriated by Congress has been expended almost exclusively upon what is known as the outer harbor of Chicago, a part of the lake surrounded by breakwaters. The fact that formerly a light-house was erected where now Rush Street Bridge stands in no respect affects the question. A ferry was then used there; and before the construction of the bridge the site as a light-house was abandoned. The existing light-house is below all the bridges. The improvements on the river above the first bridge do not represent any expenditure of the government.

From any view of this case, we see no error in the action of the court below, and its decree must accordingly be *Affirmed.*

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## HARMAN *v.* CHICAGO.

147 United States, 396. 1893.

Mr. Justice Field, after stating the facts, delivered the opinion of the court.

The question presented for determination is the validity of the ordinance of the city of Chicago exacting a license from the plaintiff for the privilege of navigating the Chicago River and its branches by tug-boats owned and controlled by him. The Chicago River is a navigable stream, and its waters connect with the harbor of Chicago, and the vessels navigating the river and harbor have access by them to Lake Michigan, and the States bordering on the lake and connecting lakes and rivers. The tugs in question, from

the owner of which the license fees were exacted, were enrolled and licensed in the coasting trade of the United States, under the provisions of the Revised Statutes prescribing the conditions of such license and enrolment. The license is in the form contained in section 4321 of the Revised Statutes, in Title L, under the head of "The Regulations of Vessels in Domestic Commerce." It declares that William Harmon, managing owner, of Chicago, having given bond that the steam tug (naming it and her tonnage) shall not be employed in any trade while this license shall continue in force, whereby the revenue of the United States shall be defrauded, and having also sworn that this license shall not be used for any other vessel, nor for any other employment than herein specified, the license is hereby granted for such steam tug (naming it) to be employed in carrying on the coasting and foreign trade, for one year from the date thereof. The license is given by the collector of customs of the district, under his hand and seal. The licenses for the several tugs were in this form, differing from each other only in the name of the tug licensed and its tonnage. The licenses confer a right upon the owner of the steam tugs to navigate with them the rivers and the waters of the United States for one year, which includes the river and harbor of Chicago, Lake Michigan, and connecting rivers and lakes. It appears from the record that at the time the license fees in controversy were exacted, these tugs were actually engaged in the coasting and foreign trade, and in towing vessels engaged in interstate commerce, from Lake Michigan to the Chicago River and its branches, and in towing vessels similarly engaged from the river into the lake.

In Gibbons *v.* Ogden, 9 Wheat. 1, 213, this Court held that vessels enrolled and licensed pursuant to the laws of the United States, as these tugs were, had conferred upon them as full and complete authority to carry on this trade as it was in the power of Congress to confer. The language of the Court in that case respecting the first section of the act then under consideration is equally applicable to the provisions of section 4311 of Title L of the Revised Statutes. This latter section declares that "vessels of twenty tons and upward, enrolled in pursuance of this Title, and having a license in force, or vessels of less than twenty tons, which, although not enrolled, have a license in force as required by this Title, and no others, shall be deemed vessels of the United States, entitled to the privileges of vessels employed in the coasting trade or fisheries." The first section of the act mentioned in Gibbons *v.* Ogden is substantially the same as the above section 4311, and, referring to the privileges conferred by it, the Court said: "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 business in which the tugs of the plaintiff were engaged is similar to that of the vessels mentioned in Foster *v.* Davenport, 22 How. 244. In that case a steamboat was employed as a lighter and tow-boat in waters in the State of Alabama. It was, therefore, insisted that she was engaged exclusively in domestic trade and commerce, and consequently the case could be distinguished from the preceding one of Sinnot *v.* Davenport, 22 How. 227, argued with it, in which a law of Alabama, passed in 1854, requiring the owners of steamboats navigating the waters of the State, before leaving the port of Mobile, to file a statement in writing in the office of the probate judge of Mobile County setting forth the name of the vessel, the name of the owner or owners, his or their place or places of residence, and the interest each had in the vessel, was held to be in conflict with the act of Congress passed in February, 1793, so far as the State law was brought to bear upon a vessel which had taken out a license, and was duly enrolled under the act of Congress for carrying on the coasting trade. But Mr. Justice Nelson, speaking for the court, replied as follows: "It is quite apparent, from the facts admitted in the case, that this steamboat was employed in aid of vessels engaged in the foreign or coastwise trade and commerce of the United States, either in the delivery of their cargoes, or in towing the vessels themselves to the port of Mobile. The character of the navigation and business in which it was employed cannot be distinguished from that in which the vessels it towed or unloaded were engaged. The lightering or towing was but the prolongation of the voyage of the vessels, assisted to their port of destination. The case, therefore, is not distinguishable in principle from the one above referred to."

In the present case a neglect or refusal of the owner of the tugs to pay the license required by the ordinance subjects him to the imposition of a fine. His only alternative is to pay the fine, or the use of his tugs in their regular business will be stopped. Of course, the ordinance, if constitutional and operative, has the effect to restrain the use of the vessels in the legitimate commerce for which they are expressly licensed by the United States. It would be a burden and restraint upon that commerce, which is authorized by the United States, and over which Congress has control. No State can interfere with it, or put obstructions upon it, without coming in conflict with the supreme authority of Congress. The requirement that every steam tug, barge or tow-boat, towing vessels or craft for hire in the Chicago River or its branches shall have a license from the city of Chicago, is equivalent to declaring that such vessels shall not enjoy the privileges conferred by the United States, except upon the conditions imposed by the city. This

ordinance is, therefore, plainly and palpably in conflict with the exclusive power of Congress to regulate commerce, interstate and foreign. The steam tugs are not confined to any one particular locality, but may carry on the trade for which they are licensed in any of the ports and navigable rivers of the United States. They may pass from the river and harbor of Chicago to any port on Lake Michigan, or other lakes and rivers connected therewith. As justly observed by counsel: The citizen of any of the States bordering on the lakes who with his tug-boat, also enrolled and licensed for the coasting trade, may wish to tow his or his neighbor's vessel, must, according to the ordinance, before he can tow it into Chicago River, or any of its branches, obtain a license from the city of Chicago to do so. The license of the United States would be insufficient to give him free access to those waters.

In Moran *v.* New Orleans, 112 U. S. 69, 74, a law of Louisiana authorized the city of New Orleans to levy and collect a license upon all persons pursuing any trade, profession or calling, and to provide for its collection, and the council of that city passed an ordinance to establish the rate of licenses for professions, callings, and other business for the year 1880, and, among others, provided that every member of a firm or company, other agency, person or corporation, owning and running tow-boats to and from the Gulf of Mexico, should pay a license fee of $500. The owner of two steam propellers, measuring over one hundred tons, duly enrolled and licensed at the port of New Orleans under the law of the United States, for the coasting trade, employed them as tug-boats in taking vessels from the sea up the river to New Orleans, and from that port to the sea. The city of New Orleans brought an action against him to recover the license under the ordinance, and obtained a judgment in its favor, which, on appeal, was affirmed by the Supreme Court of the State. Being brought to this court the judgment was reversed, with directions to the court below to dismiss the action of the city. In deciding the case this court, speaking by Mr. Justice Matthews, said of the license exacted: "It is a charge explicitly made as the price of the privilege of navigating the Mississippi River, between New Orleans and the Gulf, in the coastwise trade, as the condition on which the State of Louisiana consents that the boats of the plaintiff in error may be employed by him according to the terms of the license granted under the authority of Congress. The sole occupation sought to be subjected to the tax is that of using and enjoying the license of the United States to employ these particular vessels in the coasting trade; and the State thus seeks to burden with an exaction, fixed at its own pleasure, the very right to which the plaintiff in error is entitled under, and which he derives from, the Constitution and laws of the United States. The Louisiana statute declares expressly that if he refuses or neglects to pay the license tax imposed upon him for using his boats in this way, he shall not

be permitted to act under and avail himself of the license granted by the United States, but may be enjoined from so doing by judicial process. The conflict between the two authorities is direct and express. What the one declares may be done without the tax, the other declares shall not be done except upon payment of the tax. In such an opposition, the only question is which is the superior authority? and reduced to that, it furnishes its own answer."

In the light of these decisions, and many others to the same effect might be cited, there can be no question as to the invalidity of the ordinance under consideration, unless its validity can be found in the alleged expenditures of the city of Chicago in deepening and improving the river. It is upon such alleged ground that the court below sustained the judgment and upheld the validity of the ordinance, and it is upon that ground that it is sought to support the judgment in this court.

The decisions of this court in Huse *v.* Glover, 119 U. S. 543, and in Sands *v.* Manistee River Improvement Co., 123 U. S. 288, are particularly referred to and relied upon. The attempt is made to assimilate the present case to those cases from the fact that it is conceded that the Chicago River is from time to time deepened for navigation purposes by dredging under the direction and at the expense of the city. The license fee provided for in the ordinance of the city is treated as in the nature of a toll or compensation for the expenses of deepening the river. But the plain answer to this position is that the license fee is not exacted upon any such ground, nor is any suggestion made that any special benefit has arisen or can arise to the tugs in question by the alleged deepening of the river. The license is not exacted as a toll or compensation for any specific improvement of the river, of which the steam barges or tugs have the benefit, but is exacted for the keeping, use, or letting to hire of any steam tug, or barge, or tow-boat, for towing vessels or craft into the Chicago River, its branches, or slips connected therewith. The business of the steam barge, or tow-boat is to aid the movement of vessels in the river and its branches, and adjacent waters; that is, to aid the commerce in which such vessels are engaged.

As said by this court in Foster *v.* Davenport, 22 How. 244, from which we have quoted above, the character of the navigation and business in which the steam barges or tug-boats are employed cannot be distinguished from that in which the vessels towed are engaged. In Huse *v.* Glover, 119 U. S. 543, the Legislature of Illinois had, by various acts, adopted measures for improving the navigation of the Illinois River, including the construction of a lock and dam at two places on the river, and for that purpose created a board of canal commissioners and invested them with authority to superintend the construction of the locks and canals, to control and manage them after their construction, and to prescribe reasonable rates of toll for the passage of vessels through the locks. The works were

constructed at an expense of several hundred thousand dollars, which was borne principally by the State, although the United States bore a part of it, sufficient to testify to their consent and approval of the work; and the commissioners prescribed rates of toll for the passage of vessels through the locks, the rates being fixed per ton according to the tonnage measurement of the vessels and the amount of freight carried. Certain parties engaged in the ice trade, and employing several vessels in transporting ice on the river and thence by the Mississippi and other navigable streams to St. Louis and other Southern markets, all of which vessels were licensed and registered under the act of Congress, filed a bill alleging that, prior to the construction of the dams, the complainants were able to navigate the river without interruption, except such as was incident to the ordinary use of the channel in its natural state; that said dams were an impediment to the free navigation of the river; that for the construction of the locks they were charged and paid duties upon the tonnage measurement of their steamboats and other vessels, amounting to about five thousand dollars; and that similar charges would be made upon subsequent shipments. And the bill alleged that the imposition of the tolls and tonnage duties was in violation of article four of the ordinance for the government of the territory of the United States northwest of the Ohio River, passed July 13, 1787, which provides "that the navigable waters leading into the Mississippi and St. Lawrence and the carrying places between the same shall be a common highway and forever free, as well to the inhabitants of the territory as to citizens of the United States, and those of any other State that may be admitted into the confederacy without any tax, impost, or duty therefor," and of the article of the Constitution prohibiting the imposition of a tonnage duty by any State without the consent of Congress. The bill therefore prayed that the canal commissioners and persons acting under them might be restrained from exacting any tonnage duties or other charges for the passage of their steamboats or barges and other vessels used by them in navigating the Illinois River, and from interfering in any manner with the free navigation of the river in the course of their business. The Circuit Court of the United States sustained the validity of the statute and this court affirmed its judgment. In its opinion this court said: —

"The exaction of tolls for passage through the locks is as compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream. The provision of the clause that the navigable streams should be highways without any tax, impost, or duty, has reference to their navigation in their natural state. It did not contemplate that such navigation might not be improved by artificial means, by the removal of obstructions, or by the making of dams for deepening the waters, or by turning into the rivers waters from other streams to increase their depth. For outlays

caused by such works the State may exact reasonable tolls. They are like charges for the use of wharves and docks constructed to facilitate the landing of persons and freight, and the taking them on board, or for the repair of vessels.

"The State is interested in the domestic as well as in the interstate and foreign commerce conducted on the Illinois River; and to increase its facilities, and thus augment its growth, it has full power. It is only when, in the judgment of Congress, its action is deemed to encroach upon the navigation of the river as a means of interstate and foreign commerce, that that body may interfere and control or supersede it. If, in the opinion of the State, greater benefit would result to her commerce by the improvements made than by leaving the river in its natural state — and on that point the State must necessarily determine for itself — it may authorize them, although increased inconvenience and expense may thereby result to the business of individuals. The private inconvenience must yield to the public good."

We adhere to the doctrine thus declared. It was not new when stated in the case mentioned. It had been often announced, though, perhaps, not with as much fulness. That case differs essentially from the one before us. It pointed out distinctly the nature of the improvement; the benefit which it extended to vessels was readily perceptible, and no principle was violated, and no control of Congress over commerce, interstate or foreign, was impaired thereby. Congress, by its contribution to the work, had assented to it. The navigation of the river was improved and facilitated, and those thus benefited were required to pay a reasonable toll for the increased facilities afforded. Nothing of this kind is mentioned for consideration in the ordinance of Chicago. The license fee is a tax for the use of navigable waters, not a charge by way of compensation for any specific improvement. The grant to the city under which the ordinance was passed is a general one to all municipalities of the State. Waters navigable in themselves in a State, and connecting with other navigable waters so as to form a waterway to other States or foreign nations, cannot be obstructed or impeded so as to impair, defeat, or place any burden upon a right to their navigation granted by Congress. Such right the defendants had from the fact that their steam barges and tow-boats were enrolled and licensed, as stated, under the laws of the United States.

The case of Sands *v.* Manistee River Improvement Co., 123 U. S. 288, does not have any bearing upon the case under consideration. The Manistee River is wholly within the State of Michigan, and its improvement consisted in the removal of obstacles to the floating of logs and lumber down the stream, principally by the cutting of new channels at different points and confining the waters at other points by embankments. The statute under which the improvement company was organized contained various provisions to secure a

careful consideration of the improvements proposed and of their alleged benefit to the public, and, if adopted, their proper construction, and also for the establishment of tolls to be charged for their use. When the case came before this court it was held that the internal commerce of a State, that is, the commerce which is wholly confined within its limits, is as much under its control as foreign or interstate commerce is under the control of the general government, and, to encourage the growth of that commerce and render it safe, States might provide for the removal of obstructions from their rivers and harbors and deepen their channels and improve them in other ways, and levy a general tax or toll upon those who use the improvements to meet their cost, provided the free navigation of the waters, as permitted by the laws of the United States, was not impaired, and provided any system for the improvement of their navigation instituted by the general government was not defeated. No legislation of Congress was, by the statute of Michigan, in that case interfered with, nor any right conferred, under the legislation of Congress, in the navigation of the river by licensed or enrolled vessels, impaired, defeated, or burdened in any respect. It was the improvement of a river wholly within the State, and, therefore, until Congress took action on the subject, wholly under the control of the authorities of the State. County of Mobile *v.* Kimball, 102 U. S. 691, 699; Escanaba Co. *v.* Chicago, 107 U. S. 678.

It follows from the views expressed that the judgment of the Supreme Court of Illinois should have been for the plaintiff below, the plaintiff in error here. Its judgment will, therefore, be

*Reversed and the cause remanded to that court for further proceedings not inconsistent with this opinion.*

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## UNITED STATES *v.* RIO GRANDE DAM AND IRRIGATION COMPANY.

174 United States, 690. 1899.

[THIS suit was begun in the territorial court of New Mexico to restrain defendant, a corporation organized under the laws of the territory, and others claiming rights under it, from carrying out their purpose to erect in New Mexico a dam across the Rio Grande River and divert the waters of that river to form an artificial lake and appropriate them to the purposes of irrigation, thereby diverting them and obstructing the navigability of said river below said dam throughout its entire course. On an issue raised as to the navigability of the river the territorial court held that it would take

judicial notice that it was not navigable within the territory of New Mexico, and therefore dismissed the bill. This decree was affirmed in the supreme court of the territory and the United States appealed to this court.]

Mr. Justice Brewer delivered the opinion of the court.

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We may, therefore, properly limit our inquiry to the effect of the proposed dam and appropriation of waters upon the navigability of the Rio Grande, and, in case such proposed action tends to destroy such navigability, the extent of the right of the government to interfere. The intended construction of the dam and impounding of the water are charged in the bill and admitted in the answer. The bill further charges that the purpose is to obtain control of the entire flow of the river, and divert and use it for irrigation and supplying waters for municipal and manufacturing uses; that, by reason of the porous soil, the dry atmosphere, and consequent rapid evaporation, but little water thus taken from the river and distributed over the surface of the earth will ever be returned to the river; and that this appropriation of the waters will so deplete and prevent the flow of water through the channel of the river below the dam as to seriously obstruct the navigable capacity of the river throughout its entire course, even to its mouth. The answer, while denying an intent to appropriate all the waters of the Rio Grande, states that the entire flow, during the irrigation season, at the point where defendants propose to construct reservoirs, had long since been diverted, and was owned and beneficially used by parties other than defendants, that they did not seek to disturb such appropriation, but that their sole intention was to appropriate only such waters as had not already been legally appropriated, and that the beneficial rights to be acquired in the stream by virtue of the structures would be very largely only so acquired from the excess, storm, and flood waters now unappropriated, useless, and going to waste. In other words, the bill charges that the defendants, at the places where they proposed to construct their dam, intend thereby to appropriate all the waters of the Rio Grande, and defendants qualify that charge only so far as they say that most of the flow of the river is already appropriated, and they only propose to take the balance. The bill charges that such appropriation of the entire flow will seriously obstruct the navigability of the river from the place of the dam to the mouth of the stream. The defendants deny this, but as the court found that there was no equity in the bill, and dismissed the suit on that ground, we must, for the purposes of this inquiry, assume that it is true, that defendants are intending to appropriate the entire unappropriated flow of the Rio Grande at the place where they propose to construct their dam, and that such appropriation will seriously affect the navigability of the river where it is now navigable. The right to do this

is claimed by defendants and denied by the government, and that generally speaking is the question presented for our consideration.

The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream. It is enough, without other citations or quotations, to quote the language of Chancellor Kent (3 Kent, Comm. § 439):

"Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. '*Aqua currit et debet currere ut currere solebat,*' is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate."

While this is undoubted, and the rule obtains in those States in the Union which have simply adopted the common law, it is also true that as to every stream within its dominion a State may change this common-law rule, and permit the appropriation of the flowing waters for such purposes as it deems wise. Whether this power to change the common-law rule, and permit any specific and separate appropriation of the waters of a stream, belongs also to the legislature of a territory, we do not deem it necessary, for the purposes of this case, to inquire. We concede *arguendo* that it does.

Although this power of changing the common-law rule as to streams within its dominion undoubtedly belongs in each State, yet two limitations must be recognized: First, that, in the absence of specific authority from Congress, a State cannot, by its legislation, destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far, at least, as may be necessary for the beneficial uses of the government property; second, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the general government over interstate commerce and its natural highways vests in that government the right to take all needed measures to preserve the navigability of the navigable water courses of the country, even against any State action. It is true there have been frequent decisions recognizing the power of the State, in the absence of congressional legislation, to assume control of even navigable waters within its limits, to the extent of creating dams, booms, bridges, and other matters which operate as obstructions to navigability. The power of the State to thus legislate for the interests of its own citizens is conceded, and until in some way

Congress asserts its superior power, and the necessity of preserving the general interests of the people of all the States, it is assumed that State action, although involving temporarily an obstruction to the free navigability of a stream, is not subject to challenge. A long list of cases to this effect can be found in the reports of this court. See, among others, the following: Willson *v.* Blackbird Creek Co., 2 Pet. 245; Gilman *v.* Philadelphia, 3 Wall. 713; Escanaba Co. *v.* Chicago, 107 U. S. 678; Wellamette Iron Bridge Co. *v.* Hatch, 125 U. S. 1.

All this proceeds upon the thought that the non-action of Congress carries with it an implied assent to the action taken by the State.

Notwithstanding the unquestioned rule of the common law in reference to the right of a lower riparian proprietor to insist upon the continuous flow of the stream as it was, and although there has been in all the Western States an adoption or recognition of the common law, it was early developed in their history that the mining industry in certain States, the reclamation of arid lands in others, compelled a departure from the common-law rule, and justified an appropriation of flowing waters both for mining purposes and for the reclamation of arid lands, and there has come to be recognized in those States, by custom and by State legislation, a different rule, — a rule which permits, under certain circumstances, the appropriation of the waters of a flowing stream for other than domestic purposes. So far as those rules have only a local significance, and affect only questions between citizens of the State, nothing is presented which calls for any consideration by the Federal courts.

[Acts of Congress are quoted from as follows: Rev. Stat. § 2339; 19 Stat. 377, § 1; 26 Stat. 1101, § 18.]

Obviously, by these acts, so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common-law rule as to continuous flow. To infer therefrom that Congress intended to release its control over the navigable streams of the country, and to grant in aid of mining industries and the reclamation of arid lands the right to appropriate the waters on the sources of navigable streams to such an extent as to destroy their navigability, is to carry those statutes beyond what their fair import permits. This legislation must be interpreted in the light of existing facts, — that all through this mining region in the West were streams, not navigable, whose waters could safely be appropriated for mining and agricultural industries, without serious interference with the navigability of the rivers into which those waters flow. And in reference to all these cases of purely local interest the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common-law rule, which permitted the appropriation of those waters for legitimate industries. To hold that Congress, by

these acts, meant to confer upon any State the right to appropriate all the waters of the tributary streams which unite into a navigable water course, and so destroy the navigability of that water course in derogation of the interests of all the people of the United States, is a construction which cannot be tolerated. It ignores the spirit of the legislation, and carries the statute to the verge of the letter, and far beyond what, under the circumstances of the case, must be held to have been the intent of Congress.

But whatever may be said as to the true intent and scope of these various statutes, we have before us the legislation of 1890.

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As this is a later declaration of Congress, so far as it modifies any privileges or rights conferred by prior statutes, it must be held controlling, at least as to any rights attempted to be created since its passage; and all the proceedings of the appellees in this case were subsequent to this act. This act declares that "the creation of any obstruction, not affirmatively authorized by law to the navigable capacity of any waters in respect to which the United States has jurisdiction, is hereby prohibited." Whatever may be said in reference to obstructions existing at the time of the passage of the act, under the authority of State statutes, it is obvious that Congress meant that thereafter no State should interfere with the navigability of a stream without the condition of national assent. It did not, of course, disturb any of the provisions of prior statutes in respect to the mere appropriation of water of non-navigable streams in disregard of the old common-law rule of continuous flow, and its only purpose, as is obvious, was to affirm that as to navigable waters nothing should be done to obstruct their navigability without the assent of the national government. It was an exercise by Congress of the power, oftentimes declared by this court to belong to it, of national control over navigable streams; and various sections in this statute, as well as in the act of July 13, 1892, c. 158 (27 Stat. 88, 110), provide for the mode of asserting that control. It is urged that the true construction of this act limits its applicability to obstructions in the navigable portion of a navigable stream, and that as it appears that, although the Rio Grande may be navigable for a certain distance above its mouth, it is not navigable in the territory of New Mexico, this statute has no applicability. The language is general, and must be given full scope. It is not a prohibition of any obstruction to the navigation but any obstruction to the navigable capacity, and anything, wherever done or however done, within the limits of the jurisdiction of the United States, which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition. Evidently Congress, perceiving that the time had come when the growing interests of commerce required that the navigable waters of the United States should be subjected to the direct control of the national

government, and that nothing should be done by any State tending to destroy that navigability without the explicit assent of the national government, enacted the statute in question; and it would be to improperly ignore the scope of this language to limit it to the acts done within the very limits of navigation of a navigable stream.

The creation of any such obstruction may be enjoined, according to the last provision of the section, by proper proceedings in equity, under the direction of the attorney general of the United States, and it was in pursuance of this clause that these proceedings were commenced. Of course, when such proceedings are instituted, it becomes a question of fact whether the act sought to be enjoined is one which fairly and directly tends to obstruct (that is, interfere with or diminish) the navigable capacity of a stream. It does not follow that the courts would be justified in sustaining any proceeding by the attorney general to restrain any appropriation of the upper waters of a navigable stream. The question always is one of fact, whether such appropriation substantially interferes with the navigable capacity within the limits where navigation is a recognized fact. In the course of the argument, this suggestion was made, and it seems to us not unworthy of note, as illustrating this thought. The Hudson river runs within the limits of the State of New York. It is a navigable stream, and a part of the navigable waters of the United States, so far at least as from Albany southward. One of the streams which flows into it, and contributes to the volume of its waters, is the Croton river, a non-navigable stream. Its waters are taken by the State of New York for domestic uses in the city of New York. Unquestionably, the State of New York has a right to appropriate its waters, and the United States may not question such appropriation, unless thereby the navigability of the Hudson be disturbed. On the other hand, if the State of New York should, even at a place above the limits of navigability, by appropriation for any domestic purposes, diminish the volume of waters which, flowing into the Hudson, make it a navigable stream, to such an extent as to destroy its navigability, undoubtedly the jurisdiction of the national government would arise, and its power to restrain such appropriation be unquestioned; and, within the purview of this section, it would become the right of the attorney general to institute proceedings to restrain such appropriation.

[Case remanded for an inquiry into the question whether the threatened act of defendant will substantially diminish the navigability of the stream.[1]]

[1] In the case of KANSAS *v.* COLORADO, 206 U. S. 46, 27 Sup. Ct. Rep. 655 (1907), it was held that the government of the United States has no power to regulate the use of the water of a stream for irrigation purposes although it flows through two states, and that as between states the question is as to whether the substantial interests of the one are being materially injured by the acts of the other in authorizing the appropriation of the water of the stream for irrigation purposes.

## 2. Taxation of Commerce.

### BROWN v. MARYLAND.

12 Wheaton, 419; 7 Curtis, 262. 1827.

Mr. Chief Justice Marshall delivered the opinion of the court.

This is a writ of error to a judgment rendered in the Court of Appeals of Maryland, affirming a judgment of the City Court of Baltimore, on an indictment found in that court against the plaintiffs in error, for violating an act of the Legislature of Maryland. The indictment was founded on the 2d section of that act, which is in these words: "And be it enacted that all importers of foreign articles or commodities, of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whiskey, and other distilled spirituous liquors, etc., and other persons selling the same by wholesale, bale or package, hogshead, barrel, or tierce, shall, before they are authorized to sell, take out a license, as by the original act is directed, for which they shall pay fifty dollars; and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement." The indictment charges the plaintiffs in error with having imported and sold one package of foreign dry goods without having license to do so. A judgment was rendered against them, on demurrer, for the penalty which the act prescribes for the offence; and that judgment is now before this court.

The cause depends entirely on the question whether the legislature of a State can constitutionally require the importer of foreign articles to take out a license from the State, before he shall be permitted to sell a bale or package so imported.

It has been truly said that the presumption is in favor of every legislative act, and that the whole burden of proof lies on him who denies its constitutionality. The plaintiffs in error take the burden upon themselves, and insist that the act under consideration is repugnant to two provisions in the constitution of the United States.

1. To that which declares that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

2. To that which declares that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

1. The first inquiry is into the extent of the prohibition upon States "to lay any imposts or duties on imports or exports." The

counsel for the State of Maryland would confine this prohibition to laws imposing duties on the act of importation or exportation. The counsel for the plaintiffs in error give them a much wider scope.

In performing the delicate and important duty of construing clauses in the Constitution of our country, which involve conflicting powers of the government of the Union, and of the respective States, it is proper to take a view of the literal meaning of the words to be expounded, of their connection with other words, and of the general objects to be accomplished by the prohibitory clause, or by the grant of power.

What, then, is the meaning of the words, "imposts or duties on imports or exports?"

An impost, or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before or on entering the port, does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are "imports"? The lexicons inform us they are "things imported." If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. "A duty on imports," then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. The succeeding words of the sentence which limit the prohibition, show the extent in which it was understood. The limitation is "except what may be absolutely necessary for executing its inspection laws." Now, the inspection laws, so far as they act upon articles for exportation, are generally executed on land, before the article is put on board the vessel; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection, then, is a tax which is frequently, if not always paid for service performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the States to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition.

If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made, we know no reason why this general rule should not be as applicable to the Constitution

as to other instruments. If it be applicable, then this exception in favor of duties for the support of inspection laws, goes far in proving that the framers of the Constitution classed taxes of a similar character with those imposed for the purposes of inspection, with duties on imports and exports, and supposed them to be prohibited.

If we quit this narrow view of the object, and, passing from the literal interpretation of the words, look to the objects of the prohibition, we find no reason for withdrawing the act under consideration from its operation.

From the vast inequality between the different States of the confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several States exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives which were deemed sufficient by the statesmen of that day, the general power of taxation, indispensably necessary as it was, and jealous as the States were of any encroachment on it, was so far abridged as to forbid them to touch imports or exports, with the single exception which has been noticed. Why are they restrained from imposing these duties? Plainly, because, in the general opinion, the interest of all would be best promoted by placing that whole subject under the control of Congress. Whether the prohibition to "lay imposts, or duties on imports or exports," proceeded from an apprehension that the power might be so exercised as to disturb that equality among the States which was generally advantageous, or that harmony between them which it was desirable to preserve, or to maintain unimpaired our commercial connections with foreign nations, or to confer this source of revenue on the government of the Union, or whatever other motive might have induced the prohibition, it is plain that the object would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed, as by a power to tax it while entering the port. There is no difference, in effect, between a power to prohibit the sale of an article, and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. No object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer. It is obvious that the same power which imposes a light duty, can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. If the tax may be levied in this form by a State, it may be levied to an extent which will defeat the revenue by imposts, so far as it is drawn from importations into the particular State. We are told that such wild and irrational abuse of power is not to be apprehended, and is not to

be taken into view, when discussing its existence. All power may be abused; and if the fear of its abuse is to constitute an argument against its existence, it might be urged against the existence of that which is universally acknowledged, and which is indispensable to the general safety. The States will never be so mad as to destroy their own commerce, or even to lessen it.

We do not dissent from these general propositions. We do not suppose any State would act so unwisely. But we do not place the question on that ground.

These arguments apply with precisely the same force against the whole prohibition. It might with the same reason be said, that no State would be so blind to its own interests as to lay duties on importation which would either prohibit or diminish its trade. Yet the framers of our Constitution have thought this a power which no State ought to exercise. Conceding, to the full extent which is required, that every State would, in its legislation on this subject, provide judiciously for its own interests, it cannot be conceded that each would respect the interests of others. A duty on imports is a tax on the article, which is paid by the consumer. The great importing States would thus levy a tax on the non-importing States, which would not be less a tax because their interest would afford ample security against its ever being so heavy as to expel commerce from their ports. This would necessarily produce countervailing measures on the part of those States whose situation was less favorable to importation. For this, among other reasons, the whole power of laying duties on imports was, with a single and slight exception, taken from the States. When we are inquiring whether a particular act is within this prohibition, the question is not, whether the State may so legislate as to hurt itself, but whether the Act is within the words and mischief of the prohibitory clause. It has already been shown that a tax on the article in the hands of the importer is within its words; and we think it too clear for controversy that the same tax is within its mischief. We think it unquestionable that such a tax has precisely the same tendency to enhance the price of the article, as if imposed upon it while entering the port.

The counsel for the State of Maryland insist, with great reason, that if the words of the prohibition be taken in their utmost latitude, they will abridge the power of taxation, which all admit to be essential to the States, to an extent which has never yet been suspected, and will deprive them of resources which are necessary to supply revenue, and which they have heretofore been admitted to possess. These words must, therefore, be construed with some limitation; and, if this be admitted, they insist, that entering the country is the point of time when the prohibition ceases, and the power of the State to tax commences.

It may be conceded that the words of the prohibition ought not to be pressed to their utmost extent; that in our complex system, the

object of the powers conferred on the government of the Union, and the nature of the often conflicting powers which remain in the States, must always be taken into view, and may aid in expounding the words of any particular clause. But, while we admit that sound principles of construction ought to restrain all courts from carrying the words of the prohibition beyond the object the Constitution is intended to secure; that there must be a point of time when the prohibition ceases, and the power of the State to tax commences; we cannot admit that this point of time is the instant that the articles enter the country. It is, we think, obvious, that this construction would defeat the prohibition.

The constitutional prohibition on the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution.

The counsel for the plaintiffs in error contend that the importer purchases, by payment of the duty to the United States, a right to dispose of his merchandise, as well as to bring it into the country; and certainly the argument is supported by strong reason, as well as by the practice of nations, including our own. The object of importation is sale; it constitutes the motive for paying the duties; and if the United States possess the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understood to confer it. The practice of the most commercial nations conforms to this idea. Duties, according to that practice, are charged on those articles only which are intended for sale or consumption in the country. Thus, sea stores, goods imported and re-exported in the same vessel, goods landed and carried overland for the purpose of being re-exported from some other port, goods forced in by stress of weather, and landed, but not for sale, are exempted from the payment of duties. The whole course of legislation on the subject shows that, in the opinion

of the legislature, the right to sell is connected with the payment of duties.

The counsel for the defendant in error have endeavored to illustrate their proposition, that the constitutional prohibition ceases the instant the goods enter the country, by an array of the consequences which they suppose must follow the denial of it. If the importer acquires the right to sell by the payment of duties, he may, they say, exert that right when, where, and as he pleases, and the State cannot regulate it. He may sell by retail, at auction, or as an itinerant peddler. He may introduce articles, as gunpowder, which endanger a city, into the midst of its population; he may introduce articles which endanger the public health, and the power of self-preservation is denied. An importer may bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation.

These objections to the principle, if well founded, would certainly be entitled to serious consideration. But we think they will be found, on examination, not to belong necessarily to the principle, and consequently not to prove that it may not be resorted to with safety as a criterion by which to measure the extent of the prohibition.

This indictment is against the importer, for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them or otherwise mixes them with the general property of the State, by breaking up his packages, and travelling with them as an itinerant peddler. In the first case, the tax intercepts the import, as an import in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the State. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the State. In the last cases, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer.

So if he sells by auction. Auctioneers are persons licensed by the State, and if the importer chooses to employ them, he can as little object to paying for this service, as for any other for which he may apply to an officer of the State. The right of sale may very well be annexed to importation, without annexing to it, also, the privilege of using the officers licensed by the State to make sales in a peculiar way.

The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States. If the possessor stores it himself out of town, the removal cannot be a duty on imports, because it contributes nothing to the Revenue. If he prefers placing it in a public magazine, it is

because he stores it there, in his own opinion, more advantageously than elsewhere. We are not sure that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is undoubtedly an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed the laws of the United States expressly sanction the health laws of a State.

The principle, then, for which the plaintiffs in error contend, that the importer acquires a right, not only to bring the articles into the country, but to mix them with the common mass of property, does not interfere with the necessary power of taxation which is acknowledged to reside in the States, to that dangerous extent which the counsel for the defendants in error seem to apprehend. It carries the prohibition in the Constitution no further than to prevent the States from doing that which it was the great object of the Constitution to prevent.

But if it should be proved that a duty on the article itself would be repugnant to the Constitution, it is still argued that this is not a tax upon the article, but on the person. The State, it is said, may tax occupations, and this is nothing more.

It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it. So a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the Constitution.

In support of the argument that the prohibition ceases the instant the goods are brought into the country, a comparison has been drawn between the opposite words, export and import. As to export, it is said, means only to carry goods out of the country, so to import means only to bring them into it. But suppose we extend this comparison to the two prohibitions. The States are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any State. There is some diversity in language, but none is perceivable in the act which is prohibited. The United States have the same right to tax occupations which is possessed by the States. Now suppose the United States should re-

quire every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose; would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the Constitution would expose it, by saying that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations? Or suppose revenue cutters were to be stationed off the coast for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries; would it be received as an excuse for this outrage, were the government to say that exportation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or thing imported, ceased the instant they were brought into the country, so the prohibition to tax articles exported ceased when they were carried out of the country?

We think then, that the act under which the plaintiffs in error were indicted is repugnant to that article of the Constitution which declares, that "no State shall lay any impost or duties on imports or exports."

2. Is it also repugnant to that clause in the Constitution which empowers "Congress to regulate commerce with foreign nations, and among the several States, and with the Indian tribes"?

The oppressed and degraded state of commerce previous to the adoption of the Constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the States. To construe the power so as to impair its efficacy, would tend to defeat an object in the attainment of which the American public took, and justly took that strong interest which arose from a full conviction of its necessity.

What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several States?

This question was considered in the case of Gibbons *v.* Ogden, 9 Wheat. 1, in which it was declared to be complete in itself, and to

acknowledge no limitations other than are prescribed by the Constitution. The power is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a State, but must enter its interior.

We deem it unnecessary now to reason in support of these propositions. Their truth is proved by facts continually before our eyes, and was, we think, demonstrated, if they could require demonstration, in the case already mentioned.

If this power reaches the interior of a State, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell.

If this be admitted, and we think it cannot be denied, what can be the meaning of an act of Congress which authorizes importation, and offers the privilege for sale at a fixed price to every person who chooses to become a purchaser? How is it to be construed if an intent to deal honestly and fairly, an intent as wise as it is moral, is to enter into the construction? What can be the use of the contract, what does the importer purchase, if he does not purchase the privilege to sell?

What would be the language of a foreign government, which should be informed that its merchants, after importing according to law, were forbidden to sell the merchandise imported? What answer would the United States give to the complaints and just reproaches to which such an extraordinary circumstance would expose them? No apology could be received, or even offered. Such a state of things would break up commerce. It will not meet this argument to say that this state of things will never be produced; that the good sense of the States is a sufficient security against it. The Constitution has not confided this subject to that good sense. It is placed elsewhere. The question is, Where does the power reside? not, How far will it be probably abused? The power claimed by the State is, in its nature, in conflict with that given to Congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence.

We think, then, that if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable.

If the principles we have stated be correct, the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer for selling the article, in his character of importer, must be in opposition to the act of Congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and principal object of it, is, to prescribe the regular means for accomplishing that introduction and incorporation.

The distinction between a tax on the thing imported and on the person of the importer, can have no influence on this part of the subject. It is too obvious for controversy that they interfere equally with the power to regulate commerce.

It has been contended that this construction of the power to regulate commerce, as was contended in construing the prohibition to lay duties on imports, would abridge the acknowledged power of a State to tax its own citizens, or their property within its territory.

We admit this power to be sacred; but cannot admit that it may be used so as to obstruct the free course of a power given to Congress. We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed that the powers remaining with the States may be so exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the Constitution has applied it to the often interfering powers of the General and State governments, as a vital principle of perpetual operation. It results, necessarily, from this principle, that the taxing power of the States must have some limits. It cannot reach and restrain the action of the national government within its proper sphere. It cannot reach the administration of justice in the courts of the Union, or the collection of the taxes of the United States, or restrain the operation of any law which Congress may constitutionally pass. It cannot interfere with any regulation of commerce. If the States may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the State from one port to another, for the purpose of re-exportation? The laws of trade authorize this operation, and general convenience requires it. Or what should restrain a State from taxing any article passing through it, from one State to another, for the purpose of traffic? or from taxing the transportation of articles passing from the State itself to another State for commercial purposes? These cases are all within the sovereign power of taxation, but would obviously derange

the measures of Congress to regulate commerce, and affect materially the purpose for which that power was given. We deem it unnecessary to press this argument further, or to give additional illustrations of it, because the subject was taken up and considered with great attention, in M'Culloch *v.* The State of Maryland, 4 Wheat. 316, the decision in which case is, we think, entirely applicable to this.

It may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister State. We do not mean to give any opinion on a tax discriminating between foreign and domestic articles.

We think there is error in the judgment of the Court of Appeals of the State of Maryland, in affirming the judgment of the Baltimore City Court, because the act of the Legislature of Maryland, imposing the penalty for which the said judgment is rendered, is repugnant to the Constitution of the United States, and, consequently, void. The judgment is to be reversed, and the cause remanded to that court, with instructions to enter judgment in favor of the appellants.[1]

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## WELTON *v.* MISSOURI.

91 United States, 275. 1875.

Mr. Justice Field delivered the opinion of the court.

This case comes before us on a writ of error to the Supreme Court of Missouri, and involves a consideration of the validity of a statute of that State, discriminating in favor of goods, wares, and merchandise which are the growth, product, or manufacture of the State, and against those which are the growth, product, or manufacture of other States or countries, in the conditions upon which their sale can be made by travelling dealers. The plaintiff in error was a dealer in sewing-machines which were manufactured without the State of Missouri, and went from place to place in the State selling them without a license for that purpose. For this offence he was indicted and convicted in one of the circuit courts of the State, and was sentenced to pay a fine of fifty dollars, and to be committed until the same was paid. On appeal to the Supreme Court of the State, the judgment was affirmed.

The statute under which the conviction was had declares that whoever deals in the sale of goods, wares, or merchandise, except books, charts, maps, and stationery, which are not the growth, produce, or manufacture of the State, by going from place to place to sell the same, shall be deemed a pedler; and then enacts that no

[1] Mr. Justice Thompson dissented.

person shall deal as a pedler without a license, and prescribes the rates of charge for the licenses, these varying according to the manner in which the business is conducted, whether by the party carrying the goods himself on foot, or by the use of beasts of burden, or by carts or other land carriage, or by boats or other river vessels. Penalties are imposed for dealing without the license prescribed. No license is required for selling in a similar way, by going from place to place in the State, goods which are the growth, product, or manufacture of the State.

The license charge exacted is sought to be maintained as a tax upon a calling. It was held to be such a tax by the Supreme Court of the State; a calling, says the court, which is limited to the sale of merchandise not the growth or product of the State.

The general power of the State to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be exercised in subordination to the requirements of the Federal Constitution. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the State to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer; but if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license.

[The court here, and again further on, states and quotes from Brown *v.* Maryland, 12 Wheat. 425, *supra*, p. 303.]

So, in like manner, the license tax exacted by the State of Missouri from dealers in goods which are not the product or manufacture of the State, before they can be sold from place to place within the State, must be regarded as a tax upon such goods themselves; and the question presented is, whether legislation thus discriminating against the products of other States in the conditions of their sale by a certain class of dealers is valid under the Constitution of the United States. It was contended in the State courts, and it is urged here, that this legislation violates that clause of the Constitution which declares that Congress shall have the power to regulate commerce with foreign nations and among the several States. The power to regulate conferred by that clause upon Congress is one without limitation; and to regulate commerce is to prescribe rules by which it shall be governed, — that is, the conditions upon which it shall be conducted; to determine how far it shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited.

Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities be-

tween the citizens of our country and the citizens or subjects of other countries, and between the citizens of different States. The power to regulate it embraces all the instruments by which such commerce may be conducted. So far as some of these instruments are concerned, and some subjects which are local in their operation, it has been held that the States may provide regulations until Congress acts with reference to them; but where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all State authority.

It will not be denied that that portion of commerce with foreign countries and between the States which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the General Government was to insure this uniformity against discriminating State legislation. The depressed condition of commerce and the obstacles to its growth previous to the adoption of the Constitution, from the want of some single controlling authority, has been frequently referred to by this court in commenting upon the power in question. . . .

The power which insures uniformity of commercial regulation must cover the property which is transported as an article of commerce from hostile or interfering legislation, until it has mingled with and become a part of the general property of the country, and subjected like it to similar protection, and to no greater burdens. If, at any time before it has thus become incorporated into the mass of property of the State or nation, it can be subjected to any restrictions by State legislation, the object of investing the control in Congress may be entirely defeated. If Missouri can require a license tax for the sale by travelling dealers of goods which are the growth, product, or manufacture of other States or countries, it may require such license tax as a condition of their sale from ordinary merchants, and the amount of the tax will be a matter resting exclusively in its discretion.

The power of the State to exact a license tax of any amount being admitted, no authority would remain in the United States or in this court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating State legislation, favorable to the interests of one State and injurious to the interests of other States and countries, which existed previous to the adoption of the Constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the States.

There is a difficulty, it is true, in all cases of this character, in drawing the line precisely where the commercial power of Congress ends and the power of the State begins. A similar difficulty was felt by this court, in Brown v. Maryland, in drawing the line of distinction between

the restriction upon the power of the States to lay a duty on imports, and their acknowledged power to tax persons and property; but the court observed, that the two, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them; but that, as the distinction exists, it must be marked as the cases arise. And the court, after observing that it might be premature to state any rule as being universal in its application, held, that, when the importer had so acted upon the thing imported that it had become incorporated and mixed up with the mass of property in the country, it had lost its distinctive character as an import, and become subject to the taxing power of the State; but that, while remaining the property of the importer in his warehouse in the original form and package in which it was imported, the tax upon it was plainly a duty on imports prohibited by the Constitution.

Following the guarded language of the court in that case, we observe here, as was observed there, that it would be premature to state any rule which would be universal in its application to determine when the commercial power of the Federal Government over a commodity has ceased, and the power of the State has commenced. It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin. The act of Missouri encroaches upon this power in this respect, and is therefore, in our judgment, unconstitutional and void.

The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammelled. As the main object of that commerce is the sale and exchange of commodities, the policy thus established would be defeated by discriminating legislation like that of Missouri.

The views here expressed are not only supported by the case of Brown *v.* Maryland, already cited, but also by the case of Woodruff *v.* Parham, 8 Wall. 123, and the case of the State Freight Tax, 15 Wall. 232. In the case of Woodruff *v.* Parham, Mr. Justice Miller, speaking for the court, after observing, with respect to the law of Alabama then under consideration, that there was no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the case was not, therefore, an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity, said, "But a law having such operation would, in our opinion, be an infringement of the

provisions of the Constitution which relate to those subjects, and therefore void."

*The judgment of the Supreme Court of the State of Missouri must be reversed, and the cause remanded, with directions to enter a judgment reversing the judgment of the Circuit Court, and directing that court to discharge the defendant from imprisonment, and suffer him to depart without day.*

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## ROBBINS *v.* SHELBY COUNTY TAXING DISTRICT.

120 United States, 489. 1887.

Mr. Justice Bradley delivered the opinion of the court.

This case originated in the following manner: Sabine Robbins, the plaintiff in error, in February, 1884, was engaged at the city of Memphis, in the State of Tennessee, in soliciting the sales of goods for the firm of Rose, Robbins & Co., of Cincinnati, in the State of Ohio, dealers in paper, and other articles of stationery, and exhibited samples for the purpose of effecting such sales, — an employment usually denominated as that of a "drummer." There was in force at that time a statute of Tennessee, relating to the subject of taxation in the Taxing Districts of the State, applicable, however, only to the Taxing Districts of Shelby County, (formerly the city of Memphis,) by which it was enacted, amongst other things, that "All drummers, and all persons not having a regular licensed house of business in the Taxing District, offering for sale or selling goods, wares, or merchandise therein, by sample, shall be required to pay to the county trustee the sum of $10 per week, or $25 per month, for such privilege, and no license shall be issued for a longer period than three months." Act of 1881, c. 96, § 16.

The business of selling by sample and nearly sixty other occupations had been by law declared to be privileges, and were taxed as such, and it was made a misdemeanor, punishable by a fine of not less than five, nor more than fifty dollars, to exercise any of such occupations without having first paid the tax or obtained the license required therefor.

Under this law, Robbins, who had not paid the tax nor taken a license, was prosecuted, convicted and sentenced to pay a fine of ten dollars, together with the State and county tax, and costs; and on appeal to the Supreme Court of the State, the judgment was affirmed. This writ of error is brought to review the judgment of the Supreme Court, on the ground that the law imposing the tax was repugnant to that clause of the Constitution of the United States which declares that Congress shall have power to regulate commerce among the several States.

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THE principal question argued before the Supreme Court of Tennessee was, as to the constitutionality of the act which imposed the tax on drummers; and the court decided that it was constitutional and valid.

That is the question before us, and it is one of great importance to the people of the United States, both as it respects their business interests and their constitutional rights. It is presented in a nutshell, and does not, at this day, require for its solution any great elaboration of argument or review of authorities. Certain principles have been already established by the decisions of this court which will conduct us to a satisfactory decision. Among those principles are the following:

1. The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system, or plan of regulation. This was decided in the case of Cooley *v.* Board of Wardens of the Port of Philadelphia, 12 How. 299, 319, and was virtually involved in the case of Gibbons *v.* Ogden, 9 Wheat. 1, and has been confirmed in many subsequent cases, amongst others, in Brown *v.* Maryland, 12 Wheat. 419; The Passenger Cases, 7 How. 283; Crandall *v.* Nevada, 6 Wall. 35, 42; Ward *v.* Maryland, 12 Wall. 418, 430; State Freight Tax Cases, 15 Wall. 232, 279; Henderson *v.* Mayor of New York, 92 U. S. 259, 272; Railroad Co. *v.* Husen, 95 U. S. 465, 469; Mobile *v.* Kimball, 102 U. S. 691, 697; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S, 196, 203; Wabash, &c. Railway Co. *v.* Illinois, 118 U. S. 557.

2. Another established doctrine of this court is, that where the power of Congress to regulate is exclusive the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the States, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom. This was held by Mr. Justice Johnson in Gibbons *v.* Ogden, 9 Wheat. 1, 222, by Mr. Justice Grier in the Passenger Cases, 7 How. 283, 462, and has been affirmed in subsequent cases. State Freight Tax Cases, 15 Wall. 232, 279; Railroad Co. *v.* Husen, 95 U. S. 465, 469; Welton *v.* Missouri, 91 U. S. 275, 282; Mobile *v.* Kimball, 102 U. S. 691, 697; Brown *v.* Houston, 114 U. S. 622, 631; Walling *v.* Michigan, 116 U. S. 446, 455; Pickard *v.* Pullman Southern Car Co., 117 U. S. 34; Wabash, &c., Railway Co. *v.* Illinois, 118 U. S. 557.

3. It is also an established principle, as already indicated, that the only way in which commerce between the States can be legitimately affected by State laws, is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health, and comfort of persons and the protection of property; or when it does those things

which may otherwise incidentally affect commerce, such as the establishment and regulations of highways, canals, railroads, wharves, ferries, and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the State or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce or with some other employment or business exercised under authority of the Constitution and laws of the United States; and the imposition of taxes upon all property within the State, mingled with and forming part of the great mass of property therein. But in making such internal regulations a State cannot impose taxes upon persons passing through the State, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the State from abroad, or from another State, and not yet become part of the common mass of property therein; and no discrimination can be made, by any such regulations, adversely to the persons or property of other States; and no regulations can be made directly affecting interstate commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to Congress over the subject.

For authorities on this last head it is only necessary to refer to those already cited.

In a word, it may be said, that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject.

In view of these fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a State to levy a tax or impose any other restriction upon the citizens or inhabitants of other States, for selling or seeking to sell their goods in such State before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer, or a merchant, of one State, to sell his goods in another State, without, in some way, obtaining orders therefor? Must he be compelled to send them, at a venture, without knowing whether there is any demand for them? This may, undoubtedly, be safely done with regard to some products for which there is always a market and a demand, or where the course of trade has established a general and unlimited demand. A raiser of farm produce in New Jersey or Connecticut, or a manufacturer of leather or wooden ware, may, perhaps, safely

take his goods to the city of New York and be sure of finding a stable and reliable market for them. But there are hundreds, perhaps thousands, of articles which no person would think of exporting to another State without first procuring an order for them. It is true, a merchant or manufacturer in one State may erect or hire a warehouse or store in another State, in which to place his goods, and await the chances of being able to sell them. But this would require a warehouse or a store in every State with which he might desire to trade. Surely, he cannot be compelled to take this inconvenient and expensive course. In certain branches of business, it may be adopted with advantage. Many manufacturers do open houses or places of business in other States than those in which they reside, and send their goods there to be kept on sale. But this is a matter of convenience, and not of compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the same kind of business, and would be entirely unsuited to many branches of business. In these cases, then, what shall the merchant or manufacturer do, who wishes to sell his goods in other States? Must he sit still in his factory or warehouse, and wait for the people of those States to come to him? This would be a silly and ruinous proceeding.

The only other way, and the one, perhaps, which most extensively prevails, is to obtain orders from persons residing or doing business in those other States. But how is the merchant or manufacturer to secure such orders? If he may be taxed by such States for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon interstate commerce, is to speak at least unadvisedly and without due attention to the truth of things.

It may be suggested that the merchant or manufacturer has the post-office at his command, and may solicit orders through the mails. We do not suppose, however, that any one would seriously contend that this is the only way in which his business can be transacted without being amenable to exactions on the part of the State. Besides, why could not the State to which his letters might be sent, tax him for soliciting orders in this way, as well as in any other way?

The truth is, that, in numberless instances, the most feasible, if not the only practicable, way for the merchant or manufacturer to obtain orders in other States is to obtain them by personal application, either by himself, or by some one employed by him for that purpose; and in many branches of business he must necessarily exhibit samples for the purpose of determining the kind and quality of the goods he proposes to sell, or which the other party desires to purchase. But the right of taxation, if it exists at all, is not confined to selling by sample. It embraces every act of sale, whether by word of mouth only, or by the exhibition of samples. If the right exists, any New York or Chicago merchant visiting New Orleans

or Jacksonville, for pleasure or for his health, and casually taking an order for goods to be sent from his warehouse, could be made liable to pay a tax for so doing, or be convicted of a misdemeanor for not having taken out a license. The right to tax would apply equally as well to the principal as to his agent, and to a single act of sale as to a hundred acts.

But it will be said that a denial of this power of taxation will interfere with the right of the State to tax business pursuits and callings carried on within its limits, and its right to require licenses for carrying on those which are declared to be privileges. This may be true to a certain extent; but only in those cases in which the States themselves, as well as individual citizens, are subject to the restraints of the higher law of the Constitution. And this interference will be very limited in its operation. It will only prevent the levy of a tax, or the requirement of a license, for making negotiations in the conduct of interstate commerce; and it may well be asked where the State gets authority for imposing burdens on that branch of business any more than for imposing a tax on the business of importing from foreign countries, or even on that of postmaster or United States marshal. The mere calling the business of a drummer a privilege cannot make it so. Can the State legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a State privilege to carry on interstate commerce? It seems to be forgotten in argument, that the people of this country are citizens of the United States, as well as of the individual States, and that they have some rights under the Constitution and laws of the former independent of the latter, and free from any interference or restraint from them.

To deny to the State the power to lay the tax, or require the license in question, will not, in any perceptible degree, diminish its resources or its just power of taxation. It is very true, that if the goods when sold were in the State, and part of its general mass of property, they would be liable to taxation; but when brought into the State in consequence of the sale they will be equally liable; so that, in the end, the State will derive just as much revenue from them as if they were there before the sale. As soon as the goods are in the State and become part of its general mass of property, they will become liable to be taxed in the same manner as other property of similar character, as was distinctly held by this court in the case of Brown *v.* Houston, 114 U. S. 622. When goods are sent from one State to another for sale, or, in consequence of a sale, they become part of its general property, and amenable to its laws; provided that no discrimination be made against them *as* goods from another State, and that they be not taxed by reason of being brought from another State, but only taxed in the usual way as other goods are. Brown *v.* Houston, *qua supra;* Machine Co. *v.* Gage, 100 U. S. 676. But to

tax the sale of such goods, or the offer to sell them, before they are brought into the State, is a very different thing, and seems to us clearly a tax on interstate commerce itself.

It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers — those of Tennessee and those of other States; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State. This was decided in the case of The State Freight Tax, 15 Wall. 232. The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce. A New Orleans merchant cannot be taxed there for ordering goods from London or New York, because, in the one case, it is an act of foreign, and, in the other, of interstate commerce, both of which are subject to regulation by Congress alone.

It would not be difficult, however, to show that the tax authorized by the State of Tennessee in the present case is discrimiuative against the merchants and manufacturers of other States. They can only sell their goods in Memphis by the employment of drummers and by means of samples; whilst the merchants and manufacturers of Memphis, having regular licensed houses of business there, have no occasion for such agents, and, if they had, they are not subject to any tax therefor. They are taxed for their licensed houses, it is true; but so, it is presumable, are the merchants and manufacturers of other States in the places where they reside; and the tax on drummers operates greatly to their disadvantage in comparison with the merchants and manufacturers of Memphis. And such was undoubtedly one of its objects. This kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition. And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of its principal objects. And if a State can, in this way, impose restrictions upon interstate commerce for the benefit and protection of its own citizens, we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes that led to it.

If the selling of goods by sample and the employment of drummers for that purpose, injuriously affect the local interest of the States, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it; for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied,

discordant, or retaliatory enactments of forty different States. The confusion into which the commerce of the country would be thrown by being subject to State legislation on this subject, would be but a repetition of the disorder which prevailed under the Articles of Confederation.

To say that the tax, if invalid as against drummers from other States, operates as a discrimination against the drummers of Tennessee, against whom it is conceded to be valid, is no argument; because the State is not bound to tax its own drummers; and if it does so whilst having no power to tax those of other States, it acts of its own free will, and is itself the author of such discrimination. As before said, the State may tax its own internal commerce; but that does not give it any right to tax interstate commerce.

*The judgment of the Supreme Court of Tennessee is reversed, and the plaintiff in error must be discharged.*[1]

[1] MR. CHIEF JUSTICE WAITE delivered a dissenting opinion in which MR. JUSTICE FIELD and MR. JUSTICE GRAY concurred.

The case of FICKLEN *v.* SHELBY COUNTY TAXING DISTRICT, 145 U. S. 1 (1892), involved the validity of another section of the same State statute imposing a license tax on brokers. MR. CHIEF JUSTICE FULLER, rendering the opinion of the Court (MR. JUSTICE HARLAN dissenting), used the following language:

"In the case at bar the complainants were established and did business in the Taxing District as general merchandise brokers, and were taxed as such under section nine of chapter ninety-six of the Tennessee laws of 1881, which embraced a different subject matter from section sixteen of that chapter. For the year 1887 they paid the $50 tax charged, gave bond to report their gross commissions at the end of the year, and thereupon received, and throughout the entire year held, a general and unrestricted license to do business as such brokers. They were thereby authorized to do any and all kinds of commission business and became liable to pay the privilege tax in question, which was fixed in part and in part graduated according to the amount of capital invested in the business, or if no capital were invested, by the amount of commissions received. Although their principals happened during 1887, as to the one party, to be wholly non-resident, and as to the other, largely such, this fact might have been otherwise then and afterwards, as their business was not confined to transactions for non-residents.

"In the case of Robbins the tax was held, in effect, not to be a tax on Robbins, but on his principals; while here the tax was clearly levied upon complainants in respect of the general commission business they conducted, and their property engaged therein, or their profits realized therefrom.

"No doubt can be entertained of the right of a State legislature to tax trades, professions and occupations, in the absence of inhibition in the State constitution in that regard; and where a resident citizen engages in general business subject to a particular tax the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants, of goods situated in another State, does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution.

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"We presume it would not be doubted that if the complainants had been taxed on capital invested in the business, such taxation would not have been obnoxious to constitutional objection; but because they had no capital invested, the tax was ascertained by reference to the amount of their commissions, which when received were no less their property than their capital would have been. We agree with the Supreme Court of the State that the complainants having taken out licenses under the law in

## EMERT *v.* MISSOURI.

156 United States, 296. 1895.

THIS was an information, filed July 27, 1889, before a justice of the peace in the county of Montgomery and State of Missouri, for a misdemeanor, by peddling goods without a license, in violation of a statute of the State contained in chapter 137, entitled "Peddlers and their licenses" of the Revised Statutes of Missouri of 1879.

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MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

From early times, in England and America, there have been statutes regulating the occupation of itinerant peddlers, and requiring them to obtain licenses to practise their trade.

In Tomlin's Law Dictionary are these definitions: "*Hawkers.* Those deceitful fellows who went from place to place, buying and selling brass, pewter, and other goods and merchandise which ought to be uttered in open market, were of old so called; and the appellation seems to grow from their uncertain wandering, like persons that with *hawks* seek their game where they can find it. They are mentioned in Stat. 33 Hen. VIII. c. 4." "*Hawkers, Pedlars, and Petty Chapmen.* Persons travelling from town to town with goods and merchandise. These were under the control of commissioners for licensing them for that purpose, under Stats. 8 & 9 Wm. III, c. 25; 9 & 10 Wm. III, c. 25 [9 Wm. III, c. 27]; 29 Geo. III, c. 26."

The act of 50 Geo. III, c. 41, repealed the prior acts, and imposed a penalty on "any hawker, pedlar, petty chapman, or any other trading person or persons, going from town to town, or to other men's houses, and travelling either on foot, or with horse or horses," and exposing to sale, or selling goods, wares or merchandise by retail. Upon an information in the Court of Exchequer to recover penalties under that act, Baron Graham said: "The object of the legislature, in passing the act upon which this information is founded, was to protect, on the one hand, fair traders, particularly established shopkeepers, resident permanently in towns or other places, and paying rent and taxes there for local privileges, from the mischiefs of being

question to do a general commission business, and having given bond to report their commissions during the year, and to pay the required percentage thereon, could not, when they applied for similar licenses for the ensuing year, resort to the courts because the municipal authorities refused to issue such licenses without the payment of the stipulated tax. What position they would have occupied if they had not undertaken to do a general commission business, and had taken out no licenses therefor, but had simply transacted business for non-resident principals, is an entirely different question, which does not arise upon this record."

undersold by itinerant persons, to their injury; and, on the other, to guard the public from the impositions practised by such persons in the course of their dealings; who, having no known or fixed residence, carry on a trade by means of vending goods conveyed from place to place by horse or cart." Attorney General v. Tongue, (1823) 12 Price, 51, 60.

In Massachusetts, both before and after the adoption of the Constitution of the United States, successive statutes imposed penalties on hawkers, peddlers and petty chapmen. 7 Dane Ab. 72; Stats. 1713–14, c. 7; (1 Prov. Laws, 720;) 1716–17, c. 10; 1721–22, c. 6; 1726–27, c. 4; (2 Prov. Laws, 47, 232, 385;) 1785, c. 2; 1799, c. 20; 1820, c. 45; Rev. Stats. 1836, c. 35, §§ 7, 8. The statute of 1846, c. 244, repealing the earlier statutes, imposed a penalty on "every hawker, peddler or petty chapman, or other person, going from town to town, or from place to place, or from dwelling-house to dwelling-house in the same town, either on foot, or with one or more horses, or otherwise carrying for sale, or exposing to sale, any goods, wares or merchandise," (with certain exceptions,) without first obtaining a license, as therein provided.

In a case under that statute, Chief Justice Shaw said: "The leading primary idea of a hawker and peddler is that of an itinerant or travelling trader, who carries goods about, in order to sell them, and who actually sells them to purchasers, in contradistinction to a trader who has goods for sale and sells them in a fixed place of business. Superadded to this, (though perhaps not essential,) by a hawker is generally understood one who not only carries goods for sale, but seeks for purchasers, either by outcry, which some lexicographers conceive as intimated by the derivation of the word, or by attracting notice and attention to them as goods for sale, by an actual exhibition or exposure of them, by placards or labels, or by a conventional signal, like the sound of a horn for the sale of fish. But our statute goes further, and not only proscribes actual hawkers and peddlers, whose employment is that of travelling traders, and thus seems to refer to a business or habitual occupation; but it extends to all persons, doing the acts proscribed." Commonwealth v. Ober, (1853) 12 Cush. 493, 495.

In that case, it was objected that the statute was repugnant to the Constitution of the United States, because at variance with the exclusive right of Congress to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. To which Chief Justice Shaw answered: "The law in question interferes with none of these." "We consider this as wholly an internal commerce, which the States have a right to regulate; and, in this respect, this law stands on the same footing with the laws regulating sales of wine and spirits, sales at auction, and very many others, which are in force and constantly acted upon." 12 Cush. 497.

In Michigan, a city ordinance, passed under authority of the legis-

lature, prohibiting peddling without a license from the mayor, was held constitutional; and Chief Justice Cooley said: "That the regulation of hawkers and peddlers is important, if not absolutely essential, may be taken as established by the concurring practice of civilized States. They are a class of persons who travel from place to place among strangers, and the business may easily be made a pretence or a convenience to those whose real purpose is theft or fraud. The requirement of a license gives opportunity for inquiry into antecedents and character, and the payment of a fee affords some evidence that the business is not a mere pretence." People *v.* Russell, (1883) 49 Mich. 617, 619.

In the courts of many other States, statutes imposing a penalty for peddling without a license, all goods of particular kinds, and not discriminating against goods brought from other States or from foreign countries, have been held not to be repugnant to the Constitution of the United States. Cowles *v.* Brittain, (1822) 2 Hawks, 204; Wynne *v.* Wright, (1834) 1 Dev. & Bat. 19; Tracy *v.* State, (1829) 3 Mo. 3; Morrill *v.* State, (1875) 38 Wis. 428; Howe Machine Co. *v.* Cage, (1876) 9 Baxter, 518; Graffty *v.* Rushville, (1886) 107 Ind. 502; State *v.* Richards, (1889) 32 West Virginia, 348; Commonwealth *v.* Gardner, (1890) 133 Penn. St. 284.

The statute of Missouri, under which the conviction in the case at bar was had, is contained in a separate chapter of the Revised Statutes of the State, entitled "Peddlers and their licenses," and relating to no other subject. By this statute, "whoever shall deal in the selling of" any goods, wares or merchandise, (except books, charts, maps and stationery,) "by going from place to place to sell the same, is declared to be a peddler;" and is prohibited from dealing as a peddler without a license. Rev. Stat. of 1879, §§ 6471, 6472. The license is required to state how the dealing is to be carried on, whether on foot, or with one or more beasts of burden, a cart or wagon, or a boat or vessel; and may be obtained by any person paying the tax prescribed according to the manner in which the business is carried on. §§ 6473, 6476, 6477. Any person dealing as a peddler, without a license, whether with a pack, a wagon, or a boat, is to pay a certain penalty, which, in the case of peddling in a cart or wagon, is fifty dollars. § 6478. And any peddler, who refuses to exhibit his license on demand of a sheriff, collector, constable, or citizen householder of the county, is to forfeit the sum of ten dollars. § 6479.

The facts were agreed, that the Singer Manufacturing Company, for more than five years last past, and on the day in question, was a corporation of New Jersey; that the defendant, on and prior to that day, was in the employment of that company, and on that day, in pursuance of that employment, and having no peddler's license, was engaged in going from place to place in Montgomery county in the State of Missouri, with a horse and wagon, soliciting orders for the

sale of the company's sewing machines, and having with him in the wagon one of those machines, the property of the company, and manufactured by it at its works in New Jersey, and which it had forwarded and delivered to him for sale on its account; and that he offered this machine for sale to various persons at different places, and found a purchaser, and sold and delivered it to him.

The Supreme Court of the State, in its opinion, understood and assumed the effect of those facts to be as follows: "The defendant was engaged in going from place to place, selling and trying to sell sewing machines in Montgomery county in this State, and had been so engaged for some years. He carried the machines with him in a wagon, and on making a sale delivered those sold to the purchaser. He was not only soliciting orders, but was making sales and delivering the property sold. These acts bring him clearly within the statutory definition of a peddler; and, having no license from the State, he became liable to the penalties imposed by the statute, unless, for any reason, he was exempt from the operations of the law." 103 Missouri, 247. It is argued by one of his counsel that this was an unwarranted conclusion from the facts agreed. But the construction of those facts does not present a Federal question, except so far as it involves the constitutionality of the statute. Upon any construction, it is clear that the defendant was engaged in going from place to place within the State, without a license, soliciting orders for the sale of sewing machines, having with him in the wagon at least one of those machines, and offering that machine for sale to various persons at different places, and that he finally sold it, and delivered it to the purchaser. The conclusion that such dealings made him a peddler, within the meaning of the statute of the State and of the information on which he was convicted, presents of itself no constitutional question.

The facts appear to have been agreed for the purpose of presenting the question whether the statute was repugnant to the Constitution of the United States. This was the only question discussed in the opinion of the Supreme Court of Missouri. And it is the only one of which this court has jurisdiction upon this writ of error.

The defendant's occupation was offering for sale and selling sewing machines, by going from place to place in the State of Missouri, in a wagon, without a license. There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of goods, or of any order for their transfer, from one State to another; and were neither interstate commerce in themselves, nor were they in any way directly connected with such commerce. The only business or commerce in which he was engaged was internal and domestic; and, so far as appears, the only goods in which he was dealing had become part of the mass of property within the State. Both the occupation and the goods, therefore,

were subject to the taxing power, and to the police power, of the State.

The statute in question is not part of a revenue law. It makes no discrimination between residents or products of Missouri and those of other States; and manifests no intention to interfere, in any way, with interstate commerce. Its object, in requiring peddlers to take out and pay for licenses, and to exhibit their licenses, on demand, to any peace officer, or to any citizen householder of the county, appears to have been to protect the citizens of the State against the cheats and frauds, or even thefts, which, as the experience of ages has shown, are likely to attend itinerant and irresponsible peddling from place to place and from door to door.

If this question were now brought before this court for the first time, there could hardly be a doubt of the validity of the statute. But it is not a new question in this court.

[Many cases are cited and commented upon, among them Robbins *v.* Shelby County Taxing District, 120 U. S. 489, *supra*, p. 317, from which a passage is quoted distinguishing that case from one such as this.]

The necessary conclusion, upon authority, as well as upon principle, is that the statute of Missouri, now in question, is nowise repugnant to the power of Congress to regulate commerce among the several States, but is a valid exercise of the power of the State over persons and business within its borders. *Judgment affirmed.*

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## CRUTCHER *v.* KENTUCKY.

141 United States, 47. 1891.

Mr. Justice Bradley delivered the opinion of the court.

This case arose at Frankfort, Franklin County, Kentucky, upon an indictment found against Crutcher, the plaintiff in error, in the Franklin Circuit Court, for acting and doing business as agent for the United States Express Company, alleged to be an express company not incorporated by the laws of Kentucky, but trading and doing business as a common carrier, by express, of goods, merchandise, money, and other things of value in and through the county and State aforesaid, without having any license so to do either for himself or the company [as required by Act of March 2, 1860]. Crutcher, being arrested and brought before the court, tendered a special plea setting forth the facts with regard to his employment and the business of the company, and amongst other things that said company was a joint stock company, incorporated and having its principal office in the city of New York, in the State of New York, which plea was refused. He then pleaded "not guilty," and the

parties filed an agreed statement of facts; and, by consent, the matters of law and fact were submitted to the court, and the defendant was found guilty and sentenced to pay a fine of one hundred dollars and the costs of prosecution.

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We regret that we are unable to concur with the learned Court of Appeals of Kentucky in its views on this subject. The law of Kentucky, which is brought in question by the case, requires from the agent of every express company not incorporated by the laws of Kentucky a license from the auditor of public accounts, before he can carry on any business for said company in the State. This, of course, embraces interstate business as well as business confined wholly within the State. It is a prohibition against the carrying on of such business without a compliance with the State law. And not only is a license required to be obtained by the agent, but a statement must be made and filed in the auditor's office showing that the company is possessed of an actual capital of $150,000, either in cash or in safe investments, exclusive of stock notes. If the subject was one which appertained to the jurisdiction of the State legislature, it may be that the requirements and conditions of doing business within the State would be promotive of the public good. It is clear, however, that it would be a regulation of interstate commerce in its application to corporations or associations engaged in that business; and that is a subject which belongs to the jurisdiction of the national and not the State legislature. Congress would undoubtedly have the right to exact from associations of that kind any guarantees it might deem necessary for the public security, and for the faithful transaction of business; and as it is within the province of Congress, it is to be presumed that Congress has done, or will do, all that is necessary and proper in that regard. Besides, it is not to be presumed that the State of its origin has neglected to require from any such corporation proper guarantees as to capital and other securities necessary for the public safety. If a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other States, it would not be within the province of the State legislature to exact conditions on which they should carry on their business, nor to require them to take out a license therefor. To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject.

It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign

commerce. Would any one pretend that a State legislature could prohibit a foreign corporation, — an English or a French transportation company, for example, — from coming into its borders and landing goods and passengers at its wharves, and soliciting goods and passengers for a return voyage, without first obtaining a license from some State officer, and filing a sworn statement as to the amount of its capital stock paid in? And why not? Evidently because the matter is not within the province of State legislation, but within that of national legislation. Inman Steamship Co. *v.* Tinker, 94 U. S. 238. The prerogative, the responsibility and the duty of providing for the security of the citizens and the people of the United States in relation to foreign corporate bodies, or foreign individuals with whom they may have relations of foreign commerce, belong to the government of the United States, and not to the governments of the several States; and confidence in that regard may be reposed in the national legislature without any anxiety or apprehension arising from the fact that the subject matter is not within the province or jurisdiction of the State legislatures. And the same thing is exactly true with regard to interstate commerce as it is with regard to foreign commerce. No difference is perceivable between the two. Telegraph Co. *v.* Texas, 105 U. S. 460; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 205, 211; Phila. Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 342; McCall *v.* California, 136 U. S. 104, 110; Norfolk & Western Railroad Co. *v.* Pennsylvania, 136 U. S. 114, 118. As was said by Mr. Justice Lamar, in the case last cited, "It is well settled by numerous decisions of this court, that a State cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits."

We have repeatedly decided that a State law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it. Pickard *v.* Pullman Southern Car Co., 117 U. S. 34; Robbins *v.* Shelby County Taxing District, 120 U. S. 489; Leloup *v.* Mobile, 127 U. S. 640; Asher *v.* Texas, 128 U. S. 129; Stoutenburgh *v.* Hennick, 129 U. S. 141; McCall *v.* California, 136 U. S. 104; Norfolk & Western Railroad Co. *v.* Pennsylvania, 136 U. S. 114.

As a summation of the whole matter it was aptly said by the present Chief Justice in Lyng *v.* Michigan, 135 U. S. 161, 166: "We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business, (which is to carry goods between different States,) does also some local business by carrying goods from one point to another within the State of Kentucky. This is, probably, quite as much for the accommodation of the people of that State as for the advantage of the company. But whether so or not, it does not obviate the objection that the regulations as to license and capital stock are imposed as conditions on the company's carrying on the business of interstate commerce, which was manifestly the principal object of its organization. These regulations are clearly a burden and a restriction upon that commerce. Whether intended as such or not they operate as such. But taxes or license fees in good faith imposed exclusively on express business carried on wholly within the State would be open to no such objection.

The case is entirely different from that of foreign corporations seeking to do a business which does not belong to the regulating power of Congress. The insurance business, for example, cannot be carried on in a State by a foreign corporation without complying with all the conditions imposed by the legislation of that State. So with regard to manufacturing corporations, and all other corporations whose business is of a local and domestic nature, which would include express companies whose business is confined to points and places wholly within the State. The cases to this effect are numerous. Bank of Augusta *v.* Earle, 13 Pet. 519; Paul *v.* Virginia, 8 Wall. 168; Liverpool Insurance Company *v.* Massachusetts, 10 Wall. 566; Cooper Manufacturing Company *v.* Ferguson, 113 U. S. 727; Phila. Fire Association *v.* New York, 119 U. S. 110.

But the main argument in support of the decision of the Court of Appeals is that the act in question is essentially a regulation made in the fair exercise of the police power of the State. But it does not follow that everything which the legislature of a State may deem essential for the good order of society and the well being of its citizens can be set up against the exclusive power of Congress to regulate the operations of foreign and interstate commerce. We have lately expressly decided in the case of Leisy *v.* Hardin, 135 U. S. 100, that a State law prohibiting the sale of intoxicating liquors is void when it comes in conflict with the express or implied regulation of interstate commerce by Congress, declaring that the traffic in such liquors as articles of merchandise between the States shall be free. There are, undoubtedly, many things which in their nature are so deleterious or injurious to the lives and health of the people as to lose all benefit of protection as articles or things of commerce, or to be able to claim it only in a modified way. Such things are properly subject to the police power of the State. Chief Justice Marshall in Brown *v.* Maryland, 12 Wheat. 419, 443, instances gunpowder as clearly subject to the exercise of the police power in

regard to its removal and the place of its storage; and he adds: "The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a State." Chief Justice Taney in the License Cases, 5 How. 504, 576, took the same distinction when he said: "It has, indeed, been suggested, that, if a State deems the traffic in ardent spirits to be injurious to its citizens and calculated to introduce immorality, vice and pauperism into the State, it may constitutionally refuse to permit its importation, notwithstanding the laws of Congress; and that a State may do this upon the same principles that it may resist and prevent the introduction of disease, pestilence and pauperism from abroad. But it must be remembered that disease, pestilence and pauperism are not subjects of commerce, although sometimes among its attendant evils. They are not things to be regulated and trafficked in, but to be prevented, as far as human foresight or human means can guard against them. But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter and traffic, like any other commodity in which a right of property exists."

But whilst it is only such things as are clearly injurious to the lives and health of the people that are placed beyond the protection of the commercial power of Congress, yet when that power, or some other exclusive power of the Federal government, is not in question, the police power of the State extends to almost everything within its borders; to the suppression of nuisances; to the prohibition of manufactures deemed injurious to the public health; to the prohibition of intoxicating drinks, their manufacture or sale; to the prohibition of lotteries, gambling, horse-racing or anything else that the legislature may deem opposed to the public welfare. Bartemeyer *v.* Iowa, 18 Wall. 129; Beer Company *v.* Massachusetts, 97 U. S. 25; Fertilizing Co. *v.* Hyde Park, 97 U. S. 659; Stone *v.* Mississippi, 101 U. S. 814; Foster *v.* Kansas, 112 U. S. 201; Mugler *v.* Kansas, 123 U. S. 623; Powell *v.* Pennsylvania, 127 U. S. 678; Kidd *v.* Pearson, 128 U. S. 1; Kimmish *v.* Ball, 129 U. S. 217.

It is also within the undoubted province of the State legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts and sharp curves; and, generally, with regard to all operations in which the lives and health of the people may be endangered, even though such regulations affect to some extent the operations of interstate commerce. Such regulations are eminently local in their character, and, in the absence of congressional regulations over the same subject, are free from all constitutional objections, and unquestionably valid.

In view of the foregoing considerations, and of the well-considered distinctions that have been drawn between those things that are, and those things that are not, within the scope of commercial regulation and protection, it is not difficult to arrive at a satisfactory conclusion on the question now presented to us. The character of police regulation, claimed for the requirements of the statute in question, is certainly not such as to give them a controlling force over the regulations of interstate commerce which may have been expressly or impliedly adopted by Congress, or such as to exempt them from nullity when repugnant to the exclusive power given to Congress in relation to that commerce. This is abundantly shown by the decisions to which we have already referred, which are clear to the effect that neither licenses nor indirect taxation of any kind, nor any system of State regulation, can be imposed upon interstate any more than upon foreign commerce; and that all acts of legislation producing any such result are, to that extent, unconstitutional and void. And as, in our judgment, the law of Kentucky now under consideration, as applied to the case of the plaintiff in error, is open to this objection, it necessarily follows that the judgment of the Court of Appeals must be reversed . . . .

The CHIEF JUSTICE and MR. JUSTICE GRAY dissented.

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## BROWN *v.* HOUSTON.

114 United States, 622. 1885.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This suit was brought by the plaintiffs in error in the Civil District Court for the Parish of Orleans, State of Louisiana, 30th December, 1880, to enjoin the defendant, Houston, from seizing and selling a certain lot of coal belonging to the plaintiffs, situated in New Orleans. They alleged in their petition that they were residents and did business in Pittsburg, State of Pennsylvania; that Houston, State tax collector of the upper district of the Parish of Orleans, had officially notified Brown & Jones, the agents of the plaintiffs in New Orleans, that they (Brown & Jones) were indebted to the State of Louisiana in the sum of $352.80, State tax for the year 1880 upon a certain lot of Pittsburg coal, assessed as their property, and valued at $58,800; that they (Brown & Jones) were delinquents for said tax, and that he, said tax collector, was about to seize, advertise and sell said coal to pay said tax, as would appear by a copy of the notice annexed to the petition. The plaintiffs alleged that they were not indebted to the State of Louisiana for said tax; that they were the sole owners of the coal, and were not liable

for any tax thereon, having paid all taxes legally due for the year 1880 on said coal in Pennsylvania; and that the said coal was simply under the care of Brown & Jones as the agents of the plaintiffs in New Orleans, for sale. They further alleged that said coal was mined in Pennsylvania, and was exported from said State and imported into the State of Louisiana as their property, and was then (at the time of the petition), and had always remained, in its original condition, and never had been or become mixed or incorporated with other property in the State of Louisiana. That when said assessment was made, the said coal was afloat in the Mississippi River in the Parish of Orleans, in the original condition in which it was exported from Pennsylvania, and the agents, Brown & Jones, notified the board of assessors of the parish that the coal did not belong to them, but to the plaintiffs, and was held as before stated, and was not subject to taxation, and protested against the assessment for that purpose. The plaintiffs averred that the assessment of the tax and any attempt to collect the same were illegal and oppressive, and contrary to the Constitution of the United States, article 1, section 8, paragraphs 1 and 3, and section 10, paragraph 2; they therefore prayed an injunction to prevent the seizure and sale of the coal, which, upon giving the requisite bond, was granted.

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The defendant answered with a general denial, but admitting the assessment of the tax and the intention to sell the property for payment thereof.

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In approaching the consideration of the case we will first take up the last objection raised by the plaintiff in error, namely, that the tax was a duty on imports and exports.

It was decided by this court in the case of Woodruff *v.* Parham, 8 Wall. 123, that the term "imports," as used in that clause of the Constitution which declares that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports," does not refer to articles carried from one State into another, but only to articles imported from foreign countries into the United States. In that case the City of Mobile had by ordinance, passed in pursuance of its charter, authorized the collection of a tax on real and personal estate, sales at auction, and sales of merchandise, capital employed in business and income within the city. Woodruff and others were auctioneers, and were taxed under this ordinance for sales at auction made by them, including sales of goods, the product of other States than Alabama, received by them as consignees and agents, and sold in the original and unbroken packages; but as the ordinance made no discrimination between sales at auction of goods produced in Alabama and goods produced in other States, the court held that the tax was not unconstitutional. A contrary result must have been reached under the ruling in Brown *v.*

Maryland, 12 Wheat. 419, 449, if the constitutional prohibition referred to had been held to include imports from other States as well as imports from foreign countries; for, at the time the tax was laid, the condition of the goods, in reference to their introduction into the State, was precisely the same in one case as in the other. This court, however, after an elaborate examination of the question, held that the terms "imports" and "exports" in the clause under consideration had reference to goods brought from or carried to foreign countries alone, and not to goods transported from one State to another.

It is unnecessary, therefore, to consider further the question raised by the plaintiffs in error under their third assignment of errors so far forth, as it is based on the assumption that the tax complained of was an impost or duty on imports. The other assumption made under that assignment, that some of the coal was afterwards exported, and that the tax complained of was therefore *pro tanto* a duty on exports, is equally untenable. When the petition was filed the coal was lying in New Orleans, in the hands of Brown & Jones, for sale. The petition states this in so many words, and Rootes testifies the same thing, and adds that it was to be sold by the flat-boat load. He also adds that at the time of his examination more than half of it had been exported to foreign countries; but he probably means that it had been sold to steamers sailing to foreign ports for use on the same, and had only been exported in that way. The complainants were not exporters; they did not hold the coal at New Orleans for exportation, but for sale there. Being in New Orleans, and held there on sale, without reference to the destination or use which the purchasers might wish to make of it, it was taxed in the hands of the owners (or their agents) like all other property in the city, six mills on the dollar. If after this, and after being sold, the purchaser thought proper to put it on board of a steamer bound to foreign parts, that did not alter the character of the taxation so as to convert it from a general tax to a duty on exports. When taxed it was not held with the intent or for the purpose of exportation, but with the intent and for the purpose of sale there, in New Orleans. A duty on exports must either be a duty levied on goods as a condition, or by reason of their exportation, or, at least, a direct tax or duty on goods which are intended for exportation. Whether the last would be a duty on exports, it is not necessary to determine. But certainly, where a general tax is laid on all property alike, it cannot be construed as a duty on exports when falling upon goods not then intended for exportation, though they should happen to be exported afterwards. This is the most that can be said of the goods in question, and we are therefore of opinion that the tax was not a duty on exports any more than it was a duty on imports, within the meaning of those terms in the clause under consideration.

But in holding, with the decision in Woodruff *v.* Parham, that

goods carried from one State to another are not imports or exports within the meaning of the clause which prohibits a State from laying any impost or duty on imports or exports, we do not mean to be understood as holding that a State may levy import or export duties on goods imported from or exported to another State. We only mean to say that the clause in question does not prohibit it. Whether the laying of such duties by a State would not violate some other provision of the Constitution, that, for example, which gives to Congress the power to regulate commerce with foreign nations, among the several States and with the Indian tribes, is a different question. This brings us to the consideration of the second assignment of error, which is founded on the clause referred to.

The power to regulate commerce among the several States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations. If not in all respects an exclusive power; if, in the absence of Congressional action, the States may continue to regulate matters of local interest only incidentally affecting foreign and interstate commerce, such as pilots, wharves, harbors, roads, bridges, tolls, freights, etc., still, according to the rule laid down in Cooley *v.* Board of Wardens of Philadelphia, 12 How. 299, 319, the power of Congress is exclusive wherever the matter is national in its character or admits of one uniform system or plan of regulation; and is certainly so far exclusive that no State has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the States, as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other States, coming or brought within its jurisdiction. All laws and regulations are restrictive of natural freedom to some extent, and where no regulation is imposed by the government which has the exclusive power to regulate, it is an indication of its will that the matter shall be left free. So long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that that commerce shall be free and untrammelled; and any regulation of the subject by the States is repugnant to such freedom. . . . In short, it may be laid down as the settled doctrine of this court, at this day, that a State can no more regulate or impede commerce among the several States than it can regulate or impede commerce with foreign nations.

This being the recognized law, the question then arises whether the assessment of the tax in question amounted to any interference with, or restriction upon the free introduction of the plaintiffs' coal from the State of Pennsylvania into the State of Louisiana, and the free disposal of the same in commerce in the latter State; in other words, whether the tax amounted to a regulation of, or restriction upon, commerce among the States; or only to an exercise of local administration under the general taxing power, which, though it may incidentally affect the subjects of commerce, is entirely within

the power of the State until Congress shall see fit to interfere and make express regulations on the subject.

As to the character and mode of the assessment, little need be added to what has already been said. It was not a tax imposed upon the coal as a foreign product, or as the product of another State than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a state of transit through that State to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day. It had become a part of the general mass of property in the State, and as such it was taxed for the current year (1880), as all other property in the City of New Orleans was taxed. Under the law, it could not be taxed again until the following year. It was subjected to no discrimination in favor of goods which were the product of Louisiana, or goods which were the property of citizens of Louisiana. It was treated in exactly the same manner as such goods were treated. It cannot be seriously contended, at least in the absence of any congressional legislation to the contrary, that all goods which are the product of other States are to be free from taxation in the State to which they may be carried for use or sale. Take the City of New York, for example. When the assessor of taxes goes his round, must he omit from his list of taxables all goods which have come into the city from the factories of New England and New Jersey, or from the pastures and grainfields of the West? If he must, what will be left for taxation? And how is he to distinguish between those goods which are taxable and those which are not? With the exception of goods imported from foreign countries, still in the original packages, and goods in transit to some other place, why may he not assess all property alike that may be found in the city, being there for the purpose of remaining there till used or sold, and constituting part of the great mass of its commercial capital — provided always, that the assessment be a general one, and made without discrimination between goods the product of New York, and goods the product of other States? Of course the assessment should be a general one, and not discriminative between goods of different States. The taxing of goods coming from other States, as such, or by reason of their so coming, would be a discriminating tax against them as imports, and would be a regulation of interstate commerce, inconsistent with that perfect freedom of trade which Congress has seen fit should remain undisturbed. But if, after their arrival within the State, — that being their place of destination for use or trade, — if, after this, they are subjected to a general tax laid alike on all property within the city, we fail to see how such a taxing can be deemed a

regulation of commerce which would have the objectionable effect referred to.

We do not mean to say that if a tax-collector should be stationed at every ferry and railroad depot in the City of New York, charged with the duty of collecting a tax on every wagon load, or car load of produce and merchandise brought into the city, that it would not be a regulation of, and restraint upon interstate commerce, so far as the tax should be imposed on articles brought from other States. We think it would be, and that it would be an encroachment upon the exclusive powers of Congress. It would be very different from the tax laid on auction sales of all property indiscriminately, as in the case of Woodruff *v.* Parham, which had no relation to the movement of goods from one State to another. It would be very different from a tax laid, as in the present case, on property which had reached its destination, and had become part of the general mass of property of the city, and which was only taxed as a part of that general mass in common with all other property in the city, and in precisely the same manner.

When Congress shall see fit to make a regulation on the subject of property transported from one State to another, which may have the effect to give it a temporary exemption from taxation in the State to which it is transported, it will be time enough to consider any conflict that may arise between such regulation and the general taxing laws of the State. In the present case we see no such conflict, either in the law itself or in the proceedings which have been had under it and sustained by the State tribunals, nor any conflict with the general rule that a State cannot pass a law which shall interfere with the unrestricted freedom of commerce between the States.

[The second assignment of error is held untenable and the judgment of the State court is affirmed.[1]]

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## TELEGRAPH COMPANY *v.* TEXAS.

105 United States, 460. 1881.

Error to the Supreme Court of the State of Texas.

Mr. Chief Justice Waite delivered the opinion of the court.

The Western Union Telegraph Company is a New York corporation engaged in the business of transmitting telegrams at fixed rates of compensation. Its lines extend into and through most of the

[1] In the case of American Steel and Wire Company *v.* Speed, 192 U. S. 500, 24 Sup. Ct. Rep. 365 (1904), it was held that merchandise brought into the State from another State and held for sale was not exempt from uniform State merchants' privilege tax.

States and Territories of the United States, and to Washington, in the District of Columbia. It has availed itself of the privileges and subjected itself to the obligations of title 65 of the Revised Statutes relating to telegraph companies, and its lines connect with those owned and established by the government of the United States for public purposes. It has one hundred and twenty-five offices in the State of Texas, and is in close communication with other telegraph companies doing business in this country and abroad.

By sect. 1 of art. 8 of the Constitution of Texas the legislature is authorized to "impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing business in the State;" and by art. 4655 of the Revised Statutes, enacted under that provision, every chartered telegraph company doing business in the State is required to pay a tax of one cent for every full-rate message sent, and one-half cent for every message less than full rate. This tax is to be paid quarterly to the comptroller of the State on sworn statements made by an officer of the company. In addition to this, taxes must be paid on the real and personal property of the company in the State.

Between Oct. 1, 1879, and July 1, 1880, the company sent over its lines from its offices in Texas 169,076 full-rate, and 100,408 less than full-rate, messages. A large portion of them were sent to places outside of the State, and by the officers of the government of the United States on public business. The company neglected to pay the tax imposed, and a suit was brought in one of the courts of the State for its recovery. In defence it was insisted that the law imposing the tax was in conflict with the Constitution and laws of the United States, and, therefore, void. The Supreme Court of the State, on appeal, sustained the law, and directed a judgment against the company for the full amount claimed, allowing no deductions for messages sent out of the State, or by government officers on government business. To reverse that judgment this writ of error has been brought.

In Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S. 1, this court held that the telegraph was an instrument of commerce, and that telegraph companies were subject to the regulating power of Congress in respect to their foreign and interstate business. A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits.

Congress, to facilitate the erection of telegraph lines, has by statute authorized the use of the public domain and the military and post roads, and the crossing of the navigable streams and waters

of the United States for that purpose. As a return for this privilege those who avail themselves of it are bound to give the United States precedence in the use of their lines for public business at rates to be fixed by the Postmaster-General. Thus, as to government business, companies of this class become government agencies.

The Western Union Telegraph Company having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business. Its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business. The precise question now presented is whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the State, or sent by public officers on the business of the United States.

In Case of the State Freight Tax, 15 Wall. 232, this court decided that a law of Pennsylvania requiring transportation companies doing business in that State to pay a fixed sum as a tax "on each two thousand pounds of freight carried," without regard to the distance moved, or charge made, was unconstitutional, so far as it related to goods taken through the State, or from points without the State to points within, or from points within to points without, because to that extent it was a regulation of foreign and interstate commerce. In this the court but applied the rule, announced in Brown *v.* Maryland, 12 Wheat. 419, 444, that where the burden of a tax falls on a thing which is the subject of taxation, the tax is to be considered as laid on the thing rather than on him who is charged with the duty of paying it into the treasury. In that case, it was said, a tax on the sale of an article, imported only for sale, was a tax on the article itself. To the same general effect are Welton *v.* State of Missouri, 91 U. S. 275; Cook *v.* Pennsylvania, 97 Id. 566; and Webber *v.* Virginia, 103 Id. 344. Taxes upon passenger carriers of a specific amount for each passenger carried were held to be taxes on the passengers, in Passenger Cases, 7 How. 283; Crandall *v.* State of Nevada, 6 Wall. 35; and Henderson *v.* The Mayor, 92 U. S. 259. Taxes on vessels according to measurement without any reference to value, were declared to be taxes on tonnage. State Tonnage Cases, 12 Wall. 204; Peete *v.* Morgan, 19 Id. 581; Cannon *v.* New Orleans, 20 Id. 577; and Inman Steamship Co. *v.* Tinker, 94 U. S. 238.

The present case, as it seems to us, comes within this principle. The tax is the same on every message sent, and because it is sent, without regard to the distance carried or the price charged. It is in no respect proportioned according to the business done. If the message is sent the tax must be paid, and the amount determined solely by the class to which it belongs. If it is full rate, the tax is one cent, and if less than full rate, one-half cent. Clearly, if a fixed

tax for every two thousand pounds of freight carried is a tax on the freight, or for every measured ton of a vessel a tax on tonnage, or for every passenger carried a tax on the passenger, or for the sale of goods a tax on the goods, this must be a tax on the messages. As such, so far as it operates on private messages sent out of the State, it is a regulation of foreign and interstate commerce and beyond the power of the State. That is fully established by the cases already cited. As to the government messages, it is a tax by the State on the means employed by the government of the United States to execute its constitutional powers, and, therefore, void. It was so decided in McCulloch *v.* Maryland, 4 Wheat. 316, and has never been doubted since.

It follows that the judgment, so far as it includes the tax on messages sent out of the State, or for the government on public business, is erroneous. The rule that the regulation of commerce which is confined exclusively within the jurisdiction and territory of a State, and does not affect other nations or States or the Indian tribes, that is to say, the purely internal commerce of a State, belongs exclusively to the State, is as well settled as that the regulation of commerce which does affect other nations or States or the Indian tribes belongs to Congress. Any tax, therefore, which the State may put on messages sent by private parties, and not by the agents of the government of the United States, from one place to another exclusively within its own jurisdiction, will not be repugnant to the Constitution of the United States. Whether the law of Texas, in its present form, can be used to enforce the collection of such a tax is a question entirely within the jurisdiction of the courts of the State, and as to which we have no power of review.

The judgment of the Supreme Court of Texas will be reversed, and the cause remanded with instructions to reverse the judgment of the District Court, and proceed thereafter as justice may require, but not inconsistently with this opinion.[1]

[1] In LELOUP *v.* PORT OF MOBILE, 127 U. S. 640 (1888), a case in which a State statute imposing a license tax on telegraph companies engaged wholly or partially in transmitting messages to other States and to foreign countries, was held to be invalid, MR. JUSTICE BRADLEY, announcing the opinion of the court, uses this language: "No State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

## PHILADELPHIA AND SOUTHERN STEAMSHIP COMPANY *v.* PENNSYLVANIA.

122 United States, 326. 1887.

MR. JUSTICE BRADLEY delivered the opinion of the court.

The question in this case was, whether a State can constitutionally impose upon a steamship company, incorporated under its laws, a tax upon the gross receipts of such company derived from the transportation of persons and property by sea, between different States, and to and from foreign countries.

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The question which underlies the immediate question in the case is, whether the imposition of the tax upon the steamship company's receipts amounted to a regulation of, or an interference with, interstate and foreign commerce, and was thus in conflict with the power granted by the Constitution to Congress? The tax was levied directly upon the receipts derived by the company from its fares and freights for the transportation of persons and goods between different States, and between the States and foreign countries, and from the charter of its vessels which was for the same purpose. This transportation was an act of interstate and foreign commerce. It was the carrying on of such commerce. It was that, and nothing else. In view of the decisions of this court, it cannot be pretended that the State could constitutionally regulate or interfere with that commerce itself. But taxing is one of the forms of regulation. It is one of the principal forms. Taxing the transportation, either by its tonnage, or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. Clearly this could not be done by the State without interfering with the power of Congress. Foreign commerce has been fully regulated by Congress, and any regulations imposed by the States upon that branch of commerce would be a palpable interference. If Congress has not made any express regulations with regard to interstate commerce, its inaction, as we have often held, is equivalent to a declaration that it shall be free, in all cases where its power is exclusive; and its power is necessarily exclusive whenever the subject matter is national in its character and properly admits of only one uniform system. See the cases collected in Robbins *v.* Shelby Taxing District, 120 U. S. 489, 492, 493. Interstate commerce carried on by ships on the sea is surely of this character.

If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the State, could the fares and freights received for transportation in carrying on that commerce be constitutionally taxed? If the State cannot tax the transportation, may it, nevertheless, tax the fares and freights re-

ceived therefor? Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the State officials to say to the company: "We will not tax you for the transportation you perform, but we will tax you for what you get for performing it." Such a position can hardly be said to be based on a sound method of reasoning.

[The court considers and quotes from Brown *v.* Maryland, 12 Wheat. 419, *supra*, p. 303.]

The application of this reasoning to the case in hand is obvious. Of what use would it be to the ship-owner, in carrying on interstate and foreign commerce, to have the right of transporting persons and goods free from State interference, if he had not the equal right to charge for such transportation without such interference? The very object of his engaging in transportation is to receive pay for it. If the regulation of the transportation belongs to the power of Congress to regulate commerce, the regulation of fares and freights receivable for such transportation must equally belong to that power; and any burdens imposed by the State on such receipts must be in conflict with it. To apply the language of Chief Justice Marshall, fares and freights for transportation in carrying on interstate or foreign commerce are as much essential ingredients of that commerce as transportation itself.

It is necessary, however, that we should examine what bearing the cases of the State Freight Tax and Railway Gross Receipts, reported in 15th of Wallace, have upon the question in hand. These cases were much quoted in argument, and the latter was confidently relied on by the counsel of the Commonwealth. They both arose under certain tax laws of Pennsylvania. The first, which is reported under the title of Case of the State Freight Tax, 15 Wall. 232, was that of the Reading Railroad Company, and arose under an act passed in 1864, which imposed upon every railroad, steamboat, canal, and slack-water navigation company a tax of a certain rate per ton on every ton of freight carried by or upon the works of said company; with a proviso directing, in substance, that every company, foreign or domestic, whose line extended partly in Pennsylvania and partly in another State, should pay for the freight carried over that portion of its line in Pennsylvania the same as if its whole line were in that State. Under this law the Reading Railroad Company was charged a tax of $38,000 for freight transported to points within Pennsylvania, and of $46,000 for that exported to points without the State. The latter sum the company refused to pay; and the question in this Court was, whether that portion of the tax was constitutional; and we held that it was not. Mr. Justice Strong delivered the opinion of the court. It was held that this was not a tax upon the franchises of the companies, or upon their property, or upon their business, meas-

ured by the number of tons of freight carried; but was a tax upon the freight carried, and because of its carriage: that transportation is a constituent of commerce: that the tax was, therefore, a regulation of commerce, and a regulation of commerce among the States: that the transportation of passengers or merchandise from one State to another is, in its nature, a matter of national importance, admitting of a uniform system or plan of regulation, and therefore, under the rule established by Cooley *v.* The Port Wardens, 12 How. 299, exclusively subject to the legislation of Congress. The inevitable conclusion was, that the tax then in question was in conflict with the exclusive power of Congress to regulate commerce among the States, and was, therefore, unconstitutional. Referring to the decision in Crandall *v.* Nevada, 6 Wall. 35, in which this court had decided that a State cannot tax persons for passing through or out of it, Justice Strong said: "If State taxation of persons passing from one State to another, or a State tax upon interstate transportation of passengers, is unconstitutional, *a fortiori*, if possible, is a State tax upon the carriage of merchandise from State to State in conflict with the Federal Constitution. Merchandise is the subject of commerce. Transportation is essential to commerce; and every burden laid upon it is *pro tanto* a restriction. Whatever, therefore, may be the true doctrine respecting the exclusiveness of the power vested in Congress to regulate commerce among the States, we regard it as established that no State can impose a tax upon freight transported from State to State, or upon the transporter because of such transportation."

The court in its opinion took notice of the fact that the law was general in its terms, making no distinction between freight transported wholly within the State and that which was destined to, or came from, another State. But it was held that this made no difference. The law might be valid as to one class, and unconstitutional as to the other. On this subject Justice Strong said: "The State may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the jurisdiction of the State. Nor is a rule prescribed for carriage of goods through, out of, or into a State, any the less a regulation of transportation because the same rule may be applied to carriage which is wholly internal." This last observation meets the argument that might be made in the present case, namely, that the law is general in its terms, and taxes receipts for all transportation alike, making no discrimination against receipts for interstate or foreign transportation, and hence cannot be regarded as a special tax on the latter. The decision in the case cited shows that this does not relieve the tax from its objectionable character.

If this case stood alone, we should have no hesitation in saying that it would entirely govern the one before us; for, as before said, a tax upon fares and freights received for transportation is virtually

a tax upon the transportation itself. But at the same time that the case of State Freight Tax was decided, the other case referred to, namely, that of State Tax on Railway Gross Receipts was also decided, and the opinion was delivered by the same member of the court. 15 Wall. 284. This was also a case of a tax imposed upon the Reading Railroad Company. It arose under another act of Assembly of Pennsylvania, passed in February, 1866, by which it was enacted that "in addition to the taxes now provided by law, every railroad, canal and transportation company incorporated under the laws of this Commonwealth, and not liable to the tax upon income under existing laws, shall pay to the Commonwealth a tax of three-fourths of one per centum upon the gross receipts of said Company; the said tax shall be paid semi-annually." Under this statute the accounting officers of Pennsylvania stated an account against the Reading Railroad Company for tax on gross receipts of the company for the half year ending December 31, 1867. These receipts were derived partly from the freight of goods transported wholly within the State, and partly from the freight of goods exported to points without the State, which latter were discriminated from the former in the reports made by the company. It was the tax on the latter receipts which formed the subject of controversy. The same line of argument was taken at the bar as in the other case. This court, however, held the tax to be constitutional. The grounds on which the opinion was based, in order to distinguish this case from the preceding one, were two: first, that the tax, being collectible only once in six months, was laid upon a fund which had become the property of the company, mingled with its other property, and incorporated into the general mass of its property, possibly expended in improvements, or otherwise invested. The case is likened, in the opinion, to that of taxing goods which have been imported, after their original packages have been broken, and after they have been mixed with the mass of property in the country, which, it was said, are conceded in Brown *v.* Maryland to be taxable.

This reasoning seems to have much force. But is the analogy to the case of imported goods as perfect as is suggested? When the latter become mingled with the general mass of property in the State, they are not followed and singled out for taxation as imported goods, and by reason of their being imported. If they were, the tax would be as unconstitutional as if imposed upon them whilst in the original packages. When mingled with the general mass of property in the State, they are taxed in the same manner as other property possessed by its citizens, without discrimination or partiality. We held in Welton *v.* Missouri, 91 U. S. 275, that goods brought into a State for sale, though they thereby become a part of the mass of its property, cannot be taxed by reason of their being introduced into the State, or because they are the products of another State. To tax them as such was expressly held to be unconsti-

tutional. The tax in the present case is laid upon the gross receipts for transportation as such. Those receipts are followed and caused to be accounted for by the company, dollar for dollar. It is those specific receipts, or the amount thereof (which is the same thing), for which the company is called upon to pay the tax. They are taxed not only because they are money, or its value, but because they were received for transportation. No doubt a ship-owner, like any other citizen, may be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce, or banking, or any other employment. But that is an entirely different thing from laying a special tax upon his receipts in a particular employment. If such a tax is laid, and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, no matter when the tax is exacted, whether at the time of realizing the receipts or at the end of every six months or a year, it is an exaction aimed at the commerce itself, and is a burden upon it, and seriously affects it. A review of the question convinces us that the first ground on which the decision in State Tax on Railway Gross Receipts was placed is not tenable; that it is not supported by anything decided in Brown *v.* Maryland; but, on the contrary, that the reasoning in that case is decidedly against it.

The second ground on which the decision referred to was based was, that the tax was upon the franchise of the corporation granted to it by the State. We do not think that this can be affirmed in the present case. It certainly could not have been intended as a tax on the corporate franchise, because, by the terms of the act, it was laid equally on the corporations of other States doing business in Pennsylvania. If intended as a tax, on the franchise of doing business, — which in this case is the business of transportation in carrying on interstate and foreign commerce, it would clearly be unconstitutional. It was held by this court, in the case of Gloucester Ferry Company *v.* Pennsylvania, 114 U. S. 196, that interstate commerce carried on by corporations is entitled to the same protection against State exactions which is given to such commerce when carried on by individuals. In that case the tax was laid upon the capital stock of a ferry company incorporated by New Jersey, and engaged in the business of transporting passengers and freight between Camden, in New Jersey, and the city of Philadelphia. The law under which the tax was imposed was passed by the Legislature of Pennsylvania on the 7th of June, 1879, and declared "that every company or association whatever, now or hereafter incorporated by or under any law of this Commonwealth, or now or hereafter incorporated by any other State or territory of the United States, or foreign government, and doing business in this Commonwealth" . . . [with certain exceptions named], "shall be subject to and pay into the treasury of the Commonwealth annually a tax to be com-

puted as follows, namely:" the amount of tax is then rated by the dividends declared, and imposed upon the capital stock of the company at the rate of so many mills, or fractions of a mill, for every dollar of such capital stock. It was contended that the ferry company could not hold property in Philadelphia for the purpose of carrying on its ferrying business, and could not carry on its said buasiness there without a franchise, express or implied, from the State of Pennsylvania. But this court held, in its opinion, delivered by Mr. Justice Field, that the business of landing and receiving passengers and freight at the wharf in Philadelphia was a necessary incident to, and a part of, their transportation across the Delaware River from New Jersey; that without it that transportation would be impossible; that a tax upon such receiving and landing of passengers and freight is a tax upon their transportation, that is, upon the commerce between the two States involved in such transportation; and that Congress alone can deal with such transportation; its nonaction being equivalent to a declaration that it shall remain free from burdens imposed by State legislation. The opinion proceeds as follows: "Nor does it make any difference whether such commerce is carried on by individuals or corporations. Welton *v.* Missouri, 91 U. S. 275; Mobile *v.* Kimball, 102 U. S. 691. As was said in Paul *v.* Virginia, 8 Wall. 168, at the time of the formation of the Constitution, a large part of the commerce of the world was carried on by corporations; and the East India Company, the Hudson Bay Company, the Hamburgh Company, the Levant Company, and the Virginia Company were mentioned as among the corporations which, from the extent of their operations, had become celebrated throughout the commercial world. The grant of power [to Congress] is general in its terms, making no reference to the agencies by which commerce may be carried on. It includes commerce by whomsoever conducted, whether by individuals or corporations." p. 204. Again, "While it is conceded that the property in a State belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void as an interference with, and obstruction of, the power of Congress in the regulation of such commerce." p. 211. It is hardly necessary to add that the tax on the capital stock of the New Jersey Company, in that case, was decided to be unconstitutional, because, as the corporation was a foreign one, the tax could only be construed as a tax for the privilege or franchise of carrying on its business, and that business was interstate commerce.

The decision in this case, and the reasoning on which it is founded, so far as they relate to the taxation of interstate commerce

carried on by corporations, apply equally to domestic and foreign corporations. No doubt the capital stock of the former, regarded as inhabitants of the State, or their property, may be taxed as other corporations and inhabitants are, provided no discrimination be made against them as corporations carrying on foreign or interstate commerce, so as to make the tax, in effect, a tax on such commerce. But their business as carriers in foreign or interstate commerce cannot be taxed by the State, under the plea that they are exercising a franchise.

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The corporate franchises, the property, the business, the income of corporations created by a State may undoubtedly be taxed by the State; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal government. This is a principle so often announced by the courts, and especially by this court, that it may be received as an axiom of our constitutional jurisprudence. It is unnecessary, therefore, to review the long list of cases in which the subject is discussed. Those referred to are abundantly sufficient for our purpose. We may add, however, that since the decision of the Railway Tax Cases now reviewed, a series of cases has received the consideration of this court, the decisions in which are in general harmony with the views here expressed, and show the extent and limitations of the rule that a State cannot regulate or tax the operations or objects of interstate or foreign commerce.

[Many cases are cited without comment.]

It is hardly within the scope of the present discussion to refer to the disastrous effects to which the power to tax interstate or foreign commerce may lead. If the power exists in the State at all, it has no limit but the discretion of the State, and might be exercised in such a manner as to drive away that commerce, or to load it with an intolerable burden, seriously affecting the business and prosperity of other States interested in it; and if those States, by way of retaliation or otherwise, should impose like restrictions, the utmost confusion would prevail in our commercial affairs. In view of such a state of things which actually existed under the Confederation, Chief Justice Marshall, in the case before referred to, said: "Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal government contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and

should comprehend all foreign commerce, and all commerce among the States. To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity." 12 Wheat. 446.

[The imposition of the tax in question was therefore found to be a regulation of interstate and foreign commerce and the judgment appealed from was reversed.[1]]

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## ADAMS EXPRESS COMPANY *v.* OHIO STATE AUDITOR.

165 United States, 194. 1897.

Mr. Chief Justice Fuller delivered the opinion of the court.

[Suits were brought by the express companies in the United States Circuit Court for the Southern District of Ohio to restrain proceedings under a State statute to collect taxes from such companies. The court dismissed the cases and they were appealed to this court. The State statute has been held by the State Supreme Court not to be contrary to the State constitution. State *v.* Jones, 51 Ohio St. 492.]

This brings us to the only inquiry which it concerns us to examine. The legislation in question is claimed to be repugnant to the Constitution of the United States because in violation of the commerce clause of that instrument, and because operating to deprive appellants of their property without due process of law, and of the equal protection of the laws.

We assume that the assessments complained of were made in pursuance of the definite rule or principle of appraisement recognized and established by the Nichols law, as construed by the Supreme Court of Ohio, and the question is whether the law prescribing that rule is valid under the Federal Constitution.

The principal contention is that the rule contravenes the commerce clause because the assessments, while purporting to be on the property of complainants within the State, are in fact levied on their business, which is largely interstate commerce.

Although the transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be directly subjected to state taxation, yet property belonging to corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered

[1] This case is followed, and the case of Maine *v.* Grand Trunk Railroad Company, 142 U. S. 217, distinguished, by the majority opinion in Galveston, etc. R. Co. *v.* Texas, 210 U. S. 217, 28 Sup. Ct. Rep. 638 (1908).

as falling within the inhibition of the Constitution. Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of the governments under whose protection they conduct their operations, and taxation on property, collectible by the ordinary means, does not affect interstate commerce otherwise than incidentally, as all business is affected by the necessity of contributing to the support of government. Postal Telegraph Cable Co. *v.* Adams, 155 U. S. 688.

As to railroad, telegraph and sleeping-car companies, engaged in interstate commerce, it has often been held by this court that their property, in the several States through which their lines or business extended, might be valued as a unit for the purposes of taxation, taking into consideration the uses to which it was put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular State, without violating any Federal restriction. Western Union Telegraph Co. *v.* Massachusetts, 125 U. S. 530; Massachusetts *v.* Western Union Telegraph Co., 141 U. S. 40; Maine *v.* Grand Trunk Railway, 142 U. S. 217; Pittsburgh, Cincinnati, &c. Railway Co. *v.* Backus, 154 U. S. 421; Cleveland, Cincinnati, &c. Railway Co. *v.* Backus, ibid. 439; Western Union Telegraph Co. *v.* Taggart, 163 U. S. 1; Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18. The valuation was, thus, not confined to the wires, poles, and instruments of the telegraph company; or the roadbed, ties, rails, and spikes of the railroad company; or the cars of the sleeping-car company; but included the proportionate part of the value resulting from the combination of the means by which the business was carried on, a value existing to an appreciable extent throughout the entire domain of operation. And it has been decided that a proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular State is, in the case of railroads, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole; Pittsburgh, &c. R. Co. *v.* Backus, 154 U. S. 421, 429; or taking as the basis of assessment such proportion of the capital stock of a sleeping-car company as the number of miles of railroad over which its cars are run in a particular State bears to the whole number of miles traversed by them in that and other States; Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18; or such a proportion of the whole value of the capital stock of a telegraph company as the length of its lines within a State bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the State. Western Union Telegraph Co. *v.* Taggart, 163 U. S. 1.

Doubtless there is a distinction between the property of railroad and telegraph companies and that of express companies. The physical unity existing in the former is lacking in the latter; but there

is the same unity in the use of the entire property for the specific purpose, and there are the same elements of value arising from such use.

The cars of the Pullman Company did not constitute a physical unity, and their value as separate cars did not bear a direct relation to the valuation which was sustained in that case. The cars were moved by railway carriers under contract, and the taxation of the corporation in Pennsylvania was sustained on the theory that the whole property of the company might be regarded as a unit plant, with a unit value, a proportionate part of which value might be reached by the State authorities on the basis indicated.

No more reason is perceived for limiting the valuation of the property of express companies to horses, wagons and furniture, than that of railroad, telegraph and sleeping-car companies, to roadbed, rails and ties; poles and wires; or cars. The unit is a unit of use and management, and the horses, wagons, safes, pouches, and furniture; the contracts for transportation facilities; the capital necessary to carry on the business, whether represented in tangible or intangible property, in Ohio, possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others.

We repeat that while the unity which exists may not be a physical unity, it is something more than a mere unity of ownership. It is a unity of use, not simply for the convenience or pecuniary profit of the owner, but existing in the very necessities of the case — resulting from the very nature of the business.

The same party may own a manufacturing establishment in one State and a store in another and may make profit by operating the two, but the work of each is separate. The value of the factory in itself is not conditioned on that of the store or *vice versa*, nor is the value of the goods manufactured and sold affected thereby. The connection between the two is merely accidental and growing out of the unity of ownership. But the property of an express company distributed through different States is as an essential condition of the business united in a single specific use. It constitutes but a single plant, made so by the very character and necessities of the business.

It is this which enabled the companies represented here to charge and receive within the State of Ohio for the year ending May 1, 1895, $282,181, $358,519 and $275,446, respectively, on the basis, according to their respective returns, of $42,065, $28,438 and $23,430, of personal property owned in that State, returns which confessedly do not, however, take into account contracts for transportation and accompanying facilities.

Considered as distinct subjects of taxation, a horse is, indeed, a horse; a wagon, a wagon; a safe, a safe; a pouch. a pouch: but how

is it that $23,430 worth of horses, wagons, safes and pouches produces $275,446 in a single year? Or $28,438 worth, $358,519? The answer is obvious.

Reliance seems to be placed by counsel on the observation of Mr. Justice Lamar, in Pacific Express Company *v.* Seibert, 142 U. S. 339, 354, that "express companies, such as are defined by this act, have no tangible property, of any consequence, subject to taxation under the general laws. There is, therefore, no way by which they can be taxed at all unless by a tax upon their receipts for business transacted." But the reference was to the legislation of the State of Missouri, and the scheme of taxation under consideration here was not involved in any manner.

[After quoting the State statute which is sufficiently described elsewhere and giving extracts from the opinion of the Supreme Court of Ohio in State *v.* Jones, 51 Ohio St. 492, upholding the "Nichols Law," and from the opinion in this case in the Circuit Court of Appeals, Sanford *v.* Poe, 37 U. S. App. 378, also upholding the statute, the court continues.]

The line of reasoning thus pursued is in accordance with the decisions of this court already cited. Assuming the proportion of capital employed in each of several States through which such a company conducts its operations has been fairly ascertained, while taxation thereon, or determined with reference thereto, may be said in some sense to fall on the business of the company, it is only indirectly. The taxation is essentially a property tax, and, as such, not an interference with interstate commerce.

Nor, in this view, is the assessment on property not within the jurisdiction of the taxing authorities of the State and for that reason amounting to a taking of property without due process of law. The property taxed has its actual situs in the State, and is, therefore, subject to the jurisdiction, and the distribution among the several counties is a matter of regulation by the State legislature. Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 22; State Railroad Tax Cases, 92 U. S. 575; Delaware Railroad Tax, 18 Wall. 206; Erie Railroad *v.* Pennsylvania, 21 Wall. 492; Columbus Southern Railway *v.* Wright, 151 U. S. 470.

In Pullman's Palace Car Co. *v.* Pennsylvania, the rule is considered that personal property may be separated from its owner and he may be taxed, on its account, at the place where it is, although not the place of his own domicil, and even if he is not a citizen or a resident of the State which imposes the tax; and the distinction between ships and vessels and other personal property is pointed out. The authorities are largely examined and need not be gone over again.

There is here no attempt to tax property having a situs outside of the State, but only to place a just value on that within. Presumptively all the property of the corporation or company is held and

used for the purposes of its business, and the value of its capital stock and bonds is the value of only that property so held and used.

Special circumstances might exist, as indicated in Pittsburgh, Cincinnati, &c. Railway Co. *v.* Backus, 154 U. S. 421, 443, which would require the value of a portion of the property of an express company to be deducted from the value of its plant as expressed by the sum total of its stock and bonds before any valuation by mileage could be properly arrived at, but the difficulty in the cases at bar is that there is no showing of any such separate and distinct property which should be deducted, and its existence is not to be assumed. It is for the companies to present any special circumstances which may exist, and, failing their doing so, the presumption is that all their property is directly devoted to their business, which being so, a fair distribution of its aggregate value would be upon the mileage basis.

The States through which the companies operate ought not to be compelled to content themselves with a valuation of separate pieces of property disconnected from the plant as an entirety, to the proportionate part of which they extend protection, and to the dividends of whose owners their citizens contribute.

It is not contended that notice of the time and place of the meetings of the board was not afforded or that the companies were denied the opportunity to appear and submit such proofs, explanations, suggestions and arguments with reference to the assessment as they desired.

We are, also, unable to conclude that the classification of express companies with railroad and telegraph companies as subject to the unit rule, denies the equal protection of the laws. That provision in the Fourteenth Amendment "was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways," nor was that amendment "intended to compel a State to adopt an iron rule of equal taxation." Bell's Gap Railroad *v.* Pennsylvania, 134 U. S. 232.

In Pacific Express Co. *v.* Seibert, 142 U. S. 339, 351, in which a tax on gross receipts of express companies in the State of Missouri was sustained, Mr. Justice Lamar, speaking for the court, well says:

"This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation and of a just adaptation of property to its burdens."

And see Kentucky Railroad Tax Cases, 115 U. S. 321; Home Insurance Co. *v.* New York, 134 U. S. 594.

The policy pursued in Ohio is to classify property for taxation, when the nature of the property, or its use, or the nature of the business engaged in, requires classification, in the judgment of the legislature, in order to secure equality of burden; and property of different sorts is classified under various statutory provisions for the purposes of assessment and taxation. The state constitution requires all property to be taxed by a uniform rule and according to its true value in money, and it was held by the Supreme Court of Ohio in State *v.* Jones that the Nichols law did not violate that requirement.

In Wagoner *v.* Loomis, 37 Ohio St. 571, it was ruled that: "Statutory provisions, whereby different classes of property are listed and valued for taxation in and by different modes and agencies, are not necessarily in conflict with the provisions of the Constitution, which require all property to be taxed by a uniform rule and according to its true value in money." And the court said: "A faithful execution of the different provisions of the statutes would place upon the duplicate for taxation all the taxable property of the State, whether bank stocks or other personal property or real estate, according to its true value in money; and the equality required by the constitution has no other test."

The constitutional test was held to be complied with, whatever the mode, if the result of the assessment was that the property was assessed at its true value in money.

Considering, as we do, that the unit rule may be applied to express companies without disregarding any other Federal restriction, we think it necessarily follows that this law is not open to the objection of denying the equal protection of the laws.

We have said nothing in relation to the contention that these valuations were excessive. The method of appraisement prescribed by the law was pursued and there were no specific charges of fraud. The general rule is well settled that "whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such determination comes into inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined." Pittsburgh, Cincinnati, &c. Railway Co. *v.* Backus, 154 U. S. 434; Western Union Telegraph Co. *v.* Taggart, 163 U. S. 1. *Decrees affirmed.*[1]

[1] MR. JUSTICE WHITE delivered a dissenting opinion, in which MR. JUSTICE FIELD, MR. JUSTICE HARLAN, and MR. JUSTICE BROWN concurred.

[For the case of ALLEN *v.* PULLMAN PALACE CAR CO., 191 U. S. 171, relating to the taxation of sleeping cars employed in interstate commerce, see Appendix A, p.1114.]

### 3. Exercise of Police Power.

## RAILROAD COMPANY *v.* FULLER.

17 Wallace, 560. 1873.

[PLAINTIFF in error was sued in the State court of Iowa for the penalty provided by the State statute for charging a higher rate for transportation of freight than that posted as required by the statute. Judgment was rendered against the company, which was affirmed in the Supreme Court of the State, and the case is brought by writ of error to this court.]

MR. JUSTICE SWAYNE delivered the opinion of the court.

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The Constitution gives to Congress the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The statute complained of provides —

That each railroad company shall, in the month of September, annually, fix its rates for the transportation of passengers and of freights of different kinds;

That it shall cause a printed copy of such rates to be put up at all its stations and depots, and cause a copy to remain posted during the year;

That a failure to fulfil these requirements, or the charging of a higher rate than is posted, shall subject the offending company to the payment of the penalty prescribed.

In all other respects there is no interference. No other constraint is imposed. Except in these particulars, the company may exercise all its faculties as it shall deem proper. No discrimination is made between local and interstate freights, and no attempt is made to control the rates that may be charged. It is only required that the rates shall be fixed, made public, and honestly adhered to. In this there is nothing unreasonable or onerous. The public welfare is promoted without wrong or injury to the company. The statute was doubtless deemed to be called for by the interests of the community to be affected by it, and it rests upon a solid foundation of reason and justice.

It is not, in the sense of the Constitution, in any wise a regulation of commerce. It is a police regulation, and as such forms "a portion of the 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." Gibbons *v.* Ogden, 9 Wheat. 1.

This case presents a striking analogy to a prominent feature in the case of The Brig James Gray *v.* The Ship John Fraser, 21 How. 184. There the city authorities of Charleston had passed an ordinance

prescribing where a vessel should lie in the harbor, what light she should show at night, and making other similar regulations. It was objected that these requirements were regulations of commerce and, therefore, void. This court affirmed the validity of the ordinance.

In the complex system of polity which exists in this country the powers of government may be divided into four classes: —

Those which belong exclusively to the States.

Those which belong exclusively to the National Government.

Those which may be exercised concurrently and independently by both.

And those which may be exercised by the States but only until Congress shall see fit to act upon the subject.

The authority of the State then retires and lies in abeyance until the occasion for its exercise shall recur. *Ex parte* McNiel, 13 Wall. 240.

Commerce is traffic, but it is much more. It embraces also transportation by land and water, and all the means and appliances necessarily employed in carrying it on. 2 Story on the Constitution, §§ 1061, 1062.

The authority to regulate commerce, lodged by the Constitution in Congress, is in part within the last division of the powers of government above mentioned. Some of the rules prescribed in the exercise of that power must from the nature of things be uniform throughout the country. To that extent the authority itself must necessarily be exclusive, as much so as if it had been declared so to be by the Constitution in express terms.

Others may well vary with the varying circumstances of different localities. Where a stream navigable for the purposes of foreign or interstate commerce is obstructed by the authority of a State, such exercise of authority may be valid until Congress shall see fit to intervene. The authority of Congress in such cases is paramount and absolute, and it may compel the abatement of the obstruction whenever it shall deem it proper to do so.

. . . . . .

If the requirements of the statute here in question were, as contended by the counsel for the plaintiff in error, *regulations of commerce*, the question would arise, whether, regarded in the light of the authorities referred to, and of reason and principle, they are not regulations of such a character as to be valid until superseded by the paramount action of Congress. But as we are unanimously of the opinion that they are merely police regulations, it is unnecessary to pursue the subject. *Judgment affirmed.*

## LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY *v.* OHIO.

173 United States, 285. 1899.

MR. JUSTICE HARLAN delivered the opinion of the court.

[The action was commenced against plaintiff in error before a justice of the peace in Ohio to recover a penalty under statute (Rev. Stat. of Ohio, § 3320), for not stopping three trains each way at West Cleveland.]

In the argument at the bar as well as in the printed brief of counsel, reference was made to the numerous cases in this court adjudging that what are called the police powers of the States were not surrendered to the General Government when the Constitution was ordained but remained with the several States of the Union. And it was asserted with much confidence that while regulations adopted by competent local authority in order to protect or promote the public health, the public morals, or the public safety have been sustained where such regulations only incidentally affected commerce among the States, the principles announced in former adjudications condemn as repugnant to the Constitution of the United States all local regulations that affect interstate commerce in any degree if established merely to subserve the *public convenience*.

One of the cases cited in support of this position is Hennington *v.* Georgia, 163 U. S. 299, 303, 308, 317, which involved the validity of a statute of Georgia providing that "if any freight train shall be run on any railroad in this State on the Sabbath Day (known as Sunday), the superintendent of such railroad company, or the officer having charge of the business of that department of the railroad, shall be liable for indictment for a misdemeanor in each county through which such trains shall pass, and on conviction shall be punished. . . . *Provided, always*, That whenever any train on any railroad in this State, having in such train one or more cars loaded with live stock, which train shall be delayed beyond schedule time, shall not be required to lay over on the line of road or route during Sunday, but may run on to the point where, by due course of shipment or consignment, the next stock pen on the route may be, where said animals may be fed and watered, according to the facilities usually afforded for such transportation. And it shall be lawful for the freight trains on the different railroads in this State running over said roads on Saturday night, to run through to destination: *Provided*, The time of arrival, according to the schedule by which the train or trains started on the trip, shall not be later than eight o'clock on Sunday morning." This court said: "The well-settled rule is, that if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial rela

tion to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of courts to so adjudge, and thereby give effect to the Constitution."

The contention in that case was that the running of railroad cars laden with interstate freight was committed exclusively to the control and supervision of the National Government; and that although Congress had not taken any affirmative action upon the subject, State legislation interrupting interstate commerce even for a limited time only, whatever might be its object and however essential such legislation might be for the comfort, peace, or safety of the people of the State, was a regulation of interstate commerce forbidden by the Constitution of the United States.

After observing that the argument in behalf of the defendant rested upon the erroneous assumption that the statute of Georgia was such a regulation of interstate commerce as was forbidden by the Constitution without reference to affirmative action by Congress, and not merely a statute enacted by the State under its police power, and which, although in some degree affecting interstate commerce, did not go beyond the necessities of the case, and therefore was valid, at least until Congress intervened, this court, upon a review of the adjudged cases, said: "These authorities make it clear that the legislative enactments of the States, passed under their admitted police powers, and having a real relation to the domestic peace, order, health, and safety of their people, but which, by their necessary operation, affect to some extent or for a limited time the conduct of commerce among the States, are yet not invalid by force alone of the grant of power to Congress to regulate such commerce; and, if not obnoxious to some other constitutional provision or destructive of some right secured by the fundamental law, are to be respected in the courts of the Union until they are superseded and displaced by some act of Congress passed in execution of the power granted to it by the Constitution. Local laws of the character mentioned have their source in the powers which the States reserved and never surrendered to Congress, of providing for the public health, the public morals, and the public safety, and are not, within the meaning of the Constitution, and considered in their own nature, regulations of interstate commerce simply because, for a limited time or to a limited extent, they cover the field occupied by those engaged in such commerce. The statute of Georgia is not directed against interstate commerce. It establishes a rule of civil conduct applicable alike to all freight trains, domestic as well as interstate. It applies to the transportation of interstate freight the same rule precisely that it applies to the transportation of domestic freight." Again: "We are of opinion that such a law, although in a limited degree affecting interstate commerce, is not for that reason a needless intrusion upon the domain of Federal jurisdiction, nor strictly a regulation of interstate commerce, but, considered in its own nature, is an ordinary police regulation de

signed to secure the well-being and to promote the general welfare of the people within the State by which it was established, and therefore not invalid by force alone of the Constitution of the United States."

It is insisted by counsel that these and observations to the same effect in different cases show that the police powers of the States, when exerted with reference to matters more or less connected with interstate commerce, are restricted in their exercise, so far as the National Constitution is concerned, to regulations pertaining to the health, morals, or safety of the public, and do not embrace regulations designed merely to promote the *public convenience.*

This is an erroneous view of the adjudications of this court. While cases to which counsel refer involved the validity of State laws having reference directly to the public health, the public morals, or the public safety, in no one of them was there any occasion to determine whether the police powers of the States extended to regulations incidentally affecting interstate commerce but which were designed only to promote the public convenience or the general welfare. There are, however, numerous decisions by this court to the effect that the States may legislate with reference simply to the public convenience, subject of course to the condition that such legislation be not inconsistent with the National Constitution, nor with any act of Congress passed in pursuance of that instrument, nor in derogation of any right granted or secured by it. As the question now presented is one of great importance, it will be well to refer to some cases of the latter class.

[Cases are referred to which relate to obstructions in navigable streams. They have heretofore been sufficiently stated.]

In Western Union Telegraph Co. *v.* James, 162 U. S. 650, 662, the question was presented whether a State enactment requiring telegraph companies with lines of wires wholly or partly within the State to receive telegrams, and on payment of the charges thereon to deliver them with due diligence, was not a regulation of interstate commerce when applied to interstate telegrams. We held that such enactments did not in any just sense regulate interstate commerce. It was said in that case: "While it is vitally important that commerce between the States should be unembarrassed by vexatious State regulations regarding it, yet, on the other hand, there are many occasions where the police power of the State can be properly exercised to insure a faithful and prompt performance of duty within the limits of the State upon the part of those who are engaged in interstate commerce. We think the statute in question is one of that class, and in the absence of any legislation by Congress, the statute is a valid exercise of the power of the State over the subject."

So, in Richmond & Alleghany Railroad *v.* Patterson Tobacco Co., 169 U. S. 311, 315, it was adjudged that a statute of Virginia defining the obligations of carriers who accepted for transportation anything directed to points of destination beyond the termini of their own lines

or routes, was not, in its application to interstate business, a regulation of interstate commerce within the meaning of the Constitution. This court said: "Of course, in a latitudinarian sense any restriction as to the evidence of a contract, relating to interstate commerce, may be said to be a limitation on the contract itself. But this remote effect, resulting from the lawful exercise by a State of its power to determine the form in which contracts may be proven, does not amount to a regulation of interstate commerce." And the court cited in support of its conclusion the case of Chicago, Milwaukee, &c. Railway Co. *v.* Solan, 169 U. S. 133, 137, which involved the validity of State regulations as to the liability of carriers of passengers, and in which it was said: "They are not in themselves regulations of interstate commerce, although they control in some degree the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits."

Now, it is evident that these cases had no reference to the health, morals, or safety of the people of the State, but only to the public convenience. They recognized the fundamental principle that outside of the field directly occupied by the General Government under the powers granted to it by the Constitution, all questions arising within a State that relate to its internal order, or that involve the public convenience or the general good, are primarily for the determination of the State, and that its legislative enactments relating to those subjects, and which are not inconsistent with the State constitution, are to be respected and enforced in the courts of the Union if they do not by their operation directly entrench upon the authority of the United States or violate some right protected by the National Constitution. The power here referred to is — to use the words of Chief Justice Shaw — the power "to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth and of the subjects of the same." Commonwealth *v.* Alger, 7 Cushing, 53, 85. Mr. Cooley well said: "It cannot be doubted that there is ample power in the legislative department of the State to adopt all necessary legislation for the purpose of enforcing the obligations of railway companies as carriers of persons and goods to accommodate the public impartially, and to make every reasonable provision for carrying with safety and expedition." Cooley's Const. Lim. (6th ed.), p. 715. It may be that such legislation is not within the "police power" of a State, as those words have been sometimes, although inaccurately, used. But in our opinion the power, whether called police, governmental or legislative, exists in each State, by appropriate enactments not forbidden by its own constitution or by the Constitution of the United

States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good. This power in the States is entirely distinct from any power granted to the General Government, although when exercised it may sometimes reach subjects over which national legislation can be constitutionally extended. When Congress acts with reference to a matter confided to it by the Constitution, then its statutes displace all conflicting local regulations touching that matter, although such regulations may have been established in pursuance of a power not surrendered by the States to the General Government. Gibbons *v.* Ogden, 9 Wheat. 1, 210; Sinnot *v.* Davenport, 22 How. 227, 243; Missouri, Kansas & Texas Railway *v.* Haber, 169 U. S. 613, 626.

It is not contended that the statute in question is repugnant to the Constitution of the United States when applied to railroad trains carrying passengers between points within the State of Ohio. But the contention is that to require railroad companies, even those organized under the laws of Ohio, to stop their trains or any of them carrying interstate passengers at a particular place or places in the State for a reasonable time, so directly affects commerce among the States as to bring the statute, whether Congress has acted or not on the same subject, into conflict with the grant in the Constitution of power to regulate such commerce. That such a regulation may be in itself reasonable and may promote the public convenience or subserve the general welfare is, according to the argument made before us, of no consequence whatever; for, it is said, a State regulation which *to any extent* or for a limited time only interrupts the absolute, continuous freedom of interstate commerce is forbidden by the Constitution, although Congress has not legislated upon the particular subject covered by the State enactment. If these broad propositions are approved, it will be difficult to sustain the numerous judgments of this court upholding local regulations which in some degree or only incidentally affected commerce among the States, but which were adjudged not to be in themselves regulations of interstate commerce, but within the police powers of the States and to be respected so long as Congress did not itself cover the subject by legislation. Cooley *v.* Board, &c., 12 How. 299, 320; Sherlock *v.* Alling, 93 U. S. 99, 104; Morgan *v.* Louisiana, 118 U. S. 455, 463; Smith *v.* Alabama, 124 U. S. 465; Nashville, Chattanooga, &c. Railway *v.* Alabama, 128 U. S. 96, 100; Hennington *v.* Georgia, above cited; Missouri, Kansas, and Texas Railway *v.* Haber, above cited; and N. Y., N. H., & H. Railroad Co. *v.* New York, 165 U. S. 628, 631, 632, were all cases involving State regulations more or less affecting interstate or foreign commerce, but which were sustained upon the ground that they were not directed against nor were direct burdens upon interstate or foreign commerce; and having been enacted only to protect the public safety, the public health or the

public morals, and, having a real, substantial relation to the public ends intended to be accomplished thereby, were not to be deemed absolutely forbidden because of the mere grant of power to Congress to regulate interstate and foreign commerce, but to be regarded as only incidentally affecting such commerce and valid until superseded by legislation of Congress on the same subject.

In the case last cited — N. Y., N. H., & H. Railroad Co. *v.* New York — the question was as to the validity, when applied to interstate railroad trains, of a statute of New York forbidding the heating of passenger cars in a particular mode. This court said: "According to numerous decisions of this court sustaining the validity of State regulations enacted under the police powers of the State, and which incidentally affected commerce among the States and with foreign nations, it was clearly competent for the State of New York, in the absence of national legislation covering the subject, to forbid under penalties the heating of passenger cars in that State by stoves or furnaces kept inside the cars or suspended therefrom, although such cars may be employed in interstate commerce. While the laws of the States must yield to acts of Congress passed in execution of the powers conferred upon it by the Constitution, Gibbons *v.* Ogden, 9 Wheat. 1, 211, the mere grant to Congress of the power to regulate commerce with foreign nations and among the States did not, of itself and without legislation by Congress, impair the authority of the States to establish such reasonable regulations as were appropriate for the protection of the health, the lives, and the safety of their people. The statute in question had for its object to protect all persons travelling in the State of New York on passenger cars moved by the agency of steam against the perils attending a particular mode of heating such cars. . . . The statute in question is not directed against interstate commerce. Nor is it within the necessary meaning of the Constitution a regulation of commerce, although it controls, in some degree, the conduct of those engaged in such commerce. So far as it may affect interstate commerce, it is to be regarded as legislation in aid of commerce and enacted under the power remaining with the State to regulate the relative rights and duties of all persons and corporations within its limits. Until displaced by such national legislation as Congress may rightfully establish under its power to regulate commerce with foreign nations and among the several States, the validity of the statute, so far as the commerce clause of the Constitution of the United States is concerned, cannot be questioned."

Consistently with these doctrines it cannot be adjudged that the Ohio statute is unconstitutional. The power of the State by appropriate legislation to provide for the public convenience stands upon the same ground precisely as its power by appropriate legislation to protect the public health, the public morals, or the public safety. Whether legislation of either kind is inconsistent with any power

granted to the General Government is to be determined by the same rules.

[Railroad Co. *v.* Husen, 95 U. S. 465, is referred to. See that case, *infra*, p. 367.]

In our judgment the assumption that the statute of Ohio was not directed against interstate commerce but is a reasonable provision for the public convenience, is not unwarranted.

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It has been suggested that the conclusion reached by us is not in accord with Hall *v.* De Cuir, 95 U. S. 485, 488; Wabash, St. Louis, & Pacific Railway Co. *v.* Illinois, 118 U. S. 557, and Illinois Central Railroad Company *v.* Illinois, 163 U. S. 142, 153, 154, in each of which cases certain State enactments were adjudged to be inconsistent with the grant of power to Congress to regulate commerce among the States.

In Hall *v.* De Cuir a statute of Louisiana relating to carriers of passengers within that State, and which prohibited any discrimination against passengers on account of race or color, was held — looking at its necessary operation — to be a regulation of and a direct burden on commerce among the States, and therefore unconstitutional. The defendant, who was sued for damages on account of an alleged violation of that statute, was the master and owner of a steamboat enrolled and licensed under the laws of the United States for the coasting trade, and plying as a regular packet for the transportation of freight and passengers between New Orleans, Louisiana, and Vicksburg, Mississippi, touching at the intermediate landings both within and without Louisiana as occasion required. He insisted that it was void as to him because it directly regulated or burdened interstate business. The court distinctly recognized the principle upon which we proceed in the present case, that State legislation relating to commerce is not to be deemed a regulation of interstate commerce simply because it may to some extent or under some circumstances affect such commerce. But, speaking by Chief Justice Waite, it said: "We think it may be safely said that State legislation which seems to impose a *direct* burden upon interstate commerce, or to interfere *directly* with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without, or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin

set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced. It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. . . . No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be. If this statute can be enforced against those engaged in interstate commerce, it may be as well against those engaged in foreign; and the master of a ship clearing from New Orleans for Liverpool, having passengers on board, would be compelled to carry all, white and colored, in the same cabin during his passage down the river, or be subject to an action for damages, 'exemplary as well as actual,' by any one who felt himself aggrieved because he had been excluded on account of his color." The import of that decision is that, in the absence of legislation by Congress, a State enactment may so directly and materially burden interstate commerce as to be in itself a regulation of such commerce. We cannot perceive that there is any conflict between the decision in that case and that now made. The Louisiana statute, as interpreted by the court, embraced every passenger carrier coming into the State. The Ohio statute does not interfere at all with the management of the defendant's trains outside of the State, nor does it apply to all its trains coming into the State. It relates only to the stopping of a given number of its trains within the State at certain points, and then only long enough to receive and let off passengers. It so manifestly subserves the public convenience, and is in itself so just and reasonable, as wholly to preclude the idea that it was, as the Louisiana statute was declared to be, a direct burden upon interstate commerce, or a direct interference with its freedom.

The judgment in Wabash, St. Louis & Pacific Railway *v.* Illinois is entirely consistent with the views herein expressed. A statute of Illinois was construed by the Supreme Court of that State as prescribing rates not simply for railroad transportation beginning and ending within Illinois, but for transportation between points in Illinois and points in other States under contracts for continuous service covering the entire route through several States. Referring to the principle contained in the statute, this court held that if restricted to transportation beginning and ending within the limits of the State it might be very just and equitable, but that it could not be applied to trans-

portation through an entire series of States without imposing a direct burden upon interstate commerce forbidden by the Constitution. In the case before us there is no attempt upon the part of Ohio to regulate the movement of the defendant company's interstate trains throughout the whole route traversed by them. It applies only to the movement of trains while within the State, and to the extent simply of requiring a given number, if so many are daily run, to stop at certain places long enough to receive and let off passengers.

Nor is Illinois Central Railroad *v.* Illinois inconsistent with the views we have expressed. In that case a statute of Illinois was held, in certain particulars, to be unconstitutional (although the legislation of Congress did not cover the subject), as directly and unnecessarily burdening interstate commerce. The court said: "The effect of the statute of Illinois, as construed and applied by the Supreme Court of the State, is to require a fast mail train, carrying interstate passengers and the United States mail, from Chicago in the State of Illinois to places south of the Ohio River, over an interstate highway established by authority of Congress, to delay the transportation of such passengers and mails, by turning aside from the direct interstate route, and running to a station three miles and a half away from a point on that route, and back again to the same point, and thus travelling seven miles which form no part of its course, before proceeding on its way; and to do this for the purpose of discharging and receiving passengers at that station, for the interstate travel to and from which, it is admitted in this case, the railway company furnishes other and ample accommodation. This court is unanimously of opinion that this requirement is an unconstitutional hindrance and obstruction of interstate commerce, and of the passage of the mails of the United States." Again: "It may well be, as held by the courts of Illinois, that the arrangement made by the company with the Post Office Department of the United States cannot have the effect of abrogating a reasonable police regulation of the State. But a statute of the State, which unnecessarily interferes with the speedy and uninterrupted carriage of the mails of the United States, cannot be considered as a reasonable police regulation." The statute before us does not require the defendant company to turn any of its trains from their direct interstate route. Besides, it is clear that the particular question now presented was not involved in Illinois Central Railroad Co. *v.* Illinois; for it is stated in the court's opinion that "the question whether a statute which merely required interstate railroad trains, without going out of their course, to stop at county seats, would be within the constitutional power of the State, is not presented, and cannot be decided, upon this record." The above extracts show the full scope of that decision. Any doubt upon the point is removed by the reference made to that case in Gladson *v.* Minnesota, 166 U. S. 427, 431.

It has been suggested also that the statute of Ohio is inconsistent with section 5258 of the Revised Statutes of the United States au-

thorizing every railroad company in the United States operated by steam, its successors and assigns, "to carry upon and over its road, boats, bridges, and ferries all passengers, troops, government supplies, mails, freight, and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination." In Missouri, Kansas, & Texas Railway *v.* Haber, 169 U. S. 613, 638, above cited, it was held that the authority given by that statute to railroad companies to carry "freight and property" over their respective roads from one State to another State, did not authorize a railroad company to carry into a State cattle known, or which by due diligence might be known, to be in such condition as to impart or communicate disease to the domestic cattle of such State; and that a statute of Kansas prescribing as a rule of civil conduct that a person or corporation should not bring into that State cattle known, or which by proper diligence could be known, to be capable of communicating disease to domestic cattle, could not be regarded as beyond the necessities of the case, nor as interfering with any right intended to be given or recognized by section 5258 of the Revised Statutes. And we adjudge that the above statutory provision was not intended to interfere with the authority of a State to enact such regulations, with respect at least to a railroad corporation of its own creation, as were not directed against interstate commerce, but which only incidentally or remotely affected such commerce, and were not in themselves regulations of interstate commerce, but were designed reasonably to subserve the convenience of the public.

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For the reasons stated the judgment of the Supreme Court of Ohio is *Affirmed.*[1]

[1] There was a dissenting opinion by MR. JUSTICE SHIRAS, with whom concurred MR. JUSTICE BREWER and MR. JUSTICE PECKHAM; also a dissenting opinion by MR. JUSTICE WHITE.

In the case of CHESAPEAKE & OHIO R. CO. *v.* KENTUCKY, 179 U. S. 388, 21 Sup. Ct. Rep. 101 (1900), it was held that a separate coach law applicable only to transportation of passengers within the State was valid.

In the case of HOUSTON *v.* TEXAS CENTRAL R. CO. *v.* MAYES, 201 U. S. 321, 26 Sup. Ct. Rep. 491 (1906), it was held that a State statute requiring railroads including those engaged in interstate commerce to furnish cars as ordered by shippers within a specified time regardless of every other consideration except strikes and other public calamities was invalid as to interstate commerce shipments. The court cites CLEVELAND, ETC. R. CO. *v.* ILLINOIS, 177 U. S. 514, wherein a requirement that express trains intended only for through passengers should stop at every county seat when ample accommodations were provided by local trains, was held to be an unreasonable burden on interstate commerce.

## RAILROAD COMPANY *v.* HUSEN.

95 United States, 465. 1877.

ERROR to the Supreme Court of the State of Missouri.

MR. JUSTICE STRONG delivered the opinion of the court.

Five assignments of error appear in this record; but they raise only a single question. It is, whether the statute of Missouri, upon which the action in the State court was founded, is in conflict with the clause of the Constitution of the United States that ordains "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The statute, approved Jan. 23, 1872, by its first section, enacted as follows: "No Texas, Mexican, or Indian cattle shall be driven or otherwise conveyed into, or remain, in any county in this State, between the first day of March and the first day of November in each year, by any person or persons whatsoever." A later section is in these words: "If any person or persons shall bring into this State any Texas, Mexican, or Indian cattle, in violation of the first section of this act, he or they shall be liable, in all cases, for all damages sustained on account of disease communicated by said cattle." Other sections make such bringing of cattle into the State a criminal offence, and provide penalties for it. It was, however, upon the provisions we have quoted that this action was brought against the railroad company that had conveyed the cattle into the county. It is noticeable that the statute interposes a direct prohibition against the introduction into the State of all Texas, Mexican, or Indian cattle during eight months of each year, without any distinction between such as may be diseased and such as are not. It is true a proviso to the first section enacts that "when such cattle shall come across the line of the State, loaded upon a railroad car or steamboat, and shall pass through the State without being unloaded, such shall not be construed as prohibited by the act; but the railroad company or owners of a steamboat performing such transportation shall be responsible for all damages which may result from the disease called the Spanish or Texas fever, should the same occur along the line of transportation; and the existence of such disease along the line of such route shall be *prima facie* evidence that such disease has been communicated by such transportation." This proviso imposes burdens and liabilities for transportation through the State, though the cattle be not unloaded, while the body of the section absolutely prohibits the introduction of any such cattle into the State, with the single exception mentioned.

It seems hardly necessary to argue at length that, unless the statute can be justified as a legitimate exercise of the police power of the State, it is a usurpation of the power vested exclusively in Congress.

It is a plain regulation of interstate commerce, a regulation extending to prohibition. Whatever may be the power of a State over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. Power over one is given by the Constitution of the United States to Congress in the same words in which it is given over the other, and in both cases it is necessarily exclusive. That the transportation of property from one State to another is a branch of interstate commerce is undeniable, and no attempt has been made in this case to deny it.

The Missouri statute is a plain interference with such transportation, an attempted exercise over it of the highest possible power, — that of destruction. It meets at the borders of the State a large and common subject of commerce, and prohibits its crossing the State line during two-thirds of each year, with a proviso, however, that such cattle may come across the line loaded upon a railroad car or steamboat, and pass through the State without being unloaded. But even the right of steamboat owners and railroad companies to transport such property through the State is loaded by the law with onerous liabilities, because of their agency in the transportation. The object and effect of the statute are, therefore, to obstruct interstate commerce, and to discriminate between the property of citizens of one State and that of citizens of other States. This court has heretofore said that interstate transportation of passengers is beyond the reach of a State legislature. And if, as we have held, State taxation of persons passing from one State to another, or a State tax upon interstate transportatiou of passengers, is prohibited by the Constitution because a burden upon it, *a fortiori*, if possible, is a State tax upon the carriage of merchandise from State to State. Transportation is essential to commerce, or rather it is commerce itself; aud every obstacle to it, or burden laid upon it by legislative authority, is regulation. Case of the State Freight Tax, 15 Wall. 232, 281; Ward *v.* Maryland, 12 id. 418 ; Welton *v.* The State of Missouri, 91 U. S. 275; Henderson *v.* Mayor of the City of New York *et al.*, 92 id. 259; Chy Lung *v.* Freeman, id. 275. The two latter of these cases refer to obstructions against the admission of persons into a State, but the principles asserted are equally applicable to all subjects of commerce.

We are thus brought to the question whether the Missouri statute is a lawful exercise of the police power of the State. We admit that the deposit in Congress of the power to regulate foreign commerce and commerce among the States was not a surrender of that which may properly be denominated police power. What that power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety. As was said in Thorp *v.* The Rutland & Burlington Railroad Co., 27 Vt. 149, "it extends to the protection of the

lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State. According to the maxim, *sic utere tuo ut alienum non lædas,* which, being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others." It was further said, that, by the general police power of a State, "persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right of the Legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned." It may also be admitted that the police power of a State justifies the adoption of precautionary measures against social evils. Under it a State may legislate to prevent the spread of crime, or pauperism, or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases; a right founded, as intimated in The Passenger Cases, 7 How. 283, by Mr. Justice Greer, in the sacred law of self-defence. *Vide* 3 Sawyer, 283. The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the State; for example, animals having contagious or infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive.

But whatever may be the nature and reach of the police power of a State, it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. It cannot invade the domain of the national government. It was said in Henderson *v.* Mayor of the City of New York, 92 U. S. 259, 272, to "be clear, from the nature of our complex form of government, that whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied it may be to powers conceded to belong to the State." Substantially the same thing was said by Chief Justice Marshall in Gibbons *v.* Ogden, 9 Wheat. 1, 210. Neither the unlimited powers of a State to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon Congress by the Constitution. Many acts of a State may, indeed, affect commerce, without amounting to a regulation of it, in the constitutional sense of the term. And it is sometimes difficult to define the distinction between that which merely affects or influences and that which regulates or furnishes a rule for conduct. There is no such difficulty in the present case. While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty,

health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, &c., from entering the State; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the State beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce. Upon this subject the cases in 92 U. S., to which we have referred, are very instructive. In Henderson *v.* The Mayor, &c., the statute of New York was defended as a police regulation to protect the State against the influx of foreign paupers; but it was held to be unconstitutional, because its practical result was to impose a burden upon all passengers from foreign countries. And it was laid down that, "in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." The reach of the statute was far beyond its professed object, and far into the realm which is within the exclusive jurisdiction of Congress. So in the case of Chy Lung *v.* Freeman, where the pretence was the exclusion of lewd women; but as the statute was more far-reaching, and affected other immigrants, not of any class which the State could lawfully exclude, we held it unconstitutional. Neither of these cases denied the right of a State to protect herself against paupers, convicted criminals, or lewd women, by necessary and proper laws, in the absence of legislation by Congress, but it was ruled that the right could only arise from vital necessity, and that it could not be carried beyond the scope of that necessity. These cases, it is true, speak only of laws affecting the entrance of persons into a State; but the constitutional doctrines they maintain are equally applicable to interstate transportation of property. They deny validity to any State legislation professing to be an exercise of police power for protection against evils from abroad which is beyond the necessity for its exercise, wherever it interferes with the rights and powers of the Federal government.

Tried by this rule, the statute of Missouri is a plain intrusion upon the exclusive domain of Congress. It is not a quarantine law. It is not an inspection law. It says to all natural persons, and to all transportation companies, "You shall not bring into the State any Texas cattle, or any Mexican cattle, or Indian cattle, between March 1 and December 1 in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the State or not; and if you do bring them in, even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities." Such a statute, we do not doubt, it is beyond the power of a State to enact. To hold otherwise would be to ignore one of the leading objects which the Constitution of the United States was designed to secure.

In coming to such a conclusion, we have not overlooked the decis-

ions of very respectable courts in Illinois, where statutes similar to the one we have before us have been sustained. Yeazel *v.* Alexander, 58 Ill. 254. Regarding the statutes as mere police regulations, intended to protect domestic cattle against infectious disease, those courts have refused to inquire whether the prohibition did not extend beyond the danger to be apprehended, and whether, therefore, the statutes were not something more than exertions of police power. That inquiry, they have said, was for the legislature, and not for the courts. With this we cannot concur. The police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion.

*Judgment reversed, and the record remanded with instructions to reverse the judgment of the Circuit Court of Grundy County, and to direct that court to award a new trial.*

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## KIMMISH *v.* BALL.

129 United States, 217. 1889.

[On certificate of division of opinion from Circuit Court of the United States for the Southern District of Iowa as to the constitutionality of § 4059 of Code of Iowa (1873) relating to liability of owner for damages resulting from allowing cattle having the Texas fever to run at large and spread the disease.]

Mr. Justice Field, after stating the case, delivered the opinion of the court.

In order to understand § 4059 of the Code of Iowa, it must be read in connection with the preceding § 4058, to which it refers. It must also be known what is meant by "Texas cattle," and what influence a winter north has upon the disease called "Texas fever," with which such cattle are liable to be infected. Section 4058 is levelled against the importation of Texas cattle which have not been wintered north of the southern boundary of Missouri or Kansas. Any person bringing into the State Texas cattle, unless they have been thus wintered, is subject to be fined or imprisoned. When, therefore, § 4059 refers to the possession in the State of any "such Texas cattle" it means cattle which have not been wintered north, as mentioned in the preceding section. It is only when they have not been thus wintered that apprehension is felt that they may be infected with the disease and spread it among other cattle.

The term "Texas cattle" is not defined in the Code of Iowa; and whether used there to designate cattle from the State of Texas alone, or, as averred by the plaintiff in error, a particular breed or variety called Mexican or Spanish cattle, which are also found in Arkansas and the Indian Territory, is not material for the disposition of this case. Cattle coming from both of those States and from that Territory during the spring and summer months are often infected with what is known as Texas fever. It is supposed that they become infected with the germs of this distemper while feeding, during those months, on the low and moist grounds of those States and Territory, constituting what are called their malarial districts, which are largely covered with a thick vegetable growth. These germs are communicated to domestic cattle by contact, or by feeding in the same range or pasture. Scientists are not agreed as to the causes of the malady; and it is not important for our decision which of the many theories advanced by them is correct. That cattle coming from those sections of the country during the spring and summer months are often infected with a contagious and dangerous fever is a notorious fact; as is also the fact that cold weather, such as is usual in the winter north of the southern boundary of Missouri and Kansas, destroys the virus of the disease, and thus removes all danger of infection. It is upon these notorious facts that the legislation of Iowa for the exclusion from their limits of these cattle, unless they have passed a winter north, is based. See Missouri Pacific Railway Company *v.* Finley, 38 Kansas, 550, 556; also, First Annual Report to the Commissioner of Agriculture of the Bureau of Animal Industry for 1884, 426; and Second Annual Report of the same bureau for 1885, 310.

Section 4059, with which we are concerned, provides that any person who has in his possession in the State of Iowa any Texas cattle which have not been wintered north shall be liable for any damages that may accrue from allowing such cattle to run at large and thereby spread the disease. We are unable to appreciate the force of the objection that such legislation is in conflict with the paramount authority of Congress to regulate interstate commerce. We do not see that it has anything to do with that commerce; it is only levelled against allowing diseased Texas cattle held within the State to run at large. The defendants labor under the impression that the validity of § 4058, which is directed against the importation into the State of such cattle unless they have been wintered north, is before us, and that a consideration of its validity is necessary in passing upon § 4059; but this is a mistake. Section 4058 is before us only that we may ascertain from it the meaning intended by certain terms used in the subsequent section referring to it, and not upon any question of its constitutionality.

Nor does the case of Railroad Company *v.* Husen, 95 U. S. 465, upon which the defendant relies with apparent confidence, have any

bearing upon the questions presented. The decision in that case rested upon the ground that no discrimination was made by the law of Missouri in the transportation forbidden between sound cattle and diseased cattle; and this circumstance is prominently put forth in the opinion.

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The case is, therefore, reduced to this, whether the State may not provide that whoever permits diseased cattle in his possession to run at large within its limits shall be liable for any damages caused by the spread of the disease occasioned thereby; and upon that we do not entertain the slightest doubt. Our answer, therefore, to the first question upon which the judges below differed is in the negative, that the section in question is not unconstitutional by reason of any conflict with the commercial clause of the Constitution.

As to the second question, our answer is also in the negative. There is no denial of any rights and privileges to citizens of other States which are accorded to citizens of Iowa. No one can allow diseased cattle to run at large in Iowa without being held responsible for the damages caused by the spread of disease thereby; and the clause of the Constitution declaring that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States does not give non-resident citizens of Iowa any greater privileges and immunities in that State than her own citizens there enjoy. So far as liability is concerned for the act mentioned, citizens of other States and citizens of Iowa stand upon the same footing. Paul *v.* Virginia, 8 Wall. 168.

It follows that the judgment below must be

*Reversed, and the cause remanded for a new trial.*

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## BRIMMER *v.* REBMAN.

138 United States, 78. 1891.

Mr. Justice Harlan delivered the opinion of the court.

William Rebman was tried and convicted before a justice of the peace in Norfolk, Virginia, "a city of fifteen thousand inhabitants or more," of the offence of having wrongfully, unlawfully, and knowingly sold and offered for sale "eighteen pounds of fresh meat, to wit, fresh, uncured beef, the same being the property of Armour & Co., citizens of the State of Illinois, and a part of an animal that had been slaughtered in the county of Cook and State of Illinois, a distance of one hundred miles and over from the said city of Norfolk in the State of Virginia, without having first applied to and had the said fresh meat inspected by the fresh meat inspectors of the said city of Norfolk, he, the said Rebman, then and there well

knowing that the said fresh meat was required to be inspected under the laws of Virginia, and that the same had not been so inspected and approved as required by the act of the General Assembly of Virginia, entitled 'An act to prevent the selling of unwholesome meat,' approved February 18, 1890." He was adjudged to pay a fine of $50 for the use of the Commonwealth of Virginia, and $3.75 costs; and, failing to pay these sums, he was, by order of the justice, committed to jail, there to be safely kept until the fine and costs were paid, or until he was otherwise discharged by due course of law.

He sued out a writ of *habeas corpus* from the Circuit Court of the United States for the Eastern District of Virginia upon the ground that he was restrained of his liberty in violation of the Constitution of the United States. Upon the hearing of the petition for the writ he was discharged, upon grounds set forth in an elaborate opinion by Judge Hughes, holding the Circuit Court. *In re* Rebman, 41 Fed. Rep. 867. The case is here upon appeal by the officer having the prisoner in custody.

The sole question to be determined is whether the statute under which Rebman was arrested and tried is repugnant to the Constitution of the United States.

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The recital in the preamble that unwholesome meats were being offered for sale in Virginia cannot conclude the question of the conformity of the act to the Constitution. "There may be no purpose," this court has said, "upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the constitution;" in which case, "the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void." Minnesota *v.* Barber, 136 U. S. 313, 319, and authorities here cited. Is the statute now before us liable to the objection that, by its necessary operation, it interferes with the enjoyment of rights granted or secured by the Constitution? This question admits of but one answer. The statute is, in effect, a prohibition upon the sale in Virginia of beef, veal, or mutton, although entirely wholesome, if from animals slaughtered one hundred miles or over from the place of sale. We say prohibition, because the owner of such meats cannot sell them in Virginia until they are inspected there; and being required to pay the heavy charge of one cent per pound to the inspector, as his compensation, he cannot compete, upon equal terms, in the markets of that Commonwealth, with those in the same business whose meats, of like kinds, from animals slaughtered within less than one hundred miles from the place of sale, are not subjected to inspection, at all. Whether there shall be inspection or not, and whether the seller shall compensate the inspector or not, is thus made to depend entirely upon the place

where the animals from which the beef, veal, or mutton is taken, were slaughtered. Undoubtedly, a State may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the Constitution upon Congress, or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police powers, or of enacting inspection laws, make discriminations against the products and industries of some of the States in favor of the products and industries of its own or of other States. The owner of the meats here in question, although they were from animals slaughtered in Illinois, had the right, under the Constitution, to compete in the markets of Virginia upon terms of equality with the owners of like meats, from animals slaughtered in Virginia or elsewhere within one hundred miles from the place of sale. Any local regulation which, in terms or by its necessary operation, denies this equality in the markets of a State is, when applied to the people and products or industries of other States, a direct burden upon commerce among the States, and, therefore, void. Welton *v.* Missouri, 91 U. S. 275, 281; Railroad Co. *v.* Husen, 95 U. S. 465; Minnesota *v.* Barber, above cited. The fees exacted, under the Virginia statute, for the inspection of beef, veal, and mutton, the product of animals slaughtered one hundred miles or more from the place of sale, are, in reality, a tax; and "a discriminating tax imposed by a State, operating to the disadvantage of the products of other States when introduced into the first-mentioned State, is, in effect, a regulation in restraint of commerce among the States, and, as such, is a usurpation of the powers conferred by the Constitution upon the Congress of the United States." Walling *v.* Michigan, 116 U. S. 446, 455. Nor can this statute be brought into harmony with the Constitution by the circumstance that it purports to apply alike to the citizens of all the States, including Virginia; for, "a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute." Minnesota *v.* Barber, above cited; Robbins *v.* Shelby Taxing District, 120 U. S. 489, 497. If the object of Virginia had been to obstruct the bringing into that State, for use as human food, of all beef, veal and mutton, however wholesome, from animals slaughtered in distant States, that object will be accomplished if the statute before us be enforced.

It is suggested that this statute can be sustained by presuming — as, it is said, we should do when considering the validity of a legislative enactment — that beef, veal, or mutton will or may become unwholesome, "if transported one hundred miles or more from the place at which it was slaughtered," before being offered for sale. If that presumption could be indulged, consistently with facts of such general notoriety as to be within common knowledge, and of

which, therefore, the courts may take judicial notice, it ought not to control this case, because the statute, by reason of the onerous nature of the tax imposed in the name of compensation to the inspector, goes far beyond the purposes of legitimate inspection to determine quality and condition, and, by its necessary operation, obstructs the freedom of commerce among the States. It is, for all practical ends, a statute to prevent the citizens of distant States, having for sale fresh meats (beef, veal, or mutton), from coming into competition, upon terms of equality, with local dealers in Virginia. As such, its repugnancy to the Constitution is manifest. The case, in principle, is not distinguishable from Minnesota *v.* Barber, where an inspection statute of Minnesota, relating to fresh beef, veal, mutton, lamb and pork, offered for sale in that State, was held to be a regulation of interstate commerce and void, because, by its necessary operation, it excluded from the markets of that State, practically, all such meats — in whatever form, and although entirely sound and fit for human food — from animals slaughtered in other States.

Without considering other grounds urged in opposition to the statute and in support of the judgment below, we are of opinion that the statute of Virginia, although avowedly enacted to protect its people against the sale of unwholesome meats, has no real or substantial relation to such an object, but, by its necessary operation, is a regulation of commerce, beyond the power of the State to establish. *Judgment affirmed.*

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## MORGAN'S STEAMSHIP COMPANY *v.* LOUISIANA BOARD OF HEALTH.

118 United States, 455. 1886.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Louisiana.

The plaintiff in error was plaintiff in the State court, and in the court of original jurisdiction obtained an injunction against the Board of Health prohibiting it from collecting from the plaintiffs the fee of $30 and other fees allowed by Act 69 of the Legislature of Louisiana of 1882, for the examination which the quarantine laws of the State required in regard to all vessels passing the station. This decree was reversed, on appeal, by the Supreme Court of the State, and to this judgment of reversal the present writ of error was prosecuted.

[The first question considered is as to whether the fees provided for by the statute constituted a tonnage tax, and the court holds that they do not.]

Is the law under consideration void as a regulation of commerce? Undoubtedly it is in some sense a regulation of commerce. It arrests a vessel on a voyage which may have been a long one. It may affect commerce among the States when the vessel is coming from some other State of the Union than Louisiana, and it may affect commerce with foreign nations when the vessel arrested comes from a foreign port. This interruption of the voyage may be for days or for weeks. It extends to the vessel, the cargo, the officers and seamen, and the passengers. In so far as it provides a rule by which this power is exercised, it cannot be denied that it regulates commerce. We do not think it necessary to enter into the inquiry whether, notwithstanding this, it is to be classed among those police powers which were retained by the States as exclusively their own, and, therefore, not ceded to Congress. For, while it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, even where such powers are so exercised as to come within the domain of Federal authority as defined by the Constitution, the latter must prevail. Gibbons *v.* Ogden, 9 Wheat. 1, 210; Henderson *v.* The Mayor, 92 U. S. 259, 272; New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 661.

But it may be conceded that whenever Congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a National Board of Health, or to local boards, as may be found expedient, all State laws on the subject will be abrogated, at least so far as the two are inconsistent. But, until this is done, the laws of the State on the subject are valid. This follows from two reasons:

1. The act of 1799, the main features of which are embodied in Title LVIII. of the Revised Statutes, clearly recognizes the quarantine laws of the States and requires of the officers of the Treasury a conformity to their provisions in dealing with vessels affected by the quarantine system. And this very clearly has relation to laws created after the passage of that statute, as well as to those then in existence; and when by the act of April 29, 1878, 20 Stat. 37, certain powers in this direction were conferred on the Surgeon-General of the Marine Hospital Service, and consuls and revenue officers were required to contribute services in preventing the importation of disease, it was provided that "there shall be no interference in any manner with any quarantine laws or regulations as they now exist or may hereafter be adopted under State laws," showing very clearly the intention of Congress to adopt these laws, or to recognize the power of the States to pass them.

2. But, aside from this, quarantine laws belong to that class of State legislation which, whether passed with intent to regulate com-

merce or not, must be admitted to have that effect, and which are valid until displaced or contravened by some legislation of Congress.

The matter is one in which the rules that should govern it may in many respects be different in different localities, and for that reason be better understood and more wisely established by the local authorities. The practice which should control a quarantine station on the Mississippi River, a hundred miles from the sea, may be widely and wisely different from that which is best for the harbor of New York. In this respect the case falls within the principle which governed the cases of Willson *v.* Blackbird Creek Marsh Co., 2 Pet. 245; Cooley *v.* The Board of Wardens, 12 How. 229; Gilman *v.* Philadelphia, 3 Wall. 713, 727; Pound *v.* Turk, 95 U. S. 459, 462; Hall *v.* DeCuir, 95 U. S. 485, 488; Packet Co. *v.* Catlettsburg, 105 U. S. 559, 562; Transportation Co. *v.* Parkersburg, 107 U. S. 691, 702; Escanaba Co. *v.* Chicago, 107 U. S. 678.

This principle has been so often considered in this court that extended comment on it here is not needed. Quarantine laws are so analogous in most of their features to pilotage laws in their relation to commerce that no reason can be seen why the same principle should not apply.

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We see no error in the judgment of the Supreme Court of Louisiana, and it is *Affirmed.*

Mr. Justice Bradley dissented.

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## LEISY *v.* HARDIN.

135 United States, 100. 1890.

[This action was originally brought in the Superior Court of Keokuk, Iowa, by plaintiffs, citizens of Illinois, to recover possession of certain kegs and cases of beer belonging to plaintiffs and by them shipped from Illinois into Iowa and held by their agent at Keokuk for sale in the original packages and which had been seized by State officers of Iowa under the prohibitory liquor law in a proceeding for their condemnation and destruction. The Superior Court awarded to plaintiffs the return of the property and damages for its detention. This judgment was reversed by the Supreme Court of Iowa, and by writ of error the decision was brought here for review.]

Mr. Chief Justice Fuller, after stating the facts, delivered the opinion of the court.

The power vested in Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," is the power to prescribe the rule by which that commerce

is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution. It is co-extensive with the subject on which it acts and cannot be stopped at the external boundary of a State, but must enter its interior and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered. Gibbons *v.* Ogden, 9 Wheat. 1; Brown *v.* Maryland, 12 Wheat. 419.

And while, by virtue of its jurisdiction over persons and property within its limits, a State may provide for the security of the lives, limbs, health and comfort of persons and the protection of property so situated, yet a subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, unless placed there by congressional action. Henderson *v.* Mayor of New York, 92 U. S. 259; Railroad Co. *v.* Husen, 95 U. S. 465; Walling *v.* Michigan, 116 U. S. 446; Robbins *v.* Shelby Taxing District, 120 U. S. 489. The power to regulate commerce among the States is a unit, but if particular subjects within its operation do not require the application of a general or uniform system, the States may legislate in regard to them with a view to local needs and circumstances, until Congress otherwise directs; but the power thus exercised by the States is not identical in its extent with the power to regulate commerce among the States. The power to pass laws in respect to internal commerce, inspection laws, quarantine laws, health laws and laws in relation to bridges, ferries and highways, belongs to the class of powers pertaining to locality, essential to local intercommunication, to the progress and development of local prosperity and to the protection, the safety and the welfare of society, originally necessarily belonging to, and upon the adoption of the Constitution reserved by, the States, except so far as falling within the scope of a power confided to the general government. Where the subject matter requires a uniform system as between the States, the power controlling it is vested exclusively in Congress, and cannot be encroached upon by the States; but where, in relation to the subject matter, different rules may be suitable for different localities, the States may exercise powers which, though they may be said to partake of the nature of the power granted to the general government, are strictly not such, but are simply local powers, which have full operation until or unless circumscribed by the action of Congress in effectuation of the general power. Cooley *v.* Port Wardens, 12 How. 299.

It was stated in the 32d number of the Federalist that the States might exercise concurrent and independent power in all cases but three: First, where the power was lodged exclusively in the Federal Constitution; second, where it was given to the United States and prohibited to the States; third, where, from the nature and subjects of the power, it must be necessarily exercised by the national gov-

ernment exclusively. But it is easy to see that Congress may assert an authority under one of the granted powers, which would exclude the exercise by the States upon the same subject of a different but similar power, between which and that possessed by the general government no inherent repugnancy existed.

Whenever, however, a particular power of the general government is one which must necessarily be exercised by it, and Congress remains silent, this is not only not a concession that the powers reserved by the States may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the States cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled. County of Mobile *v.* Kimball, 102 U. S. 691; Brown *v.* Houston, 114 U. S. 622, 631; Wabash, St. Louis, &c. Railway Co. *v.* Illinois, 118 U. S. 557; Robbins *v.* Shelby Taxing District, 120 U. S. 489, 493.

That ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress, and the decisions of courts, is not denied. Being thus articles of commerce, can a State, in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister State? or when imported prohibit their sale by the importer? If the importation cannot be prohibited without the consent of Congress, when does property imported from abroad, or from a sister State, so become part of the common mass of property within a State as to be subject to its unimpeded control?

In Brown *v.* Maryland, *supra*, the act of the State legislature drawn in question was held invalid as repugnant to the prohibition of the Constitution upon the States to lay any impost or duty upon imports or exports, and to the clause granting the power to regulate commerce; and it was laid down by the great magistrate who presided over this court for more than a third of a century, that the point of time when the prohibition ceases and the power of the State to tax commences is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country, which happens when the original package is no longer such in his hands; that the distinction is obvious between a tax which intercepts the import as an import on its way to become incorporated

with the general mass of property, and a tax which finds the article already incorporated with that mass by the act of the importer; that as to the power to regulate commerce, none of the evils which proceeded from the feebleness of the Federal Government contributed more to the great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress; that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the States; that that power was complete in itself, acknowledged no limitations other than those prescribed by the Constitution, was co-extensive with the subject on which it acts and not to be stopped at the external boundary of a State, but must be capable of entering its interior; that the right to sell any article imported was an inseparable incident to the right to import it; and that the principles expounded in the case applied equally to importations from a sister State. Manifestly this must be so, for the same public policy applied to commerce among the States as to foreign commerce, and not a reason could be assigned for confiding the power over the one which did not conduce to establish the propriety of confiding the power over the other. Story, Constitution, § 1066. And although the precise question before us was not ruled in Gibbons *v.* Ogden and Brown *v.* Maryland, yet we think it was virtually involved and answered, and that this is demonstrated, among other cases, in Bowman *v.* Chicago & Northwestern Railway Co., 125 U. S. 465. In the latter case, section 1553 of the Code of the State of Iowa as amended by c. 143 of the acts of the twentieth General Assembly in 1886, forbidding common carriers to bring intoxicating liquors into the State from any other State or Territory, without first being furnished with a certificate as prescribed, was declared invalid, because essentially a regulation of commerce among the States, and not sanctioned by the authority, express or implied, of Congress. The opinion of the court, delivered by Mr. Justice Matthews, the concurring opinion of Mr. Justice Field, and the dissenting opinion by Mr. Justice Harlan, on behalf of Mr. Chief Justice Waite, Mr. Justice Gray, and himself, discussed the question involved in all its phases; and while the determination of whether the right of transportation of an article of commerce from one State to another includes by necessary implication the right of the consignee to sell it in unbroken packages at the place where the transportation terminates was in terms reserved, yet the argument of the majority conducts irresistibly to that conclusion, and we think we cannot do better than repeat the grounds upon which the decision was made to rest. It is there shown that the transportation of freight or of the subjects of commerce, for the purpose of exchange or sale, is beyond all question a constituent of commerce itself; that this was the prominent idea in the minds of the framers of the Constitution, when to Congress was committed the power to regulate commerce

among the several States; that the power to prevent embarrassing restrictions by any State was the end desired; that the power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations; and that it would be absurd to suppose that the transmission of the subjects of trade from the State of the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade, either with foreign nations or among the States. It is explained that where State laws alleged to be regulations of commerce among the States have been sustained, they were laws which related to bridges or dams across streams, wholly within the State, or police or health laws, or to subjects of a kindred nature, not strictly of commercial regulation. But the transportation of passengers or of merchandise from one State to another is in its nature national, admitting of but one regulating power; and it was to guard against the possibility of commercial embarrassments which would result if one State could directly or indirectly tax persons or property passing through it, or prohibit particular property from entrance into the State, that the power of regulating commerce among the States was conferred upon the Federal Government.

"If in the present case," said Mr. Justice Matthews, "the law of Iowa operated upon all merchandise sought to be brought from another State into its limits, there could be no doubt that it would be a regulation of commerce among the States," and he concludes that this must be so, though it applied only to one class of articles of a particular kind. The legislation of Congress on the subject of interstate commerce by means of railroads, designed to remove trammels upon transportation between different States, and upon the subject of the transportation of passengers and merchandise, (Revised Statutes, sections 4252 to 4289, inclusive,) including the transportation of nitro-glycerine and other similar explosive substances, with the proviso that, as to them, "any State, territory, district, city, or town within the United States" should not be prevented by the language used "from regulating or from prohibiting the traffic in or transportation of those substances between persons or places lying or being within their respective territorial limits, or from prohibiting the introduction thereof into such limits for sale, use or consumption therein," is referred to as indicative of the intention of Congress that the transportation of commodities between the States shall be free, except where it is positively restricted by Congress itself, or by States in particular cases by the express permission of Congress. It is said that the law in question was not an inspection law, the object of which "is to improve the quality of articles produced by the labor of a country, to fit them for exportation; or, it may be, for domestic use;" Gibbons *v.* Ogden, 9 Wheat. 1, 203; Turner *v.* Maryland, 107 U. S. 38, 55; nor could it be regarded as a regulation of quarantine or a sanitary provision for the purpose of protecting the

physical health of the community; nor a law to prevent the introduction into the State of diseases, contagious, infectious, or otherwise. Articles in such a condition as tend to spread disease are not merchantable, are not legitimate subjects of trade and commerce, and the self-protecting power of each State, therefore, may be rightfully exerted against their introduction, and such exercise of power cannot be considered a regulation of commerce, prohibited by the Constitution; and the observations of Mr. Justice Catron, in The License Cases, 5 How. 504, 599, are quoted to the effect that what does not belong to commerce is within the jurisdiction of the police power of the State, but that which does belong to commerce is within the jurisdiction of the United States; that to extend the police power over subjects of commerce would be to make commerce subordinate to that power, and would enable the State to bring within the police power "any article of consumption that a State might wish to exclude, whether it belonged to that which was drunk or to food and clothing; and with nearly equal claims to propriety, as malt liquors and the products of fruits other than grapes stand on no higher ground than the light wines of this and other countries, excluded in effect by the law as it now stands. And it would be only another step to regulate real or supposed extravagance in food and clothing." And Mr. Justice Matthews thus proceeds, p. 493: "For the purpose of protecting its people against the evils of intemperance, it has the right to prohibit the manufacture within its limits of intoxicating liquors; it may also prohibit all domestic commerce in them between its own inhabitants, whether the articles are introduced from other States or from foreign countries; it may punish those who sell them in violation of its laws; it may adopt any measures tending, even indirectly and remotely, to make the policy effective until it passes the line of power delegated to Congress under the Constitution. It cannot, without the consent of Congress, express or implied, regulate commerce between its people and those of the other States of the Union in order to effect its end, however desirable such a regulation might be. . . . Can it be supposed that by omitting any express declaration on the subject, Congress has intended to submit to the several States the decision of the question in each locality of what shall and what shall not be articles of traffic in the interstate commerce of the country? If so, it has left to each State, according to its own caprice and arbitrary will, to discriminate for or against every article grown, produced, manufactured or sold in any State and sought to be introduced as an article of commerce into any other. If the State of Iowa may prohibit the importation of intoxicating liquors from all other States, it may also include tobacco, or any other article, the use or abuse of which it may deem deleterious. It may not choose, even, to be governed by considerations growing out of the health, comfort or peace of the community. Its policy may be directed to other ends. It may choose to establish a system

directed to the promotion and benefit of its own agriculture, manufactures, or arts of any description, and prevent the introduction and sale within its limits of any or of all articles that it may select as coming into competition with those which it seeks to protect. The police power of the State would extend to such cases, as well as to those in which it was sought to legislate in behalf of the health, peace and morals of the people. In view of the commercial anarchy and confusion that would result from the diverse exertions of power by the several States of the Union, it cannot be supposed that the Constitution or Congress have intended to limit the freedom of commercial intercourse among the people of the several States."

Many of the cases bearing upon the subject are cited and considered in these opinions, and among others The License Cases, 5 How. 504, wherein laws passed by Massachusetts, New Hampshire, and Rhode Island, in reference to the sale of spirituous liquors, came under review and were sustained, although the members of the court who participated in the decisions did not concur in any common ground upon which to rest them. That of Peirce *et al. v.* New Hampshire is perhaps the most important to be referred to here. In that case the defendants had been fined for selling a barrel of gin in New Hampshire which they had bought in Boston and brought coastwise to Portsmouth, and there sold in the same barrel and in the same condition in which it was purchased in Massachusetts, but contrary to the law of New Hampshire in that behalf. The conclusion of the opinion of Mr. Chief Justice Taney is in these words, p. 586: "Upon the whole, therefore, the law of New Hampshire is in my judgmeut a valid one. For, although the gin sold was an import from another State, and Congress have clearly the power to regulate such importations, under the grant of power to regulate commerce among the several States, yet, as Congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the State may suppose to be its interest or duty to pursue."

Referring to the cases of Massachusetts and Rhode Island, the Chief Justice, after saying that if the laws of those States came in collision with the laws of Congress authorizing the importation of spirits and distilled liquors, it would be the duty of the court to declare them void, thus continues, p. 576: "It has, indeed, been suggested, that, if a State deems the traffic in ardent spirits to be injurious to its citizens, and calculated to introduce immorality, vice and pauperism into the State, it may constitutionally refuse to permit its importation, notwithstanding the laws of Congress; and that a State may do this upon the same principles that it may resist and prevent the introduction of disease, pestilence or pauperism from abroad. But it must be remembered that disease, pestilence and

pauperism are not subjects of commerce, although sometimes among its attendant evils. They are not things to be regulated and trafficked in, but to be prevented, as far as human foresight or human means can guard against them. But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter, and traffic, like any other commodity in which a right of property exists. And Congress, under its general power to regulate commerce with foreign nations, may prescribe what article of merchandise shall be admitted and what excluded; and may therefore admit, or not, as it shall deem best, the importation of ardent spirits. And inasmuch as the laws of Congress authorize their importation, no State has a right to prohibit their introduction. . . . These State laws act altogether upon the retail or domestic traffic within their respective borders. They act upon the article after it has passed the line of foreign commerce, and become a part of the general mass of property in the State. These laws may, indeed, discourage imports, and diminish the price which ardent spirits would otherwise bring. But although a State is bound to receive and to permit the sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government. And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether if it thinks proper."

The New Hampshire case, the Chief Justice observed, differs from Brown *v.* Maryland, in that the latter was a case arising out of commerce with foreign nations, which Congress had regulated by law; whereas the case in hand was one of commerce between two States, in relation to which Congress had not exercised its power. "But the law of New Hampshire acts directly upon an import from one State to another, while in the hands of the importer for sale, and is therefore a regulation of commerce, acting upon the article while it is within the admitted jurisdiction of the General Government, and subject to its control and regulation. The question, therefore, brought up for decision is, whether a State is prohibited by the Constitution of the United States from making any regulations of foreign commerce, or of commerce with another State, although such regulation is confined to its own territory, and made for its own convenience or interest, and does not come in conflict with any law of Congress. In other words, whether the grant of power to Congress is of itself a prohibition to the States, and renders all State laws upon the

subject null and void." p. 578. He declares it to appear to him very clear, p. 579, "that the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States. The controlling and supreme power over commerce with foreign nations and the several States is undoubtedly conferred upon Congress. Yet, in my judgment, the State may, nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress." He comments on the omission of any prohibition in terms, and concludes that if, as he thinks, "the framers of the Constitution (knowing that a multitude of minor regulations must be necessary, which Congress amid its great concerns could never find time to consider and provide) intended merely to make the power of the Federal Government supreme upon this subject over that of the States, then the omission of any prohibition is accounted for, and is consistent with the whole instrument. The supremacy of the laws of Congress, in cases of collision with State laws, is secured in the article which declares that the laws of Congress, passed in pursuance of the powers granted, shall be the supreme law; and it is only where both governments may legislate on the same subject that this article can operate." And he considers that the legislation of Congress and the States has conformed to this construction from the foundation of the government, as exemplified in State laws in relation to pilots and pilotage and health and quarantine laws.

But conceding the weight properly to be ascribed to the judicial utterances of this eminent jurist, we are constrained to say that the distinction between subjects in respect of which there can be of necessity only one system or plan of regulation for the whole country, and subjects local in their nature, and, so far as relating to commerce, mere aids rather than regulations, does not appear to us to have been sufficiently recognized by him in arriving at the conclusions announced. That distinction has been settled by repeated decisions of this court, and can no longer be regarded as open to re-examination. After all, it amounts to no more than drawing the line between the exercise of power over commerce with foreign nations and among the States and the exercise of power over purely local commerce and local concerns.

The authority of Peirce *v.* New Hampshire, in so far as it rests on the view that the law of New Hampshire was valid because Congress had made no regulation on the subject, must be regarded as having been distinctly overthrown by the numerous cases hereinafter referred to.

The doctrine now firmly established is, as stated by Mr. Justice Field, in Bowman *v.* Chicago, &c. Railway Co., 125 U. S. 507, "that

where the subject upon which Congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers and docks, and the like, which can be properly regulated only by special provisions adapted to their localities, the State can act until Congress interferes and supersedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the States shall be unrestricted. It is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the State, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled."

The conclusion follows that, as the grant of the power to regulate commerce among the States, so far as one system is required, is exclusive, the States cannot exercise that power without the assent of Congress, and, in the absence of legislation, it is left for the courts to determine when State action does or does not amount to such exercise, or, in other words, what is or is not a regulation of such commerce. When that is determined, controversy is at an end. Illustrations exemplifying the general rule are numerous.

[Many cases are cited and commented upon, which have already been sufficiently stated.]

In Mugler *v.* Kansas, 123 U. S. 623, it was adjudged that "State legislation which prohibits the manufacture of spirituous, malt, vinous, fermented or other intoxicating liquors within the limits of the State, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege or immunity secured by the Constitution of the United States, or by the amendments thereto." And this was in accordance with our decisions in Bartemeyer *v.* Iowa, 18 Wall. 129; Beer Company *v.* Massachusetts, 97 U. S. 25; and Foster *v.* Kansas, 112 U. S. 201. So in Kidd *v.* Pearson, 128 U. S. 1, it was held that a State statute which provided (1) that foreign intoxicating liquors may be imported into the State, and there kept for sale by the importer, in the original packages, or for transportation in such packages and sale beyond the limits of the State; and (2) that intoxicating liquors may be manufactured and sold within the State for mechanical, medicinal, culin

ary and sacramental purposes, but for no other, not even for the purpose of transportation beyond the limits of the State, was not an undertaking to regulate commerce among the States. And in Eilenbecker *v.* District Court of Plymouth County, 134 U. S. 31, 40, we affirmed the judgment of the Supreme Court of Iowa, sustaining the sentence of the district court of Plymouth in that State, imposing a fine of $500 and costs, and imprisonment in jail for three months, if the fine was not paid within thirty days, as a punishment for contempt in refusing to obey a writ of injunction issued by that court, enjoining and restraining the defendant from selling or keeping for sale any intoxicating liquors, including ale, wine and beer, in Plymouth County. Mr. Justice Miller there remarked: "If the objection to the statute is that it authorizes a proceeding in the nature of a suit in equity to suppress the manufacture and sale of intoxicating liquors which are by law prohibited, and to abate the nuisance which the statute declares such acts to be, wherever carried on, we respond that, so far as at present advised, it appears to us that all the powers of a court, whether at common law or in chancery, may be called into operation by a legislative body for the purpose of suppressing this objectionable traffic; and we know of no hindrance in the Constitution of the United States to the form of proceedings, or to the court in which this remedy shall be had. Certainly, it seems to us to be quite as wise to use the processes of the law and the powers of a court to prevent the evil, as to punish the offence as a crime after it has been committed."

These decisions rest upon the undoubted right of the States of the Union to control their purely internal affairs, in doing which they exercise powers not surrendered to the national government; but whenever the law of the State amounts essentially to a regulation of commerce with foreign nations or among the States, as it does when it inhibits, directly or indirectly, the receipt of an imported commodity or its disposition before it has ceased to become an article of trade between one State and another, or another country and this, it comes in conflict with a power which, in this particular, has been exclusively vested in the general government, and is therefore void.

In Mugler *v.* Kansas, *supra*, the court said (p. 662) that it could not "shut out of view the fact, within the knowledge of all, that the public health, the public morals and the public safety may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism and crime existing in the country are, in some degree at least, traceable to this evil." And that "if in the judgment of the Legislature [of a State] the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is

not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. . . . Nor can it be said that government interferes with or impairs any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage." Undoubtedly, it is for the legislative branch of the State governments to determine whether the manufacture of particular articles of traffic, or the sale of such articles, will injuriously affect the public, and it is not for Congress to determine what measures a State may properly adopt as appropriate or needful for the protection of the public morals, the public health or the public safety; but notwithstanding it is not vested with supervisory power over matters of local administration, the responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the State in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action.

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The plaintiffs in error are citizens of Illinois, are not pharmacists, and have no permit, but import into Iowa beer, which they sell in original packages, as described. Under our decision in Bowman *v.* Chicago, &c. Railway Co., *supra*, they had the right to import this beer into that State, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that in the absence of congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer. Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by State laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a State the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a State, represented in the State legislature, the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the

latter was considered essential to that more perfect Union which the Constitution was adopted to create. Undoubtedly, there is difficulty in drawing the line between the municipal powers of the one government and the commercial powers of the other, but when that line is determined, in the particular instance, accommodation to it, without serious inconvenience, may readily be found, to use the language of Mr. Justice Johnson, in Gibbons *v.* Ogden, 9 Wheat. 1, 238, in "a frank and candid co-operation for the general good."

The legislation in question is to the extent indicated repugnant to the third clause of section 8 of Art. 1 of the Constitution of the United States, and therefore the judgment of the Supreme Court of Iowa is

*Reversed and the cause remanded for further proceedings not inconsistent with this opinion.*[1]

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## RHODES *v.* IOWA.

170 United States, 412. 1898.

Mr. Justice White delivered the opinion of the court.

The Chicago, Burlington, and Quincy Railroad Company was, in 1891, a common carrier, incorporated under the laws of Illinois, and operated among others a line of railway from Dallas, Illinois, to Burlington, Iowa, and beyond said point. The Burlington and Western Railway Company was, at the same date, a common carrier, incorporated under the laws of Iowa, and operated a line of railway from Burlington, Iowa, to Oskaloosa in that State, with stations at intervening points, one of which was Brighton, in Washington County. Both of these corporations had a depot at Burlington, which they jointly used. The two carriers had, at the time stated and for years previous thereto, between themselves joint freight tariffs, by which transportation, under a single through way bill, was given to merchandise from any station on either of the lines to any station on the line of the other.

In August, 1891, the Dallas Transportation Company delivered to the Chicago, Burlington, and Quincy Railroad at Dallas, Illinois, a wooden box stated to contain groceries consigned to William Horn, Brighton, Iowa. It had been the habit of the agent of the Dallas company before this date to ship intoxicating liquors over the Chicago, Burlington, and Quincy. The box in question was receipted for as through freight, and was billed through in accordance with the custom above stated, was taken to Burlington, Iowa, there delivered to the Burlington and Western company, by whom it was carried to

[1] Mr. Justice Gray delivered a dissenting opinion, in which Mr. Justice Harlan and Mr. Justice Brewer concurred.

Brighton. On its arrival there, the package was placed by the trainmen on the station platform, and shortly afterwards the plaintiff in error, who was the station agent of the Burlington and Western, in the discharge of his duties opened the door of the freight house, and moved the box into a freight warehouse, which was about six feet from the platform. In about an hour thereafter the box was seized by a constable under a search warrant, on the ground that it contained intoxicating liquors, which proved to be the truth, and subsequently the liquor was condemned and ordered to be destroyed, and the order was executed. At the time of the seizure the freight charge due to the railways was unpaid. It was admitted that there was nothing on the package to notify the receiving railway of its contents, unless such knowledge can be imputed from the nature of the previous dealings of the Dallas company with the railway. There was, however, testimony showing that the railroad agent who moved the box from the freight platform to the warehouse had reason to know or suspect that it contained liquor, since it was proven that, before the arrival of the box at Brighton, a mail carrier called at the station and asked for a package consigned to William Horn, stating that one was expected from Dallas, and that it would contain intoxicating liquor.

The plaintiff in error was proceeded against by information before a justice of the peace, charging him with the unlawful transportation of intoxicating liquors conveyed from Burlington to Brighton, Iowa. This prosecution was under the provisions of the statutes of the State of Iowa, to which we shall hereafter refer. He was convicted, and sentenced to pay a fine of $100. An appeal from this sentence was taken to the District Court, where it was affirmed, in which court, among other defences, it was alleged that the package in question was not subject to the jurisdiction of the State of Iowa, because at the time of its removal from the platform to the freight warehouse it was in course of interstate commerce transportation. The District Court having affirmed the conviction, an appeal was taken to the Supreme Court of the State of Iowa, where the judgment below was also affirmed. State *v.* Rhodes, 90 Iowa, 496. To this judgment of affirmance this writ of error is prosecuted.

The sole question presented for consideration is whether the statute of the State of Iowa can be held to apply to the box in question whilst it was in transit from its point of shipment, Dallas, Illinois, to its delivery to the consignee at the point to which it was consigned. That is to say, whether the law of the State of Iowa can be made to apply to a shipment from the State of Illinois, before the arrival and delivery of the merchandise, without causing the Iowa law to be repugnant to the Constitution of the United States.

[The statement of the court with reference to its previous decisions in Bowman *v.* Chicago & Northwestern Railway, 125 U. S. 465, and Leisy *v.* Hardin, 135 U. S. 100, is here omitted, as the later of those cases, fully explaining the former, is given *supra*, p. 378.]

The fundamental right which the decision in the Bowman case held to be protected from the operation of State laws by the Constitution of the United States was the continuity of shipment of goods coming from one State into another from the point of transmission to the point of consignment, and the accomplishment there of the delivery covered by the contract. This protection of the Constitution of the United States is plainly denied by the statute now under review, as its provisions are interpreted by the court below. The power which it was held in the Bowman case the State did not possess was that of stopping interstate shipments at the State line by breaking their continuity and intercepting their course from the point of origin to the point of consummation. The right of a State to exert these very powers is plainly upheld by the decision rendered below. It follows that if the ruling in the Bowman case is applicable to the question here presented, it is decisive of this controversy, and must lead to a reversal of the judgment below rendered. The claim is, however, and it was upon this ground that the court below rested its judgment, that under and by virtue of the provisions of the act of Congress of August 8, 1890, c. 728, 26 Stat. 313, the ruling in the Bowman case is no longer apposite, as the effect of the act of Congress in question was to confer upon the State of Iowa the power to subject to its statutory regulations merchandise shipped from another State the moment it reached the line of the State of Iowa, and before the consummation of the contract of shipment by arrival at its destination and delivery there to the consignee. And it is to this question that the discussion at bar has mainly related, and upon which a decision of the cause really depends.

It is not gainsaid that the effect of the act of Congress was to deprive the receiver of goods shipped from another State of all power to sell the same in the State of Iowa in violation of its laws; but whilst it is thus conceded that the act of Congress has allowed the Iowa law to attach to the property when brought into the State before sale, when it otherwise would not have done so until after sale, on the other hand, it is contended that the act of Congress in no way provides that the laws of Iowa should apply before the consummation by delivery of the interstate commerce transaction. To otherwise construe the act of Congress, it is claimed, would cause it to give to the statutes of Iowa extraterritorial operation, and would render the act of Congress repugnant to the Constitution of the United States. It has been settled that the effect of the act of Congress is to allow the statutes of the several States to operate upon packages of imported liquor before sale. *In re* Rahrer, 140 U. S. 545.

Did the act of Congress referred to operate to attach the legislation of the State of Iowa to the goods in question the moment they reached the State line, and before the completion of the act of transportation, by arriving at the point of consignment and the delivery there to the consignee is then the pivotal question? The act of Congress is as follows: —

"That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

The words "shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory," in one sense might be held to mean arrival at the State line. But to so interpret them would necessitate isolating these words from the entire context of the act, and would compel a construction destructive of other provisions contained therein. But this would violate the fundamental rule requiring that a law be construed as a whole, and not by distorting or magnifying a particular word found in it. It is clearly contemplated that the word "arrival" signified that the goods should actually come into the State, since it is provided that "all fermented, distilled, or other intoxicating liquors or liquids transported into a State or Territory," and this is further accentuated by the other provision, "or remaining therein for use, consumption, sale, or storage therein."

This language makes it impossible in reason to hold that the law intended that the word "arrival" should mean at the State line, since it presupposes the coming of the goods into the State for "use, consumption, sale, or storage." The fair inference from the enumeration of these conditions, which are all-embracing, is that the time when they could arise was made the test by which to determine the period when the operation of the State law should attach to goods brought into the State. But to uphold the meaning of the word "arrival," which is necessary to support the State law, as construed below, forces the conclusion that the act of Congress in question authorized State laws to forbid the bringing into the State at all. This follows from the fact that if arrival means crossing the line, then the act of crossing into the State would be a violation of the State law, and hence necessarily the operation of the law is to forbid crossing the line and to compel remaining beyond the same. Thus, if the construction of the word "arrival" be that which is claimed for it, it must be held that the State statute attached and operated beyond the State line confessedly before the time when it was intended by the act of Congress it should take effect.

But the subtle signification of words and the niceties of verbal distinction furnish no safe guide for construing the act of Congress. On the contrary, it should be interpreted and enforced by the light of the fundamental rule of carrying out its purpose and object, of affording the remedy which it was intended to create, and of defeat-

ing the wrong which it was its purpose to frustrate. Undoubtedly the purpose of the act was to enable the laws of the several States to control the character of merchandise therein enumerated at an earlier date than would have been otherwise the case; but it is equally unquestionable that the act of Congress manifests no purpose to confer upon the States the power to give their statutes an extraterritorial operation so as to subject persons and property beyond their borders to the restraints of their laws. If the act of Congress be construed as reaching the contract for interstate shipment made in another State, the necessary effect must be to give to the laws of the several States extraterritorial operation, for, as held in the Bowman case, the inevitable consequence of allowing a State law to forbid interstate shipments of merchandise would be to destroy the right to contract beyond the limits of the State for such shipments. If the construction claimed be upheld, it would be in the power of each State to compel every interstate commerce train to stop before crossing its borders, and discharge its freight, lest by crossing the line it might carry within the State merchandise of the character named covered by the inhibitions of a State statute. The force of this view is well illustrated by the conclusions of the court below, where it is said: —

"Was the defendant, in the removal of the liquor, engaged in transporting or conveying it within the meaning of our statute? The language of the statute is broad enough to cover the act of defendant in removing the liquor from the platform to the freight room of the depot. He was one of the instruments necessary to complete the act of transportation. If it be not so, then clearly he is within the terms of the act, as he conveyed 'the liquor from one point to another within this State.' His guilt is not to be determined by the distance he conveyed the package, but his conveying it any distance was a violation of the law. With the propriety of legislation, making such an act a crime, and with the severity of the punishment attached to doing the act, we have nothing to do."

If it had been the intention of the act of Congress to provide for the stoppage at the State line of every interstate commerce contract relating to the merchandise named in the act, such purpose would have been easy of expression. The fact that such power was not conveyed, and that, on the contrary, the language of the statute relates to the receipt of the goods "into any State or Territory for use, consumption, sale, or storage therein," negatives the correctness of the interpretation holding that the receipt into any State or Territory for the purposes named could never take place. Light is thrown upon the purpose and spirit of the act by another consideration. The Bowman case was decided in 1888, the opinion in Leisy *v.* Hardin was announced in April, 1890, the act under consideration was approved August 8, 1890. Considering these dates, it is reasonable to infer that the provisions of the act were intended by Congress to

cause the legislative authority of the respective States to attach to intoxicating liquors coming into the States by an interstate shipment, only after the consummation of the shipment, but before the sale of the merchandise, — that is, that the one receiving merchandise of the character named should, whilst retaining the full right to use the same, no longer enjoy the right to sell free from the restrictions as to sale created by State legislation, a right which the decision in Leisy *v.* Hardin had just previously declared to exist.

This view gives meaning and effect to the language of the act providing that such merchandise "shall not be exempt therefrom" (legislative power of the State) by reason of being introduced therein in "original packages or otherwise." These words have no place or meaning in the act if its purpose was to attach the power of the State to the goods before the termination of the interstate commerce shipment. The words "original packages" had, at the time of the passage of the act by the decisions of this court, acquired with reference to the construction of the Constitution a technical meaning, signifying that the merchandise in such packages was entitled to be sold within a State by the receiver thereof, although State laws might forbid the sale of merchandise of like character not in such packages.

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It follows from this conclusion that as the act for which the plaintiff in error was convicted, and which consisted in moving the goods from the platform to the freight warehouse, was a part of the interstate commerce transportation, and was done before the law of Iowa could constitutionally attach to the goods, the conviction was erroneous, and the judgment below is, therefore, *Reversed.*[1]

[1] Mr. Justice Gray rendered a dissenting opinion, in which Mr. Justice Harlan and Mr. Justice Brown concurred.

As to C. O. D. shipments of liquor from one state into another see American Express Company *v.* Iowa, 196 U. S. 133, 25 Sup. Ct. Rep. 182 (1905). In Reymann Brewing Company *v.* Brister, 179 U. S. 445, 21 Sup. Ct. Rep. 201 (1900), it was held that a state tax on the business of trafficing in intoxicating liquors was valid as to the foreign manufacturer who maintained a place of business in the State for storing and selling such liquors; and in Delamater *v.* South Dakota, 205 U. S. 93, 27 Sup. Ct. Rep. 447 (1907), that a State license tax might be imposed on traveling salesmen soliciting orders for intoxicating liquors including those taking orders for liquors to be shipped into the State.

## SCHOLLENBERGER *v.* PENNSYLVANIA.

171 United States, 1. 1898.

THE plaintiffs in error were indicted for and convicted of a violation of a statute of Pennsylvania [making the sale of oleomargarine a misdemeanor]. It provides as follows:

"That no person, firm, or corporate body shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk, or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her or their possession with intent to sell the same as an article of food."

[From the special verdict of the jury it appeared that Schollenberger, agent for the sale in Pennsylvania of oleomargarine manufactured in Rhode Island, had complied with the provisions of the act of Congress relating to such sale, and that a tub of oleomargarine packed, stamped, and branded, as required by that act and shipped by the manufacturer to said agent, was sold by him as a wholesaler in the same form to one purchasing as an article of food. Upon this special verdict the trial court entered judgment for defendant, but on appeal to the State Supreme Court the judgment was reversed (170 Penn. St. 284), and the case remanded to the lower court that defendant might be sentenced. The defendant appealed from this judgment.]

MR. JUSTICE PECKHAM delivered the opinion of the court.

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The Supreme Court of the State upheld the statute upon the ground that it was a legitimate exercise of the police power of the State not inconsistent with the right of the owner of the product to bring it within the State in appropriate packages suitable for sale to the wholesale dealer and not intended for sale at retail by the importer to the consumer, and that in the cases under consideration the packages were not wholesale original packages and their sale amounted to a mere retail trade.

Upon the first ground for sustaining the conviction in these cases the argument upon the part of the Commonwealth runs somewhat as follows: It may be admitted that actually pure oleomargarine is not dangerous to the public health, but whether it be pure depends upon the method of its manufacture, and its purity cannot be ascertained by any superficial examination, and any certain and effective supervision of the method of its manufacture is impossible. It is manufactured to imitate in its appearance butter, with a view to deceiving

the ultimate consumer as to its character, and this deception cannot be avoided by coverings, labels or marks upon the product; the legislature of Pennsylvania was therefore so far justified in protecting its citizens against oleomargarine by prohibiting its sale; that the legislation in question does not discriminate in favor of the citizens of Pennsylvania or in any manner against any particular State or any particular manufacturer of the article, and, as there is nothing in the case tending to prove the contrary, it must be assumed that the legislation was enacted in good faith for the protection of the health of the citizens and for the prevention of deception, and as such legislation did not hamper the actual transportation of merchandise, the statute must be held to be within the power of the legislature to enact, and is therefore valid; at all events, the State has a right in cases of newly invented food products to determine for its citizens the question whether they are wholesome and non-deceptive, and that oleomargarine is one of that class of products, and is necessarily subject to the right of the State either to regulate or absolutely to prohibit its sale.

In the examination of this subject the first question to be considered is whether oleomargarine is an article of commerce? No affirmative evidence from witnesses called to the stand and speaking directly to that subject is found in the record. We must determine the question with reference to those facts which are so well and universally known that courts will take notice of them without particular proof being adduced in regard to them, and also by reference to those dealings of the commercial world which are of like notoriety.

Any legislation of Congress upon the subject must, of course, be regarded by this court as a fact of the first importance. If Congress has affirmatively pronounced the article to be a proper subject of commerce, we should rightly be influenced by that declaration. By reference to the statutes we discover that Congress in 1886 passed "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine." Act of August 2, 1886, c. 840, 24 Stat. 209. In that statute we find that Congress has given a definition of the meaning of oleomargarine and has imposed a special tax on the manufacturers of the article, on wholesale dealers, and upon retail dealers therein and the provisions of the Revised Statutes in relation to special taxes are, so far as applicable, made to extend to the special taxes imposed by the third section of the act, and to the persons upon whom they are imposed. Manufacturers are required to file with the proper collector of internal revenue such notices, and to keep such books and conduct their business under such supervision as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation require. Provision is made for the packing of oleomargarine by the manufacturer in packages containing not less

than ten pounds and marked as prescribed in the act, and it provides that all sales made by manufacturers of oleomargarine and wholesale dealers in oleomargarine shall be in the original stamped packages. A tax of two cents per pound is laid upon oleomargarine, to be paid by the manufacturer, and the tax levied is to be represented by coupon stamps. Oleomargarine imported from foreign countries is taxed, in addition to the import duty imposed on the same, an internal revenue tax of fifteen cents per pound. Provision is made for warehousing, and a penalty imposed for selling the oleomargarine thus imported if not properly stamped. Provision is also made for the appointment of an analytical chemist and microscopist by the Secretary of the Treasury, and such chemist or microscopist may examine the different substances which may be submitted in contested cases, and the Commissioner of Internal Revenue is to decide in such cases as to the taxation, and his decision is to be final. The Commissioner is also empowered to decide "whether any substance made in imitation or semblance of butter and intended for human consumption, contains ingredients deleterious to the public health; but in case of doubt or contest his decisions in this class of cases may be appealed from to a board hereby constituted for the purpose, composed of the Surgeon General of the Army, the Surgeon General of the Navy and the Commissioner of Agriculture, and the decisions of this board shall be final in the premises." Provision is also made for the removal of oleomargarine from the place of its manufacture for export to a foreign country without payment of tax or affixing of stamps thereto, and there is a penalty denounced against any person engaged in carrying on the business of oleomargarine who should defraud or attempt to defraud the United States of the tax.

This act shows that Congress at the time of its passage in 1886 recognized the article as a proper subject of taxation and as one which was the subject of traffic and of exportation to foreign countries and of importation from such countries. Its manufacture was recognized as a lawful pursuit, and taxation was levied upon the manufacturer of the article, upon the wholesale and retail dealers therein, and also upon the article itself.

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Upon all these facts we think it apparent that oleomargarine has become a proper subject of commerce among the States and with foreign nations.

The general rule to be deduced from the decisions of this court is that a lawful article of commerce cannot be wholly excluded from importation into a State from another State where it was manufactured or grown. A State has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food.

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We do not think the fact that the article is subject to be adulterated by dishonest persons, in the course of its manufacture, with other substances, which it is claimed may in some instances become deleterious to health, creates the right in any State through its legislature to forbid the introduction of the unadulterated article into the State. The fact that the article is liable to adulteration in the course of manufacture, and that the articles with which it may be mixed may possibly and under some circumstances be deleterious to the health of those who consume it, is known to us by means of various references to the subject in books and encyclopædias, but there was no affirmative evidence offered on the trial to prove the fact. From these sources of information it may be admitted that oleomargarine in the course of its manufacture may sometimes be adulterated by dishonest manufacturers with articles that possibly may become injurious to health. Conceding the fact, we yet deny the right of a State to absolutely prohibit the introduction within its borders of an article of commerce, which is not adulterated and which in its pure state is healthful, simply because such an article in the course of its manufacture may be adulterated by dishonest manufacturers for purposes of fraud or illegal gains. The bad article may be prohibited, but not the pure and healthy one.

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It is claimed, however, that the very statute under consideration has heretofore been held valid by this court in the case of Powell *v.* Pennsylvania, 127 U. S. 678. That case did not involve rights arising under the commerce clause of the Federal Constitution. The article was manufactured and sold within the State, and the question was one as to the police power of the State acting upon a subject always within its jurisdiction. The plaintiff in error was convicted of selling within the Commonwealth two cases containing five pounds each of an article of food designed to take the place of butter, the sale having taken place in the city of Harrisburg, and it was part of a quantity manufactured in and, as alleged, in accordance with the laws of the Commonwealth. The plaintiff in error claimed that the statute under which his conviction was had was a violation of the Fourteenth Amendment to the Constitution of the United States. This court held that the statute did not violate any provision of that Amendment, and therefore held that the conviction was valid.

The Powell case did not and could not involve the rights of an importer under the commerce clause. The right of a State to enact laws in relation to the administration of its internal affairs is one thing, and the right of a State to prevent the introduction within its limits of an article of commerce is another and a totally different thing. Legislation which has its effect wholly within the State and upon products manufactured and sold therein might be held valid as not in violation of any provision of the Federal Constitution, when at the same time legislation directed towards prohibiting the

importation within the State of the same article manufactured outside of its limits might be regarded as illegal because in violation of the rights of citizens of other States arising under the commerce clause of that instrument.

. . . . . .

Nor is the question determined adversely to this view in the case of Plumley *v.* Massachusetts, 155 U. S. 462. The statute in that case prevented the sale of this substance in imitation of yellow butter produced from pure unadulterated milk or cream of the same, and the statute contained a proviso that nothing therein should be "construed to prohibit the manufacture or sale of oleomargarine in a separate or distinct form and in such manner as will advise the consumer of its real character, free from coloration or ingredients that cause it to look like butter." This court held that a conviction under that statute for having sold an article known as oleomargarine, not produced from unadulterated milk or cream, but manufactured *in imitation of yellow butter produced from pure unadulterated milk or cream, was valid.* Attention was called in the opinion to the fact that the statute did not prohibit the manufacture or sale of all oleomargarine, but only such as was colored in imitation of yellow butter produced from unadulterated milk or cream of such milk. If free from coloration or ingredient that caused it to look like butter, the right to sell it in a separate and distinct form and in such manner as would advise the consumer of the real character was neither restricted nor prohibited. The court held that under the statute the party was only forbidden to practise in such matters a fraud upon the general public; that the statute seeks to suppress false pretences and to promote fair dealing in the sale of an article of food, and that it compels the sale of oleomargarine for what it really is by preventing its sale for what it is not; that the term "commerce among the States" did not mean a recognition of a right to practise a fraud upon the public in the sale of an article even if it had become the subject of trade in different parts of the country. It was said that the Constitution of the United States did not take from the States the power of preventing deception and fraud in the sale within their respective limits of articles, in whatever State manufactured, and that that instrument did not secure to any one the privilege of committing a wrong against society.

[Commonwealth *v.* Schollenberg, 156 Penn. St. 201, and the opinion of the Pennsylvania court in the present case are considered, and various cases, most of them already given or discussed, are cited and commented upon.]

We are not aware of any such distinction as is attempted to be drawn by the court below in these cases between a sale at wholesale to individuals engaged in the wholesale trade or one at retail to the consumer. How small may be an original package it is not necessary to here determine. We do say that a sale of a ten pound pack-

age of oleomargarine, manufactured, packed, marked, imported and sold under the circumstances set forth in detail in the special verdict, was a valid sale, although to a person who was himself a consumer. We do not say or intimate that this right of sale extended beyond the first sale by the importer after its arrival within the State. Waring *v.* The Mayor, 8 Wall. 110, 122. The importer had the right to sell not only personally, but he had the right to employ an agent to sell for him. Otherwise his right to sell would be substantially valueless, for it cannot be supposed that he would be personally engaged in the sale of every original package sent to the different States in the Union. Having the right to sell through his agent, a sale thus effected is valid.

The right of the importer to sell cannot depend upon whether the original package is suitable for retail trade or not. His right to sell is the same, whether to consumers or to wholesale dealers in the article, provided he sells them in original packages. This does not interfere with the acknowledged right of the State to use such means as may be necessary to prevent the introduction of an adulterated article, and for that purpose to inspect and test the article introduced, provided the State law does really inspect and does not substantially prohibit the introduction of the pure article and thereby interfere with interstate commerce. It cannot for the purpose of preventing the introduction of an impure or adulterated article absolutely prohibit the introduction of that which is pure and wholesome. The act of the Legislature of Pennsylvania, under consideration, to the extent that it prohibits the introduction of oleomargarine from another State and its sale in the original package, as described in the special verdict, is invalid.

*The judgments are therefore reversed and the cases remanded to the Supreme Court of Pennsylvania for further proceedings not inconsistent with this opinion.*[1]

[1] MR. JUSTICE GRAY delivered a dissenting opinion, in which MR. JUSTICE HARLAN concurred.

In COLLINS *v.* NEW HAMPSHIRE, 171 U. S. 30 (1898), which was argued with the case above, the question was whether a State statute requiring all oleomargarine sold in the State to be colored pink was valid as to sales in original packages. The court said (through the same justice who delivered the prevailing opinion in the case above, and with the same dissent): —

"We think this case comes within the principle of the cases just decided regarding the statute of the Commonwealth of Pennsylvania prohibiting the introduction of oleomargarine into that Commonwealth. This statute is in its practical effect prohibitory. It is clear that it is not an inspection law in any sense. It provides for no inspection, and it is apparent that none was intended. The act is a mere evasion of the direct prohibition contained in the Pennsylvania statute, and yet if enforced the result, within the State, would be quite as positive in the total suppression of the article as is the case with the Pennsylvania act.

"In a case like this it is entirely plain that if the State has not the power to absolutely prohibit the sale of an article of commerce like oleomargarine in its pure state, it has no power to provide that such article shall be colored, or rather discolored, by

### c. *Federal Tax on Exports.*

## PACE *v.* BURGESS.

92 United States, 372. 1875.

[This action was brought in the United States Circuit Court for Virginia to recover from defendant as United States collector of internal revenue the amount paid to him by plaintiff for stamps required by statute of the United States to be affixed, and which were affixed to packages of manufactured tobacco intended for exportation. Judgment was for defendant and plaintiff took a writ of error.]

Mr. Justice Bradley delivered the opinion of the court.

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The plaintiff contends that the charge for the stamps required to be placed on packages of manufactured tobacco intended for exportation was and is a duty on exports, within the meaning of that clause in the Constitution of the United States which declares that "no tax or duty shall be laid on articles exported from any State." But it is manifest that such was not its character or object. The stamp was intended for no other purpose than to separate and identify the tobacco which the manufacturer desired to export, and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected. It was a means devised to prevent fraud, and secure the faithful carrying out of the declared intent with regard to the tobacco so marked. The payment of twenty-five cents or of ten cents for the stamp used was no more a tax on the export than was the fee for clearing the vessel in which it was transported, or for making out and certifying the manifest of the cargo. It bore no proportion whatever to the quantity or value of the package on which it was affixed. These were unlimited, except by the discretion of the exporter or the convenience of handling. The large amount

adding a foreign substance to it, in the manner described in the statute. Pink is not the color of oleomargarine in its natural state. The act necessitates and provides for adulteration. It enforces upon the importer the necessity of adding a foreign substance to his article, which is thereby rendered unsalable, in order that he may be permitted lawfully to sell it. If enforced, the result could be foretold. To color the substance as provided for in the statute naturally excites a prejudice and strengthens a repugnance up to the point of a positive and absolute refusal to purchase the article at any price. The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. Henderson *v.* Mayor of New York, 92 U. S. 259; Morgan's Steamship Co. *v.* Louisiana, 118 U. S. 455, at 462. Although under the wording of this statute the importer is permitted to sell oleomargarine freely and to any extent, provided he colors it pink, yet the permission to sell, when accompanied by the imposition of a condition which, if complied with, will effectually prevent any sale, amounts in law to a prohibition."

paid for such stamps by the plaintiff only shows that he was carrying on an immense business.

The evidence given to show that the original cost of the stamps was never less than the amount paid for them by the manufacturers is entitled to very slight consideration. The cost of the paper, ink, and printing, formed but a small part of the expense of those arrangements which were necessary in order to give to the exporter the benefit of exemption from taxation, and at the same time to secure the necessary precautions against the perpetration of fraud. We know how next to impossible it is to prevent fraudulent practices wherever the internal revenue is concerned; and the pretext of intending to export such an article as manufactured tobacco would open the widest door to such practices, if the greatest strictness and precaution were not observed. The proper fees accruing in the due administration of the laws and regulations necessary to be observed to protect the government from imposition and fraud likely to be committed under pretence of exportation are in no sense a duty on exportation. They are simply the compensation given for services properly rendered. The rule by which they are estimated may be an arbitrary one; but an arbitrary rule may be more convenient and less onerous than any other which can be adopted. The point to guard against is, the imposition of a duty under the pretext of fixing a fee. In the case under consideration, having due regard to that latitude of discretion which the legislature is entitled to exercise in the selection of the means for attaining a constitutional object, we cannot say that the charge imposed is excessive, or that it amounts to an infringement of the constitutional provision referred to. We cannot say that it is a tax or duty instead of what it purports to be, a fee or charge, for the employment of that instrumentality which the circumstances of the case render necessary for the protection of the government.

One cause of difficulty in the case arises from the use of stamps as one of the means of segregating and identifying the property intended to be exported. It is the form in which many taxes and duties are imposed and liquidated; stamps being seldom used, except for the purpose of levying a duty or tax. But we must regard things rather than names. A stamp may be used, and, in the case before us, we think it is used, for quite a different purpose from that of imposing a tax or duty; indeed, it is used for the very contrary purpose, — that of securing exemption from a tax or duty. The stamps required by recent laws to be affixed to all agreements, documents, and papers, and to different articles of manufacture, were really and in truth taxes and duties, or evidences of the payment of taxes and duties, and were intended as such. The stamp required to be placed on gold-dust exported from California by a law of that State was clearly an export tax, as this court decided in the case of Almy *v.* The State of California, 24 How. 169. In all such cases, no one could entertain

a reasonable doubt on the subject. The present case is different, and must be judged by its own circumstances. The sense and reason of the thing will generally determine the character of every case that can arise.

[The charge for stamps was therefore held not a tax or duty and the judgment was affirmed.[1]]

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### d. *State Tax on Imports or Exports.*

### BROWN *v.* MARYLAND.

12 Wheat. 419; 7 Curtis, 262. 1827.

[See page 303, *supra*.]

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### ALMY *v.* CALIFORNIA.

24 Howard, 169. 1860.

Mr. Chief Justice Taney delivered the opinion of the court.

The only question in this case is upon the constitutionality of a law of California, imposing a stamp tax upon bills of lading.

By an act passed by the Legislature of that State to provide a revenue for the support of the Government from a stamp tax on certain instruments of writing, among other instruments mentioned in the law, a stamp tax was imposed on bills of lading for the transportation from any point or place in that State, to any point or place without the State, of gold or silver coin, in whole or in part, gold-dust, or gold or silver in bars or other form; and the law requires that there shall be attached to the bill of lading, or stamped thereon, a stamp or stamps, expressing in value the amount of such tax or duty.

By a previous law upon the same subject it was made a misdemeanor, punishable by fine, to use any paper without a stamp, where the law required stamped paper to be used.

After the passage of these acts, Almy, the plaintiff in error, being the master of the ship "Ratler," then lying in the port of San Francisco, and bound to New York, received a quantity of gold-dust for transportation to New York, for which he signed a bill of lading upon unstamped paper, and without having any stamp attached to it. For this disobedience to the law of California he was indicted in the Court of Sessions for a misdemeanor, and at the trial the jury found

[1] In the case of Cornell *v.* Coyne, 192 U. S. 418, 24 Sup. Ct. Rep. 383 (1904), it was held that a Federal statute imposing a stamp tax upon the manufacture of "filled cheese" was not, as applied to such commodity manufactured for export, a violation of the prohibition that "no tax or duty shall be laid on articles exported from any State."

a special verdict setting out particularly the facts, of which the above is a brief summary; and upon the return of the verdict the counsel for the defendant moved for a judgment of acquittal upon the ground that the law of California was repugnant to the Constitution of the United States. But the Court decided that the State law was not repugnant to the Constitution of the United States, and adjudged that Almy should pay a fine of $100 for this offence. And the Court of Sessions being the highest court of the State which had jurisdiction of the matter in controversy, this writ of error is brought to revise that judgment.

[The Court states the case of Brown v. Maryland.]

So in the case before us. If the tax was laid on the gold or silver exported, every one would see that it was repugnant to the Constitution of the United States, which in express terms declares that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

But a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing; for a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another. The necessities of commerce require it. And it is hardly less necessary to the existence of such commerce than casks to cover tobacco, or bagging to cover cotton, when such articles are exported to a foreign country; for no one would put his property in the hands of a ship-master without taking written evidence of its receipt on board the vessel, and the purposes for which it was placed in his hands. The merchant could not send an agent with every vessel, to inform the consignee of the cargo what articles he had shipped, and prove the contract of the master if he failed to deliver them in safety. A bill of lading, therefore, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance and effect, a duty on the article exported. And if the law of California is constitutional, then every cargo of every description exported from the United States may be made to pay an export duty to the State, provided the tax is imposed in the form of a tax on the bill of lading, and this in direct opposition to the plain and express prohibition in the Constitution of the United States.

In the case now before the Court, the intention to tax the export of gold and silver, in the form of a tax on the bill of lading, is too plain to be mistaken. The duty is imposed only upon bills of lading of gold and silver, and not upon articles of any other description. And we think it is impossible to assign a reason for imposing the duty upon the one and not upon the other, unless it was intended to lay a tax on the gold and silver exported, while all other articles were

exempted from the charge. If it was intended merely as a stamp duty on a particular description of paper, the bill of lading of any other cargo is in the same form, and executed in the same manner and for the same purposes, as one for gold and silver, and so far as the instrument of writing was concerned, there could hardly be a reason for taxing one and not the other.

In the judgment of this Court the State tax in question is a duty upon the export of gold and silver, and consequently repugnant to the clause in the Constitution hereinbefore referred to; and the judgment of the Court of Sessions must therefore be reversed.

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## TURNER *v.* MARYLAND.

107 United States, 38. 1882.

Mr. Justice Blatchford delivered the opinion of the court.

[The case as set out in the opinion may be thus briefly stated: Turner was indicted in the State court for violating a State statute relating to inspection of tobacco exported out of the State. Having been convicted, and the conviction having been affirmed in the State Court of Appeals, he prosecuted a writ of error to this court.]

The Legislature of the State of Maryland, from the earliest history of the colony and since the formation of the State government, has made the inspection of tobacco raised in that State compulsory. That inspection has included many features, and has extended to the form, size, and weight of the packages containing the tobacco, as well as to the quality of the article. Fixing the identity and weight of tobacco alleged to have been grown in the State, and thus preserving the reputation of the article in markets outside of the State, is a legitimate part of inspection laws, and the means prescribed therefor in the statutes in question naturally conduce to that end. Such provisions, as parts of inspection laws, are as proper as provisions for inspecting quality; and it cannot be said that the absence of the latter provisions, in respect to any particular class of tobacco, necessarily causes the laws containing the former provisions to cease to be inspection laws. It is easy to see that the use of the precaution of weighing and marking the weight on the hogshead and recording it in a book is to enable it to be determined at any time whether the contents have been diminished subsequently to the original packing, by comparing a new weight with the original marked weight, or, if the marked weight be altered, with the weight entered in the warehouse book. The things required to be done in respect to the hogshead of tobacco in the present case, aside from any inspection of quality, are to be done to prepare and fit the hogshead, as a unit, containing the tobacco, for exportation, and for becoming an article of foreign commerce or commerce among

the States, and are to be done before it becomes such an article. They are properly parts of inspection laws, within the definition given by this court in Gibbons *v.* Ogden, 9 Wheat. 1. In a note to the argument of Mr. Emmet in that case, at page 119, are collected references to many statutes of the States, in the form of inspection laws, showing what features have been generally recognized as falling within the domain of those laws, — such as the size of barrels or casks, and the number of hoops on them; what pieces of beef or pork, and what quantity and size of nails, should be in one cask; the length, breadth, and thickness of staves and heading, lumber, boards, shingles, etc.; and the branding of pot and pearl ashes, flour, fish, and lumber, and the forfeiture of them, if unbranded. These were cited as instances of the exercise by States of the power to act upon an article grown or produced in a State, before it became an article of foreign or domestic commerce, or of commerce among the States, to prepare it for such purpose. It was in reference to laws of this character that it was said, in argument, in Gibbons *v.* Ogden, that the enactments seemed arbitrary, and were not founded on the idea that the things the exportation of which was thus prohibited or restrained were dangerous or noxious, but had for their object to improve foreign trade and raise the character and reputation of the articles in a foreign market. It was in reference to such laws, among other inspection laws, that Chief Justice Marshall, in Gibbons *v.* Ogden, p. 203, after remarking that a power to regulate commerce was not the source from which a right to pass inspection laws was derived, said: "The object of inspection laws is to improve the quality of articles produced by the labor 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." It was not suggested by the Court that those particular laws were not valid exercises of the power of the State to fit the articles for exportation, or that in addition to, or even aside from, ascertaining the quality of the article produced in a State, the State could not define the form of the lawful package or its weight, and subject form and weight, with or without quality, to the supervision of an inspector, to ascertain that the required conditions in respect to the article were observed.

In addition to the instances cited in Gibbons *v.* Ogden, the diligence of the attorney-general of the State of Maryland has collected and presented to us, in argument numerous instances, showing, by the text of the inspection laws of the thirteen American colonies and States, in force in 1787, when the Constitution of the United States was adopted, that the form, capacity, dimensions, and weight of packages were objects of inspection irrespective of the quality of the con-

tents of the packages. The instances embrace, among others, the dimensions of shingles, staves, and hoops; the size of casks and barrels for fish, pork, beef, pitch, tar, and turpentine; and the size of hogsheads of tobacco. In Maryland, the dimensions of tobacco hogsheads were fixed by various statutes passed from the year 1658 to the year 1763. By the act of 1763, c. 18, sect. 18, it was enacted that all tobacco packed in hogsheads exceeding forty-eight inches in the length of the stave, and seventy inches in the whole diameters within the staves, at the croze and bulge, should be accounted unlawful tobacco and should not be passed or received. Like provisions fixing the dimensions of hogsheads of tobacco have been in force in Maryland from 1789 till now. In view of such legislation existing at the time the Constitution of the United States was adopted and ratified by the original States, known to the framers of the Constitution who came from the various States, and called "inspection laws" in those States, it follows that the Constitution in speaking of "inspection laws," included such laws, and intended to reserve to the States the power of continuing to pass such laws, even though to carry them out, and make them effective, in preventing the exportation from the State of the various commodities, unless the provisions of the laws were observed, it became necessary to impose charges which amounted to duties or imposts on exports to an extent absolutely necessary to execute such laws. The general sense in which the power of the States in this respect has been understood since the adoption of the Constitution is shown by the legislation of the States since that time, as collected in like manner by the attorney-general of Maryland, covering the form, capacity, dimensions, and weight of packages containing articles grown or produced in a State, and intended for exportation. These laws are none the less inspection laws because, as was said by this court in Gibbons *v.* Ogden, they "may have a remote and considerable influence on commerce." It is a circumstance of weight that the laws referred to in the Constitution are by it made "subject to the revision and control of the Congress." Congress may, therefore, interpose, if at any time any statute, under the guise of an inspection law, goes beyond the limit prescribed by the Constitution, in imposing duties or imposts on imports or exports. These and kindred laws of Maryland have been in force for a long term of years, and there has been no such interposition.

[Other objections to the statute are considered and found not to be well taken and the judgment is affirmed.]

## e. *State Tax on Tonnage.*

### INMAN STEAMSHIP COMPANY *v.* TINKER.

94 United States, 238. 1876.

Mr. Justice Swayne delivered the opinion of the court.

[The case, as stated in the opinion, is briefly this: The complainant, a foreign corporation, sought in the United States Circuit Court for the Southern District of New York, to have defendant, as captain of the port of New York, restrained from collecting certain port fees provided for by State statute, to be computed on the tonnage of vessels entering such port. Complainant's objection to the statute was that it violated clause 2 of Art. I., sec. 10, of the Constitution of the United States. The bill was dismissed, and plaintiff appealed.]

The classification of the powers of the national government, the several categories into which they may be resolved, and the rights and powers of the States in our complex system of polity, have been so often considered by this court, that it is unnecessary upon this occasion to re-examine the subject. Gilman *v.* Philadelphia, 3 Wall. 713; *Ex parte* McNiel, 13 id. 236, 240.

Tonnage, in our law, is a vessel's "internal cubical capacity in tons of one hundred cubic feet each, to be ascertained" in the manner prescribed by Congress. Act of May 6, 1864, 13 Stat. pp. 70, 72; Rev. Stat. U. S. 804, § 4153. "Tonnage duties are duties upon vessels in proportion to their capacity." Bouv. Law Dict., "Tonnage."

The term was formerly applied to merchandise. Cowel, in his Law Dictionary, published in 1708, thus defines it: "Tonnage (*tonnagium*) is a custom or impost paid to the king for merchandise carried out or brought in ships, or such like vessels, according to a certain rate upon every ton, and of this you may read in the statutes of 12 Edw. IV. c. 3; 6 Hen. VIII. c. 14," etc. The vital principle of such a tax or duty is that it is imposed, whatever the subject, solely according to the rule of weight, either as to the capacity to carry, or the actual weight of the thing itself.

In this law of the State there are several important points that must not be overlooked. The charge is not exacted for any services rendered or offered to be rendered. If the vessel enter the port and immediately take her departure, or load or unload, or make fast to any wharf, either of these things disjunctively brings her within the act, and makes her liable to the burden prescribed.

The charge is applied wholly irrespective of the *ad valorem* principle.

If either of the three vessels of the appellant was new and making her first voyage, and another of the same tonnage was making her

last trip before being broken up, and the former were of many times the value of the latter, the act would apply the same procrustean rule to both. The rate of payment, and the amount to be paid, would, in both cases, be the same.

The act makes a discrimination. To one class of vessels it applies the rate here in question, to another class double that rate, and to yet another class none at all. Those belonging to the latter are wholly exempted.

We think a clearer case of the imposition of a tonnage duty than is presented in the record before us can hardly be imagined. If the law had been passed by Congress instead of the State, and the charge imposed had been expressly designated a *tonnage* duty, its character as such could not appear in a stronger light. But the name is immaterial: it is the substance we are to consider.

It does not advance the argument in behalf of the appellee to maintain that the regulations prescribed by the act are necessary and proper in the port for which they are provided. It is not our purpose to examine them, except as to the proposition in hand. It may be that, aside from the imposition of this tax, they contain nothing exceptionable, and that in all other respects they are wise and well considered. Similar provisions, varying according to local circumstances, exist at all important points throughout the world whither marine commerce finds its way. They are indispensable to those engaged in that business. They fence out many evils, and promote largely the convenience and the welfare of those engaged in this field of enterprise. Perhaps it is hardly too strong language to say they are well-nigh vital to commerce itself. It may be conceded, also, that foreign steamships and other vessels visiting the ports of a State for business purposes may be made liable by the laws of such State for all reasonable and proper port charges. This is but a fair return for the benefits received. But such charges must not be repugnant to the Constitution of the United States. Any conflict is fatal to them. The warrant for such competent legislation may be found in that immense mass of police and other powers which the States originally possessed, which they have not parted with, and which still belongs to them; or it may in some cases be found among those which the States may exercise, but only until Congress shall see fit to act upon the subject. The authority of the State then retires, and lies in abeyance until the occasion for its exercise shall recur. *Ex parte* McNeil, 13 Wall. 236.

"Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Const. Amend. 10.

The State, in passing this law imposing a tonnage duty, has exercised a power expressly prohibited to it by the Constitution. In that particular the law is, therefore, void. This view is sustained by the rulings of this court in the State Tonnage Tax Cases, 12 Wall.

204, and Cannon *v.* New Orleans, 20 id. 577. See also Steamship Company *v.* Port Wardens, 6 id. 31, and Peete *v.* Morgan, 19 id. 581.

The tax imposed is not merely a mode of measuring the compensation to be paid. The answer to this suggestion is, that it is exacted where there is nothing to be paid for, and has no reference to any circumstance in this connection but the tonnage of the vessel and the class to which it belongs.

The commerce clauses of the Constitution had their origin in a wise and salutary policy. They give to Congress the entire control of the foreign and interstate commerce of the country. They were intended to secure harmony and uniformity in the regulations by which they should be governed. Wherever such commerce goes, the power of the nation accompanies it, ready and competent, as far as possible, to promote its prosperity and redress the wrongs and evils to which it may be subjected. It was deemed especially important that the States should not impose tonnage taxes. Hence the prohibition in the Constitution, without the assent of Congress previously given. The confusions and mischiefs that would ensue if this restriction were removed are too obvious to require comment. The lesson upon the subject taught by the law before us is an impressive one.

How the charges, which it is conceded the State may impose, must be shaped in order to be valid, is a subject which it is not within our province to consider, and in regard to which it would not be proper for us to express any opinion. We decide only the point before us.

*Decree reversed, and cause remanded with directions to proceed in conformity to this opinion.*

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## PACKET COMPANY *v.* KEOKUK.

95 United States, 80. 1877.

Mr. Justice Strong delivered the opinion of the court.

The principal question presented by the record of this case is, whether a municipal corporation of a State, having by the law of its organization an exclusive right to make wharves, collect wharfage, and regulate wharfage rates, can, consistently with the Constitution of the United States, charge and collect wharfage proportioned to the tonnage of the vessels from the owners of enrolled and licensed steamboats mooring and landing at the wharves constructed on the banks of a navigable river.

The city of Keokuk is such a corporation, existing by virtue of a special charter granted by the legislature of Iowa. To determine whether the charge prescribed by the ordinance in question is a duty

of tonnage, within the meaning of the Constitution, it is necessary to observe carefully its object and essence. If the charge is clearly a duty, a tax, or burden, which in its essence is a contribution claimed for the privilege of entering the port of Keokuk, or remaining in it, or departing from it, imposed, as it is, by authority of the State, and measured by the capacity of the vessel, it is doubtless embraced by the constitutional prohibition of such a duty. But a charge for services rendered or for conveniences provided is in no sense a tax or a duty. It is not a hindrance or impediment to free navigation. The prohibition to the State against the imposition of a duty of tonnage was designed to guard against local hindrances to trade and carriage by vessels, not to relieve them from liability to claims for assistance rendered and facilities furnished for trade and commerce. It is a tax or a duty that is prohibited: something imposed by virtue of sovereignty, not claimed in right of proprietorship. Wharfage is of the latter character. Providing a wharf to which vessels may make fast, or at which they may conveniently load or unload, is rendering them a service. The character of the service is the same whether the wharf is built and offered for use by a State, a municipal corporation, or a private individual; and, when compensation is demanded for the use of the wharf, the demand is an assertion, not of sovereignty, but of a right of property. A passing vessel may use the wharf or not, at its election, and thus may incur liability for wharfage or not, at the choice of the master or owner. No one would claim that a demand of compensation for the use of a dry-dock for repairing a vessel, or a demand for towage in a harbor, would be a demand of a tonnage tax, no matter whether the dock was the property of a private individual or of a State, and no matter whether proportioned or not to the size or tonnage of the vessel. There is no essential difference between such a demand and one for the use of a wharf. It has always been held that wharfage dues may be exacted; and it is believed that they have been collected in ports where the wharves have belonged to the State or a municipal corporation ever since the adoption of the Constitution. In Cannon *v.* New Orleans, 20 Wall. 577, this court, while holding an ordinance void that fixed dues upon steamboats which should moor or land in any part of the port of New Orleans, measured by the number of tons of the boats, because substantially a tax for the privilege of stopping in the port, and, therefore, a duty or tonnage, carefully guarded the right to exact wharfage. The language of the court was: "In saying this (namely, denying the validity of the ordinance then before it), we do not understand that this principle interposes any hindrance to the recovery from any vessel landing at a wharf or pier owned by an individual, or by a municipal or other corporation, a just compensation for the use of such property. It is a doctrine too well settled, and a practice too common and too essential to the interests of commerce and navigation, to admit of a doubt, that for the use of such structures, erected by individual enterprise

and recognized everywhere as private property, a reasonable compensation can be exacted. And it may be safely admitted, also, that it is within the power of the State to regulate this compensation, so as to prevent extortion, a power which is often very properly delegated to the local municipal authority. Nor do we see any reason why, when a city or other municipality is the owner of such structures, built by its own money, to assist vessels landing within its limits in the pursuit of their business, the city should not be allowed to exact and receive this reasonable compensation as well as individuals."

No doubt, neither a State nor a municipal corporation can be permitted to impose a tax upon tonnage under cover of laws or ordinances ostensibly passed to collect wharfage. This has sometimes been attempted, but the ordinances will always be carefully scrutinized. In Cannon *v.* New Orleans, the ordinance was held invalid, not because the charge was for wharfage, nor even because it was proportioned to the tonnage of the vessels, but because the charge was not for wharfage or any service rendered. It was for stopping in the harbor, though no wharf was used. Such, also, was Northwestern Packet Co. *v.* St. Paul, 3 Dill. 454. So, in Steamship Co. *v.* Port Wardens, 6 Wall. 31, the statute held void imposed a tax upon every ship entering the port. This was held to be alike a regulation of commerce and a duty of tonnage. It was a sovereign exaction, not a charge for compensation. Of the same character was the tax held prohibited in Peete *v.* Morgan, 19 id. 581.

It is insisted, however, on behalf of the plaintiffs in error, that the charge prescribed by the ordinance must be considered as an imposition of a duty of tonnage, because it is regulated by and proportioned to the number of tons of the vessels using the wharf; and the argument is attempted to be supported by the ruling of this court in State Tonnage Tax Cases, 12 Wall. 204. But this is a misconception of those cases. The statute of Alabama declared invalid was not a provision to secure or regulate compensation for wharfage, or for any services rendered to the vessels taxed. It imposed a tax "upon all steamboats, vessels, and other water-crafts plying in the navigable waters of the State," to be levied "at the rate of one dollar per ton of the registered tonnage thereof." It did not tax the boats as property in proportion to their value, but according to their capacity, or, as was said, "solely and exclusively on the basis of their cubical contents, as ascertained by the rules of admeasurement and computation prescribed by Congress." It was the nature of the tax or duty, coupled with the mode of assessing it, which made the law a violation of the Constitution. As stated, the vessels taxed were such as were plying in the navigable waters of the State. If not plying in those waters, they were not taxed. The tax was, therefore, an impediment to navigation in those waters, which led the court to say that it was as instruments of commerce and not as property the vessels were required to contribute to the revenues of the State. The

fact that the tax was proportioned to the tonnage of the vessels taxed was relied upon only as supporting the conclusion that they were not taxed as property, but as instruments of commerce; and the court, in view of all these considerations, remarked, "Beyond all question, the act is an act to raise revenue without any corresponding or equivalent benefit or advantage to the vessels taxed or to the ship-owners, and consequently it is not to be upheld by virtue of the rules applied in the construction of laws regulating pilot dues and port charges." Nothing in these cases justifies the assertion that either wharfage or port charges are duties of tonnage, merely because they are proportioned to the actual tonnage or cubical capacity of vessels. It would be a strange misconception of the purpose of the framers of the Constitution were its provisions thus understood. What was intended by the provisions of the second clause of the tenth section of the first article was to protect the freedom of commerce, and nothing more. The prohibition of a duty of tonnage should, therefore, be construed so as to carry out that intent. A mere adherence to the letter, without reference to the spirit and purpose, may in this case mislead, as it has misled in other cases. It cannot be thought the framers of the Constitution, when they drafted the prohibition, had in mind charges for services rendered or for conveniences furnished to vessels in port, which are facilities to commerce rather than hindrances to its freedom; and, if such charges were not in mind, the mode of ascertaining their reasonable amount could not have been. In Cooley *v.* The Board of Port Wardens, 12 How. 299, this court recognized a clear distinction between wharfage and duties on imports or exports, or duties on tonnage. Referring to the second paragraph of sect. 10, art. 1, of the Constitution, Curtis, J., speaking for the court, said: "This provision of the Constitution was intended to operate upon subjects actually existing and well understood when the Constitution was formed. Imposts, and duties on imports, exports, and tonnage, were then known to the commerce of the civilized world to be as distinct from fees and charges for pilotage, and from the penalties by which commercial States enforced their laws, as they were from charges for wharfage or towage, or any other local port charges for services rendered to vessels or cargoes, and to declare that such pilot fees or penalties are embraced within the words imposts, or duties on imports, exports, or tonnage, would be to confound things essentially different, and which must have been known to be actually different by those who used this language. . . . It is the thing and not the name that it is to be considered."

For these reasons, we hold that the ordinance cannot be considered as imposing a duty of tonnage, and what we have said is sufficient to show that most of the other objections of the plaintiffs in error to its validity have no substantial foundation. It is in no sense a regulation of commerce between the States, nor does it impose duties upon vessels bound to or from one State to another, nor compel entry or

clearance in the port of Keokuk; nor is it contrary to the compact contained in the ordinance of 1787, since it levies no tax for the navigation of the river; nor is it in conflict with the act of Congress respecting the enrolment and license of vessels for the coasting trade. All these objections rest on the mistaken assumption that port charges, and especially wharfage, are taxes, duties, and restraints of commerce.

In nothing that we have said do we mean to be understood as affirming that a city can, by ordinance or otherwise, charge or collect wharfage for merely entering its port, or stopping therein, or for the use of that which is not a wharf, but merely the natural and unimproved shore of a navigable river. Such a question does not arise in this case. The record shows that the wharfage charged to these plaintiffs in error was for the use of a wharf, built, paved, and improved by the city at large expense. So far as the ordinance imposes and regulates such a charge, it is not obnoxious to the accusation that it is in conflict with the Constitution. A different question would be presented had the steamboats landed at the bank of the river where no wharf had been constructed or improvement made to afford facilities for receiving or discharging cargoes. We adhere to all that was decided in Cannon *v.* New Orleans. In that case, the city ordinance imposed what were called "levee dues" on all steamboats that should moor or land in any part of the harbor of New Orleans. It was subsequently amended by the substitution of the words "levee and wharfage dues" for "levee dues;" but, even as amended, it did not profess to demand wharfage. The plaintiff filed a petition for an injunction against the collection of the dues prescribed by it, and for the recovery of those he had been compelled to pay. It did not appear that he had ever made use of any wharf or improved levee; and what we decided was, that the city could not impose a charge for merely stopping in the harbor. The case in hand is different. The ordinance of Keokuk has imposed no charge upon these plaintiffs which it was beyond the power of the city to impose. To the extent to which they are affected by it there is no valid objection to it. Statutes that are constitutional in part only will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are severable. We think a severance is possible in this case. It may be conceded the ordinance is too broad, and that some of its provisions are unwarranted. When those provisions are attempted to be enforced, a different question may be presented.

*Judgment affirmed.*

## TRANSPORTATION COMPANY *v.* WHEELING.

99 United States, 273. 1878.

Mr. Justice Clifford delivered the opinion of the court.

Power to impose taxes for legitimate purposes resides in the States as well as in the United States; but the States cannot, without the consent of Congress, lay any duty of tonnage, nor can they levy any imposts or duties on imports or exports except what may be absolutely necessary for executing their inspection laws, as without the consent of Congress they are prohibited from exercising any such power. Outside of those prohibitions the power of the States extends to all objects within their sovereign power, except the means and instruments of the Federal government. State Tonnage Tax Cases, 12 Wall. 204, 212.

Taxes levied by a State upon ships or vessels as instruments of commerce and navigation are within the clause of the Constitution which prohibits the States from levying any duty of tonnage without the consent of Congress; and it makes no difference whether the ships or vessels taxed belong to the citizens of the State which levies the tax or to the citizens of another State, as the prohibition is general, withdrawing altogether from the States the power to lay any duty of tonnage under any circumstances, without the consent of Congress.

Pending the controversy in the subordinate State court, the parties by consent filed in the case an agreed statement of facts, from which and the pleadings it appears that the plaintiffs commenced an action of assumpsit against the defendants to recover back certain sums of money which the latter involuntarily paid to the former as taxes wrongfully assessed, as they allege, upon four certain steamboats which they owned, and which for four years or more they employed in carrying passengers and freight between the port of Wheeling and other ports on the Ohio River.

It appears that the plaintiffs are an incorporated company organized under the law of the State, and that the defendants are a municipal corporation chartered as a city under the law of the same State. Authority is vested in the city to assess, levy, and collect an annual tax, under such regulations as they may prescribe by ordinance for the use of the city, on personal property in the city, not to exceed in any one year fifty cents on every one hundred dollars of the assessed valuation thereof. By the same law it is provided that personal property shall be deemed to include all subjects of taxation which the assessors, acting under the laws of the State, are or shall be by law required to enter on their books as such property for the purpose of State taxation. Pursuant to that law, taxes were assessed for the several years mentioned against the plaintiffs for

the appraised value of the four steamboats and the furniture of the same, which they owned and used as aforesaid, it appearing that the plaintiffs' principal place of business was Wheeling, and that three of the steamboats were usually lying at the wharf or at the bank of the river within the corporate limits of the city.

Throughout the whole period each of the steamboats was duly enrolled and licensed as coasting vessels under the laws of the United States, and the agreed statement shows that the plaintiffs paid for each all dues, fees, and charges which were properly demandable under those laws. Payment of the taxes was made under protest and in order to escape the seizure and sale of the steamboats.

Service was made, and the parties having waived a jury and filed an agreed statement of facts as before stated, submitted the case to the court of original jurisdiction. Hearing was had, and the court rendered judgment in favor of the defendants. Exceptions were filed by the plaintiffs, and they removed the case into the Supreme Court of the State, called the Court of Appeals where the judgment of the subordinate court was affirmed. Though defeated in both of the State courts, the plaintiffs sued out the present writ of error and removed the cause into this court.

Since the transcript was entered here, the plaintiffs have assigned for error that the State Court of Appeals erred in holding that the taxes levied are not within the constitutional prohibition that no State, without the consent of Congress, shall lay any duty of tonnage.

Ships or vessels of ten or more tons burden, duly enrolled and licensed, if engaged in commerce on waters which are navigable by such vessels from the sea, are ships and vessels of the United States, entitled to the privileges secured to such vessels by the act for enrolling and licensing ships or vessels to be employed in the coasting trade. 1 Stat. 205, 287.

Authorities to show that the States are prohibited from subjecting any such ship or vessel to any duty of tonnage is scarcely necessary, as that proposition is universally admitted; the only question which can properly arise in the case presented for decision being whether the tax as imposed by State authority is or is not a tonnage duty, within the meaning of the Consitution. Tonnage duties cannot be levied; but it is too well settled to admit of question that taxes levied by a State, upon ships or vessels owned by the citizens of the State, as property, based on a valuation of the same as property, to the extent of such ownership, are not within the prohibition of the Constitution.

Power to tax for the support of the State governments exists in the States independently of the national government; and it may well be assumed that where there is no cession of contradictory or inconsistent jurisdiction in the United States, nor any restraining compact in the Constitution, the power in the States to tax for the

support of the State authority reaches all the property within the State which is not properly regarded as the instruments or means of the Federal government. Nathan *v.* Louisiana, 8 How. 73; Brown *v.* Maryland, 12 Wheat. 419; Weston *v.* City Council of Charleston, 2 Pet. 449.

Beyond question these authorities show that all subjects over which the sovereign power of a State extends are objects of taxation, the rule being that the sovereignty of a State extends to everything which exists by its own authority or is introduced by its permission, except those means which are employed by Congress to carry into execution the powers given by the people to the Federal government, whose laws, made in pursuance of the Constitution, are supreme. McCulloch *v.* Maryland, 4 Wheat. 429; Savings Society *v.* Coite, 6 Wall. 604.

Annual taxes upon ships and vessels for the support of the State governments as property, upon a valuation as other personal property, are everywhere laid; nor is it believed that it requires much argument to prove that the opposite theory is unsound and indefensible in principle, as it is contrary to the generally received opinion, and wholly unsupported by any judicial determination. Instead of that, there are many cases in which the courts, in refuting the authority of the States to lay duties of tonnage, have admitted that the owners of ships may be taxed to the extent of their interest in the same, for the value of the property. Assessments of the kind, when levied for municipal purposes, must be made against the owner of the property, and can only be made in the municipality where the owner resides.

Though a ship, when engaged in the transportation of passengers, said Mr. Chief Justice Taney, is a vehicle of commerce and within the power of regulation granted to Congress, yet it has always been held that the power to regulate commerce, as conferred, does not give to Congress the power to tax the ship, nor prohibit the State from taxing it as the property of the owner, when he resides within their own jurisdiction; and he adds, that the authority of Congress to tax ships is derived from the express grant of power in the eighth section of the first article, to lay and collect taxes, duties, imports, and excises; and that the inability of the States to tax the ship as an instrument of commerce arises from the express prohibition contained in the tenth section of the same article. Passenger Cases, 7 How. 283, 479.

Support to that view is also derived from one of the numbers of the Federalist, which has ever been regarded as entitled to weight in any discussion as to the true intent and meaning of the provisions of our fundamental law. It is there maintained that no right of taxation which the States had previously enjoyed was surrendered, unless expressly prohibited; and that the right of the States to tax was not impaired by any affirmative grant of power to the general

government; that duties on imports were a part of the taxing power; and that the States would have had a right, after the adoption of the Constitution, to lay duties on imports and exports if they had not been expressly prohibited from doing so by that instrument. Federalist, No. 32. From which it follows, if the writer of that publication is correct, that the power granted to regulate commerce did not prohibit the States from laying import duties upon merchandise imported from foreign countries; that the commercial clause does not apply to the right of taxation in either sovereignty, the taxing power being a distinct and separate power from the power to regulate commerce; and that the right of taxation in the States remains over every subject where it before existed, with the exception only of those expressly or impliedly prohibited.

Neither imposts nor duties on imports or exports can be levied by a State, except what may be absolutely necessary for executing its inspection laws, nor can a State levy any duty of tonnage without the consent of Congress. State power of taxation is doubtless very comprehensive; but it is not without limits, as appears from what has already been remarked, to which it may be added, that State tax laws cannot restrain the action of the national authority, nor can they abridge the operation of any law which Congress may constitutionally pass. They may extend to every object of value, not excepted as aforesaid, within the sovereignty of the State; but they cannot reach the means and instruments of the Federal government, nor the administration of justice in the Federal courts, nor the collection of the public revenue, nor interfere with any constitutional regulation of Congress.

Power to tax its citizens or subjects in some form is an attribute of every government, residing in it as part of itself; and hence it follows that the power to tax may be exercised at the same time upon the same objects of private property by the State and by the United States, without inconsistency or repugnancy. McCulloch *v.* Maryland, *supra;* Providence Bank *v.* Billings, 4 Pet. 514.

Such power exists in the State as one conferred or not prohibited by the State constitution, and in the Congress by express grant. Hence the existence of such powers is perfectly consistent, though the two governments, in exercising the same, act entirely independent of each other as applied to the property of the citizens.

Legislative power to tax, as a general proposition, extends to all proper objects of taxation within the sovereign jurisdiction of a State; but the power of a State of the Union to lay taxes does not extend to the instruments of the national government, nor to the constitutional means to carry into execution the powers conferred by the Federal Constitution. Tax laws of the State cannot restrain the action of the national government, nor can they circumscribe the operation of any constitutional act of Congress. They may extend to every object of value belonging to the citizen within the

sovereignty of the State, not within the express exemptions of the Constitution, or those which are necessarily implied as falling within the category of means or instruments to carry into execution the powers granted by the fundamental law. Day *v.* Buffington, 3 Cliff. 387.

Power to levy taxes, said Mr. Chief Justice Marshall, could not be considered as abridging the right of the States on that subject, it being clear that the States might have exercised the power to levy duties on imports or exports had the Constitution contained no prohibition upon the subject; from which he deduces the proposition that the prohibition is an exception from the acknowledged power of the States to levy taxes, and that the prohibition is not derived from the power of Congress to regulate commerce. Gibbons *v.* Ogden, 9 Wheat. 201.

States, said Mr. Justice McLean, cannot regulate foreign commerce; but he held in the same case that they may tax a ship or other vessel used in commerce the same as other property owned by its citizens, or they may tax the stages in which the mail is transported, as that does not regulate the conveyance of the mail any more than the taxing the ship regulates commerce, though he admitted that the tax in both instances affected in some degree the use of the property, which undoubtedly is correct. Passenger Cases, *supra*.

Enrolled vessels engaged in conveying passengers and freight, which were owned by citizens of the State of New York, entered the port of San Francisco, and while there were compelled to pay certain taxes. Payment having been made under protest the owners of the vessels brought suit to recover back the amount; and Mr. Justice Nelson, in disposing of the case here, in behalf of the court, held "that the vessels were not in any proper sense abiding within the limits of California so as to become incorporated with the other personal property of the State; that they were there but temporarily engaged in lawful trade and commerce, with their *situs* at the home port, where the vessels belonged and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid"— which shows to a demonstration that the owners of ships and vessels are liable to taxation for their interest in the same upon a valuation as for other personal property. Hays *v.* Pacific Mail Steamship Co., 17 How. 596, 599.

Ships, when duly registered or enrolled, are instruments of commerce, and are to be regarded as means employed by the United States in execution of the powers of the Constitution, and therefore they are not subject to State regulations. Sinnot *v.* Davenport, 22 id. 227.

Such instruments or means are not given by the people of a particular State, but by the people of all the States, and upon principle as well as authority should be subjected to that government only which belongs to all.

Taxation, beyond all doubt, is the exercise of a sovereign power, and it must be admitted that all subjects over which the sovereign power of a State extends are objects of taxation; but it is equally clear that those objects over which it does not extend are exempt from State taxation, — from which it follows that the means and instruments of the general government are exempt from taxation. McCulloch *v.* Maryland, *supra.*

Tonnage duties on ships by the States are expressly prohibited, but taxes levied by a State upon ships or vessels owned by the citizens of the State as property, based on a valuation of the same as property, are not within the prohibition, for the reason that the prohibition, when properly construed, does not extend to the investments of the citizens in such structures.

Duties of tonnage, says Cooley, the States are forbidden to lay; but he adds that the meaning of the prohibition seems to be that vessels must not be taxed as vehicles of commerce, according to capacity, it being admitted that they may be taxed like other property. Cooley, Const. Lim. (4th ed.), 606.

"Vessels are taxable as property," says the same author; and he adds that "possibly the tax may be measured by the capacity, when they are taxed only as property and not as vehicles of commerce;" which may be true if it clearly appears that the tax is to the owner in the locality of his residence, and is not a tax upon the ship as an instrument of commerce. Cooley, Taxation, 61.

"Whatever more general or more limited view may be entertained of the true meaning of this clause," says Mr. Justice Miller, "it is perfectly clear that a duty, tax, or burden imposed under the authority of the State, which is by the law imposing it to be measured by the capacity of the vessel, and is in its essence a contribution claimed for the privilege of arriving and departing from a port in the United States, is within the prohibition." Cannon *v.* New Orleans, 20 Wall. 577; Peete *v.* Morgan, 19 id. 581; State Tonnage Tax Cases, 12 id. 204.

Decided cases of the kind everywhere deny to the States the power to tax ships as the instruments of commerce, but they all admit, expressly or impliedly, that the State may tax the owners of such personal property for their interest in the same. Corresponding views are expressed by Mr. Burroughs in his valuable treatise upon Taxation. He says that vessels of all kinds are liable to taxation as property in the same manner as other personal property owned by citizens of the State; that the prohibition only comes into play where they are not taxed in the same manner as the other property of the citizens, or where the tax is imposed upon the vessel as an instrument of commerce, without reference to the value as property. Burroughs, Taxation, 91; Johnson *v.* Drummond, 20 Gratt. (Va.), 419.

Property in ships and vessels, say the Court of Appeals of Mary-

land, before the Federal Constitution was adopted, was within the taxing power of the State; and they held that such property since that time, when belonging to a citizen of the State living within her territory and subject to her jurisdiction, and protected by her laws, is a part of his capital in trade, and, like other property, is the subject of State taxation. Howell *v.* The State, 3 Gill (Md.), 14; Perry *v.* Torrence, 8 Ohio, 522.

Beyond all doubt, the taxes in this case were levied against the owners as property, upon a valuation as in respect to all other personal property, nor is it pretended that the taxes were levied as duties of tonnage. Congress has prescribed the rates of measurement and computation in ascertaining the tonnage of American ships and vessels, and in the light of those regulations Burroughs says that the word "tonnage" means the contents of the vessel expressed in tons, each of one hundred cubical feet. p. 89.

Homans says that the word has long been an official term, intended originally to express the burden that a ship would carry, in order that the various dues and customs levied upon shipping might be imposed according to the size of the vessel, or rather in proportion to her capability of carrying burden. Homan's Dict., Com. and Nav., Tonnage.

Tested by these definitions and the authorities already cited, it is as clear as any thing in legal decision can be, that the taxes levied in this case are not duties of tonnage, within the meaning of the Federal Constitution. Taken as a whole, the contention of the plaintiffs is not that the taxes in question are duties of tonnage, but their proposition is that ships and vessels, when duly enrolled and licensed for the coasting trade, are not subject to State taxation in any form, and that the owners of the vessels cannot be taxed for the same as property, even when valued as other personal property, as the basis of State or municipal taxation.

Opposed as that theory is to the settled rule of construction, that the commercial clause of the Constitution neither confers, regulates, nor prohibits taxation, it is not deemed necessary to give the theory much further consideration. Gibbons *v.* Ogden, *supra*. By that authority it is settled that the power to tax, and the power to regulate and prohibit taxation, are given in the Constitution by separate clauses, and that those powers are altogether separate and distinct from the power to regulate commerce; from which it follows, as a necessary consequence, that the enrolment of a ship or vessel does not exempt the owner of the same from taxation for his interest in the ship or vessel as property, upon a valuation of the same as in the case of other personal property.

*Judgment affirmed.*

## SECTION III. — NATURALIZATION.

### BOYD v. THAYER.

143 United States, 135. 1892.

[A PROCEEDING by information was instituted in the Supreme Court of Nebraska by Thayer, who had been governor of the State and was entitled to hold the office until his successor was duly elected and qualified, to question the right of Boyd, who claimed to have been duly elected and to be qualified to hold that office. By the Constitution of Nebraska it is provided that no one shall be eligible as governor who has not for two years been a citizen of the United States and of the State. Relator claimed that respondent was not such citizen, and demurred to the answer setting up facts relied on to show such citizenship. The Supreme Court of Nebraska sustained this demurrer and entered up judgment of ouster as against respondent, reinstating the relator. A writ of error was thereupon sued out of the Supreme Court of the United States by Boyd, by which he sought to have the action of the State court reviewed on the ground that it involved the denial of a right or privilege under the Constitution and laws of the United States. The court, MR. JUSTICE FIELD, dissenting, held that the case was within its jurisdiction. Only so much of the opinion is given as is necessary to present the views of the court on the subject of naturalization.]

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

. . . . . .

Naturalization is the act of adopting a foreigner, and clothing him with the privileges of a native citizen, and relator's position is that such adoption has neither been sought nor obtained by respondent under the acts of Congress in that behalf.

Congress in the exercise of the power to establish a uniform rule of naturalization has enacted general laws under which individuals may be naturalized, but the instances of collective naturalization by treaty or by statute are numerous.

Thus, although Indians are not members of the political sovereignty, many classes of them have been made citizens in that way. Elk *v.* Wilkins, 112 U. S. 94. By the treaty of September 27, 1830, provision was made for such heads of families of the Choctaws as desired it, to remain and become citizens of the United States. 7 Stat. 335. By the treaty of December 29, 1835, such individuals

and families of the Cherokees as were averse to a removal west of the Mississippi and desirous to become citizens of the States where they resided were allowed to do so. Ibid. 483. By the act of Congress of March 3, 1843, it was provided that on the completion of certain arrangements for the partition of the lands of the tribe among its members, "the said Stockbridge tribe of Indians, and each and every of them, shall then be deemed to be, and from that time forth are hereby declared to be, citizens of the United States, to all intents and purposes, and shall be entitled to all the rights, privileges, and immunities of such citizens." 5 Stat. 647, c. 101, § 7. And such was the act of March 3, 1839, 5 Stat. c. 83, pp. 349, 351, relating to the Brothertown Indians of Wisconsin.

The act of Congress approved February 8, 1887, 24 Stat. 388, c. 119, was much broader, and by its terms made every Indian situated as therein referred to, a citizen of the United States.

Manifestly the nationality of the inhabitants of territory acquired by conquest or cession becomes that of the government under whose dominion they pass, subject to the right of election on their part to retain their former nationality by removal or otherwise, as may be provided.

All white persons or persons of European descent who were born in any of the colonies, or resided or had been adopted there, before 1776, and had adhered to the cause of independence up to July 4, 1776, were by the declaration invested with the privileges of citizenship. United States *v.* Ritchie, 17 How. 525, 539; Inglis *v.* Trustees of Sailors' Snug Harbor, 3 Pet. 99. In McIlvaine *v.* Coxe's Lessee, 4 Cranch, 209, it was held that Mr. Coxe had lost the right of election by remaining in New Jersey after she had declared herself a State, and had passed laws pronouncing him to be a member of the new government; but the right itself was not denied. Shanks *v.* Dupont, 3 Pet. 242.

Under the second article of Jay's treaty (8 Stat. 116, 117), British subjects who resided at Detroit before and at the time of the evacuation of the Territory of Michigan, and who continued to reside there afterwards without at any time prior to the expiration of one year from such evacuation declaring their intention of becoming British subjects, became *ipso facto* to all intents and purposes American citizens. Crane *v.* Reeder, 25 Mich. 303.

By section three of Article IV. of the Constitution, "new States may be admitted by the Congress into this Union." The section, as originally reported by the committee of detail, contained the language: "If the admission be consented to, the new State shall be admitted on the same terms as the original ones. But the legislature may make conditions with the new States concerning the public debt which shall be then subsisting." These clauses were stricken out, in spite of strenuous opposition, upon the view that wide latitude ought to be given to the Congress, and the denial of

any attempt to impede the growth of the western country. Madison Papers, 5 Elliot, 381, 492, 493; 3 Gilpin, 1456.

And paragraph two was added, that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

By article three of the treaty of Paris of 1803 (8 Stat. 200, 202), it was provided that "the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."

It was said by Mr. Justice Catron, in his separate opinion in Dred Scott v. Sandford, 19 How. 393, 525: "The settled doctrine in the State courts of Louisiana is, that a French subject coming to the Orleans Territory, after the treaty of 1803 was made, and before Louisiana was admitted into the Union, and being an inhabitant at the time of the admission, became a citizen of the United States by that act; that he was one of the inhabitants contemplated by the third article of the treaty, which referred to all the inhabitants embraced within the new State on its admission. That this is the true construction I have no doubt."

In Desbois's Case, 2 Martin, 185 (decided in 1812), one Desbois, of French birth, applied for a license to practise as a counsellor and attorney at law in the Superior Courts of Louisiana, and by one of the rules of the court the applicant could not be admitted unless he was a citizen of the United States. Desbois conceded that he had no claim to citizenship by birth nor by naturalization under the acts of Congress to establish a uniform rule on that subject, but he contended that there was a third mode of acquiring citizenship of the United States, namely, the admission into the Union of a State of which he was a citizen. He contended that as he had, in the year 1806, removed to and settled with his family in the city of New Orleans in the Territory of Orleans, in contemplation of the enjoyment of all the advantages which the laws of the Territory and of the United States held out to foreigners removing into that Territory, and had ever since considered it as his adopted country, he had become a citizen under the act of Congress of March 2, 1805, further providing for the territorial government of Orleans, the enabling act of February 20, 1811, and that of April 8, 1812, admitting the State.

Judge Martin, who delivered the opinion of the court, referred among other things to the fact that the act of Congress authorizing

the formation of the State government of Louisiana was almost literally copied from that which authorized that of Ohio, and, pointing out that by the first section of the latter statute the inhabitants of the designated Territory were authorized to form for themselves a State constitution, while by the fourth section the persons entitled to vote for members of the convention were described as, first, all male citizens of the United States, and next, all other persons having in all other respects the legal qualifications to vote for members of the general assembly of the Territory, which were a freehold of fifty acres of land in the district and citizenship of one of the States and residence in the district, or the like freehold and two years' residence in the district, said, "The word 'inhabitants,' in the first section of this act, must be taken *lato sensu;* it cannot be restrained so as to include citizens of the United States only; for other persons are afterwards called upon to vote. There is not any treaty, or other instrument, which may be said to control it. Every attempt to restrict it must proceed on principles absolutely arbitrary. If the word is to be taken *lato sensu* in the act passed in favor of the people of one Territory, is there any reason to say that we are to restrain it, in another act, passed for similar purposes, in favor of the people of another Territory ?"

And after an able discussion of the subject, he concluded that the applicant must be considered a citizen of the State of Louisiana, and entitled to all the rights and privileges of a citizen of the United States.

In 1813, in United States *v.* Laverty, 3 Martin, 733, Judge Hall of the District Court of the United States held that the inhabitants of the Territory of Orleans became citizens of Louisiana and of the United States by the admission of Louisiana into the Union; denied that the only constitutional mode of becoming a citizen of the United States is naturalization by compliance with the uniform rule established by Congress; and fully agreed with the decision in Desbois's case, which he cited. By the ordinance for the government of the Northwest Territory, of July 13, 1787, it was provided that as soon as there should be 5,000 free male inhabitants of full age in the district thereby constituted, they were to receive authority to elect representatives to a general assembly, and the qualifications of a representative in such cases were previous citizenship of one of the United States for three years and residence in the district, or a residence of three years in the district and a fee-simple estate of 200 acres of land therein. The qualifications of electors were a freehold in fifty acres of land in the district, previous citizenship of one of the United States, and residence, or the like freehold, and two years' residence in the district. And it was also provided that there should be formed in the Territory not less than three nor more than five States, with certain boundaries, and that whenever any such State should contain 60,000 free inhabitants,

such State should be admitted by its delegates in Congress on an equal footing with the original States in all respects whatever, and should be at liberty to form a permanent constitution and State government, provided it should be republican and in conformity with the articles of compact. 1 Stat. 51 *a*; Rev. Stat. 2d ed. Organic Laws, 13, 14.

Reference to the various acts of Congress creating the Indiana and Illinois Territories, 2 Stat. 58; 2 Stat. 514; the enabling acts under which the State governments of Ohio, Indiana, and Illinois were formed, 2 Stat. 173; 3 Stat. 289; 2 Stat. 428; and the act recognizing, and resolutions admitting, those States, 2 Stat. 201; 3 Stat. 399; 3 Stat. 536; and to their original constitutions; establishes that the inhabitants or people who were empowered to take part in the creation of these new political organisms, and who continued to participate in the discharge of political functions, included others than those who were originally citizens of the United States. And that the action of Congress was advisedly taken is put beyond doubt by the language used in the legislation in question.

In the case of the admission of Michigan this was strikingly shown. By the act of Congress of January 11, 1805, 2 Stat. 309, a part of the Indiana Territory was constituted the Territory of Michigan, and a government in all respects similar to that provided by the ordinance of 1787 was established. The act of February 16, 1819, 3 Stat. 482, authorized that Territory to send a delegate to Congress, and conferred the right of suffrage on the free white male citizens of the Territory who had resided therein one year next preceding the election and had paid county or territorial taxes. The act of March 3, 1823, 3 Stat. 769, provided that all citizens of the United States having the qualifications prescribed by the act of February 16, 1819, should be entitled to vote and be eligible to office. By an act of the territorial legislature of January 26, 1835, the free white male inhabitants of the Territory of full age, who had resided therein three months preceding "the fourth day of April next in the year one thousand eight hundred and thirty-five," were authorized to choose delegates to form a constitution and State government. Mich. Laws, 1835, pp. 72, 75. Delegates were elected accordingly, and a constitution completed June 29, 1835, and ratified by a vote of the people November 2, 1835, which provided that every white male citizen above the age of twenty-one years, who had resided in the State six months next preceding any election, should be entitled to vote at any election, "and every white male inhabitant of the age aforesaid, who may be a resident of the State at the time of the signing of this constitution, shall have the right of voting as aforesaid." 1 Charters and Constitutions, 983, 984. This constitution was laid before Congress by President Jackson in a special message, December 9, 1835,

and a bill was introduced for the admission of Michigan into the Union. While this was under consideration an amendment to the provision that on the assent being given by a convention of the people of Michigan to certain boundaries defined in the bill, the State should be admitted, to strike out the words "people of the said State" and insert "by the free male white citizens of the United States over the age of twenty-one years, residing within the limits of the proposed State," was voted down; as was also another amendment proposing to insert after that part of the bill which declared the constitution of the new State ratified and confirmed by Congress, the words "except that provision of said constitution by which aliens are permitted to enjoy the right of suffrage." The act was passed June 15, 1836, and the conditions imposed having been first rejected and then finally accepted, the State was admitted into the Union by the act of January 26, 1837.

In all these instances citizenship of the United States in virtue of the recognition by Congress of the qualified electors of the State as citizens thereof, was apparently conceded, and it was the effect in that regard that furnished a chief argument to those who opposed the admission of Michigan. It may be added as to that State that the State constitution of 1850, as amended in 1870, preserved the rights as an elector of "every male inhabitant, residing in the State on the 24th day of June, 1835." And in Attorney-General *v.* Detroit, 78 Mich. 545, 563, the Supreme Court of Michigan assigned as one of the reasons for holding the registry law under consideration invalid, that no provision was therein made for this class of voters, nor for the inhabitants who had resided in Michigan in 1850 and declared their intention to become citizens of the United States, who had the right to vote under the constitution of 1850.

The sixth article of the treaty of 1819 with Spain, 8 Stat. 256, contained a provision to the same effect as that in the treaty of Paris, and Mr. Chief Justice Marshall said (Amer. Ins. Co. *v.* Canter, 1 Pet. 511, 542): "This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government till Florida shall become a State. In the meantime, Florida continues to be a Territory of the United States; governed by virtue of that clause in the Constitution, which empowers Congress 'to make all needful rules and regulations, respecting the Territory, or other property belonging to the United States.'"

At the second session of the Twenty-seventh Congress, in the case of David Levy, who had been elected a delegate from the Territory of Florida, where it was alleged that he was not a citizen

of the United States, it was held by the House Committee on Elections that "it matters nothing whether the naturalization be effected by act of Congress, by treaty, or by the admission of new States, the provision is alike applicable."

The question turned on whether Mr. Levy's father was an inhabitant of Florida at the time of its transfer to the United States, as the son admitted that he was not a native-born citizen of the United States, but claimed citizenship through that of his father effected by the treaty while he was a minor. The argument of the report in support of the position that "no principle has been more repeatedly announced by the judicial tribunals of the country, and more constantly acted upon, than that the leaning, in questions of citizenship, should always be in favor of the claimant of it," and that liberality of interpretation should be applied to such a treaty, is well worthy of perusal. Contested Elections, 1834, 1835, 2d Session, 38th Congress, 41.

By the eighth article of the treaty with Mexico of 1848, those Mexicans who remained in the territory ceded, and who did not declare within one year their intention to remain Mexican citizens, were to be deemed citizens of the United States. 9 Stat. 930.

By the annexation of Texas, under a joint resolution of Congress of March 1, 1845, and its admission into the Union on an equal footing with the original States, December 29, 1845, all the citizens of the former republic became, without any express declaration, citizens of the United States. 5 Stat. 798; 9 Stat. 108; McKinney *v.* Saviego, 18 How. 235; Cryer *v.* Andrews, 11 Texas, 170; Barrett *v.* Kelly, 31 Texas, 476; Carter *v.* Territory, 1 N. Mex. 317.

It is too late at this day to question the plenary power of Congress over the Territories. As observed by Mr. Justice Matthews, delivering the opinion of the court in Murphy *v.* Ramsey, 114 U. S. 15, 44: "It rests with Congress to say whether, in a given case, any of the people, resident in the Territory, shall participate in the election of its officers, or the making of its laws; and it may, therefore, take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it as it may deem expedient. The right of local self-government, as known to our system as a constitutional franchise, belongs, under the Constitution, to the States and to the people thereof, by whom that Constitution was ordained, and to whom by its terms all power not conferred by it upon the government of the United States was expressly reserved. The personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, State and National; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States. . . . If we concede that this discretion in Con-

gress is limited by the obvious purposes for which it was conferred, and that those purposes are satisfied by measures which prepare the people of the Territories to become States in the Union, still the conclusion cannot be avoided, that the act of Congress here in question is clearly within that justification."

Congress having the power to deal with the people of the Territories in view of the future States to be formed from them, there can be no doubt that in the admission of a State a collective naturalization may be effected in accordance with the intention of Congress and the people applying for admission.

Admission on an equal footing with the original States, in all respects whatever, involves equality of constitutional right and power, which cannot thereafterwards be controlled, and it also involves the adoption as citizens of the United States of those whom Congress makes members of the political community, and who are recognized as such in the formation of the new State with the consent of Congress.

[The enabling act for the admission of Nebraska, and the proceedings had thereunder, are then set out.]

It follows from these documents that Congress regarded as citizens of the Territory all who were already citizens of the United States, and all who had declared their intention to become such. Indeed, they are referred to in section three of the enabling act as citizens, and by the organic law the right of suffrage and of holding office had been allowed to them. Those whose naturalization was incomplete were treated as in the same category as those who were already citizens of the United States. What the State had power to do after its admission is not the question. Before Congress let go its hold upon the Territory, it was for Congress to say who were members of the political community. So far as the original States were concerned, all those who were citizens of such States became upon the formation of the Union citizens of the United States, and upon the admission of Nebraska into the Union "upon an equal footing with the original States, in all respects whatsoever," the citizens of what had been the Territory became citizens of the United States and of the State.

As remarked by Mr. Chief Justice Waite in Minor *v.* Happersett, 21 Wall. 162, 167: "Whoever, then, was one of the people of either of these States when the Constitution of the United States was adopted, became *ipso facto* a citizen — a member of the nation created by its adoption. He was one of the persons associating together to form the nation and was, consequently, one of its original citizens. As to this there has never been a doubt. Disputes have arisen as to whether or not certain persons or certain classes of persons were part of the people at the time, but never as to their citizenship if they were."

But it is argued that James E. Boyd had never declared his

intention to become a citizen of the United States, although his father had, and that because, as alleged, his father had not completed his naturalization before the son attained his majority, the latter cannot be held to come within the purview of the acts of Congress relating to the Territory and the admission of the State, so as to be entitled to claim to have been made a citizen thereby.

The act of March 26, 1790, 1 Stat. 103, provided for the naturalization of aliens, and then that "the children of such persons so naturalized, dwelling within the United States, being under the age of twenty-one years at the time of such naturalization, shall also be considered as citizens of the United States."

The third section of the act of January 29, 1795, 1 Stat. 414, 415, provided "that the children of persons duly naturalized, dwelling within the United States, and being under the age of twenty-one years, at the time of such naturalization, and the children of citizens of the United States, born out of the limits and jurisdiction of the United States, shall be considered as citizens of the United States," &c.

The fourth section of the act of April 14, 1802, 2 Stat. 153, 155, carried into the Revised Statutes as section 2172, was: "That the children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject, by the government of the United States, may have become citizens of any one of the said States, under the laws thereof, being under the age of twenty-one years, at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States." In Campbell *v.* Gordon, 6 Cranch, 176, it was held that this section conferred the rights of citizenship upon the minor child of a parent who had been duly naturalized under the act of 1795, although the child did not become a resident of the United States until she came here after that, but before the act of 1802 was passed.

The rule was to be a uniform rule, and we perceive no reason for limiting such a rule to the children of those who had been already naturalized. In our judgment the intention was that the act of 1802 should have a prospective operation. United States *v.* Kellar, 13 Fed. Rep. 82; West *v.* West, 8 Paige, 433; State *v.* Andriano, 92 Mo. 70; State *v.* Penney, 10 Ark. 621; O'Connor *v.* The State, 9 Fla. 215.

By the second section of the act of March 26, 1804, 2 Stat. 292, p. 293, if any alien who had complied with the terms of the act should die without having completed his naturalization, his widow and children should be considered citizens upon taking the oaths prescribed by law; and this was carried forward into section 2168 of the Revised Statutes.

By the first section of the act of May 26, 1824, 4 Stat. 69.

carried forward into section 2167 of the Revised Statutes, any alien, being a minor, who shall have resided in the United States three years next preceding his arrival at majority and continued to reside therein, may, upon reaching the age of twenty-one years, and after a residence of five years, including the three years of minority, be admitted a citizen of the United States without having made during minority the declaration of intention required in the case of aliens.

The statutory provisions leave much to be desired, and the attention of Congress has been called to the condition of the laws in reference to election of nationality; and to the desirability of a clear definition of the status of minor children of fathers who had declared their intention to become citizens, but had failed to perfect their naturalization; and of the status gained by those of full age by the declaration of intention. 2 Whart. Int. Dig. 340, 341, 350.

Clearly minors acquire an inchoate status by the declaration of intention on the part of their parents. If they attain their majority before the parent completes his naturalization, then they have an election to repudiate the status which they find impressed upon them, and determine that they will accept allegiance to some foreign potentate or power rather than hold fast to the citizenship which the act of the parent has initiated for them. Ordinarily this election is determined by application on their own behalf, but it does not follow that an actual equivalent may not be accepted in lieu of a technical compliance.

James E. Boyd was born in Ireland of Irish parents in 1834, and brought to this country in 1844 by his father, Joseph Boyd, who settled at Zanesville, Muskingum County, Ohio, and on March 5, 1849, declared his intention to become a citizen of the United States. In 1855 James E. Boyd, who had grown up in the full belief of his father's citizenship, and had been assured by him that he had completed his naturalization by taking out his second papers in 1854, voted in Ohio as a citizen. In August, 1856, he removed to the Territory of Nebraska. In 1857 he was elected and served as county clerk of Douglas County; in 1864 he was sworn into the military service and served as a soldier of the Federal government to defend the frontier from an attack of Indians; in 1866 he was elected a member of the Nebraska legislature and served one session; in 1871 he was elected a member of the convention to frame a State constitution and served as such; in 1875 he was again elected and served as a member of the convention which framed the present State constitution; in 1880 he was elected and acted as president of the city council of Omaha; and in 1881 and 1885, respectively, was elected mayor of that city, serving in all four years. From 1856 until the State was admitted, and from thence to this election, he had voted at every election, territorial, State,

municipal, and national. He had taken, prior to the admission of the State, the oath required by law in entering upon the duties of the offices he had filled, and sworn to support the Constitution of the United States and the provisions of the organic act under which the Territory of Nebraska was created. For over thirty years prior to his election as governor he had enjoyed all the rights, privileges, and immunities of a citizen of the United States and of the Territory and State, as being in law, as he was in fact, such citizen.

When he removed to Nebraska, that Territory was to a large extent a wilderness, and he spent years of extreme hardship upon the frontier, one of the pioneers of the new settlement and one of the inhabitants who subsequently formed a government for themselves. The policy which sought the development of the country by inviting to participation in all the rights, privileges, and immunities of citizenship, those who would engage in the labors and endure the trials of frontier life, which has so vastly contributed to the unexampled progress of the nation, justifies the application of a liberal rather than a technical rule in the solution of the question before us.

We are of opinion that James E. Boyd is entitled to claim that if his father did not complete his naturalization before his son had attained majority, the son cannot be held to have lost the inchoate status he had acquired by the declaration of intention, and to have elected to become the subject of a foreign power, but, on the contrary, that the oaths he took and his action as a citizen entitled him to insist upon the benefit of his father's act, and placed him in the same category as his father would have occupied if he had emigrated to the Territory of Nebraska; that, in short, he was within the intent and meaning, effect and operation, of the acts of Congress in relation to citizens of the Territory, and was made a citizen of the United States and of the State of Nebraska under the organic and enabling acts and the act of admission.

[Another line of reasoning is then stated leading to the same result, the reversal of the decision of the State court. MR. JUSTICE HARLAN, MR. JUSTICE GRAY, and MR. JUSTICE BROWN concur in the result on this second line of reasoning.]

[As to citizenship of inhabitants of territory annexed to the United States see the case of DOWNES v. BIDWELL, 182 U. S. 244, in Appendix B, at p.1119.]

## In re RODRIGUEZ.

81 Federal Reporter, 337. 1897.

[United States District Court; Western District of Texas.]

At the May term, 1896, of this court, Ricardo Rodriguez, a citizen of Mexico, filed an application, in due form, by which he sought to become a naturalized citizen of the United States. Two affidavits, embodying the essential requisites prescribed by the naturalization laws, accompanied the application, and also a copy of the affidavit made by the applicant, and filed in the county court of Bexar County, Tex., January 25, 1893, in which he declared his intention to become a citizen of the United States.

Maxey, District Judge, after stating the case, delivered the following opinion: —

. . . . . .

The applicant, a citizen by birth of the republic of Mexico, desires to avail himself of the inherent right of expatriation, and to invest himself with the rights and privileges pertaining to citizenship of our country. Although forty-nine years have elapsed since the negotiation of the treaty of Guadalupe-Hidalgo, which greatly increased our territorial area, and incorporated many thousands of Mexicans into our common citizenship, as will be hereinafter shown, the question of the individual naturalization of a Mexican citizen is now for the first time, so far as the court is advised, submitted for judicial determination. To the question, why may not he be naturalized under the laws of Congress? it is replied that by section 2169 of the Revised Statutes it is provided: "The provisions of this title shall apply to aliens (being free white persons, and to aliens) of African nativity, and to persons of African descent." The contention is that, by the letter of the statute, a Mexican citizen, answering to the description of the applicant, is, because of his color, denied the right to become a citizen of the United States by naturalization; and, in support of this view, the following authorities are relied upon: *In re* Ah Yup (decided by Judge Sawyer in 1878), 5 Sawy. 155, 1 Fed. Cas. 223; *In re* Camille (decided by Judge Deady in 1880), 6 Fed. 256; *In re* Kanaka Nian (decided by Supreme Court of Utah in 1889), 21 Pac. 993; *In re* Saito (decided by Judge Colt in 1894), 62 Fed. 126; and 2 Kent, Comm. 73, where the learned Chancellor expresses a doubt in these words: "Perhaps there might be difficulties also as to the copper-colored natives of America, or the yellow or tawny races of Asiatics, and it may well be doubted whether any of them are white persons, within the purview of the law."

Of the four cases above cited, *In re* Ah Yup is the first in point of time, and the leading one. The four applications were denied, Ah

Yup being a native of China, Camille a native of British Columbia, and of half Indian and half white blood, Nian a native of the Hawaiian Islands, whose ancestors were Kanakas, and Saito a native of Japan. When the case of Ah Yup was decided, the Chinese question was flagrant on the Pacific slope, and Judge Sawyer seemed to think, predicating his conclusion upon the debates in Congress, that the purpose of the amendment extending the right of naturalization to Africans and persons of African descent was to exclude Chinese from the benefits of naturalization. To quote his own language: —

"Many other senators spoke pro and con on the question, this being the point of the contest, and these extracts being fair examples of the opposing opinions. . . . It was finally defeated [the amendment to strike the word 'white' from the naturalization laws]; and the amendment cited, extending the right of naturalization to the African only, was adopted. It is clear from these proceedings that Congress retained the word 'white' in the naturalization laws for the sole purpose of excluding the Chinese from the right of naturalization. . . . Thus, whatever latitudinarian construction might otherwise have been given to the term 'white person,' it is entirely clear that Congress intended by this legislation to exclude Mongolians from the right of naturalization. I am therefore of the opinion that a native of China, of the Mongolian race, is not a white person, within the meaning of the act of Congress. The second question is answered in the discussion of the first. The amendment is intended to limit the operation of the provision as it then stood in the Revised Statutes. It would have been more appropriately inserted in section 2165 than where it is found, in section 2169. But the purpose is clear. It was certainly intended to have some operation, or it would not have been adopted. The purpose undoubtedly was to restore the law to the condition in which it stood before the revision, and to exclude the Chinese. It was intended to exclude some classes, and, as all white aliens and those of the African race are entitled to naturalization under other words, it is difficult to perceive whom it could exclude, unless it be the Chinese."

The opinion of Judge Sawyer is by no means decisive of the present question, as his language may well convey the meaning that the amendment of the naturalization statutes referred to by him was intended solely as a prohibition against the naturalization of members of the Mongolian race. The naturalization of Chinese is, however, no longer an open question, as section 14 of the act of May 6, 1882, expressly provides "that hereafter no State court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed." 22 Stat. 61.

If Chinese were denied the right to become naturalized citizens under laws existing when *In re* Ah Yup was decided, why did Congress subsequently enact the prohibitory statute above quoted? Indeed, it is a debatable question whether the term "free white person," as

used in the original act of 1790, was not employed for the sole purpose of withholding the right of citizenship from the black or African race and the Indians then inhabiting this country. But it is not necessary to enter upon a discussion of that question; nor is it deemed material to inquire to what race ethnological writers would assign the present applicant. If the strict scientific classification of the anthropologist should be adopted, he would probably not be classed as white. It is certain he is not an African, nor a person of African descent. According to his own statement, he is a "pure-blooded Mexican," bearing no relation to the Aztecs or original races of Mexico. Being, then, a citizen of Mexico, may he be naturalized pursuant to the laws of Congress? If debarred by the strict letter of the law from receiving letters of citizenship, is he embraced within the intent and meaning of the statute? If he falls within the meaning and intent of the law, his application should be granted, notwithstanding the letter of the statute may be against him.

[Various treaties and other public acts of the United States are referred to, bearing upon citizenship of persons residing in the territory acquired by the United States from Mexico.]

When all the foregoing laws, treaties, and constitutional provisions are considered, which either affirmatively confer the rights of citizenship upon Mexicans, or tacitly recognize in them the right of individual naturalization, the conclusion forces itself upon the mind that citizens of Mexico are eligible to American citizenship, and may be individually naturalized by complying with the provisions of our laws.

. . . . . .

## SECTION IV. — BANKRUPTCY.

### BALDWIN *v.* HALE.

1 Wallace, 223. 1863.

[THIS was an action brought in the Circuit Court of the United States for the District of Massachusetts, by Hale against Baldwin, on a promissory note.

Baldwin executed at Boston in the State of Massachusetts his promissory note for two thousand dollars, payable there to his own order, and subsequently indorsed such note to Hale. Subsequently Baldwin had a certificate of discharge in a proceeding in the Court of

Insolvency of the State of Massachusetts, which certificate embraced by its terms all contracts to be performed within the State of Massachusetts; but in this insolvency proceeding Hale did not prove his debt nor take any part.

At the time of the execution of the note, and also at the commencement of this suit, Hale was a citizen of the State of Vermont, and Baldwin was a citizen of the State of Massachusetts.

Baldwin relied on the certificate of discharge in the insolvency proceeding as a bar to the action, but the court below did not sustain this contention and rendered judgment against him. Whereupon he brought the case to this court by writ of error to have a determination by this court of the correctness of the ruling of the lower court as to the effect of this discharge upon the indebtedness to Hale.]

Mr. Justice Clifford, after stating the case, delivered the opinion of the court.

Contract was made in Boston, and was to be performed at the place where it was made, and upon that ground it is contended by the defendant that the certificate of discharge is a complete bar to the action. But the case shows that the plaintiff was a citizen of Vermont, and inasmuch as he did not prove his debt against the defendant's estate in insolvency, nor in any manner become a party to those proceedings, he insists that the certificate of discharge is a matter *inter alios*, and wholly insufficient to support the defence.

Adopting the views of the court in Scribner *et al. v.* Fisher, 2 Gray, 43, the defendant concedes that the law is so, as between citizens of different States, except in cases where it appears by the terms of the contract that it was made and must be performed in the State enacting such insolvent law. Where the contract was made and is by its terms to be performed in the State in which the certificate of discharge was obtained, the argument is, that the discharge is entirely consistent with the contract, and that the certificate operates as a bar to the right of recovery everywhere, irrespective of the citizenship of the promisee. Plaintiff admits that a majority of the Supreme Court of Massachusetts, in the case referred to, attempted to maintain that distinction, but he insists that it is without any foundation in principle, and that the decisions of this court in analogous cases are directly the other way.

Controversies involving the constitutional effect and operation of State insolvent laws have frequently been under consideration in this court, and unless it be claimed that constitutional questions must always remain open, it must be conceded, we think, that there are some things connected with the general subject that ought to be regarded as settled and forever closed.

State legislatures have authority to pass a bankrupt or insolvent law, provided there be no act of Congress in force establishing a uniform system of bankruptcy, conflicting with such law; and, provided the law itself be so framed, that it does not impair the obliga-

tion of contracts. Such was the decision of this court in Sturges *v.* Crowninshield, 4 Wheat. 122, and the authority of that decision has never been successfully questioned. Suit was brought in that case against the defendant as the maker of two promissory notes. They were both dated at New York, on the 22d day of March, 1811, and the defendant pleaded his discharge under an act for the benefit of insolvent debtors and their creditors, passed by the legislature of New York subsequently to the date of the notes in controversy. Contracts in that case, it will be observed, were made prior to the passage of the law, and the court held, for that reason, that the law, or that feature of it, was unconstitutional and void, as impairing the obligation of contracts within the meaning of the Constitution of the United States. Suggestion is made that the ruling of the court in the case of McMillan *v.* McNeill, 4 Wheat. 209, decided at the same term, asserts a different doctrine, but we think not, if the facts of the case are properly understood.

Recurring to the statement of the case, it appears that the contract was made in Charleston, in the State of South Carolina, and it is true that both parties resided there at the time the contract was made, but the defendant subsequently removed to New Orleans, in the State of Louisiana, and it was in the latter State where he obtained the certificate of discharge from his debts. He was also one of a firm doing business in Liverpool, and a commission of bankruptcy had been issued there, both against him and his partner, and they respectively obtained certificates of discharge. Suit was brought in the District Court for the District of Louisiana, and the defendant pleaded those certificates of discharge in bar of the action, and the plaintiff demurred to the plea. Under that state of the case and of the pleadings, the court held that the certificate of discharge obtained in the State of Louisiana was no defence to the suit, and very properly remarked that the circumstance that the State law was passed before the debt was contracted made no difference in the application of the principle. Bearing in mind that the plaintiff was a citizen of South Carolina, and that the contract was made there, it is obvious that the remark of the court is entirely consistent with the decision in the former case.

Secondly, the court also held that a discharge under a foreign bankrupt law was no bar to an action in the courts of the United States, on a contract made in this country. Speaking of that case, Mr. Justice Johnson afterwards remarked that it decided nothing more than that insolvent laws have no extra-territorial operation upon the contracts of other States, and that the anterior or posterior character of the law with reference to the date of the contract makes no difference in the application of that principle. Eight years later the question, in all its phases, was again presented to this court, in the case of Ogden *v.* Saunders, 12 Wheat. 213, and was very fully examined.

Three principal points were ruled by the court. First, the court

held that the power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States did not exclude the right of the States to legislate on the same subject, except when the power had actually been exercised by Congress, and the State laws conflicted with those of Congress. Secondly, that a bankrupt or insolvent law of any State which discharges both the person of the debtor and his future acquisitions of property, was not a law impairing the obligation of contracts so far as respects debts contracted subsequent to the passage of such law. Thirdly, but that a certificate of discharge under such a law cannot be pleaded in bar of an action brought by a citizen of another State in the courts of the United States, or of any other State than that where the discharge was obtained. Much diversity of opinion, it must be admitted, existed among the members of the court on that occasion, but it is clear that the conclusions to which the majority came were in precise accordance with what had been substantially determined in the two earlier cases to which reference has been made. Misapprehension existed, it seems, for a time, whether the second opinion delivered by Mr. Justice Johnson in that case was, in point of fact, the opinion of a majority of the court, but it is difficult to see any ground for any such doubt. Referring to the opinion, it will be seen that he states explicitly that he is instructed to dispose of the cause, and he goes on to explain that the majority on the occasion is not the same as that which determined the general question previously considered. Ample authority exists for regarding that opinion as the opinion of the court, independently of what appears in the published report of the case. When the subsequent case of Boyle *v.* Zacharie *et al.*, 6 Pet. 348, was first called for argument, inquiry was made of the court whether the opinion in question was adopted by the other judges who concurred in the judgment of the court. To which Marshall, C. J., replied, that the judges who were in the minority of the court upon the general question concurred in that opinion, and that whatever principles were established in that opinion were to be considered no longer open for controversy, but the settled law of the court. Judge Story delivered the unanimous opinion of the court in that case during the same session, and in the course of the opinion he repeated the explanations previously given by the Chief Justice. Boyle *v.* Zacharie *et al.*, 6 Pet. 643. Explanations to the same effect were also made by the present Chief Justice in the case of Cook *v.* Moffat *et al.*, 5 How. 310, which had been ruled by him at the circuit. He had ruled the case in the court below, in obedience to what he understood to be the settled doctrine of the court, and a majority of the court affirmed the judgment. Acquiescing in that judgment as a correct exposition of the law of the court, he nevertheless thought it proper to restate the individual opinion which he entertained upon the subject, but before doing so, he gave a clear and satisfactory exposition of what had previously been decided by the court. Those

remarks confirm what had at a much earlier period been fully explained by the former Chief Justice and his learned associate. Taken together, these several explanations ought to be regarded as final and conclusive. Assuming that to be so, then, it was settled by this court in that case, — 1. That the power given to the United States to pass bankrupt laws is not exclusive. 2. 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. 3. 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. Saunders, a citizen of Kentucky, brought suit in that case against Ogden, who was a citizen of Louisiana at the time the suit was brought. Plaintiff declared upon certain bills of exchange drawn by one Jordan, at Lexington, in the State of Kentucky, upon Ogden, the defendant, in the city of New York, where he then resided. He was then a citizen of the State of New York, and the case shows that he accepted the bills of exchange at the city of New York, and that they were subsequently protested for non-payment.

Defendant pleaded his discharge under the insolvent law of New York, passed prior to the date of the contract. Evidently, therefore, the question presented was, whether a discharge of a debtor under a State insolvent law was valid as against a creditor or citizen of another State, who had not subjected himself to the State laws otherwise than by the origin of the contract, and the decision in express terms was, that such a proceeding was "incompetent to discharge a debt due a citizen of another State." Whenever the question has been presented to this court since that opinion was pronounced, the answer has uniformly been that the question depended upon citizenship. Such were the views of the court in Suydam *et al. v.* Broadnax *et al.*, 14 Pet. 75, where it was expressly held that a certificate of discharge cannot be pleaded in bar of an action brought by a citizen of another State in the courts of the United States, or of any other State than that where the discharge was obtained. Undoubtedly a State may pass a bankrupt or insolvent law under the conditions before mentioned, and such a law is operative and binding upon the citizens of the State, but we repeat what the court said in Cook *v.* Moffat *et al.*, 5 How. 308, that such laws "can have no effect on contracts made before their enactment, or beyond their territory." Judge Story says, in the case of Springer *v.* Foster *et al.*, 2 Story, C. C. 387, that the settled doctrine of the Supreme Court is, that no State insolvent laws can discharge the obligation of any contract made in the State, except such contracts as are made between citi-

zens of that State. He refers to the case of Ogden *v.* Saunders to support the proposition, and remarks, without qualification, that the doctrine of that case was subsequently affirmed in Boyle *v.* Zacharie, where there was no division of opinion. In the last-mentioned case he gave the opinion of the court, and he there expressed substantially the same views. Confirmation of the fact that such was his opinion may be found both in his Commentaries on the Constitution and in his treatise entitled Conflict of Laws. His view as to the result of the various decisions of this court is, that they establish the following propositions: 1. That State insolvent laws may apply to all contracts within the State between citizens of the State. 2. That they do not apply to contracts made within the State between a citizen of the State and a citizen of another State. 3. That they do not apply to contracts not made within the State: 2 Story on Const., sec. 1390 (3d edition), p. 281; Story on Confl. L., sec. 341, p. 573.

Chancellor Kent also says that the discharge under a State law is not effectual as against a citizen of another State who did not make himself a party to the proceedings under the law. 2 Kent Com. (9th ed.), p. 503. All of the State courts, or nearly all, except the Supreme Court of Massachusetts, have adopted the same view of the subject, and that court has recently held that a certificate of discharge in insolvency is no bar to an action by a foreign corporation against the payee of a note, who indorsed it to the corporation in blank before its maturity, although the note itself was executed and made payable in that State by a citizen of the State. Repeated decisions have been made in that court, which seem to support the same doctrine. Savoye *v.* Marsh, 10 Met. 594; Braynard *v.* Marshall, 8 Pick. 196. But a majority of the court held, in Scribner *et al. v.* Fisher, 2 Gray, 43, that if the contract was to be performed in the State where the discharge was obtained, it was a good defence to an action on the contract, although the plaintiff was a citizen of another State and had not in any manner become a party to the proceedings. Irrespective of authority it would be difficult if not impossible to sanction that doctrine. Insolvent systems of every kind partake of the character of a judicial investigation. Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence. Nations *et al. v.* Johnson *et al.*, 24 How. 203; Boswell's Lessee *v.* Otis *et al.*, 9 How. 350; Oakley *v.* Aspinwall, 4 Comst. 514.

Regarded merely in the light of principle, therefore, the rule is one which could hardly be defended, as it is quite evident that the courts of one State would have no power to require the citizens of other States to become parties to any such proceeding. Suydam *et al. v.* Broadnax *et al.*, 14 Pet. 75. But it is unnecessary to pursue the inquiry, as the decisions of this court are directly the other way;

and so are most of the decisions of the State courts. Donnelly *v.* Corbett, 3 Seld. 500; Poe *v.* Duck, 5 Md. 1; Anderson *v.* Wheeler, 25 Conn. 607; Felch *v.* Bugbee *et al.*, 48 Me. 9; Demerrit *v.* Exchange Bank, 10 Law Rep. N. s. 606; Woodhull *v.* Wagner, Bald. C. C. 300.

Insolvent laws of one State cannot discharge the contracts of citizens of other States, because they have no extra-territorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other State voluntarily becomes a party to the proceeding, has no jurisdiction in the case. Legal notice cannot be given, and consequently there can be no obligation to appear, and of course there can be no legal default. The judgment of the Circuit Court is therefore affirmed with costs.

*Judgment accordingly.*

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## SECTION V. — THE CURRENCY.

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### LEGAL TENDER CASE.

### JUILLIARD *v.* GREENMAN.

110 United States, 421. 1884.

Juilliard, a citizen of New York, brought an action against Greenman, a citizen of Connecticut, in the Circuit Court of the United States for the Southern District of New York, alleging that the plaintiff sold and delivered to the defendant, at his special instance and request, one hundred bales of cotton, of the value and for the agreed price of $5,122.90; and that the defendant agreed to pay that sum in cash on the delivery of the cotton, and had not paid the same or any part thereof, except that he had paid the sum of $22.90 on account, and was now justly indebted to the plaintiff therefor in the sum of $5,100; and demanding judgment for this sum with interest and costs.

The defendant in his answer admitted the citizenship of the parties, the purchase and delivery of the cotton, and the agreement to pay therefor, as alleged; and averred that, after the delivery of the cotton, he offered and tendered to the plaintiff, in full payment, $22.50 in gold coin of the United States, forty cents in silver coin of the United States, and two United States notes, one of the denomination of $5,000, and the other of the denomination of $100, of the description known as United States legal tender notes, purporting by recital thereon to be legal tender, at their respective face values, for all debts, public and private, except duties on imports and inter-

est on the public debt, and which, after having been presented for payment, and redeemed and paid in gold coin, since January 1st, 1879, at the United States sub-treasury in New York, had been reissued and kept in circulation under and in pursuance of the act of Congress of May 31st, 1878, ch. 146; that at the time of offering and tendering these notes and coin to the plaintiff, the sum of $5,122.90 was the entire amount due and owing in payment for the cotton, but the plaintiff declined to receive the notes in payment of $5,100 thereof; and that the defendant had ever since remained, and still was, ready and willing to pay to the plaintiff the sum of $5,100 in these notes, and brought these notes into court, ready to be paid to the plaintiff, if he would accept them.

The plaintiff demurred to the answer, upon the grounds that the defence, consisting of new matter, was insufficient in law upon its face, and that the facts stated in the answer did not constitute any defence to the cause of action alleged.

The Circuit Court overruled the demurrer and gave judgment for the defendant, and the plaintiff sued out this writ of error.

MR. JUSTICE GRAY delivered the opinion of the court.

The amount which the plaintiff seeks to recover, and which, if the tender pleaded is sufficient in law, he is entitled to recover, is $5,100. There can, therefore, be no doubt of the jurisdiction of this court to revise the judgment of the Circuit Court. Act of February 16th, 1875, ch. 77, § 3; 18 Stat. 315.

The notes of the United States, tendered in payment of the defendant's debt to the plaintiff, were originally issued under the acts of Congress of February 25th, 1862, ch. 33, July 11th, 1862, ch. 142, and March 3d, 1863, ch. 73, passed during the War of the Rebellion, and enacting that these notes should "be lawful money and a legal tender in payment of all debts, public and private, within the United States," except for duties on imports and interest on the public debt. 12 Stat. 345, 532, 709.

The provisions of the earlier acts of Congress, so far as it is necessary, for the understanding of the recent statutes, to quote them, are re-enacted in the following provisions of the Revised Statutes: —

"SECT. 3579. When any United States notes are returned to the Treasury, they may be reissued, from time to time, as the exigencies of the public interest may require.

"SECT. 3580. When any United States notes returned to the Treasury are so mutilated or otherwise injured as to be unfit for use, the Secretary of the Treasury is authorized to replace the same with others of the same character and amounts.

"SECT. 3581. Mutilated United States notes, when replaced according to law, and all other notes which by law are required to be taken up and not reissued, when taken up shall be destroyed in such manner and under such regulations as the Secretary of the Treasury may prescribe.

"SECT. 3582. The authority given to the Secretary of the Treasury to make any reduction of the currency, by retiring and cancelling United States notes, is suspended."

"SECT. 3588. United States notes shall be lawful money and a legal tender in payment of all debts, public and private, within the United States, except for duties on imports and interest on the public debt."

The act of January 14th, 1875, ch. 15, "to provide for the resumption of specie payments," enacted that on and after January 1st, 1879, "the Secretary of the Treasury shall redeem in coin the United States legal tender notes then outstanding, on their presentation for redemption at the office of the Assistant Treasurer of the United States in the City of New York, in sums of not less than fifty dollars," and authorized him to use for that purpose any surplus revenues in the Treasury and the proceeds of the sales of certain bonds of the United States. 18 Stat. 296.

The act of May 31st, 1878, ch. 146, under which the notes in question were reissued, is entitled "An Act to forbid the further retirement of United States legal tender notes," and enacts as follows: —

"From and after the passage of this act it shall not be lawful for the Secretary of the Treasury or other officer under him to cancel or retire any more of the United States legal tender notes. And when any of said notes may be redeemed or be received into the Treasury under any law from any source whatever and shall belong to the United States, they shall not be retired, cancelled, or destroyed, but they shall be reissued and paid out again and kept in circulation: Provided, That nothing herein shall prohibit the cancellation and destruction of mutilated notes and the issue of other notes of like denomination in their stead, as now provided by law. All acts and parts of acts in conflict herewith are hereby repealed." 20 Stat. 87.

The manifest intention of this act is that the notes which it directs, after having been redeemed, to be reissued and kept in circulation, shall retain their original quality of being a legal tender.

The single question, therefore, to be considered, and upon the answer to which the judgment to be rendered between these parties depends, is whether notes of the United States, issued in time of war, under acts of Congress, declaring them to be a legal tender in payment of private debts, and afterwards in time of peace redeemed and paid in gold coin at the Treasury, and then reissued under the act of 1878, can, under the Constitution of the United States, be a legal tender in payment of such debts.

Upon full consideration of the case, the court is unanimously of opinion that it cannot be distinguished in principle from the cases heretofore determined, reported under the names of the Legal Tender Cases, 12 Wall. 457; Dooley *v.* Smith, 13 Wall. 604; Railroad Company *v.* Johnson, 15 Wall. 195; and Maryland *v.* Railroad Company. 22 Wall. 105; and all the judges, except Mr. Justice Field, who adheres to the views expressed in his dissenting opinions in those cases, are of opinion that they were rightly decided.

The elaborate printed briefs submitted by counsel in this case, and the opinions delivered in the Legal Tender Cases, and in the earlier case of Hepburn *v.* Griswold, 8 Wall. 603, which those cases over-

ruled, forcibly present the arguments on either side of the question of the power of Congress to make the notes of the United States a legal tender in payment of private debts. Without undertaking to deal with all those arguments, the court has thought it fit that the grounds of its judgment in the case at bar should be fully stated.

No question of the scope and extent of the implied powers of Congress under the Constitution can be satisfactorily discussed without repeating much of the reasoning of Chief Justice Marshall in the great judgment in McCulloch *v.* Maryland, 4 Wheat. 316, by which the power of Congress to incorporate a bank was demonstrated and affirmed, notwithstanding the Constitution does not enumerate, among the powers granted, that of establishing a bank or creating a corporation.

The people of the United States by the Constitution established a national government, with sovereign powers, legislative, executive, and judicial. "The government of the Union," said Chief Justice Marshall, "though limited in its powers, is supreme within its sphere of action;" "and its laws, when made in pursuance of the Constitution, form the supreme law of the land." "Among the enumerated powers of government, we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government." 4 Wheat. 405, 406, 407.

A constitution, establishing a frame of government, declaring fundamental principles, and creating a national sovereignty, and intended to endure for ages and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract. The Constitution of the United States, by apt words of designation or general description, marks the outlines of the powers granted to the national legislature; but it does not undertake, with the precision and detail of a code of laws, to enumerate the subdivisions of those powers, or to specify all the means by which they may be carried into execution. Chief Justice Marshall, after dwelling upon this view, as required by the very nature of the Constitution, by the language in which it is framed, by the limitations upon the general powers of Congress introduced in the ninth section of the first article, and by the omission to use any restrictive term which might prevent its receiving a fair and just interpretation, added these emphatic words: "In considering this question, then, we must never forget that it is *a constitution* we are expounding." 4 Wheat. 407. See also page 415.

The breadth and comprehensiveness of the words of the Constitution are nowhere more strikingly exhibited than in regard to the powers over the subjects of revenue, finance, and currency, of which there is no other express grant than may be found in these few brief clauses: —

"The Congress shall have power

"To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

"To borrow money on the credit of the United States;

"To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;"

"To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures."

The section which contains the grant of these and other principal legislative powers concludes by declaring that the Congress shall have power

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

By the settled construction and the only reasonable interpretation of this clause, the words "necessary and proper" are not limited to such measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution; but they include all appropriate means which are conducive or adapted to the end to be accomplished, and which in the judgment of Congress will most advantageously effect it.

That clause of the Constitution which declares that "the Congress shall have the power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States," either embodies a grant of power to pay the debts of the United States, or presupposes and assumes that power as inherent in the United States as a sovereign government. But, in whichever aspect it be considered, neither this nor any other clause of the Constitution makes any mention of priority or preference of the United States as a creditor over other creditors of an individual debtor. Yet this court, in the early case of United States *v.* Fisher, 2 Cranch, 358, held that, under the power to pay the debts of the United States, Congress had the power to enact that debts due to the United States should have that priority of payment out of the estate of an insolvent debtor, which the law of England gave to debts due the Crown.

In delivering judgment in that case, Chief Justice Marshall expounded the clause giving Congress power to make all necessary and proper laws, as follows: "In construing this clause, it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary, because the end might be

obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution. The government is to pay the debt of the Union, and must be authorized to use the means which appear to itself the most eligible to effect that object." 2 Cranch, 396.

In McCulloch *v.* Maryland, he more fully developed the same view, concluding thus: "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." 4 Wheat. 421.

The rule of interpretation thus laid down has been constantly adhered to and acted on by this court, and was accepted as expressing the true test by all the judges who took part in the former discussions of the power of Congress to make the treasury notes of the United States a legal tender in payment of private debts.

The other judgments delivered by Chief Justice Marshall contain nothing adverse to the power of Congress to issue legal tender notes.

By the Articles of Confederation of 1777, the United States in Congress assembled were authorized "to borrow money or emit bills on the credit of the United States;" but it was declared that "each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this confederation expressly delegated to the United States in Congress assembled." Art. 2; art. 9, § 5; 1 Stat. 4, 7. Yet, upon the question whether, under those articles, Congress, by virtue of the power to emit bills on the credit of the United States, had the power to make bills so emitted a legal tender, Chief Justice Marshall spoke very guardedly, saying: "Congress emitted bills of credit to a large amount, and did not, perhaps could not, make them a legal tender. This power resided in the States." Craig *v.* Missouri, 4 Pet. 410, 435. But in the Constitution, as he had before observed in McCulloch *v.* Maryland, "there is no phrase which, like the Articles of Confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the Tenth Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word 'expressly,' and declares only that the powers 'not delegated to the United States, nor prohibited to the States, are reserved to the States

or to the people;" thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the Articles of Confederation, and probably omitted it to avoid those embarrassments." 4 Wheat. 406.

The sentence sometimes quoted from his opinion in Sturges *v.* Crowninshield had exclusive relation to the restrictions imposed by the Constitution on the powers of the States, and especial reference to the effect of the clause prohibiting the States from passing laws impairing the obligation of contracts, as will clearly appear by quoting the whole paragraph: "Was this general prohibition intended to prevent paper money? We are not allowed to say so, because it is expressly provided that no State shall 'emit bills of credit;' neither could these words be intended to restrain the States from enabling debtors to discharge their debts by the tender of property of no real value to the creditor, because for that subject also particular provision is made. Nothing but gold and silver coin can be made a tender in payment of debts." 4 Wheat. 122, 204.

Such reports as have come down to us of the debates in the Convention that framed the Constitution afford no proof of any general concurrence of opinion upon the subject before us. The adoption of the motion to strike out the words "and emit bills" from the clause "to borrow money and emit bills on the credit of the United States" is quite inconclusive. The philippic delivered before the Assembly of Maryland by Mr. Martin, one of the delegates from that State, who voted against the motion, and who declined to sign the Constitution, can hardly be accepted as satisfactory evidence of the reasons or the motives of the majority of the Convention. See 1 Elliot's Debates, 345, 370, 376. Some of the members of the Convention, indeed, as appears by Mr. Madison's minutes of the debates, expressed the strongest opposition to paper money. And Mr. Madison has disclosed the grounds of his own action, by recording that "this vote in the affirmative by Virginia was occasioned by the acquiescence of Mr. Madison, who became satisfied that striking out the words would not disable the government from the use of public notes, so far as they could be safe and proper; and would only cut off the pretext for a paper currency, and particularly for making the bills a tender, either for public or private debts." But he has not explained why he thought that striking out the words "and emit bills" would leave the power to emit bills, and deny the power to make them a tender in payment of debts. And it cannot be known how many of the other delegates, by whose vote the motion was adopted, intended neither to proclaim nor to deny the power to emit paper money, and were influenced by the argument of Mr. Gorham, who "was for

striking out, without inserting any prohibition," and who said: "If the words stand, they may suggest and lead to the emission." "The power, so far as it will be necessary or safe, will be involved in that of borrowing." 5 Elliot's Debates, 434, 435, and note. And after the first clause of the tenth section of the first article had been reported in the form in which it now stands, forbidding the States to make anything but gold or silver coin a tender in payment of debts, or to pass any law impairing the obligation of contracts, when Mr. Gerry, as reported by Mr. Madison, "entered into observations inculcating the importance of public faith, and the propriety of the restraint put on the States from impairing the obligation of contracts, alleging that Congress ought to be laid under the like prohibitions," and made a motion to that effect, he was not seconded. Ib. 546. As an illustration of the danger of giving too much weight, upon such a question, to the debates and the votes in the Convention, it may also be observed that propositions to authorize Congress to grant charters of incorporation for national objects were strongly opposed, especially as regarded banks, and defeated. Ib. 440, 543, 544. The power of Congress to emit bills of credit, as well as to incorporate national banks, is now clearly established by decisions to which we shall presently refer.

The words "to borrow money," as used in the Constitution, to designate a power vested in the national government, for the safety and welfare of the whole people, are not to receive that limited and restricted interpretation and meaning which they would have in a penal statute, or in an authority conferred, by law or by contract, upon trustees or agents for private purposes.

The power "to borrow money on the credit of the United States" is the power to raise money for the public use on a pledge of the public credit, and may be exercised to meet either present or anticipated expenses and liabilities of the government. It includes the power to issue, in return for the money borrowed, the obligations of the United States in any appropriate form, of stock, bonds, bills, or notes; and in whatever form they are issued, being instruments of the national government, they are exempt from taxation by the governments of the several States. Weston *v.* Charleston City Council, 2 Pet. 449; Banks *v.* Mayor, 7 Wall. 16; Bank *v.* Supervisors, 7 Wall. 26. Congress has authority to issue these obligations in a form adapted to circulation from hand to hand in the ordinary transactions of commerce and business. In order to promote and facilitate such circulation, to adapt them to use as currency, and to make them more current in the market, it may provide for their redemption in coin or bonds, and may make them receivable in payment of debts to the government. So much is settled beyond doubt, and was asserted or distinctly admitted by the judges who dissented from the decision in the Legal Tender Cases, as well as by those who concurred in that decision. Veazie Bank *v.* Fenno, 8 Wall. 533, 548; Hepburn *v.*

Griswold, 8 Wall. 616, 636; Legal Tender Cases, 12 Wall. 543, 544, 560, 582, 610, 613, 637.

It is equally well settled that Congress has the power to incorporate national banks, with the capacity, for their own profit as well as for the use of the government in its money transactions, of issuing bills which under ordinary circumstances pass from hand to hand as money at their nominal value, and which, when so current, the law has always recognized as a good tender in payment of money debts, unless specifically objected to at the time of the tender. United States Bank *v.* Bank of Georgia, 10 Wheat. 333, 347; Ward *v.* Smith, 7 Wall. 447, 451. The power of Congress to charter a bank was maintained in McCulloch *v.* Maryland, 4 Wheat. 316, and in Osborn *v.* United States Bank, 9 Wheat. 738, chiefly upon the ground that it was an appropriate means for carrying on the money transactions of the government. But Chief Justice Marshall said: "The currency which it circulates, by means of its trade with individuals, is believed to make it a more fit instrument for the purposes of government than it could otherwise be; and if this be true, the capacity to carry on this trade is a faculty indispensable to the character and objects of the institution." 9 Wheat. 864. And Mr. Justice Johnson, who concurred with the rest of the court in upholding the power to incorporate a bank, gave the further reason that it tended to give effect to "that power over the currency of the country, which the framers of the Constitution evidently intended to give to Congress alone." Ib. 873.

The constitutional authority of Congress to provide a currency for the whole country is now firmly established. In Veazie Bank *v.* Fenno, 8 Wall. 533, 548, Chief Justice Chase, in delivering the opinion of the court, said: "It cannot be doubted that under the Constitution the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government, and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit." Congress, having undertaken to supply a national currency, consisting of coin, of treasury notes of the United States, and of the bills of national banks, is authorized to impose on all State banks, or national banks, or private bankers, paying out the notes of individuals or of State banks, a tax of ten per cent upon the amount of such notes so paid out. Veazie Bank *v.* Fenno, above cited; National Bank *v.* United States, 101 U. S. 1. The reason for this conclusion was stated by Chief Justice Chase, and repeated by the present Chief Justice, in these words: "Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on

the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile." 8 Wall. 549; 101 U. S. 6.

By the Constitution of the United States, the several States are prohibited from coining money, emitting bills of credit, or making anything but gold and silver coin a tender in payment of debts. But no intention can be inferred from this to deny to Congress either of these powers. Most of the powers granted to Congress are described in the eighth section of the first article; the limitations intended to be set to its powers, so as to exclude certain things which might otherwise be taken to be included in the general grant, are defined in the ninth section; the tenth section is addressed to the States only. This section prohibits the States from doing some things which the United States are expressly prohibited from doing, as well as from doing some things which the United States are expressly authorized to do, and from doing some things which are neither expressly granted nor expressly denied to the United States. Congress and the States equally are expressly prohibited from passing any bill of attainder or *ex post facto* law, or granting any title of nobility. The States are forbidden, while the President and Senate are expressly authorized, to make treaties. The States are forbidden, but Congress is expressly authorized, to coin money. The States are prohibited from emitting bills of credit; but Congress, which is neither expressly authorized nor expressly forbidden to do so, has, as we have already seen, been held to have the power of emitting bills of credit, and of making every provision for their circulation as currency, short of giving them the quality of legal tender for private debts — even by those who have denied its authority to give them this quality.

It appears to us to follow, as a logical and necessary consequence, that Congress has the power to issue the obligations of the United States in such form, and to impress upon them such qualities as currency for the purchase of merchandise and the payment of debts, as accord with the usage of sovereign governments. The power, as incident to the power of borrowing money and issuing bills or notes of the government for money borrowed, of impressing upon those bills or notes the quality of being a legal tender for the payment of private debts, was a power universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adoption of the Constitution of the United States. The governments of Europe, acting through the monarch or the legislature, according to the distribution of powers under their respective constitutions, had and have as sovereign a power of issuing paper money as of stamping coin. This power has been distinctly recognized in an important modern case, ably argued and fully considered, in which the

Emperor of Austria, as King of Hungary, obtained from the English Court of Chancery an injunction against the issue in England, without his license, of notes purporting to be public paper money of Hungary. Austria *v.* Day, 2 Giff. 628, and 3 D. F. & J. 217. The power of issuing bills of credit, and making them, at the discretion of the legislature, a tender in payment of private debts, had long been exercised in this country by the several Colonies and States; and during the Revolutionary War the States, upon the recommendation of the Congress of the Confederation, had made the bills issued by Congress a legal tender. See Craig *v.* Missouri, 4 Pet. 435, 453; Briscoe *v.* Bank of Kentucky, 11 Pet. 257, 313, 334–336; Legal Tender Cases, 12 Wall. 557, 558, 622; Phillips on American Paper Currency, *passim*. The exercise of this power not being prohibited to Congress by the Constitution, it is included in the power expressly granted to borrow money on the credit of the United States.

This position is fortified by the fact that Congress is vested with the exclusive exercise of the analogous power of coining money and regulating the value of domestic and foreign coin, and also with the paramount power of regulating foreign and interstate commerce. Under the power to borrow money on the credit of the United States, and to issue circulating notes for the money borrowed, its power to define the quality and force of those notes as currency is as broad as the like power over a metallic currency under the power to coin money and to regulate the value thereof. Under the two powers, taken together, Congress is authorized to establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes, as regards the national government or private individuals.

The power of making the notes of the United States a legal tender in payment of private debts, being included in the power to borrow money and to provide a national currency, is not defeated or restricted by the fact that its exercise may affect the value of private contracts. If, upon a just and fair interpretation of the whole Constitution, a particular power or authority appears to be vested in Congress, it is no constitutional objection to its existence, or to its exercise, that the property or the contracts of individuals may be incidentally affected. The decisions of this court, already cited, afford several examples of this.

Upon the issue of stock, bonds, bills, or notes of the United States, the States are deprived of their power of taxation to the extent of the property invested by individuals in such obligations, and the burden of State taxation upon other private property is correspondingly increased. The ten per cent tax, imposed by Congress on notes of State banks and of private bankers, not only lessens the value of such notes, but tends to drive them, and all State banks of issue, out of existence. The priority given to debts due to the United States over the private debts of an insolvent debtor diminishes the

value of these debts, and the amount which their holders may receive out of the debtor's estate.

So, under the power to coin money and to regulate its value, Congress may (as it did with regard to gold by the act of June 28th, 1834, ch. 95, and with regard to silver by the act of February 28th, 1878, ch. 20) issue coins of the same denominations as those already current by law, but of less intrinsic value than those, by reason of containing a less weight of the precious metals, and thereby enable debtors to discharge their debts by the payment of coins of the less real value. A contract to pay a certain sum in money, without any stipulation as to the kind of money in which it shall be paid, may always be satisfied by payment of that sum in any currency which is lawful money at the place and time at which payment is to be made. 1 Hale P. C. 192–194; Bac. Ab. Tender, B. 2; Pothier, Contract of Sale, No. 416; Pardessus, Droit Commercial, Nos. 204, 205; Searight *v.* Calbraith, 4 Dall. 324. As observed by Mr. Justice Strong, in delivering the opinion of the court in the Legal Tender Cases, "Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power." 12 Wall. 549.

Congress, as the legislature of a sovereign nation, being expressly empowered by the Constitution "to lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States," and "to borrow money on the credit of the United States," and "to coin money and regulate the value thereof and of foreign coin;" and being clearly authorized, as incidental to the exercise of those great powers, to emit bills of credit, to charter national banks, and to provide a national currency for the whole people, in the form of coin, treasury notes, and national bank bills; and the power to make the notes of the government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution; we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress, consistent with the letter and spirit of the Constitution, and therefore, within the meaning of that instrument, "necessary and proper for carrying into execution the powers vested by this Constitution in the government of the United States."

Such being our conclusion in matter of law, the question whether at any particular time, in war or in peace, the exigency is such, by reason of unusual and pressing demands on the resources of the government, or of the inadequacy of the supply of gold and silver

coin to furnish the currency needed for the uses of the government and of the people, that it is, as matter of fact, wise and expedient to resort to this means, is a political question, to be determined by Congress when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the courts. To quote once more from the judgment in McCulloch *v.* Maryland: "Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." 4 Wheat. 423.

It follows that the act of May 31st, 1878, ch. 146, is constitutional and valid; and that the Circuit Court rightly held that the tender in treasury notes, reissued and kept in circulation under that act, was a tender of lawful money in payment of the defendant's debt to the plaintiff. *Judgment affirmed.*[1]

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## TREBILCOCK *v.* WILSON.

12 Wallace, 687. 1871.

[WILSON executed to Trebilcock in June, 1861, a promissory note for nine hundred dollars, due in one year after date with interest at ten per cent per annum, "payable in specie," and at the same date executed a mortgage on real property to secure the payment of the same.

In July, 1865, Wilson brought action in a District Court of Iowa, setting out the note above referred to, and alleging that he had previously tendered to defendant payment of said note in full in legal tender treasury notes of the United States, authorized by act of Congress of February 25th, 1862, which provided that such notes should be "lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports," &c., and that this tender had been refused by the defendant on the ground that such money was not the kind called for by the contract, and plaintiff prayed that defendant be required to release the mortgage upon the proper book of record as having been satisfied by such tender, it being further averred that plaintiff had kept the money tendered ready to pay the defendant, and that it was brought into court for that purpose.

Defendant interposed a demurrer to the petition, stating the following grounds: —

"1st. The petition shows upon its face that by the contract the

[1] MR. JUSTICE FIELD dissented.

note could only be discharged by payment of the amount due thereon in gold.

"2d. The petition asks the aid of this court for the reason that the petitioners tendered the amount of the note described in the petition in United States treasury notes. Such tender is not good. There is no law of this State or of the United States making anything but gold and silver a legal tender in discharge of the contract set out in the petition. This contract was entered into on the 25th day of June, 1861. The law of Congress making United States treasury notes a legal tender in payment of debts does not apply to this contract, because it was not enacted until long after this contract was entered into, to wit, on the 25th day of February, 1862. To apply this law to this contract would be to make it a retrospective law, a law impairing the obligation of contracts, in violation of the Constitution of the United States."

This demurrer was overruled by the District Court, and it was decreed that the mortgage be cancelled and satisfaction thereof entered upon the record.

The case being appealed to the Supreme Court of Iowa, the decree of the lower court was affirmed and the case was brought to this court on writ of error.

The opinion of the Supreme Court of Iowa is reported in 23 Iowa, 331, where, however, the court does not give its reasons but refers to earlier cases, from which it appears that in the view of that court the insertion in the contract of specific terms as to the medium for payment did not change or increase the obligation of the maker to pay in any medium or currency declared by law to be a legal tender in the payment of debts, and that the enactment after the execution of the contract of the statute making treasury notes a legal tender, simply provided another medium for the payment of the debt already existing, which was specified to be so many dollars of a certain currency.]

Mr. Justice Field delivered the opinion of the court.

The principal question presented in this case for our consideration is, whether a promissory note of an individual, payable by its terms *in specie*, can be satisfied, against the will of the holder, by the tender of notes of the United States declared by the act of Congress of February 25th, 1862, to be a legal tender in payment of debts.

[A portion of the opinion relating to a question of jurisdiction of the court is omitted.]

We proceed, then, to consider the merits of the case. The note of the plaintiff is made payable, as already stated, *in specie*. The use of these terms, *in specie*, does not assimilate the note to an instrument in which the amount stated is payable in chattels; as, for example, to a contract to pay a specified sum in lumber, or in fruit, or grain. Such contracts are generally made because it is more convenient for the maker to furnish the articles designated than to pay

the money. He has his option of doing either at the maturity of the contract, but if he is then unable to furnish the articles or neglects to do so, the number of dollars specified is the measure of recovery. But here the terms, *in specie*, are merely descriptive of the kind of dollars in which the note is payable, there being different kinds in circulation, recognized by law. They mean that the designated number of dollars in the note shall be paid in so many gold or silver dollars of the coinage of the United States. They have acquired this meaning by general usage among traders, merchants, and bankers, and are the opposite of the terms, *in currency*, which are used when it is desired to make a note payable in paper money. These latter terms, *in currency*, mean that the designated number of dollars is payable in an equal number of notes which are current in the community as dollars. Taup *v.* Drew, 10 How. 218.

This being the meaning of the terms *in specie*, the case is brought directly within the decision of Bronson *v.* Rhodes, 7 Wall. 229, where it was held that express contracts, payable in gold or silver dollars, could only be satisfied by the payment of coined dollars, and could not be discharged by notes of the United States declared to be a legal tender in payment of debts.

The several coinage acts of Congress make the gold and silver coins of the United States a legal tender in all payments, according to their nominal or declared values. The provisions of the act of January 18th, 1837, and of March 3d, 1849, in this respect, were in force when the act of February 25th, 1862, was passed, and still remain in force. As the act of 1862 declares that the notes of the United States shall also be lawful money and a legal tender in payment of debts, and this act has been sustained, by the recent decision of this court, as valid and constitutional, we have, *according to that decision*, two kinds of money, essentially different in their nature, but equally lawful. It follows, from that decision, that contracts payable in either, or for the possession of either, must be equally lawful, and, if lawful, must be equally capable of enforcement. The act of 1862 itself distinguishes between the two kinds of dollars in providing for the payment in coin of duties on imports and the interest on the bonds and notes of the government. It is obvious that the requirement of coin for duties could not be complied with by the importer, nor could his necessities for the purchase of goods in a foreign market be answered, if his contracts for coin could not be specifically enforced, but could be satisfied by an offer to pay its nominal equivalent in note dollars.

The contemporaneous and subsequent legislation of Congress has distinguished between the two kinds of dollars. The act of March 17th, 1862 (12 Stat. at Large, 370), passed within one month after the passage of the first legal tender act, authorized the Secretary of the Treasury to purchase coin with bonds or United States notes, at such rates and upon such terms as he might deem most advantageous to

the public interest, thus recognizing that the notes and the coin were not exchangeable in the market according to their legal or nominal values.

The act of March 3d, 1863 (12 Stat. at Large, 719, § 4), amending the internal revenue act, required contracts for the purchase or sale of gold or silver coin to be in writing, or printed, and signed by the parties, their agents or attorneys, and stamped; thus impliedly recognizing the validity of previous contracts of that character without this formality. The same act also contained various provisions respecting contracts for the loan of currency secured by a pledge or deposit of gold or silver coin, where the contracts were not to be performed within three days.

Legislation of a later date has required all persons making returns of income, to declare "whether the several rates and amounts therein contained are stated according to their values in legal tender currency, or according to their values in coined money," and if stated "in coined money," it is made the duty of the assessor to reduce the rates and amounts "to their equivalent in legal tender currency, according to the value of such coined money in said currency for the time covered by said returns." 14 Stat. at Large, 147.

The practice of the government has corresponded with the legislation we have mentioned. It has uniformly recognized in its fiscal affairs the distinction in value between paper currency and coin. Some of its loans are made payable specifically in coin, whilst others are payable generally in lawful money. It goes frequently into the money market, and at one time buys coin with currency, and at another time sells coin for currency. In its transactions it every day issues its checks, bills, and obligations, some of which are payable in gold, while others are payable simply in dollars. And it keeps its accounts of coin and currency distinct and separate.

If we look to the act of 1862, in the light of the contemporaneous and subsequent legislation of Congress, and of the practice of the government, we shall find little difficulty in holding that it was not intended to interfere in any respect with existing or subsequent contracts payable by their express terms in specie; and that when it declares that the notes of the United States shall be lawful money, and a legal tender for all debts, it means for all debts which are payable in money generally, and not obligations payable in commodities, or obligations of any other kind.

In the case of Cheang-Kee *v.* United States, 3 Wall. 320, a judgment for unpaid duties, payable in gold and silver coin of the United States, rendered by the Circuit Court for the District of California, was affirmed by this court.

It is evident that a judgment in any other form would often fail to secure to the United States payment in coin, which the law requires, or its equivalent. If the judgment were rendered for the payment of dollars generally it might, according to the recent deci-

sion of this court, be paid in note dollars, and, if they were depreciated, the government would not recover what it was entitled to receive. If, on the other hand, the value of the coin was estimated in currency and judgment for the amount entered, the government, in case of any delay in the payment of the judgment, by appeal or otherwise, would run the risk of losing a portion of what it was entitled to receive by the intermediate fluctuations in the value of the currency. From considerations of this kind this court felt justified in sustaining the judgment of the Circuit Court for California, requiring its amount to be paid specifically in coin, as being the only mode by which the law could be fully enforced. The same reasoning justified similar judgments upon contracts that stipulated specifically for the payment of coin. The twentieth section of the act of 1792 (1 Stat. at Large, 250, § 20), establishing a mint and regulating the coins of the United States, in providing that the money of account of the United States shall be expressed in dollars, dimes, cents, and mills, and that all proceedings in the courts of the United States shall be kept in conformity with this regulation, impliedly, if not directly, sanctions the entry of judgments in this form. The section has reference to the coins prescribed by the act, and when, by the creation of a paper currency, another kind of money, expressed by similar designations, was sanctioned by law and made a tender in payment of debts, it was necessary, as stated in Bronson *v.* Rhodes, to avoid ambiguity and prevent a failure of justice, to allow judgments to be entered for the payment of coined dollars, when that kind of money was specifically designated in the contracts upon which suits were brought.

It follows from the views expressed, that the judgment of the Supreme Court of Iowa must be reversed, and that court directed to remand the cause to the proper inferior court of the State for further proceedings in conformity with this opinion;

*And it is so ordered.*

MR. JUSTICE BRADLEY, dissenting.

I dissent from the opinion of the court in this case for reasons stated in my opinion delivered in the cases of Knox *v.* Lee and Parker *v.* Davis, 12 Wall. 554. In all cases where the contract is to pay a certain sum of money of the United States, in whatever phraseology that money may be described (except cases specially exempted by law), I hold that the legal tender acts make the treasury notes a legal tender. Only in those cases in which gold and silver are stipulated for as bullion can they be demanded in specie, like any other chattel. Contracts for specie made since the legal tender acts went into operation, when gold became a commodity subject to market prices, may be regarded as contracts for bullion. But all contracts for money made before the acts were passed must, in my judgment, be regarded as on the same platform. No difficulty can arise in this view of the case in sustaining all proper transactions for the purchase and sale of gold coin.

MR. JUSTICE MILLER, dissenting.

In the case of Bronson *v.* Rhodes I expressed my dissent on the ground that a contract for gold dollars, in terms, was in no respect different, in legal effect, from a contract for dollars without the qualifying words, specie or gold, and that the legal tender statutes had, therefore, the same effect in both cases.

I adhere to that opinion, and dissent from the one just delivered by the court.

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## SECTION VI. — BILLS OF CREDIT.

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### BRISCOE *v.* THE PRESIDENT AND DIRECTORS OF THE BANK OF THE COMMONWEALTH OF KENTUCKY.

11 Peters, 257; 12 Curtis, 418. 1837.

M'LEAN, J., delivered the opinion of the court.

This case is brought before this court, by a writ of error from the Court of Appeals of the State of Kentucky, under the 25th section of the Judiciary Act of 1789. 1 Stats. at Large, 85.

An action was commenced by the Bank of the Commonwealth of Kentucky, against the plaintiffs in error, in the Mercer Circuit Court of Kentucky, on a note for $2,048.37, payable to the president and directors of the bank; and the defendants filed two special pleas, in the first of which oyer was prayed of the note on which suit was brought, and they say that the plaintiff ought not to have, &c., because the note was given on the renewal of a like note, given to the said bank, and they refer to the act establishing the bank, and allege that it never received any part of the capital stock specified in the act; that the bank was authorized to issue bills of credit, on the faith of the State, in violation of the Constitution of the United States. That by various statutes the notes issued were made receivable in discharge of executions, and if not so received, the collection of the money should be delayed, &c.; and the defendants aver that the note was given to the bank on a loan of its bills, and that the consideration, being illegal, was void.

The second plea presents, substantially, the same facts. To both the pleas a general demurrer was filed, and the court sustained the demurrer, and gave judgment in favor of the bank. This judgment was removed, by appeal, to the Court of Appeals, which is the highest court of judicature in the State, where the judgment of the Circuit Court was affirmed, and being brought before this court by writ of error, the question is presented whether the notes issued by the

bank are bills of credit, emitted by the State, in violation of the Constitution of the United States.

. . . . . .

The terms "bills of credit," in their mercantile sense, comprehend a great variety of evidences of debt, which circulate in a commercial country. In the early history of banks it seems their notes were generally denominated bills of credit; but in modern times they have lost that designation, and are now called either bank-bills, or bank-notes.

But the inhibition of the Constitution applies to bills of credit, in a more limited sense.

It would be difficult to classify the bills of credit which were issued in the early history of this country. They were all designed to circulate as money, being issued under the laws of the respective colonies; but the forms were various in the different colonies, and often in the same colony.

In some cases they were payable with interest, in others without interest. Funds arising from certain sources of taxation were pledged for their redemption, in some instances; in others they were issued without such a pledge. They were sometimes made a legal tender; at others, not. In some instances a refusal to receive them operated as a discharge of the debt; in others, a postponement of it.

They were sometimes payable on demand; at other times, at some future period. At all times the bills were receivable for taxes, and in payment of debts due to the public, except, perhaps, in some instances, where they had become so depreciated as to be of little or no value.

These bills were frequently issued by committees, and sometimes by an officer of the government, or an individual designated for that purpose.

The bills of credit emitted by the States during the Revolution, and prior to the adoption of the Constitution, were not very dissimilar from those which the colonies had been in the practice of issuing. There were some characteristics which were common to all these bills. They were issued by the colony or State, and on its credit. For in cases where funds were pledged, the bills were to be redeemed at a future period, and gradually as the means of redemption should accumulate. In some instances, Congress guaranteed the payment of bills emitted by a State.

They were, perhaps, never convertible into gold and silver, immediately on their emission; as they were issued to supply the pressing pecuniary wants of the government, their circulating as money was indispensable. The necessity which required their emission precluded the possibility of their immediate redemption.

In the case of Craig *et al. v.* The State of Missouri, 4 Pet. 410, this court was called upon, for the first time, to determine what constituted a bill of credit, within the meaning of the Constitution. A

majority of the judges in that case, in the language of the Chief Justice, say, that "bills of credit signify a paper medium, intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society."

A definition so general as this would certainly embrace every description of paper which circulates as money.

Two of the dissenting judges, on that occasion, gave a more definite, though, perhaps, a less accurate meaning, of the terms "bills of credit."

By one of them it was said, "a bill of credit may, therefore, be considered a bill drawn and resting merely on the credit of the drawer, as contradistinguished from a fund constituted or pledged for the payment of the bill." And in the opinion of the other, it is said, "to constitute a bill of credit, within the meaning of the Constitution, it must be issued by a State, and its circulation as money, enforced by statutory provisions. It must contain a promise of payment by the State generally, when no fund has been appropriated to enable the holder to convert it into money. It must be circulated on the credit of the State; not that it will be paid on presentation, but that the State, at some future period, on a time fixed or resting in its own discretion, will provide for the payment."

These definitions cover a large class of the bills of credit issued and circulated as money, but there are classes which they do not embrace, and it is believed that no definition, short of a description of each class, would be entirely free from objection; unless it be in the general terms used by the venerable and lamented Chief Justice.

The definition, then, which does include all classes of bills of credit emitted by the colonies or States, is, a paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money.

Having arrived at this point, the next inquiry in the case is, whether the notes of the Bank of the Commonwealth were bills of credit within the meaning of the Constitution.

. . . . . .

A State cannot do that which the Federal Constitution declares it shall not do. It cannot coin money. Here is an act inhibited in terms so precise that they cannot be mistaken. They are susceptible of but one construction. And it is certain that a State cannot incorporate any number of individuals, and authorize them to coin money. Such an act would be as much a violation of the Constitution as if the money were coined by an officer of the State, under its authority. The act being prohibited cannot be done by a State, either directly or indirectly.

And the same rule applies as to the emission of bills of credit by a State. The terms used here are less specific than those which relate to coinage. Whilst no one can mistake the latter, there are great

differences of opinion as to the construction of the former. If the terms in each case were equally definite, and were susceptible of but one construction, there could be no more difficulty in applying the rule in the one case than in the other.

The weight of the argument is admitted, that a State cannot, by any device that may be adopted, emit bills of credit. But the question arises, what is a bill of credit within the meaning of the Constitution ? On the answer of this must depend the constitutionality or unconstitutionality of the act in question.

A State can act only through its agents; and it would be absurd to say that any act was not done by a State, which was done by its authorized agents.

To constitute a bill of credit within the Constitution it must be issued by a State, on the faith of the State, and be designed to circulate as money. It must be a paper which circulates on the credit of the State; and is so received and used in the ordinary business of life.

The individual or committee who issue the bill must have the power to bind the State; they must act as agents, and, of course, do not incur any personal responsibility, nor impart, as individuals, any credit to the paper. These are the leading characteristics of a bill of credit which a State cannot emit. Were the notes of the Bank of the Commonwealth bills of credit issued by the State ?

The president and directors of the bank were incorporated, and vested with all the powers usually given to banking institutions. They were authorized to make loans on personal security, and on mortgages of real estate. Provisions were made, and regulations, common to all banks ; but there are other parts of the charter which, it is contended, show that the president and directors acted merely as agents of the State.

In the preamble of the act it is declared to be "expedient and beneficial to the State, and the citizens thereof, to establish a bank on the funds of the State, for the purpose of discounting paper, and making loans for longer periods than has been customary, and for the relief of the distresses of the community."

The president and directors were elected by the legislature. The capital of the bank belonged to the State, and it received the dividends.

These and other parts of the charter, it is argued, show that the bank was a mere instrument of the State to issue bills; and that, if by such a device the provision of the Constitution may be evaded, it must become a nullity.

That there is much plausibility and some force in this argument cannot be denied; and it would be in vain to assert that on this head the case is clear of difficulty.

The preamble of the act to incorporate the bank shows the object of its establishment. It was intended to "relieve the distresses of the community;" and the same reason was assigned, it is truly said,

for the numerous emissions of paper money during the Revolution, and prior to that period.

To relieve the distresses of the community, or the wants of the government, has been the common reason assigned for the increase of a paper medium, at all times and in all countries. When a measure of relief is determined on, it is never difficult to find plausible reasons for its adoption. And it would seem in regard to this subject that the present generation has profited but little from the experience of past ages.

The notes of this bank, in common with the notes of all other banks in the State, and indeed throughout the Union, with some exceptions, greatly depreciated. This arose from various causes then existing, and which, under similar circumstances, must always produce the same result.

The intention of the legislature in establishing the bank, as expressed in the preamble, must be considered in connection with every part of the act, and the question must be answered, whether the notes of the bank were bills of credit within the inhibition of the Constitution.

Were these notes issued by the State?

Upon their face they do not purport to be issued by the State, but by the president and directors of the bank. They promise to pay to bearer on demand the sums stated.

Were they issued on the faith of the State?

The notes contain no pledge of the faith of the State in any form. They purport to have been issued on the credit of the funds of the bank, and must have been so received in the community.

But these funds, it is said, belonged to the State; and the promise to pay on the face of the notes was made by the president and directors as agents of the State.

They do not assume to act as agents, and there is no law which authorizes them to bind the State. As in, perhaps, all bank charters, they had the power to issue a certain amount of notes; but they determined the time and circumstances which should regulate these issues.

When a State emits bills of credit the amount to be issued is fixed by law, as also the fund out of which they are to be paid, if any fund be pledged for their redemption; and they are issued on the credit of the State, which, in some form, appears upon the face of the notes, or by the signature of the person who issues them.

As to the funds of the Bank of the Commonwealth, they were, in part only, derived from the State. The capital, it is true, was to be paid by the State; but in making loans the bank was required to take good securities, and these constituted a fund to which the holders of the notes could look for payment, and which could be made legally responsible.

In this respect the notes of this bank were essentially different

from any class of bills of credit, which are believed to have been issued.

The notes were not only payable in gold and silver on demand, but there was a fund, and, in all probability, a sufficient fund, to redeem them. This fund was in possession of the bank, and under the control of the president and directors. But whether the fund was adequate to the redemption of the notes issued, or not, is immaterial to the present inquiry. It is enough that the fund existed, independent of the State, and was sufficient to give some degree of credit to the paper of the bank.

The question is not whether the Bank of the Commonwealth had a large capital or a small one, or whether its notes were in good credit or bad, but whether they were issued by the State, and on the faith and credit of the State. The notes were received in payment of taxes, and in discharge of all debts to the State; and this, aided by the fund arising from notes discounted, with prudent management, under favorable circumstances, might have sustained, and, it is believed, did sustain, to a considerable extent, the credit of the bank. The notes of this bank which are still in circulation are equal in value, it is said, to specie.

But there is another quality which distinguished these notes from bills of credit. Every holder of them could not only look to the funds of the bank for payment, but he had in his power the means of enforcing it.

The bank could be sued; and the records of this court show that while its paper was depreciated, a suit was prosecuted to judgment against it by a depositor, and who obtained from the bank, it is admitted, the full amount of his judgment in specie.

What means of enforcing payment from the State had the holder of a bill of credit. It is said by the counsel for the plaintiffs that he could have sued the State. But was a State liable to be sued?

In the case of Chisholm's Executor *v.* The State of Georgia, in 1792, 2 Dal. 419, it was decided that a State could be sued before this court, and this led to the adoption of the amendment of the Constitution on this subject. But the bills of credit which were emitted prior to the Constitution are those that show the mischief against which the inhibition was intended to operate. And we must look to that period, as of necessity we have done, for the definition and character of a bill of credit.

No sovereign State is liable to be sued without her consent. Under the articles of confederation, a State could be sued only in cases of boundary.

It is believed that there is no case where a suit has been brought at any time on bills of credit against a State; and it is certain that no suit could have been maintained on this ground prior to the Constitution.

In the year 1769, the colonial legislature of Maryland passed an

"act for emitting bills of credit," in which bills to the amount of $318,000 were authorized to be struck, under the direction of two commissioners, whom the governor should appoint. These persons were to be styled "commissioners for emitting bills of credit," by that name to have succession, to sue or be sued, in all cases relative to their trust. The commissioners were authorized to make loans on good security, to draw bills of exchange on London, under certain circumstances; and they were authorized to reissue the bills issued by them.

In the year 1712, it is stated in Hewit's History of South Carolina, the legislature of that colony established a public bank, and issued £48,000, in bills of credit, called bank bills. The money was to be lent out at interest on landed or personal security.

The bills emitted under these acts are believed to be peculiar, and unlike all other emissions under the colonial governments. But a slight examination of the respective acts will show that the bills authorized by them were emitted on the credit of the colonies, and were essentially different from the notes in question.

The holders of these bills could not convert them into specie; they could bring no suit. The Maryland bill was as follows: "This indented bill of six dollars shall entitle the bearer hereof to receive bills of exchange payable in London, or gold and silver at the rate of four shillings and sixpence per dollar, for the said bill, according to the directions of an act of the assembly of Maryland, dated at Annapolis: signed by R. Conden and J. Clapham."

If the leading properties of the notes of the Bank of the Commonwealth were essentially different from any of the numerous classes of bills of credit issued by the States or colonies; if they were not emitted by the State, nor upon its credit, but on the credit of the funds of the bank; if they were payable in gold and silver on demand, and the holder could sue the bank; and if to constitute a bill of credit it must be issued by a State, and on the credit of the State, and the holder could not, by legal means, compel the payment of the bill, — how can the character of these two descriptions of paper be considered as identical? They were both circulated as money, but in name, in form, and in substance they differ.

It is insisted that the principles of this case were settled in the suit of Craig *et al. v.* The State of Missouri, 4 Pet. 410.

In that case the court decided that the following paper, issued under a legislative act of Missouri, was a bill of credit within the meaning of the Constitution: —

"This certificate shall be receivable at the treasury, or any of the loan offices of the State of Missouri, in the discharge of taxes or debts due to the State, in the sum of dollars, with interest for the same, at the rate of two per cent per annum, from the date." By the act, certificates in this form, of various amounts, were issued and were receivable in discharge of all taxes or debts due to the State, and in payment of salaries of State officers.

Four of the seven judges considered that these certificates were designed to circulate as money; that they were issued on the credit of the State; and consequently were repugnant to the Constitution.

These certificates were loaned on good security, at different loan offices of the State, and were signed by the auditor and treasurer of State. They were receivable in payment of salt, at the public salt works, "and the proceeds of the salt springs, the interest accruing to the State, and all estates purchased by officers under the provisions of the act, and all the debts then due, or which should become due to the State, were pledged and constituted a fund for the redemption of the certificates;" and the faith of the State was also pledged for the same purpose.

It is only necessary to compare these certificates with the notes issued by the Bank of the Commonwealth, to see that no two things which have any property in common could be more unlike. They both circulated as money, and were receivable on public account, but in every other particular they were essentially different.

If to constitute a bill of credit, either the form or substance of the Missouri certificate is requisite, it is clear that the notes of the Bank of the Commonwealth cannot be called bills of credit. To include both papers under one designation would confound the most important distinctions, not only as to their form and substance, but also as to their origin and effect.

There is no principle decided by the court in the case of Craig *v.* The State of Missouri, 4 Pet. 410, which at all conflicts with the views here presented. Indeed, the views of the court are sustained and strengthened, by contrasting the present case with that one.

The State of Kentucky is the exclusive stockholder in the Bank of the Commonwealth; but does this fact change the character of the corporation? Does it make the bank identical with the State? And are the operations of the bank the operations of the State? Is the bank the mere instrument of the sovereignty, to effectuate its designs, and is the State responsible for its acts?

The answer to these inquiries will be given in the language of this court, used in former adjudications.

In the case of the Bank of the United States *v.* The Planters' Bank, 9 Wheat. 904, the Chief Justice, in giving the opinion of the court, says: "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates and to the business which is to be transacted. Thus many States of the Union who have an interest in banks are not suable even in their own courts; yet they never exempt the corporation from being sued. The State of Geor-

gia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation than are expressly given by the incorporating act."

"The government becoming a corporator lays down its sovereignty, so far as respects the transactions of the corporation; and exercises no power or privilege which is not derived from the charter."

"The State does not, by becoming a corporator, identify itself with the corporation."

In the case of the Bank of the Commonwealth of Kentucky *v.* Wistar and others, 3 Pet. 431, the question was raised whether a suit could be maintained against the bank, on the ground that it was substantially a suit against the State.

The agents of the defendants deposited a large sum in the bank; and when the deposit was demanded, the bank offered to pay the amount in its own notes, which were at a discount. The notes were refused, and a suit was commenced on the certificate of deposit.

A judgment being entered against the bank, in the Circuit Court of Kentucky, a writ of error was brought to this court. In the court below the defendant pleaded to the jurisdiction, on the ground that the State of Kentucky alone was the proprietor of the stock of the bank; for which reason it was insisted that the suit was virtually against a sovereign State.

Mr. Justice Johnson, in giving the opinion of the court, after copying the language used in the case above quoted, says: "If a State did exercise any other power in or over a bank, or impart to it its sovereign attributes, it would be hardly possible to distinguish the issue of the paper of such banks from a direct issue of bills of credit; which violation of the Constitution, no doubt, the State here intended to avoid."

Can language be more explicit and more appropriate than this, to the points under consideration?

This court further say: "The defendants pleaded to the jurisdiction, on the ground that the State of Kentucky was sole proprietor of the stock of the bank, for which reason it was insisted that the suit was virtually against a sovereign State. But the court is of opinion that the question is no longer open here. The case of the United States Bank *v.* The Planters' Bank of Georgia, 9 Wheat. 904, was a much stronger case for the defendants than the present; for there the State of Georgia was not only a proprietor, but a corporator. Here, the State is not a corporator; since, by the terms of the act, the president and directors alone constitute the body corporate, the metaphysical person liable to suit."

If the bank acted as the agent of the State under an unconstitu-

tional charter, although the persons engaged might be held liable individually, could they have been held responsible as a corporation?

It is true the only question raised by the plea was, whether the bank could be sued, as its stock was owned by the State? But it would be difficult to decide this question, without, to some extent, considering the constitutionality of the charter. And, indeed, it appears that this point did not escape the attention of the court; for they say, "if a State imparted any of its sovereign attributes to a bank in which it was a stockholder, it would hardly be possible to distinguish the paper of such a bank from bills of credit;" and this, the court say, "the State in that case intended to avoid."

These extracts cover almost every material point raised in this investigation.

They show that a State, when it becomes a stockholder in a bank, imparts none of its attributes of sovereignty to the institution; and that this is equally the case, whether it own a whole or a part of the stock of the bank.

It is admitted by the counsel for the plaintiffs that a State may become a stockholder in a bank; but they contend that it cannot become the exclusive owner of the stock. They give no rule by which the interest of a State in such an institution shall be graduated, nor at what point the exact limit shall be fixed. May a State own one fourth, one half, or three fourths of the stock? If the proper limit be exceeded, does the charter become unconstitutional; and is its constitutionality restored if the State recede within the limit? The court are as much at a loss to fix the supposed constitutional boundary of this right as the counsel can possibly be.

If the State must stop short of owning the entire stock, the precise point may surely be ascertained. It cannot be supposed that so important a constitutional principle as contended for, exists without limitation.

If a State may own a part of the stock of a bank, we know of no principle which prevents it from owning the whole. As a stockholder, in the language of this court, above cited, it can exercise no more power in the affairs of the corporation than is expressly given by the incorporating act. It has no more power than any other stockholder to the same extent.

This court did not consider that the character of the incorporation was at all affected by the exclusive ownership of the stock by the State. And they say that the case of the Planters' Bank presented stronger ground of defence than the suit against the Bank of the Commonwealth. That in the former the State of Georgia was not only a proprietor, but a corporator; and that in the latter the president and directors constituted the corporate body. And yet in the case of the Planters' Bank the court decided the State could only be considered as an ordinary corporator, both as it regarded its powers and responsibilities.

If these positions be correct, is there not an end to this controversy? If the Bank of the Commonwealth is not the State, nor the agent of the State; if it possesses no more power than is given to it in the act of incorporation and precisely the same as if the stock were owned by private individuals, — how can it be contended that the notes of the bank can be called bills of credit, in contradistinction from the notes of other banks?

If, in becoming an exclusive stockholder in this bank, the State imparts to it none of its attributes of sovereignty; if it holds the stock as any other stockholder would hold it, — how can it be said to emit bills of credit? Is it not essential, to constitute a bill of credit within the Constitution, that it should be emitted by a State? Under its charter the bank has no power to emit bills which have the impress of the sovereignty, or which contain a pledge of its faith. It is a simple corporation, acting within the sphere of its corporate powers, and can no more transcend them than any other banking institution. The State, as a stockholder, bears the same relation to the bank as any other stockholder.

The funds of the bank, and its property of every description, are held responsible for the payment of its debts; and may be reached by legal or equitable process. In this respect it can claim no exemption under the prerogatives of the State.

And if, in the course of its operations, its notes have depreciated like the notes of other banks, under the pressure of circumstances, still, it must stand or fall by its charter. In this its powers are defined, and its rights, and the rights of those who give credit to it, are guaranteed. And even an abuse of its powers, through which its credit has been impaired and the community injured, cannot be considered in this case.

We are of the opinion that the act incorporating the Bank of the Commonwealth was a constitutional exercise of power by the State of Kentucky; and, consequently, that the notes issued by the bank are not bills of credit, within the meaning of the Federal Constitution. The judgment of the court of appeals is therefore affirmed, with interest and costs.[1]

[1] Mr. Justice Story delivered a dissenting opinion.

In Poindexter *v.* Greenhow, 114 U. S. 283 (1885), the validity of certain bonds of the State of Virginia and the coupons attached thereto was called in question on the ground that they were bills of credit. On this point Mr. Justice Matthews, in rendering the opinion of the court, uses the following language: —

"The meaning of the term 'bills of credit,' as used in the Constitution, has been settled by decisions of this court. By a sound rule of interpretation, it has been construed in the light of the historical circumstances which are known to have led to the adoption of the clause prohibiting their emission by the States, and in view of the great public and private mischiefs experienced during and prior to the period of the War of Independence, in consequence of unrestrained issues, by the colonial and State governments, of paper money, based alone upon credit. The definition thus deduced was not founded on the abstract meaning of the words, so as to include everything in the nature of an obligation to pay money, reposing on the public faith, and subject

to future redemption, but was limited to those particular forms of evidences of debt, which had been so abused to the detriment of both private and public interests. Accordingly, Chief Justice Marshall, in Craig *v.* Missouri, 4 Pet. 410, 432, said, that 'bills of credit signify a paper medium intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society.' This definition was made more exact by merely expressing, however, its implications, in Briscoe *v.* The Bank of Kentucky, 11 Pet. 257, 314, where it was said: 'The definition, then, which does include all classes of bills of credit, emitted by the colonies or States, is a paper issued by the sovereign power, containing a pledge of its faith and designed to circulate as money.' And again, p. 318, 'To constitute a bill of credit, within the Constitution, it must be issued by a State, on the faith of the State, and be designed to circulate as money. It must be a paper which circulates on the credit of the State, and is so received and used in the ordinary business of life.' The definition was repeated in Darrington *v.* The Bank of Alabama, 13 How. 12.

"It is very plain to us that the coupons in question are not embraced within these terms. They are not bills of credit in the sense of this constitutional prohibition. They are issued by the State, it is true. They are promises to pay money. Their payment and redemption are based on the credit of the State, but they were not emitted by the State in the sense in which a government emits its treasury notes, or a bank its bank notes — a circulating medium or paper currency — as a substitute for money. And there is nothing on the face of the instruments, nor in their form or nature, nor in the terms of the law which authorized their issue, nor in the circumstances of their creation or use, as shown by the record, on which to found an inference that these coupons were designed to circulate, in the common transactions of business, as money, nor that in fact they were so used. The only feature relied on to show such a design or to prove such a use is, that they are made receivable in payment of taxes and other dues to the State. From this it is argued that they would obtain such a circulation from hand to hand as money, as the demand for them, based upon such a quality, would naturally give. But this falls far short of their fitness for general circulation in the community, as a representative and substitute for money, in the common transactions of business, which is necessary to bring them within the constitutional prohibition against bills of credit. The notes of the Bank of the State of Arkansas, which were the subject of controversy in Woodruff *v.* Trapnall, 10 How. 190, were, by law, receivable by the State in payment of all dues to it, and this circumstance was not supposed to make them bills of credit. It is true, however, that in that case it was held they were not so because they were not issued by the State and in its name, although the entire stock of the bank was owned by the State, which furnished the whole capital, and was entitled to all the profits. In this case the coupons were issued by the State of Virginia and in its name, and were obligations based on its credit, and which it had agreed as one mode of redemption, to receive in payment of all dues to itself in the hands of any holder; but they were not issued as and for money, nor was this quality impressed upon them to fit them for use as money, or with the design to facilitate their circulation as such. It was conferred, as is apparent from all the circumstances of their creation and issue, merely as an assurance, by way of contract with the holder, of the certainty of their due redemption in the ordinary transactions between the State treasury and the taxpayers. They do not become receivable in payment of taxes till they are due, and the design, we are bound to presume, was that they would be paid at maturity. This necessarily excludes the idea that they were intended for circulation at all."

## SECTION VII. — WEIGHTS AND MEASURES.

### WEAVER *v.* FEGELY.

29 Pennsylvania State, 27. 1857.

ERROR to the Common Pleas of Berks County.

This was an action on the case in assumpsit, brought by Fegely & Brother against Charles B. Weaver, to recover the price of a large quantity of anthracite coal sold and delivered to the defendants by the ton. The only matter in dispute between the parties was, whether the ton consisted of 2,000 pounds, or 2,240 pounds avoirdupois. The plaintiffs contended for the former, the defendant for the latter.

The court below (JONES, P. J.) decided that 2,000 pounds constituted a ton, and directed the jury to make up their verdict accordingly.

The jury found for the plaintiff $167.95, and judgment was entered on the verdict. The defendant thereupon sued out this writ, and assigned for error: —

1. The court erred in charging the jury as follows: "No act is produced by which Congress has at any time declared how many pounds shall make a ton. It is strange if there be not such an act, but we know of none such, and therefore treat the question as though there was none."

2. "The several States may legislate upon the subject as long as its ground is not covered by national legislation. Pennsylvania has so legislated with regard to the ton, and we believe her action to be constitutional and valid in the absence of national legislation."

3. "The plaintiff in this case is entitled to recover for 79 tons, 1,286 pounds of coals, sold and delivered, which is the Pennsylvania measure of the same, at 2,000 pounds to the ton, with interest from the 19th of March, 1855, to this day."

The opinion of the court was delivered by

LEWIS, C. J. The question raised in this case was decided in Evans *v.* Myers, 1 Casey, 114. It was not then supposed, by any one, that Congress had exercised their constitutional power to fix a standard of weights and measures. In the decision since pronounced by Judge Grier, in Holt *v.* The Steamer Miantonomi, it is fully conceded that they have not hitherto exercised that power. The same concession is made by Judge Story, in his Commentaries on the Constitution. The omission to exercise this power was in fact made a matter of complaint and remonstrance by the legislature of

Pennsylvania, in their resolutions of the 9th April, 1834, in which the general government was urged to perform this obligation. The act of assembly of the 15th April, 1834, is based upon the neglect of the Federal legislature in this particular, and it is, in that act, expressly provided that whenever Congress shall establish a standard of weights and measures, the standards named in the State law shall be made to conform to the act of Congress. It is an error to suppose that either the resolution of Congress of the 14th June, 1836, or the acts of 19th May, 1828, and 30th August, 1842, establish a standard of weights and measures, to regulate the business transactions of the people. The resolution of 1836 was nothing more than a preliminary step, looking to the exercise of the power at a future day. The act of 1828 had relation merely to the operations of the United States mint; and the act of 1842 was limited exclusively to the collection of the public revenue, under the tariff of that year. There is therefore no foundation whatever for the allegation that Congress has exercised this power, and that there is therefore any actual conflict between the State and National legislation on this subject.

But it seems to be thought, by the plaintiff in error, that the mere grant of the power to Congress, although not exercised by that body, extinguishes it in the States. This is contrary to the rule of construction adopted by all approved authorities. Alexander Hamilton, who was not likely to relinquish Federal authority where he could maintain it with any show of reason, states the rule thus: "This *exclusive* delegation, or rather this alienation of State sovereignty, exists only in three cases: 1st, Where the Constitution *in express terms* granted an *exclusive* authority to the Union; 2d, Where it granted an authority to the Union, and at the same time *prohibited the States from exercising the like authority;* 3d, Where it granted an authority to the Union to which a similar authority in the States would be *absolutely and totally contradictory and repugnant.*" It is not pretended that the grant of the power to regulate weights and measures is exclusive in express terms, nor that the States are expressly prohibited from exercising it. The State sovereignties are therefore to be extinguished, as regards this subject, if at all, by *mere implication.* But that implication can only arise where the State authority is "*absolutely* and *totally contradictory* and *repugnant*" to the power delegated to Congress. These terms necessarily imply the pre-existence of something to contradict or oppose. But there is nothing whatever either in the Constitution or in the acts of Congress, which the act of assembly in any respect contravenes or opposes. It is therefore perfectly constitutional. The true rule in this respect was correctly stated by Chief Justice Tilghman, in the celebrated case of Moore *v.* Houston, 3 S. & R. 179: "Where the authority of the States is taken away *by implication*, they may continue to act until the United States exercise their power, because, until such exercise, there can be no incompati-

bility." The decision of the Supreme Court of Pennsylvania, in the case referred to, was affirmed in the Supreme Court of the United States. The frequent application of the principle settled in that case is familiar to all persons conversant with the operations of our government. Congress has power to provide for calling forth the militia, but the States may do the same, so that their enactments do not conflict with the acts of Congress. Moore *v.* Houston, 3 S. & R. 170; s. c. 5 Wheat. 1. Congress may establish uniform bankrupt laws, but the States may exercise the same power within their respective jurisdictions, so long as they do not conflict with existing regulations of Congress. Sturges *v.* Crowninshield, 4 Wheat. 122; Ogden *v.* Saunders, 12 Wheat. 213 ; Boyle *v.* Zacharie, 6 Pet. 348. Congress may exercise the taxing power, and so may the States exercise general powers of the like kind. Congress have power to punish for counterfeiting the coin, and had power to punish for counterfeiting the notes of the Bank of the United States, and the States exercised the same power. Fox *v.* Ohio, 5 How. 432; White *v.* Commonwealth, 4 Binn. 418; Livingston *v.* Van Ingen, 9 Johns. Rep. 267. Congress may grant exclusive privileges for limited times to authors and inventors. The states did the same until Congress exercised the power. 9 Johns. 267. Congress have power to provide for the recaption of fugitive slaves. The States have the same power, so long as their enactments are not in conflict with the acts of Congress on the subject. It is true that this principle was denied by Justice Story, in Prigg *v.* Pennsylvania, 16 Peters, 539. But that opinion was on a question which did not arise in the case. It was one of the most mischievous heresies ever promulgated. It was never received as the true construction of the Federal Constitution, and the more recent case of Moore *v.* Illinois, 14 How. Rep. 13, shows that it was promulgated without the sanction of a majority of the court.

The United States courts have jurisdiction over controversies between citizens of different States, but no one has ever doubted the jurisdiction of the State courts over the same parties. To hold that the mere grant of power to the Federal government over any subject extinguishes State authority over the same subject, would invalidate thousands of judgments rendered by State courts, in controversies between citizens of different States. In every State in the Union weights and measures have been constantly governed either by a standard established by a State statute, or by the common law of the State. The power of each State to establish its own common law on this subject has never been denied. If the States have this power, they certainly have the power to enact statutes. The power being acknowledged, it is not for the Federal government to interfere with the *manner* of exercising it. To deny the existence of this authority now, would overturn the practice which has been uniformly acted on by all the States during the whole period of their political existence. It would throw all past transactions into confusion, and leave the

business community no guide whatever for the future; for there is no certainty that Congress will ever deem it expedient to fix a standard. Chief Justice Tilghman, in The Farmers' and Mechanics' Bank *v.* Smith, 3 S. & R. 69, stated a fact which no one has ever denied, when he declared that "the States have regulated weights and measures at their pleasure," "without objection." Their right to do so, until Congress shall act on the subject, admits of no doubt.

*Judgment affirmed.*

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## Section VIII. — Counterfeiting.

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### UNITED STATES *v.* MARIGOLD.

9 Howard, 560; 18 Curtis, 261. 1849.

Daniel, J., delivered the opinion of the court.

[Defendant was charged in the Circuit Court of the United States for the Northern District of New York with having brought into the United States from a foreign place certain counterfeit coin made in the resemblance and similitude of certain coins of the United States, knowing the same to be counterfeit, and intending thereby to defraud divers persons unknown, and also with having passed such counterfeit coin with intent to defraud, all in violation of section 20 of the act of Congress of March 3, 1825, entitled "An Act more effectually to provide for the punishment of certain crimes against the United States." The defendant demurred to the indictment, and the judges certified a division of opinion on the following questions:

"First. Whether Congress, under and by the Constitution, had power and authority to enact so much of the said twentieth section of the said Act as relates to bringing into the United States counterfeit coins.

"Second. Whether Congress, under and by virtue of the Constitution, had power to enact so much of the said twentieth section as relates to uttering, publishing, passing, and selling of the counterfeit coins therein specified."]

The inquiry first propounded upon this record points, obviously, to the answer which concedes to Congress the power here drawn in question. Congress are, by the Constitution, vested with the power to regulate commerce with foreign nations; and however, at periods of high excitement, an application of the terms "to regulate commerce" such as would embrace absolute prohibition may have been questioned, yet, since the passage of the embargo and non-intercourse laws, and the repeated judicial sanctions those statutes have received,

it can scarcely, at this day, be open to doubt that every subject falling within the legitimate sphere of commercial regulation may be partially or wholly excluded, when either measure shall be demanded by the safety or by the important interests of the entire nation. Such exclusion cannot be limited to particular classes or descriptions of commercial subjects; it may embrace manufactures, bullion, coin, or any other thing. The power once conceded, it may operate on any and every subject of commerce to which the legislative discretion may apply it.

But the twentieth section of the act of Congress of March 3, 1825, or rather those provisions of that section brought to the view of this court by the second question certified, are not properly referable to commercial regulations, merely as such; nor to considerations of ordinary commercial advantage. They appertain rather to the execution of an important trust invested by the Constitution, and to the obligation to fulfil that trust on the part of the government, namely, the trust and the duty of creating and maintaining a uniform and pure metallic standard of value throughout the Union. The power of coining money and of regulating its value was delegated to Congress by the Constitution for the very purpose, as assigned by the framers of that instrument, of creating and preserving the uniformity and purity of such a standard of value; and on account of the impossibility which was foreseen of otherwise preventing the inequalities and the confusion necessarily incident to different views of policy, which in different communities would be brought to bear on this subject. The power to coin money being thus given to Congress, founded on public necessity, it must carry with it the correlative power of protecting the creature and object of that power. It cannot be imputed to wise and practical statesmen; nor is it consistent with common sense, that they should have vested this high and exclusive authority, and with a view to objects partaking of the magnitude of the authority itself, only to be rendered immediately vain and useless, as must have been the case had the government been left disabled and impotent as to the only means of securing the objects in contemplation.

If the medium which the government was authorized to create and establish could immediately be expelled, and substituted by one it had neither created, estimated, nor authorized, — one possessing no intrinsic value, — then the power conferred by the Constitution would be useless, wholly fruitless of every end it was designed to accomplish. Whatever functions Congress are, by the Constitution, authorized to perform, they are, when the public good requires it, bound to perform; and on this principle, having emitted a circulating medium, a standard of value indispensable for the purposes of the community, and for the action of the government itself, they are accordingly authorized and bound in duty to prevent its debasement and expulsion, and the destruction of the general confidence and

convenience, by the influx and substitution of a spurious coin in lieu of the constitutional currency. We admit that the clause of the Constitution authorizing Congress to provide for the punishment of counterfeiting the securities and current coin of the United States does not embrace within its language the offence of uttering or circulating spurious or counterfeited coin (the term "counterfeit," both by its etymology and common intendment, signifying the fabrication of a false image or representation); nor do we think it necessary or regular to seek the foundation of the offence of circulating spurious coin, or for the origin of the right to punish that offence, either in the section of the statute before quoted, or in this clause of the Constitution. We trace both the offence and the authority to punish it to the power given by the Constitution to coin money, and to the correspondent and necessary power and obligation to protect and to preserve in its purity this constitutional currency for the benefit of the nation. Whilst we hold it a sound maxim that no powers should be conceded to the Federal government which cannot be regularly and legitimately found in the charter of its creation, we acknowledge equally the obligation to withhold from it no power or attribute which, by the same charter, has been declared necessary to the execution of expressly granted powers, and to the fulfilment of clear and well-defined duties.

It has been argued that the doctrines ruled in the case of Fox *v.* The State of Ohio, 5 How. 410, are in conflict with the positions just stated in the case before us. We can perceive no such conflict, and think that any supposition of the kind must flow from a misapprehension of one or both of these cases. The case of Fox *v.* The State of Ohio involved no question whatsoever as to the powers of the Federal government to coin money and regulate its value; nor as to the power of that government to punish the offence of importing or circulating spurious coin; nor as to its power to punish for counterfeiting the current coin of the United States. That case was simply a prosecution for a private cheat practised by one citizen of Ohio upon another, within the jurisdiction of the State, by means of a base coin in the similitude of a dollar, — an offence denounced by the law of Ohio as obnoxious to punishment by confinement in the State penitentiary. And the question, and the only one, brought up for the examination of this court was, whether this private cheat could be punished by the State authorities, on account of the immediate instrument of its perpetration having been a base coin, in the similitude of a dollar of the coinage of the United States.

The stress of the argument of this court in that case was to show that the right of the State to punish that cheat had not been taken from her by the express terms, nor by any necessary implication, of the Constitution. It claimed for the State neither the power to coin money nor to regulate the value of coin; but simply that of protecting her citizens against frauds committed upon them within her

jurisdiction, and indeed, as a means auxiliary thereto, of relying upon the true standard of the coin as established and regulated under the authority of Congress. In illustration of the existence of the right just mentioned in the State, and in order merely to show that it had not been taken from her, it was said that the punishment of such a cheat did not fall within the express language of those clauses of the Constitution which gave to Congress the right of coining money and of regulating its value, or of providing for the punishment of counterfeiting the current coin. It was also said by this court, that the fact of passing or putting off a base coin did not fall within the language of those clauses of the Constitution; for this fact fabricated, altered, or changed nothing, but left the coins, whether genuine or spurious, precisely as before. But this court have nowhere said that an offence cannot be committed against the coin or currency of the United States, or against that constitutional power which is exclusively authorized for public uses to create that currency, and which for the same public uses and necessities is authorized and bound to preserve it; nor have they said that the debasement of the coin would not be as effectually accomplished by introducing and throwing into circulation a currency which was spurious and similated, as it would be by actually making counterfeits, — fabricating coin of inferior or base metal. On the contrary, we think that either of these proceedings would be equally in contravention of the right and of the obligation appertaining to the government to coin money, and to protect and preserve it at the regulated or standard rate of value.

With a view of avoiding conflict between the State and Federal jurisdictions, this court, in the case of Fox *v.* The State of Ohio, have taken care to point out that the same act might, as to its character and tendencies, and the consequences it involved, constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each. We think this distinction sound, as we hold to be the entire doctrines laid down in the case above mentioned, and regard them as being in nowise in conflict with the conclusions adopted in the present case.

We therefore order it to be certified to the Circuit Court of the United States for the Northern District of New York, in answer to the questions propounded by that court: —

1. That Congress had power and authority, under the Constitution, to enact so much of the twentieth section of the act of March 3, 1825, entitled "An Act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," as relates to bringing into the United States counterfeit coins.

2. That Congress, under and by virtue of the Constitution, had power to enact so much of the said twentieth section as relates to the uttering, publishing, passing, and selling of the counterfeit coin therein specified.

## SECTION IX. — POST-OFFICES AND POST-ROADS.

### IN RE RAPIER.

143 United States, 110. 1892.

[RAPIER and others were arrested under indictments in Federal courts charged with violation of provisions of the United States statutes making it criminal to deposit or cause to be deposited in the mails any letter, postal card, or circular concerning any lottery, or any newspaper containing any advertisement of any lottery.]

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

. . . . . .

These are applications for discharge by writ of *habeas corpus* from arrest for alleged violations of an act of Congress, approved September 19, 1890, entitled "An Act to amend certain sections of the Revised Statutes relating to lotteries, and for other purposes." 26 Stat. 465.

The question for determination relates to the constitutionality of section 3894 of the Revised Statutes as amended by that act. In *Ex parte* Jackson, 96 U. S. 727, it was held that the power vested in Congress to establish post-offices and post-roads embraced the regulation of the entire postal system of the country, and that under it Congress may designate what may be carried in the mail and what excluded; that in excluding various articles from the mails the object of Congress is not to interfere with the freedom of the press or with any other rights of the people, but to refuse the facilities for the distribution of matter deemed injurious by Congress to the public morals; and that the transportation in any other way of matters excluded from the mails would not be forbidden. Unless we are prepared to overrule that decision, it is decisive of the question before us.

It is argued that in Jackson's case it was not urged that Congress had no power to exclude lottery matter from the mails; but it is conceded that the point of want of power was passed upon in the opinion. This was necessarily so, for the real question was the existence of the power and not the defective exercise of it. And it is a mistake to suppose that the conclusion there expressed was not arrived at without deliberate consideration. It is insisted that the express powers of Congress are limited in their exercise to the objects for which they were intrusted, and that in order to justify Congress in exercising any incidental or implied powers to carry into effect its express authority, it must appear that there is some relation between the means employed and the legitimate end. This

is true, but while the legitimate end of the exercise of the power in question is to furnish mail facilities for the people of the United States, it is also true that mail facilities are not required to be furnished for every purpose.

The States before the Union was formed could establish post-offices and post-roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish post-offices and post-roads was surrendered to the Congress it was as a complete power, and the grant carried with it the right to exercise all the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality.

. . . . . .

We cannot regard the right to operate a lottery as a fundamental right infringed by the legislation in question; nor are we able to see that Congress can be held, in its enactment, to have abridged the freedom of the press. The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communication is not abridged within the intent and meaning of the constitutional provision unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matters condemned by its judgment, through the governmental agencies which it controls. That power may be abused furnishes no ground for a denial of its existence, if government is to be maintained at all.

In short, we do not find sufficient grounds in the arguments of counsel, able and exhaustive as they have been, to induce us to change the views already expressed in the case to which we have referred. We adhere to the conclusion therein announced.[1]

[1] In PUBLIC CLEARING HOUSE *v.* COYNE, 194 U. S. 497, 24 Sup. Ct. Rep. 789 (1904), it was held that a statute, authorizing the Postmaster General upon evidence satisfactory to him that any person or company is engaged in conducting any lottery or any other scheme or device for obtaining money or property through the mails by means of false or fraudulent pretenses to instruct postmasters to return letters directed to such person or company to the office at which they were originally mailed with the word "Fraudulent" plainly written or stamped on the outside thereof, was constitutional. The decision is put upon the ground that the postal service is not a necessary function of the government but is a public function assumed and established by Congress for the general welfare, and that Congress may designate what may be carried in the mails and what excluded; and further that the action of the Postmaster General in enforcing the statute in any case is not subject to judicial review.

## SECTION X. — COPYRIGHTS AND PATENTS.

### WHEATON *v.* PETERS.

8 Peters, 591; 11 Curtis, 223. 1834.

McLEAN, J., delivered the opinion of the court.

[Complainants (Wheaton and another) sought to enjoin defendants from publishing a series of volumes called "Condensed Reports of Cases in the Supreme Court of the United States," containing decisions reported by said Wheaton as official reporter of the court, and published and copyrighted by him. Defendants denied that their publication was an infringement, and also denied that complainants had complied with all the requisites to the vesting of any right under the act of Congress. The bill of complaint was dismissed in the lower court and complainants appeal.]

Some of the questions which arise in this case are as novel, in this country, as they are interesting. But one case involving similar principles, except a decision by a State court, has occurred; and that was decided by the Circuit Court of the United States for the District of Peunsylvania, from whose decree no appeal was taken.

The right of the complainants must be first examined. If this right shall be sustained as set forth in the bill, and the defendants shall be proved to have violated it, the court will be bound to give the appropriate redress.

The complainants assert their right on two grounds.

First, under the common law.

Secondly, under the acts of Congress.

And they insist, in the first place, that an author was entitled, at common law, to a perpetual property in the copy of his works, and in the profits of their publication; and to recover damages for its injury, by an action on the case, and to the protection of a court of equity.

In support of this proposition, the counsel for the complainants have indulged in a wide range of argument, and have shown great industry and ability. The limited time allowed for the preparation of this opinion will not admit of an equally extended consideration of the subject by the court.

Perhaps no topic in England has excited more discussion among literary and talented men, than that of the literary property of authors. So engrossing was the subject, for a long time, as to leave

few neutrals, among those who were distinguished for their learning and ability. At length the question, whether the copy of a book or literary composition belongs to the author at common law, was brought before the Court of King's Bench, in the great case of Miller *v.* Taylor, reported in 4 Burr. 2303. This was a case of great expectation, and the four judges, in giving their opinions, *seriatim*, exhausted the argument on both sides. Two of the judges, and Lord Mansfield, held that, by the common law, an author had a literary property in his works; and they sustained their opinion with very great ability. Mr. Justice Yeates, in an opinion of great length, and with an ability, if equalled, certainly not surpassed, maintained the opposite ground.

Previous to this case, injunctions had issued out of chancery to prevent the publication of certain works, at the instance of those who claimed a property in the copyright, but no decision had been given. And a case had been commenced, at law, between Tonson and Collins, on the same ground, and was argued with great ability, more than once, and the Court of King's Bench were about to take the opinion of all the judges, when they discovered that the suit had been brought by collusion, to try the question, and it was dismissed.

This question was brought before the House of Lords, in the case of Donaldson *v.* Beckett and others, reported in 4 Burr. 2408.

Lord Mansfield, being a peer, through feelings of delicacy, declined giving any opinion. The eleven judges gave their opinions on the following points: 1. Whether at common law an author of any book or literary composition had the sole right of first printing, and publishing the same for sale; and might bring an action against any person who printed, published, and sold the same without his consent. On this question there were eight judges in the affirmative, and three in the negative.

2. If the author had such right originally, did the law take it away, upon his printing and publishing such book or literary composition; and might any person, afterward, reprint and sell, for his own benefit, such book or literary composition, against the will of the author? This question was answered in the affirmative by four judges, and in the negative by seven.

3. If such action would have lain, at common law, is it taken away by the statute of 8 Anne; and is an author, by the said statute, precluded from every remedy, except on the foundation of the said statute, and on the terms of the conditions prescribed thereby? Six of the judges, to five, decided that the remedy must be under the statute.

4. Whether the author of any literary composition, and his assigns, had the sole right of printing and publishing the same in perpetuity, by the common law. Which question was decided in favor of the author, by seven judges to four.

5. Whether this right is any way impeached, restrained, or taken away by the statute 8 Anne. Six, to five judges, decided that the right is taken away by the statute. And the Lord Chancellor, seconding Lord Camden's motion to reverse, the decree was reversed.

It would appear from the points decided that a majority of the judges were in favor of the common-law right of authors, but that the same had been taken away by the statute.

The title and preamble of the statute, 8 Anne, c. 19, is as follows: "An Act for the encouragement of learning by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned.

"Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families," &c.

In 7 Term Rep. 627, Lord Kenyon says: "All arguments in the support of the rights of learned men in their works must ever be heard with great favor by men of liberal minds to whom they are addressed. It was probably on that account that when the great question of literary property was discussed, some judges of enlightened understanding went the length of maintaining that the right of publication rested exclusively in the authors and those who claimed under them for all time; but the other opinion finally prevailed, which established that the right was confined to the times limited by the act of Parliament. And that, I have no doubt, was the right decision."

And in the case of the University of Cambridge *v.* Bryer, 16 East, 319, Lord Ellenborough remarked: "It has been said that the statute of 8 Anne has three objects; but I cannot subdivide the first two; I think it has only two. The counsel for the plaintiffs contended that there was no right at common law; and perhaps there might not be; but of that we have not particularly anything to do."

From the above authorities, and others which might be referred to if time permitted, the law appears to be well settled in England, that, since the statute of 8 Anne, the literary property of an author in his works can only be asserted under the statute. And that, notwithstanding the opinion of a majority of the judges in the great case of Miller *v.* Taylor, 4 Burr. 2303, was in favor of the common-law right before the statute, it is still considered, in England, as a question by no means free from doubt.

That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy endeavors to realize a profit by its

publication, cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world.

The argument that a literary man is as much entitled to the product of his labor as any other member of society, cannot be controverted. And the answer is, that he realizes this product by the transfer of his manuscripts, or in the sale of his works when first published.

A book is valuable on account of the matter it contains, the ideas it communicates, the instruction or entertainment it affords. Does the author hold a perpetual property in these? Is there an implied contract by every purchaser of his book, that he may realize whatever instruction or entertainment which the reading of it shall give, but shall not write out or print its contents?

In what respect does the right of an author differ from that of an individual who has invented a most useful and valuable machine? In the production of this, his mind has been as intensely engaged, as long, and, perhaps, as usefully to the public, as any distinguished author in the composition of his book.

The result of their labors may be equally beneficial to society, and in their respective spheres they may be alike distinguished for mental vigor. Does the common law give a perpetual right to the author, and withhold it from the inventor? And yet it has never been pretended that the latter could hold, by the common law, any property in his invention, after he shall have sold it publicly.

It would seem, therefore, that the existence of a principle may well be doubted, which operates so unequally. This is not a characteristic of the common law. It is said to be founded on principles of justice, and that all its rules must conform to sound reason.

Does not the man who imitates the machine profit as much by the labor of another, as he who imitates or republishes a book? Can there be a difference between the types and press with which one is formed, and the instruments used in the construction of the others?

That every man is entitled to the fruits of his own labor must be admitted; but he can enjoy them only, except by statutory provision, under the rules of property, which regulate society, and which define the rights of things in general.

But, if the common-law right of authors were shown to exist in England, does the same right exist, and to the same extent, in this country?

It is clear, there can be no common law of the United States. The Federal government is composed of twenty-four sovereign and independent States; each of which may have its local usages, customs, and common law. There is no principle which pervades

the Union, and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our Federal system, only by legislative adoption.

. . . . . .

In the eighth section of the first article of the Constitution of the United States it is declared that Congress shall have power "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." And in pursuance of the power thus delegated, Congress passed the act of the 31st of May, 1790.

This is entitled "An Act for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies, during the times therein mentioned."

In the first section of this act it is provided "that from and after its passage, the author and authors of any map, chart, book, or books, already printed within these United States, being a citizen, &c., who hath or have not transferred to any other person the copyright of such map, chart, book, or books, &c., shall have the sole right and liberty of printing, reprinting, publishing, and vending such map, book, or books, for fourteen years."

In behalf of the common-law right, an argument has been drawn from the word "secure," which is used in relation to this right, both in the Constitution and in the acts of Congress. This word, when used as a verb active, signifies to protect, insure, save, ascertain, &c.

The counsel for the complainants insist that the term, as used, clearly indicates an intention not to originate a right, but to protect one already in existence.

There is no mode by which the meaning affixed to any word or sentence, by a deliberative body, can be so well ascertained, as by comparing it with the words and sentences with which it stands connected. By this rule the word "secure," as used in the Constitution, could not mean the protection of an acknowledged legal right. It refers to inventors as well as authors, and it has never been pretended by any one, either in this country or in England, that an inventor has a perpetual right, at common law, to sell the thing invented.

And if the word "secure" is used in the Constitution, in reference to a future right, was it not so used in the act of Congress?

But it is said in that part of the first section of the act of Congress, which has been quoted, a copyright is not only recognized as existing, but that it may be assigned, as the rights of the assignee are protected, the same as those of the author.

As before stated, an author has, by the common law, a property in his manuscript; and there can be no doubt that the rights of an assignee of such manuscript would be protected by a court of

chancery. This is presumed to be the copyright recognized in the act, and which was intended to be protected by its provisions. And this protection was given, as well to books published under such circumstances as to manuscript copies.

That Congress, in passing the act of 1790, did not legislate in reference to existing rights, appears clear, from the provision that the author, &c., "shall have the sole right and liberty of printing," &c. Now if this exclusive right existed at common law, and Congress were about to adopt legislative provisions for its protection, would they have used this language? Could they have deemed it necessary to vest a right already vested. Such a presumption is refuted by the words above quoted, and their force is not lessened by any other part of the act.

Congress, then, by this act, instead of sanctioning an existing right, as contended for, created it. This seems to be the clear import of the law, connected with the circumstances under which it was enacted.

From these considerations it would seem that if the right of the complainants can be sustained, it must be sustained under the acts of Congress. Such was, probably, the opinion of the counsel who framed the bill, as the right is asserted under the statutes, and no particular reference is made to it as existing at common law. The claim, then, of the complainants must be examined in reference to the statutes under which it is asserted.

There are but two statutes which have a bearing on this subject; one of them has already been named, and the other was passed the 29th of April, 1802.

The first section of the act of 1790 provides that an author, or his assignee, "shall have the sole right and liberty of printing, reprinting, publishing, and vending such map, chart, book, or books, for the term of fourteen years, from the recording of the title thereof in the clerk's office, as hereinafter directed; and that the author, &c., in books not published, &c., shall have the sole right and liberty of printing, reprinting, publishing, and vending such map, chart, book, or books, for the like term of fourteen years, from the time of recording the title thereof in the clerk's office, as aforesaid. And at the expiration of the said term the author, &c., shall have the same exclusive right continued to him, &c., for the further term of fourteen years: provided he or they shall cause the title thereof to be a second time recorded, and published in the same manner as is hereinafter directed, and that within six months before the expiration of the first term of fourteen years."

The third section provides that "no person shall be entitled to the benefit of this act, &c., unless he shall first deposit, &c., a printed copy of the title in the clerk's office," &c. "And such author or proprietor shall, within two months from the date thereof, cause a

copy of said record to be published in one or more of the newspapers printed in the United States, for the space of four weeks."

And the fourth section enacts that "the author, &c., shall, within six months after the publishing thereof, deliver or cause to be delivered to the Secretary of State, a copy of the same, to be preserved in his office."[1]

The first section of the act of 1802 provides, that "every person who shall claim to be the author, &c., before he shall be entitled to the benefit of the act entitled an act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the time therein mentioned, he shall, in addition to the requisites enjoined in the third and fourth sections of said act, if a book or books, give information by causing the copy of the record which by said act he is required to publish, to be inserted in the page of the book next to the title."

These are substantially the provisions by which the complainants' right must be tested. They claim under a renewal of the term, but this necessarily involves the validity of the right under the first as well as the second term. In the language of the statute, the "same exclusive right" is continued the second term that existed the first.

It will be observed that a right accrues under the act of 1790 from the time a copy of the title of the book is deposited in the clerk's office. But the act of 1802 adds another requisite to the accruing of the right, and that is, that the record made by the clerk shall be published in the page next to the title-page of the book.

And it is argued with great earnestness and ability, that these are the only requisites to the perfection of the complainants' title. That the requisition of the third section to give public notice in the newspapers, and that contained in the fourth to deposit a copy in the Department of State, are acts subsequent to the accruing of the right, and whether they are performed or not, cannot materially affect the title.

The case is compared to a grant with conditions subsequent, which can never operate as a forfeiture of the title. It is said also that the object of the publication in the newspapers, and the deposit of the copy in the Department of State, was merely to give notice to the public; and that such acts, not being essential to the title, after so great a lapse of time, may well be presumed. That if neither act had been done, the right of the party having accrued before either was required to be done, it must remain unshaken.

This right, as has been shown, does not exist at common law; it originated, if at all, under the acts of Congress. No one can deny

[1] Publication of notice in a newspaper is no longer required. See Rev. Stat. § 4956. — [ED.]

that when the legislature are about to vest an exclusive right in an author or an inventor, they have the power to prescribe the conditions on which such right shall be enjoyed; and that no one can avail himself of such right who does not substantially comply with the requisitions of the law.

This principle is familiar as it regards patent rights; and it is the same in relation to the copyright of a book. If any difference shall be made, as it respects a strict conformity to the law, it would seem to be more reasonable to make the requirement of the author rather than the inventor.

The papers of the latter are examined in the department of State, and require the sanction of the Attorney-General; but the author takes every step on his own responsibility, unchecked by the scrutiny or sanction of any public functionary.

The acts required to be done by an author, to secure his right, are in the order in which they must naturally transpire. First, the title of the book is to be deposited with the clerk, and the record he makes must be inserted in the first or second page; then the public notice in the newspapers is to be given; and within six months after the publication of the book, a copy must be deposited in the Department of State.

A right undoubtedly accrues on the record being made with the clerk, and the printing of it as required; but what is the nature of that right? Is it perfect? If so, the other two requisites are wholly useless.

How can the author be compelled either to give notice in the newspapers, or deposit a copy in the State Department? The statute affixes no penalty for a failure to perform either of these acts; and it provides no means by which it may be enforced.

But we are told they are unimportant acts. If they are indeed wholly unimportant, Congress acted unwisely in requiring them to be done. But whether they are important or not, is not for the court to determine, but the legislature; and in what light they were considered by the legislature we can learn only by their official acts.

Judging then of these acts by this rule, we are not at liberty to say that they are unimportant, and may be dispensed with. They are acts which the law requires to be done, and may this court dispense with their performance?

But the inquiry is made, shall the non-performance of these subsequent conditions operate as a forfeiture of the right?

The answer is, that this is not a technical grant of precedent and subsequent conditions. All the conditions are important; the law requires them to be performed; and, consequently, their performance is essential to a perfect title. On the performance of a part of them the right vests; and this was essential to its protection under the statute; but other acts are to be done, unless Congress have legislated in vain, to render the right perfect.

The notice could not be published until after the entry with the clerk, nor could the book be deposited with the Secretary of State until it was published. But these are acts not less important than those which are required to be done previously. They form a part of the title, and until they are performed the title is not perfect.

The deposit of the book in the Department of State, may be important to identify it at any future period, should the copyright be contested, or an unfounded claim of authorship asserted.

But, if doubts could be entertained whether the notice and deposit of the book in the State Department were essential to the title, under the act of 1790, on which act my opinion is principally founded, though I consider it in connection with the other act; there is, in the opinion of three of the judges, no ground for doubt under the act of 1802. The latter act declares that every author, &c., before he shall be entitled to the benefit of the former act, shall, "in addition to the requisitions enjoined in the third and fourth sections of said act, if a book, publish," &c.

Is not this a clear exposition of the first act? Can an author claim the benefit of the act of 1790, without performing "the requisites enjoined in the third and fourth sections of it." If there be any meaning in language, the act of 1802, the three judges think, requires these requisites to be performed "in addition" to the one required by that act, before an author, &c., "shall be entitled to the benefit of the first act."

The rule by which conditions precedent and subsequent are construed in a grant, can have no application to the case under consideration; as every requisite, in both acts, is essential to the title.

. . . . . .

The act of Congress under which Mr. Wheaton, one of the complainants, in his capacity of reporter, was required to deliver eighty copies of each volume of his reports to the Department of State, and which were, probably, faithfully delivered, does not exonerate him from the deposit of a copy under the act of 1790. The eighty volumes were delivered for a different purpose; and cannot excuse the deposit of the one volume as specially required.

The construction of the acts of Congress being settled, in the further investigation of the case it would become necessary to look into the evidence and ascertain whether the complainants have not shown a substantial compliance with every legal requisite. But on reading the evidence we entertain doubts, which induce us to remand the cause to the Circuit Court, where the facts can be ascertained by a jury.

And the cause is accordingly remanded to the Circuit Court, with directions to that court to order an issue of facts to be examined and tried by a jury, at the bar of said court, upon this point, viz., whether the said Wheaton, as author, or any other person as proprietor, had complied with the requisites prescribed by the third

and fourth sections of the said act of Congress, passed the 31st day of May, 1790, in regard to the volumes of Wheaton's Reports in the said bill mentioned, or in regard to one or more of them in the following particulars, viz., whether the said Wheaton or proprietor did, within two months from the date of the recording thereof in the clerk's office of the District Court, cause a copy of the said record to be published in one or more of the newspapers printed in the resident States, for the space of four weeks; and whether the said Wheaton or proprietor, after the publishing thereof, did deliver or cause to be delivered to the Secretary of State of the United States a copy of the same to be preserved in his office, according to the provisions of the said third and fourth sections of the said act.

And if the said requisites have not been complied with in regard to all the said volumes, then the jury to find in particular in regard to what volumes they or either of them have been so complied with.

It may be proper to remark that the court are unanimously of opinion that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.[1]

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## PATTERSON v. KENTUCKY.

97 United States, 501. 1878.

Mr. Justice Harlan delivered the opinion of the court.

Whether the final judgment of the Court of Appeals of Kentucky denies to plaintiff in error any right secured to her by the Constitution and laws of the United States, is the sole question presented in this case for our determination.

That court affirmed the judgment of an inferior State court in which, upon indictment and trial, a fine of $250 was imposed upon plaintiff in error for a violation of certain provisions of a Kentucky statute, approved Feb. 21, 1874, regulating the inspection and gauging of oils and fluids, the product of coal, petroleum, or other bituminous substances. The statute provides that such oils and fluids, by whatever name called and wherever manufactured, which may or can be used for illuminating purposes, shall be inspected by an authorized State officer, before being used, sold, or offered for sale. Such as ignite or permanently burn at a temperature of 130° Fahrenheit and upwards are recognized by the statute as standard oils, while those which ignite or permanently burn at a less temperature are condemned as unsafe for illuminating purposes. Inspectors are required to brand casks and barrels with the words "standard oil," or

[1] Mr. Justice Thompson rendered a dissenting opinion.

with the words "unsafe for illuminating purposes," as inspection may show to be proper. The statute imposes a penalty upon all who sell or offer for sale, within the State, such oils and fluids as have been condemned, the casks or barrels containing which have been branded with the words indicating such condemnation.

The specific offence charged in the indictment was that the plaintiff in error had sold, within the State, to one Davis an oil known as the Aurora oil, the casks containing which had been previously branded by an authorized inspector with the words "unsafe for illuminating purposes." That particular oil is the same for which, in 1867, letters-patent were granted to Henry C. Dewitt, of whom the plaintiff in error is the assignee, by assignment duly recorded as required by the laws of the United States. Upon the trial of the case it was agreed that the Aurora oil could not, by any chemical combination described in the patent, be made to conform to the standard or test required by the Kentucky statute as a prerequisite to the right, within that State, to sell, or to offer for sale, illuminating oils of the kind designated.

The plaintiff in error, as assignee of the patentee, in asserting the right to sell the Aurora oil in any part of the United States, claims that no State could, consistently with the Federal Constitution and the laws of Congress, prevent or obstruct the exercise of that right, either by express words of prohibition, or by regulations which prescribed tests to which the patented article could not be made to conform.

The Court of Appeals of Kentucky held this construction of the Constitution and the laws of the United States to be inadmissible, and in that opinion we concur.

Congress is given power to promote the progress of science and the useful arts. To that end it may, by all necessary and proper laws, secure to inventors, for limited times, the exclusive right to their inventions. That power has been exerted in the various statutes prescribing the terms and conditions upon which letters-patent may be obtained. It is true that letters-patent, pursuing the words of the statute, do, in terms, grant to the inventor, his heirs and assigns, the exclusive right to make, use, and vend to others his invention or discovery, throughout the United States and the Territories thereof. But, obviously, this right is not granted or secured, without reference to the general powers which the several States of the Union unquestionably possess over their purely domestic affairs, whether of internal commerce or of police. "In the American constitutional system," says Mr. Cooley, "the power to establish the ordinary regulations of police has been left with the individual States, and cannot be assumed by the national government." Cooley, Const. Lim. 574. While it is confessedly difficult to mark the precise boundaries of that power, or to indicate, by any general rule, the exact limitations which the States must observe in its exercise, the existence of such a power in

the States has been uniformly recognized in this court. Gibbons *v.* Ogden, 9 Wheat. 1; License Cases, 5 How. 504; Gilman *v.* Philadelphia, 3 Wall. 713; Henderson *et al. v.* Mayor of the City of New York *et al.*, 92 U. S. 259; Railroad Company *v.* Husen, 95 id. 465; Beer Company *v.* Massachusetts, [97 U. S.] 25. It is embraced in what Mr. Chief Justice Marshall, in Gibbons *v.* Ogden, calls that "immense mass of legislation" which can be most advantageously exercised by the States, and over which the national authorities cannot assume supervision or control. "If the power only extends to a just regulation of rights, with a view to the due protection and enjoyment of all, and does not deprive any one of that which is justly and properly his own, it is obvious that its possession by the State, and its exercise for the regulation of the property and actions of its citizens, cannot well constitute an invasion of national jurisdiction or afford a basis for an appeal to the protection of the national authorities." Cooley, Const. Lim. 574. By the settled doctrines of this court the police power extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights. State legislation, strictly and legitimately for police purposes, does not, in the sense of the Constitution, necessarily intrench upon any authority which has been confided, expressly or by implication, to the national government. The Kentucky statute under examination manifestly belongs to that class of legislation. It is, in the best sense, a mere police regulation, deemed essential for the protection of the lives and property of citizens. It expresses in the most solemn form the deliberate judgment of the State that burning fluids which ignite or permanently burn at less than a prescribed temperature are unsafe for illuminating purposes. Whether the policy thus pursued by the State is wise or unwise, it is not the province of the national authorities to determine. That belongs to each State, under its own sense of duty, and in view of the provisions of its own Constitution. Its action, in those respects, is beyond the corrective power of this court. That the statute of 1874 is a police regulation within the meaning of the authorities is clear from our decision in United States *v.* Dewitt, 9 Wall. 41. By the internal revenue act of March 2, 1867, a penalty was imposed upon any person who should mix for sale naphtha and illuminating oils, or who should knowingly sell, or keep for sale, or offer for sale, such mixture, or who should sell or offer for sale oil made from petroleum for illuminating purposes, inflammable at less temperature or fire-test than 110° Fahrenheit. We held that to be simply a police regulation, relating exclusively to the internal trade of the States; that, although emanating from Congress, it could have by its own force no constitutional operation within State limits, and was without effect, except where the legislative authority of Congress excluded, territorially, all State legislation, as, for example, in the District of Columbia.

The Kentucky statute being, then, an ordinary police regulation

for the government of those engaged in the internal commerce of that State, the only remaining question is, whether, under the operation of the Federal Constitution and the laws of Congress, it is without effect in cases where the oil, although condemned by the State as unsafe for illuminating purposes, has been made and prepared for sale in accordance with a discovery for which letters-patent had been granted. We are of opinion that the right conferred upon the patentee and his assigns to use and vend the corporeal thing or article, brought into existence by the application of the patented discovery, must be exercised in subordination to the police regulations which the State established by the statute of 1874. It is not to be supposed that Congress intended to authorize or regulate the sale, within a State, of tangible personal property which that State declares to be unfit and unsafe for use, and by statute has prohibited from being sold or offered for sale within her limits. It was held by Chief Justice Shaw to be a settled principle, "growing out of the nature of well-ordered society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community." Commonwealth *v.* Alger, 7 Cush. (Mass.) 53. In recognition of this fundamental principle, we have frequently decided that the police power of the States was not surrendered when the Constitution conferred upon Congress the general power to regulate commerce with foreign nations and between the several States. Hence the States may, by police regulations, protect their people against the introduction within their respective limits of infected merchandise. "A bale of goods upon which the duties have or have not been paid, laden with infection, may be seized under health laws, and if it cannot be purged of its poison, may be committed to the flames." Gilman *v.* Philadelphia, *supra*. So may the State, by like regulations, exclude from their midst not only convicts, paupers, idiots, lunatics, and persons likely to become a public charge, but animals having contagious diseases. Railroad Company *v.* Husen, *supra*. This court has never hesitated, by the most rigid rules of construction, to guard the commercial power of Congress against encroachment in the form or under the guise of State regulation, established for the purpose and with the effect of destroying or impairing rights secured by the Constitution. It has, nevertheless, with marked distinctness and uniformity, recognized the necessity, growing out of the fundamental conditions of civil society, of upholding State police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health, and property, which each State owes to her citizens. These considerations, gathered from the former decisions of this court, would seem to justify the conclusion that the right which the patentee or his assignee possesses in the property created

by the application of a patented discovery must be enjoyed subject to the complete and salutary power with which the States have never parted, of so defining and regulating the sale and use of property within their respective limits as to afford protection to the many against the injurious conduct of the few. The right of property in the physical substance, which is the fruit of the discovery, is altogether distinct from the right in the discovery itself, just as the property in the instruments or plate by which copies of a map are multiplied is distinct from the copyright of the map itself. Stephens *v.* Cady, 14 How. 528; Stevens *v.* Gladding *et al.*, 17 id. 447. The right to sell the Aurora oil was not derived from the letters-patent, but it existed and could have been exercised before they were issued, unless it was prohibited by valid local legislation. All which they primarily secure is the exclusive right in the discovery. That is an incorporeal right, or, in the language of Lord Mansfield in Millar *v.* Taylor, 4 Burr. 2396, "a property in notion," having "no corporeal tangible substance." Its enjoyment may be secured and protected by national authority against all interference; but the use of the tangible property which comes into existence by the application of the discovery is not beyond the control of State legislation, simply because the patentee acquires a monopoly in his discovery.

An instructive case upon the precise point under consideration is Jordan *v.* The Overseers of Dayton, 4 Ohio, 295. Jordan was sued in debt, to recover certain penalties for practising medicine in violation of an Ohio statute regulating the practice of physic and surgery. His defence rested, in part, upon the ground that the medicine administered by him was that for which letters-patent had issued to his assignor, granting to the latter the exclusive right of making, constructing, using, and vending to others to be used, the medicine in question, which was described in the letters-patent as a new and useful improvement, and as being a mode of preparing, mixing, compounding, administering, and using that medicine. The contention of Jordan was that the State government could not restrict or control the beneficial or lucrative use of the invention, and that, as assignee of the patentee, he was entitled to administer the patented medicine without obtaining a license to practise physic or surgery as required by the State statute. The Supreme Court of Ohio said: "This leads us to consider the nature and extent of such rights as accrue from letters-patent for useful discoveries. Although the inventor had at all times the right to enjoy the fruits of his own ingenuity, in every lawful form of which its use was susceptible, yet, before the enactment of the statute, he had not the power of preventing others from participating in that enjoyment to the same extent with himself; so that, however the world might derive benefit from his labors, no profit ensued to himself. The ingenious man was therefore led either to abandon pursuits of this nature, or to conceal his results from the world. The end of the statute was to encourage useful inventions.

and to hold forth, as inducements to the inventor, the exclusive use of his inventions for a limited period. The sole operation of the statute is to enable him to prevent others from using the products of his labors except with his consent. But his own right of using is not enlarged or affected. There remains in him, as in every other citizen, the power to manage his property, or give direction to his labors, at his pleasure, subject only to the paramount claims of society, which requires that his enjoyment may be modified by the exigencies of the community to which he belongs, and regulated by laws which render it subservient to the general welfare, if held subject to State control. If the State should pass a law for the purpose of destroying a right created by the Constitution, this court will do its duty; but an attempt by the legislature, in good faith, to regulate the conduct of a portion of its citizens, in a matter strictly pertaining to its internal economy, we cannot but regard as a legitimate exercise of power, although such law may sometimes indirectly affect the enjoyment of rights flowing from the Federal government." Some light is thrown upon the question by Vanini *et al. v.* Paine *et al.*, 1 Harr. (Del.) 65. In that case it appears that Yates and McIntyre were assignees of Vanini, the inventor and patentee of a mode of drawing lotteries, and making schemes for lotteries on the combination and permutation principle. Other brokers issued a scheme for drawing a lottery under a certain act for the benefit of a school, adopting the plan of Vanini's patent. Yates and McIntyre filed their bill for injunction upon the ground, partly, that the defendants were proceeding in violation of the patent-rights secured to Vanini. The Court of Errors and Appeals of Delaware said: "At the times Yates & McIntyre made contracts for the lottery privileges set forth in the bill, we had, in force, an act of assembly prohibiting lotteries, the preamble of which declares that they are pernicious and destructive to frugality and industry, and introductive of idleness and immorality, and against the common good and general welfare. It therefore cannot be admitted that the plaintiffs have a right to use an invention for drawing lotteries in this State, merely because they have a patent for it under the United States. A person might with as much propriety claim a right to commit murder with an instrument, because he held a patent for it as a new and useful invention."

In Livingston *v.* Van Ingen, 9 Johns. 507, 582, Chancellor Kent said that "the national power will be fully satisfied if the property created by patent be, for the given time, enjoyed and used exclusively, *so far* as, under the laws of the several States, the property shall be deemed for toleration. There is no need of giving this power any broader construction in order to attain the end for which it was granted, which was to reward the beneficent efforts of genius, and to encourage the useful arts." That case, so far as it related to the validity, under the commercial clause of the Constitution, of certain statutes of New York, is not now recognized as authority. It is, perhaps, also true

that the language just quoted was not absolutely necessary to the decision of that case. But as an expression of opinion by an eminent jurist as to the nature and extent of the rights secured by the Federal Constitution to inventors, it is entitled to great weight.

Without further elaboration, we deem it only necessary to say that the Kentucky statute does not, in our judgment, contravene the provisions of the Federal Constitution, or of any statute passed in pursuance thereof. Its execution creates no necessary conflict with national authority, and interferes with no right secured by Federal legislation, to the patentee or his assigns.

We perceive no error in the judgment, and it is

*Affirmed.*

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## HERDIC *v.* ROESSLER.

109 New York, 127. 1888.

[This was an action upon a promissory note in which failure of consideration was pleaded as a defence. Judgment was entered in the trial court upon a verdict in favor of defendant, which judgment was affirmed on appeal to the General Term of the Supreme Court (39 Hun, 198), and the judgment was then brought to the Court of Appeals for review.]

The verdict of the jury sustained the defence. The consideration was the sale by the payee to the defendant of the right to make, use, and vend a patented article, under an invention patented by the payee, and of a collateral agreement on his part to promote, by means of orders and in other specified ways, the business of the defendant. The words "given for a patent-right" were not written or printed in the note, as required by the act, chapter 65 of the Laws of 1877. The note was in the ordinary form of commercial paper, and was given, dated, and payable at Buffalo, in this State, where the defendant resides and where the agreement was made in pursuance of which the note was given. It was subsequently, before maturity, transferred by the payee to the plaintiff in the State of Pennsylvania, where the parties to the transfer resided. It was claimed, and there was evidence tending to show, that the plaintiff paid value for the note, without notice of any defence, but it was proved and found by the jury that he had notice when he purchased it of the consideration for which it was given. The defendant was permitted, against the objection and exception of the plaintiff, to read in evidence a statute of Pennsylvania, similar to the statute of New York above referred to. The plaintiff requested the court to charge the jury that the statute, chapter 65 of the Laws of 1877, was unconstitutional and

void. The court refused to charge as requested, to which refusal the plaintiff excepted.

ANDREWS, J. The validity of the statute, chapter 65 of the Laws of 1877, is the principal question in this case. It is entitled "An Act to regulate the execution and transfer of negotiable instruments given for patent-rights." The first section declares that "whenever any promissory note or other negotiable instrument shall be given, the consideration of which shall consist, in whole or in part, of the right to make, use, or vend any patent invention or inventions claimed or represented by the vendor at the time of the sale to be patented, the words 'given for a patent-right' shall be prominently and legibly written or printed on the face of such note or instrument above the signature thereto; and such note or instrument in the hands of any purchaser or holder shall be subject to the same defences as in the hands of the original owner." Then follows a provision in the second section to the effect that if any person shall take, sell, or transfer any promissory note or other negotiable instrument, not having such words therein, knowing the consideration of such note or instrument to consist, in whole or in part, of the right to make, use, and vend any patent invention, [he] shall be guilty of a misdemeanor.

The constitutionality of the act is assailed on the ground that it is in contravention of article 1, section 8, of the Constitution of the United States, and the acts of Congress enacted in pursuance thereof, which secure to a patentee, for a limited time, "the full and exclusive right and liberty of making, using, and vending to others to be used," his invention or discovery. 5 U. S. Stat. at Large, 117. It is insisted that the statute of the State operates as an unlawful restraint upon the right of sale conferred upon the patentee by the acts of Congress. This question has been considered by the highest courts in the States of Pennsylvania and Ohio, under statutes substantially like the statute in this State, and, in the opinions delivered, the constitutionality of the legislation was maintained. Tod *v.* Wick, 36 Ohio St. 370; Haskell *v.* Jones, 86 Pa. St. 173. The plaintiff, however, in opposition to this view, cites several cases. *Ex parte* Robinson, 2 Biss. 309; Woolen *v.* Banker, U. S. Ct. Court, S. D. Ohio, 2 Flipp. 33; *In re* Lake, U. S. Ct. Court, N. D. Ohio, Matthews, J.; Cranson *v.* Smith, 37 Mich. 309; Wilch *v.* Phelps, 14 Neb. 134; State *v.* Lockwood, 43 Wis. 403. The leading case cited by the plaintiff, *Ex parte* Robinson, arose under a statute of Indiana, making it unlawful for a person to sell, or offer to sell, any patent-right within that State without first filing an authenticated copy of the letters-patent with the clerk of the court, and at the same time making an affidavit before the clerk that the letters-patent were genuine and had not been revoked or annulled, and that he had full authority to sell, &c. It was held by Mr. Justice Davis, sitting at circuit, that the law then in question was unconstitutional and

void, as an infringement upon the right of sale secured to a patentee by the letters-patent. The other cases mentioned are founded mainly upon the authority of *Ex parte* Robinson. It will be observed that even if that case was well decided, it would not necessarily determine a case arising under our statute, which does not undertake to impose conditions upon the right to sell a patented invention, but simply prescribes that if a negotiable instrument is taken upon such sale, the words "given for a patent-right" shall be inserted, and subjects the note to defences existing against its original holder, notwithstanding its transfer. The Supreme Court of the United States in a recent case (Patterson *v.* State of Kentucky, 97 U. S. 501) had occasion to pass upon the validity of a statute of Kentucky, which prohibited the sale in that State of illuminating oils not bearing a prescribed test. The plaintiff was the patentee of an oil which, if the statute was valid, could not be sold at all in Kentucky, as it could not be made so as to conform it to the statute standard. It was claimed that the law was an invasion of the right secured to the patentee by his patent, to sell his invention. The opinion of Mr. Justice Harlan in the case, upholding the statute, in which the court concurred, is an able and satisfactory exposition of the doctrine that the patent laws do not interfere with the power of a State to pass laws for the protection and security of its citizens in their persons and property, or in respect to matters of internal polity, although such laws may incidentally affect the profitable use or sale by a patentee of his invention. The Supreme Court of Indiana, after the decision in Patterson *v.* Kentucky, affirmed the constitutionality of the Indiana statute, reversing its previous decisions to the contrary founded upon *Ex parte* Robinson. Brechbill *v.* Randall, 102 Ind. 528; New *v.* Walker, 108 id. 365. Under this state of the authorities we feel at liberty to declare our concurrence in the views expressed by the courts of Ohio and Pennsylvania upon the general question. The right of a discoverer to sell his invention is not derived from his patent. This right would exist although no patent laws had been enacted. What he obtains by his patent is the right to exclude others from selling or using his invention for the period specified, the right to sell or use which would, except for the protection of the patent laws, be open to all the world. The statute of New York, now in question, in no way interferes with this exclusive right. A State law directly infringing this right would unquestionably be void. The law of Congress and the State law are not in conflict. The object of one is to secure to the inventor an exclusive right to use or sell his invention, and the object of the other is to protect against fraud in sales. The State law operates upon the thing taken for the right sold, when that is a negotiable instrument, by requiring the consideration to be plainly expressed, and thus subjecting the instrument, when transferred, to the same defences in the hands of the transferee as in the hands of the original

holder. The statute does not make the note illegal, although the statutory words are omitted, nor does it take from a *bona fide* transferee for value before maturity, without notice of the consideration, the protection accorded to commercial paper by the law merchant. This is the view taken in the case first cited, and is, we think, the true construction of the statute. It is impossible to say even that the statute operates to the disadvantage of the patentee. It may restrict the currency of the paper taken on sales of patent-rights, but, on the other hand, it may facilitate sales by inducing confidence on the part of purchasers, that they will be protected in case of fraud or other defence. We refer, for a fuller discussion on the general question, to the cases cited. The admission of the Pennsylvania statute in evidence, if erroneous, was harmless. The right of the defendant to interpose his defence against the plaintiff, the indorsee of the note, although he was a purchaser for value, provided he had notice of the consideration, was secured to him by the *lex loci*, and the plaintiff took the paper subject to all the infirmities which attached to it by the law of the place where the contract was made and was to be performed. Story's Prom. Notes, § 168 *et seq.*; 2 Kent's Com. 459. There is no other question which requires special notice.

The judgment should be affirmed.

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## DALE TILE MANUFACTURING COMPANY *v.* HYATT.

125 United States, 46. 1888.

Mr. Justice Gray delivered the opinion of the court.

The defendant contended in the courts of New York that those courts had no jurisdiction, because the plaintiff's right to maintain her action depended upon the question whether the second reissue of her patent was valid or invalid under the patent laws of the United States, and that of that question the courts of the United States had exclusive jurisdiction. The judgments of each court of the State, holding that the question of the validity of that reissue could not be contested in this action, and assuming jurisdiction to render judgment against the defendant, necessarily involved a decision against the immunity claimed by the defendant under the Constitution and laws of the United States, which this court has jurisdiction to review.

The motion to dismiss must therefore be denied. But the decision was so clearly right, that the motion to affirm is granted.

The action was upon an agreement in writing, by which the plaintiff, as owner of letters-patent, already once reissued, granted to the

defendant an exclusive license to make and sell the patented articles within a certain territory, during the term of the patent and of any extension or renewal thereof; and the defendant expressly acknowledged the validity of the letters-patent, and stipulated that the plaintiff might, without prejudice to this agreement, obtain further reissues, and promised to pay to the plaintiff certain royalties so long as no decision adverse to the validity of the patent should have been rendered.

The defendant contended that this was a case arising under the patent laws, of which the courts of the United States have exclusive jurisdiction. Rev. Stat. § 629, cl. 9; § 711, cl. 5. But it is clearly established by a series of decisions of this court, that an action upon such an agreement as that here sued on is not a case arising under the patent laws.

It has been decided that a bill in equity in the Circuit Court of the United States by the owner of letters-patent, to enforce a contract for the use of the patent-right, or to set aside such a contract because the defendant has not complied with its terms, is not within the acts of Congress, by which an appeal to this court is allowable in cases arising under the patent laws, without regard to the value of the matter in controversy. Act of July 4, 1836, c. 357, § 17, 5 Stat. 124; Rev. Stat. § 699; Wilson *v.* Sandford, 10 How. 99; Brown *v.* Shannon, 20 How. 55.

Following those decisions, it was directly adjudged in Hartell *v.* Tilghman, 99 U. S. 547, that a bill in equity by a patentee, alleging that the defendants had broken a contract by which they had agreed to pay him a certain royalty for the use of his invention and to take a license from him, and thereupon he forbade them to use it, and they disregarded the prohibition, and he filed this bill charging them as infringers, and praying for an injunction, an account of profits and damages, was not a case arising under the patent laws, and therefore, the parties being citizens of the same State, not within the jurisdiction of the Circuit Court of the United States. And the judges who dissented from that conclusion admitted it to be perfectly well settled "that where a suit is brought on a contract of which a patent is the subject-matter, either to enforce such contract, or to annul it, the case arises on the contract, or out of the contract, and not under the patent laws." 99 U. S. 558.

In the still later case of Albright *v.* Teas, 106 U. S. 613, a patentee filed a bill in equity in a State court, setting up a contract by which he agreed to assign his patent to the defendants and they agreed to pay him certain royalties, and alleging that the defendants had refused to account for or pay such royalties to him, and had fraudulently excluded him from inspecting their books of account. The defendants answered that the plaintiff had been paid all the royalties to which he was entitled, and that, if he claimed more, it was because he insisted that goods made under another patent

were an infringement of his. This court held that it was not a case arising under the Constitution or laws of the United States, removable as such into the Circuit Court under the act of March 3, 1875, c. 137, § 2. 18 Stat. 470.

It was said by Chief Justice Taney in Wilson *v.* Sandford, and repeated by the court in Hartell *v.* Tilghman, and in Albright *v.* Teas, "The dispute in this case does not arise under any act of Congress; nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill; and there is no act of Congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common-law and equity principles." 10 How. 101, 102; 99 U. S. 552; 106 U. S. 619.

Those words are equally applicable to the present case, except that, as it is an action at law, the principles of equity have no bearing. This action, therefore, was within the jurisdiction, and, the parties being citizens of the same State, within the exclusive jurisdiction, of the State courts; and the only Federal question in the case was rightly decided.

Upon the merits of the case, it follows from what has been already said, that no question is presented, of which this court, upon this writ of error, has jurisdiction. Murdock *v.* Memphis, 20 Wall. 590. The grounds of the judgment below appear in the opinion of the Court of Appeals, to which, under the existing acts of Congress, this court is at liberty to refer. Philadelphia Fire Association *v.* New York, 119 U. S. 110; Kreiger *v.* Shelby County Railroad, [125 U. S.] 43. Whether that court was right in its suggestion that it would have no jurisdiction to determine the validity of the second reissue if incidentally drawn in question in an action upon an agreement between the parties, we need not consider; inasmuch as it expressly declined to pass upon any such question, because it held that, in this action to recover royalties due under the agreement, the defendant, while continuing to enjoy the privileges of the license, was estopped to deny the validity of the patent, or of any reissue thereof. The decision was based upon the contract between the parties; and the court did not decide, nor was it necessary for the determination of the case that it should decide any question depending on the construction or effect of the patent laws of the United States. Kinsman *v.* Parkhurst, 18 How. 289; Brown *v.* Atwell, 92 U. S. 327.

*Judgment affirmed.*

## SECTION XI. — PIRACIES, FELONIES ON THE HIGH SEAS, &c.

### UNITED STATES v. SMITH.

5 Wheaton, 153; 4 Curtis, 597. 1820.

THIS was an indictment for piracy against the prisoner, Thomas Smith, before the Circuit Court of Virginia, on the act of Congress of the 3d of March, 1819 (3 Stats. at Large, 513).

The jury found a special verdict, as follows: "We, of the jury, find, that the prisoner, Thomas Smith, in the month of March, 1819, and others, were part of the crew of a private armed vessel, called The Creollo (commissioned by the government of Buenos Ayres, a colony then at war with Spain), and lying in the port of Margaritta; that in the month of March, 1819, the said prisoner and others of the crew mutinied, confined their officer, left the vessel, and in the said port of Margaritta, seized, by violence, a vessel called The Irresistible, a private armed vessel, lying in that port, commissioned by the government of Artigas, who was also at war with Spain; that the said prisoner and others, having so possessed themselves of the said vessel, The Irresistible, appointed their officers, proceeded to sea on a cruise, without any documents or commission whatever; and while on that cruise, in the month of April, 1819, on the high seas, committed the offence charged in the indictment, by the plunder and robbery of the Spanish vessel therein mentioned. If the plunder and robbery aforesaid be piracy under the act of the Congress of the United States, entitled 'An Act to protect the commerce of the United States, and punish the crime of piracy,' then we find the said prisoner guilty; if the plunder and robbery, above stated, be not piracy under the said act of Congress, then we find him not guilty."

The Circuit Court divided on the question, whether this be piracy as defined by the law of nations so as to be punishable under the act of Congress of the 3d of March, 1819, and thereupon the question was certified to this court for its decision.

STORY, J., delivered the opinion of the court.

The act of Congress upon which this indictment is founded provides, "that if any person or persons whatsoever, shall, upon the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall be brought into, or found in the United States, every such offender or offenders shall, upon conviction thereof, &c., be punished with death."

The first point made at the bar is, whether this enactment be a constitutional exercise of the authority delegated to Congress upon the subject of piracies. The Constitution declares that Congress shall have power "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." The argument which has been urged in behalf of the prisoner is, that Congress is bound to define, in terms, the offence of piracy, and is not at liberty to leave it to be ascertained by judicial interpretation. If the argument be well founded, it seems admitted by the counsel that it equally applies to the eighth section of the act of Congress of 1790 (1 Stats. at Large, 113), c. 9, which declares that robbery and murder committed on the high seas shall be deemed piracy; and yet, notwithstanding a series of contested adjudications on this section, no doubt has hitherto been breathed of its conformity to the Constitution.

In our judgment, the construction contended for proceeds upon too narrow a view of the language of the Constitution. The power given to Congress is not merely "to define and punish piracies;" if it were, the words "to define" would seem almost superfluous, since the power to punish piracies would be held to include the power of ascertaining and fixing the definition of the crime. And it has been very justly observed, in a celebrated commentary, that the definition of piracies might have been left, without inconvenience, to the law of nations, though a legislative definition of them is to be found in most municipal codes. The Federalist, No. 42, p. 276. But the power is also given "to define and punish felonies on the high seas, and offences against the law of nations." The term "felonies" has been supposed, in the same work, not to have a very exact and determinate meaning in relation to offences at the common law committed within the body of a county. However this may be, in relation to offences on the high seas, it is necessarily somewhat indeterminate, since the term is not used in the criminal jurisprudence of the admiralty in the technical sense of the common law. See 3 Inst. 112; Hawk. P. C. c. 37; Moore, 576. Offences, too, against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations. In respect, therefore, as well to felonies on the high seas as to offences against the law of nations, there is a peculiar fitness in giving the power to define as well as to punish; and there is not the slightest reason to doubt that this consideration had very great weight in producing the phraseology in question.

But supposing Congress were bound, in all the cases included in the clause under consideration, to define the offence, still, there is nothing which restricts it to a mere logical enumeration, in detail, of all the facts constituting the offence. Congress may as well define by using a term of a known and determinate meaning, as by an express enumeration of all the particulars included in that term.

That is certain which is by necessary reference made certain. When the act of 1790 declares that any person who shall commit the crime of robbery, or murder, on the high seas shall be deemed a pirate, the crime is not less clearly ascertained than it would be by using the definitions of these terms as they are found in our treatises of the common law. In fact, by such a reference, the definitions are necessarily included, as much as if they stood in the text of the act. In respect to murder, where "malice aforethought" is of the essence of the offence, even if the common-law definition were quoted in express terms, we should still be driven to deny that the definition was perfect, since the meaning of "malice aforethought" would remain to be gathered from the common law. There would then be no end to our difficulties, or our definitions, for each would involve some terms which might still require some new explanation. Such a construction of the Constitution is, therefore, wholly inadmissible. To define piracies, in the sense of the Constitution, is merely to enumerate the crimes which shall constitute piracy; and this may be done either by a reference to crimes having a technical name, and determinate extent, or by enumerating the acts in detail, upon which the punishment is inflicted.

It is next to be considered whether the crime of piracy is defined by the law of nations with reasonable certainty. What the law of nations on this subject is, may be ascertained by consulting the works of jurists writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law. There is scarcely a writer on the law of nations who does not allude to piracy as a crime of a settled and determinate nature; and whatever may be the diversity of definitions, in other respects, all writers concur in holding that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy. The same doctrine is held by all the great writers on maritime law, in terms that admit of no reasonable doubt. The common law, too, recognizes and punishes piracy as an offence, not against its own municipal code, but as an offence against the law of nations (which is part of the common law), as an offence against the universal law of society, a pirate being deemed an enemy of the human race. Indeed, until the statute of 28th of Henry VIII., c. 15, piracy was punishable in England only in the admiralty, as a civil-law offence; and that statute, in changing the jurisdiction, has been universally admitted not to have changed the nature of the offence. Hawk. P. C. c. 37, s. 2; 3 Inst. 112. Sir Charles Hedges, in his charge at the admiralty sessions, in the case of Rex *v.* Dawson, 5 State Trials, declared, in emphatic terms, that "piracy is only a sea term for robbery, piracy being a robbery committed within the jurisdiction of the admiralty." Sir Leoline Jenkins, too, on a like occasion, declared that "a robbery, when committed upon the sea, is what we call piracy;" and he cited the civil-law writers in proof. And

it is manifest from the language of Sir William Blackstone, 4 Bl. Comm. 73, in his comments on piracy, that he considered the common-law definition as distinguishable in no essential respect from that of the law of nations. So that, whether we advert to writers on the common law, or the maritime law, or the law of nations, we shall find that they universally treat of piracy as an offence against the law of nations, and that its true definition, by that law, is robbery upon the sea. And the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offence against any persons whatsoever, with whom they are in amity, is a conclusive proof that the offence is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment. We have, therefore, no hesitation in declaring that piracy, by the law of nations, is robbery upon the sea, and that it is sufficiently and constitutionally defined by the fifth section of the act of 1819.

Another point has been made in this case, which is, that the special verdict does not contain sufficient facts upon which the court can pronounce that the prisoner is guilty of piracy. We are of a different opinion. The special verdict finds that the prisoner is guilty of the plunder and robbery charged in the indictment; and finds certain additional facts from which it is most manifest that he and his associates were, at the time of committing the offence, freebooters upon the sea, not under the acknowledged authority or deriving protection from the flag or commission of any government. If, under such circumstances, the offence be not piracy, it is difficult to conceive any which would more completely fit the definition.

It is to be certified to the Circuit Court that upon the facts stated the case is piracy, as defined by the law of nations, so as to be punishable under the act of Congress of the 3d of March, 1819.[1]

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## UNITED STATES *v.* RODGERS.

150 United States, 249. 1893.

In February, 1888, the defendants, Robert S. Rodgers and others, were indicted in the District Court of the United States for the Eastern District of Michigan for assaulting, in August, 1887, with a dangerous weapon, one James Downs, on board of the steamer Alaska, a vessel belonging to citizens of the United States, and then being within the admiralty jurisdiction of the United States, and not within the jurisdiction of any particular State of the United

[1] Mr. Justice Livingston delivered a dissenting opinion.

States, viz., within the territorial limits of the Dominion of Canada.

The indictment contained six counts, charging the offence to have been committed in different ways, or with different intent, and was remitted to the Circuit Court for the Sixth Circuit of the Eastern District of Michigan. There the defendant Rodgers filed a plea to the jurisdiction of the court, alleging that it had no jurisdiction of the matters charged, as appeared on the face of the indictment, and to the plea a demurrer was filed. Upon this demurrer the judges of the Circuit Court were divided in opinion, [and certified to this court the question "whether the courts of the United States have jurisdiction, under section 5346 of the Revised Statutes of the United States, to try a person for an assault with a dangerous weapon, committed on a vessel belonging to a citizen of the United States, when such vessel is in the Detroit River, out of the jurisdiction of any particular State and within the territorial limits of the Dominion of Canada".]

Section 5346 of the Revised Statutes, upon which the indictment was found, is as follows: —

"SEC. 5346. Every person who, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, on board any vessel belonging in whole or part to the United States, or any citizen thereof, with a dangerous weapon, or with intent to perpetrate any felony, commits an assault on another shall be punished by a fine of not more than three thousand dollars and by imprisonment at hard labor not more than three years."

The statute relating to the place of trial in this case is contained in section 730 of the Revised Statutes, which is as follows: —

"SEC. 730. The trial of all offences committed upon the high seas or elsewhere, out of the jurisdiction of any particular State or district, shall be in the district, where the offender is found or into which he is first brought."

MR. JUSTICE FIELD delivered the opinion of the court. Several questions of interest arise upon the construction of section 5346 of the Revised Statutes, upon which the indictment in this case was found. The principal one is whether the term "high seas," as there used, is applicable to the open, unenclosed waters of the Great Lakes, between which the Detroit River is a connecting stream. The term was formerly used, particularly by writers on public law, and generally in official communications between different governments, to designate the open, unenclosed waters of the ocean, or of the British seas, outside of their ports and havens. At one time it was claimed that the ocean, or portions of it, were subject to the exclusive use of particular nations. The Spaniards, in the 16th century, asserted the right to exclude all others from the Pacific

Ocean. The Portuguese claimed, with the Spaniards, under the grant of Pope Alexander VI., the exclusive use of the Atlantic Ocean west and south of a designated line. And the English, in the 17th century, claimed the exclusive right to navigate the seas surrounding Great Britain. Woolsey on International Law, § 55.

In the discussions which took place in support of and against these extravagant pretensions the term "high seas" was applied, in the sense stated. It was also used in that sense by English courts and law writers. There was no discussion with them as to the waters of other seas. The public discussions were generally limited to the consideration of the question whether the high seas, that is, the open, unenclosed seas, as above defined, or any portion thereof, could be the property or under the exclusive jurisdiction of any nation, or whether they were open and free to the navigation of all nations. The inquiry in the English courts was generally limited to the question whether the jurisdiction of the admiralty extended to the waters of bays and harbors, such extension depending upon the fact whether they constituted a part of the high seas.

In his treatise on the rights of the sea, Sir Matthew Hale says: "The sea is either that which lies within the body of a county, or without. That arm or branch of the sea which lies within the *fauces terræ*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county, and, therefore, within the jurisdiction of the sheriff or coroner. That part of the sea which lies not within the body of a county is called the main sea or ocean." De Jure Maris, c. iv. By the "main sea" Hale here means the same thing expressed by the term "high sea," — "*mare altum*," or "*le haut meer*."

In Waring *v.* Clarke, 5 How. 441, 452, this court said that it had been frequently adjudicated in the English common-law courts since the restraining statutes of Richard II. and Henry IV., "that high seas mean that portion of the sea which washes the open coast." In United States *v.* Grush, 5 Mason, 290, it was held by Mr. Justice Story, in the United States Circuit Court, that the term "high seas," in its usual sense, expresses the unenclosed ocean or that portion of the sea which is without the *fauces terræ* on the sea coast, in contradistinction to that which is surrounded or enclosed between narrow headlands or promontories. It was the open, unenclosed waters of the ocean, or the open, unenclosed waters of the sea, which constituted the "high seas" in his judgment. There was no distinction made by him between the ocean and the sea, and there was no occasion for any such distinction. The question in issue was whether the alleged offences were committed within a county of Massachusetts on the sea coast, or without it, for in the latter case they were committed upon the high seas and within the statute. It was held that they were committed in the county of Suffolk, and thus were not covered by the statute.

If there were no seas other than the ocean, the term "high seas" would be limited to the open, unenclosed waters of the ocean. But as there are other seas besides the ocean, there must be high seas other than those of the ocean. A large commerce is conducted on seas other than the ocean and the English seas, and it is equally necessary to distinguish between their open waters and their ports and havens, and to provide for offences on vessels navigating those waters and for collisions between them. The term "high seas" does not, in either case, indicate any separate and distinct body of water; but only the open waters of the sea or ocean, as distinguished from ports and havens and waters within narrow headlands on the coast. This distinction was observed by Latin writers between the ports and havens of the Mediterranean and its open waters — the latter being termed the high seas.[1] In that sense the term may also be properly used in reference to the open waters of the Baltic and the Black Sea, both of which are inland seas, finding their way to the ocean by a narrow and distant channel. Indeed, wherever there are seas in fact, free to the navigation of all nations and people on their borders, their open waters outside of the portion "surrounded or enclosed between narrow headlands or promontories," on the coast, as stated by Mr. Justice Story, or "without the body of a county," as declared by Sir Matthew Hale, are properly characterized as high seas, by whatever name the bodies of water of which they are a part may be designated. Their names do not determine their character. There are, as said above, high seas on the Mediterranean (meaning outside of the enclosed waters along its coast), upon which the principal commerce of the ancient world was conducted and its great naval battles fought. To hold that on such seas there are no high seas, within the true meaning of that term, that is, no open, unenclosed waters, free to the navigation of all nations and people on their borders, would be to place upon that term a narrow and contracted meaning. We prefer to use it in its true sense, as applicable to the open, unenclosed waters of all seas, than to adhere to the common meaning of the term two centuries ago, when it was generally limited to the open waters of the ocean and of seas surrounding Great Britain, the freedom of which was then the principal subject of discussion. If it be conceded, as we think it must be, that the open, unenclosed waters of the Mediterranean are high seas, that concession is a sufficient answer to the claim that the high seas always denote the open waters of the ocean.

Whether the term is applied to the open waters of the ocean or of a particular sea, in any case, will depend upon the context or cir-

[1] "Insula *portum*
Efficit objectu laterum, quibus omnis ab *alto*
Frangitur, inque sinus scindit sese unda reductos."
*The Æneid*, Lib. 1, v. 159–161.

cumstances attending its use, which in all cases affect, more or less, the meaning of language. It may be conceded that if a statement is made that a vessel is on the high seas, without any qualification by language or circumstance, it will be generally understood as meaning that the vessel is upon the open waters of one of the oceans of the world. It is true, also, that the ocean is often spoken of by writers on public law as *the sea*, and characteristics are then ascribed to the sea generally which are properly applicable to the ocean alone; as, for instance, that its open waters are the highway of all nations. Still the fact remains that there are other seas than the ocean whose open waters constitute a free highway for navigation to the nations and people residing on their borders, and are not a free highway to other nations and people, except there be free access to those seas by open waters or by conventional arrangements.

As thus defined, the term would seem to be as applicable to the open waters of the great Northern lakes as it is to the open waters of those bodies usually designated as seas. The Great Lakes possess every essential characteristic of seas. They are of large extent in length and breadth; they are navigable the whole distance in either direction by the largest vessels known to commerce; objects are not distinguishable from the opposite shores; they separate, in many instances, States, and in some instances constitute the boundary between independent nations; and their waters, after passing long distances, debouch into the ocean. The fact that their waters are fresh and not subject to the tides, does not affect their essential character as seas. Many seas are tideless, and the waters of some are saline only in a very slight degree.

The waters of Lake Superior, the most northern of these lakes, after traversing nearly 400 miles, with an average breadth of over 100 miles, and those of Lake Michigan, which extend over 350 miles, with an average breadth of 65 miles, join Lake Huron, and, after flowing about 250 miles, with an average breadth of 70 miles, pass into the river St. Clair; thence through the small lake of St. Clair into the Detroit River; thence into Lake Erie and, by the Niagara River, into Lake Ontario; whence they pass, by the river St. Lawrence, to the ocean, making a total distance of over 2,000 miles. Ency. Britannica, vol. 21, p. 178. The area of the Great Lakes, in round numbers, is 100,000 square miles. Ibid. vol. 14, p. 217. They are of larger dimensions than many inland seas which are at an equal or greater distance from the ocean. The waters of the Black Sea travel a like distance before they come into contact with the ocean. Their first outlet is through the Bosphorus, which is about 20 miles long and for the greater part of its way less than a mile in width, into the sea of Marmora, and through that to the Dardanelles, which is about 40 miles in length and less than four miles in width, and then they find their way through the islands of

the Greek Archipelago, up the Mediterranean Sea, past the Straits of Gibraltar to the ocean, a distance, also, of over 2,000 miles.

In the Genesee Chief case, 12 How. 443, this court, in considering whether the admiralty jurisdiction of the United States extended to the Great Lakes, and speaking, through Chief Justice Taney, of the general character of those lakes, said: "These lakes are, in truth, inland seas. Different States border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them between different States and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas applies with equal force to the lakes. There is an equal necessity for the instance and for the prize power of the admiralty court to administer international law, and if the one cannot be established, neither can the other" (12 How. 453).

After using this language, the Chief Justice commented upon the inequality which would exist, in the administration of justice, between the citizens of the States on the lakes, if, on account of the absence of tide water in those lakes, they were not entitled to the remedies afforded by the grant of admiralty jurisdiction of the Constitution, and the citizens of the States bordering on the ocean or upon navigable waters affected by the tides. The court, perceiving that the reason for the exercise of the jurisdiction did not in fact depend upon the tidal character of the waters, but upon their practical navigability for the purposes of commerce, disregarded the test of tide water prevailing in England as inapplicable to our country with its vast extent of inland waters. Acting upon like considerations in the application of the term "high seas" to the waters of the Great Lakes, which are equally navigable, for the purposes of commerce, in all respects, with the bodies of water usually designated as seas, and are in no respect affected by the tidal or saline character of their waters, we disregard the distinctions made between salt and fresh water seas, which are not essential, and hold that the reason of the statute, in providing for protection against violent assaults on vessels in tidal waters, is no greater but identical with the reason for providing against similar assaults on vessels in navigable waters that are neither tidal nor saline. The statute was intended to extend protection to persons on vessels belonging to citizens of the United States, not only upon the high seas, but in all navigable waters of every kind out of the jurisdiction of any particular State, whether moved by the tides or free from their influence.

The character of these lakes as seas was recognized by this court in the recent Chicago Lake Front Case, where we said: "These lakes possess all the general characteristics of open seas, except in

the freshness of their waters, and in the absence of the ebb and flow of the tide." "In other respects," we added, "they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes." Illinois Central R. R. Co. *v.* Illinois, 146 U. S. 387, 435.

It is to be observed also that the term "high" in one of its significations is used to denote that which is common, open, and public. Thus every road or way or navigable river which is used freely by the public is a "high" way. So a large body of navigable water other than a river, which is of an extent beyond the measurement of one's unaided vision, and is open and unconfined, and not under the exclusive control of any one nation or people, but is the free highway of adjoining nations or people, must fall under the definition of "high seas" within the meaning of the statute. We may as appropriately designate the open, unenclosed waters of the lakes as the high seas of the lakes, as to designate similar waters of the ocean as the high seas of the ocean, or similar waters of the Mediterranean as the high seas of the Mediterranean.

The language of section 5346, immediately following the term "high seas," declaring the penalty for violent assaults when committed on board of a vessel in any arm of the sea or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, equally as when committed on board of a vessel on the high seas, lends force to the construction given to that term. The language used must be read in conjunction with that term, and as referring to navigable waters out of the jurisdiction of any particular State, but connecting with the high seas mentioned. The Detroit River, upon which was the steamer Alaska at the time the assault was committed, connects the waters of Lake Huron (with which, as stated above, the waters of Lake Superior and Lake Michigan join) with the waters of Lake Erie, and separates the Dominion of Canada from the United States, constituting the boundary between them, the dividing line running nearly midway between its banks, as established by commissioners, pursuant to the treaty between the two countries. 8 Stat. 274, 276. The river is about 22 miles in length and from one to three miles in width, and is navigable at all seasons of the year by vessels of the largest size. The number of vessels passing through it each year is immense. Between the years 1880 and 1892, inclusive, they averaged from thirty-one to forty thousand a year, having a tonnage varying from sixteen to twenty-four millions. In traversing the river they are constantly passing from the territorial jurisdiction of the one nation to that of the other. All of them, however, so far as transactions had on board

are concerned, are deemed to be within the country of their owners. Constructively they constitute a part of the territory of the nation to which the owners belong. Whilst they are on the navigable waters of the river they are within the admiralty jurisdiction of that country. This jurisdiction is not changed by the fact that each of the neighboring nations may in some cases assert its own authority over persons on such vessels in relation to acts committed by them within its territorial limits. In what cases jurisdiction by each country will be thus asserted and to what extent, it is not necessary to inquire, for no question on that point is presented for our consideration. The general rule is that the country to which the vessel belongs will exercise jurisdiction over all matters affecting the vessel or those belonging to her, without interference of the local government, unless they involve its peace, dignity, or tranquillity, in which case it may assert its authority. Wildenhus's Case, 120 U. S. 1, 12; Halleck on International Law, c. vii. § 26, p. 172. The admiralty jurisdiction of the country of the owners of the steamer upon which the offence charged was committed is not denied. They being citizens of the United States, and the steamer being upon navigable waters, it is deemed to be within the admiralty jurisdiction of the United States. It was, therefore, perfectly competent for Congress to enact that parties on board committing an assault with a dangerous weapon should be punished when brought within the jurisdiction of the District Court of the United States. But it will hardly be claimed that Congress by the legislation in question intended that violent assaults committed upon persons on vessels owned by citizens of the United States in the Detroit River, without the jurisdiction of any particular State, should be punished, and that similar offences upon persons on vessels of like owners upon the adjoining lakes should be unprovided for. If the law can be deemed applicable to offences committed on vessels in any navigable river, haven, creek, basin, or bay, connecting with the lakes, out of the jurisdiction of any particular State, it would not be reasonable to suppose that Congress intended that no remedy should be afforded for similar offences committed on vessels upon the lakes, to which the vessels on the river, in almost all instances, are directed, and upon whose waters they are to be chiefly engaged. The more reasonable inference is that Congress intended to include the open, unenclosed waters of the lakes under the designation of high seas. The term, in the eye of reason, is applicable to the open, unenclosed portion of all large bodies of navigable waters, whose extent cannot be measured by one's vision, and the navigation of which is free to all nations and people on their borders, by whatever names those bodies may be locally designated. In some countries small lakes are called seas, as in the case of the Sea of Galilee, in Palestine. In other countries large bodies of water, greater than many bodies denominated seas, are called lakes, gulfs,

or basins. The nomenclature, however, does not change the real character of either, nor should it affect our construction of terms properly applicable to the waters of either. By giving to the term "high seas" the construction indicated, there is consistency and sense in the whole statute, but there is neither if it be disregarded. If the term applies to the open, unenclosed waters of the lakes, the application of the legislation to the case under indictment cannot be questioned, for the Detroit River is a water connecting such high seas, and all that portion which is north of the boundary line between the United States and Canada is without the jurisdiction of any State of the Union. But if they be considered as not thus applying, it is difficult to give any force to the rest of the statute without supposing that Congress intended to provide against violence on board of vessels in navigable rivers, havens, creeks, basins, and bays, without the jurisdiction of any particular State, and intentionally omitted the much more important provision for like violence and disturbances on vessels upon the Great Lakes. All vessels in any navigable river, haven, creek, basin, or bay of the lakes, whether within or without the jurisdiction of any particular State, would some time find their way upon the waters of the lakes; and it is not a reasonable inference that Congress intended that the law should apply to offences only on a limited portion of the route over which the vessels were expected to pass, and that no provision should be made for such offences over a much greater distance on the lakes.

Congress in thus designating the open, unenclosed portion of large bodies of water, extending beyond one's vision, naturally used the same term to indicate it as was used with reference to similar portions of the ocean or of bodies which had been designated as seas. When Congress, in 1790, first used that term the existence of the Great Lakes was known; they had been visited by great numbers of persons in trading with the neighboring Indians, and their immense extent and character were generally understood. Much more accurate was this knowledge when the act of March 3, 1825, was passed, 4 Stat. 115, c. 65, and when the provisions of section 5346 were re-enacted in the Revised Statutes in 1874. In all these cases, when Congress provided for the punishment of violence on board of vessels, it must have intended that the provision should extend to vessels on those waters the same as to vessels on seas, technically so called. There were no bodies of water in the United States to any portion of which the term "high seas" was applicable if not to the open, unenclosed waters of the Great Lakes. It does not seem reasonable to suppose that Congress intended to confine its legislation to the high seas of the ocean, and to its navigable rivers, havens, creeks, basins, and bays, without the jurisdiction of any State, and to make no provision for offences on those vast bodies of inland waters of the United States. There are vessels of

every description on those inland seas now carrying on a commerce greater than the commerce on any other inland seas of the world. And we cannot believe that the Congress of the United States purposely left for a century those who navigated and those who were conveyed in vessels upon those seas without any protection.

The statute under consideration provides that every person who, upon the high seas or in any river connecting with them, as we construe its language, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, commits, on board of any vessel belonging in whole or in part to the United States, or any citizen thereof, an assault on another with a dangerous weapon or with intent to perpetrate a felony, shall be punished, etc. The Detroit River, from shore to shore, is within the admiralty jurisdiction of the United States, and connects with the open waters of the lakes — high seas, as we hold them to be, within the meaning of the statute. From the boundary line, near its centre, to the Canadian shore it is out of the jurisdiction of the State of Michigan. The case presented is therefore directly within its provisions. The act of Congress of September 4, 1890, 26 Stat. 424, c. 874 (1 Sup. to the Rev. Stat. chap. 874, p. 799), providing for the punishment of crimes subsequently committed on the Great Lakes, does not, of course, affect the construction of the law previously existing.

We are not unmindful of the fact that it was held by the Supreme Court of Michigan in People *v.* Tyler, 7 Mich. 161, that the criminal jurisdiction of the Federal courts did not extend to offences committed upon vessels on the lakes. The judges who rendered that decision were able and distinguished; but that fact, whilst it justly calls for a careful consideration of their reasoning, does not render their conclusion binding or authoritative upon this court. Their opinions show that they did not accept the doctrine extending the admiralty jurisdiction to cases on the lakes and navigable rivers, which is now generally, we might say almost universally, received as sound by the judicial tribunals of the country. It is true, as there stated, that, as a general principle, the criminal laws of a nation do not operate beyond its territorial limits, and that to give any government, or its judicial tribunals, the right to punish any act or transaction as a crime, it must have occurred within those limits. We accept this doctrine as a general rule, but there are exceptions to it as fully recognized as the doctrine itself. One of those exceptions is that offences committed upon vessels belonging to citizens of the United States, within their admiralty jurisdiction (that is, within navigable waters), though out of the territorial limits of the United States, may be judicially considered when the vessel and parties are brought within their territorial jurisdiction. As we have before stated, a vessel is deemed part of the territory of the country to which she belongs. Upon that sub-

ject we quote the language of Mr. Webster, while Secretary of State, in his letter to Lord Ashburton of August, 1842. Speaking for the government of the United States, he stated with great clearness and force the doctrine which is now recognized by all countries. He said: "It is natural to consider the vessels of a nation as parts of its territory, though at sea, as the State retains its jurisdiction over them; and according to the commonly received custom, this jurisdiction is preserved over the vessels even in parts of the sea subject to a foreign dominion. This is the doctrine of the law of nations, clearly laid down by writers of received authority, and entirely conformable, as it is supposed, with the practice of modern nations. If a murder be committed on board of an American vessel by one of the crew upon another or upon a passenger, or by a passenger on one of the crew or another passenger, while such vessel is lying in a port within the jurisdiction of a foreign State or sovereignty, the offence is cognizable and punishable by the proper court of the United States in the same manner as if such offence had been committed on board the vessel on the high seas. The law of England is supposed to be the same. It is true that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another, is not necessarily wholly exclusive. We do not so consider or so assert it. For any unlawful acts done by her while thus lying in port, and for all contracts entered into while there, by her master or owners, she and they must, doubtless, be answerable to the laws of the place. Nor, if her master or crew, while on board in such port, break the peace of the community by the commission of crimes, can exemption be claimed for them. But, nevertheless, the law of nations, as I have stated it, and the statutes of governments founded on that law, as I have referred to them, show that enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships not only over the high sea, but into ports and harbors, or wheresoever else they may be water-borne, for the general purpose of governing and regulating the rights, duties, and obligations of those on board thereof, and that, to the extent of the exercise of this jurisdiction, they are considered as parts of the territory of the nation herself." 6 Webster's Works, 306, 307.

We do not accept the doctrine that, because by the treaty between the United States and Great Britain the boundary line between the two countries is run through the centre of the lakes, their character as seas is changed, or that the jurisdiction of the United States to regulate vessels belonging to their citizens navigating those waters and to punish offences committed upon such vessels, is in any respect impaired. Whatever effect may be given to the boundary line between the two countries, the jurisdiction of the United States over the vessels of their citizens navigating those waters and the persons on board remains unaffected. The limitation to the juris-

diction by the qualification that the offences punishable are committed on vessels in any arm of the sea, or in any river, haven, creek, basin, or bay "without the jurisdiction of any particular State," which means without the jurisdiction of any State of the Union, does not apply to vessels on the "high seas" of the lakes, but only to vessels on the waters designated as connecting with them. So far as vessels on those seas are concerned, there is no limitation named to the authority of the United States. It is true that lakes, properly so called, that is, bodies of water whose dimensions are capable of measurement by the unaided vision, within the limits of a State, are part of its territory and subject to its jurisdiction, but bodies of water of an extent which cannot be measured by the unaided vision, and which are navigable at all times in all directions, and border on different nations or States or people, and find their outlet in the ocean as in the present case, are seas in fact, however they may be designated. And seas in fact do not cease to be such, and become lakes, because by local custom they may be so called.

In our judgment the District Court of the Eastern District of Michigan had jurisdiction to try the defendant upon the indictment found, and it having been transferred to the Circuit Court, that court had jurisdiction to proceed with the trial, and the demurrer to its jurisdiction should have been overruled.[1]

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## SECTION XII. — WAR.

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### THE PRIZE CASES.

2 Black, 635. 1862.

[THE cases which were considered together under this title involved the lawfulness of seizures and condemnations as prizes of vessels violating the blockade of Southern ports under proclamation of the President of the United States in 1861.]

MR. JUSTICE GRIER delivered the opinion of the court.

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By the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole executive power.

[1] MR. JUSTICE GRAY and MR. JUSTICE BROWN delivered dissenting opinions.

He is bound to take care that the laws be faithfully executed. He is Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the acts of Congress of February 28th, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be "*unilateral.*" Lord Stowell (1 Dodson, 247) observes: "It is not the less a war on *that account*, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other."

The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the act of Congress of May 13th, 1846, which recognized "*a state of war as existing by the act of the Republic of Mexico.*" This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the act of the President in accepting the challenge without a previous formal declaration of war by Congress.

This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of *war*. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.

It is not the less a civil war, with belligerent parties in hostile array, because it may be called an "insurrection" by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or State be acknowledged in order to constitute it a party belligerent in a war according to the law of nations. Foreign nations acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist unless there be two belligerent parties. In the case of the Santissima Trinidad, 7 Wheat. 337, this Court say: "The government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed her determination to remain neutral between the parties. Each party is therefore deemed by us

a belligerent nation, having, so far as concerns us, the sovereign rights of war." See also 3 Binn. 252.

As soon as the news of the attack on Fort Sumter, and the organization of a government by the seceding States, assuming to act as belligerents, could become known in Europe, to wit, on the 13th of May, 1861, the Queen of England issued her proclamation of neutrality, "recognizing hostilities as existing between the government of the United States of America and *certain States* styling themselves the Confederate States of America." This was immediately followed by similar declarations or silent acquiescence by other nations.

After such an official recognition by the sovereign, a citizen of a foreign State is estopped to deny the existence of a war with all its consequences as regards neutrals. They cannot ask a Court to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race, and thus cripple the arm of the government and paralyze its power by subtle definitions and ingenious sophisms.

The law of nations is also called the law of nature; it is founded on the common consent as well as the common sense of the world. It contains no such anomalous doctrine as that which this court are now for the first time desired to pronounce, to wit: That insurgents who have risen in rebellion against their sovereign, expelled her courts, established a revolutionary government, organized armies, and commenced hostilities, are not *enemies* because they are *traitors;* and a war levied on the government by traitors, in order to dismember and destroy it, is not a *war* because it is an "insurrection."

Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this court must be governed by the decisions and acts of the political department of the government to which this power was intrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

The correspondence of Lord Lyons with the Secretary of State admits the fact and concludes the question.

If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the legislature of 1861, which was wholly employed in enacting laws to enable the government to prosecute the war with vigor and efficiency. And finally, in 1861, we find Congress "*ex majore cautela*" and in anticipation of such astute objections, passing an act "approving, legalizing, and making valid all the acts, proclamations, and orders of the President, &c., as

if they had been *issued and done under the previous express authority* and direction of the Congress of the United States."

Without admitting that such an act was necessary under the circumstances, it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, that on the well-known principle of law, "*omnis ratihabitio retrotrahitur et mandato equiparatur*," this ratification has operated to perfectly cure the defect. In the case of Brown *v.* United States, 8 Cr. 131, 132, 133, Mr. Justice Story treats of this subject, and cites numerous authorities to which we may refer to prove this position, and concludes, "I am perfectly satisfied that no subject can commence hostilities or capture property of an enemy, when the sovereign has prohibited it. But suppose he did, I would ask if the sovereign may not ratify his proceedings, and thus by a retroactive operation give validity to them?"

Although Mr. Justice Story dissented from the majority of the court on the whole case, the doctrine stated by him on this point is correct and fully substantiated by authority.

The objection made to this act of ratification, that it is *ex post facto*, and therefore unconstitutional and void, might possibly have some weight on the trial of an indictment in a criminal court. But precedents from that source cannot be received as authoritative in a tribunal administering public and international law.[1]

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## MARTIN *v.* MOTT.

12 Wheaton, 19; 7 Curtis, 10. 1827.

Story, J., delivered the opinion of the court.

This is a writ of error to the judgment of the court for the trial of impeachments and the correction of errors of the State of New York, being the highest court of that State, and is brought here in virtue of the 25th section of the Judiciary Act of 1789, c. 20 (1 Stats. at Large, 85). The original action was a replevin for certain goods and chattels, to which the original defendant put in an avowry, and to that avowry there was a demurrer, assigning nineteen distinct and special causes of demurrer. Upon a joinder in demurrer, the Supreme Court of the State gave judgment against the avowant; and that judgment was affirmed by the high court to which the present writ of error is addressed.

The avowry, in substance, asserts a justification of the taking of

[1] Mr. Justice Nelson delivered a dissenting opinion, in which Mr. Chief Justice Taney, Mr. Justice Catron, and Mr. Justice Clifford concurred.

the goods and chattels to satisfy a fine and forfeiture imposed upon the original plaintiff by a court-martial, for a failure to enter the service of the United States as a militia-man, when thereto required by the President of the United States, in pursuance of the act of the 28th of February, 1795. It is argued that this avowry is defective, both in substance and form; and it will be our business to discuss the most material of these objections; and as to others, of which no particular notice is taken, it is to be understood that the court are of opinion that they are either unfounded in fact or in law, and do not require any separate examination.

For the more clear and exact consideration of the subject, it may be necessary to refer to the Constitution of the United States, and some of the provisions of the act of 1795. The Constitution declares that Congress shall have power "to provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions;" and also "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States." In pursuance of this authority, the act of 1795 has provided, "that whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the State or States most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his order for that purpose to such officer or officers of the militia as he shall think proper." And like provisions are made for the other cases stated in the Constitution. It has not been denied here that the act of 1795 is within the constitutional authority of Congress, or that Congress may not lawfully provide for cases of imminent danger of invasion, as well as for cases where an invasion has actually taken place. In our opinion there is no ground for a doubt on this point, even if it had been relied on, for the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasion is to provide the requisite force for action before the invader himself has reached the soil.

The power thus confided by Congress to the President is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be

considered as an open question, upon which every officer to whom the orders of the President are addressed may decide for himself, and equally open to be contested by every militia-man who shall refuse to obey the orders of the President? We are all of opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopard the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the Commander-in-chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance. If "the power of regulating the militia, and of commanding its services in times of insurrection and invasion, are (as it has been emphatically said they are) natural incidents to the duties of superintending the common defence, and of watching over the internal peace of the confederacy" (The Federalist, No. 29), these powers must be so construed as to the modes of their exercise as not to defeat the great end in view. If a superior officer has a right to contest the orders of the President upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier; and any act done by any person in furtherance of such orders would subject him to responsibility in a civil suit, in which his defence must finally rest upon his ability to establish the facts by competent proofs. Such a course would be subversive of all discipline, and expose the best-disposed officers to the chances of ruinous litigation. Besides, in many instances the evidence upon which the President might decide that there is imminent danger of invasion might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of state, which the public interest, and even safety, might imperiously demand to be kept in concealment.

If we look at the language of the act of 1795, every conclusion drawn from the nature of the power itself is strongly fortified. The words are, "whenever the United States shall be invaded, or be in imminent danger of invasion, &c., it shall be lawful for the President, &c., to call forth such number of the militia, &c., as he may judge necessary to repel such invasion." The power itself is

confided to the Executive of the Union, to him who is, by the Constitution, "the commander-in-chief of the militia, when called into the actual service of the United States," whose duty it is to "take care that the laws be faithfully executed," and whose responsibility for an honest discharge of his official obligations is secured by the highest sanctions. He is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts. If he does so act, and decides to call forth the militia, his orders for this purpose are in strict conformity with the provisions of the law; and it would seem to follow, as a necessary consequence, that every act done by a subordinate officer, in obedience to such orders, is equally justifiable. The law contemplates that, under such circumstances, orders shall be given to carry the power into effect; and it cannot therefore be a correct inference that any other person has a just right to disobey them. The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and in effect defeat it. Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. And in the present case we are all of opinion that such is the true construction of the act of 1795. It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself. In a free government, the danger must be remote, since in addition to the high qualities which the Executive must be presumed to possess, of public virtue, and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny.

This doctrine has not been seriously contested upon the present occasion. It was indeed maintained and approved by the Supreme Court of New York, in the case of Vanderheyden *v.* Young, 11 Johns. Rep. 150, where the reasons in support of it were most ably expounded by Mr. Justice Spencer, in delivering the opinion of the court.

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## Section XIII. — Ceded Districts.

### METROPOLITAN RAILROAD COMPANY *v.* DISTRICT OF COLUMBIA.

132 United States, 1. 1889.

Mr. Justice Bradley delivered the opinion of the court.

This was an action brought by the District of Columbia in November, 1880, to recover from the Metropolitan Railroad Company the sum of $161,622.52. The alleged cause of action was work done and materials furnished by the plaintiff in paving certain streets and avenues in the city of Washington at various times in the years 1871, 1872, 1873, 1874, and 1875, upon and in consequence of the neglect of the defendant to do said work and furnish said materials in accordance with its duty as prescribed by its charter.

The defendant was chartered by an act of Congress dated July 1, 1864, 13 Stat. 326, c. 190, and amended March 3, 1865, 13 Stat. 536, c. 119. By these acts it was authorized to construct and operate lines or routes of double-track railways in designated streets and avenues in Washington and Georgetown.

The first section of the charter contains the following proviso: "Provided, that the use and maintenance of said road shall be subject to the municipal regulations of the city of Washington within its corporate limits." Of course this provision reserves police control over the road and its operations on the part of the authorities of the city. The fourth section of the charter declares, "that the said corporation hereby created shall be bound to keep said tracks, and for the space of two feet beyond the outer rail thereof, and also the space between the tracks, at all times well paved and in good order, without expense to the United States or to the city of Washington." The fifth section declares "that nothing in this act shall prevent the government at any time, at their option, from altering the grade or otherwise improving all avenues and streets occupied by said roads, or the city of Washington from so altering or improving such streets and avenues, and the sewerage thereof, as may be under their respective authority and control; and in such event it shall be the duty of said company to change their said railroad so as to conform to such grade and pavement."

It is on these provisions that the claim of the city is based.

The amended declaration sets out in great detail the grading and paving which were done in various streets and avenues along and

adjoining the tracks of the defendant, and which it is averred should have been done by the defendant under the provisions of its charter; but which the defendant neglected and refused to do.

The defendant filed twelve several pleas to the action, the eleventh and twelfth being pleas of the statute of limitations. Issue was taken upon all the pleas except these two, and they were demurred to. The court sustained the demurrer, and the cause was tried on the other issues, and a verdict found for the plaintiff. 4 Mackey, 214.

The case is brought here by writ of error, which brings up for consideration a bill of exceptions taken at the trial, and the ruling upon the demurrer to the pleas of the statute of limitations. It is conceded that if the court below erred in sustaining that demurrer, the judgment must be reversed. That question will, therefore, be first considered.

It is contended by the plaintiff that it (the District of Columbia) is not amenable to the statute of limitations, for three reasons: first, because of its dignity as partaking of the sovereign power of government; secondly, because it is not embraced in the terms of the statute of limitations in force in the District; and, thirdly, because if the general words of the statute are sufficiently broad to include the District, still, municipal corporations, unless specially mentioned, are not subject to the statute.

1. The first question, therefore, will be, whether the District of Columbia is, or is not, a municipal body merely, or whether it has such a sovereign character, or is so identified with or representative of the sovereignty of the United States as to be entitled to the prerogatives and exemptions of sovereignty.

In order to a better understanding of the subject under consideration, it will be proper to take a brief survey of the government of the District and the changes it has undergone since its first organization.

Prior to 1871, the local government of the District of Columbia, on the east side of the Potomac, had been divided between the corporations of Washington and Georgetown and the Levy Court of the county of Washington. Georgetown had been incorporated by the legislature of Maryland as early as 1789 (Davis's Laws, Dist. Col. 478), as Alexandria had been by the legislature of Virginia as early as 1748 and 1779 (Davis's Laws, 533, 541); and those towns or cities were clearly nothing more than ordinary municipal corporations, with the usual powers of such corporations. When the government of the United States took possession of the District in December, 1800, it was divided by Congress into two counties, that of Alexandria on the west side of the Potomac, and that of Washington on the east side; and the laws of Virginia were continued over the former, and the laws of Maryland over the latter; and a court, called the Circuit Court of the District of Columbia, was established with gen-

eral jurisdiction, civil and criminal, to hold sessions alternately in each county; but the corporate rights of the cities of Alexandria and Georgetown, and of all other corporate bodies, were expressly left unimpaired, except as related to judicial powers. See Act of Feb. 27, 1801, 2 Stat. 103, c. 15. A supplementary act, passed a few days later, gave to the Circuit Court certain administrative powers, the same as those vested in the County and Levy Courts of Virginia and Maryland respectively; and it was declared that the magistrates to be appointed should be a board of commissioners within their respective counties, and have the same powers and perform the same duties as the Levy Courts of Maryland. These powers related to the construction and repair of roads, bridges, ferries, the care of the poor, &c. Act of March 3, 1801, 2 Stat. 115, c. 25. On May 3, 1802, an act was passed to incorporate the city of Washington. 2 Stat. 195, c. 53. It invested the mayor and common council (the latter being elected by the white male inhabitants) with all the usual powers of municipal bodies, such as the power to pass by-laws and ordinances; powers of administration, regulation and taxation; amongst others specially named, the power "to erect and repair bridges; to keep in repair all necessary streets, avenues, drains, and sewers, and to pass regulations necessary for the preservation of the same, agreeably to the plan of said city." Various amendments, from time to time, were made to this charter, and additional powers were conferred. A general revision of it was made by act of Congress passed May 15, 1820. 3 Stat. 583, c. 104. A further revision was made and additional powers were given by the act of May 17, 1848, 9 Stat. 223, c. 42, but nothing to change the essential character of the corporation.

The powers of the Levy Court extended more particularly to the country, outside of the cities; but also to some matters in the cities common to the whole county. It was reorganized, and its powers and duties more specifically defined, in the acts of July 1st, 1812, 2 Stat. 771, c. 117, and of March 3d, 1863, 12 Stat. 799. By the last act, the members of the court were to be nine in number, and to be appointed by the President and Senate.

In the first year of the war, August 6th, 1861, 12 Stat. 320, c. 62, an act was passed "to create a Metropolitan Police District of the District of Columbia, and to establish a police therefor." The police had previously been appointed and regulated by the mayor and common council of Washington; but it was now deemed important that it should be under the control of the government. The act provided for the appointment of five commissioners by the President and Senate, who, together with the mayors of Washington and Georgetown, were to form the board of police for the District; and this board was invested with extraordinary powers of surveillance and guardianship of the peace.

This general review of the form of government which prevailed in

the District of Columbia and city of Washington prior to 1871 is sufficient to show that it was strictly municipal in its character; and that the government of the United States, except so far as the protection of its own public buildings and property was concerned, took no part in the local government, any more than any State government interferes with the municipal administration of its cities. The officers of the departments, even the President himself, exercised no local authority in city affairs. It is true, in consequence of the large property interests of the United States in Washington, in the public parks and buildings, the government always made some contribution to the finances of the city; but the residue was raised by taxing the inhabitants of the city and District, just as the inhabitants of all municipal bodies are taxed.

In 1871 an important modification was made in the form of the District government; a legislature was established, with all the apparatus of a distinct government. By the act of February 21st, of that year, entitled "An Act to provide a government for the District of Columbia," 16 Stat. 419, c. 62, it was enacted (§ 1) that all that part of the territory of the United States included within the limits of the District of Columbia be created into a government by the name of the District of Columbia, by which name it was constituted "a *body corporate for municipal purposes*," with power to make contracts, sue and be sued, and "to exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States." A governor and legislature were created; also a board of public works; the latter to consist of the governor as its president, and four other persons, to be appointed by the President and Senate. To this board was given the control and repair of the streets, avenues, alleys, and sewers of the city of Washington, and all other works which might be intrusted to their charge by the legislative assembly or Congress. They were empowered to disburse the moneys raised for the improvement of streets, avenues, alleys, and sewers, and roads and bridges, and to assess upon adjoining property, specially benefited thereby, a reasonable proportion of the cost, not exceeding one third. The acts of this board were held to be binding on the municipality of the District in Barnes *v.* District of Columbia, 91 U. S. 540. It was regarded as a mere branch of the District government, though appointed by the President and not subject to the control of the District authorities.

This constitution lasted until June 20th, 1874, when an act was passed entitled "An Act for the government of the District of Columbia, and for other purposes." 18 Stat. 116, c. 337. By this act the government established by the act of 1871 was abolished, and the President, by and with the advice and consent of the Senate, was authorized to appoint a commission, consisting of three persons, to exercise the power and authority then vested in the governor and board of public works, except as afterwards limited by the act. By

a subsequent act, approved June 11th, 1878, 20 Stat. 102, c. 180, it was enacted that the District of Columbia should "*remain and continue a municipal corporation,*" as provided in § 2 of the Revised Statutes relating to said District, and the appointment of commissioners was provided for, to have and to exercise similar powers given to the commissioners appointed under the act of 1874. All rights of action and suits for and against the District were expressly preserved *in statu quo.*

Under these different changes the administration of the affairs of the District of Columbia and city of Washington has gone on in much the same way, except a change in the depositaries of power, and in the extent and number of powers conferred upon them. Legislative powers have now ceased, and the municipal government is confined to mere administration. The identity of corporate existence is continued, and all actions and suits for and against the District are preserved unaffected by the changes that have occurred.

In view of these laws, the counsel of the plaintiff contend that the government of the District of Columbia is a department of the United States government, and that the corporation is a mere name, and not a person in the sense of the law, distinct from the government itself. We cannot assent to this view. It is contrary to the express language of the statutes. That language is that the District shall "remain and continue a municipal corporation," with all rights of action and suits for and against it. If it were a department of the government, how could it be sued? Can the Treasury Department be sued? or any other department? We are of opinion that the corporate capacity and corporate liabilities of the District of Columbia remain as before, and that its character as a mere municipal corporation has not been changed. The mode of appointing its officers does not abrogate its character as a municipal body politic. We do not suppose that it is necessary to a municipal government, or to municipal responsibility, that the officers should be elected by the people. Local self-government is undoubtedly desirable where there are not forcible reasons against its exercise. But it is not required by any inexorable principle. All municipal governments are but agencies of the superior power of the State or government by which they are constituted, and are invested with only such subordinate powers of local legislation and control as the superior legislature sees fit to confer upon them. The form of those agencies and the mode of appointing officials to execute them are matters of legislative discretion. Commissioners are not unfrequently appointed by the legislature or executive of a State for the administration of municipal affairs, or some portion thereof, sometimes temporarily, sometimes permanently. It may be demanded by motives of expediency or the exigencies of the situation; by the boldness of corruption, the absence of public order and security, or the necessity of high executive ability in dealing with particular

populations. Such unusual constitutions do not release the people from the duty of obedience or from taxation, or the municipal body from those liabilities to which such bodies are ordinarily subject. Protection of life and property are enjoyed, perhaps in greater degree, than they could be, in such cases, under elective magistracies; and the government of the whole people is preserved in the legislative representation of the State or general government. "Nor can it in principle," said Mr. Justice Hunt in the Barnes case, "be of the slightest consequence by what means these several officers are placed in their position, whether they are elected by the people of the municipality or appointed by the President or a governor. The people are the recognized source of all authority, State and municipal, and to this authority it must come at last, whether immediately or by a circuitous process." Barnes *v.* District of Columbia, 91 U. S. 540, 545.

One argument of the plaintiff's counsel in this connection is, that the District of Columbia is a separate State or sovereignty according to the definition of writers on public law, being a distinct political society. This position is assented to by Chief Justice Marshall, speaking for this court, in the case of Hepburn *v.* Ellzey, 2 Cranch, 445, 452, where the question was whether a citizen of the District could sue in the Circuit Courts of the United States as a citizen of a State. The court did not deny that the District of Columbia is a State in the sense of being a distinct political community; but held that the word "State" in the Constitution, where it extends the judicial power to cases between citizens of the several "States," refers to the States of the Union. It is undoubtedly true that the District of Columbia is a separate political community in a certain sense, and in that sense may be called a State; but the sovereign power of this qualified State is not lodged in the corporation of the District of Columbia, but in the government of the United States. Its supreme legislative body is Congress. The subordinate legislative powers of a municipal character which have been or may be lodged in the city corporations, or in the District corporation, do not make those bodies sovereign. Crimes committed in the District are not crimes against the District, but against the United States. Therefore, whilst the District may, in a sense, be called a State, it is such in a very qualified sense. No more than this was meant by Chief Justice Taney, when, in the Bank of Alexandria *v.* Dyer, 14 Pet. 141, 146, he spoke of the District of Columbia as being formed, by the acts of Congress, into one separate political community, and of the two counties composing it (Washington and Alexandria) as resembling different counties in the same State; by reason whereof it was held that parties residing in one county could not be said to be "beyond the seas," or in a different jurisdiction, in reference to the other county, though the two counties were subject to different laws.

We are clearly of opinion that the plaintiff is a municipal corporation, having a right to sue and be sued, and subject to the ordinary rules that govern the law of procedure between private persons.[1]

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[The judgment of the trial court is therefore reversed.]

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## FORT LEAVENWORTH RAILROAD COMPANY *v.* LOWE.

114 United States, 525. 1885.

Mr. Justice Field delivered the opinion of the court.

The plaintiff, a corporation organized under the laws of Kansas, was in 1880, and has ever since been, the owner of a railroad in the reservation of the United States in that State, known as the Fort Leavenworth Military Reservation. In that year its track, right of way, franchises, road-bed, telegraph line, and instruments connected therewith on the Reservation, were assessed by the board of assessors of the State, and a tax of $394.40 levied thereon, which was paid by the railroad company under protest in order to prevent a sale of the property. The present action is brought [against the sheriff to whom the money was paid] to recover back the money thus paid, on the ground that the property, being entirely within the Reservation, was exempt from assessment and taxation by the State.

The land constituting the Reservation was part of the territory acquired in 1803 by cession from France, and, until the formation of the State of Kansas, and her admission into the Union, the United States possessed the rights of a proprietor, and had political dominion and sovereignty over it. For many years before that admission it had been reserved from sale by the proper authorities of the United States for military purposes, and occupied by them as a military post. The jurisdiction of the United States over it during this time was necessarily paramount. But in 1861 Kansas was admitted into the Union upon an equal footing with the original States, that is, with the same rights of political dominion and sovereignty, subject like them only to the Constitution of the United States. Congress might undoubtedly, upon such admission, have stipulated for retention of the political authority, dominion and legislative power of the United States over the Reservation, so long as it should be used for military purposes by the government; that is, it could have excepted the place from the jurisdiction of Kansas, as one needed for the uses of the general government. But

[1] In Geofroy *v.* Riggs, 133 U. S. 258 (1890), it is held that the District of Columbia is a "State" within the terms of a treaty with France regulating the rights of Frenchmen to inherit property within the "States of the Union."

The provisions of the Seventh Amendment as to trial by jury are applicable to the District of Columbia. Capital Traction Co. *v.* Hof, 174 U. S. 1; *infra*, p. 956.

from some cause, inadvertence perhaps, or over-confidence that a recession of such jurisdiction could be had whenever desired, no such stipulation or exception was made. The United States, therefore, retained, after the admission of the State, only the rights of an ordinary proprietor; except as an instrument for the execution of the powers of the general government, that part of the tract, which was actually used for a fort or military post, was beyond such control of the State, by taxation or otherwise, as would defeat its use for those purposes. So far as the land constituting the Reservation was not used for military purposes, the possession of the United States was only that of an individual proprietor. The State could have exercised, with reference to it, the same authority and jurisdiction which she could have exercised over similar property held by private parties. This defect in the jurisdiction of the United States was called to the attention of the government in 1872. In April of that year the Secretary of War addressed a communication to the Attorney-General, enclosing papers touching the Reservation, and submitting for his official opinion the questions, whether, under the Constitution, the reservation of the land for a site as a military post and for public buildings took it out of the operation of the law of March 3, 1859, 11 Stat. 430, and, if so, what action would be required on the part of the Executive or Congress to restore the land to the exclusive jurisdiction of the United States. The Attorney-General replied that the act admitting Kansas as a State into the Union had the effect to withdraw from Federal jurisdiction all the territory within the boundaries of the new State, excepting only that of the Indians having treaties with the United States, which provided that without their consent such territory should not be subject to State jurisdiction, and the Reservation was not within this exception; and that to restore the Federal jurisdiction over the land included in the Reservation, it would be necessary to obtain from the State of Kansas a cession of jurisdiction, which he had no doubt would upon application be readily granted by the State legislature. 14 Opin. Attorneys-General, 33. It does not appear from the record before us that such application was ever made; but, on the 22d of February, 1875, the legislature of the State passed an act entitled "An Act to cede jurisdiction to the United States over the territory of the Fort Leavenworth Military Reservation," the first section of which is as follows: —

"That exclusive jurisdiction be, and the same is hereby ceded to the United States over and within all the territory owned by the United States, and included within the limits of the United States military reservation known as the Fort Leavenworth Reservation in said State, as declared from time to time by the President of the United States, saving, however, to the said State the right to serve civil or criminal process within said Reservation, in suits or prose-

cutions for or on account of rights acquired, obligations incurred, or crimes committed in said State, but outside of said cession and Reservation; and saving further to said State the right to tax railroad, bridge, and other corporations, their franchises and property, on said Reservation." Laws of Kansas, 1875, p. 95.

The question as to the right of the plaintiff to recover back the taxes paid depends upon the validity and effect of the last saving clause in this act. As we have said, there is no evidence before us that any application was made by the United States for this legislation, but, as it conferred a benefit, the acceptance of the act is to be presumed in the absence of any dissent on their part. The contention of the plaintiff is that the act of cession operated under the Constitution to vest in the United States exclusive jurisdiction over the Reservation, and that the last saving clause, being inconsistent with that result, is to be rejected. The Constitution provides that "Congress shall have power to *exercise exclusive legislation in all cases whatsoever* over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the government of the United States, and *to exercise like authority* over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." Art. 1, sec. 8.

The necessity of complete jurisdiction over the place which should be selected as the seat of government was obvious to the framers of the Constitution. Unless it were conferred the deliberations of Congress might in times of excitement be exposed to interruptions without adequate means of protection; its members, and the officers of the government, be subjected to insult and intimidation, and the public archives be in danger of destruction. The Federalist, in support of this clause in the Constitution, in addition to these reasons, urged that "a dependence of the members of the general government on the State comprehending the seat of the government for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the confederacy." No. 43.

The necessity of supreme legislative authority over the seat of government was forcibly impressed upon the members of the constitutional convention by occurrences which took place near the close of the Revolutionary War. At that time, while Congress was in session in Philadelphia, it was surrounded and insulted by a body of mutineers of the Continental Army. In giving an account of this proceeding, Mr. Rawle, in his Treatise on the Constitution, says of the action of Congress: "It applied to the executive authority of Pennsylvania for defence; but, under the ill-conceived Constitution of the State at that time, the executive power was vested

in a council, consisting of thirteen members, and they possessed or exhibited so little energy, and such apparent intimidation, that the Congress indignantly removed to New Jersey, whose inhabitants welcomed it with promises of defending it. It remained for some time at Princeton without being again insulted, till, for the sake of greater convenience, it adjourned to Annapolis. The general dissatisfaction with the proceedings of the executive authority of Pennsylvania, and the degrading spectacle of a fugitive Congress, suggested the remedial provisions now under consideration." Rawle, Constitution of the United States, 113. Of this proceeding Mr. Justice Story remarks: "If such a lesson could have been lost upon the people, it would have been as humiliating to their intelligence as it would have been offensive to their honor." 2 Story, Constitution, § 1219.

Upon the second part of the clause in question, giving power to "exercise like authority," that is, of exclusive legislation "over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings," the Federalist observes that the necessity of this authority is not less evident. "The public money expended on such places," it adds, "and the public property deposited in them, require that they should be exempt from the authority of the particular State. Nor would it be proper for the places on which the security of the entire Union may depend to be in any degree dependent on a particular member of it. All objections and scruples are here also obviated by requiring the concurrence of the States concerned in every such establishment." "The power," says Mr. Justice Story, repeating the substance of Mr. Madison's language, "is wholly unexceptionable, since it can only be exercised at the will of the State, and therefore it is placed beyond all reasonable scruple."

This power of exclusive legislation is to be exercised, as thus seen, over places purchased, by consent of the legislatures of the States in which they are situated, for the specific purposes enumerated. It would seem to have been the opinion of the framers of the Constitution that, without the consent of the States, the new government would not be able to acquire lands within them; and therefore it was provided that when it might require such lands for the erection of forts and other buildings for the defence of the country, or the discharge of other duties devolving upon it, and the consent of the States in which they were situated was obtained for their acquisition, such consent should carry with it political dominion and legislative authority over them. Purchase with such consent was the only mode then thought of for the acquisition by the general government of title to lands in the States. Since the adoption of the Constitution this view has not generally prevailed. Such consent has not always been obtained, nor supposed necessary,

for the purchase by the general government of lands within the States. If any doubt has ever existed as to its power thus to acquire lands within the States, it has not had sufficient strength to create any effective dissent from the general opinion. The consent of the States to the purchase of lands within them for the special purposes named is, however, essential, under the Constitution, to the transfer to the general government, with the title, of political jurisdiction and dominion. Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that case, unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the States equally with the property of private individuals.

But not only by direct purchase have the United States been able to acquire lands they needed without the consent of the States, but it has been held that they possess the right of eminent domain within the States, using those terms, not as expressing the ultimate dominion or title to property, but as indicating the right to take private property for public uses when needed to execute the powers conferred by the Constitution; and that the general government is not dependent upon the caprice of individuals or the will of State legislatures in the acquisition of such lands as may be required for the full and effective exercise of its powers. This doctrine was authoritatively declared in Kohl *v.* United States, 91 U. S. 367. All the judges of the court agreed in the possession by the general government of this right, although there was a difference of opinion whether provision for the exercise of the right had been made in that case. The court, after observing that lands in the States are needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses and court-houses, and for other public uses, said: "If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen." The right to acquire property in this way, by condemnation, may be exerted either through tribunals expressly designated by Congress, or by resort to tribunals of the State in which the property is situated, with her consent for that purpose. Such consent will always be presumed in the absence of express prohibition. United States *v.* Jones, 109 U. S. 513, 519; Matter of Petition of United States, 96 N. Y. 227.

Besides these modes of acquisition, the United States possessed, on the adoption of the Constitution, an immense domain lying north and west of the Ohio River, acquired as the result of the Revolu-

tionary War from Great Britain, or by cessions from Virginia, Massachusetts, and Connecticut; and, since the adoption of the Constitution, they have by cession from foreign countries, come into the ownership of a territory still larger, lying between the Mississippi River and the Pacific Ocean, and out of these territories several States have been formed and admitted into the Union. The proprietorship of the United States in large tracts of land within these States has remained after their admission. There has been, therefore, no necessity for them to purchase or to condemn lands within those States, for forts, arsenals, and other public buildings, unless they had disposed of what they afterwards needed. Having the title, they have usually reserved certain portions of their lands from sale or other disposition, for the uses of the government.

This brief statement as to the different modes in which the United States have acquired title to lands upon which public buildings have been erected will serve to explain the nature of their jurisdiction over such places, and the consistency with each other of decisions on the subject by Federal and State tribunals, and of opinions of the Attorneys-General.

When the title is acquired by purchase by consent of the legislatures of the States, the Federal jurisdiction is exclusive of all State authority. This follows from the declaration of the Constitution that Congress shall have "like authority" over such places as it has over the district which is the seat of government; that is, the power of "exclusive legislation in all cases whatsoever." Broader or clearer language could not be used to exclude all other authority than that of Congress; and that no other authority can be exercised over them has been the uniform opinion of Federal and State tribunals, and of the Attorneys-General.

The reservation which has usually accompanied the consent of the States that civil and criminal process of the State courts may be served in the places purchased, is not considered as interfering in any respect with the supremacy of the United States over them; but is admitted to prevent them from becoming an asylum for fugitives from justice. And Congress, by statute passed in 1795, declared that cessions from the States of the jurisdiction of places where light-houses, beacons, buoys, or public piers were or might be erected, with such reservations, should be deemed sufficient for the support and erection of such structures, and if no such reservation had been made, or in future cessions for those purposes should be omitted, civil and criminal process issued under the authority of the State or of the United States might be served and executed within them. 1 Stat. 426, ch. 40.

Thus, in United States *v.* Cornell, 2 Mason, 60, it was held by Mr. Justice Story, that the purchase of land by the United States for public purposes, within the limits of a State, did not of itself oust the jurisdiction or sovereignty of the State over the lands pur-

chased; but that the purchase must be by consent of the legislature of the State, and then the jurisdiction of the United States under the Constitution became exclusive. In that case the defendant was indicted for murder committed in Fort Adams, in Newport Harbor, Rhode Island. The place had been purchased by the United States with the consent of the State, to which was added the reservation mentioned, as to the service of civil and criminal process within it. The main questions presented for decision were, whether the sole and exclusive jurisdiction over the place vested in the United States without a formal act of cession, and whether the reservation as to service of process made the jurisdiction concurrent with that of the State. The first question was answered, as above, that the purchase by consent gave the exclusive jurisdiction; and, as to the second question, the court said: "In its terms, it certainly does not contain any reservation of concurrent jurisdiction or legislation. It provides only that civil and criminal process issued under the authority of the State, which must, of course, be for acts done within and cognizable by the State, may be executed within the ceded lands, notwithstanding the cession. Not a word is said from which we can infer that it was intended that the State should have a right to punish for acts done within the ceded lands. The whole apparent object is answered by considering the clause as meant to prevent these lands from becoming a sanctuary for fugitives from justice for acts done within the acknowledged jurisdiction of the State. Now, there is nothing incompatible with the exclusive sovereignty or jurisdiction of one State that it should permit another State in such cases to execute its process within its limits. And a cession of exclusive jurisdiction may well be made with a reservation of a right of this nature, which then operates only as a condition annexed to the cession, and as an agreement of the new sovereign to permit its free exercise as *quoad hoc* his own process. This is the light in which clauses of this nature (which are very frequent in grants made by the States to the United States) have been received by this court on various occasions on which the subject has been heretofore brought before it for consideration, and it is the same light in which it has also been received by a very learned State court. In our judgment it comports entirely with the apparent intention of the parties, and gives effect to acts which might otherwise, perhaps, be construed entirely nugatory. For it may well be doubted whether Congress is, by the terms of the Constitution, at liberty to purchase lands for forts, dock-yards, &c., with the consent of the State legislature, where such consent is so qualified that it will not justify the exclusive legislation of Congress there. It may well be doubted if such consent be not utterly void. *Ut res magis valeat quam pereat*, we are bound to give the present act a different construction if it may reasonably be done; and we have not the least hesitation in declaring that the

true interpretation of the present proviso leaves the sole and exclusive jurisdiction of Fort Adams in the United States."

The case referred to in which the subject was considered by a learned State court is that of Commonwealth *v.* Clary, 8 Mass. 72 There the Supreme Court of Massachusetts held that the courts of the Commonwealth could not take cognizance of offences committed upon lands in the town of Springfield purchased with the consent of the Commonwealth by the United States for the purpose of erecting arsenals upon them. That was the case of a prosecution against the defendant for selling spirituous liquors on the land without a license, contrary to a statute of the State. But the court held that the law had no operation within the lands mentioned. "The territory," it said, "on which the offence charged is agreed to have been committed is the territory of the United States, over which the Congress have exclusive power of legislation." It added, that "the assent of the Commonwealth to the purchase of this territory by the United States had this condition annexed to it, that civil and criminal process might be served therein by the officers of the Commonwealth. This condition was made with a view to prevent the territory from becoming a sanctuary for debtors and criminals; and from the subsequent assent of the United States to the said condition, evidenced by their making the purchase, it results that the officers of the Commonwealth, in executing such process, act under the authority of the United States. No offences committed within that territory are committed against the laws of this Commonwealth, nor can such offences be punishable by the courts of the Commonwealth unless the Congress of the United States should give to the said courts jurisdiction thereof." In Mitchell *v.* Tibbetts, 17 Pick. 298, before the same court, years afterwards, it was held that a vessel employed in transporting stone from Maine to the navy-yard in Charlestown, Mass., a place purchased by the United States with the consent of the State, was not employed in transporting stone within the Commonwealth, and therefore committed no offence in disregarding a statute making certain requirements of vessels thus employed. The court said that to bring a vessel within the description of the statute, she must be employed in landing stone at, or taking stone from, some place in the Commonwealth, and that the law of Massachusetts did not extend to and operate within the territory ceded, adopting the principle of its previous decision in 8 Mass.

In March, 1841, the House of Representatives of Massachusetts requested of the justices of the Supreme Judicial Court of that State their opinion whether persons residing on lands in that State purchased by or ceded to the United States for navy-yards, arsenals, dock-yards, forts, light-houses, hospitals, and armories were entitled to the benefits of the State common schools for their children in the towns where such lands were located; and the justices replied that,

"where the general consent of the Commonwealth is given to the purchase of territory by the United States for forts and dock-yards, and where there is no other condition or reservation in the act granting such consent, but that of a concurrent jurisdiction of the State for the service of civil process and criminal process against persons charged with crimes committed out of such territory, the government of the United States has the sole and exclusive jurisdiction over such territory for all purposes of legislation and jurisprudence with the single exception expressed; and consequently that no persons are amenable to the laws of the Commonwealth for crimes and offences committed within said territory; and that persons residing within the same do not acquire the civil and political privileges, nor do they become subject to the civil duties and obligations, of inhabitants of the towns within which such territory is situated." And, accordingly, they were of opinion that persons residing on such lands were not entitled to the benefits of the common schools for their children in the towns in which such lands were situated. 1 Met. 580.

In Sinks *v.* Reese, 19 Ohio St. 306, the question came before the Supreme Court of Ohio, as to the effect of a proviso in the act of that State, ceding to the United States its jurisdiction over lands within her limits for the purposes of a National Asylum for Disabled Volunteer Soldiers, which was, that nothing in the act should be construed to prevent the officers, employees, and inmates of the asylum, who were qualified voters of the State, from exercising the right of suffrage at all township, county, and State elections in the township in which the National Asylum should be located. And it was held that, upon the purchase of the territory by the United States, with the consent of the legislature of the State, the general government became invested with exclusive jurisdiction over it and its appurtenances in all cases whatsoever; and that the inmates of such asylum resident within the territory, being within such exclusive jurisdiction, were not residents of the State so as to entitle them to vote, within the meaning of the Constitution, which conferred the elective franchise upon its residents alone.

To the same effect have been the opinions of the Attorneys-General, when called for by the head of one of the Departments. Thus, in the case of the armory at Harper's Ferry, in Virginia, the question arose whether officers of the army, or other persons, residing in the limits of the armory, the lands composing which had been purchased by consent of the State, were liable to taxation by her. The consent had been accompanied by a cession of jurisdiction, with a declaration that the State retained concurrent jurisdiction with the United States over the place, so far as it could consistently with the acts giving consent to the purchase and ceding jurisdiction; and that its courts, magistrates, and officers might take such cognizance, execute such processes, and discharge such other

legal functions within it as might not be incompatible with the true intent and meaning of those acts. The question having been submitted to the Attorney-General, he replied that the sole object and effect of the reservation was to prevent the place from becoming a sanctuary for fugitives from justice, for acts done within the acknowledged jurisdiction of the State, and that in all other respects the exterritoriality of the armory at Harper's Ferry was complete, in so far as regards the State; that the persons in the employment of the United States, actually residing in the limits of the armory, did not possess the civil and political rights of citizens of the State, nor were they subject to the tax and other obligations of such citizens. 6 Opins. Attorneys-General, 577. See also the case of The New York Post Office Site, 10 Opins. Attorneys-General, 35.

These authorities are sufficient to support the proposition which follows naturally from the language of the Constitution, that no other legislative power than that of Congress can be exercised over lands within a State purchased by the United States with her consent for one of the purposes designated; and that such consent under the Constitution operates to exclude all other legislative authority.

But with reference to lands owned by the United States, acquired by purchase without the consent of the State, or by cessions from other governments, the case is different. Story, in his Commentaries on the Constitution, says: "If there has been no cession by the State of the place, although it has been constantly occupied and used under purchase, or otherwise, by the United States for a fort or arsenal, or other constitutional purpose, the State jurisdiction still remains complete and perfect;" and in support of this statement he refers to People *v.* Godfrey, 17 Johns. 225. In that case the land on which Fort Niagara was erected, in New York, never having been ceded by the State to the United States, it was adjudged that the courts of the State had jurisdiction of crimes or offences against the laws of the State committed within the fort or its precincts, although it had been garrisoned by the troops of the United States and held by them since its surrender by Great Britain pursuant to the treaties of 1783 and 1794. In deciding the case, the court said that the possession of the post by the United States must be considered as a possession for the State, not in derogation of her rights, observing that it regarded it as a fundamental principle that the rights of sovereignty were not to be taken away by implication. "If the United States," the court added, "had the right of exclusive legislation over the Fortress of Niagara they would have also exclusive jurisdiction; but we are of opinion that the right of exclusive legislation within the territorial limits of any State can be acquired by the United States only in the mode pointed out in the Constitution, *by purchase, by consent of the legislature of the State in which*

*the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.* The essence of that provision is that the State shall freely cede the particular place to the United States for one of the specific and enumerated objects. This jurisdiction cannot be acquired tortiously or by disseisin of the State; much less can it be acquired by mere occupancy, with the implied or tacit consent of the State, when such occupancy is for the purpose of protection."

Where, therefore, lands are acquired in any other way by the United States within the limits of a State than by purchase with her consent, they will hold the lands subject to this qualification: that if upon them forts, arsenals, or other public buildings are erected for the uses of the general government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the general government. Their exemption from State control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers. But, when not used as such instrumentalities, the legislative power of the State over the places acquired will be as full and complete as over any other places within her limits.

As already stated, the land constituting the Fort Leavenworth Military Reservation was not purchased, but was owned by the United States by cession from France many years before Kansas became a State; and whatever political sovereignty and dominion the United States had over the place comes from the cession of the State since her admission into the Union. It not being a case where exclusive legislative authority is vested by the Constitution of the United States, that cession could be accompanied with such conditions as the State might see fit to annex not inconsistent with the free and effective use of the fort as a military post.

In the recent case of the Fort Porter Military Reservation, the opinion of the Attorney-General was in conformity with this view of the law. On the 28th of February, 1842, the legislature of New York authorized the commissioners of its land office to cede to the United States the title to certain land belonging to the State within her limits, "for military purposes, reserving a free and uninterrupted use and control in the canal commissioners of all that may be necessary for canal and harbor purposes." Under this act the title was conveyed to the United States. The act also ceded to them jurisdiction over the land. In 1880, the superintendent of public works in New York, upon whom the duties of canal commissioner were devolved, informed the Secretary of War that the interests of the State required that the land, or a portion of it, should be occupied by her for canal purposes, claiming the right to

thus occupy it under the reservation in the act of cession. The opinion of the Attorney-General was, therefore, requested as to the authority of the Secretary of War to permit the State, under these considerations, to use so much of the land as would not interfere with its use for military purposes. The Attorney-General replied that the United States, under the grant, held the land for military purposes, and that the reservation in favor of the State could be deemed valid only so far as it was not repugnant to the grant; that, hence, the right of the State to occupy and use the premises for canal or harbor purposes must be regarded as limited or restricted by the purposes of the grant; that, when such use and occupation would defeat or interfere with those purposes, the right of the State did not exist; but, when they would not interfere with those purposes, the State was entitled to use so much of the land as might be necessary for her canal and harbor purposes. 16 Opin. Attorneys-General, 592.

We are here met with the objection that the legislature of a State has no power to cede away her jurisdiction and legislative power over any portion of her territory, except as such cession follows under the Constitution from her consent to a purchase by the United States for some one of the purposes mentioned. If this were so, it would not aid the railroad company; the jurisdiction of the State would then remain as it previously existed. But aside from this consideration, it is undoubtedly true that the State, whether represented by her legislature, or through a convention specially called for that purpose, is incompetent to cede her political jurisdiction and legislative authority over any part of her territory to a foreign country, without the concurrence of the general government. The jurisdiction of the United States extends over all the territory within the States, and, therefore, their authority must be obtained, as well as that of the State within which the territory is situated, before any cession of sovereignty or political jurisdiction can be made to a foreign country. And so when questions arose as to the northeastern boundary, in Maine, between Great Britain and the United States, and negotiations were in progress for a treaty to settle the boundary, it was deemed necessary on the part of our government to secure the co-operation and concurrence of Maine, so far as such settlement might involve a cession of her sovereignty and jurisdiction as well as title to territory claimed by her, and of Massachusetts, so far as it might involve a cession of title to lands held by her. Both Maine and Massachusetts appointed commissioners to act with the Secretary of State, and after much negotiation the claims of the two States were adjusted, and the disputed questions of boundary settled. The commissioners of Maine were appointed by her legislature; and those of Massachusetts by her governor under authority of an act of her legislature. It was not deemed necessary to call a convention of the people in either of

them to give to the commissioners the requisite authority to act effectively for their respective States. 5 Webster's Works, 99; 6 ib. 273.

In their relation to the general government, the States of the Union stand in a very different position from that which they hold to foreign governments. Though the jurisdiction and authority of the general government are essentially different from those of the State, they are not those of a different country; and the two, the State and general government, may deal with each other in any way they may deem best to carry out the purposes of the Constitution. It is for the protection and interests of the States, their people and property, as well as for the protection and interests of the people generally of the United States, that forts, arsenals, and other buildings for public uses are constructed within the States. As instrumentalities for the execution of the powers of the general government, they are, as already said, exempt from such control of the States as would defeat or impair their use for those purposes; and if, to their more effective use, a cession of legislative authority and political jurisdiction by the State would be desirable, we do not perceive any objection to its grant by the legislature of the State. Such cession is really as much for the benefit of the State as it is for the benefit of the United States. It is necessarily temporary, to be exercised only so long as the places continue to be used for the public purposes for which the property was acquired or reserved from sale. When they cease to be thus used, the jurisdiction reverts to the State.

The Military Reservation of Fort Leavenworth was not, as already said, acquired by purchase with the consent of Kansas. And her cession of jurisdiction is not of exclusive legislative authority over the land, except so far as that may be necessary for its use as a military post; and it is not contended that the saving clause in the act of cession interferes with such use. There is, therefore, no constitutional prohibition against the enforcement of that clause. The right of the State to subject the railroad property to taxation exists as before the cession. The invalidity of the tax levied not being asserted on any other ground than the supposed exclusive jurisdiction of the United States over the reservation notwithstanding the saving clause, the judgment of the court below must be *Affirmed.*

## SECTION XIV. — TREASON.

### UNITED STATES *v.* GREATHOUSE AND OTHERS.

4 Sawyer, 457. 1863.

ON the fifteenth day of March, 1863, the schooner *J. M. Chapman* was seized in the harbor of San Francisco, by the United States revenue officers, while sailing, or about to sail, on a cruise in the service of the Confederate States, against the commerce of the United States; and the leaders of the expedition, consisting of Ridgeley Greathouse, Asbury Harpending, Alfred Rubery, William C. Law, Lorenzo L. Libby, with several others, were indicted, under the act of Congress of July 17, 1862, for engaging in, and giving aid and comfort to, the then existing rebellion against the government of the United States.

FIELD, Circuit Justice (charging jury).

. . . . . .

The defendants are indicted for engaging in, and giving aid and comfort to, the existing rebellion against the government of the United States. The indictment is framed under the second section of the act of Congress of July 17, 1862, entitled "An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes;" and it charges the commission of acts, which, in the judgment of the court, amount to treason within the meaning of the Constitution. Treason is the only crime defined by the Constitution. That instrument declares that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." The clause was borrowed from an ancient English statute, enacted in the year 1352, in the reign of Edward III., commonly known as the statute of treasons. Previous to the passage of that statute there was great uncertainty as to what constituted treason. Numerous offences were raised to its grade by arbitrary constructions of the law. The statute was passed to remove this uncertainty, and to restrain the power of the crown to oppress the subject by constructions of this character. It comprehends all treason under seven distinct branches. The framers of our Constitution selected one of these branches, and declared that treason against the United States should be restricted to the acts which it designates. "Treason against the United States," is the language adopted, "shall consist only in levying war against them, or adhering to their enemies, giving them aid and comfort." No other acts

can be declared to constitute the offense. Congress can neither extend, nor restrict, nor define the crime. Its power over the subject is limited to prescribing the punishment.

At the time the Constitution was framed, the language incorporated into it, from the English statute, had received judicial construction, and acquired a definite meaning; and that meaning has been generally adopted by the courts of the United States. Thus Chief Justice Marshall, in commenting upon the term "levying war," says: "It is a technical term. It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our Constitution in the sense which had been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in that ascertained meaning, unless the contrary be proved by the context. It is, therefore, reasonable to suppose, unless it be incompatible with other expressions of the Constitution, that the term 'levying war' is used in that instrument in the same sense in which it was understood, in England and in this country, to have been used in statute 25 of Edward III., from which it is borrowed."

The constitutional provision, as you perceive, is divided into two clauses, "levying war against the United States," and "adhering to their enemies, giving them aid and comfort." The term "enemies," as used in the second clause, according to its settled meaning, at the time the Constitution was adopted, applies only to the subjects of a foreign power in a state of open hostility with us. It does not embrace rebels in insurrection against their own government. An enemy is always the subject of a foreign power who owes no allegiance to our government or country. We may, therefore, omit all consideration of this second clause in the constitutional definition of treason. To convict the defendants they must be brought within the first clause of the definition. They must be shown to have committed acts which amount to a levying of war against the United States. To constitute a levying of war there must be an assemblage of persons in force, to overthrow the government, or to coerce its conduct. The words embrace not only those acts by which war is brought into existence, but also those acts by which war is prosecuted. They levy war who create or carry on war. The offence is complete, whether the force be directed to the entire overthrow of the government throughout the country, or only in certain portions of the country, or to defeat the execution and compel the repeal of one of its public laws.

It is not, however, necessary that I should go into any close definition of the words "levying war," for it is not sought to apply them to any doubtful case. War has been levied against the United

States. War of gigantic proportions is now waged against them, and the government is struggling with it for its life. War being levied, all who aid in its prosecution, whether by open hostilities in the field, or by performing any part in the furtherance of the common object, "however minute or however remote from the scene of action," are equally guilty of treason within the constitutional provision. In treason there are no accessories; all who engage in the rebellion at any stage of its existence, or who designedly give to it any species of aid and comfort, in whatever part of the country they may be, stand on the same platform; they are all principals in the commission of the crime; they are all levying war against the United States.

In *Ex parte* Bollman and *Ex parte* Swartwout, 4 Cranch, 127, Mr. Chief Justice Marshall, in delivering the opinion of the Supreme Court of the United States, said: "It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied — that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." And in commenting upon this language, on the trial of Burr, the same distinguished judge said: "According to the opinion, it is not enough to be leagued in the conspiracy, and that war be levied, but it is also necessary to perform a part; that part is the act of levying war. That part, it is true, may be minute; it may not be the actual appearance in arms, and it may be remote from the scene of action, that is, from the place where the army is assembled; but it must be a part, and that part must be performed by a person who is leagued in the conspiracy. This part, however minute or remote, constitutes the overt act, of which alone the person who performs it can be convicted." 2 Burr's Trial, 438–9. The indictment in the present case, as I have already stated, is based upon the second section of the act of July 17, 1862. The Constitution, although defining treason, leaves to Congress the authority to prescribe its punishment. In 1790, Congress passed an act fixing to the offence the penalty of death. By the first section of the act of July, 1862, Congress gave a discretionary power to the courts to inflict the penalty of death, or fine and imprisonment, providing that in either case the slaves of the party convicted, if any he have, shall be liberated. The second section of the act declares "that if any person shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States, or the laws thereof, or shall give aid or comfort thereto, or shall engage in or give aid and comfort to any such existing rebellion or insurrection, and be convicted thereof, such person shall be punished by imprisonment for a period not exceed-

ing ten years, or by a fine not exceeding $10,000, and by the liberation of all his slaves, if any he have, or by both said punishments, at the discretion of the court." The fourth section provides that the act shall not be construed in any way to affect or alter the prosecution, conviction, or punishment of any person guilty of treason before its passage, unless convicted under the act.

There would seem, upon a first examination, to be an inconsistency between the first and second sections of this act — the first section declaring a particular punishment for treason, and the second declaring, for acts which may constitute treason, a different punishment. It appears from the debate in the Senate of the United States, when the second section was under consideration, that it was the opinion of several senators that the commission of the acts which it designates might, under some circumstances, constitute an offence less than treason. The Constitution, as you have seen, declares that "treason against the United States shall consist only in levying war or in adhering to their enemies, giving them aid and comfort." Rebels not being enemies within its meaning, an indictment alleging the giving of aid and comfort to them had been, as was stated, held defective. But if such ruling had been made, it was made, we may presume, not because the giving of aid and comfort to rebels was not treason, but because the parties giving such aid and comfort were equally involved in guilt with those in open hostilities and should have been indicted for levying war; for every species of aid and comfort which, if given to a foreign enemy, would constitute treason within the second clause of the constitutional provision — adhering to the enemies of the United States — would, if given to the rebels in insurrection against the government, constitute a levying of war under the first clause. The second section of the act, however, relieves the subject from any difficulty so far as the form of the indictment is concerned. It is not necessary now to use specifically the term "levying war;" it will be sufficient if the indictment follows the language of the act, as the indictment does in the present case. But we are unable to conceive of any act designated in the second section which would not constitute treason, except perhaps as suggested by my associate, that of inciting to a rebellion. If we lay aside the discussion in the Senate, and read the several sections of the act together, the apparent inconsistency disappears. Looking at the act alone, we conclude that Congress intended: 1. To preserve the act of 1790, which prescribes the penalty of death, in force for the prosecution and punishment of offences committed previous to July 17, 1862, unless the parties accused are convicted under the act of the latter date for subsequent offences; 2. To punish treason thereafter committed with death, or fine and imprisonment, in the discretion of the court, unless the treason consist in engaging in or assisting a rebellion or insurrection against the authority of the United States, or the laws thereof, in which event the death penalty

is to be abandoned, and a less penalty inflicted. By this construction, the apparent inconsistency in the provisions of the different sections is avoided, and effect given to each clause of the act. The defendants are therefore in fact on trial for treason, and they have had all the protection and privileges allowed to parties accused of treason, without being liable, in case of conviction, to the penalty which all other civilized nations have awarded to this, the highest of crimes known to the law.

The indictment charges that on the sixteenth of March, 1863, and long before and since, an open and public rebellion by certain citizens of the United States, under a pretended government called the Confederate States of America, has existed against the United States and their authority and laws; that the defendants, in disregard of their allegiance to the United States, did on that day, and divers other times before and since, at the city of San Francisco, "maliciously and traitorously" engage in, and give aid and comfort to the said rebellion; that in the prosecution and execution of their "treasonable and traitorous" purposes, they procured, prepared, fitted out, and armed a schooner called the *J. M. Chapman*, then lying within the port of San Francisco, with the intent that the same should be employed in the service of the rebellion, to cruise on the high seas, and commit hostilities upon the citizens, property and vessels of the United States; and that they entered upon the said schooner and sailed from the port of San Francisco upon such cruise in the service of said rebellion. In other words, the indictment alleges: 1. The existence of a rebellion against the United States, their authority and laws; 2. That the defendants traitorously engaged in and gave aid and comfort to the same; 3. That in the execution of their treasonable and traitorous purposes, they procured, fitted out, and armed a vessel to cruise in the service of the rebellion upon the high seas, and commit hostilities against the citizens, property, and vessels of the United States; 4. That they sailed in their vessel from the port of San Francisco upon such cruise in the service of the rebellion.

The existence of the rebellion is a matter of public notoriety, and like matters of general and public concern to the whole country, may be taken notice of by judges and juries without that particular proof which is required of the other matters charged. The public notoriety, the proclamations of the President, and the acts of Congress are sufficient proof of the allegation of the indictment in this respect. The same notoriety and public documents are also sufficient proof that the rebellion is organized and carried on under a pretended government, called the Confederate States of America.

As to the treasonable purposes of the defendants there is no conflict in the evidence. It is true the principal witnesses of the government are, according to their own statements, co-conspirators with the defendants and equally involved in guilt with them, if guilt

there be in any of them. But their testimony, as you have seen, has been corroborated in many of its essential details. You are, however, the exclusive judges of its credibility. The court will only say to you that there is no rule of law which excludes the testimony of an accomplice, or prevents you from giving credence to it, when it has been corroborated in material particulars. Indeed, gentlemen, I have not been able to perceive from the argument of counsel that the truth of the material portions of their testimony has been seriously controverted.

It is not necessary that I should state in detail the evidence produced. I do not propose to do so. It is sufficient to refer to its general purport. It is not denied, and will not be denied, that the evidence tends to establish that Harpending obtained from the president of the so-called Confederate States a letter of marque — a commission to cruise in their service on the high seas, in a private armed vessel, and commit hostilities against the citizens, vessels, and property of the United States; that his co-defendants and others entered into a conspiracy with him to purchase, and fit out, and arm a vessel, and cruise under the said letter of marque, in the service of the rebellion; that in pursuance of the conspiracy they purchased the schooner *J. M. Chapman;* that they purchased cannon, shells, and ammunition, and the means usually required in enterprises of that kind, and placed them on board the vessel; that they employed men for the management of the vessel; and that, when everything was in readiness, they started with the vessel from the wharf, with the intention to sail from the port of San Francisco on the arrival on board of the captain, who was momentarily expected. Gentlemen, I do not propose to say anything to you upon the much disputed questions whether or not the vessel ever did, in fact, sail from the port of San Francisco, or whether, if she did sail, she started on the hostile expedition. In the judgment of the court they are immaterial, if you find the facts to be what I have said the evidence tends to establish.

When Harpending received the letter of marque, with the intention of using it, if such be the case (and it is stated by one of the witnesses that he represented that he went on horseback over the plains expressly to obtain it), he became leagued with the insurgents — the conspiracy between him and the chiefs of the rebellion was complete; it was a conspiracy to commit hostilities on the high seas against the United States, their authority and laws. If the other defendants united with him to carry out the hostile expedition, they, too, became leagued with him and the insurgent chiefs in Virginia in the general conspiracy. The subsequent purchasing of the vessel, and the guns, and the ammunition, and the employment of the men to manage the vessel, if these acts were done in furtherance of the common design, were overt acts of treason. Together, these acts complete the essential charge of the indictment. In doing them, the defendants were

performing a part in aid of the great rebellion. They were giving it aid and comfort.

It is not essential to constitute the giving of aid and comfort that the enterprise commenced should be successful and actually render assistance. If, for example, a vessel fully equipped and armed in the service of the rebellion should fail in its attack upon one of our vessels and be itself captured, no assistance would in truth be rendered to the rebellion; but yet, in judgment of law, in legal intent, the aid and comfort would be given. So if a letter containing important intelligence for the insurgents be forwarded, the aid and comfort are given, though the letter be intercepted on its way. Thus Foster, in his treatise on Crown Law, says: "And the bare sending money or provisions, or sending intelligence to rebels or enemies, which in most cases is the most effectual aid that can be given them, will make a man a traitor, though the money or intelligence should happen to be intercepted; for the party in sending it did all he could; the treason was complete on his part, though it had not the effect he intended."

Wherever overt acts have been committed which, in their natural consequence, if successful, would encourage and advance the interests of the rebellion, in judgment of law aid and comfort are given. Whether aid and comfort are given — the overt acts of treason being established — is not left to the balancing of probabilities — it is a conclusion of law.

If the defendants obtained a letter of marque from the president of the so-called Confederate States, the fact does not exempt them from prosecution in the tribunals of the country for the acts charged in the indictment. The existence of civil war, and the application of the rules of law to particular cases, under special circumstances, do not imply the renunciation or waiver by the Federal government of any of its municipal rights as sovereign toward the citizens of the seceded States.

As matter of policy and humanity, the government of the United States has treated the citizens of the so-called Confederate States, taken in open hostilities, as prisoners of war, and has thus exempted them from trial for violation of its municipal laws. But the courts have no such dispensing power; they can only enforce the laws as they find them upon the statute-book. They cannot treat any new government as having authority to issue commissions or letters of marque which will afford protection to its citizens until the legislative and executive departments have recognized its existence. The judiciary follows the political department of the government in these particulars. By that department the rules of war have been applied only in special cases; and notwithstanding the application, Congress has legislated in numerous instances for the punishment of all parties engaged in or rendering assistance in any way to the existing rebellion. The law under which the defendants are

indicted was passed after captives in war had been treated and exchanged as prisoners of war, in numerous instances.

But even if full belligerent rights had been conceded to the Confederate States, such rights could not be invoked for the protection of persons entering within the limits of States which have never seceded, and secretly getting up hostile expeditions against our government and its authority and laws. The local and temporary allegiance, which every one — citizen or alien — owes to the government under which he at the time lives, is sufficient to subject him to the penalties of treason.[1]

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## SECTION XV. — NON-ENUMERATED AND IMPLIED POWERS.

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### McCULLOCH *v.* MARYLAND.

4 Wheaton, 316; 4 Curtis, 415. 1819.

[See page 1, *supra.*]

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### GIBBONS *v.* OGDEN.

9 Wheaton, 1; 6 Curtis, 1. 1824.

[See page 235, *supra.*]

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### LEGAL TENDER CASE.

110 United States, 421. 1884.

[See page 442, *supra.*]

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### ANDERSON *v.* DUNN.

6 Wheaton, 204; 5 Curtis, 61. 1821.

ERROR to the Circuit Court of the District of Columbia.

This was an action of trespass, brought in the court below, by the plaintiff in error against the defendant in error, for an assault and

[1] The charge of HOFFMAN, District Judge, is omitted. The defendants were found guilty and sentenced.

battery, and false imprisonment; to which the defendant pleaded the general issue, and a special plea of justification. The plaintiff demurred generally to the special plea, which was adjudged good, and the demurrer overruled; and judgment upon such demurrer was entered for the defendant, and a writ of error brought by the plaintiff.

JOHNSON, J., delivered the opinion of the court.

Notwithstanding the range which has been taken by the plaintiff's counsel, in the discussion of this cause, the merits of it really lie in a very limited compass. The pleadings have narrowed them down to the simple inquiry, whether the House of Representatives can take cognizance of contempts committed against themselves, under any circumstances? The duress complained of was sustained under a warrant issued to compel the party's appearance, not for the actual infliction of punishment for an offence committed. Yet it cannot be denied, that the power to institute a prosecution must be dependent upon the power to punish. If the House of Representatives possessed no authority to punish for contempt, the initiating process issued in the assertion of that authority must have been illegal; there was a want of jurisdiction to justify it.

It is certainly true, that there is no power given by the Constitution to either House to punish for contempts, except when committed by their own members. Nor does the judicial or criminal power given to the United States, in any part, expressly extend to the infliction of punishment for contempt of either House, or any one co-ordinate branch of the government. Shall we, therefore, decide that no such power exists?

It is true that such a power, if it exists, must be derived from implication, and the genius and spirit of our institutions are hostile to the exercise of implied powers. Had the faculties of man been competent to the framing of a system of government which would have left nothing to implication, it cannot be doubted that the effort would have been made by the framers of the Constitution. But what is the fact? There is not in the whole of that admirable instrument a grant of powers which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, indeed, but auxiliary and subordinate.

The idea is utopian, that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest on responsibility, and stated appeals to public approbation. Where all power is derived from the people, and public functionaries, at short intervals, deposit it at the feet of the people, to be resumed again only at their will, individual fears may be alarmed by the monsters of imagination, but individual liberty can be in little danger.

No one is so visionary as to dispute the assertion, that the sole end and aim of all our institutions is the safety and happiness of the

citizen. But the relation between the action and the end is not always so direct and palpable as to strike the eye of every observer. The science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the State as they arise. It is the science of experiment.

But if there is one maxim which necessarily rides over all others, in the practical application of government, it is, that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them. The interests and dignity of those who created them require the exertion of the powers indispensable to the attainment of the ends of their creation. Nor is a casual conflict with the rights of particular individuals any reason to be urged against the exercise of such powers. The wretch beneath the gallows may repine at the fate which awaits him, and yet it is no less certain that the laws under which he suffers were made for his security. The unreasonable murmurs of individuals against the restraints of society have a direct tendency to produce that worst of all despotisms, which makes every individual the tyrant over his neighbor's rights.

That "the safety of the people is the supreme law," not only comports with, but is indispensable to, the exercise of those powers in their public functionaries, without which that safety cannot be guarded. On this principle it is that courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution.

It is true that the courts of justice of the United States are vested, by express statute provision, with power to fine and imprison for contempts; but it does not follow, from this circumstance, that they would not have exercised that power without the aid of the statute, or not in cases, if such should occur, to which such statute provision may not extend; on the contrary, it is a legislative assertion of this right, as incidental to a grant of judicial power, and can only be considered either as an instance of abundant caution, or a legislative declaration, that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment.

But it is contended, that if this power in the House of Representatives is to be asserted on the plea of necessity, the ground is too broad, and the result too indefinite; that the executive, and every co-ordinate, and even subordinate, branch of the government, may resort to the same justification, and the whole assume to themselves, in the exercise of this power, the most tyrannical licentiousness.

This is, unquestionably, an evil to be guarded against; and if the doctrine may be pushed to that extent, it must be a bad doctrine, and is justly denounced.

But what is the alternative? The argument obviously leads to the total annihilation of the power of the House of Representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy may meditate against it. This result is fraught with too much absurdity not to bring into doubt the soundness of any argument from which it is derived. That a deliberative assembly, clothed with the majesty of the people, and charged with the care of all that is dear to them; composed of the most distinguished citizens, selected and drawn together from every quarter of a great nation; whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity which unlimited confidence in their wisdom and purity can inspire; that such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested. And, accordingly, to avoid the pressure of these considerations, it has been argued that the right of the respective Houses to exclude from their presence, and their absolute control within their own walls, carry with them the right to punish contempts committed in their presence; while the absolute legislative power given to Congress, within this district, enables them to provide by law against all other insults against which there is any necessity for providing.

It is to be observed, that so far as the issue of this cause is implicated, this argument yields all right of the plaintiff in error to a decision in his favor; for, *non constat*, from the pleadings, but that this warrant issued for an offence committed in the immediate presence of the House.

Nor is it immaterial to notice what difficulties the negation of this right in the House of Representatives draws after it, when it is considered that the concession of the power, if exercised within their walls, relinquishes the great grounds of the argument, to wit, the want of an express grant, and the unrestricted and undefined nature of the power here set up. For why should the House be at liberty to exercise an ungranted, and unlimited, and undefined power within their walls, any more than without them? If the analogy with individual right and power be resorted to, it will reach no further than to exclusion, and it requires no exuberance of imagination to exhibit the ridiculous consequences which might result from such a restriction, imposed upon the conduct of a deliberative assembly.

Nor would their situation be materially relieved by resorting to their legislative power within the district. That power may, indeed, be applied to many purposes, and was intended by the Constitution to extend to many purposes indispensable to the security and dignity of the general government; but they are purposes of a more grave

and general character than the offences which may be denominated contempts, and which, from their very nature, admit of no precise definition. Judicial gravity will not admit of the illustrations which this remark would admit of. Its correctness is easily tested by pursuing, in imagination, a legislative attempt at defining the cases to which the epithet "contempt" might be reasonably applied.

. . . . . .

But it is argued that the inference, if any, arising under the Constitution, is against the exercise of the powers here asserted by the House of Representatives; that the express grant of power to punish their members respectively, and to expel them, by the application of a familiar maxim, raises an implication against the power to punish any other than their own members.

This argument proves too much; for its direct application would lead to the annihilation of almost every power of Congress. To enforce its laws upon any subject without the sanction of punishment is obviously impossible. Yet there is an express grant of power to punish in one class of cases, and one only; and all the punishing power exercised by Congress in any cases, except those which relate to piracy and offences against the laws of nations, is derived from implication. Nor did the idea ever occur to any one, that the express grant in one class of cases repelled the assumption of the punishing power in any other.

The truth is, that the exercise of the powers given over their own members, was of such a delicate nature that a constitutional provision became necessary to assert or communicate it. Constituted as that body is, of the delegates of confederated States, some such provision was necessary to guard against their mutual jealousy, since every proceeding against a representative would indirectly affect the honor or interests of the State which sent him.

In reply to the suggestion that on this same foundation of necessity might be raised a superstructure of implied powers in the executive, and every other department, and even ministerial officer of the government, it would be sufficient to observe, that neither analogy nor precedent would support the assertion of such powers in any other than a legislative or judicial body. Even corruption anywhere else would not contaminate the source of political life. In the retirement of the cabinet, it is not expected that the executive can be approached by indignity or insult; nor can it ever be necessary to the executive, or any other department, to hold a public deliberative assembly. These are not arguments; they are visions which mar the enjoyment of actual blessings with the attack or feint of the harpies of imagination.

As to the minor points made in this case, it is only necessary to observe, that there is nothing on the face of this record from which it can appear on what evidence this warrant was issued. And we are not to presume that the House of Representatives would have

issued it without duly establishing the fact charged on the individual. And, as to the distance to which the process might reach, it is very clear that there exists no reason for confining its operation to the limits of the District of Columbia; after passing those limits, we know no bounds that can be prescribed to its range but those of the United States. And why should it be restricted to other boundaries? Such are the limits of the legislating powers of that body; and the inhabitant of Louisiana or Maine may as probably charge them with bribery and corruption, or attempt, by letter, to induce the commission of either, as the inhabitant of any other section of the Union. If the inconvenience be urged, the reply is obvious; there is no difficulty in observing that respectful deportment which will render all apprehension chimerical. *Judgment affirmed.*[1]

[1] In the case of KILBOURN v. THOMPSON, 103 U. S. 168 (1880), the scope of the decision in Anderson v. Dunn is somewhat limited. Referring to that case MR. JUSTICE MILLER, delivering the opinion of the court, uses this language: —

"It may be said that since the order of the House, and the warrant of the speaker, and the plea of the sergeant-at-arms, do not disclose the ground on which the plaintiff was held guilty of a contempt, but state the finding of the House in general terms as a judgment of guilty, and as the court placed its decision on the ground that such a judgment was conclusive in the action against the officer who executed the warrant, it is no precedent for a case where the plea establishes, as we have shown it does in this case by its recital of the facts, that the House has exceeded its authority.

"This is, in fact, a substantial difference. But the court in its reasoning goes beyond this, and though the grounds of the decision are not very clearly stated, we take them to be: that there is in some cases a power in each House of Congress to punish for contempt; that this power is analogous to that exercised by courts of justice, and that it being the well-established doctrine that when it appears that a prisoner is held under the order of a court of general jurisdiction for a contempt of its authority, no other court will discharge the prisoner or make further inquiry into the cause of his commitment. That this is the general rule, though somewhat modified since that case was decided, as regards the relations of one court to another, must be conceded.

"But we do not concede that the Houses of Congress possess this general power of punishing for contempt. The cases in which they can do this are very limited, as we have already attempted to show. If they are proceeding in a matter beyond their legitimate cognizance, we are of opinion that this can be shown, and we cannot give our assent to the principle that, by the mere act of asserting a person to be guilty of a contempt, they thereby establish their right to fine and imprison him, beyond the power of any court or any other tribunal whatever to inquire into the grounds on which the order was made. This necessarily grows out of the nature of an authority which can only exist in a limited class of cases, or under special circumstances; otherwise the limitation is unavailing and the power omnipotent. The tendency of modern decisions everywhere is to the doctrine that the jurisdiction of a court or other tribunal to render a judgment affecting individual rights, is always open to inquiry, when the judgment is relied on in any other proceeding. See Williamson v. Berry, 8 How. 495; Thompson v. Whitman, 18 Wall. 457; Knowles v. The Gas-Light & Coke Co., 19 id. 58; Pennoyer v. Neff, 95 U. S. 714."

## Ex parte CURTIS.

106 United States, 371. 1882.

Petition for a writ of *habeas corpus*.

In the act of Aug. 15, 1876, making appropriations for the legislative, executive, and judicial expenses of the government (c. 287, 19 Stat. 143), the following appears as section six: "That all executive officers or employés of the United States not appointed by the President, with the advice and consent of the Senate, are prohibited from requesting, giving to, or receiving from, any other officer or employé of the government, any money or property or other thing of value for political purposes; and any such officer or employé who shall offend against the provisions of this section, shall be at once discharged from the service of the United States; and he shall also be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in a sum not exceeding five hundred dollars."

Curtis, the petitioner, an employé of the United States, was indicted in the Circuit Court for the Southern District of New York, and convicted under this act for receiving money for political purposes from other employés of the government. Upon his conviction he was sentenced to pay a fine, and stand committed until payment was made. Under this sentence he was taken into custody by the marshal, and on his application a writ of *habeas corpus* was issued by one of the justices of this court in vacation, returnable here at the present term, to inquire into the validity of his detention. The important question presented on the return to the writ so issued is whether the act under which the conviction was had is constitutional.

Mr. Chief Justice Waite, after stating the case, delivered the opinion of the court.

The act is not one to prohibit all contributions of money or property by the designated officers and employés of the United States for political purposes. Neither does it prohibit them altogether from receiving or soliciting money or property for such purposes. It simply forbids their receiving from or giving to each other. Beyond this no restrictions are placed on any of their political privileges.

That the government of the United States is one of delegated powers only, and that its authority is defined and limited by the Constitution, are no longer open questions; but express authority is given Congress by the Constitution to make all laws necessary and proper to carry into effect the powers that are delegated. Art. 1, sect. 8. Within the legitimate scope of this grant Congress is permitted to determine for itself what is necessary and what is proper.

The act now in question is one regulating in some particulars the conduct of certain officers and employés of the United States. It rests on the same principle as that originally passed in 1789 at the

first session of the first Congress, which makes it unlawful for certain officers of the Treasury Department to engage in the business of trade or commerce, or to own a sea vessel, or to purchase public lands or other public property, or to be concerned in the purchase or disposal of the public securities of a State, or of the United States (Rev. Stat., sect. 243); and that passed in 1791, which makes it an offence for a clerk in the same department to carry on trade or business in the funds or debts of the States or of the United States, or in any kind of public property (id., sect. 244); and that passed in 1812, which makes it unlawful for a judge appointed under the authority of the United States to exercise the profession of counsel or attorney, or to be engaged in the practice of the law (id., sect. 713); and that passed in 1853, which prohibits every officer of the United States or person holding any place of trust or profit, or discharging any official function under or in connection with any executive department of the government of the United States, or under the Senate or House of Representatives, from acting as an agent or attorney for the prosecution of any claim against the United States (id., sect. 5498); and that passed in 1863, prohibiting members of Congress from practising in the Court of Claims (id., sect. 1058); and that passed in 1867, punishing, by dismissal from service, an officer or employé of the government who requires or requests any workingman in a navy-yard to contribute or pay any money for political purposes (id., sect. 1546); and that passed in 1868, prohibiting members of Congress from being interested in contracts with the United States (id., sect. 3739); and another, passed in 1870, which provides that no officer, clerk, or employé in the government of the United States shall solicit contributions from other officers, clerks, or employés for a gift to those in a superior officer position, and that no officials or clerical superiors shall receive any gift or present as a contribution to them from persons in government employ getting a less salary than themselves, and that no official or clerk shall make a donation as a gift or present to any official superior (id., sect. 1784). Many others of a kindred character might be referred to, but these are enough to show what has been the practice in the Legislative Department of the government from its organization, and, so far as we know, this is the first time the constitutionality of such legislation has ever been presented for judicial determination.

The evident purpose of Congress in all this class of enactments has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service. Clearly such a purpose is within the just scope of legislative power, and it is not easy to see why the act now under consideration does not come fairly within the legitimate means to such an end. It is true, as is claimed by the counsel for the petitioner, political assessments upon office-holders are not prohibited. The managers of political campaigns, not in the employ of the United States, are just

as free now to call on those in office for money to be used for political purposes as ever they were, and those in office can contribute as liberally as they please, provided their payments are not made to any of the prohibited officers or employés. What we are now considering is not whether Congress has gone as far as it may, but whether that which has been done is within the constitutional limits upon its legislative discretion.

A feeling of independence under the law conduces to faithful public service, and nothing tends more to take away this feeling than a dread of dismissal. If contributions from those in public employment may be solicited by others in official authority, it is easy to see that what begins as a request may end as a demand, and that a failure to meet the demand may be treated by those having the power of removal as a breach of some supposed duty, growing out of the political relations of the parties. Contributions secured under such circumstances will quite as likely be made to avoid the consequences of the personal displeasure of a superior, as to promote the political views of the contributor, — to avoid a discharge from service, not to exercise a political privilege. The law contemplates no restrictions upon either giving or receiving, except so far as may be necessary to protect, in some degree, those in the public service against exactions through fear of personal loss. This purpose of the restriction, and the principle on which it rests, are most distinctly manifested in sect. 1546, *supra*, the re-enactment in the Revised Statutes of sect. 3 of the act of June 30, 1868, c. 172, which subjected an officer or employé of the government to dismissal if he required or requested a workingman in a navy-yard to contribute or pay any money for political purposes, and prohibited the removal or discharge of a workingman for his political opinions; and in sect. 1784, the re-enactment of the act of Feb. 1, 1870, c. 63, "to protect officials in public employ," by providing for the summary discharge of those who make or solicit contributions for presents to superior officers. No one can for a moment doubt that in both these statutes the object was to protect the classes of officials and employés provided for from being compelled to make contributions for such purposes through fear of dismissal if they refused. It is true that dismissal from service is the only penalty imposed, but this penalty is given for doing what is made a wrongful act. If it is constitutional to prohibit the act, the kind or degree of punishment to be inflicted for disregarding the prohibition is clearly within the discretion of Congress, provided it be not cruel or unusual.

If there were no other reasons for legislation of this character than such as relate to the protection of those in the public service against unjust exactions, its constitutionality would, in our opinion, be clear; but there are others, to our minds, equally good. If persons in public employ may be called on by those in authority to contribute from their personal income to the expenses of political campaigns, and a

refusal may lead to putting good men out of the service, liberal payments may be made the ground for keeping poor ones in. So, too, if a part of the compensation received for public services must be contributed for political purposes, it is easy to see that an increase of compensation may be required to provide the means to make the contribution, and that in this way the government itself may be made to furnish indirectly the money to defray the expenses of keeping the political party in power that happens to have for the time being the control of the public patronage. Political parties must almost necessarily exist under a republican form of government; and when public employment depends to any considerable extent on party success, those in office will naturally be desirous of keeping the party to which they belong in power. The statute we are now considering does not interfere with this. The apparent end of Congress will be accomplished if it prevents those in power from requiring help for such purposes as a condition to continued employment.

We deem it unnecessary to pursue the subject further. In our opinion the statute under which the petitioner was convicted is constitutional. The other objections which have been urged to the detention cannot be considered in this form of proceeding. Our inquiries in this class of cases are limited to such objections as relate to the authority of the court to render the judgment by which the prisoner is held. We have no general power to review the judgments of the inferior courts of the United States in criminal cases, by the use of the writ of *habeas corpus* or otherwise. Our jurisdiction is limited to the single question of the power of the court to commit the prisoner for the act of which he has been convicted. *Ex parte* Lange, 18 Wall. 163; *Ex parte* Rowland, 104 U. S. 604.

The commitment in this case was lawful, and the petitioner is, consequently,

*Remanded to the custody of the marshal for the Southern District of New York.*[1]

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## LOGAN *v.* UNITED STATES.

144 United States, 263. 1892.

Mr. Justice Gray delivered the opinion of the court.

The plaintiffs in error were indicted on sections 5508 and 5509 of the Revised Statutes, for conspiracy, and for murder in the prosecution of the conspiracy; and were convicted, under section 5508, of a conspiracy to injure and oppress citizens of the United States in the free exercise and enjoyment of the right to be secure from assault or

[1] Mr. Justice Bradley delivered a dissenting opinion.

bodily harm, and to be protected against unlawful violence, while in the custody of a marshal of the United States under a lawful commitment by a commissioner of the Circuit Court of the United States for trial for an offence against the laws of the United States.

By section 5508 of the Revised Statutes, "if two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same," "they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office or place of honor, profit, or trust, created by the Constitution or laws of the United States."

1. The principal question in this case is whether the right of a citizen of the United States, in the custody of a United States marshal under a lawful commitment to answer for an offence against the United States, to be protected against lawless violence, is a right secured to him by the Constitution or laws of the United States, or whether it is a right which can be vindicated only under the laws of the several States.

This question is presented by the record in several forms. It was raised in the first instance by the defendants "excepting to" and moving to quash the indictment. A motion to quash an indictment is ordinarily addressed to the discretion of the court, and therefore a refusal to quash cannot generally be assigned for error. United States *v.* Rosenburgh, 7 Wall. 580; United States *v.* Hamilton, 109 U. S. 63. But the motion in this case appears to have been intended and understood to include an exception, which, according to the practice in Louisiana and Texas, is equivalent to a demurrer. And the same question is distinctly presented by the judge's refusal to instruct the jury as requested, and by the instructions given by him to the jury.

Upon this question, the court has no doubt. As was said by Chief Justice Marshall, in the great case of McCulloch *v.* Maryland, "The government of the Union, though limited in its powers, is supreme within its sphere of action." "No trace is to be found in the Constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the Constitution." 4 Wheat. 316, 405, 424.

Among the powers which the Constitution expressly confers upon Congress is the power to make all laws necessary and proper for carrying into execution the powers specifically granted to it, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. In the exercise of this general power of legislation, Congress may use any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished, and are consistent with the letter and the spirit of the Constitution. McCulloch *v.* Maryland, 4 Wheat. 316, 421; Juilliard *v.* Greenman, 110 U. S. 421, 440, 441.

Although the Constitution contains no grant, general or specific, to Congress of the power to provide for the punishment of crimes, except piracies and felonies on the high seas, offences against the law of nations, treason, and counterfeiting the securities and current coin of the United States, no one doubts the power of Congress to provide for the punishment of all crimes and offences against the United States, whether committed within one of the States of the Union, or within territory over which Congress has plenary and exclusive jurisdiction.

To accomplish this end, Congress has the right to enact laws for the arrest and commitment of those accused of any such crime or offence, and for holding them in safe custody until indictment and trial; and persons arrested and held pursuant to such laws are in the exclusive custody of the United States, and are not subject to the judicial process or executive warrant of any State. Ableman *v.* Booth, 21 How. 506; Tarble's Case, 13 Wall. 397; Robb *v.* Connolly, 111 U. S. 624. The United States, having the absolute right to hold such prisoners, have an equal duty to protect them, while so held, against assault or injury from any quarter. The existence of that duty on the part of the government necessarily implies a corresponding right of the prisoners to be so protected; and this right of the prisoners is a right secured to them by the Constitution and laws of the United States.

The statutes of the United States have provided that any person accused of a crime or offence against the United States may by any United States judge or commissioner of a Circuit Court be arrested and confined, or bailed, as the case may be, for trial before the court of the United States having cognizance of the offence; and, if bailed, may be arrested by his bail, and delivered to the marshal or his deputy, before any judge or other officer having power to commit for the offence, and be thereupon recommitted to the custody of the marshal, to be held until discharged by due course of law. Rev. Stat. §§ 1014, 1018. They have also provided that all the expenses attendant upon the transportation from place to place, and upon the temporary or permanent confinement of persons arrested or committed under the laws of the United States, shall be paid out of the Treasury of the United States; and that the marshal, in case of

necessity, may provide a convenient place for a temporary jail, and "shall make such other provision as he may deem expedient and necessary for the safe-keeping of the prisoners arrested or committed under the authority of the United States, until permanent provision for that purpose is made by law." Rev. Stat. §§ 5536–5538.

In the case at the bar, the indictments alleged, the evidence at the trial tended to prove, and the jury have found by their verdict, that while Charles Marlow and five others, citizens of the United States, were in the custody and control of a deputy marshal of the United States under writs of commitment from a commissioner of the Circuit Court, in default of bail, to answer to indictments for an offence against the laws of the United States, the plaintiffs in error conspired to injure and oppress them in the free exercise and enjoyment of the right, secured to them by the Constitution and laws of the United States, to be protected, while in such custody and control of the deputy marshal, against assault and bodily harm, until they had been discharged by due process of the laws of the United States.

If, as some of the evidence introduced by the government tended to show, the deputy marshal and his assistants made no attempt to protect the prisoners, but were in league and collusion with the conspirators, that does not lessen or impair the right of protection, secured to the prisoners by the Constitution and laws of the United States.

The prisoners were in the exclusive custody and control of the United States, under the protection of the United States, and in the peace of the United States. There was a coextensive duty on the part of the United States to protect against lawless violence persons so within their custody, control, protection, and peace; and a corresponding right of those persons, secured by the Constitution and laws of the United States, to be so protected by the United States. If the officers of the United States, charged with the performance of the duty, in behalf of the United States, of affording that protection and securing that right, neglected or violated their duty, the prisoners were not the less under the shield and panoply of the United States.

The cases heretofore decided by this court, and cited in behalf of the plaintiffs in error, are in no way inconsistent with these views, but, on the contrary, contain much to support them. The matter considered in each of those cases was whether the particular right there in question was secured by the Constitution of the United States, and was within the acts of Congress.

[Several cases are stated with quotations therefrom, including United States *v.* Cruikshank, 92 U. S. 542, *supra*, p. 31; Civil Rights Cases, 109 U. S. 3, *supra*, p. 37; and *In re* Neagle, 135 U. S. 1, *supra*, p. 65.]

The whole scope and effect of this series of decisions is that, while

certain fundamental rights, recognized and declared, but not granted or created, in some of the Amendments to the Constitution, are thereby guaranteed only against violation or abridgment by the United States, or by the States, as the case may be, and cannot therefore be affirmatively enforced by Congress against unlawful acts of individuals; yet that every right, created by, arising under or dependent upon, the Constitution of the United States, may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object.

Among the particular rights which this court, as we have seen, has adjudged to be secured, expressly or by implication, by the Constitution and laws of the United States, and to be within section 5508 of the Revised Statutes, providing for the punishment of conspiracies by individuals to oppress or injure citizens in the free exercise and enjoyment of rights so secured, are the political right of a voter to be protected from violence while exercising his right of suffrage under the laws of the United States; and the private right of a citizen, having made a homestead entry, to be protected from interference while remaining in the possession of the land for the time of occupancy which Congress has enacted shall entitle him to a patent.

In the case at bar, the right in question does not depend upon any of the Amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action. Any government which has power to indict, try, and punish for crime, and to arrest the accused and hold them in safe keeping until trial, must have the power and the duty to protect against unlawful interference its prisoners so held, as well as its executive and judicial officers charged with keeping and trying them.

. . . . . .

The United States are bound to protect against lawless violence all persons in their service or custody in the course of the administration of justice. This duty and the correlative right of protection are not limited to the magistrates and officers charged with expounding and executing the laws, but apply, with at least equal force, to those held in custody on accusation of crime, and deprived of all means of self-defence.

For these reasons, we are of opinion that the crime of which the plaintiffs in error were indicted and convicted was within the reach of the constitutional powers of Congress, and was covered by section 5508 of the Revised Statutes; and it remains to be considered whether they were denied any legal right by the other rulings and instructions of the Circuit Court.

2. The objection to the consolidation of the indictments on which the plaintiffs in error were tried and convicted cannot prevail.

[The conviction was reversed, however, for error in admitting evidence.]

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## THE CHINESE EXCLUSION CASE.

[CHAE CHAN PING *v.* UNITED STATES.]

130 United States, 581. 1889.

MR. JUSTICE FIELD delivered the opinion of the court.

This case comes before us on appeal from an order of the Circuit Court of the United States for the Northern District of California refusing to release the appellant, on a writ of *habeas corpus*, from his alleged unlawful detention by Captain Walker, master of the steamship "Belgic," lying within the harbor of San Francisco. The appellant is a subject of the Emperor of China and a laborer by occupation. He resided at San Francisco, California, following his occupation, from some time in 1875 until June 2, 1887, when he left for China on the steamship "Gaelic," having in his possession a certificate, in terms entitling him to return to the United States, bearing date on that day, duly issued to him by the collector of customs of the port of San Francisco, pursuant to the provisions of section four of the restriction act of May 6, 1882, as amended by the act of July 5, 1884. 22 Stat. 59, c. 126; 23 Stat. 115, c. 220.

On the 7th of September, 1888, the appellant, on his return to California, sailed from Hong Kong in the steamship "Belgic," which arrived within the port of San Francisco on the 8th of October following. On his arrival he presented to the proper custom-house officers his certificate, and demanded permission to land. The collector of the port refused the permit, solely on the ground that under the act of Congress, approved October 1, 1888, supplementary to the restriction acts of 1882 and 1884, the certificate had been annulled and his right to land abrogated, and he had been thereby forbidden again to enter the United States. 25 Stat. 504, c. 1064. The captain of the steamship, therefore, detained the appellant on board the steamer. Thereupon a petition on his behalf was presented to the Circuit Court of the United States for the Northern District of California, alleging that he was unlawfully restrained of his liberty, and praying that a writ of *habeas corpus* might be issued directed to the master of the steamship, commanding him to have the body of the appellant, with the cause of his detention, before the court at a time and place designated, to do and receive what might there be considered in the premises. A writ was accordingly issued, and in obedience to it

the body of the appellant was produced before the court. Upon the hearing which followed, the court, after finding the facts substantially as stated, held as conclusions of law that the appellant was not entitled to enter the United States, and was not unlawfully restrained of his liberty, and ordered that he be remanded to the custody of the master of the steamship from which he had been taken under the writ. From this order an appeal was taken to this court.

The appeal involves a consideration of the validity of the act of Congress of October 1, 1888, prohibiting Chinese laborers from entering the United States who had departed before its passage, having a certificate issued under the act of 1882 as amended by the act of 1884, granting them permission to return. The validity of the act is assailed as being in effect an expulsion from the country of Chinese laborers, in violation of existing treaties between the United States and the government of China, and of rights vested in them under the laws of Congress.

It will serve to present with greater clearness the nature and force of the objections to the act, if a brief statement be made of the general character of the treaties between the two countries and of the legislation of Congress to carry them into execution.

[A history of the statutes and treaties relating to the immigration of Chinese is here omitted, as not necessary to the question for which the case is inserted.]

There being nothing in the treaties between China and the United States to impair the validity of the act of Congress of October 1, 1888, was it on any other ground beyond the competency of Congress to pass it? If so, it must be because it was not within the power of Congress to prohibit Chinese laborers who had at the time departed from the United States, or should subsequently depart, from returning to the United States. Those laborers are not citizens of the United States; they are aliens. That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power. As said by this court in the case of The Exchange, 7 Cranch, 116, 136, speaking by Chief Justice Marshall: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source."

While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations. As said by this court in the case of Cohens *v.* Virginia, 6 Wheat. 264, 413, speaking by the same great Chief Justice: "That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace we are one people. In all commercial regulations, we are one and the same people. In many other respects the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects is the government of the Union. It is their government, and in that character they have no other. America has chosen to be in many respects, and to many purposes, a nation; and for all these purposes her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can then in affecting these objects legitimately control all individuals or governments within the American territory. The constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States. They are members of one great empire — for some purposes sovereign, for some purposes subordinate." The same view is expressed in a different form by Mr. Justice Bradley, in Knox *v.* Lee, 12 Wall. 457, 555, where he observes that "the United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all which are forbidden to the State governments. It has jurisdiction over all those general subjects of legislation and sovereignty which affect the interests of the whole people equally and alike, and which require uniformity of regulations and laws, such as the coinage, weights and measures, bankruptcies, the postal system, patent and copyright laws, the public lands and interstate commerce, all which subjects are expressly or impliedly prohibited to the State governments. It has power to suppress insurrections, as well as to repel invasions, and to organize, arm, discipline, and call into service the

militia of the whole country. The President is charged with the duty and invested with the power to take care that the laws be faithfully executed. The judiciary has jurisdiction to decide controversies between the States, and between their respective citizens, as well as questions of national concern; and the government is clothed with power to guarantee to every State a republican form of government, and to protect each of them against invasion and domestic violence."

The control of local matters being left to local authorities, and national matters being intrusted to the government of the Union, the problem of free institutions existing over a widely extended country, having different climates and varied interests, has been happily solved. For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers. If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases its determination is conclusive upon the judiciary. If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action, it can make complaint to the executive head of our government, or resort to any other measure which, in its judgment, its interests or dignity may demand; and there lies its only remedy.

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The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or

restrained on behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract. Whatever license, therefore, Chinese laborers may have obtained, previous to the act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time, at its pleasure. Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition and made it applicable only to persons departing from the country after the passage of the act, are not questions for judicial determination. If there be any just ground of complaint on the part of China, it must be made to the political department of our government, which is alone competent to act upon the subject. The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer or other disposition, not such as are personal and untransferable in their character. Thus in The Head Money Cases [112 U. S. 580], the court speaks of certain rights being in some instances conferred upon the citizens or subjects of one nation residing in the territorial limits of the other, which are "capable of enforcement as between private parties in the courts of the country." "An illustration of this character," it adds, "is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens." 112 U. S. 580, 598. The passage cited by counsel from the language of Mr. Justice Washington in Society for the Propagation of the Gospel *v.* New Haven, 8 Wheat. 464, 493, also illustrates this doctrine. There the learned justice observes that "if real estate be purchased or secured under a treaty, it would be most mischievous to admit that the extinguishment of the treaty extinguished the right to such estate. In truth, it no more affects such rights than the repeal of a municipal law affects rights acquired under it." Of this doctrine there can be no question in this court; but far different is this case, where a continued suspension of the exercise of a governmental power is insisted upon as a right, because, by the favor and consent of the government, it has not heretofore been exerted with respect to the appellant or to the class to which he belongs. Between property rights not affected by the termination or abrogation of a treaty, and expectations of benefits from the continuance of existing legislation, there is as wide a difference as between realization and hopes.

During the argument reference was made by counsel to the alien law of June 25, 1798, and to opinions expressed at the time by men

of great ability and learning against its constitutionality. 1 Stat. 570, c. 58. We do not attach importance to those opinions in their bearing upon this case. The act vested in the President power to order all such aliens as he should judge dangerous to the peace and safety of the United States, or should have reasonable grounds to suspect were concerned in any treasonable or secret machination against the government, to depart out of the territory of the United States within such time as should be expressed in his order. There were other provisions also distinguishing it from the act under consideration. The act was passed during a period of great political excitement, and it was attacked and defended with great zeal and ability. It is enough, however, to say that it is entirely different from the act before us, and the validity of its provisions was never brought to the test of judicial decision in the courts of the United States. *Order affirmed.*

In FONG YUE TING *v.* UNITED STATES, 149 U. S. 698 (1893), the question was as to the validity of a statute providiug for the registration of Chinese laborers within the United States who were entitled by existing law to remain within the limits of the United States, and the expulsion of those not registered; and the court sustained the constitutionality of the statute. MR. JUSTICE GRAY delivering the opinion, used the following language:—

"The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare, the question now before the court is whether the manner in which Congress has exercised this right in sections 6 and 7 of the act of 1892 is consistent with the Constitution.

"The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective. The only goverument of this country, which other nations recognize or treat with, is the government of the Union; and the only American flag known throughout the world is the flag of the United States.

"The Constitution of the United States speaks with no uncertain sound upon this subject. That instrument, established by the people of the United States as the fundamental law of the land, has conferred upon the President the executive power; has made him the commander-in-chief of the army and navy; has authorized him, by and with the consent of the Senate, to make treaties, and to appoint ambassadors, public ministers, and consuls; and has made it his duty to take care that the laws be faithfully executed. The Constituion has granted to Congress the power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces; and to make all laws necessary and proper for carrying into execution these powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. And the several States are expressly forbidden to enter into any treaty, alliance, or confederation; to grant letters of marque and reprisal; to enter into any agreement or compact with another State, or with a foreign power; or to engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

In the case of UNITED STATES *ex rel. v.* WILLIAMS, 194 U. S. 279, 24 Sup. Ct. Rep. 719 (1904), The Chinese Exclusion Case *supra* was followed in holding constitutional a statute authorizing the executive officers of the United States under rules and regulations made by the Secretary of the Treasury to exclude or deport from the United States various classes of aliens including those described in the statute as "anarchists."

## SECTION XVI. — RESTRICTIONS ON THE POWERS OF CONGRESS.

[ON the general proposition, applicable to Congress and State legislatures alike, that legislative authority cannot be delegated, see the cases under Chap. III., Sec. I., *supra*.

As illustrating the doctrine that a legislative body cannot pass an act which shall limit or be derogatory to the authority of its successors, see cases on pp. 1014–1017.]

# CHAPTER V.

## THE POWERS OF THE EXECUTIVE.

### SECTION I. — REPRIEVES AND PARDONS.

#### EX PARTE WELLS.

18 Howard, 307. 1855.

MR. JUSTICE WAYNE delivered the opinion of the court.

The petitioner was convicted of murder in the District of Columbia, and sentenced to be hung on the 23d of April, 1852. President Fillmore granted to him a conditional pardon. The material part of it is as follows: "For divers good and sufficient reasons I have granted, and do hereby grant unto him, the said William Wells, a pardon of the offence of which he was convicted — upon condition that he be imprisoned during his natural life; that is, the sentence of death is hereby commuted to imprisonment for life in the penitentiary of Washington." On the same day the pardon was accepted in these words: "I hereby accept the above and within pardon, with condition annexed."

An application was made by the petitioner to the Circuit Court of the District of Columbia, for a writ of *habeas corpus*. It was rejected, and is now before this court by way of appeal.

The second article of the Constitution of the United States, section two, contains this provision: "The President shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment."

Under this power, the President has granted reprieves and pardons since the commencement of the present government. Sundry provisions have been enacted, regulating its exercise for the army and navy, in virtue of the constitutional power of Congress to make rules and regulations for the government of the army and navy. No statute has ever been passed regulating it in cases of conviction by the civil authorities. In such cases, the President has acted exclusively under the power as it is expressed in the Constitution.

This case raises the question, whether the President can constitutionally grant a conditional pardon to a convicted murderer, sentenced

to be hung, offering to change that punishment to imprisonment for life; and if he does, and it be accepted by the convict, whether it is not binding upon him, to justify a court to refuse him a writ of *habeas corpus*, applied for upon the ground that the pardon is absolute, and the condition of it void.

The counsel for the prisoner contends that the pardon is valid, to remit entirely the sentence of the court for his execution, and that the condition annexed to the pardon, and accepted by the prisoner, is illegal. It is also said that a President granting such a power assumes a power not conferred by the Constitution — that he legislates a new punishment into existence, and sentences the convict to suffer it; in this way violating the legislative and judicial powers of the government, it being the province of the first to enact laws for the punishment of offences against the United States, and that of the judiciary to sentence convicts for violations of those laws according to them. It is said to be the exercise of prerogative, such as the king of England has in such cases, and that, under our system, there can be no other foundation, empowering a President of the United States to show the same clemency.

We think this is a mistake arising from the want of due consideration of the legal meaning of the word "pardon." It is supposed that it was meant to be used exclusively with reference to an absolute pardon, exempting a criminal from the punishment which the law inflicts for a crime he has committed.

But such is not the sense or meaning of the word, either in common parlance or in law. In the first, it is forgiveness, release, remission. Forgiveness for an offence, whether it be one for which the person committing it is liable in law or otherwise. Release from pecuniary obligation, as where it is said, I pardon you your debt. Or it is the remission of a penalty, to which one may have subjected himself by the non-performance of an undertaking or contract, or when a statutory penalty in money has been incurred, and it is remitted by a public functionary having power to remit it.

In the law it has different meanings, which were as well understood when the Constitution was made as any other legal word in the Constitution now is.

Such a thing as a pardon without a designation of its kind is not known in the law. Time out of mind, in the earliest books of the English law, every pardon has its particular denomination. They are general, special or particular, conditional or absolute, statutory, not necessary in some cases, and in some grantable of course. Sometimes, though, an express pardon for one is a pardon for another, such as in approver and appellee, principal and accessory in certain cases, or where many are indicted for felony in the same indictment, because the felony is several in all of them, and not joint, and the pardon for one of them is a pardon for all, though they may not be mentioned in it; or it discharges sureties for a fine, payable

at a certain day, and the king pardons the principal; or sureties for the peace, if the principal is pardoned, after forfeiture. We might mention other legal incidents of a pardon, but those mentioned are enough to illustrate the subject of pardon, and the extent or meaning of the President's power to grant reprieves and pardons. It meant that the power was to be used according to law; that is, as it had been used in England, and these States when they were colonies; not because it was a prerogative power, but as incidents of the power to pardon, particularly when the circumstances of any case disclosed such uncertainties as made it doubtful if there should have been a conviction of the criminal, or when they are such as to show that there might be a mitigation of the punishment without lessening the obligation of vindicatory justice. Without such a power of clemency, to be exercised by some department or functionary of a government, it would be most imperfect and deficient in its political morality, and in that attribute of deity whose judgments are always tempered with mercy. And it was with the fullest knowledge of the law upon the subject of pardons, and the philosophy of government in its bearing upon the Constitution, when this court instructed Chief Justice Marshall to say, in The United States *v.* Wilson, 7 Pet. 162: "As the power has been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it." We still think so, and that the language used in the Constitution, conferring the power to grant reprieves and pardons, must be construed with reference to its meaning at the time of its adoption. At the time of our separation from Great Britain, that power had been exercised by the king, as the chief executive. Prior to the revolution, the colonies, being in effect under the laws of England, were accustomed to the exercise of it in the various forms, as they may be found in the English law books. They were, of course, to be applied as occasions occurred, and they constituted a part of the jurisprudence of Anglo-America. At the time of the adoption of the Constitution, American statesmen were conversant with the laws of England, and familiar with the prerogatives exercised by the crown. Hence, when the words "to grant pardons" were used in the Constitution, they conveyed to the mind the authority as exercised by the English crown, or by its representatives in the colonies. At that time both Englishmen and Americans attached the same meaning to the word "pardon." In the convention which framed the Constitution, no effort was made to define or change its meaning, although it was limited in cases of impeachment.

We must then give the word the same meaning as prevailed here and in England at the time it found a place in the Constitution. This is in conformity with the principles laid down by this court in

Cathcart *v.* Robinson, 5 Pet. 264, 280; and in Flavel's Case, 8 Watts & Serg. 197; Attorney-General's brief.

A pardon is said by Lord Coke to be a work of mercy, whereby the king, either before attainder, sentence, or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical. 3 Inst. 233. And the king's coronation oath is, "that he will cause justice to be executed in mercy." It is frequently conditional, as he may extend his mercy upon what terms he pleases, and annex to his bounty a condition precedent or subsequent, on the performance of which the validity of the pardon will depend. Co. Litt. 274, 276; 2 Hawk. Ch. 37, § 45; 4 Black. Com. 401. And if the felon does not perform the condition of the pardon, it will be altogether void; and he may be brought to the bar and remanded, to suffer the punishment to which he was originally sentenced. Cole's Case, Moore, 466; Bac. Abr., Pardon, E. In the case of Packer and others — Canadian prisoners — 5 Mees. & W. 32, Lord Abinger decided for the court, if the condition upon which alone the pardon was granted be void, the pardon must also be void. If the condition were lawful, but the prisoner did not assent to it, nor submit to be transported, he cannot have the benefit of the pardon — or if, having assented to it, his assent be revocable, we must consider him to have retracted it by the application to be set at liberty, in which case he is equally unable to avail himself of the pardon.

But to the power of pardoning there are limitations. The king cannot, by any previous license, make an offence dispunishable which is *malum in se*, i. e. unlawful in itself, as being against the law of nature, or so far against the public good as to be indictable at common law. A grant of this kind would be against reason and the common good, and therefore void. 2 Hawk. C. 37, § 28. So he cannot release a recognizance to keep the peace with another by name, and generally with other lieges of the king, because it is for the benefit and safety of all his subjects. 3 Inst. 238. Nor, after suit has been brought in a popular action, can the king discharge the informer's part of the penalty (3 Inst. 238); and if the action be given to the party grieved, the king cannot discharge the same. 3 Inst. 237. Nor can the king pardon for a common nuisance, because it would take away the means of compelling a redress of it, unless it be in a case where the fine is to the king, and not a forfeiture to the party grieved. Hawk. C. 37, § 33; 5 Chit. Burn. 2.

And this power to pardon has also been restrained by particular statutes. By the act of settlement, 12 & 13 Will. III. c. 2, Eng., no pardon under the great seal is pleadable to an impeachment by the Commons in Parliament, but after the articles of impeachment have been heard and determined, he may pardon. The provision in our Constitution, excepting cases of impeachment out of the power of the President to pardon, was evidently taken from that statute, and is an improvement upon the same. Nor does the power to pardon in Eng-

land extend to the *habeas corpus* act, 31 Car. II. c. 2, which makes it a *premunire* to send a subject to any prison out of England, &c., or beyond the seas, and further provides that any person so offending shall be incapable of the king's pardon. There are also pardons grantable as of common right, without any exercise of the king's discretion; as where a statute creating an offence, or enacting penalties for its future punishment, holds out a promise of immunity to accomplices to aid in the conviction of their associates. When accomplices do so voluntarily, they have a right absolutely to a pardon. 1 Chit. C. L. 766. Also, when, by the king's proclamation, they are promised immunity on discovering their accomplices and are the means of convicting them. Rudd's Case, Cowp. 334; 1 Leach, 118. But except in these cases, accomplices, though admitted according to the usual phrase to be "king's evidence," have no absolute claim or legal right to a pardon. But they have an equitable claim to pardon, if upon the trial a full and fair disclosure of the joint guilt of one of them and his associates is made. He cannot plead it in bar of an indictment for such offence, but he may use it to put off the trial, in order to give him time to apply for a pardon. Rudd's Case, Cowp. 331; 1 Leach, 115. So, conditional pardons by the king do not permit transportation or exile as a commutable punishment, unless the same has been provided for by legislation. See 39 Eliz. c. 4, and 5 Geo. IV. c. 84, a consolidation of all the laws regulating the transportation of offenders from Great Britain.

Having shown, by the citation of many authorities, the king's power to grant conditional pardons, with the restraints upon the power, also when pardons for offences and crimes are grantable of course, and when a party has an equitable right to apply for a pardon, we now proceed to show, by the decisions of some of the courts of the States of this Union, that they have expressed opinions coincident with what has been stated to be the law of England, and more particularly how the pardoning power may be exercised in them by the governors of the States, whose constitutions have clauses giving to them the power to grant pardons, in terms identical with those used in the Constitution of the United States.

In the Constitution of the State of Pennsylvania, of 1790, it is declared in the 2d article, section 9, that the governor shall have power to remit fines and penalties, and grant reprieves and pardons, except in cases of impeachment.

Sargeant, Justice, said in Flavel's Case, 8 Watts & Serg. 197, "several propositions were made in the convention which formed the Constitution of 1838, to limit and control the exercise of the power of pardon by the executive, but they were overruled and the provision left as it stood." "Now, no principle is better settled than that for the definition of legal terms and construction of legal powers mentioned in our Constitution and laws, we must resort to the common law when no act or assembly, or judicial interpretation, or settled usage, has altered their meaning."

Then proceeding to show the nature and application of conditions, the learned judge remarks: "And so may the king make a charter of pardon to a man of his life, upon condition. A pardon, therefore, being an act of such a nature as that by the common law it may be upon any condition, it has the same nature and operation in Pennsylvania, and it follows that the governor may annex to a pardon any condition, whether subsequent or precedent, not forbidden by law. And it lies upon the grantee to perform the condition; or if the condition is not performed, the original sentence remains in full vigor and may be carried into effect."

To this case we add those of The State *v.* Smith, 1 Bailey's S. C. Rep. 283, 298; also Addington's Case, in the 2d volume of the same reporter, p. 516; also Hunt, *ex parte;* also that of The People *v.* Potter, N. Y. Leg. Obs. 177; s. c. 1 Parker Crim. Rep. 4; and the case of The United States *v.* Geo. Wilson, 7 Pet. 150.

But it was urged by the counsel who represents the petitioner, that the power to reprieve and pardon does not include the power to grant a conditional pardon, the latter not having been enumerated in the Constitution as a distinct power. And he cited the constitutions of several of the States, the legislation of others, and two decisions, to show that when the power to commute punishment had not been given in terms, that legislation had authorized it; and that when that had not been done, that the courts had decided against the commutation by the governors of the States. And it was said, so far from the President having such a power, that, as the grant was not in the Constitution, Congress would not give it.

It not unfrequently happens in discussions upon the Constitution, that an involuntary change is made in the words of it, or in their order, from which, as they are used, there may be a logical conclusion, though it be different from what the Constitution is in fact. And even though the change may appear to be equivalent, it will be found upon reflection not to convey the full meaning of the words used in the Constitution. This is an example of it. The power as given is not to reprieve and pardon, but that the President shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment. The difference between the real language and that used in the argument is material. The first conveys only the idea of an absolute power as to the purpose or object for which it is given. The real language of the Constitution is general, that is, common to the class of pardons, or extending the power to pardon to all kinds of pardons known in the law as such, whatever may be their denomination. We have shown that a conditional pardon is one of them. A single remark from the power to grant reprieves will illustrate the point. That is not only to be used to delay a judicial sentence when the President shall think the merits of the case, or some cause connected with the offender, may require it, but it extends also to cases *ex necessitate legis*, as where a female after

conviction is found to be *enceinte*, or where a convict becomes insane, or is alleged to be so. Though the reprieve in either case produces delay in the execution of a sentence, the means to be used, to determine either of the two just mentioned, are clearly within the President's power to direct; and reprieves in such cases are different in their legal character, and different as to the causes which may induce the exercise of the power to reprieve.

In this view of the Constitution, by giving to its words their proper meaning, the power to pardon conditionally is not one of inference at all, but one conferred in terms.

The mistake in the argument is, in considering an incident of the power to pardon the exercise of a new power, instead of its being a part of the power to pardon. We use the word incident as a legal term, meaning something appertaining to and necessarily depending upon another, which is termed the principal.

But admitting that to be so, it may be said, as the condition, when accepted, becomes a substitute for the sentence of the court, involving another punishment, the latter is substantially the exercise of a new power. But this is not so, for the power to offer a condition, without ability to enforce its acceptance, when accepted by the convict, is the substitution, by himself, of a lesser punishment than the law has imposed upon him, and he cannot complain if the law executes the choice he has made.

As to the suggestion that conditional pardons cannot be considered as being voluntarily accepted by convicts so as to be binding upon them, because they are made whilst under *duress per minas* and duress of imprisonment, it is only necessary to remark, that neither applies to this case, as the petitioner was legally in prison. "If a man be legally imprisoned, and either to procure his discharge, or on any other fair account, seal a bond or deed, this is not duress or imprisonment, and he is not at liberty to avoid it. And a man condemned to be hung cannot be permitted to escape the punishment altogether, by pleading that he had accepted his life by *duress per minas*." And if it be further urged, as it was in the argument of this case, that no man can make himself a slave for life by convention, the answer is, that the petitioner had forfeited his life for crime, and had no liberty to part with.

We believe we have now noticed every point made in the argument by counsel on both sides, except that which deduces the President's power to grant a conditional pardon, from the local law of Maryland, of force in the District of Columbia. We do not thing it necessary to discuss it, as we have shown that the President's power to do so exists under the Constitution of the United States.

We are of opinion that the Circuit Court of the District of Columbia rightly refused the petitioner's application, and this court affirms it.[1]

[1] MR. JUSTICE MCLEAN delivered a dissenting opinion.

## Ex parte GARLAND.

4 Wallace, 333. 1866.

Mr. Justice Field delivered the opinion of the court.

On the second of July, 1862, Congress passed an act prescribing an oath to be taken by every person elected or appointed to any office of honor or profit under the government of the United States, either in the civil, military, or naval departments of the public service, except the President, before entering upon the duties of his office, and before being entitled to its salary, or other emoluments. On the 24th of January, 1865, Congress, by a supplementary act, extended its provisions so as to embrace attorneys and counsellors of the courts of the United States. This latter act provides that after its passage no person shall be admitted as an attorney and counsellor to the bar of the Supreme Court, and, after the fourth of March, 1865, to the bar of any Circuit or District Court of the United States, or of the Court of Claims, or be allowed to appear and be heard by virtue of any previous admission, or any special power of attorney, unless he shall have first taken and subscribed the oath prescribed by the act of July 2d, 1862. It also provides that the oath shall be preserved among the files of the court; and if any person take it falsely he shall be guilty of perjury, and, upon conviction, shall be subject to the pains and penalties of that offence.

At the December Term, 1860, the petitioner was admitted as an attorney and counsellor of this court, and took and subscribed the oath then required. By the second rule, as it then existed, it was only requisite to the admission of attorneys and counsellors of this court, that they should have been such officers for the three previous years in the highest courts of the States to which they respectively belonged, and that their private and professional character should appear to be fair.

In March, 1865, this rule was changed by the addition of a clause requiring the administration of the oath, in conformity with the act of Congress.

In May, 1861, the State of Arkansas, of which the petitioner was a citizen, passed an ordinance of secession, which purported to withdraw the State from the Union, and afterwards, in the same year, by another ordinance, attached herself to the so-called Confederate States, and by act of the congress of that confederacy was received as one of its members.

The petitioner followed the State, and was one of her representatives — first in the lower house, and afterwards in the senate, of the congress of that confederacy, and was a member of the senate at the time of the surrender of the Confederate forces to the armies of the United States.

In July, 1865, he received from the President of the United States

a full pardon for all offences committed by his participation, direct or implied, in the Rebellion. He now produces his pardon, and asks permission to continue to practise as an attorney and counsellor of the court without taking the oath required by the act of January 24th, 1865, and the rule of the court, which he is unable to take, by reason of the offices he held under the Confederate government. He rests his application principally upon two grounds: —

1st. That the act of January 24th, 1865, so far as it affects his status in the court, is unconstitutional and void; and,

2d. That, if the act be constitutional, he is released from compliance with its provisions by the pardon of the President.

The oath prescribed by the act is as follows: —

1st. That the deponent has never voluntarily borne arms against the United States since he has been a citizen thereof;

2d. That he has not voluntarily given aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto;

3d. That he has never sought, accepted, or attempted to exercise the functions of any office whatsoever, under any authority, or pretended authority, in hostility to the United States;

4th. That he has not yielded a voluntary support to any pretended government, authority, power, or constitution, within the United States, hostile or inimical thereto; and,

5th. That he will support and defend the Constitution of the United States against all enemies, foreign and domestic, and will bear true faith and allegiance to the same.

This last clause is promissory only, and requires no consideration. The questions presented for our determination arise from the other clauses. These all relate to past acts. Some of these acts constituted, when they were committed, offences against the criminal laws of the country; others may, or may not, have been offences according to the circumstances under which they were committed, and the motives of the parties. The first clause covers one form of the crime of treason, and the deponent must declare that he has not been guilty of this crime, not only during the War of the Rebellion, but during any period of his life since he has been a citizen. The second clause goes beyond the limits of treason, and embraces not only the giving of aid and encouragement of a treasonable nature to a public enemy, but also the giving of assistance of any kind to persons engaged in armed hostility to the United States. The third clause applies to the seeking, acceptance, or exercise not only of offices created for the purpose of more effectually carrying on hostilities, but also of any of those offices which are required in every community, whether in peace or war, for the administration of justice and the preservation of order. The fourth clause not only includes those who gave a cordial and active support to the hostile government, but also those who yielded a reluctant obedience to the existing order, established without their co-operation.

The statute is directed against parties who have offended in any of the particulars embraced by these clauses. And its object is to exclude them from the profession of the law, or at least from its practice in the courts of the United States. As the oath prescribed cannot be taken by these parties, the act, as against them, operates as a legislative decree of perpetual exclusion. And exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct. The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and instead of lessening, increases its objectionable character. All enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included.

In the exclusion which the statute adjudges it imposes a punishment for some of the acts specified which were not punishable at the time they were committed; and for other of the acts it adds a new punishment to that before prescribed, and it is thus brought within the further inhibition of the Constitution against the passage of an *ex post facto* law. In the case of Cummings against The State of Missouri, just decided, we have had occasion to consider at length the meaning of a bill of attainder and of an *ex post facto* law in the clause of the Constitution forbidding their passage by the States, and it is unnecessary to repeat here what we there said. A like prohibition is contained in the Constitution against enactments of this kind by Congress; and the argument presented in that case against certain clauses of the Constitution of Missouri is equally applicable to the act of Congress under consideration in this case.

The profession of an attorney and counsellor is not like an office created by an act of Congress, which depends for its continuance, its powers, and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution. Attorneys and counsellors are not officers of the United States; they are not elected or appointed in the manner prescribed by the Constitution for the election and appointment of such officers. They are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character. It has been the general practice in this country to obtain this evidence by an examination of the parties. In this court the fact of the admission of such officers in the highest court of the States to which they respectively belong, for three years preceding their application, is regarded as sufficient evidence of the possession of the requisite legal learning, and the statement of counsel moving their admission sufficient evidence that their private and professional character is fair. The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and

conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded. *Ex parte* Heyfron, 7 How. (Miss.) 127; Fletcher *v.* Daingerfield, 20 Cal. 430. Their admission or their exclusion is not the exercise of a mere ministerial power. It is the exercise of judicial power, and has been so held in numerous cases. It was so held by the Court of Appeals of New York in the matter of the application of Cooper for admission. 22 N. Y. 81. "Attorneys and counsellors," said that court, "are not only officers of the court, but officers whose duties relate almost exclusively to proceedings of a judicial nature. And hence their appointment may, with propriety, be intrusted to the courts, and the latter in performing this duty may very justly be considered as engaged in the exercise of their appropriate judicial functions."

In *Ex parte* Secombe, 19 How. 9, a *mandamus* to the Supreme Court of the Territory of Minnesota to vacate an order removing an attorney and counsellor was denied by this court, on the ground that the removal was a judicial act. "We are not aware of any case," said the court, "where a *mandamus* was issued to an inferior tribunal, commanding it to reverse or annul its decision, where the decision was in its nature a judicial act and within the scope of its jurisdiction and discretion." And in the same case the court observed, that "it has been well settled by the rules and practice of common-law courts that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed."

The attorney and counsellor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency.

The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question, in this case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution. That this result cannot be effected indirectly by a State under the form of creating qualifications we have held in the case of Cummings *v.* The State of Missouri [4 Wall. 277], and the reasoning by which that conclusion was reached applies equally to similar action on the part of Congress.

This view is strengthened by a consideration of the effect of the

pardon produced by the petitioner, and the nature of the pardoning power of the President.

The Constitution provides that the President "shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment." Article II. § 2.

The power thus conferred is unlimited, with the exception stated. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.

Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.

There is only this limitation to its operation: it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment. 4 Bl. Com. 402; 6 Bacon's Abridg. tit. Pardon; Hawkins, Book 2, c. 37, §§ 34 and 54.

The pardon produced by the petitioner is a full pardon "for all offences by him committed, arising from participation, direct or implied, in the Rebellion," and is subject to certain conditions which have been complied with. The effect of this pardon is to relieve the petitioner from all penalties and disabilities attached to the offence of treason, committed by his participation in the Rebellion. So far as that offence is concerned, he is thus placed beyond the reach of punishment of any kind. But to exclude him, by reason of that offence, from continuing in the enjoyment of a previously acquired right, is to enforce a punishment for that offence notwithstanding the pardon. If such exclusion can be effected by the exaction of an expurgatory oath covering the offence, the pardon may be avoided, and that accomplished indirectly which cannot be reached by direct legislation. It is not within the constitutional power of Congress thus to inflict punishment beyond the reach of executive clemency. From the petitioner, therefore, the oath required by the act of January 24th, 1865, could not be exacted, even if that act were not subject to any other objection than the one thus stated.

It follows, from the views expressed, that the prayer of the petitioner must be granted.

The case of R. H. Marr is similar, in its main features, to that of the petitioner, and his petition must also be granted.

And the amendment of the second rule of the court, which requires the oath prescribed by the act of January 24th, 1865, to be taken by attorneys and counsellors, having been unadvisedly adopted, must be rescinded. *And it is so ordered.*

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## SECTION II. TREATIES.

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### HAVER *v.* YAKER.

9 Wallace, 32. 1869.

[THE heirs of one Yaker instituted proceedings in a State court of Kentucky to have the real estate of their ancestor of the same name, which was in the possession of his widow, assigned to them.

It appears that Yaker, the ancestor, was born in Switzerland, and died intestate in Kentucky in 1853, having come to the United States some years previously and been naturalized as a citizen thereof. At the time of his death said Yaker was seized of real estate in Kentucky, and left a widow who was a resident and citizen of that State. The heirs who institute the proceeding, and who are the next of kin, were, at the time of Yaker's death, and thereafter remained, subjects of Switzerland and resident there.

At the date of the death of said Yaker, which, as above stated, was in the year 1853, the statutes of Kentucky denied the right of inheritance of real estate to aliens, save under certain conditions, within which the heirs of Yaker, who are the applicants for the assignment of his property, did not fall. Under these laws the widow was entitled to the real estate in question on the failure of heirs, or in case the persons who would otherwise have been heirs were not entitled to inherit on account of alienage.

In the year 1850 a treaty had been made between the representatives of the Swiss Confederation and like representatives of the United States (which treaty will be found in 11 Stat. at Large, 587), by the terms of which, as contended by the Yaker heirs, they were entitled to take and hold the real estate in question. This treaty provided by its terms that it should be submitted to the approval and ratification of the proper bodies in the two respective States, and that this ratification should be exchanged at Washington in due course. This treaty was duly submitted by such representatives to their respective States, but was not ratified by the United States, nor were the ratifications required by the terms of the treaty exchanged, until the year 1855, in which year the treaty was ratified by the Senate of

the United States after some alterations. The President thereupon made the treaty public.

It was contended on the part of the widow that the treaty under which the heirs claimed did not take effect until ratification in 1855, which was not until after her rights to the real estate had become vested.

In this view of the case it would be immaterial what construction should be put upon the terms of the treaty, inasmuch as it could not be given a retroactive effect so as to cut off the widow's rights, which had already vested under the statutes of Kentucky.

The Court of Appeals of Kentucky held that the treaty did not take effect until ratification, and therefore decided against the claims of the heirs of Yaker and in favor of the claims of his widow.

By writ of error this decision of the Court of Appeals of Kentucky was brought to this court for review.]

Mr. Justice Davis delivered the opinion of the court.

It is undoubtedly true, as a principle of international law, that, as respects the rights of either government under it, a treaty is considered as concluded and binding from the date of its signature. In this regard the exchange of ratifications has a retroactive effect, confirming the treaty from its date. Wheaton's International Law, by Dana, 336, bottom paging. But a different rule prevails where the treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified. In so far as it affects them, it is not considered as concluded until there is an exchange of ratifications, and this we understand to have been decided by this court in Arredondo's case, reported in 6th Peters, p. 749. The reason of the rule is apparent. In this country, a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land. If so, before it can become a law, the Senate, in whom rests the authority to ratify it, must agree to it. But the Senate are not required to adopt or reject it as a whole, but may modify or amend it, as was done with the treaty under consideration. As the individual citizen, on whose rights of property it operates, has no means of knowing anything of it while before the Senate, it would be wrong in principle to hold him bound by it, as the law of the land, until it was ratified and proclaimed. And to construe the law, so as to make the ratification of the treaty relate back to its signing, thereby divesting a title already vested, would be manifestly unjust, and cannot be sanctioned.

These views dispose of this case, and we are not required to determine whether this treaty, if it had become a law at an earlier date, would have secured the plaintiffs in error the interest which they claim in the real estate left by Yaker at his death.

*Judgment affirmed.*[1]

[1] In Foster *v.* Neilson, 2 Pet. 253 (1829), which was a case involving conflicting claims of Spain and the United States to certain territory in the eastern district of Louisiana which the United States claimed under the treaty for the purchase of

## THE PEOPLE, EX REL. THE ATTORNEY-GENERAL *v.* GERKE.

5 California, 381. 1855.

APPEAL from the District Court of the Fourth Judicial District, San Francisco County.

On the 23d of August, 1853, one Auguste Deck, a citizen of Prussia, died intestate, in the city of San Francisco, leaving, undisposed of, a large amount of real estate.

On the 14th of September following, letters of administration were granted by the Probate Court to the defendant, Gerke.

Clark afterwards purchased from the absent heirs a large portion of the property.

An information was filed by the Attorney-General in the court below, citing the defendants to show cause why Deck's estate should not escheat to the State of California. The court below entered judgment *pro forma*, in favor of the People. Defendants appealed.

HEYDENFELDT, J., delivered the opinion of the court.

By a convention between the United States and the Kingdom of Prussia, made in the year 1828, the fourteenth article provides, "And when on the death of any person holding real estate within the territory of the one party, such real estate would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation."

The Attorney-General, in support of the information filed in this case, denies the power of the Federal government to make such a provision by treaty, and the determination of this case depends upon the solution of that question. Cases have frequently arisen where

Louisiana, and the validity of certain Spanish grants thereof which were the subject of adjustment in a subsequent treaty between the two powers (made in 1818), in sec. 8 of which it was stipulated that grants of land made prior to a date named shall be ratified and confirmed, &c., it was held that the obligation of the provision was upon the government of the United States, which undertook thereby to pass acts which should ratify and confirm them. MARSHALL, C. J., in rendering the opinion of the court, uses this language: —

"A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

"In the United States, a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court."

aliens have claimed to inherit by virtue of treaty provisions analogous to the one under consideration, and in all of them, so far as I have examined, the stipulations were enforced in favor of the foreign claimants. See 2 Wheat. 259; 4 ibid. 453; 8 ibid. 464; 9 ibid. 489; 10 ibid. 181.

But in none of these cases was the question raised as to the power of the Federal government to make the treaty. It has been the practice of the government from an early period after the ratification of the Constitution, and its power is now, I believe, for the first time disputed.

The language which grants the power to make treaties contains no words of limitation; it does not follow that the power is unlimited. It must be subject to the general rule, that an instrument is to be construed so as to reconcile and give meaning and effect to all its parts. If it were otherwise, the most important limitation upon the powers of the Federal government would be ineffectual, and the reserved rights of the States would be subverted. This principle of construction as applied, not only in reference to the Constitution of the United States, but particularly in the relation of all the rest of it, to the treaty-making grant, was recognized both by Mr. Jefferson and John Adams, two leaders of opposite schools of construction. See Jefferson's Works, Vol. III. p. 135; and Vol. VI. p. 560.

It may, therefore, be assumed that, aside from the limitations and prohibitions of the Constitution upon the powers of the Federal government, "the power of treaty was given, without restraining it to particular objects, in as plenipotentiary a form as held by any sovereign in any other society." This principle, as broadly as I have deemed proper to lay it down, results from the form and necessities of our government, as elicited by a general view of the Federal compact. Before the compact, the States had the power of treaty-making as potentially as any power on earth; it extended to every subject whatever. By the compact, they expressly granted it to the Federal government in general terms, and prohibited it to themselves.

The general government must, therefore, hold it as fully as the States held who granted it, with the exceptions which necessarily flow from a proper construction of the other powers granted, and those prohibited by the Constitution. The only questions, then, which can arise in the consideration of the validity of a treaty are: First, Is it a proper subject of treaty according to international law or the usage and practice of civilized nations? Second, Is it prohibited by any of the limitations in the Constitution?

Taking for illustration the present subject of treaty, no one will deny that, to the commercial States of the Union, and indeed to the citizens of any State who are engaged in foreign commerce, a stipulation to remove the disability of aliens to hold property is of paramount importance, or, at any rate, it may be so considered by the States, and demanded as a part of their commercial polity.

Now, as by the compact the States are absolutely prohibited from making treaties, if the general government has not the power, then we must admit a lameness and incompleteness in our whole system, which renders us inferior to any other enlightened nation, in the power and ability to advance the prosperity of the people we govern.

Mr. Calhoun, in his discourse on the Constitution and Government of the United States, has given to this power a full consideration, and I cannot doubt that the view which I have taken is sustained by his reasoning. According to his opinion, the following may be classed as the limitations on the treaty-making power: First, It is limited strictly to questions *inter alios*, "all such clearly appertain to it." Second, "By all the provisions of the Constitution which inhibit certain acts from being done by the government or any of its departments." Third, "By such provisions of the Constitution as direct certain acts to be done in a particular way, and which prohibit the contrary." Fourth, "It can enter into no stipulation calculated to change the character of the government, or to do that which can only be done by the Constitution-making power; or which is inconsistent with the nature and structure of the government or the objects for which it was formed."

Having stated these as the only limitations, the author adds, "Within these limits all questions which may arise between us and other powers, be the subject-matter what it may, fall within the limits of the treaty-making power, and may be adjusted by it."

One of the arguments at the bar against the extent of this power of treaty is, that it permits the Federal government to control the internal policy of the States, and, in the present case, to alter materially the statutes of distribution.

If this was so to the full extent claimed, it might be a sufficient answer to say, that it is one of the results of the compact, and, if the grant be considered too improvident for the safety of the States, the evil can be remedied by the Constitution-making power. I think, however, that no such consequence follows as is insisted. The statutes of distribution are not altered or affected. Alienage is the subject of the treaty. Its disability results from political reasons which arose at an early period of the history of civilization, and which the enlightened advancement of modern times, and changes in the political and social condition of nations, have rendered without force or consequence. The disability to succeed to property is alone removed, the character of the person is made politically to undergo a change, and then the statute of distribution is left to its full effect, unaltered and unimpaired in word or sense. If there is one object more than another which belongs to our political relations, and which ought to be the subject of treaty regulations, it is the extension of this comity which is so highly favored by the liberal spirit of the age, and so conducive in its tendency to the peace and amity of nations.

Even if the effect of this power was to abrogate to some extent the legislation of the States, we have authority for admitting it, if it does not exceed the limitations which we have cited from the work of Mr. Calhoun, and laid down as the rule to which we yield our assent.

During the War of the Revolution, the States had passed acts of confiscation; acts against the collection of debts due to the subjects of Great Britain; and acts for the punishment of treason. By the treaty of peace, the effects of these various acts were provided against, and as late as 1792, long after the ratification of the Constitution, Mr. Jefferson, in answer to the complaint of the British Minister, Mr. Hammond, distinctly recognized the doctrine that treaties are the supreme law of the land, and that State legislation must yield to them; and he therein cites the acts of State legislatures and the decisions of State judges, who all conform to the same opinion. See Vol. III., Jefferson's Works, 365.

I can see no danger which can result from yielding to the Federal government the full extent of powers which it may claim from the plain language, intent, and meaning of the grant under consideration. Upon some subjects, the policy of a State government, as shown by her legislation, is dependent upon the policy of foreign governments, and would be readily changed upon the principle of mutual concession. This can only be effected by the action of that branch of the State sovereignty known as the general government, and when effected, the State policy must give way to that adopted by the governmental agent of her foreign relations.

It results from these views that the treaty of 1828, with Prussia, is valid, and that aliens, subjects of Prussia, are protected by its provisions.

The judgment is reversed, and the cause remanded.[1]

[1] The concurring opinion of BRYAN, J., is omitted.

This case is cited and quoted from with approval in Opel *v.* Shoup, 100 Iowa, 407 (1896), in which the same question was considered and a similar conclusion was reached; and also in Wunderle *v.* Wunderle, 144 Ill. 40 (1893). That the provisions of a treaty will control in such case, see Hauenstein *v.* Lynham, 100 U. S. 483, *supra*, p. 72, and note.

In GEOFROY *v.* RIGGS, 133 U. S. 258 (1890), the right of a Frenchman to inherit property in the District of Columbia was held to be regulated by a treaty with France. There was no question as between the provisions of the treaty and any statute; but MR. JUSTICE FIELD, rendering the opinion of the court, uses this language: —

"That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised, or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries. As commercial intercourse increases between different countries, the residence of citizens of one country within the territory of the other naturally follows, and the removal of their disability from alienage to hold, transfer, and inherit property in such cases tends to promote amicable relations. Such removal has been within the present century the frequent subject of treaty arrangement. The treaty power, as expressed in the Constitution, is in terms unlimited, except by those restraints which are found in that instrument against the

## HEAD MONEY CASES.

112 United States, 580. 1884.

[FIVE cases were tried in the Circuit Court of the United States for the Eastern District of New York, in which it was sought to recover back moneys paid under protest to the collector of the port of New York by the various plaintiffs. The money was claimed by the collector as duty at fifty cents per head on passengers brought to the city of New York, the claim being based on the provisions of the act of August 3, 1882, entitled "An Act to regulate immigration" (22 Stat. c. 376, p. 214), requiring the payment of that amount of duty for each passenger not a citizen of the United States, who shall come by steam or sail vessel from a foreign port to any port within the United States. Judgments for plaintiffs (18 Fed. R. 135) were brought to this court on writ of error.]

MR. JUSTICE MILLER delivered the opinion of the court.

[The objection that the act is not within the power of Congress is first considered, and the conclusion is reached that it is within the power to regulate foreign commerce, reference being made to Henderson *v.* The Mayor of New York, 92 U. S. 259, *supra*, 243.]

Another objection to the validity of this act of Congress is that it violates provisions contained in numerous treaties of our government with friendly nations. And several of the articles of these treaties are annexed to the careful brief of counsel. We are not satisfied that this act of Congress violates any of these treaties, on any just construction of them. Though laws similar to this have long been enforced by the State of New York in the great metropolis of foreign trade, where four-fifths of these passengers have been landed, no complaint has been made by any foreign nation to ours, of the violation of treaty obligations by the enforcement of those laws.

But we do not place the defence of the act of Congress against this objection upon that suggestion.

We are of opinion that, so far as the provisions in that act may be found to be in conflict with any treaty with a foreign nation, they

action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter without its consent. Fort Leavenworth Railroad Co. *v.* Lowe, 114 U. S. 525, 541. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. Ware *v.* Hylton, 3 Dall. 199; Chirac *v.* Chirac, 2 Wheat. 259; Hauenstein *v.* Lynham, 100 U. S. 483; 8 Opinions Attys.-Gen. 417; The People *v.* Gerke, 5 Cal. 381."

must prevail in all the judicial courts of this country. We had supposed that the question here raised was set at rest in this court by the decision in the case of The Cherokee Tobacco, 11 Wall. 616. It is true, as suggested by counsel, that three judges of the court did not sit in the case, and two others dissented. But six judges took part in the decision, and the two who dissented placed that dissent upon the ground that Congress did not *intend* that the tax on tobacco should extend to the Cherokee tribe. They referred to the existence of the treaty which would be violated if the statute was so construed as persuasive against such a construction, but they nowhere intimated that, if the statute was correctly construed by the court, it was void because it conflicted with the treaty, which they would have done if they had held that view. On the point now in controversy it was therefore the opinion of all the judges who heard the case. See United States *v.* McBratney, 104 U. S. 621–3.

The precise question involved here, namely, a supposed conflict between an act of Congress, imposing a customs duty, and a treaty with Russia on that subject, in force when the act was passed, came before the Circuit Court for the District of Massachusetts in 1855. It received the consideration of that eminent jurist, Mr. Justice Curtis of this court, who in a very learned opinion exhausted the sources of argument on the subject, holding that if there were such conflict the act of Congress must prevail in a judicial forum. Taylor *v.* Morton, 2 Curtis, 454. And Mr. Justice Field, in a very recent case in the Ninth Circuit, that of Ah Lung, 18 Fed. Rep. 28, on a writ of *habeas corpus*, has delivered an opinion sustaining the same doctrine in reference to a statute regulating the immigration of Chinamen into this country. In the Clinton Bridge Case, Woolw. 150, 156, the writer of this opinion expressed the same views as did Judge Woodruff, on full consideration, in Ropes *v.* Clinch, 8 Blatch. 304, and Judge Wallace, in the same circuit, in Bartram *v.* Robertson, 15 Fed. Rep. 212.

It is very difficult to understand how any different doctrine can be sustained.

A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties, which

regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that "this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land." A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

But even in this aspect of the case there is nothing in this law which makes it irrepealable or unchangeable. The Constitution gives it no superiority over an act of Congress in this respect, which may be repealed or modified by an act of a later date. Nor is there anything in its essential character, or in the branches of the government by which the treaty is made, which gives it this superior sanctity.

A treaty is made by the President and the Senate. Statutes are made by the President, the Senate, and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate. And such is, in fact, the case in a declaration of war, which must be made by Congress, and which, when made, usually suspends or destroys existing treaties between the nations thus at war.

In short, we are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.

Other objections are made to this statute. Some of these relate, not to the power of Congress to pass the act, but to the expediency or justice of the measure, of which Congress, and not the courts, are the sole judges — such as its unequal operation on persons not paupers or criminals, and its effect in compelling the ultimate payment of the sum demanded for each passenger by that passenger himself. Also, that the money is to be drawn from the treasury without an appropriation by Congress. The act itself makes the appropriation, and even if this be not warranted by the Constitution, it does not make void the demand for contribution, which may yet be appropriated by Congress, if that be necessary, by another statute.

It is enough to say that, Congress having the power to pass a law

regulating immigration as a part of the commerce of this country with foreign nations, we see nothing in the statute by which it has here exercised that power, forbidden by any other part of the Constitution.

The judgment of the Circuit Court in all the cases is

*Affirmed.*

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## SECTION III. — DIPLOMATIC RELATIONS AND POLITICAL QUESTIONS.

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### JONES *v.* UNITED STATES.

137 United States, 202. 1890.

MR. JUSTICE GRAY delivered the opinion of the court.

This was an indictment, found in the District Court of the United States for the District of Maryland, and remitted to the Circuit Court under Rev. Stat. § 1039, alleging that Henry Jones, late of that district, on September 14, 1889, "at Navassa Island, a place which then and there was under the sole and exclusive jurisdiction of the United States, and out of the jurisdiction of any particular State or district of the United States, the same being, at the time of the committing of the offences in the manner and form as hereinafter stated by the persons hereinafter named, an island situated in the Caribbean Sea, and named Navassa Island, and which was then and there recognized and considered by the United States as containing a deposit of guano, within the meaning and terms of the laws of the United States relating to such islands, and which was then and there recognized and considered by the United States as appertaining to the United States, and which was also then and there in the possession of the United States, under the laws of the United States then and there in force relating to such islands," murdered one Thomas N. Foster, by giving him three mortal blows with an axe, of which he there died on the same day; and that other persons named aided and abetted in the murder. The indictment, after charging the murder in usual form, alleged that the District of Maryland was the District of the United States into which the defendant was afterwards first brought from the Island of Navassa.

[The opinion contains a statement of the legislation by Congress (now embodied in R. S. §§ 5570–5578) relating to the discovery and occupation by citizens of the United States of guano islands not within the lawful jurisdiction of any other government, which provides for the extension by the President of the jurisdiction of the

United States over islands so occupied. Documents are set out which were relied on as showing that Navassa Island had been recognized and considered by the United States as appurtenant to it and in its possession within the provisions of such legislation, and it was claimed that the Federal court had jurisdiction to try Jones for the act committed on that island under R. S. § 5339, providing for the punishment of murder committed "within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States."]

By the law of nations, recognized by all civilized States, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens, or subjects of one nation, in its name, and by its authority or with its assent, take and hold actual, continuous, and useful possession (although only for the purpose of carrying on a particular business, such as catching and curing fish, or working mines) of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired. This principle affords ample warrant for the legislation of Congress concerning guano islands. Vattel, lib. 1, c. 18; Wheaton on International Law (8th ed.), §§ 161, 165, 176, note 104; Halleck on International Law, c. 6, §§ 7, 15; 1 Phillimore on International Law (3d ed.), §§ 227, 229, 230, 232, 242; 1 Calvo Droit International (4th ed.), §§ 266, 277, 300; Whiton *v.* Albany Ins. Co., 109 Mass. 24, 31.

Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances. Gelston *v.* Hoyt, 3 Wheat. 246, 324; United States *v.* Palmer, 3 Wheat. 610; The Divina Pastora, 4 Wheat. 52; Foster *v.* Neilson, 2 Pet. 253, 307, 309; Keane *v.* McDonough, 8 Pet. 308; Garcia *v.* Lee, 12 Pet. 511, 520; Williams *v.* Suffolk Ins. Co., 13 Pet. 415; United States *v.* Yorba, 1 Wall. 412, 423; United States *v.* Lynde, 11 Wall. 632, 638. It is equally well settled in England. The Pelican, Edw. Adm. appx. D; Taylor *v.* Barclay, 2 Sim. 213; Emperor of Austria *v.* Day, 3 De G., F. & J. 217, 221, 233; Republic of Peru *v.* Peruvian Guano Co., 36 Ch. D. 489, 497; Republic of Peru *v.* Dreyfus, 38 Ch. D. 348, 356, 359.

In Williams *v.* Suffolk Ins. Co., in an action on a policy of insurance, the following question arose in the Circuit Court, and was brought up by a certificate of division of opinion between the judges thereof: —

"Whether, inasmuch as the American government has insisted and does still insist, through its regular executive authority, that the

Falkland Islands do not constitute any part of the dominions within the sovereignty of the government of Buenos Ayres, and that the seal fishery at those islands is a trade free and lawful to the citizens of the United States, and beyond the competency of the Buenos Ayrean government to regulate, prohibit, or punish; it is competent for the Circuit Court in this cause to inquire into and ascertain by other evidence the title of said government of Buenos Ayres to the sovereignty of the said Falkland Islands, and, if such evidence satisfies the court, to decide against the doctrines and claims set up and supported by the American government on this subject; or whether the action of the American government on this subject is binding and conclusive on this court as to whom the sovereignty of those islands belongs." 13 Pet. 417.

This court held that the action of the executive department, on the question to whom the sovereignty of those islands belonged, was binding and conclusive upon the courts of the United States, saying: "Can there be any doubt that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union." "In the present case, as the executive in his message, and in his correspondence with the government of Buenos Ayres, has denied the jurisdiction which it has assumed to exercise over the Falkland Islands, the fact must be taken and acted on by this court as thus asserted and maintained." 13 Pet. 420.

All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence, nor in accord with the pleadings. United States *v.* Reynes, 9 How. 127; Kennett *v.* Chambers, 14 How. 38; Hoyt *v.* Russell, 117 U. S. 401, 404; Coffee *v.* Grover, 123 U. S. 1; State *v.* Dunwell, 3 R. I. 127; State *v.* Wagner, 61 Maine, 178; Taylor *v.* Barclay, and Emperor of Austria *v.* Day, above cited; 1 Greenl. Ev. § 6.

In United States *v.* Reynes, upon the question whether a Spanish grant of land in Louisiana was protected, either by the treaty of retrocession from Spain to France, or by the treaty of Paris, by which the Territory of Louisiana was ceded to the United States, this court held: "The treaties above mentioned, the public acts and proclama-

tions of the Spanish and French governments, and those of their publicly recognized agents, in carrying into effect those treaties, though not made exhibits in this cause, are historical and notorious facts, of which the court can take regular judicial notice, and reference to which is implied in the investigation before us." 9 How. 147, 148.

In Kennett *v.* Chambers, a bill to compel specific performance of a contract made in the United States in September, 1836, by which a general in the Texan army agreed to convey lands in Texas, in consideration of money paid him to aid in raising and equipping troops against Mexico, was dismissed on demurrer, because the independence of Texas, though previously declared by that State, had not then been acknowledged by the government of the United States; and the court established this conclusion by referring to messages of the President of the United States to the Senate, a letter from the President to the Governor of Tennessee, and a note from the Secretary of State to the Mexican Minister, none of which were stated in the record before the court. 14 How. 47, 48.

So in Coffee *v.* Grover, upon writ of error to the Supreme Court of Florida, in a case involving a title to land, claimed under conflicting grants from the State of Florida and the State of Georgia, and depending upon a disputed boundary between those States, this court ascertained the true boundary by consulting public documents, some of which had not been given in evidence at the trial, nor referred to in the opinion of the court below. 123 U. S. 11 *et seq.*

In Taylor *v.* Barclay, a bill in equity, based on an agreement which it alleged had been made in 1825 by agents of "the government of the Federal Republic of Central America, which was a sovereign and independent State, recognized and treated as such by His Majesty the King of these Realms," was dismissed on demurrer by Vice-Chancellor Shadwell, who said: "I have had communication with the Foreign Office, and I am authorized to state that the Federal Republic of Central America has not been recognized as an independent government by the government of this country." "Inasmuch as I conceive it is the duty of the judge in every court to take notice of public matters which affect the government of this country, I conceive that, notwithstanding there is this averment in the bill, I am bound to take the fact as it really exists, not as it is averred to be." "Nothing is taken to be true, except that which is properly pleaded; and I am of opinion that, when you plead that which is historically false, and which the judges are bound to take notice of as being false, it cannot be said you have properly pleaded, merely because it is averred, in plain terms; and that I must take it just as if there was no such averment on the record." 2 Sim. 220, 221, 223.

That case is in harmony with decisions made in the time of Lord Coke, and in which he took part, that against an allegation of a public act of Parliament, of which the judges ought to take notice, the other party cannot plead *nul tiel record*, but, if the act be misrecited,

ought to demur in law upon it. The Prince's Case, 8 Rep. 14 *a*, 28 *a*; Woolsey's Case, Godb. 178.

In the ascertainment of any facts of which they are bound to take judicial notice, as in the decision of matters of law which it is their office to know, the judges may refresh their memory and inform their conscience from such sources as they deem most trustworthy. Gresley Eq. Ev. pt. 3, c. 1; Fremont *v.* United States, 17 How. 542, 557; Brown *v.* Piper, 91 U. S. 37, 42; State *v.* Wagner, 61 Maine, 178. Upon the question of the existence of a public statute, or of the date when it took effect, they may consult the original roll or other official records. Spring *v.* Eve, 2 Mod. 240; 1 Hale's Hist. Com. Law (5th ed.), 19–21; Gardner *v.* Collector, 6 Wall. 419; South Ottawa *v.* Perkins, 94 U. S. 260, 267–269, 277; Post *v.* Supervisors, 105 U. S. 667. As to international affairs, such as the recognition of a foreign government, or of the diplomatic character of a person claiming to be its representative, they may inquire of the Foreign Office or the Department of State. Taylor *v.* Barclay, above quoted; The Charkieh, L. R. 4 Ad. & Ec. 59, 74, 86; *Ex parte* Hitz, 111 U. S. 766; *In re* Baiz, 135 U. S. 403.

In the case at bar, the indictment alleges that the Island of Navassa, on which the murder is charged to have been committed, was at the time under the sole and exclusive jurisdiction of the United States, and out of the jurisdiction of any particular State or district of the United States, and recognized and considered by the United States as containing a deposit of guano within the meaning and terms of the laws of the United States relating to such islands, and recognized and considered by the United States as appertaining to the United States and in the possession of the United States under those laws.

These allegations, indeed, if inconsistent with facts of which the court is bound to take judicial notice, could not be treated as conclusively supporting the verdict and judgment. But, on full consideration of the matter, we are of opinion that those facts are quite in accord with the allegations of the indictment.

The power, conferred on the President of the United States by section 1 of the act of Congress of 1856, to determine that a guano island shall be considered as appertaining to the United States, being a strictly executive power, affecting foreign relations, and the manner in which his determination shall be made known not having been prescribed by statute, there can be no doubt that it may be declared through the Department of State, whose acts in this regard are in legal contemplation the acts of the President. Wolsey *v.* Chapman, 101 U. S. 755, 770; Runkle *v.* United States, 122 U. S. 543, 557; 11 Opinions of Attorneys General, 397, 399.

[The action of the State Department is then set out as showing the assertion by the United States of exclusive jurisdiction over the island, and the conviction in the lower court is affirmed.]

## LUTHER *v.* BORDEN.

7 Howard, 1; 17 Curtis, 1. 1848.

TANEY, C. J., delivered the opinion of the court.

This case has arisen out of the unfortunate political differences which agitated the people of Rhode Island in 1841 and 1842.

It is an action of trespass brought by Martin Luther, the plaintiff in error, against Luther M. Borden and others, the defendants, in the Circuit Court of the United States for the District of Rhode Island, for breaking and entering the plaintiff's house. The defendants justify upon the ground that large numbers of men were assembled in different parts of the State for the purpose of overthrowing the government by military force, and were actually levying war upon the State; that, in order to defend itself from this insurrection, the State was declared by competent authority to be under martial law; that the plaintiff was engaged in the insurrection; and that the defendants, being in the military service of the State, by command of their superior officer, broke and entered the house and searched the rooms for the plaintiff, who was supposed to be there concealed, in order to arrest him, doing as little damage as possible. The plaintiff replied, that the trespass was committed by the defendants of their own proper wrong, and without any such cause; and upon the issue joined on this replication, the parties proceeded to trial.

The evidence, offered by the plaintiff and the defendants, is stated at large in the record; and the questions decided by the Circuit Court, and brought up by the writ of error, are not such as commonly arise in an action of trespass. The existence and authority of the government, under which the defendants acted, was called in question; and the plaintiff insists, that, before the acts complained of were committed, that government had been displaced and annulled by the people of Rhode Island, and that the plaintiff was engaged in supporting the lawful authority of the State, and the defendants themselves were in arms against it.

This is a new question in this court, and certainly a very grave one; and at the time when the trespass is alleged to have been committed, it had produced a general and painful excitement in the State, and threatened to end in bloodshed and civil war.

The evidence shows that the defendants, in breaking into the plaintiff's house and endeavoring to arrest him, as stated in the pleadings, acted under the authority of the government which was established in Rhode Island at the time of the Declaration of Independence, and which is usually called the charter government. For when the separation from England took place, Rhode Island did not, like the other States, adopt a new constitution, but continued the

form of government established by the charter of Charles II. in 1663; making only such alterations, by acts of the legislature, as were necessary to adapt it to their condition and rights as an independent State. It was under this form of government that Rhode Island united with the other States in the Declaration of Independence, and afterwards ratified the Constitution of the United States and became a member of this Union; and it continued to be the established and unquestioned government of the State until the difficulties took place which have given rise to this action.

In this form of government, no mode of proceeding was pointed out by which amendments might be made. It authorized the legislature to prescribe the qualification of voters, and in the exercise of this power the right of suffrage was confined to freeholders, until the adoption of the constitution of 1843.

For some years previous to the disturbances of which we are now speaking, many of the citizens became dissatisfied with the charter government, and particularly with the restriction upon the right of suffrage. Memorials were addressed to the legislature upon this subject, urging the justice and necessity of a more liberal and extended rule. But they failed to produce the desired effect. And thereupon meetings were held and associations formed by those who were in favor of a more extended right of suffrage, which finally resulted in the election of a convention to form a new constitution to be submitted to the people for their adoption or rejection. This convention was not authorized by any law of the existing government. It was elected at voluntary meetings, and by those citizens only who favored this plan of reform; those who were opposed to it, or opposed to the manner in which it was proposed to be accomplished, taking no part in the proceedings. The persons chosen as above mentioned, came together and framed a constitution, by which the right of suffrage was extended to every male citizen of twenty-one years of age, who had resided in the State for one year, and in the town in which he offered to vote, for six months, next preceding the election. The convention also prescribed the manner in which this constitution should be submitted to the decision of the people; permitting every one to vote on that question who was an American citizen, twenty-one years old, and who had a permanent residence or home in the State, and directing the votes to be returned to the convention.

Upon the return of the votes, the convention declared that the constitution was adopted and ratified by a majority of the people of the State, and was the paramount law and constitution of Rhode Island. And it communicated this decision to the governor under the charter government, for the purpose of being laid before the legislature; and directed elections to be held for a governor, members of the legislature, and other officers under the new constitution. These elections accordingly took place, and the governor, lieutenant-

governor, secretary of state, and senators and representatives thus appointed, assembled at the city of Providence on May 3, 1842, and immediately proceeded to organize the new government, by appointing the officers and passing the laws necessary for that purpose.

The charter government did not, however, admit the validity of these proceedings, nor acquiesce in them. On the contrary, in January, 1842, when this new constitution was communicated to the governor, and by him laid before the legislature, it passed resolutions declaring all acts done for the purpose of imposing that constitution upon the State to be an assumption of the powers of government, in violation of the rights of the existing government and of the people at large; and that it would maintain its authority and defend the legal and constitutional rights of the people.

In adopting this measure, as well as in all others taken by the charter government to assert its authority, it was supported by a large number of the citizens of the State, claiming to be a majority, who regarded the proceedings of the adverse party as unlawful and disorganizing, and maintained that, as the existing government had been established by the people of the State, no convention to frame a new constitution could be called without its sanction; and that the times and places of taking the votes, and the officers to receive them, and the qualification of the voters, must be previously regulated and appointed by law.

But notwithstanding the determination of the charter government, and of those who adhered to it, to maintain its authority, Thomas W. Dorr, who had been elected governor under the new constitution, prepared to assert the authority of that government by force, and many citizens assembled in arms to support him. The charter government thereupon passed an act declaring the State under martial law, and at the same time proceeded to call out the militia, to repel the threatened attack, and to subdue those who were engaged in it. In this state of the contest, the house of the plaintiff, who was engaged in supporting the authority of the new government, was broken and entered in order to arrest him. The defendants were, at the time, in the military service of the old government, and in arms to support its authority.

It appears, also, that the charter government, at its session of January, 1842, took measures to call a convention to revise the existing form of government; and after various proceedings, which it is not material to state, a new constitution was formed by a convention elected under the authority of the charter government, and afterwards adopted and ratified by the people; the times and places at which the votes were to be given, the persons who were to receive and return them, and the qualification of the voters, having all been previously authorized and provided for by law passed by the charter government. This new government went into operation in May, 1843, at which time the old government formally surrendered all its

powers; and this constitution has continued ever since to be the admitted and established government of Rhode Island.

The difficulties with the government, of which Mr. Dorr was the head, were soon over. They had ceased before the constitution was framed by the convention elected by the authority of the charter government. For after an unsuccessful attempt made by Mr. Dorr, in May, 1842, at the head of a military force, to get possession of the State arsenal at Providence, in which he was repulsed, and an assemblage of some hundreds of armed men under his command at Chepatchet in the June following, which dispersed upon the approach of the troops of the old government, no further effort was made to establish it; and until the constitution of 1843 went into operation, the charter government continued to assert its authority and exercise its powers, and to enforce obedience, throughout the State, arresting and imprisoning, and punishing, in its judicial tribunals, those who had appeared in arms against it.

We do not understand, from the argument, that the constitution, under which the plaintiff acted, is supposed to have been in force after the constitution of May, 1843, went into operation. The contest is confined to the year preceding. The plaintiff contends that the charter government was displaced, and ceased to have any lawful power, after the organization, in May, 1842, of the government which he supported; and although that government never was able to exercise any authority in the State, nor to command obedience to its laws or to its officers, yet he insists that it was the lawful and established government, upon the ground that it was ratified by a large majority of the male people of the State of the age of twenty-one and upwards, and also by a majority of those who were entitled to vote for general officers under the then existing laws of the State. The fact that it was so ratified was not admitted; and at the trial in the Circuit Court he offered to prove it by the production of the original ballots, and the original registers of the persons voting, verified by the oaths of the several moderators and clerks of the meetings, and by the testimony of all the persons so voting, and by the said constitution; and also offered in evidence, for the same purpose, that part of the census of the United States for the year 1840 which applies to Rhode Island; and a certificate of the secretary of state of the charter government, showing the number of votes polled by the freemen of the State for the ten years then last past.

The Circuit Court rejected this evidence, and instructed the jury that the charter government and laws under which the defendants acted were, at the time the trespass is alleged to have been committed, in full force and effect as the form of government and paramount law of the State, and constituted a justification of the acts of the defendants as set forth in their pleas.

It is this opinion of the Circuit Court that we are now called upon

to review. It is set forth more at large in the exception, but is in substance as above stated; and the question presented is certainly a very serious one. For, if this court is authorized to enter upon this inquiry as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned, if it had been annulled by the adoption of the opposing government, then the laws passed by its legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the jugments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals.

When the decision of this court might lead to such results, it becomes its duty to examine very carefully its own powers before it undertakes to exercise jurisdiction.

Certainly, the question which the plaintiff proposed to raise by the testimony he offered has not heretofore been recognized as a judicial one in any of the State courts. In forming the constitutions of the different States, after the Declaration of Independence, and in the various changes and alterations which have since been made, the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision. In Rhode Island, the question has been directly decided. Prosecutions were there instituted against some of the persons who had been active in the forcible opposition to the old government. And in more than one of the cases evidence was offered on the part of the defence similar to the testimony offered in the Circuit Court, and for the same purpose; that is, for the purpose of showing that the proposed constitution had been adopted by the people of Rhode Island, and had, therefore, become the established government, and consequently that the parties accused were doing nothing more than their duty in endeavoring to support it.

But the courts uniformly held that the inquiry proposed to be made belonged to the political power and not to the judicial; that it rested with the political power to decide whether the charter government had been displaced or not; and when that decision was made, the judicial department would be bound to take notice of it as the paramount law of the State, without the aid of oral evidence or the examination of witnesses; that, according to the laws and institutions of Rhode Island, no such change had been recognized by the political power; and that the charter government was the lawful and established government of the State during the period in contest, and that those who were in arms against it were insurgents, and liable to punishment. This doctrine is clearly and forcibly stated in the opinion of the Supreme Court of the State in the trial of Thomas

W. Dorr, who was the governor elected under the opposing constitution, and headed the armed force which endeavored to maintain its authority.

Indeed we do not see how the question could be tried and judicially decided in a State court. Judicial power presupposes an established government capable of enacting laws and enforcing their execution, and of appointing judges to expound and adminster them. The acceptance of the judicial office is a recognition of the authority of the government from which it is derived. And if the authority of that government is annulled and overthrown, the power of its courts and other officers is annulled with it. And if a State court should enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial decision upon the question it undertook to try. If it decides at all as a court, it necessarily affirms the existence and authority of the government under which it is exercising judicial power.

It is worthy of remark, however, when we are referring to the authority of State decisions, that the trial of Thomas W. Dorr took place after the constitution of 1843 went into operation. The judges who decided that case held their authority under that constitution; and it is admitted on all hands that it was adopted by the people of the State, and is the lawful and established government. It is the decision, therefore, of a State court, whose judicial authority to decide upon the constitution and laws of Rhode Island is not questioned by either party to this controversy, although the government under which it acted was framed and adopted under the sanction and laws of the charter government.

The point, then, raised here has been already decided by the courts of Rhode Island. The question relates, altogether, to the constitution and laws of that State; and the well-settled rule in this court is, that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of the State.

Upon what ground could the Circuit Court of the United States, which tried this case, have departed from this rule, and disregarded and overruled the decisions of the courts of Rhode Island? Undoubtedly the courts of the United States have certain powers under the Constitution and laws of the United States which do not belong to the State courts. But the power of determining that a State government has been lawfully established, which the courts of the State disown and repudiate, is not one of them. Upon such a question the courts of the United States are bound to follow the decisions of the State tribunals, and must therefore regard the charter government as the lawful and established government during the time of this contest.

Besides, if the Circuit Court had entered upon this inquiry, by what rule could it have determined the qualification of voters upon the adoption or rejection of the proposed constitution, unless there was some previous law of the State to guide it? It is the province of a court to expound the law, not to make it. And certainly it is no part of the judicial functions of any court of the United States to prescribe the qualification of voters in a State, giving the right to those to whom it is denied by the written and established constitution and laws of the State, or taking it away from those to whom it is given; nor has it the right to determine what political privileges the citizens of a State are entitled to, unless there is an established constitution or law to govern its decision.

And if the then existing law of Rhode Island, which confined the right of suffrage to freeholders, is to govern, and this question is to be tried by that rule, how could the majority have been ascertained by legal evidence, such as a court of justice might lawfully receive? The written returns of the moderators and clerks of mere voluntary meetings, verified by affidavit, certainly would not be admissible; nor their opinions or judgments as to the freehold qualification of the persons who voted. The law requires actual knowledge in the witness of the fact to which he testifies in a court of justice. How, then, could the majority of freeholders have been determined in a judicial proceeding.

The court had not the power to order a census of the freeholders to be taken; nor would the census of the United States of 1840 be any evidence of the number of freeholders in the State in 1842. Nor could the court appoint persons to examine and determine whether every person who had voted possessed the freehold qualification which the law then required. In the nature of things, the Circuit Court could not know the name and residence of every citizen and bring him before the court to be examined. And if this were attempted, where would such an inquiry have terminated? And how long must the people of Rhode Island have waited to learn from this court under what form of government they were living during the year in controversy?

But this is not all. The question as to the majority is a question of fact. It depends upon the testimony of witnesses, and if the testimony offered by the plaintiff had been received, the defendants had the right to offer evidence to rebut it; and there might, and probably would, have been conflicting testimony as to the number of voters in the State, and as to the legal qualifications of many of the individuals who had voted. The decision would, therefore, have depended upon the relative credibility of witnesses, and the weight of testimony; and as the case before the Circuit Court was an action at common law, the question of fact, according to the Seventh Amendment to the Constitution of the United States, must have been tried by the jury. In one case a jury might find that the constitution

which the plaintiff supported was adopted by a majority of the citizens of the State, or of the voters entitled to vote by the existing law. Another jury in another case might find otherwise. And as a verdict is not evidence in a suit between different parties, if the courts of the United States have the jurisdiction contended for by the plaintiff, the question whether the acts done under the charter government during the period in contest are valid or not, must always remain unsettled and open to dispute. The authority and security of the State governments do not rest on such unstable foundations.

Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.

The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.

Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide was placed there, and not in the courts.

So, too, as relates to the clause in the above-mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfil this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the Federal government to interfere. But Congress thought otherwise, and no doubt wisely; and by the act of February 28, 1795, provided, that, "in case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States, on

application of the legislature of such State or of the executive, when the legislature cannot be convened, to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection."

By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. He is to act upon the application of the legislature, or of the executive, and consequently he must determine what body of men constitute the legislature, and who is the governor, before he can act. The fact that both parties claim the right to the government cannot alter the case, for both cannot be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress.

After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it, and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States, or the government which the President was endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order. Yet if this right does not reside in the courts, when the conflict is raging — if the judicial power is, at that time, bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offences and crimes the acts which it before recognized, and was bound to recognize, as lawful.

It is true that in this case the militia were not called out by the President. But upon the application of the governor under the charter government, the President recognized him as the executive power of the State, and took measures to call out the militia to support his authority, if it should be found necessary for the general government to interfere; and it is admitted in the argument that it was the knowledge of this decision that put an end to the armed opposition to the charter government, and prevented any further efforts to establish by force the proposed constitution. The interference of the President, therefore, by announcing his determination, was as effectual as if the militia had been assembled under his orders. And it should be equally authoritative. For certainly no

court of the United States, with a knowledge of this decision, would have been justified in recognizing the opposing party as the lawful government, or in treating as wrongdoers or insurgents the officers of the government which the President had recognized, and was prepared to support by an armed force. In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice. And this principle has been applied by the act of Congress to the sovereign States of the Union.

It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual. When citizens of the same State are in arms against each other, and the constituted authorities unable to execute the laws, the interposition of the United States must be prompt, or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis. And the elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a wilful abuse of power as human prudence and foresight could well provide. At all events, it is conferred upon him by the Constitution and laws of the United States, and must, therefore, be respected and enforced in its judicial tribunals.

A question very similar to this arose in the case of Martin *v.* Mott, 12 Wheat. 29–31. The first clause of the first section of the act of February 28, 1795, of which we have been speaking, authorizes the President to call out the militia to repel invasion. It is the second clause in the same section which authorizes the call to suppress an insurrection against a State government. The power given to the President in each case is the same, with this difference only, that it cannot be exercised by him in the latter case, except upon the application of the legislature or executive of the State. The case above mentioned arose out of a call made by the President, by virtue of the power conferred by the first clause; and the court said that "whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts." The grounds upon which that opinion is maintained are set forth in the report, and, we think, are conclusive. The same principle applies to the case now before the court. Undoubtedly, if the President, in exercising this power, shall fall into error, or invade the rights of the people of the State, it would be in the power of Congress to apply the proper remedy. But the courts must administer the law as they find it.

The remaining question is, whether the defendants, acting under

military orders issued under the authority of the government, were justified in breaking and entering the plaintiff's house. In relation to the act of the legislature declaring martial law, it is not necessary in the case before us to inquire to what extent, nor under what circumstances, that power may be exercised by a State. Unquestionably, a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it. But the law of Rhode Island evidently contemplated no such government. It was intended merely for the crisis, and to meet the peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the State authorities. And, unquestionably, a State may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union, as to any other government. The State itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war, and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition. And in that state of things the officers engaged in its military service might lawfully arrest any one, who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection; and might order a house to be forcibly entered and searched, when there were reasonable grounds for supposing he might be there concealed. Without the power to do this, martial law and the military array of the government would be mere parade, and rather encourage attack than repel it. No more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for the purposes of oppression, or any injury wilfully done to person or property, the party by whom, or by whose order, it is committed, would undoubtedly be answerable.

We forbear to remark upon the cases referred to in the argument, in relation to the commissions anciently issued by the kings of England to commissioners, to proceed against certain descriptions of persons in certain places by the law martial. These commissions were issued by the king at his pleasure, without the concurrence or authority of Parliament, and were often abused for the most despotic and oppressive purposes. They were used before the regal power of England was well defined, and were finally abolished and prohibited by the petition of right in the reign of Charles I. But they bear no analogy in any respect to the declaration of martial law by the legislative authority of the State, made for the purposes of self-defence,

when assailed by an armed force; and the cases and commentaries concerning these commissions cannot, therefore, influence the construction of the Rhode Island law, nor furnish any test of the lawfulness of the authority exercised by the government.

Upon the whole, we see no reason for disturbing the judgment of the Circuit Court. The admission of evidence to prove that the charter government was the established government of the State, was an irregularity, but is not material to the judgment. A Circuit Court of the United States, sitting in Rhode Island, is presumed to know the constitution and law of the State. And in order to make up its opinion upon that subject, it seeks information from any authentic and available source, without waiting for the formal introduction of testimony to prove it, and without confining itself to the proofs which the parties may offer. But this error of the Circuit Court does not affect the result. For whether this evidence was or was not received, the Circuit Court, for the reasons hereinbefore stated, was bound to recognize that government as the paramount and established authority of the State.

Much of the argument on the part of the plaintiff turned upon political rights and political questions, upon which the court has been urged to express an opinion. We decline doing so. The high power has been conferred on this court, of passing judgment upon the acts of the State sovereignties, and of the legislative and executive branches of the Federal government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums. No one, we believe, has ever doubted the proposition that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or not, by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it.

The judgment of the Circuit Court must, therefore, be affirmed.[1]

[1] Mr. Justice Woodbury delivered a dissenting opinion.

In the case of Georgia *v.* Stanton, 6 Wall. 50 (1867), in which it was sought to restrain defendant as Secretary of War from enforcing the Reconstruction Acts which it was charged would result in the destruction and overthrow of the existing government of the State, Mr. Justice Nelson, rendering the opinion of the court, uses this language: —

"That these matters, both as stated in the body of the hill and in the prayers for relief, call for the judgment of the court upon political questions, and upon rights,

## SECTION IV. — APPOINTMENT AND REMOVAL OF OFFICERS.

### UNITED STATES v. GERMAINE.

99 United States, 508. 1878.

MR. JUSTICE MILLER delivered the opinion of the court.

The defendant was appointed by the Commissioner of Pensions to act as surgeon, under the act of March 3, 1873, the third section of which is thus stated in the Revised Statutes as sect. 4777: —

"That the Commissioner of Pensions be, and he is hereby, empowered to appoint, at his discretion, civil surgeons to make the periodical examination of pensioners which are or may be required by law, and to examine applicants for pension, where he shall deem an examination by a surgeon appointed by him necessary; and the fee for such examinations, and the requisite certificates thereof in duplicate, including postage on such as are transmitted to pension agents, shall be two dollars, *which shall be paid by the agent for paying pensions* in the district within which the pensioner or claimant resides, out of any money appropriated for the payment of pensions, under such regulations as the Commissioner of Pensions may prescribe."

He was indicted in the district of Maine for extortion in taking fees from pensioners to which he was not entitled. The law under which he was indicted is thus set forth in sect. 12 of the act of 1825 (4 Stat. 118): —

not of persons or property, but of a political character, will hardly be denied. For the rights for the protection of which our authority is invoked are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court.

"It is true the bill, in setting forth the political rights of the State, and of its people to be protected, among other matters, avers, that Georgia owns certain real estate and buildings therein, State capitol, and executive mansion, and other real and personal property; and that putting the acts of Congress into execution, and destroying the State, would deprive it of the possession and enjoyment of its property. But it is apparent that this reference to property, and statement concerning it, are only by way of showing one of the grievances resulting from the threatened destruction of the State, and in aggravation of it, not as a specific ground of relief. This matter of property is neither stated as an independent ground, nor is it noticed at all in the prayers for relief. Indeed the case, as made in the bill, would have stopped far short of the relief sought by the State, and its main purpose and design given up, by restraining its remedial effect simply to the protection of the title and possession of its property. Such relief would have called for a very different bill from the one before us."

The determination of a State boundary is not, however, a political question in this sense, and may be made by the courts. See U. S. *v.* Texas, 142 U. S. 621, *infra*, p. 676.

"Every officer of the United States who is guilty of extortion under color of his office shall be punished by a fine of not more than $500, or by imprisonment not more than one year, according to the aggravation of his offence."

The indictment being remitted into the Circuit Court, the judges of that court have certified a division of opinion upon the questions whether such appointment made defendant an officer of the United States within the meaning of the above act, and whether upon demurrer to the indictment judgment should be rendered for the United States or for defendant.

The counsel for defendant insists that art. 2, sect. 2, of the Constitution, prescribing how officers of the United States shall be appointed, is decisive of the case before us. It declares that "the President shall nominate, and by and with the advice and consent of the Senate shall appoint, ambassadors, other public ministers and consuls, judges of the Supreme Court, and *all* other *officers* of the United States, whose appointments are not *herein* otherwise provided for and which shall be established by law. But the Congress may, by law, vest the appointment of such inferior officers as they may think proper, in the President alone, in the courts of law, or in the heads of departments."

The argument is that provision is here made for the appointment of *all* officers of the United States, and that defendant, not being appointed in either of the modes here mentioned, is not an *officer*, though he may be an agent or employee working for the government and paid by it, as nine-tenths of the persons rendering service to the government undoubtedly are, without thereby becoming its officers.

The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to offices inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt. This Constitution is the supreme law of the land, and no act of Congress is of any validity which does not rest on authority conferred by that instrument. It is, therefore, not to be supposed that Congress, when enacting a criminal law for the punishment of officers of the United States, intended to punish any one not appointed in one of those modes. If the punishment were designed for others than officers as defined by the Constitution, words to that effect would be used, as servant, agent, person in the service or employment of the government; and this has been done where it was so intended, as in

the sixteenth section of the act of 1846, concerning embezzlement, by which any officer *or agent* of the United States *and all persons participating in the act,* are made liable. 9 Stat. 59.

As the defendant here was not appointed by the President or by a court of law, it remains to inquire if the Commissioner of Pensions, by whom he was appointed, is the head of a department, within the meaning of the Constitution, as is argued by the counsel for plaintiffs.

That instrument was intended to inaugurate a new system of government, and the departments to which it referred were not then in existence. The clause we have cited is to be found in the article relating to the executive, and the word as there used has reference to the subdivision of the power of the executive into departments, for the more convenient exercise of that power. One of the definitions of the word given by Worcester is, "a part or division of the executive government, as the Department of State, or of the Treasury." Congress recognized this in the act creating these subdivisions of the executive branch by giving to each of them the name of a department. Here we have the Secretary of State, who is by law the head of the Department of State, the Departments of War, Interior, Treasury, &c. And by one of the latest of these statutes reorganizing the Attorney-General's office and placing it on the basis of the others, it is called the Department of Justice. The association of the words "heads of departments" with the President and the courts of law strongly implies that something different is meant from the inferior commissioners and bureau officers, who are themselves the mere aids and subordinates of the heads of the departments. Such, also, has been the practice, for it is very well understood that the appointments of the thousands of clerks in the Departments of the Treasury, Interior, and the others, are made by the heads of those departments, and not by the heads of the bureaus in those departments.

So in this same section of the Constitution it is said that the President may require the opinion in writing of the principal officer in each of the executive departments relating to the duties of their respective offices.

The word "department," in both these instances, clearly means the same thing, and the principal officer in the one case is the equivalent of the head of department in the other.

While it has been the custom of the President to require these opinions from the Secretaries of State, the Treasury, of War, Navy, &c., and his consultation with them as members of his cabinet has been habitual, we are not aware of any instance in which such written opinion has been officially required of the head of any of the bureaus, or of any commissioner or auditor in these departments.

The case of U. S. *v.* Hartwell (6 Wall. 385) is not, as supposed, in conflict with these views. It is clearly stated and relied on in the opinion that Hartwell's appointment was approved by the Assistant

Secretary of the Treasury as acting head of that department, and he was, therefore, an officer of the United States.

If we look to the nature of defendant's employment, we think it equally clear that he is not an officer. In that case the court said, the term embraces the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional or temporary. In the case before us, the duties are *not* continuing and permanent, and they *are* occasional and intermittent. The surgeon is only to act when called on by the Commissioner of Pensions in some special case, as when some pensioner or claimant of a pension presents himself for examination. He may make fifty of these examinations in a year, or none. He is required to keep no place of business for the public use. He gives no bond and takes no oath, unless by some order of the Commissioner of Pensions of which we are not advised.

No regular appropriation is made to pay his compensation, which is two dollars for every certificate of examination, but it is paid out of money appropriated for paying pensions in his district, under regulations to be prescribed by the commissioner. He is but an agent of the commissioner, appointed by him, and removable by him at his pleasure, to procure information needed to aid in the performance of his own official duties. He may appoint one or a dozen persons to do the same thing. The compensation may amount to five dollars or five hundred dollars per annum. There is no penalty for his absence from duty or refusal to perform, except his loss of the fee in the given case. If Congress had passed a law requiring the commissioner to appoint a man to furnish each agency with fuel at a price per ton fixed by law high enough to secure the delivery of the coal, he would have as much claim to be an officer of the United States as the surgeons appointed under this statute.

We answer that the defendant is not an officer of the United States, and that judgment on the demurrer must be entered in his favor. Let it be so certified to the Circuit Court.

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## BLAKE *v.* UNITED STATES.

103 United States, 227. 1880.

[This suit was instituted in the Court of Claims by Blake to recover salary claimed to be due him as post chaplain. A communication by him to the Secretary of War had been treated and accepted as a resignation, and one Gilmore had been appointed to the position by the President and confirmed by the Senate, and had

thereafter performed the duties of the office and received the salary therefor. It was afterwards found by the President that Blake was insane at the time he wrote his resignation, and on his recovery he was reappointed to a similar position, but his claim for salary in the mean time was left for adjudication in the Court of Claims, where it was dismissed, and Blake appeals.]

MR. JUSTICE HARLAN delivered the opinion of the court.

The claim is placed upon the ground that before, at the date of, and subsequent to, the letter addressed to the Secretary of War, which was treated as his resignation, he was insane in a sense that rendered him irresponsible for his acts, and consequently that his supposed resignation was inoperative and did not have the effect to vacate his office. Did the appointment of Gilmore, by and with the advice and consent of the Senate, to the post-chaplaincy held by Blake, operate, *proprio vigore*, to discharge the latter from the service, and invest the former with the rights and privileges belonging to that office? If this question be answered in the affirmative, it will not be necessary to inquire whether Blake was, at the date of the letter of Dec. 24, 1868, in such condition of mind as to enable him to perform, in a legal sense, the act of resigning his office; or, whether the acceptance of his resignation, followed by the appointment of his successor, by the President, by and with the advice and consent of the Senate, is not, in view of the relations of the several departments of the government to each other, conclusive, in this collateral proceeding, as to the fact of a valid effectual resignation.

From the organization of the government under the present Constitution, to the commencement of the recent war for the suppression of the rebellion, the power of the President, in the absence of statutory regulations, to dismiss from the service an officer of the army or navy, was not questioned in any adjudged case, or by any department of the government.

Upon the general question of the right to remove from office, as incident to the power to appoint, *Ex parte* Hennen (13 Pet. 259) is instructive. That case involved the authority of a district judge of the United States to remove a clerk and appoint some one in his place.

The court, among other things, said: "All offices, the tenure of which is not fixed by the Constitution or limited by law, must be held either during good behavior, or (which is the same thing in contemplation of law) during the life of the incumbent, or must be held at the will and discretion of some department of the government, and subject to removal at pleasure.

"It cannot for a moment be admitted that it was the intention of the Constitution that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation, it would seem to be a sound

and necessary rule to consider the power of removal as incident to the power of appointment. This power of removal from office was a subject much disputed, and upon which a great diversity of opinion was entertained in the early history of this government. This related, however, to the power of the President to remove officers appointed with the concurrence of the Senate; and the great question was whether the removal was to be by the President alone, or with the concurrence of the Senate, both constituting the appointing power. No one denied the power of the President and Senate jointly to remove, where the tenure of the office was not fixed by the Constitution; which was a full recognition of the principle that the power of removal was incident to the power of appointment. But it was very early adopted, as the practical construction of the Constitution, that this power was vested in the President alone. And such would appear to have been the legislative construction of the Constitution." 1 Kent, Com. 309; 2 Story, Const. (4th ed.), sects. 1537–1540, and notes; 2 Marshall, Life of Washington, 162; Sergeant, Const. Law, 372; Rawle, Const., c. 14.

During the administration of President Tyler, the question was propounded by the Secretary of the Navy to Attorney-General Legare, whether the President could strike an officer from the rolls, without a trial by a court-martial, after a decision in that officer's favor by a court of inquiry ordered for the investigation of his conduct. His response was: "Whatever I might have thought of the power of removal from office, if the subject were *res integra*, it is now too late to dispute the settled construction of 1789. It is according to that construction, from the very nature of executive power, absolute in the President, subject only to his responsibility to the country (his constituents) for a breach of such a vast and solemn trust. 3 Story, Com. Const. 397, sect. 1538. It is obvious that if necessity is a sufficient ground for such a concession in regard to officers in the civil service, the argument applies *a multo fortiori* to the military and naval departments. . . . I have no doubt, therefore, that the President had the constitutional power to do what he did, and that the officer in question is not in the service of the United States." The same views were expressed by subsequent attorneys-general. 4 Opin. 1; 6 id. 4; 8 id. 233; 12 id. 424; 15 id. 421.

In Du Barry's Case (4 id. 612) Attorney-General Clifford said that the attempt to limit the exercise of the power of removal to the executive officers in the civil service found no support in the language of the Constitution nor in any judicial decision; and that there was no foundation in the Constitution for any distinction in this regard between civil and military officers.

In Lansing's Case (6 id. 4) the question arose as to the power of the President, in his discretion, to remove a military storekeeper. Attorney-General Cushing said: "Conceding, however, that military storekeepers are officers, or, at least, quasi officers, of the army, it

does not follow that they are not subject to be deprived of their commission at the will of the President.

"I am not aware of any ground of distinction in this respect, so far as regards the strict question of law, between officers of the army and any other officers of the government. As a general rule, with the exception of judicial officers only, they all hold their commissions by the same tenure in this respect. Reasons of a special nature may be deemed to exist why the rule should not be applied to military in the same way as it is to civil officers, but the legal applicability to both classes of officers is, it is conceived, the settled construction of the Constitution. It is no answer to this doctrine to say that officers of the army are subject to be deprived of their commissions by the decision of a court-martial. So are civil officers by impeachment. The difference between the two cases is in the form and mode of trial, not in the principle, which leaves unimpaired in both cases alike the whole constitutional power of the President.

"It seems unnecessary in this case to recapitulate in detail the elements of constitutional construction and historical induction by which this doctrine has been established as the public law of the United States. I observe only that, so far as regards the question of abstract power, I know of nothing essential in the grounds of legal conclusion, which have been so thoroughly explored at different times in respect of civil officers, which does not apply to officers of the army."

The same officer, subsequently, when required to consider this question, said that "the power has been exercised in many cases with approbation, express or implied, of the Senate, and without challenge by any legislative act of Congress. And it is expressly reserved in every commission of the officers, both of the navy and army." 8 Opin. 231.

Such was the established practice in the Executive Department, and such the recognized power of the President up to the passage of the act of July 17, 1862, c. 200 (12 Stat. 596), entitled "An Act to define the pay and emoluments of certain officers of the army, and for other purposes," the seventeenth section of which provides that "the President of the United States be, and hereby is, authorized and requested to dismiss and discharge from the military service, either in the army, navy, marine corps, or volunteer force, any officer for any cause which, in his judgment, either renders such officer unsuitable for, or whose dismission would promote, the public service."

In reference to that act Attorney-General Devens (15 Opin. 421) said, with much reason, that so far as it "gives authority to the President, it is simply declaratory of the long-established law. It is probable that the force of the act is to be found in the word 'requested,' by which it was intended to re-enforce strongly this power in the hands of the President at a great crisis of the State."

The act of March 3, 1865, c. 79 (13 Stat. 489), provides that, in

case any officer of the military or naval service, thereafter dismissed by the authority of the President, shall make application in writing for a trial, setting forth, under oath, that he has been wrongfully and unjustly dismissed, "the President shall, as soon as the necessities of the service may permit, convene a court-martial to try such officer on the charges on which he was dismissed. And if such court-martial shall not award dismissal or death as the punishment of such officer, the order of dismissal shall be void. And if the court-martial aforesaid shall not be convened for the trial of such officer within six months from the presentation of his application for trial, the sentence of dismissal shall be void."

Thus, so far as legislative enactments are concerned, stood the law in reference to dismissals, of army or naval officers, by the President, until the passage of the army appropriation act of July 17, 1866, c. 176 (14 Stat. 92), the fifth section of which is as follows: —

"That section seventeen of an act, entitled 'An Act to define the pay and emoluments of certain officers of the army,' approved July seventeenth, eighteen hundred and sixty-two, and a resolution, entitled 'A Resolution to authorize the President to assign the command of troops in the same field, or department, to officers of the same grade, without regard to seniority,' approved April fourth, eighteen hundred and sixty-two, be, and the same are hereby repealed. And no officer in the military or naval service shall, in time of peace, be dismissed from the service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof."

Two constructions may be placed upon the last clause of that section without doing violence to the words used. Giving them a literal interpretation, it may be construed to mean, that although the tenure of army and naval officers is not fixed by the Constitution, they shall not, in time of peace, be dismissed from the service, under any circumstances, or for any cause, or by any authority whatever, except in pursuance of the sentence of a court-martial to that effect, or in commutation thereof. Or, in view of the connection in which the clause appears, — following, as it does, one in the same section repealing provisions touching the dismissal of officers by the President, alone, and to assignments, by him, of the command of troops, without regard to seniority of officers, — it may be held to mean, that, whereas, under the act of July 17, 1862, as well as before its passage, the President, alone, was authorized to dismiss an army or naval officer from the service for any cause which, in his judgment, either rendered such officer unsuitable for, or whose dismissal would promote, the public service, he alone shall not, thereafter, in time of peace, exercise such power of dismissal, except in pursuance of a court-martial sentence to that effect, or in commutation thereof. Although this question is not free from difficulty, we are of opinion that the latter is the true construction of the act. That section

originated in the Senate as an amendment of the army appropriation bill which had previously passed the House of Representatives. Cong. Globe, 39th Congress, pp. 3254, 3405, 3575, and 3589. It is supposed to have been suggested by the serious differences existing, or which were apprehended, between the legislative and executive branches of the government in reference to the enforcement, in the States lately in rebellion, of the reconstruction acts of Congress. Most, if not all, of the senior officers of the army enjoyed, as we may know from the public history of that period, the confidence of the political organization then controlling the legislative branch of the government. It was believed that, within the limits of the authority conferred by statute, they would carry out the policy of Congress, as indicated in the reconstruction acts, and suppress all attempts to treat them as unconstitutional and void, or to overthrow them by force. Hence, by way of preparation for the conflict then apprehended between the executive and legislative departments as to the enforcement of those acts, Congress, by the fifth section of the act of July 13, 1866, repealed not only the seventeenth section of the act of July 17, 1862, but also the resolution of April 4, 1862, which authorized the President, whenever military operations required the presence of two or more officers of the same grade, in the same field or department, to assign the command without regard to seniority of rank. In furtherance, as we suppose, of the objects of that legislation, was the second section of the army appropriation act of March 2, 1867, c. 170 (14 Stat. 486), establishing the headquarters of the general of the army at Washington, requiring all orders and instructions relating to military operations issued by the President or Secretary of War to be issued through that officer, and, in case of his inability, through the next in rank, and declaring that the general of the army "shall not be removed, suspended, or relieved from command, or assigned to duty elsewhere than at said headquarters, except at his own request, without the previous approval of the Senate, and any orders or instructions relating to military operations issued contrary to the requirements of this section shall be null and void; and any officer who shall issue orders or instructions contrary to the provision of this section shall be deemed guilty of a misdemeanor in office," &c.

Our conclusion is that there was no purpose, by the fifth section of the act of July 13, 1866, to withdraw from the President the power, with the advice and consent of the Senate, to supersede an officer in the military or naval service by the appointment of some one in his place. If the power of the President and Senate, in this regard, could be constitutionally subjected to restrictions by statute (as to which we express no opinion), it is sufficient for the present case to say that Congress did not intend by that section to impose them. It is, in substance and effect, nothing more than a declaration, that the power theretofore exercised by the President, without the concur-

rence of the Senate, of summarily dismissing or discharging officers of the army or the navy, whenever in his judgment the interest of the service required it to be done, shall not exist, or be exercised, *in time of peace*, except in pursuance of the sentence of a court-martial, or in commutation thereof. There was, as we think, no intention to deny or restrict the power of the President, by and with the advice and consent of the Senate, to displace them by the appointment of others in their places.

It results that the appointment of Gilmore, with the advice and consent of the Senate, to the office held by Blake, operated in law to supersede the latter, who thereby, in virtue of the new appointment, ceased to be an officer in the army from and after, at least, the date at which that appointment took effect, — and this, without reference to Blake's mental capacity to understand what was a resignation. He was, consequently, not entitled to pay as post-chaplain after July 2, 1870, from which date his successor took rank. Having ceased to be an officer in the army, he could not again become a post-chaplain, except upon a new appointment, by and with the advice and consent of the Senate. Mimmack *v.* United States, 97 U. S. 426, 437.

As to that portion of the claim covering the period between April 28, 1869, and July 2, 1870, it is only necessary to say, that, even were it conceded that the appellant did not cease to be an officer in the army by reason of the acceptance of his resignation, tendered when he was mentally incapable of understanding the nature and effect of such an act, he cannot recover in this action. His claim for salary during the above period accrued more than six years, and the disability of insanity ceased more than three years before the commencement of this action. The government pleads the Statute of Limitations, and it must be sustained. Congress alone can give him the relief which he seeks. *Judgment affirmed.*

# CHAPTER VI.

## THE JUDICIAL DEPARTMENT.

## SECTION I. — CONSTITUTIONAL GRANT OF JURISDICTION.

### a. *Cases arising under Constitution, Laws, or Treaties of the United States.*

### OSBORN AND OTHERS, APPELLANTS, *v.* THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF THE UNITED STATES, RESPONDENTS.

9 Wheaton, 738; 6 Curtis, 251. 1824.

[THIS suit was brought in the Circuit Court of the United States for Ohio by the bank to restrain Osborn and others, officers of the State, from collecting a State tax on the bank. A decree was rendered against the State officers, who appealed. In the Supreme Court a re-argument was requested upon the point of the constitutionality and effect of the provision in the charter of the bank, which was incorporated under act of Congress, authorizing it to sue in the Circuit Courts of the United States.]

MARSHALL, C. J., delivered the opinion of the court.

. . . . . .

2. We will now consider the constitutionality of the clause in the act of incorporation, which authorizes the bank to sue in the Federal courts.

In support of this clause, it is said that the legislative, executive, and judicial powers of every well constructed government are coextensive with each other; that is, they are potentially coextensive. The Executive Department may constitutionally execute every law which the legislature may constitutionally make, and the Judicial Department may receive from the legislature the power of construing every such law. All governments which are not extremely defective in their organization must possess within themselves the means of expounding as well as enforcing their own laws. If we examine the Constitution of the United States, we find that its framers kept this

great political principle in view. The 2d article vests the whole executive power in the President; and the 3d article declares, "that the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

This clause enables the Judicial Department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States.

The suit of The Bank of the United States *v.* Osborn and others is a case, and the question is, whether it arises under a law of the United States.

The appellants contend that it does not, because several questions may arise in it which depend on the general principles of the law, not on any act of Congress.

If this were sufficient to withdraw a case from the jurisdiction of the Federal courts, almost every case, although involving the construction of a law, would be withdrawn; and a clause in the Constitution relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing. There is scarcely any case every part of which depends on the Constitution, laws, or treaties of the United States. The questions whether the fact alleged as the foundation of the action be real or fictitious; whether the conduct of the plaintiff has been such as to entitle him to maintain his action; whether his right is barred; whether he has received satisfaction, or has in any manner released his claims, are questions, some or all of which may occur in almost every case; and if their existence be sufficient to arrest the jurisdiction of the court, words which seem intended to be as extensive as the Constitution, laws, and treaties of the Union, which seem designed to give the courts of the government the construction of all its acts, so far as they affect the rights of individuals, would be reduced to almost nothing.

In those cases in which original jurisdiction is given to the Supreme Court, the judicial power of the United States cannot be exercised in its appellate form. In every other case the power is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct. With the exception of these cases in which original jurisdiction is given to this court, there is none to which the judicial power extends, from which the original jurisdiction of the inferior courts is excluded by the Constitution. Original jurisdiction, so far as the Constitution gives a rule, is coextensive with the

judicial power. We find in the Constitution no prohibition to its exercise, in every case in which the judicial power can be exercised. It would be a very bold construction to say that this power could be applied in its appellate form only, to the most important class of cases to which it is applicable.

The Constitution establishes the Supreme Court, and defines its jurisdiction. It enumerates cases in which its jurisdiction is original and exclusive; and then defines that which is appellate; but does not insinuate that, in any such case, the power cannot be exercised in its original form by courts of original jurisdiction. It is not insinuated that the judicial power, in cases depending on the character of the cause, cannot be exercised in the first instance in the courts of the Union, but must first be exercised in the tribunals of the State; tribunals over which the government of the Union has no adequate control, and which may be closed to any claim asserted under a law of the United States.

We perceive, then, no ground on which the proposition can be maintained, that Congress is incapable of giving the Circuit Courts original jurisdiction, in any case to which the appellate jurisdiction extends.

We ask, then, if it can be sufficient to exclude this jurisdiction, that the case involves questions depending on general principles? A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the Constitution, but to those parts of cases only which present the particular question involving the construction of the Constitution or the law. We say, it never can be extended to the whole case, because, if the circumstance that other points are involved in it shall disable Congress from authorizing the courts of the Union to take jurisdiction of the original cause, it equally disables Congress from authorizing those courts to take jurisdiction of the whole cause, on an appeal, and thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim rights under the Constitution, laws, or treaties of the United States, a trial in the Federal courts, will be restricted to the insecure remedy of an appeal upon an in-

sulated point, after it has received that shape which may be given to it by another tribunal, into which he is forced against his will.

We think, then, that when a question to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

The case of the bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law?

Take the case of a contract, which is put as the strongest against the bank.

When a bank sues, the first question which presents itself, and which lies at the foundation of the cause, is, has this legal entity a right to sue? Has it a right to come, not into this court particularly, but into any court? This depends on a law of the United States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case. The right to sue, if decided once, is decided forever; but the power of Congress was exercised antecedently to the first decision on that right, and if it was constitutional then, it cannot cease to be so, because the particular question is decided. It may be revived at the will of the party, and most probably would be renewed, were the tribunal to be changed. But the question respecting the right to make a particular contract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case. The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defence, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue cannot depend on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not.

The appellants say, that the case arises on the contract; but the validity of the contract depends on a law of the United States, and the plaintiff is compelled, in every case, to show its validity. The case arises emphatically under the law. The act of Congress is its foundation. The contract could never have been made, but under the authority of that act. The act itself is the first ingredient in the case, is its origin, is that from which every other part arises. That other questions may also arise, as the execution of the contract, or its performance, cannot change the case, or give it any other origin than the charter of incorporation. The action still originates in, and is sustained by, that charter.

The clause giving the bank a right to sue in the Circuit Courts of the United States stands on the same principle with the acts authorizing officers of the United States who sue in their own names, to sue in the courts of the United States. The Postmaster-General, for example, cannot sue under that part of the Constitution which gives jurisdiction to the Federal courts, in consequence of the character of the party, nor is he authorized to sue by the Judiciary Act. 1 Stats. at Large, 73. He comes into the courts of the Union under the authority of an act of Congress, the constitutionality of which can only be sustained by the admission that his suit is a case arising under a law of the United States. If it be said that it is such a case, because a law of the United States authorizes the contract, and authorizes the suit, the same reasons exist with respect to a suit brought by the bank. That, too, is such a case; because that suit, too, is itself authorized, and is brought on a contract authorized by a law of the United States. It depends absolutely on that law, and cannot exist a moment without its authority.

If it be said that a suit brought by the bank may depend in fact altogether on questions unconnected with any law of the United States, it is equally true, with respect to suits brought by the Postmaster-General. The plea in bar may be payment, if the suit be brought on a bond, or *non assumpsit*, if it be brought on an open account, and no other question may arise than what respects the complete discharge of the demand. Yet the constitutionality of the act authorizing the Postmaster-General to sue in the courts of the United States has never been drawn into question. It is sustained singly by an act of Congress, standing on that construction of the Constitution which asserts the right of the legislature to give original jurisdiction to the Circuit Courts, in cases arising under a law of the United States.

The clause (1 Stats. at Large, 322), in the patent law, authorizing suits in the Circuit Courts, stands, we think, on the same principle. Such a suit is a case arising under a law of the United States. Yet the defendant may not, at the trial, question the validity of the patent, or make any point which requires the construction of an act of Congress. He may rest his defence exclusively on the fact that

he has not violated the right of the plaintiff. That this fact becomes the sole question made in the cause, cannot oust the jurisdiction of the court, or establish the position, that the case does not arise under a law of the United States.

It is said that a clear distinction exists between the party and the cause; that the party may originate under a law with which the cause has no connection; and that Congress may, with the same propriety, give a naturalized citizen, who is the mere creature of a law, a right to sue in the courts of the United States, as give that right to the bank.

This distinction is not denied; and if the act of Congress was a simple act of incorporation, and contained nothing more, it might be entitled to great consideration. But the act does not stop with incorporating the bank. It proceeds to bestow upon the being it has made, all the faculties and capacities which that being possesses. Every act of the bank grows out of this law, and is tested by it. To use the language of the Constitution, every act of the bank arises out of this law.

A naturalized citizen is, indeed, made a citizen under an act of Congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The Constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might sue. He is distinguishable in nothing from a native citizen, except so far as the Constitution makes the distinction. The law makes none.

There is, then, no resemblance between the act incorporating the bank, and the general naturalization law. 2 Stats. at Large, 153.

Upon the best consideration we have been able to bestow on this subject, we are of opinion that the clause in the act of incorporation, enabling the bank to sue in the courts of the United States, is consistent with the Constitution, and to be obeyed in all courts.

[The merits of the case are then considered; also the question whether the suit is in effect against the State of Ohio in violation of the Eleventh Amendment to the Federal Constitution. This last point of the case is sufficiently referred to in cases given *infra*, on pages 702 to 720. The decree is affirmed.[1]]

[1] Mr. Justice Johnson rendered a concurring opinion.

In Pacific Railroad Removal Cases, 115 U. S. 1 (1885), Mr. Justice Bradley, rendering the opinion of the court, uses this language: —

"We are of opinion that corporations of the United States, created by and organ-

ized under acts of Congress like the plaintiffs in error in these cases, are entitled as such to remove into the Circuit Courts of the United States suits brought against them in the State courts, under and by virtue of the act of March 3, 1875, on the ground that such suits are suits 'arising under the laws of the United States.' We do not propose to go into a lengthy argument on the subject; we think that the question has been substantially decided long ago by this court. The exhaustive argument of Chief Justice Marshall in the case of Osborn *v.* Bank of the United States, 9 Wheat. 738, 817–828, delivered more than sixty years ago, and always acquiesced in, renders any further discussion unnecessary to show that a suit by or against a corporation of the United States is a suit arising under the laws of the United States. That argument was the basis of the decision on the jurisdictional question in that case. The precise question, it is true, was as to the power of Congress to authorize the bank to sue and be sued in the United States courts. The words of its charter were, that the bank should be made able and capable in law to 'sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all State courts having competent jurisdiction, and in any Circuit Court of the United States.' The power to create such a jurisdiction in the Federal courts rested solely on the truth of the proposition, that a suit by or against the bank would be a suit arising under the laws of the United States; for the Constitution confined the judicial power of the United States to these four classes of cases, namely: first, to cases in law and equity, arising under the Constitution, the laws of the United States, and treaties made under their authority; secondly, to cases affecting ambassadors, other public ministers and consuls; thirdly, to cases of admiralty and maritime jurisdiction; fourthly, to certain controversies depending on the character of the parties, such as controversies to which the United States are a party, those between two or more States, or a State and citizens of another State, or citizens of different States, or citizens of the same State claiming lands under grants of different States, or a State or its citizens and foreign States, citizens, or subjects. Now, suits by or against the United States Bank could not possibly, as such, belong to any of these classes except the first, namely, cases in law and equity arising under the Constitution, laws, or treaties of the United States; and the Supreme Court, as well as the distinguished counsel who argued the Osborn case, so understood it. Unless, therefore, a case in which the bank was a party was for that reason a case arising under the laws of the United States, Congress would not have had the power to authorize it to sue and be sued in the Circuit Court of the United States. And to this question, to wit, whether such a case was a suit arising under the laws of the United States, the court directed its principal attention. But as it was objected that several questions of general law might arise in a case, besides that which depended upon an act of Congress, the court first disposed of that objection, holding that, as scarcely any case occurs every part of which depends on the Constitution, laws, or treaties of the United States, it is sufficient for the purposes of Federal jurisdiction if the case necessarily involves a question depending on such Constitution, laws, or treaties."

[The quoted portions of that opinion are omitted, as the portions referred to are given in full above.]

"If the case of Osborn *v.* The Bank of the United States is to be adhered to as a sound exposition of the Constitution, there is no escape from the conclusion that these suits against the plaintiffs in error, considering the said plaintiffs as corporations created by and organized under the acts of Congress referred to in the several petitions for removal in these cases, were and are suits arising under the laws of the United States. An examination of those acts of Congress shows that the corporations now before us, not only derive their existence, but their powers, their functions, their duties, and a large portion of their resources, from those acts, and, by virtue thereof, sustain important relations to the government of the United States."

## SOUTHERN PACIFIC RAILROAD COMPANY *v.* CALIFORNIA.

118 United States, 109. 1886.

Mr. Chief Justice Waite delivered the opinion of the court.

This is a suit brought by the State of California, in one of its own courts, against the Southern Pacific Railroad Company to recover $31,470.58 claimed to be due for taxes. The railroad company answered the complaint, setting up, among others, the following defences: —

1. That under and by virtue of the acts of Congress of July 27, 1866, 14 Stat. 292, ch. 278; March 3, 1871, 16 Stat. 573, ch. 122; and May 2, 1872, 17 Stat. 59, ch. 132, the defendant "became, and ever since has been, a Federal corporation, and has held its franchises and exercised all its corporate powers under the government of the United States;" or, "if, by virtue of the several acts of Congress . . . referred to, it did not become a Federal corporation, yet it holds under the government of the United States all the corporate powers and franchise granted to it by the said several Acts of Congress as the trustee for the government, and for the governmental uses and purposes specified in said acts;" "that the government of the United States has never given to the State of California the right to lay any tax upon the franchise, existence, or operations of defendant;" that the "value of all the franchises held and corporate powers exercised by defendant under said acts of Congress" were included in the valuation of the property of the company upon which the taxes sued for were assessed, and that by reason of the premises the taxes are illegal and void.

2. That the property of the company for which the taxes sued for were levied was, and is, encumbered by a mortgage securing an indebtedness of the railroad company exceeding $3,000 a mile, and that it was valued for taxation without deduction on account of such encumbrance, because such was the requirement of the statute with respect to railroad corporations owning railroads within the State, and operated in more than one county, and this corporation was, and is, of that class.

3. That the statute under which the taxes were levied is repugnant to Art. XIV. of the Amendments of the Constitution of the United States, inasmuch as it deprives railroad corporations of the State operated in more than one county of the equal protection of the laws, 1, by providing that the property of such corporations shall be valued for taxation to them without deduction on account of mortgage encumbrances, while the mortgaged property of other corporations and of natural persons is taxed to its owner only on its value after the value of the mortgage has been deducted; and, 2, by failing to provide

a tribunal for the correction of errors in the valuation of the property of such railroad corporations for taxation, when such a tribunal is provided for all other corporations and for natural persons.

4. That the statute is still further repugnant to the same amendment, because it deprives such corporations of their property without due process of law, there being no provision for notice to them of a time, place, or tribunal for a hearing in defence of their rights in the valuation of their property for taxation.

Upon the filing of this answer, the railroad company presented its petition, accompanied with the necessary security, for the removal of the suit to the Circuit Court of the United States for the District of California, under the act of March 3, 1875, 18 Stat. 470, ch. 137, on the ground that the action "is a suit at law of a civil nature and arising under the Constitution and laws of the United States." This petition was filed in time. The State court proceeded with the suit notwithstanding the petition, and gave judgment against the railroad company for the full amount of the tax and the statutory penalty. From this judgment the corporation appealed to the Supreme Court, where the only question presented for decision was "whether the Federal Constitution and the act of Congress authorized a removal of an action from a State to a Federal court brought by a State to recover taxes levied under its laws on the property of a being created by its power in one of its own courts." This question was decided against the corporation, and the judgment of the court below affirmed. To this judgment of affirmance the present writ of error was brought on the allowance of the Chief Justice of the Supreme Court of the State.

In Railroad Co. *v.* Mississippi, 102 U. S. 135, 141, it was decided that a suit brought by a State in one of its own courts against a corporation of its own creation can be removed to the Circuit Court of the United States, under the act of March 3, 1875, if it is a suit arising under the Constitution or laws of the United States, although it may involve questions other than those which depend on the Constitution and laws. The case of Ames *v.* Kansas, 111 U. S. 449, is to the same effect; and in Starin *v.* New York, 115 U. S. 248, 257, it was stated, as the effect of all the authorities on the subject, that if, from the questions involved in a suit, "it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the act of 1875; otherwise not."

Applying these rules, which must now be considered as settled, to the present case, it is apparent that the court below erred in deciding that the suit was not removable; for it distinctly appears that the right of the State to recover was made by the pleadings to depend,

1, on the power of the State to tax the franchises of the corporation derived from the acts of Congress, which were specially referred to, as well as the property used in connection therewith, and, 2, on the effect of Art. XIV. of the Amendments of the Constitution on the validity of the statutes under which the taxes sued for were levied. The first depended on the construction of the acts of Congress, and the second on the construction of the constitutional amendment. If decided in one way the State might recover, if in another it would be defeated, at least in part. The right of removal does not depend upon the validity of the claim set up under the Constitution or laws. It is enough if the claim involves a real and substantial dispute or controversy in the suit. In this case there can be no doubt about that. The Circuit Court of the United States for the district of California has already decided more than once, in other cases involving precisely the same questions, that the statute on which the recovery depends was unconstitutional and void, and some of these cases are now pending here on writs of error. Already much time has been devoted in this court to their argument under special assignments.

The judgment of the Supreme Court is reversed and the cause remanded, with directions that it be sent back to the Superior Court of Los Angeles County for removal to the Circuit Court of the United States, in accordance with the prayer of the petition filed for that purpose. *Judgment reversed.*

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## BOCK *v.* PERKINS.

139 United States, 628. 1891.

Mr. Justice Harlan delivered the opinion of the court.

This action involves the title to a certain stock of goods seized under attachments sued out against the property of H. P. Lane from the Circuit Court of the United States for the Northern District of Iowa, and directed to the marshal of that district for execution. The goods, when seized, were in the possession of the plaintiff in error, who claimed the right to hold them under an assignment made to him by Lane before the attachments were issued. Bock seeks to recover from Perkins, the marshal, and from Thrift and Hopkins, his deputies, damages in the sum of ten thousand dollars for their seizure. The defence was, that the goods were the property of Lane at the time of the seizure, and, therefore, were liable to be taken under the attachments. Upon the petition of the defendants, accompanied by a proper bond, and an affidavit setting forth the nature of the defence, the case was removed into the court below for trial as one arising under the laws of the United States. The plaintiff moved to remand it to the State court. The motion was denied, and by direction of

the court the jury returned a verdict for the defendants. A judgment in their favor was accordingly entered. Bock *v.* Perkins, 28 Fed. Rep. 123.

The court below properly retained the case for trial. Every marshal of the United States, as well as his deputy, must take an oath or affirmation that he will faithfully execute all lawful precepts directed to him, and in all things well and truly perform the duties of his office. The marshal must also give bond, with sureties, for the faithful performance of the duties of his office by himself and deputies. And marshals and their deputies have, in the respective States, the same powers in executing the laws of the United States as sheriffs and their deputies have in executing the laws of such States. Rev. Stat. §§ 782, 783, 788. A case, therefore, depending upon the inquiry whether a marshal or his deputy has rightfully executed a lawful precept directed to the former from a court of the United States, is one arising under the laws of the United States; for, as this court has said, "cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defence of the party, in whole or in part, by whom they are asserted." Tennessee *v.* Davis, 100 U. S. 257, 264; Railroad Co. *v.* Mississippi, 102 U. S. 135, 141. If the goods in question, when seized, were the property of Lane, the marshal and his deputies were in the discharge of duties imposed upon them by the laws of the United States; and for any failure in that regard he would be liable to suit by any one thereby injured. Rev. Stat. § 784. This case was, therefore, one arising under the laws of the United States, and removable from the State court. Feibelman *v.* Packard, 109 U. S. 421, 423; Bachrack *v.* Norton, 132 U. S. 337; Reagan *v.* Aiken, [138 U. S. 109]; Houser *v.* Clayton, 3 Woods, 273; Ellis *v.* Norton, 16 Fed. Rep. 4.

No different doctrine was announced in Buck *v.* Colbath, 3 Wall. 334. On the contrary, that case sustains the view we have just expressed. Colbath sued Buck in a State court in trespass for taking his goods, the latter pleading simply that he was marshal of the United States, and had seized the goods under an attachment against the property of certain parties named therein, but not averring that the goods belonged to the defendants named in the writ. This court, upon error to the highest court of the State, held that the marshal was guilty of trespass in levying upon the property of one against whom the writ did not run, and could be sued therefor in a State court — the *mere* fact that the writ issued from a Federal court constituting no defence. The judgment in that case against the marshal was reviewed here under the act of Congress authorizing such review in cases where a party specially claimed the protection of an authority exercised under the United States, and the decision withheld the protection so claimed. The decision sustains the proposition that

where a marshal, being sued in trespass in a State court for taking property under a writ of attachment to him directed, defends upon the ground that the property attached belonged to the defendant named in the writ, the case is one arising under the laws of the United States, and therefore removable.

[The merits of the case are then considered and the judgment is affirmed.]

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### b. *Cases affecting Ambassadors, other Public Ministers, and Consuls.*

### BÖRS *v.* PRESTON.

111 United States, 252. 1884.

This action was brought in the Circuit Court of the United States for the Southern District of New York. The plaintiff, Preston, is a citizen of that State, while the defendant is the consul at the port of New York, for the Kingdoms of Norway and Sweden.

The object of the action is to recover damages for the alleged unlawful conversion by defendant, to his own use, of certain articles of merchandise. The answer denies the material allegations of the complaint, and, in addition, by way of counterclaim, asks judgment against the plaintiff for certain sums. To the counterclaim a replication was filed, and a trial had before a jury, which resulted in a verdict in favor of plaintiff for $7,313.10. For that amount judgment was entered against the defendant. The defendant sued out this writ of error. The following assignments of error are found in the record: —

"First assignment of error. That the plaintiff in error being before, at the time of the commencement of this suit, and ever since Consul of the Kingdoms of Norway and Sweden, he ought not, according to the Constitution and laws of the United States, to have been impleaded in the Circuit Court, but in the District Court of the United States for the Southern District of New York, or in some of the District Courts, and that the Circuit Court had not jurisdiction of this cause, and should have directed a verdict for said defendant.

"Second assignment of error. That judgment was given for the defendant in error against the plaintiff in error, when by the laws of the United States the judgment ought to have been given for the plaintiff in error against the defendant in error, it being admitted that the plaintiff in error was, at the time of the transaction on the 8th of April, and continued to the trial, the Consul for Sweden and Norway, at the port of New York, whereby the Circuit Court had no jurisdiction of the cause."

Mr. Justice Harlan delivered the opinion of the court. After reciting the facts in the above language, he continued: —

The assignments of error question the jurisdiction of the Circuit Court, under the Constitution and the laws of the United States, to hear and determine any suit whatever brought against the consul of a foreign government.

Some reference was made in argument to the fact that the defendant did not in the court below plead exemption, by virtue of his official character, from suit in a Circuit Court of the United States. To this it is sufficient to reply that this court must, from its own inspection of the record, determine whether a suit against a person holding the position of consul of a foreign government is excluded from the jurisdiction of the Circuit Courts. In cases of which the Circuit Courts may take cognizance only by reason of the citizenship of the parties, this court, as its decisions indicate, has, except under special circumstances, declined to express any opinion upon the merits on appeal or writ of error, where the record does not affirmatively show jurisdiction in the court below; this, because the courts of the Union, being courts of limited jurisdiction, the presumption in every stage of the cause is, that it is without their jurisdiction unless the contrary appears from the record. Grace *v.* American Insurance Company, 109 U. S. 278, 283; Robertson *v.* Cease, 97 U. S. 646.

Much more, therefore, will we refuse to determine on the merits, and will reverse on the point of jurisdiction, cases where the record shows affirmatively that they are of a class which the statute excludes altogether from the cognizance of Circuit Courts. If this were not so it would be in the power of the parties by negligence or design to invest those courts with a jurisdiction expressly denied to them. To these considerations it may be added, that the exemption of the consul of a foreign government from suit in particular courts is the privilege, not of the person who happens to fill that office, but of the State or government he represents. It was so decided in Davis *v.* Packard, 7 Pet. 276, 284. While practically it may be of no consequence whether original jurisdiction of suits against consuls of foreign governments is conferred upon one court of the United States rather than another, it is sufficient that the legislative branch of the government has invested particular courts with jurisdiction in the premises.

We proceed then to inquire whether, under the Constitution and laws of the United States, a Circuit Court may, under any circumstances, hear and determine a suit against the consul of a foreign government; in other words, whether other courts have been invested with exclusive jurisdiction of such suits.

The Constitution declares that "the judicial power of the United States shall extend . . . to all cases affecting ambassadors or other public ministers and consuls;" "to controversies between citizens of

a State and foreign citizens or subjects;" that "in all cases affecting ambassadors, other public ministers and consuls, . . . the Supreme Court shall have original jurisdiction;" and that in all other cases previously mentioned in the same clause "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

The Judiciary Act of 1789 invested the District Courts of the United States with "jurisdiction, exclusively of the courts of the several States, of all suits against consuls or vice-consuls," except for offences of a certain character; this court, with "original, but not exclusive, jurisdiction of all suits . . . in which a consul or vice-consul shall be a party;" and the Circuit Courts, with jurisdiction of civil suits in which an alien is a party. 1 Stat. 76–80. In this act we have an affirmance by the first Congress — many of whose members participated in the convention which adopted the Constitution, and were, therefore, conversant with the purposes of its framers — of the principle that the original jurisdiction of this court of cases in which a consul or vice-consul is a party, is not necessarily exclusive, and that the subordinate courts of the Union may be invested with jurisdiction of cases affecting such representatives of foreign governments. On a question of constitutional construction, this fact is entitled to great weight.

Very early after the passage of that act the case of United States *v.* Ravara, 2 Dall. 297, was tried in the Circuit Court of the United States for the District of Pennsylvania, before Justices Wilson and Iredell of this court, and the district judge. It was an indictment against a consul for a misdemeanor, of which, it was claimed, the Circuit Court had jurisdiction under the eleventh section of the Judiciary Act, giving Circuit Courts "exclusive cognizance of all crimes and offences cognizable under the authority of the United States," except where that act "otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the District Courts of the crimes and offences cognizable therein." In behalf of the accused it was contended that this court, in virtue of the constitutional grant to it of original jurisdiction in all cases affecting consuls, had exclusive jurisdiction of the prosecution against him. Mr. Justice Wilson and the district judge concurred in overruling this objection. They were of opinion that although the Constitution invested this court with original jurisdiction in cases affecting consuls, it was competent for Congress to confer concurrent jurisdiction, in those cases, upon such inferior courts as might, by law, be established. Mr. Justice Iredell dissented, upon the ground that the word "original," in the clause of the Constitution under examination, meant exclusive. The indictment was sustained, and the defendant upon the final trial, at which Chief Justice Jay presided, was found guilty. He was subsequently pardoned on condition that he would surrender his commission and *exequatur*.

In United States v. Ortega, 11 Wheat. 467, — which was a criminal prosecution, in a Circuit Court of the United States, for the offence of offering personal violence to a public minister, contrary to the law of nations and the act of Congress, — one of the questions certified for decision was whether the jurisdiction conferred by the Constitution upon this court, in cases affecting ambassadors or other public ministers and consuls, was not only original but exclusive of the Circuit Courts. But its decision was waived and the case determined upon another ground. Of that case it was remarked by Chief Justice Taney, in Gittings v. Crawford, Taney's Dec. 1, 5, that an expression of opinion upon that question would not have been waived had the court regarded it as settled by previous decisions.

In Davis v. Packard, *ubi supra*, upon error to the Court for the Correction of Errors of the State of New York, the precise question presented was whether, under the Constitution and laws of the United States, a State court could take jurisdiction of civil suits against foreign consuls. It was determined in the negative, upon the ground that by the ninth section of the act of 1789 jurisdiction was given to the District Courts of the United States, exclusively of the courts of the several States, of all suits against consuls and vice-consuls, except for certain offences mentioned in the act. The jurisdiction of the State courts was denied because — and no other reason was assigned — jurisdiction had been given to the District Courts of the United States exclusively of the former courts; a reason which probably would not have been given had the court, as then organized, supposed that the constitutional grant of original jurisdiction to this court, in all cases affecting consuls, deprived Congress of power to confer concurrent original jurisdiction, in such cases, upon the subordinate courts of the Union. It is not to be supposed that the clause of the Constitution giving original jurisdiction to this court in cases affecting consuls, was overlooked, and, therefore, the decision, in that case, may be regarded as an affirmance of the constitutionality of the act of 1789, giving original jurisdiction in such cases, also, to District Courts of the United States. And it is a significant fact, that in the decision in Davis v. Packard, Chief Justice Marshall concurred, although he had delivered the judgments in Marbury v. Madison, 1 Cranch, 137; Cohens v. Virginia, 6 Wheat. 264; and Osborn v. Bank of the United States, 9 Wheat. 738, 821, some of the general expressions in which are not infrequently cited in support of the broad proposition that the jurisdiction of this court is made by the Constitution exclusive of every other court, in all cases of which by that instrument it is given original jurisdiction. It may also be observed that of the seven justices who concurred in the judgment in Davis v. Packard, five participated in the decision of Osborn v. Bank of the United States.

In St. Luke's Hospital v. Barclay, 3 Blatch. 259, which was a suit in equity in the Circuit Court of the United States for the South-

ern District of New York, the question was distinctly raised whether the consular character of the alien defendant exempted him from the jurisdiction of the Circuit Courts. The jurisdiction of the Circuit Court was maintained, the opinion of the court being that the jurisdiction of the District Courts was made by statute exclusive only of the State courts, and that under the eleventh section of the act of 1789, the defendant being an alien, — no exception being made therein as to those who were consuls, — was amenable to a suit in the Circuit Court brought by a citizen. Subsequently the question was reargued before Mr. Justice Nelson and the district judge, and the proposition was pressed that the defendants could not be sued except in this court or in some District Court. But the former ruling was sustained.

In Graham *v.* Stucken, 4 Blatch. 50, the same question was carefully considered by Mr. Justice Nelson, who again held that the constitutional grant of original jurisdiction to this court in cases affecting consuls; the legislative grant in the act of 1789 to this court of original but not exclusive jurisdiction of suits in which a consul or vice-consul is a party; and the legislative grant of jurisdiction to the District Courts, exclusive of the State courts, of suits against consuls or vice-consuls, did not prevent the Circuit Courts, which had jurisdiction of suits to which an alien was a party, from taking cognizance of a suit brought by a citizen against an alien, albeit the latter was, at the time, the consul of a foreign government.

In Gittings *v.* Crawford, Taney's Dec. 1, which was a suit upon a promissory note brought in the District Court of the United States for Maryland, by a citizen of that State against a consul of Great Britain, the point was made in the Circuit Court on writ of error that by the Constitution of the United States this court had exclusive jurisdiction of such cases.

The former adjudications of this and other courts of the Union were there examined, and the conclusion reached — and in that conclusion we concur — that, as Congress was not expressly prohibited from giving original jurisdiction in cases affecting consuls to the inferior judicial tribunals of the United States, neither public policy nor convenience would justify the court in implying such prohibition, and upon such implication, pronounce the act of 1789 to be unconstitutional and void. Said Chief Justice Taney: "If the arrangement and classification of the subjects of jurisdiction into appellate and original, as respects the Supreme Court, do not exclude that tribunal from appellate power in the cases where original jurisdiction is granted, can it be right, from the same clause, to imply words of exclusion as respects other courts whose jurisdiction is not there limited or prescribed, but left for the future regulation of Congress? The true rule in this case is, I think, the rule which is constantly applied to ordinary acts of legislation, in which the grant of jurisdiction over a certain subject-matter to one court, does not, of itself, imply that

that jurisdiction is to be exclusive. In the clause in question, there is nothing but mere affirmative words of grant, and none that import a design to exclude the subordinate jurisdiction of other courts of the United States on the same subject-matter." Taney's Dec. 9. After alluding to the fact that the position of consul of a foreign government is sometimes filled by one of our own citizens, he observes: "It could hardly have been the intention of the statesmen who framed our Constitution to require that one of our citizens who had a petty claim of even less than five dollars against another citizen, who had been clothed by some foreign government with the consular office, should be compelled to go into the Supreme Court to have a jury summoned in order to enable him to recover it; nor could it have been intended, that the time of that court, with all its high duties to perform, should be taken up with the trial of every petty offence that might be committed by a consul in any part of the United States; that consul, too, being often one of our own citizens."

Such was the state of the law when the Revised Statutes of the United States went into operation. By section 563 it is provided that "the District Courts shall have jurisdiction . . . of all suits against consuls or vice-consuls," except for certain offences; by section 629, that "the Circuit Courts shall have original jurisdiction" of certain classes of cases, among which are civil suits in which an alien is a party; by section 687, that this court shall have "original but not exclusive jurisdiction of all suits . . . in which a consul or vice-consul is a party;" and by section 711, that the jurisdiction vested in the courts of the United States in the cases and proceedings there mentioned — among which (par. 8) are "suits against ambassadors or other public ministers or their domestics, or domestic servants, or against consuls or vice-consuls" — shall be exclusive of the courts of the several States. But by the act of February 18th, 1875, that part of section 711 last quoted was repealed, 18 Stat. 318; so that, by the existing law, there is no statutory provision which, in terms, makes the jurisdiction of the courts of the United States exclusive of the State courts in suits against consuls or vice-consuls.

It is thus seen that neither the Constitution nor any act of Congress defining the powers of the Courts of the United States has made the jurisdiction of this court, or of the District Courts, exclusive of the Circuit Courts in suits brought against persons who hold the position of consul, or in suits or proceedings in which a consul is a party. The jurisdiction of the latter courts, conferred without qualification, of a controversy between a citizen and an alien, is not defeated by the fact that the alien happens to be the consul of a foreign government. Consequently, the jurisdiction of the court below cannot be questioned upon the ground simply that the defendant is the consul of the Kingdom of Norway and Sweden.

But as this court and the District Courts are the only courts of the Union which, under the Constitution or the existing statutes, are in

vested with jurisdiction, without reference to the citizenship of the parties, of suits against consuls, or in which consuls are parties, and since the Circuit Court was without jurisdiction, unless the defendant is an alien or a citizen of some State other than New York, it remains to consider whether the record shows him to be either such citizen or an alien. There is neither averment nor evidence as to his citizenship, unless the conceded fact that he is the consul of a foreign government is to be taken as adequate proof that he is a citizen or subject of that government. His counsel insist that the consul of a foreign country, discharging his duties in this country, is, in the absence of any contrary evidence, to be presumed in law to be a citizen or subject of the country he represents. This presumption, it is claimed, arises from the nature of his office and the character of the duties he is called upon to discharge. But, in our opinion, the practice of the different nations does not justify such presumption. "Though the functions of consul," says Kent, "would seem to require that he should not be a subject of the State in which he resides, yet the practice of the maritime powers is quite lax on this point, and it is usual, and thought most convenient, to appoint subjects of the foreign country to be consuls at its ports." 1 Kent, 44. In Gittings *v.* Crawford, *ubi supra*, it was said by Chief Justice Taney that, "in this country, as well as others, it often happens that the consular office is conferred by a foreign government on one of our own citizens." It is because of this practice that the question has frequently arisen as to the extent to which citizens of a country, exercising the functions of foreign consuls, are exempt from the political and municipal duties which are imposed upon their fellow citizens. 1 Halleck's International Law, London ed., vol. 1, ch. 11, § 10 *et seq.* In an elaborate opinion by Attorney-General Cushing addressed to Secretary Marcy, the question was considered whether citizens of the United States, discharging consular functions here by appointment of foreign governments, were subject to service in the militia or as jurors. 8 Opin. Attys.-Genl. 169. It was, perhaps, because of the difficulties arising in determining questions of this character that many of the treaties between the United States and other countries define with precision the privileges and exemptions given to consuls of the respective nations — exemptions from public service being accorded, as a general rule, only to a consul who is a citizen or subject of the country he represents. Rev. Stat. of Dist. Col., Public Treaties, Index, title "Consuls."

But it seems unnecessary to pursue the subject further. When the jurisdiction of the Circuit Court depends upon the alienage of one of the parties, the fact of alienage must appear affirmatively either in the pleadings or elsewhere in the record. Brown *v.* Keene, 8 Pet. 115; Bingham *v.* Cabot, 3 Dall. 382; Capron *v.* Van Noorden, 2 Cranch, 126; Robertson *v.* Cease, *supra*. It cannot be inferred, argumentatively, from the single circumstance that such person holds

and exercises the office of consul of a foreign government. Neither the adjudged cases nor the practice of this government prevent an American citizen — not holding an office of profit or trust under the United States — from exercising in this country the office of consul of a foreign government.

Our conclusion is that, as it does not appear from the record that the defendant is an alien, and since it is consistent with the record that the defendant was and is a citizen of the same State with the plaintiff, the record, as it now is, does not present a case which the Circuit Court had authority to determine. Without, therefore, considering the merits of this cause,

*The judgment must be reversed, and the cause remanded for such further proceedings as may be consistent with this opinion. It is so ordered.*

Mr. Justice Gray. Mr. Justice Miller and myself concur in the judgment of reversal, on the ground that the Circuit Court had no jurisdiction of the case, because the record does not show that the defendant was an alien, or a citizen of a different State from that of which the plaintiff was a citizen. We express no opinion upon the question whether, if the record had shown that state of facts, as well as that the defendant was a consul, the Circuit Court would have had jurisdiction.

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## c. *Cases of Admiralty and Maritime Jurisdiction.*

### WARING *v.* CLARKE.

**5 Howard, 441; 16 Curtis, 456. 1846.**

Wayne, J., delivered the opinion of the court.

This is a libel *in rem*, to recover damages for injuries arising from a collision, alleged to have happened within the ebb and flow of the tide in the Mississippi River, about ninety-five miles above New Orleans.

The decree of the Circuit Court is resisted upon the merits, and also upon the ground that the case is not within the admiralty and maritime jurisdiction of the courts of the United States.

We will first consider the point of jurisdiction.

The learned counsel for the appellants, Mr. Reverdy Johnson, contended that, even if the evidence proved that the collision took place within the ebb and flow of the tide, the court had not jurisdiction, because the locality is *infra corpus comitatus*.

Two grounds were taken to maintain that position.

1. That the grant in the Constitution of "all cases of admiralty and maritime jurisdiction" was limited to what were cases of admiralty and maritime jurisdiction in England, when our revolutionary war began, or when the Constitution was adopted, and that a collision between ships within the ebb and flow of the tide, *infra corpus comitatus*, was not one of them.

2. That the distinguishing limitation of admiralty jurisdiction, and decisive test against it, in England and in the United States, except in the cases allowed in England, was the competency of a court of common law to give a remedy in a given case in a trial by jury. And, as auxiliary to this ground, it was urged that the clause in the 9th section of the judiciary act of 1789, 1 Statutes at Large, 77, "saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it," took away such cases from the admiralty jurisdiction of the courts of the United States.

The same positions have been taken again by Mr. Ames and Mr. Whipple, in the case of the New Jersey Steam Navigation Company *v.* The Merchant's Bank of Boston, 6 How. 344. Everything in support of them, which could be drawn from the history of admiralty jurisdiction in England, or from what had been its practice in the United States, and from adjudged cases in both countries, was urged by those gentlemen. All must admit, who heard them, that nothing was omitted which could be brought to bear upon the subject. We come, then, to the decision of these points, with every advantage which learned research, and ingenious and comprehensive deduction from it, can give us.

It is the first time that the point has been distinctly presented to this court, whether a case of collision in our rivers, where the tide ebbs and flows, is within the admiralty jurisdiction of the courts of the United States, if the locality be, in the sense in which it is used by the common-law judges in England, *infra corpus comitatus*. It is this point that we are now about to decide; and it is our wish that nothing which may be said in the course of our remarks shall be extended to embrace any other case of contested admiralty jurisdiction.

We do not think that either of the grounds taken can be maintained. But, before giving our reasons for this conclusion, it will be well for us to state the cases in which the instance court in England exercised jurisdiction when our Constitution was adopted.

In cases to enforce judgments of foreign admiralty courts, when the person or his goods are within the jurisdiction. Mariners' wages, except when the contract was under seal, or made out of the customary way of such contracts. Bottomry, in certain cases only, and under many restrictions. Salvage, when the property shipwrecked was not cast ashore. Cases between the several owners of ships, when they disputed among themselves about the policy or advantage of sending her upon a particular voyage. In cases of goods, and the

proceeds of goods piratically taken, which will be arrested by a warrant from the court, as belonging to the crown and as droits of the admiralty. And in cases of collision and injuries to property or persons on the high seas.

It may as well be said by us, at once, that, in cases of this last class, it has frequently been adjudicated in the English common-law courts, since the restraining statutes of Richard II. and Henry IV. were passed, that high seas mean that portion of the sea which washes the open coast; and that any branch of the sea within the *fauces terræ*, where a man may reasonably discern from shore to shore, is, or at least may be, within the body of a county. In fact, the general rule in England has been, since the time of Lord Coke, upon the interpretation given by the courts of common law to the statutes 13 & 15 Richard II. and 2 Henry IV., to prohibit the admiralty from exercising jurisdiction in civil cases, or causes of action arising *infra corpus comitatus*. So sternly has the admiralty been excluded from what we believe to have been its ancient jurisdiction in England, that a prohibition within a few years has been issued in a case of collision happening between the Isle of Wight and the Hampshire coast; and a case of collision in the river Humber, twenty miles from the main sea, but within the flux and reflux of the tide, has been held not to be within the admiralty jurisdiction. The Public Opinion, 2 Hagg. 398.

It has not, however, been the undisputed rule, nor allowed to be the correct interpretation of the statutes of Richard. It has always been contended by the advocates of the admiralty, that ports, creeks, and rivers are within its jurisdiction, and not within those statutes; meaning that the ancient jurisdiction in such localities was not excluded by the words of the statutes. Browne, however, in his Civil and Admiralty Law, vol. 2, p. 92, thinks they were within the words of the statutes; not meaning, though, to affirm the declaration of Lord Coke, that those statutes were affirmative of the common law. We think they were not. However much every true English and American lawyer may feel himself indebted to the learning of that great lawyer, and will ever be cautious of disparaging it, it is difficult for any one to read and reflect upon the part which he took in the controversy upon admiralty jurisdiction in England, without assenting to Mr. Justice Buller's remarks, in Smart *v.* Wolf, 3 Durn. & East, 348: "With respect to what is said relative to the admiralty jurisdiction in 4th Inst. 135, I think that part of Lord Coke's work has always been received with great caution, and frequently contradicted. He seems to have entertained not only a jealousy of, but an enmity against, that jurisdiction. The passage in 4th Inst. 135, disallowing the right to take stipulations, is expressly denied in 2 Lord Raym. 1826. And I may conclude with the words of Lord Holt in that case, that in this case 'the admiralty had jurisdiction, and there is neither statute nor common law to restrain them.'"

Having thus admitted, to the fullest extent, the locality in England within which the courts of common law permitted the admiralty to exercise jurisdiction in cases of collision, we return to the ground taken, that the same limitation is to be imposed, in like cases, upon the admiralty courts of the United States.

We have already said, it cannot be maintained. It is opposed by general, and also by constitutional considerations, to which we have not heard an answer.

In the first place, those who framed the Constitution, and the lawyers in America in that day, were familiar with a different and more extensive jurisdiction in most of the States when they were colonies, than was allowed in England, from the interpretation which was given by the common-law courts to the restraining statutes of Richard II. and Henry IV. The commissions to the vice-admirals in the colonies in North America, insular and continental, contained a much larger jurisdiction than existed in England when they were granted. That to the governor of New Hampshire, investing him with the power of an admiralty judge, declares the jurisdiction to extend "throughout all and every the sea-shores, public streams, ports, fresh-water rivers, creeks, and arms, as well of the sea as of the rivers and coasts whatsoever, of our said provinces."

In a work by Anthony Stokes, his Majesty's Chief Justice in Georgia, entitled "A View of the Constitution of the British Colonies in North America and the West Indies," will be found, at page 166, the form of the commission of vice-admiral for the provinces in North America. He says, in page 150, the dates in the commission are arbitrary, and the name of any particular province is omitted. Its language is: "And we do hereby remit and grant unto you, the aforesaid A. B., our power and authority in and throughout our province of —— aforementioned, &c., &c., and maritime ports whatsoever, of the same and thereto adjacent, and also throughout all and every of the sea-shores, public streams, ports, fresh-water rivers, creeks, and arms, as well of the sea as of the rivers and coasts whatsoever, of our said province of F." The extracts from both commissions are the same. We have the authority of Chief Justice Stokes, that all given in the colonies were alike. The jurisdiction given in those commissions is as large as was exercised in the ancient practice in admiralty in England. It should be observed, too, that they were given long before any difficulties occurred between the mother country and ourselves; and that they contained no power complained of by us afterwards, when it was said an attempt was made to extend admiralty powers "beyond these ancient limits." The king's authority to grant those commissions in the colonies has never been, and cannot be, denied. In all the appeals taken from the colonial courts to the High Court of Admiralty in England, no such thing was ever intimated.

Was it not known, also, that, whilst the States were colonies, vice-

admiralty courts had been in all of them, — in some, as has just been said, by commissions from the crown, with additional powers conferred upon them by acts of Parliament; in others, by rights reserved in their charters, and in other colonies by their own legislation? — that, whether from either source, they exercised a jurisdiction over all maritime contracts, and over torts and injuries, as well in ports as upon the high seas? — that acts of Parliament recognized their jurisdiction as original maritime jurisdiction, in all seizures for contravention of the revenue laws?

Was not a larger jurisdiction in admiralty exercised in Massachusetts, throughout her whole colonial existence, than was permitted to the admiralty in England by the prohibitions of her common-law courts? Were her members in the convention which formed our Constitution ignorant of it?

Were the members from Pennsylvania and South Carolina forgetful that the extent of the admiralty jurisdiction in the colonies had been the subject of judicial inquiry in England, growing out of proceedings in the admiralty courts of both of those States in revenue cases? — that it had been decided in 1754, in the case of The Vrow Dorothea, 2 Rob. 246, — which was an appeal from the vice-admiralty judge in South Carolina to the High Court of Admiralty, and thence to the delegates, — that the jurisdiction in admiralty in the colonies for a breach of the revenue laws was in its nature maritime, and was not a jurisdiction specially conferred by the statute of William III. c. 22, § 6; a judgment which subsequently received the assent of all the common-law judges, in a reference to them from the Privy Council? 2 Rob. 246; 8 Wheat. 397, note. This, too, after an eminent lawyer, Mr. West, assigned as counsel to the Commissioners of Trade and Plantations, had, in 1720, expressed the opinion that the statutes of 13 & 15 Richard II. c. 3, and 2 Henry IV. c. 11, and 27 Elizabeth, c. 11, were not introductive of new laws, but only declarative of the common law, and were therefore of force in the plantations; and that none of the acts of trade and navigation gave the admiralty judges in the West Indies increase of jurisdiction beyond that exercised by the High Court of Admiralty at home.

Shall it be presumed, also, that the members of the convention were altogether disregardful of what had been the early legislation of several of the States, when they were colonies, upon admiralty jurisdiction and the rules for proceeding in such courts? — of the larger jurisdiction given by Virginia by her act of 1660, than was at that time allowed to the admiralty in England? — that it was passed in the year that the ordinance of the republican government in England expired by the restoration? That ordinance revived much of the ancient jurisdiction in admiralty. It was judicially acted upon in England for twelve years. When it expired there, the enlightened influences connected with trade and foreign commerce, "and the uncertainty of jurisdiction in the trial of maritime causes," which

led to its enactment, no doubt had their weight in inducing Virginia, then our leading colony in commerce, to adopt by legislation many of its provisions. That ordinance and the act of Virginia have, in our view, important bearings upon the point under consideration. They were well known to those who represented Virginia in the convention. In its proceedings they had an active and intellectual agency, which makes it very unlikely that they were unmindful of the admiralty jurisdiction in Virginia. In New York, also, there was a court of admiralty, the proceedings, of which were according to the course of the civil law. Maryland, too, had her admiralty, differing in jurisdiction from that of England.

Further, the proceedings of our Continental Congress in 1774 afford reasons for us to conclude that no such limitation was meant. The admiralty jurisdiction, ancient and circumscribed as it afterwards was in England, and as it was exercised in the colonies, was necessarily the subject of examination, when the Congress was preparing the declaration and resolves of the 14th October, 1774; in which it is said "that the several acts of 4 Geo. III. c. 15, 34; 5 Geo. III. c. 25; 6 Geo. III. c. 52; 7 Geo. III. c. 41; and 8 Geo. III. c. 22, which impose duties for the purpose of raising a revenue in America, extend the power of the admiralty courts beyond their ancient limits." Journal of Congress, 1774, 21. Again, when it was said (Journal, 33), after reciting other grievances under the statute of 1767: "And amidst the just fears and jealousies thereby occasioned, a statute was made in the next year (1768) to establish courts of admiralty on a new model, expressly for the end of more effectually recovering of the penalties and forfeitures inflicted by acts of Parliament, framed for the purpose of raising revenue in America." And again, in the address to the king (Journal, 47), it is said: "By several acts of Parliament, made in the 4th, 5th, 6th, 7th, and 8th years of your Majesty's reign, duties are imposed upon us for the purpose of raising a revenue, and the powers of the admiralty and vice-admiralty courts are extended beyond their ancient limits; whereby our property is taken from us without our consent," &c. Why this repeated allusion to the ancient limits of admiralty jurisdiction, by men fully acquainted with every part of English jurisprudence, if they had not believed it had existed in England at one time much beyond what was at that time its exercise in her admiralty courts?

With these proceedings of the Continental Congress every member of the convention which framed the Constitution was familiar. They knew, also, what had been the extent and the manner of the exercise of admiralty jurisdiction in the States, after the war began, until the Articles of Confederation had been ratified, — what it had been thence to the adoption of the Constitution. Advised, as they were by personal experience, of the difficulties which attended the separate exercise by the States of admiralty powers, before the confederation was formed, and afterwards from the restricted grant of judicial

power in its articles, can it be supposed, in framing the Constitution, when they were endeavoring to apply a remedy for those evils by getting the States to yield admiralty jurisdiction altogether to the United States, it was intended to circumscribe the larger jurisdiction existing in them to the limited cases, and those only then allowed in England to be cases of admiralty and maritime jurisdiction? — that the latter was exclusively intended without any reference to the former, with which they were most familiar? Can it be reasonable to infer that such were the intentions of the framers of the Constitution? Is it not more reasonable to say, — nay, may we not say it is certain, — that, in their discussions and thoughts upon the grant of admiralty jurisdiction, they mingled with what they knew were cases of admiralty jurisdiction in England, what it actually was and had been in the States they were representing, with an enlarged comprehension of the controversy which had been carried on in England for more than two hundred years, between the judges of the common-law courts and the admiralty, upon the subject of its jurisdiction? Besides, nothing can be found in the debates of the convention, nor in its proceedings, nor in the debates of the conventions in the States upon the Constitution, to sanction such an idea. It is remarkable, too, that the words, "all cases of admiralty and maritime jurisdiction," as they now are in the Constitution, were in the first plan of government submitted to the convention, and that in all subsequent proceedings and reports they were never changed. There was but one opinion concerning the grant, and that was, the necessity to give a power to the United States to relieve them from the difficulties which had arisen from the exercise of admiralty jurisdiction by the States separately. That would not have been accomplished, if it had been intended to limit the power to the few cases of which the English courts took cognizance.

But, besides what we have already said, there is, in our opinion, an unanswerable constitutional objection to the limitation of "all cases of admiralty and maritime jurisdiction," as it is expressed in the Constitution, to the cases of admiralty and maritime jurisdiction in England when our Constitution was adopted. To do so would make the latter a part and parcel of the Constitution, — as much so as if those cases were written upon its face. It would take away from the courts of the United States the interpretation of what were cases of admiralty and maritime jurisdiction. It would be a denial to Congress of all legislation upon the subject. It would make, for all time to come, without an amendment of the Constitution, that unalterable by any legislation of ours, which can at any time be changed by the Parliament of England, — a limitation which never could have been meant, and cannot be inferred from the words, which extend the jurisdiction of the courts of the United States "to all cases of admiralty and maritime jurisdiction." One extension of the jurisdiction of the courts of the United States exists beyond the

limitation proposed, just as it existed in the colonies before they became independent States, which never has been a case of admiralty jurisdiction in England. We mean seizures under the laws of impost, navigation, or trade of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burden, within the respective districts of the courts, as well as upon the high seas. And this, we have shown in a previous part of this opinion, was decided in England as early as 1754, with the subsequent assent of the common-law judges, not to be a jurisdiction conferred upon the courts of admiralty in the colonies by statutes, but was a case in the colonies of admiralty jurisdiction. 2 Rob. 246. And so it is treated in the 9th section of the judiciary act of 1789. We cannot help thinking that section — a declaration by Congress contemporary with the adoption of the Constitution — very decisive against the limitation contended for by counsel in this case. Again, this court decided, as early as 1805 (2 Cranch, 406), in the case of The Sally, that the forfeiture of a vessel, under the act of Congress against the slave-trade, was a case of admiralty and maritime jurisdiction, and not of common law. And so it had done before, in the case of The La Vengeance, 3 Dall. 297. Again, Congress, by an act passed the 19th of June, 1813 (3 Stats. at Large, 2), declared that a vessel employed in a fishing voyage should be answerable for the fishermen's share of the fish caught, upon a contract made on land, in the same form and to the same effect as any other vessel is by law liable to be proceeded against for the wages of seamen or mariners in the merchant service. We shall cite no more, though we might do so, of legislative and judicial interpretations, to show that the admiralty jurisdiction of the courts of the United States is not confined to the cases of admiralty jurisdiction in England when the Constitution was adopted.

No such interpretation has been permitted in respect to any other power in the Constitution. In what aspect would it not be presented, if applied to the clause immediately preceding the grant of admiralty jurisdiction, "to all cases affecting ambassadors, other ministers and consuls"? Is that grant, too, to be interpreted by the jurisdiction which the English common-law courts exercise in cases affecting those functionaries, or to be regulated by what Lord Coke says, in 4 Inst. 152, to be their liabilities to punishment for offences? Try the interpretation proposed by its application to the grant to Congress "to establish uniform laws on the subject of bankruptcies throughout the United States." Would it not result in this, that all the power which Congress had under that grant was the bankrupt system of England as it existed there when the Constitution was adopted? Such a limitation upon that clause we deny. We think we may very safely say, such interpretations of any grant in the Constitution, or limitations upon those grants, according to any English legislation or judicial rule, cannot be permitted. At

most, they furnish only analogies to aid us in our constitutional expositions. We therefore conclude that the grant of admiralty power to the courts of the United States was not intended to be limited or to be interpreted by what were cases of admiralty jurisdiction in England when the Constitution was adopted.

We will now consider the proposition, that the test against admiralty jurisdiction in England and the United States is the competency of a court of common law to give a remedy in a given case in a trial by jury; or that in all cases, except in seamen's wages, where the courts of common law have a concurrent jurisdiction with the admiralty, and can try the cause and give redress, that alone takes away the admiralty jurisdiction. It has the authority of Lord Coke to sustain it. But it was the effort and the design of Lord Coke to make locality the boundary in cases of contract, as well as in tort, that is, to limit the jurisdiction in admiralty to contracts made on the sea, and to be executed on the sea; and to exclude its jurisdiction in all cases of marine contracts made on the land, though they related exclusively to marine services, principally to be executed on the sea. To that extent the admiralty courts were prohibited by the common-law judges from exercising jurisdiction, until the unreasonableness and inconvenience of the restriction forced them to relax it in the case of seamen's wages. Then it was that the common-law courts began to reflect upon what jurisdiction in admiralty rested, and upon the principles upon which it would attach. With the acknowledgment of all of them ever since, it was affirmed that the subject-matter, and not locality, determined the jurisdiction in cases of contract. Passing over intermediate decisions showing the manner and the reasons given for the relaxation in the one case, and the revival of the other, for which the admiralty always contended, we will cite the case of Menetone *v.* Gibbons, 3 Durn. & East, 269, 270. Lord Kenyon and Sir Francis Buller say, in that case, the question whether the admiralty has or has not jurisdiction, depends upon the subject-matter. We wish it to be remarked, however, that the manner of proceeding is another affair, with which we do not meddle now.

It was only upon the principle that the subject-matter in cases of contract determined the jurisdiction, that this court decided the cases of The Aurora, 1 Wheat. 96, The General Smith, 4 Wheat. 438, and The St. Jago de Cuba, 9 Wheat. 409.

If, then, in both classes of civil cases of which the instance court has jurisdiction, subject-matter in the one class, and locality in the other, ascertains it, neither a jury trial nor the concurrent jurisdiction of the common-law courts can be a test for jurisdiction in either class. Crimes as well those of which the admiralty has jurisdiction as those of which it has not, except in cases of impeachment, the Constitution declares shall be tried by a jury. But there is no provision, as the Constitution originally was, from which it can be inferred that civil causes in admiralty were to be tried by a jury, contrary to what the

framers of the Constitution knew was the mode of trial of issues of fact in the admiralty. We confess, then, we cannot see how they are to be embraced in the Seventh Amendment of the Constitution, providing that in suits at common law the trial by jury should be preserved. Cases under $20 are not so provided for. Does not the specification of amount show the class of suits meant in the amendment, if anything could show it more conclusively than the term "suits at common law"?

Suits at common law are a distinct class, so recognized in the Constitution, whether they be such as are concurrent with suits of which there is jurisdiction in admiralty, or not. Can concurrent jurisdiction imply exclusion of jurisdiction from tribunals, in cases admitted to have been cases in admiralty, without trial by jury? Again, suits at common law indicate a class, to distinguish them from suits in equity and admiralty; cases in admiralty, another class distinguishable from both, as well as to the system of laws determining them as the manner of trial, except that in equity issues of fact may be sent to the common-law courts for a trial by jury. Suppose, then, the Seventh Amendment of the Constitution had not been made, suits at the common law and in admiralty would have been tried in the accustomed way of each. But an amendment is made, inhibiting any law from being passed which shall take away the right of trial by jury in suits at common law. Now by what rule of interpretation or by what course of reasoning can such a provision be converted into an inhibition upon the mode of trial of suits which are not exclusively suits at common law, recognized, too, as such by the Constitution, for the trial of which Congress can establish courts which are not courts of common law, but courts of admiralty, without or with a jury, in its discretion, to try all issues of fact? Tried in either way, though, they are still cases in admiralty, and this power in Congress under the grant of admiralty jurisdiction, to try issues of fact in it by jury, being as well known when the Seventh Amendment was made as it is now, is conclusive that it was done with reference to suits at common law alone. There is no escape from this result, unless it is to be implied that the amendments were proposed by persons careless or ignorant of the difference in the mode of trial of suits at common law and in admiralty. But they were not so, for we find some of them in Congress, a few months after, preparing and concurring in the enactment of a law, that the "trials of issues in fact in the District Courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury."

In respect to the clause in the 9th section of the judiciary act, — "saving and reserving to suitors in all cases a common-law remedy where the common law is competent to give it," — we remark, its meaning is, that in cases of concurrent jurisdiction in admiralty and common law the jurisdiction in the latter is not taken away. The saving is for the benefit of suitors, plaintiff and defendant, when

the plaintiff in a case of concurrent jurisdiction chooses to sue in the common-law courts, so giving to himself and the defendant all the advantages which such tribunals can give to suitors in them. It certainly could not have been intended more for the benefit of the defendant than for the plaintiff, which would be the case if he could at his will force the plaintiff into a common-law court, and in that way release himself and his property from all the responsibilities which a court of admiralty can impose upon both, as a security and indemnity for injuries of which a libellant may complain, — securities which a court of common law cannot give.

Having disposed of the objections to the jurisdiction of the courts of admiralty of the United States, growing out of the supposed limitation of them to the cases allowed in England and from the test of jury trial, we proceed to consider that objection to jurisdiction in this case, because the collision took place *infra corpus comitatus*. We have admitted the validity of this objection in England, but, on the other hand, it cannot be denied that the restriction there to cases of collision happening *super altum mare*, or without the *fauces terræ*, was imposed by the statutes of Richard, contrary to what had been in England the ancient exercise of admiralty jurisdiction in ports and havens within the ebb and flow of the tide. We have seen no case, ancient or modern, from which it can correctly be inferred that such exercise of jurisdiction was prohibited by mere force of the common law. The most that can be said in favor of the statutes of Richard being affirmative of the common law, are the assertions of Lord Coke and the prohibitions of the common-law courts, subsequent to those statutes, and founded upon them, restricting the jurisdiction of the courts of admiralty to cases of collisions happening upon the high seas; contrary to what we have already said was its ancient jurisdiction in ports and havens in cases of torts and collision, and certainly in opposition to what was then, and still continues to be, the admiralty jurisdiction, in cases of collision, of every other country in Europe.

But giving to such prohibitions of the courts of common law the utmost authority claimed for them, — that is, that they are affirmances of the common law as interpretations of the statutes of Richard, — does it follow that they are to be taken as a rule in the admiralty courts of the United States in cases of collision? Must it not first be shown that the statutes of Richard were in force as such in America, and that the colonies considered and adopted that portion of the common law as applicable to their situation? Now, the statutes of Richard were never in force in any of the colonies, except as they were adopted by the legislation of some of them; and the common law only in its general principles, as they were applicable, with such portions of it as were adopted by common consent in any one of the colonies, or by statute. This being so, the rule in England for collision cases being neither obligatory here by the statutes of Rich-

ard nor by the common law, we feel ourselves permitted to look beyond them, to ascertain what the locality is which gives jurisdiction to the courts of the United States in cases of collision or tort, or what makes the subject-matter of any service or undertaking a marine contract. Are we bound to say, because it has been so said by the common-law courts in England, in reference to the point under discussion, that sea always means high sea, or the main sea? — that the waters flowing from it into havens, ports, and rivers are not "parcel of the sea"? — that the fact of the political division of a country into counties makes it otherwise, and takes away the jurisdiction in admiralty, in respect to all the marine means of commerce and the injuries which may be done to vessels in their passage from the sea to their ports of destination, and in their outward-bound voyages until they are upon the high sea? Is there not a surer foundation for a correct ascertainment of the locality of marine jurisdiction in the general admiralty law, than the designation of it by the common-law courts in England? Especially when the latter has in no instance been applied by England as a limitation upon the general admiralty law in any of her colonies; and when in all of them, until the act of 2 William IV. c. 51, was passed, the commissions gave to her vice-admirals jurisdiction throughout "all and every of the sea-shores, public streams, ports, fresh-water rivers, creeks, and arms, as well of the sea as of the rivers and coasts whatsoever." Besides, the use of the word "sea" to fix admiralty jurisdiction, and what part of it might be within the body of a county, have not been settled points among the common-law judges in England. Lord Hale differed from Lord Coke. The former, in defining what the sea is, says: "That it is either that which lies within the body of the county or without; that arm or branch of the sea which lies within the *fauces terræ* is, or at least may be, within the body of a county; that part which lies not within the body of a county is called the main sea." It is difficult to reconcile the differences of opinion and of definition given by the common-law courts in Lord Coke's day, and for fifty years afterwards, as to the meaning and legal application of the word "sea," so as to make a practical rule to govern the decisions of cases, or to determine what were cases of admiralty jurisdiction. But there is no difficulty in making such a rule, if the construction of it, by the admiralty courts, is adopted. In that construction, it meant not only high sea, but arms of the sea, waters flowing from it into ports and havens, and as high upon rivers as the tide ebbs and flows. We think in the controversy between the courts of admiralty and common law, upon the subject of jurisdiction, that the former have the best of the argument; that they maintain the jurisdiction for which they contend with more learning, more directness of purpose, and without any of that verbal subtilty which is found in the arguments of their adversaries. The conclusions of the admiralty, too, are more congenial with our geographical condition. We may very

reasonably infer they were thought so on that account by the framers of the Constitution when the judicial grant was expressed by them in the words, "all cases of admiralty and maritime jurisdiction." In those words it is given by Congress to the courts, leaving to them the interpretation of what were such cases; as well the subject-matter which makes them so, as the locality which gives admiralty jurisdiction in cases of tort and collision. The grant, too, has been interpreted by this court in some cases of the first class, which leaves no doubt upon our minds as to the locality which gives jurisdiction in the other. We do not consider it an open question, but *res adjudicata* by this court. In Peyroux *et al. v.* Howard and Varion, 7 Pet. 342, the objection to the jurisdiction was overruled, upon the ground that the subject-matter of the service rendered was maritime, and performed within the ebb and flow of the tide, at New Orleans. The court say, although the current in the Mississippi at New Orleans may be so strong as not to be turned backward by the tide, yet if the effect of the tide upon the current is so great as to occasion a regular rise and fall of the water, it may properly be said to be within the ebb and flow of the tide. The material consideration is, whether the service is essentially a maritime service, and to be performed on the sea or on tide water. In the case of The Steamboat Orleans *v.* Phœbus, 11 Pet. 175, the jurisdiction of the court was denied, on the ground that the boat was not employed or intended to be employed in navigation and trade on the sea, or on tide waters. In Steamboat Jefferson, Johnson claimant, 10 Wheat. 428, this court says: "In respect to contracts for the hire of seamen, the admiralty never pretended to claim, nor could it rightfully exercise, any jurisdiction, except in cases where the service was substantially performed, or to be performed, on the sea or upon waters within the ebb and flow of the tide. This is the prescribed limit, which it was not at liberty to transcend. We say, the service was to be substantially performed on the sea, or on tide water, because there is no doubt that the jurisdiction exists, although the commencement or termination of the voyage may happen to be at some place beyond the reach of the tide. The material consideration is, whether the service is essentially a maritime service. In the present case the voyage, not only in its commencement and termination, but in all its intermediate progress, was several hundred miles above the ebb and flow of the tide; and in no just sense can the wages be considered as earned in a maritime employment." In United States *v.* Coombs, 12 Pet. 72, where the question certified to the court directly involved what was the admiralty jurisdiction, under the grant of "all cases of admiralty and maritime jurisdiction," the language of this court is: "The question which arises is, What is the true nature and extent of the admiralty jurisdiction? Does it in cases where it is dependent upon locality, reach beyond high-water mark? Our opinion is, that in cases purely dependent upon the locality of the act done, it is limited to

the sea, and to tide waters, as far as the tide flows; and that it does not reach beyond high-water mark. It is the doctrine which has been repeatedly asserted by this court; and we see no reason to depart from it." Now, though none of the foregoing cases are cases of collision upon tide waters, but of contracts, services rendered essentially maritime, and in a case of wreck, — the point ruled in all of them, as to the jurisdiction of the court in tide water as far as the tide flows, was directly presented for decision in each of them. The locality of jurisdiction, then, having been ascertained, it must comprehend cases of collision happening in it. Our conclusion is, that the admiralty jurisdiction of the courts of the United States extends to tide waters, as far as the tide flows, though that may be *infra corpus comitatus;* that the case before us did happen where the tide ebbed and flowed *infra corpus comitatus,* and that the court has jurisdiction to decree upon the claim of the libellant for damages.

Before leaving this point, however, we desire to say that the 9th section of the judiciary act countenances all the conclusions which have been announced in this opinion. We look upon it as legislative action contemporary with the first being of the Constitution, expressive of the opinion of some of its framers, that the grant of admiralty jurisdiction was to be interpreted by the courts in accordance with the acknowledged principles of general admiralty law. In that section the distinction is made between high seas and waters which are navigable from the sea by vessels of ten or more tons burden. Admiralty jurisdiction is given upon both, and though the latter is confined by the language to cases of seizure, it is so with the understanding that such cases were strictly of themselves within the admiralty jurisdiction. It declares that issues of fact in civil causes of admiralty and maritime jurisdiction shall not be tried by a jury, and makes so clear an assignment to the courts of jurisdiction in criminal, admiralty, and common-law suits, that the last two cannot be so confounded as to place both of them under the Seventh Amendment of the Constitution, which is: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law."

[On consideration of the merits of the case the decree was affirmed. MR. JUSTICE CATON delivered a concurring opinion and MR. JUSTICE WOODBURY delivered a dissenting opinion.[1]]

[1] In the case of THE PROPELLER GENESEE CHIEF *v.* FITZHUGH, 12 How. 443 (1851), the question was raised whether the courts of the United States had jurisdiction in admiralty over a case of collision on Lake Ontario. MR. CHIEF JUSTICE TANEY, delivering the opinion of the court, used this language: —

"At the time the Constitution of the United States was adopted, and our courts of admiralty went into operation, the definition which had been adopted in England was equally proper here. In the old thirteen States the far greater part of the navigable waters are tide waters. And in the States which were at that period in any degree

commercial, and where courts of admiralty were called on to exercise their jurisdiction, every public river was tide water to the head of navigation. And, indeed, until the discovery of steamboats, there could be nothing like foreign commerce upon waters with an unchanging current resisting the upward passage. The courts of the United States, therefore, naturally adopted the English mode of defining a public river, and consequently the boundary of admiralty jurisdiction. It measured it by tide water. And that definition having found its way into our courts, became, after a time, the familiar mode of describing a public river, and was repeated, as cases occurred, without particularly examining whether it was as universally applicable in this country as it was in England. If there were no waters in the United States which are public, as contradistinguished from private, except where there is tide, then unquestionably here as well as in England tide water must be the limits of admiralty power. And as the English definition was adopted in our courts, and constantly used in judicial proceedings and forms of pleading, borrowed from England, the public character of the river was in process of time lost sight of, and the jurisdiction of the admiralty treated as if it was limited by the tide. The description of a public navigable river was substituted in the place of the thing intended to be described. And under the natural influence of precedents and established forms, a definition originally correct was adhered to and acted on, after it had ceased, from a change in circumstances, to be the true description of public waters. It was under the influence of these precedents and this usage that the case of The Thomas Jefferson, 10 Wheat. 428, was decided in this court, and the jurisdiction of the courts of admiralty of the United States declared to be limited to the ebb and flow of the tide. The Steamboat Orleans *v.* Phœbus, 11 Pet. 175, afterwards followed this case, merely as a point decided.

"It is the decision in the case of The Thomas Jefferson which mainly embarrasses the court in the present inquiry. We are sensible of the great weight to which it is entitled. But at the same time we are convinced that, if we follow it, we follow an erroneous decision into which the court fell, when the great importance of the question as it now presents itself could not be foreseen; and the subject did not therefore receive that deliberate consideration which at this time would have been given to it by the eminent men who presided here when that case was decided. For the decision was made in 1825, when the commerce on the rivers of the West and on the lakes was in its infancy, and of little importance, and but little regarded compared with that of the present day.

"Moreover, the nature of the questions concerning the extent of the admiralty jurisdiction, which have arisen in this court, were not calculated to call its attention particularly to the one we are now considering. The point in dispute has generally been, whether the jurisdiction was not as limited in the United States as it was in England at the time the Constitution was adopted. And if it was so limited, then it did not extend to contracts for maritime services when made on land; nor to torts and collisions on a tide-water river, if they took place in the body of a county. The attention of the court, therefore, in former cases, has been generally strongly attracted to that question, and never, we believe, until recently, drawn to the one we are now discussing, except in the case of The Thomas Jefferson, afterwards followed in The Steamboat Orleans *v.* Phœbus, as already mentioned. For, with this exception, the cases always arose on contracts for services on tide water, or were upon libels for collisions or other torts committed within the ebb and flow of the tide. There was, therefore, no necessity for inquiring whether the jurisdiction extended further in a public navigable water. And following the English definition, tide was assumed and spoken of as its limit, although that particular question was not before the court.

"The attention of the court was, however, drawn to this subject in the case of Waring *v.* Clarke, 5 How. 441, which was decided in 1848. The collision took place on the Mississippi River, near the bayou Goulah, and there was much doubt whether the tide flowed so high. There was a good deal of conflicting evidence. But the majority of the court thought there was sufficient proof of tide there, and consequently it was not necessary to consider whether the admiralty power extended higher.

"But that case showed the unreasonableness of giving a construction to the Constitution which would measure the jurisdiction of the admiralty by the tide. For if such be the construction, then a line drawn across the river Mississippi would limit the jurisdiction, although there were ports of entry above it, and the water as deep and navigable, and the commerce as rich, and exposed to the same hazards and incidents, as the commerce below. The distinction would be purely artificial and arbitrary as well as unjust, and would make the Constitution of the United States subject one part of a public river to the jurisdiction of a court of the United States, and deny it to another part equally public and but a few yards distant.

"It is evident that a definition that would at this day limit public rivers in this country to tide-water rivers, is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers in which there is no tide. And certainly there can be no reason for admiralty power over a public tide water, which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and the waters connecting them are undoubtedly public waters, and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States.

"We are the more convinced of the correctness of the rule we have now laid down, because it is obviously the one adopted by Congress in 1789, when the government went into operation. For the 9th section of the judiciary act of 1789, 1 Stats. at Large, 76, by which the first courts of admiralty were established, declares that the District Courts 'shall have exclusive cognizance of all civil causes of admiralty and maritime jurisdiction including all seizures under the laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas.'

"The jurisdiction is here made to depend upon the navigable character of the water, and not upon the ebb and flow of the tide. If the water was navigable, it was deemed to be public; and if public, was regarded as within the legitimate scope of the admiralty jurisdiction conferred by the Constitution."

In the case of The Steamboat Magnolia, 20 How. 296 (1857), which was a proceeding in admiralty on account of a collision occurring in the Alabama River in the county of Wilcox, in the State of Alabama, it was contended that the jurisdiction in admiralty did not attach, because, first, the collision was within the body of the county, and, second, because it was at a point on the river above tide water. Mr. Justice Grier, delivering the opinion of the court, used the following language:—

"1. The Alabama River flows through the State of Alabama. It is a great public river, navigable from the sea for many miles above the ebb and flow of the tide. Vessels licensed for the coasting trade, and those engaged in foreign commerce, pass on its waters to ports of entry within the State. It is not, like the Mississippi, a boundary between coterminous States. Neither is it, like the Penobscot (see Veazie *v.* Moore, 14 How. 568), made subservient to the internal trade of the State, by artificial means and dams constructed at its mouth, rendering it inaccessible to sea-going vessels. It differs from the Hudson, which rises in and passes through the State of New York, in the fact that it is navigable for ships and vessels of the largest class far above where its waters are affected by the tide.

"Before the adoption of the present Constitution, each State, in the exercise of its sovereign power, had its own Court of Admiralty, having jurisdiction over the harbors, creeks, inlets, and public navigable waters connected with the sea. This jurisdiction was exercised not only over rivers, creeks, and inlets, which were boundaries to or passed through other States, but also where they were wholly within the State. Such a distinction was unknown, nor (as it appears from the decision of this court in the case of Waring *v.* Clark, 5 How. 441) had these courts been driven from the exercise of jurisdiction over torts committed on navigable water within the body of a county, by the jealousy of the common-law courts.

"When, therefore, the exercise of admiralty and maritime jurisdiction over its public rivers, ports, and havens was surrendered by each State to the government of the United States, without an exception as to subjects or places, this court cannot

interpolate one into the Constitution, or introduce an arbitrary distinction which has no foundation in reason or precedent.

"The objection to jurisdiction stated in the plea, 'that the collision was within the county of Wilcox, in the State of Alabama,' can therefore have no greater force or effect from the fact alleged in the argument, that the Alabama River, so far as it is navigable, is wholly within the boundary of the State. It amounts only to a renewal of the old contest between courts of common law and courts of admiralty, as to their jurisdiction within the body of a county. This question has been finally adjudicated in this court, and the argument exhausted, in the case of Waring *v.* Clark. After an experience of ten years, we have not been called on by the bar to review its principles as founded in error, nor have we heard of any complaints by the people of wrongs suffered on account of its supposed infringement of the right of trial by jury. So far, therefore, as the solution of the question now before us is affected by the fact that the tort was committed within the body of a county, it must be considered as finally settled by the decision in that case.

"2. The second ground of objection to the jurisdiction of the court is founded on the fact that though the collision complained of occurred in a great navigable river, it was on a part of that river not affected by the flux and reflux of the tide, but 'far above it.'

"This objection, also, is one which has heretofore been considered and decided by this court, after full argument and much deliberation. In the case of The Genesee Chief, 12 How. 444, we have decided, that though in England the flux and reflux of the tide was a sound and reasonable test of a navigable river, because on that island tide water and navigable water were synonymous terms, yet that 'there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water on which commerce is carried on between different States or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason — and, indeed, contrary to it.' The case of the Thomas Jefferson, 10 Wheaton, and others, which had hastily adopted this arbitrary and (in this country) false test of navigable waters, were necessarily overruled.

"Since the decision of these cases, the several District Courts have taken jurisdiction of cases of collision on the great public navigable rivers. Some of these cases have been brought to this court by appeal, and in no instance has any objection been taken, either by the counsel or the court, to the jurisdiction, because the collision was within the body of a county, or above the tide. See Fritz *v.* Bull, 12 How. 466; Walsh *v.* Rogers, 13 How. 283; The Steamboat New World, 16 How. 469; Ure *v.* Kauffman, 19 How. 56; New York and Virginia S. B. Co. *v.* Calderwood, 19 How. 245.

"In our opinion, therefore, neither of the facts alleged in the answer, nor both of them taken together, will constitute a sufficient exception to the jurisdiction of the District Court.

"It is due, however, to the learned counsel who has presented the argument for respondent in this case, to say, that he has not attempted to impugn the decision of this court in the case of Waring *v.* Clark, nor to question the sufficiency of the reasons given in the case of The Genesee Chief for overruling the case of The Thomas Jefferson; but he contends that the case of The Genesee Chief decided that the act of Congress of 1845, 'extending the jurisdiction of the District Court to certain cases upon the lakes,' &c., was not only constitutional, but also that it conferred a new jurisdiction, which the court did not possess before; and consequently, as that act was confined to the lakes, and 'to vessels of twenty or more tons burden, licensed and employed in the business of commerce and navigation between ports and places in different States and Territories,' it cannot authorize the District Courts in assuming jurisdiction over waters and subjects not included in the act, and more especially where the navigable portion of the river is wholly within the boundary of a single State. It is contended also that the case of Fritz *v.* Bull, and those which follow it, sustaining the jurisdiction of the Court of Admiralty over torts on the Mississippi

River, cannot be reconciled with the points decided in the former case, as just stated, unless on the hypothesis that the act of 1845 be construed to include the Mississippi and other great rivers of the West; which it manifestly does not.

"But it never has been asserted by this court, either in the case of Fritz *v.* Bull or in any other case, that the admiralty jurisdiction exercised over the great navigable rivers of the West was claimed under the act of 1845, or by virtue of anything therein contained.

"The Constitution, in defining the powers of the courts of the United States, extends them to 'all cases of admiralty and maritime jurisdiction.' It defines how much of the judicial power shall be exercised by the Supreme Court only; and it was left to Congress to ordain and establish other courts, and to fix the boundary and extent of their respective jurisdictions. Congress might give any of these courts the whole or so much of the admiralty jurisdiction as it saw fit. It might extend their jurisdiction over all navigable waters, and all ships and vessels thereon, or over some navigable waters, and vessels of a certain description only. Consequently, as Congress had never before 1845 conferred admiralty jurisdiction over the Northern fresh-water lakes *not* 'navigable from the sea,' the District Courts could not assume it by virtue of this clause in the Constitution. An act of Congress was therefore necessary to confer this jurisdiction on those waters, and was completely within the constitutional powers of Congress; unless, by some unbending law of nature, fresh-water lakes and rivers are necessarily within the category of those that are not 'navigable,' and which, consequently, could not be subjected to 'admiralty jurisdiction,' any more than canals or railroads.

"When these States were colonies, and for a long time after the adoption of the Constitution of the United States, the shores of the great lakes of the North, above and beyond the ocean tides, were as yet almost uninhabited, except by savages. The necessities of commerce and the progress of steam navigation had not as yet called for the exercise of admiralty jurisdiction, except on the ocean border of the Atlantic States.

"The judiciary act of 1789, in defining the several powers of the courts established by it, gives to the District Courts of the United States 'exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction, including all seizures, &c., when they are made on waters which are *navigable from the sea* by vessels of ten or more tons burden, &c., as well as upon the high seas.'

"So long as the commerce of the country was centred chiefly on the Eastern Atlantic ports, where the fresh-water rivers were seldom navigable above tide water, no inconvenience arose from the adoption of the English insular test of 'navigable waters.' Hence it was followed by the courts without objection or inquiry.

"But this act does not confine admiralty jurisdiction to tide waters; and if the flux and reflux of the tide be abandoned, as an arbitrary and false test of a 'navigable river,' it required no further legislation of Congress to extend it to the Mississippi, Alabama, and other great rivers, 'navigable from the sea.' If the waters over which this jurisdiction is claimed be within this category, the act makes no distinction between them. It is not confined to rivers or waters which bound coterminous States, such as the Mississippi and Ohio, or to rivers passing through more than one State; nor does the act distinguish between them and rivers which rise in and pass through one State only, and are consequently '*infra corpus comitatus.*' The admiralty jurisdiction surrendered by the States to the Union had no such bounds as exercised by themselves, and is clogged with no such conditions in its surrender. The interpolation of such conditions by the courts would exclude many of the ports, harbors, creeks, and inlets most frequented by ships and commerce, but which are wholly included within the boundaries of a State or the body of a county."

In the case of THE ROBERT W. PARSONS, 191 U. S. 17, 24 Sup. Ct. Rep. 8 (1903), it was held that the Erie Canal is a navigable water within the scope of the admiralty jurisdiction of the United States.

## Ex parte BOYER.

109 United States, 629. 1884.

Mr. Justice Blatchford delivered the opinion of the court.

The owners of the canal-boat Brilliant and her cargo filed a libel in admiralty, in the District Court of the United States for the Northern District of Illinois, against the steam canal-boat B & C, in a case of collision. The libel alleges that the Brilliant is a vessel of more than 20 tons burden, and was employed, at the time of the collision, in the business of commerce and navigation between ports and places in different States and Territories of the United States, upon the lakes and navigable waters connecting said lakes; that the B & C is a vessel of more than 20 tons burden, and was, at the time of the collision, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between ports and places in different States and Teritories of the United States, upon the lakes and navigable waters of the United States; that, in August, 1882, the Brilliant, while bound from Morris, Illinois, to Chicago, Illinois, towed, with other canal-boats, by a steam canal-boat, and carrying the proper lights, and moving up the Illinois and Lake Michigan canal, about four miles south of the Chicago end of the canal, was, through the negligence of the B & C, struck and sunk, with her cargo, by the B & C, which was moving in the opposite direction, to the damage of the libellants $1,500. The owners and claimants of the B & C answered the libel, giving their version of the collision and alleging that it was wholly due to the faulty navigation of the Brilliant, and that it occurred on the Illinois and Michigan canal, at a place within the body of Cook County, in the State of Illinois. In November, 1883, the District Court made an interlocutory decree, finding that both parties were in fault, and decreeing that they should each pay one-half of the damages occasioned by the collision, to be thereafter ascertained and assessed by the court. The owners of the B & C have now presented to this court a petition, praying that a writ of prohibition may issue to the judge of the said District Court, prohibiting him from proceeding further in said suit. The ground alleged for the writ is the want of jurisdiction of the District Court, as a court of admiralty, over the waters where the collision occurred.

The Illinois and Michigan canal is an artificial navigable waterway connecting Lake Michigan and the Chicago River with the Illinois River and the Mississippi River. By the act of Congress of March 30th, 1822, ch. 14, 3 Stat. 659, the use of certain public lands of the United States was vested in the State of Illinois, forever, for a canal to connect the Illinois River with the southern bend of Lake

Michigan. The act declared "That the said canal, when completed, shall be and forever remain a public highway, for the use of the government of the United States, free from any toll or other charge whatever for any property of the United States, or persons in their service passing through the same." This declaration was repeated in the act of March 2d, 1827, ch. 51, 4 Stat. 234, granting more land to the State of Illinois to aid it in opening the canal. We take judicial notice of the historical fact that the canal, 96 miles long, was completed in 1848, and is 60 feet wide and 6 feet deep, and is capable of being navigated by vessels which a canal of such size will accommodate, and which can thus pass from the Mississippi River to Lake Michigan and carry on interstate commerce, although the canal is wholly within the territorial bounds of the State of Illinois. By the act of 1822, if the land granted thereby shall cease to be used for a canal suitable for navigation, the grant is to be void. It may properly be assumed that the District Court found to be true the allegations of the libel, before cited, as to the character and employment of the two vessels, those allegations being put in issue by the answer.

Within the principles laid down by this court in the cases of The Daniel Ball, 10 Wall. 557, and The Montello, 20 Wall. 430, which extended the salutary views of admiralty jurisdiction applied in The Genesee Chief, 12 How. 443, The Hine *v.* Trevor, 4 Wall. 555, and The Eagle, 8 Wall. 15, we have no doubt of the jurisdiction of the District Court in this case. Navigable water situated as this canal is, used for the purposes for which it is used, a highway for commerce between ports and places in different States, carried on by vessels such as those in question here, is public water of the United States, and within the legitimate scope of the admiralty jurisdiction conferred by the Constitution and statutes of the United States, even though the canal is wholly artificial, and is wholly within the body of a State, and subject to its ownership and control; and it makes no difference as to the jurisdiction of the District Court that one or the other of the vessels was at the time of the collision on a voyage from one place in the State of Illinois to another place in that State. The Belfast, 7 Wall. 624. Many of the embarrassments connected with the question of the extent of the jurisdiction of the admiralty disappeared when this court held, in the case of The Eagle, *ubi supra*, that all of the provisions of § 9 of the Judiciary Act of September 24th, 1789, ch. 20, 1 Stat. 77, which conferred admiralty and maritime jurisdiction upon the District Courts were inoperative, except the simple clause giving to them "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction." That decision is carried out by the enactment in § 563 of the Revised Statutes, subdivision 8, that the District Courts shall have jurisdiction of "all civil causes of admiralty and maritime jurisdiction," thus leaving out the inoperative provisions.

This case does not raise the question whether the admiralty jurisdiction of the District Court extends to waters wholly within the body of a State, and from which vessels cannot so pass as to carry on commerce between places in such State and places in another State or in a foreign country; and no opinion is intended to be intimated as to jurisdiction in such a case.

*The prayer of the petition is denied.*

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## MANCHESTER *v.* MASSACHUSETTS.

139 United States, 240. 1891.

[This action was prosecuted in the courts of Massachusetts to impose a fine for violation of a State statute regulating the method of fishing in Buzzard's Bay. The place where the acts charged were committed was in that part of the bay which was within a marine league from the Massachusetts shore at low-water mark. The Supreme Court of Massachusetts held the statute to be constitutional. 152 Mass. 230. The defendant sued out a writ of error.]

Mr. Justice Blatchford, after stating the facts, delivered the opinion of the court.

The principal contentions in this court on the part of the defendant are, that although Massachusetts, if an independent nation, could have enacted a statute like the one in question, which her own courts would have enforced and which other nations would have recognized, yet when she became one of the United States, she surrendered to the general government her right of control over the fisheries of the ocean, and transferred to it her rights over the waters adjacent to the coast and a part of the ocean; that, as by the Constitution, article 3, section 2, the judicial power of the United States is made to extend to all cases of admiralty and maritime jurisdiction, it is consistent only with that view that the rights in respect of fisheries should be regarded as national rights, and be enforced only in national courts; that the proprietary right of Massachusetts is confined to the body of the county; that the offence committed by the defendant was committed outside of that territory, in a locality where legislative control did not rest upon title in the soil and waters, but upon rights of sovereignty inseparably connected with national character, and which were intrusted exclusively to enforcement in admiralty courts; that the Commonwealth has no jurisdiction upon the ocean within three miles of the shore; that it could not, by the statute in question, oust the United States of jurisdiction; that fishing upon the high seas is in its nature an integral part of national commerce, and its control and regulation are necessarily vested in Congress and not in

the individual States; that Congress has manifested its purpose to take the regulation of coast fisheries, in the particulars covered by the Massachusetts statute in question, by the joint resolution of Congress of February 9, 1871 (16 Stat. 593), establishing the Fish Commission, and by Title 51 of the Revised Statutes, entitled "Regulation of Fisheries," and by the act of February 28, 1887, c. 288 (24 Stat. 434), relating to the mackerel fisheries, and by acts relating to bounties, privileges, and agreements, and by granting the license under which the defendant's steamer was fishing; and that, in view of the act of Congress authorizing such license, no statute of a State could defeat the right of the defendant to fish in the high seas under it.

By the Public Statutes of Massachusetts, Part 1, Title 1, c. 1, sections 1 and 2, it is enacted as follows: "Section 1. The territorial limits of this Commonwealth extend one marine league from its seashore at low-water mark. When an inlet or arm of the sea does not exceed two marine leagues in width between its headlands, a straight line from one headland to the other is equivalent to the shore line. Section 2. The sovereignty and jurisdiction of the Commonwealth extend to all places within the boundaries thereof; subject to the rights of concurrent jurisdiction granted over places ceded to the United States." The same Public Statutes, Part 1, Title 1, c. 22, section 1, contain the following provision: "The boundaries of counties bordering on the sea shall extend to the line of the Commonwealth, as defined in section one of chapter one." Section 11 of the same chapter is as follows: "The jurisdiction of counties separated by waters within the jurisdiction of the Commonwealth shall be concurrent upon and over such waters." By section 2 of chapter 196 of the acts of Massachusetts of 1881, it is provided as follows: "Section 2. The harbor and land commissioners shall locate and define the courses of the boundary lines between adjacent cities and towns bordering upon the sea and upon arms of the sea from high-water mark outward to the line of the Commonwealth, as defined in said section one [section one of chapter one of the General Statutes], so that the same shall conform as nearly as may be to the course of the boundary lines between said adjacent cities and towns on the land; and they shall file a report of their doings with suitable plans and exhibits, showing the boundary lines of any town by them located and defined, in the registry of deeds in which deeds of real estate situated in such town are required to be recorded, and also in the office of the secretary of the Commonwealth."

The report of the Superior Court states that the point where the defendant was using the seine was within that part of Buzzard's Bay which the harbor and land commissioners, acting under the provisions of the act of 1881, had, so far as they were capable of doing so, assigned to and made part of the town of Falmouth; that the distance between the headlands at the mouth of Buzzard's Bay "was more than one and less than two marine leagues;" that "the distance

across said bay, at the point where the acts of the defendant were done, is more than two marine leagues, and the opposite points are in different counties;" and that "the place where the defendant was so engaged with said seine was about, and not exceeding, one mile and a quarter from a point on the shore midway from the north line of" the town of Falmouth "to the south line" of that town.

Buzzard's Bay lies wholly within the territory of Massachusetts, having Barnstable County on the one side of it, and the counties of Bristol and Plymouth on the other. The defendant offered evidence that he was fishing for menhaden only with a purse seine; that "the bottom of the sea was not encroached upon or disturbed;" "that it was impossible to discern objects across from one headland to the other at the mouth of Buzzard's Bay;" and that the steamer was duly enrolled and licensed at the port of Newport, Rhode Island, under the laws of the United States, for carrying on the menhaden fishery.

By section 1 of chapter 196 of the laws of Massachusetts of 1881, it was enacted as follows: "Section 1. The boundaries of cities and towns bordering upon the sea shall extend to the line of the Commonwealth as the same is defined in section one of chapter one of the General Statutes." Section 1 of chapter 1 of the General Statutes contains the provisions before recited as now contained in the Public Statutes, chapter 1, section 1, and chapter 22, sections 1 and 11. Buzzard's Bay was undoubtedly within the territory described in the charter of the Colony of New Plymouth and the Province charter. By the definitive treaty of peace of September 3, 1783, between the United States and Great Britain (8 Stat. 81), His Britannic Majesty acknowledged the United States, of which Massachusetts Bay was one, to be free, sovereign, and independent States, and declared that he treated with them as such, and, for himself, his heirs and successors, relinquished all claims to the government, propriety, and territorial rights of the same and every part thereof. Therefore, if Massachusetts had continued to be an independent nation, her boundaries on the sea, as defined by her statutes, would unquestionably be acknowledged by all foreign nations, and her right to control the fisheries within those boundaries would be conceded. The limits of the right of a nation to control the fisheries on its seacoasts, and in the bays and arms of the sea within its territory, have never been placed at less than a marine league from the coast on the open sea; and bays wholly within the territory of a nation, the headlands of which are not more than two marine leagues, or six geographical miles, apart, have always been regarded as a part of the territory of the nation in which they lie. Proceedings of the Halifax Commission of 1877, under the Treaty of Washington of May 8, 1871, Executive Document No. 89, 45th Congress, 2d session, Ho. Reps., pp. 120, 121, 166.

On this branch of the subject the case of The Queen *v.* Keyn,

2 Exch. D. 63, is cited for the plaintiff in error, but there the question was not as to the extent of the dominion of Great Britain over the open sea adjacent to the coast, but only as to the extent of the existing jurisdiction of the Court of Admiralty in England over offences committed on the open sea; and the decision had nothing to do with the right of control over fisheries in the open sea or in bays or arms of the sea. In all the cases cited in the opinions delivered in The Queen *v.* Keyn, wherever the question of the right of fishery is referred to, it is conceded that the control of fisheries, to the extent of at least a marine league from the shore, belongs to the nation on whose coast the fisheries are prosecuted.

In Direct U. S. Cable Co. *v.* Anglo-American Tel. Co., 2 App. Cas. 394, it became necessary for the Privy Council to determine whether a point in Conception Bay, Newfoundland, more than three miles from the shore, was a part of the territory of Newfoundland, and within the jurisdiction of its legislature. The average width of the bay was about fifteen miles, and the distance between its headlands was rather more than twenty miles; but it was held that Conception Bay was a part of the territory of Newfoundland, because the British government had exercised exclusive dominion over it, with the acquiescence of other nations, and it had been declared by act of Parliament "to be part of the British territory, and part of the country made subject to the legislature of Newfoundland."

We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide-waters is a marine league from its coast; that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit; and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or free-moving fish, or fish attached to or embedded in the soil. The open sea within this limit is, of course, subject to the common right of navigation; and all governments, for the purpose of self-protection in time of war or for the prevention of frauds on its revenue, exercise an authority beyond this limit. Gould, Waters, Part 1, c. 1, §§ 1–17, and notes; Neill *v.* Duke of Devonshire, 8 App. Cas. 135; Gammell *v.* Commissioners, 3 Macq. 419; Mowat *v.* McFee, 5 Canada Sup. Ct. 66; The Queen *v.* Cubitt, 22 Q. B. D. 622; St. 46 & 47 Vict. c. 22.

It is further insisted by the plaintiff in error, that the control of the fisheries of Buzzard's Bay is, by the Constitution of the United States, exclusively with the United States, and that the statute of Massachusetts is repugnant to that Constitution and to the laws of the United States.

In Dunham *v.* Lamphere, 3 Gray, 268, it was held (Chief Justice Shaw delivering the opinion of the court), that in the distribution of powers between the general and State governments, the right to the fisheries and the power to regulate the fisheries on the coasts and in

the tide-waters of the State, were left, by the Constitution of the United States, with the States, subject only to such powers as Congress may justly exercise in the regulation of commerce, foreign and domestic. In the present case the court below was asked to reconsider that decision, mainly on the ground that the admiralty and maritime jurisdiction of the courts of the United States was not considered in the opinion, and that the recent decisions of the Supreme Court of the United States, on the power of Congress to regulate commerce, required that the decision be reconsidered; but the court stated that no recent decisions of this court had been cited which related to the regulation of fisheries within the territorial tide-waters of a State, and that the decisions of this court which related to that subject did not appear to be in conflict with the decision in Dunham *v.* Lamphere, and that it never had been decided anywhere that the regulation of the fisheries within the territorial limits of a State was a regulation of commerce.

It is further contended that by the Constitution of the United States the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and is exclusive; that this case is within such jurisdiction; and that, therefore, the courts of Massachusetts have no jurisdiction over it. In McCready *v.* Virginia, 94 U. S. 391, the question involved was, whether the State of Virginia could prohibit the citizens of other States from planting oysters in Ware River, a stream in Virginia where the tide ebbed and flowed, when her own citizens had that privilege. In that case it was said, that the principle had long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away; and that, in like manner, the States own the tide-waters themselves and the fish in them, so far as they are capable of ownership while running; and this court added, in its opinion: "The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship."

In Smith *v.* Maryland, 18 How. 71, 74, a vessel licensed to be employed in the coasting trade and fisheries was seized by the sheriff of Anne Arundel County in Maryland, while engaged in dredging for

oysters in Chesapeake Bay, in violation of a statute of Maryland enacted for the purpose of preventing the destruction of oysters in the waters of that State; and the questions presented were whether that statute was repugnant to the provisions of the Constitution of the United States which grant to Congress the power to regulate commerce, or to those which declare that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction, or to those which declare that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. Mr. Justice Curtis, in delivering the opinion of this court, said: "Whatever soil below low-water mark is the subject of exclusive property and ownership, belongs to the State on whose maritime border and within whose territory it lies, subject to any lawful grants of that soil by the State, or the sovereign power which governed its territory, before the Declaration of Independence. Pollard *v.* Hagan, 3 How. 212; Martin *v.* Waddell, 16 Pet. 367; Den *v.* Jersey Co., 15 How. 426. But this soil is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell-fish as floating fish." He also said that the statute of Maryland does "not touch the subject of the common liberty of taking oysters, save for the purpose of guarding it from injury, to whomsoever it may belong, and by whomsoever it may be enjoyed. Whether this liberty belongs exclusively to the citizens of the State of Maryland, or may lawfully be enjoyed in common by all citizens of the United States; whether this public use may be restricted by the State to its own citizens or a part of them, or by force of the Constitution of the United States must remain common to all citizens of the United States; whether the national government, by a treaty or act of Congress, can grant to foreigners the right to participate therein; or what, in general, are the limits of the trust upon which the State holds this soil, or its power to define and control that trust, are matters wholly without the scope of this case, and upon which we give no opinion." Upon the question of the admiralty jurisdiction, he said: "But we consider it to have been settled by this court, in United States *v.* Bevans, 3 Wheat. 336, that this clause in the Constitution did not affect the jurisdiction, nor the legislative power of the States, over so much of their territory as lies below high-water mark, save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or laws of the United States. As this law conflicts neither with the admiralty jurisdiction of any court of the United States conferred by Congress, nor with any law of Congress whatever, we are of opinion it is not repugnant to this clause of the Constitution." The court also held that the act was not repugnant to the clause of the Constitution which conferred upon Congress the power to regulate commerce, and that the enrolment and license of the vessel gave to the plaintiff in error no right

to violate the statute of Maryland. It is said in the opinion that "no question was made in the court below whether the place in question be within the territory of the State. The law is, in terms, limited to the waters of the State;" and the question, therefore, did not arise "whether a voyage of a vessel, licensed and enrolled for the coasting trade, had been interrupted by force of a law of a State while on the high seas, and out of the territorial jurisdiction of such State." The dimensions of Chesapeake Bay do not appear in the report of the case, but it has been said that this bay is "twelve miles across at the ocean." 1 Bish. Crim. Law, § 105. It is a bay considerably larger than Buzzard's Bay, and is not wholly within the State of Maryland, although at the point where Anne Arundel County bounds upon it it is wholly in that State. Haney *v.* Compton, 36 N. J. Law, 507; Corfield *v.* Coryell, 4 Wash. C. C. 371; Weston *v.* Sampson, 8 Cush. 347; Mahler *v.* Norwich & New York Transportation Co., 35 N. Y. 352; United States *v.* Smiley, 6 Sawyer, 640.

In the case of Stockton *v.* Baltimore & N. Y. R. Co., 32 Fed. Rep. 9, in the Circuit Court for the District of New Jersey, Mr. Justice Bradley shows clearly that there is no necessary conflict between the right of the State to regulate the fisheries in a given locality and the right of the United States to regulate commerce and navigation in the same locality. He says that, prior to the Revolution, the shore and lands under water of the navigable streams and waters of the Province of New Jersey belonged to the King of Great Britain, and, after the Conquest, those lands were held by the State, as they were by the King, in trust for the public uses of navigation and fishery. He adds: "It is true that to utilize the fisheries, especially those of shell-fish, it was necessary to parcel them out to particular operators. . . . The power to regulate commerce is the basis of the power to regulate navigation and navigable waters and streams. . . . So wide and extensive is the operation of this power that no State can place any obstruction in or upon any navigable waters against the will of Congress." The doctrine has always been firmly maintained by this court, that whenever a conflict arises between a State and the United States, as to the regulation of commerce or navigation, the authority of the latter is supreme and controlling.

Under the grant by the Constitution of judicial power to the United States in all cases of admiralty and maritime jurisdiction, and under the rightful legislation of Congress, personal suits on maritime contracts or for maritime torts can be maintained in the State courts; and the courts of the United States, merely by virtue of this grant of judicial power, and in the absence of legislation by Congress, have no criminal jurisdiction whatever. The criminal jurisdiction of the courts of the United States is wholly derived from the statutes of the United States. Butler *v.* Boston & Savannah Steamship Co., 130 U. S. 527; The Belfast, 7 Wall. 624; The Eagle, 8 Wall. 15; Leon *v.* Galceran, 11 Wall. 185; Steamboat Co. *v.* Chase, 16 Wall. 522;

s. c. 9 R. I. 419; Schoonmaker *v.* Gilmore, 102 U. S. 118; Insurance Co. *v.* Dunham, 11 Wall. 1; Jones *v.* United States, 137 U. S. 202, 211. In each of the cases of United States *v.* Bevans, 3 Wheat. 336, and of Commonwealth *v.* Peters, 12 Met. 387, the place where the offence was committed was in Boston Harbor; and it was held to be within the jurisdiction of Massachusetts, according to the meaning of the statutes of the United States which punished certain offences committed upon the high seas or in any river, haven, basin, or bay "out of the jurisdiction of any particular State." The test applied in Commonwealth *v.* Peters, which was decided in the year 1847, was that the place was within a bay "not so wide but that persons and objects on the one side can be discerned by the naked eye by persons on the opposite side," and was therefore within the body of a county. In United States *v.* Bevans, Marshall, C. J., said: "The jurisdiction of a State is coextensive with its territory; coextensive with its legislative power. The place described is unquestionably within the original territory of Massachusetts. It is then within the jurisdiction of Massachusetts, unless that jurisdiction has been ceded to the United States." If the place where the offence charged in this case was committed is within the general jurisdiction of Massachusetts, then, according to the principles declared in Smith *v.* Maryland, the statute in question is not repugnant to the Constitution and laws of the United States.

It is also contended that the jurisdiction of a State as between it and the United States must be confined to the body of counties; that counties must be defined according to the customary English usage at the time of the adoption of the Constitution of the United States; that by this usage counties were bounded by the margin of the open sea; and that, as to bays and arms of the sea extending into the land, only such or such parts were included in counties as were so narrow that objects could be distinctly seen from one shore to the other by the naked eye. But there is no indication that the customary law of England in regard to the boundaries of counties was adopted by the Constitution of the United States as a measure to determine the territorial jurisdiction of the States. The extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation; and, except so far as any right of control over this territory has been granted to the United States, this control remains with the State. In United States *v.* Bevans, Marshall, C. J., in the opinion, asks the following questions: "Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters on which those cases may arise?" "As the powers of the respective governments now stand, if two citizens of Massachusetts step into shallow water when the tide flows, and fight a duel, are they not within the jurisdiction, and punishable by the laws, of Massachusetts?" The statutes of the United States define and punish but few offences on the high seas,

and, unless other offences when committed in the sea near the coast can be punished by the States, there is a large immunity from punishment for acts which ought to be punishable as criminal. Within what are generally recognized as the territorial limits of States by the law of nations, a State can define its boundaries on the sea and the boundaries of its counties; and by this test the Commonwealth of Massachusetts can include Buzzard's Bay within the limits of its counties.

The statutes of Massachusetts, in regard to bays at least, make definite boundaries which, before the passage of the statutes, were somewhat indefinite; and Rhode Island and some other States have passed similar statutes defining their boundaries. Public Statutes of Rhode Island, 1882, c. 1, §§ 1, 2; c. 3, § 6; Gould, Waters, § 16 and note. The waters of Buzzard's Bay are, of course, navigable waters of the United States, and the jurisdiction of Massachusetts over them is necessarily limited, Commonwealth *v.* King, 150 Mass. 221; but there is no occasion to consider the power of the United States to regulate or control, either by treaty or legislation, the fisheries in these waters, because there are no existing treaties or acts of Congress which relate to the menhaden fisheries within such a bay. The rights granted to British subjects by the treaties of June 5, 1854, and May 8, 1871, to take fish upon the shores of the United States, had expired before the statute of Massachusetts (St. 1886, c. 192) was passed which the defendant is charged with violating. The Fish Commission was instituted "for the protection and preservation of the food fishes of the coast of the United States." Title 51 of the Revised Statutes relates solely to food fisheries, and so does the act of 1887. Nor are we referred to any decision which holds that the other acts of Congress alluded to apply to fisheries for menhaden, which is found as a fact in this case not to be a food fish, and to be only valuable for the purpose of bait and of manufacture into fish oil.

The statute of Massachusetts which the defendant is charged with violating is, in terms, confined to waters "within the jurisdiction of this Commonwealth;" and it was evidently passed for the preservation of the fish, and makes no discrimination in favor of citizens of Massachusetts and against citizens of other States. If there be a liberty of fishing for swimming fish in the navigable waters of the United States common to the inhabitants or the citizens of the United States, upon which we express no opinion, the statute may well be considered as an impartial and reasonable regulation of this liberty; and the subject is one which a State may well be permitted to regulate within its territory, in the absence of any regulation by the United States. The preservation of fish, even although they are not used as food for human beings, but as food for other fish which are so used, is for the common benefit; and we are of opinion that the statute is not repugnant to the Constitution and the laws of the United States.

It may be observed that section 4398 of the Revised Statutes (a re-enactment of section 4 of the joint resolution of February 9, 1871) provides as follows, in regard to the Commissioner of Fish and Fisheries: "The commissioner may take or cause to be taken at all times, in the waters of the seacoast of the United States, where the tide ebbs and flows, and also in the waters of the lakes, such fish or specimens thereof as may in his judgment, from time to time, be needful or proper for the conduct of his duties, any law, custom, or usage of any State to the contrary notwithstanding." This enactment may not improperly be construed as suggesting that, as against the law of a State, the Fish Commissioner might not otherwise have the right to take fish in places covered by the State law.

The pertinent observation may be made that, as Congress does not assert, by legislation, a right to control pilots in the bays, inlets, rivers, harbors, and ports of the United States, but leaves the regulation of that matter to the States, Cooley *v.* Board of Wardens, 12 How. 299; so, if it does not assert by affirmative legislation its right or will to assume the control of menhaden fisheries in such bays, the right to control such fisheries must remain with the State which contains such bays.

We do not consider the question whether or not Congress would have the right to control the menhaden fisheries which the statute of Massachusetts assumes to control; but we mean to say only that, as the right of control exists in the State in the absence of the affirmative action of Congress taking such control, the fact that Congress has never assumed the control of such fisheries is persuasive evidence that the right to control them still remains in the State.

*Judgment affirmed.*

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## THE MOSES TAYLOR.

4 Wallace, 411. 1866.

Mr. Justice Field delivered the opinion of the court.

This case arises upon certain provisions of a statute of California regulating proceedings in civil cases in the courts of that State. Laws of California of 1851, p. 51. The sixth chapter of the statute relates to actions against steamers, vessels, and boats, and provides that they shall be liable — 1st, for services rendered on board of them, at the request of, or on contract with, their respective owners, agents, masters, or consignees; 2d, for supplies furnished for their use upon the like request; 3d, for materials furnished in their construction, repair, or equipment; 4th, for their wharfage and anchorage within the State; 5th, for non-performance or malperformance of any contract for the transportation of persons or

property made by their respective owners, agents, masters, or consignees; 6th, for injuries committed by them to persons or property; and declares that these several causes of action shall constitute liens upon the steamers, vessels, and boats, for one year after the causes of action shall have accrued, and have priority in the order enumerated, and preference over all other demands. The statute also provides that actions for demands arising upon any of these grounds may be brought directly against the steamers, vessels, or boats by name; that process may be served on the master, mate, or any person having charge of the same; that they may be attached as security for the satisfaction of any judgment which may be recovered; and that if the attachment be not discharged, and a judgment be recovered by the plaintiff, they may be sold, with their tackle, apparel, and furniture, or such interest therein as may be necessary, and the proceeds applied to the payment of the judgment.

These provisions, with the exception of the clause designating the order of priority in the liens, and their preference over other demands, were enacted in 1851; that clause was inserted by an amendment in 1860.

In 1863, the steamship Moses Taylor, a vessel of over one thousand tons burden, was owned by Marshall O. Roberts, of the city of New York, and was employed by him in navigating the Pacific Ocean, and in carring passengers and freight between Panama and San Francisco. In October of that year the plaintiff in the court below, the defendant in error in this court, entered into a contract with Roberts, as owner of this steamship, by which, in consideration of one hundred dollars, Roberts agreed to transport him from New York to San Francisco as a steerage passenger, with reasonable despatch, and to furnish him with proper and necessary food, water, and berths, or other conveniences for lodging, on the voyage. The contract, as set forth in the complaint, does not in terms provide for transportation on any portion of the voyage by the Moses Taylor, but the case was tried upon the supposition that such was the fact, and we shall, therefore, treat the contract as if it specified a transportation by that steamer on the Pacific for the distance between Panama and San Francisco. For alleged breach of this contract the present action was brought under the statute mentioned, in a court of a justice of the peace held within the city of San Francisco. Courts held by justices of the peace were at that time by another statute invested with jurisdiction of these cases, where the amount claimed did not exceed two hundred dollars, except where the action was brought to recover seamen's wages, for a voyage performed, in whole or in part, without the waters of the State. Laws of California of 1853, p. 287, and of 1856, p. 133.

The agent for the Moses Taylor appeared to the action, and denied the jurisdiction of the court, insisting that the cause of action was one over which the courts of admiralty had exclusive jurisdic-

tion, and also traversed the several matters alleged as breaches of the contract.

The justice of the peace overruled the objection to his jurisdiction, and gave judgment for the amount claimed. On appeal to the County Court the action was tried *de novo* upon the same pleadings, but in all respects as if originally commenced in that court. The want of jurisdiction there, and the exclusive cognizance of such causes of action by the courts of admiralty, were again urged and were again overruled; and a similar judgment to that of the justice of the peace was rendered. The amount of the judgment was too small to enable the owner of the steamer to take the case by appeal to the Supreme Court of the State. That court has no appellate jurisdiction in cases where the demand in dispute, exclusive of interest, is under three hundred dollars, unless it involve the legality of a tax, impost, assessment, toll, or municipal fine. Constitution of the State, Art. VI. sec. 4, as amended in 1862. The decision of the County Court was the decision of the highest court in the State which had jurisdiction of the matter in controversy. From that court, therefore, the case is brought here by writ of error.

The case presented is clearly one within the admiralty and maritime jurisdiction of the Federal courts. The contract for the transportation of the plaintiff was a maritime contract. As stated in the complaint, it related exclusively to a service to be performed on the high seas, and pertained solely to the business of commerce and navigation. There is no distinction in principle between a contract of this character and a contract for the transportation of merchandise. The same liability attaches upon their execution both to the owner and the ship. The passage-money in the one case is equivalent to the freight-money in the other. A breach of either contract is the appropriate subject of admiralty jurisdiction.

The action against the steamer by name, authorized by the statute of California, is a proceeding in the nature and with the incidents of a suit in admiralty. The distinguishing and characteristic feature of such suit is that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly. It is this dominion of the suit in admiralty over the vessel or thing itself which gives to the title made under its decrees validity against all the world. By the common-law process, whether of mesne attachment or execution, property is reached only through a personal defendant, and then only to the extent of his title. Under a sale, therefore, upon a judgment in a common-law proceeding the title acquired can never be better than that possessed by the personal defendant. It is his title, and not the property itself, which is sold.

The statute of California, to the extent in which it authorizes actions *in rem* against vessels for causes of action cognizable in the admiralty, invests her courts with admiralty jurisdiction, and so the Supreme Court of that State has decided in several cases. In Averill

*v.* The Steamer Hartford, 2 Cal. 308, the court thus held, and added that "the proceedings in such actions must be governed by the principles and forms of admiralty courts, except where otherwise controlled or directed by the act."

This jurisdiction of the courts of California was asserted and is maintained upon the assumed ground that the cognizance by the Federal courts "of civil causes of admiralty and maritime jurisdiction" is not exclusive, as declared by the ninth section of the Judiciary Act of 1789.

The question presented for our determination is, therefore, whether such cognizance by the Federal courts is exclusive, and this depends either upon the constitutional grant of judicial power, or the validity of the provision of the ninth section of the act of Congress.

The Constitution declares that the judicial power of the United States "shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State or the citizens thereof and foreign States, citizens, or subjects." Article II. § 2.

How far this judicial power is exclusive, or may, by the legislation of Congress, be made exclusive, in the courts of the United States, has been much discussed, though there has been no direct adjudication upon the point. In the opinion delivered in the case of Martin *v.* Hunter's Lessee, 1 Wheat. 334, Mr. Justice Story comments upon the fact that there are two classes of cases enumerated in the clause cited, between which a distinction is drawn; that the first class includes cases arising under the Constitution, laws, and treaties of the United States, cases affecting ambassadors, other public ministers, and consuls, and cases of admiralty and maritime jurisdiction; and that, with reference to this class, the expression is that the judicial power shall extend to *all cases;* but that in the subsequent part of the clause, which embraces all the other cases of national cognizance, and forms the second class, the word "all" is dropped. And the learned justice appears to have thought the variation in the language the result of some determinate reason, and suggests that, with respect to the first class, it may have been the intention of the framers of the Constitution imperatively to extend the judicial power either in an original or appellate form to all cases, and, with respect to the latter class, to leave it to Congress to qualify the jurisdiction in such manner as public policy might dictate. Many cogent reasons and various considerations of public policy are stated

in support of this suggestion. The vital importance of all the cases enumerated in the first class to the national sovereignty is mentioned as a reason which may have warranted the distinction, and which would seem to require that they should be vested exclusively in the national courts, — a consideration which does not apply, at least with equal force, to cases of the second class. Without, however, placing implicit reliance upon the distinction stated, the learned justice observes, in conclusion, that it is manifest that the judicial power of the United States is in some cases unavoidably exclusive of all State authority, and that in all others it may be made so at the election of Congress. We agree fully with this conclusion. The legislation of Congress has proceeded upon this supposition. The Judiciary Act of 1789, in its distribution of jurisdiction to the several Federal courts, recognizes and is framed upon the theory that in all cases to which the judicial power of the United States extends, Congress may rightfully vest exclusive jurisdiction in the Federal courts. It declares that in some cases, from their commencement, such jurisdiction shall be exclusive; in other cases it determines at what stage of procedure such jurisdiction shall attach, and how long and how far concurrent jurisdiction of the State courts shall be permitted. Thus, cases in which the United States are parties, civil causes of admiralty and maritime jurisdiction, and cases against consuls and vice-consuls, except for certain offences, are placed, from their commencement, exclusively under the cognizance of the Federal courts.

On the other hand, some cases, in which an alien or a citizen of another State is made a party, may be brought either in a Federal or a State court, at the option of the plaintiff; and if brought in the State court may be prosecuted until the appearance of the defendant, and then, at his option, may be suffered to remain there, or may be transferred to the jurisdiction of the Federal courts.

Other cases, not included under these heads, but involving questions under the Constitution, laws, treaties, or authority of the United States, are only drawn within the control of the Federal courts upon appeal or writ of error, after final judgment.

By subsequent legislation of Congress, and particularly by the legislation of the last four years, many of the cases, which by the Judiciary Act could only come under the cognizance of the Federal courts after final judgment in the State courts, may be withdrawn from the concurrent jurisdiction of the latter courts at earlier stages, upon the application of the defendant.

The constitutionality of these provisions cannot be seriously questioned, and is of frequent recognition by both State and Federal courts.

The cognizance of civil causes of admiralty and maritime jurisdiction vested in the District Courts by the ninth section of the Judiciary Act may be supported upon like considerations. It has been made exclusive by Congress, and that is sufficient, even if we should

admit that in the absence of its legislation the State courts might have taken cognizance of these causes. But there are many weighty reasons why it was so declared. "The admiralty jurisdiction," says Mr. Justice Story, "naturally connects itself, on the one hand, with our diplomatic relations and the duties to foreign nations and their subjects; and, on the other hand, with the great interests of navigation and commerce, foreign and domestic. There is, then, a peculiar wisdom in giving to the national government a jurisdiction of this sort which cannot be yielded, except for the general good, and which multiplies the securities for the public peace abroad, and gives to commerce and navigation the most encouraging support at home." Commentaries, § 1672.

The case before us is not within the saving clause of the ninth section. That clause only saves to suitors "the right of a common-law remedy, where the common law is competent to give it." It is not a remedy in the common-law courts which is saved, but a common-law remedy. A proceeding *in rem*, as used in the admiralty courts, is not a remedy afforded by the common law: it is a proceeding under the civil law. When used in the common-law courts, it is given by statute.

It follows, from the views expressed, that the judgment of the County Court must be reversed, and the cause remanded, with directions to dismiss the action for want of jurisdiction.

*And it is so ordered.*

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## LEON *v.* GALCERAN.

11 Wallace, 185. 1870.

GALCERAN and *two other sailors* brought each a suit *in personam*, in one of the State courts of Louisiana, against Maristany, owner of the schooner Gallego, to recover mariners' wages, and had the schooner, which was subject to a lien and "privilege" in their favor, according to the laws of Louisiana, similar in some respects to the principles of the maritime law, sequestered by the sheriff of the parish. The writ of sequestration was levied upon the schooner, which was afterwards released upon Maristany's giving a forthcoming bond, with one Leon as surety, for the return of the vessel to the sheriff on the final judgment. Judgments having been rendered by default against Maristany, the owner, *in personam*, for the amounts claimed, with the mariner's lien and privilege upon the property sequestered, a writ of *fi. fa.* was issued and demand made without effect, of the defendant in execution, by the sheriff for the return of the property bonded. On the return of the sheriff that the property bonded could not be found, suits (the suits below) were brought in

the same court by the three sailors against Leon, to enforce *in personam* against him the obligation of the forthcoming bonds, and judgments were rendered *in personam* against Leon, the surety, in their favor, for the amounts fixed by the original judgments. From the judgments thus rendered in the court below (that having been the highest court in Louisiana where a decision in the suit could be had), Leon took these writs of error.

Mr. Justice Clifford delivered the opinion of the court.

Mariners in suits to recover their wages may proceed against the owner or master of the ship *in personam*, or they may proceed *in rem* against the ship or ship and freight, at their election.

Where the suit is *in rem* against the ship or ship and freight, the original jurisdiction of the controversy is exclusive in the District Courts, as provided by the ninth section of the Judiciary Act, but when the suit is *in personam* against the owner or master of the vessel, the mariner may proceed by libel in the District Court, or he may, at his election, proceed in an action at law either in the Circuit Court, if he and his debtor are citizens of different States, or in a State court as in other causes of action cognizable in the State and Federal courts exercising jurisdiction in common-law cases, as provided in the eleventh section of the Judiciary Act. 1 Stat. at Large, 78; The Belfast, 7 Wall. 642, 644.

He may have an action at law in the case supposed either in the Circuit Court or in a State court, because the common law, in such a case, is competent to give him a remedy, and wherever the common law is competent to give a party a remedy in such a case, the right to such a remedy is reserved and secured to suitors by the saving clause contained in the ninth section of the Judiciary Act.

Services, as mariners on board the schooner Gallego, were rendered by each of the appellees in these cases, and their claims for wages remaining unpaid, on the 8th of August, 1868, they severally brought suit *in personam* against Joseph Maristany, the sole owner of the schooner, to recover the respective amounts due to them as wages for their services as such mariners.

Claims of the kind create a lien upon the vessel under the laws of that State quite similar to the lien which arises in such cases under the maritime law. They accordingly applied to the court where the suits were returnable for writs of sequestration, and the same having been granted and placed in the hands of the sheriff for service, were levied upon the schooner as a security to respond to the judgments which the plaintiffs in the respective suits might recover against the owner of the vessel, as the defendant in the several suits.

Such a writ when duly issued and served in such a case has substantially the same effect in the practice of the courts of that State as an attachment on mesne process in jurisdictions where a creditor is authorized to employ such a process to create a lien upon the property of his debtor as a security to respond to his judgment. Neither

the writ of sequestration nor the process of attachment is a proceeding *in rem*, as known and practised in the admiralty, nor do they bear any analogy whatever to such a proceeding, as the suit in all such cases is a suit against the owner of the property and not against the property as an offending thing, as in case where the libel is *in rem* in the Admiralty Court to enforce a maritime lien in the property.

Due notice was given of the suit to the defendant in each case, and he appeared and made defence. Pending the suits the schooner, which had previously been seized by the sheriff under the writ or writs of sequestration, was released on motion of the defendant in those suits and was delivered into his possession, he, the defendant, giving a bond to the sheriff, with surety conditioned to the effect that he would not send the property out of the jurisdiction of the court nor make any improper use of it, and that he would faithfully present the same in case such should be the decree of the court, or that he would satisfy such judgment as should be recovered in the suit.

Judgment was recovered by the plaintiff in each case against the owner of the schooner, and executions were issued on the respective judgments, and the same were placed in the hands of the sheriff. Unable to find any property of the debtor or to make the money the sheriff returned the execution unsatisfied, and the property bonded was duly demanded both of the principal obligor and of the present plaintiff in error, who was the surety in each of the forthcoming bonds.

Given, as the bonds were, on the release of the schooner, they became the substitute for the property, and the obligors refusing to return the same or to satisfy the judgments, the respective judgment creditors instituted suits against the surety in those bonds. Service having been duly made, the defendant appeared and filed an exception to the jurisdiction of the court in each case, upon the ground that the cause of action was a matter exclusively cognizable in the District Courts of the United States; but the court overruled the exception and gave judgment for the plaintiff, whereupon the defendant sued out a writ of error in each case and removed the same into this court.

Briefly stated, the defence in the court below was that the action was founded on a bond given for the sale of the schooner seized under admiralty process in a proceeding *in rem*, over which the State court had no jurisdiction *ratione materiæ*, "and that the bond was taken *coram non judice* and is void." Enough has already been remarked to show that the theory of fact assumed in the exception is not correct, as the respective suits instituted by the mariners were suits *in personam* against the owner of the schooner and not suits *in rem* against the vessel, as assumed in the exception. Were the fact as supposed, the conclusion assumed would follow, as it is well-settled law that common-law remedies are not appropriate nor

competent to enforce a maritime lien by a proceeding *in rem*, and consequently that the jurisdiction conferred upon the District Courts, so far as respects that mode of proceeding, is exclusive.

State legislatures have no authority to create a maritime lien, nor can they confer any jurisdiction upon a State court to enforce such a lien by a suit or proceeding *in rem*, as practised in the admiralty courts, but whenever a maritime lien arises the injured party may pursue his remedy by a suit *in personam* or by a proceeding *in rem* at his election. Such a party may proceed *in rem* in the admiralty, and if he elects to pursue his remedy in that mode he cannot proceed in any other form, as the jurisdiction of the admiralty courts is exclusive in respect to that mode of proceeding; but such a party is not restricted to that mode of proceeding, even in the Admiralty Court, as he may waive his lien and proceed *in personam* against the owner or master of the vessel in the same jurisdiction, nor is he compelled to proceed in the admiralty at all, as he may resort to his common-law remedy in the State courts, or in the Circuit Court, if he and his debtor are citizens of different States.

Suitors, by virtue of the saving clause in the ninth section of the Judiciary Act conferring jurisdiction in admiralty upon the District Courts, have the right of a common-law remedy in all cases "where the common law is competent to give it," and the common law is as competent as the admiralty to give a remedy in all cases where the suit is *in personam* against the owner of the property.

Attempts have been made to show that the opinion of the court in the case of The Moses Taylor, 4 Wall. 411, and the opinion of the court in the case of The Hine *v.* Trevor, 4 Wall. 555, are inconsistent with the views here expressed, that the court in those cases do not admit that a party in such a case can ever have a remedy in a State court; but it is clear that every such suggestion is without foundation, as plainly appears from the brief explanations given in each case by the justice who delivered the opinion of the court. Express reference is made in each of those cases to the clause in the ninth section of the Judiciary Act which gives to suitors the right of a common-law remedy where the common law is competent to give it, and there is nothing in either opinion, when the language employed is properly applied to the subject-matter then under consideration, in the slightest degree inconsistent with the more elaborate exposition of the clause subsequently given in the opinion of the court in the case of The Belfast, 7 Wall. 642, in which all the members of the court as then constituted concurred. Those explanations are a part of the respective opinions, and they expressly recognize the right of the suitor to his common-law action and remedy by attachment as provided in the saving clause of the ninth section of the Judiciary Act.

Common-law remedies are not competent to enforce a maritime lien by a proceeding *in rem*, and consequently the original jurisdiction to enforce such a lien by that mode of proceeding is exclusive in

the District Courts, which is precisely what was decided in each of the three cases to which reference is made. Authority, therefore, does not exist in a State court to hear and determine a suit *in rem*, founded upon a maritime contract in which a maritime lien arises, for the purpose of enforcing such a lien. Jurisdiction in such cases is exclusively in the District Courts, subject to appeal as provided in the acts of Congress; but such a lien does not arise in a contract for materials and supplies furnished to a vessel in her home port, and in respect to such contracts it is competent for the States to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement. The Belfast, 7 Wall. 643; The St. Lawrence, 1 Black, 529.

Even where a maritime lien arises the injured party, if he sees fit, may waive his lien and proceed by a libel *in personam* in the admiralty, or he may elect not to go into admiralty at all, and may resort to his common-law remedy, as the plaintiffs in these cases did, in the subordinate court. They brought their suits in the State court against the owner of the schooner, as they had a right to do; and having obtained judgments against the defendant they might levy their executions upon any property belonging to him, not exempted from attachment and execution, which was situated in that jurisdiction.

Undoubtedly they might also resort to the bond given when the schooner was released, but they were not compelled to do so if the sheriff could find other property belonging to the debtor. By the return of the sheriff it appears that other property to satisfy the executions could not be found, and under those circumstances they brought these suits against the surety in those bonds, as they clearly had a right to do, whether the question is tested by the laws of Congress or the decisions of this court. *Judgment affirmed.*

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## d. *Controversies to which the United States or a State is a party.*

### 1. Suits by or against the United States.

### STANLEY *v.* SCHWALBY.

162 United States, 255. 1896.

This was an action of trespass to try title, brought in the District Court of Bexar County in the State of Texas, by Mary U. Schwalby, joining her husband, J. A. Schwalby, against David S. Stanley, William R. Gibson, Samuel T. Cushing, and Joseph C. Bailey, to recover a parcel of land in the city of San Antonio.

[Plaintiff claimed to be owner in fee of an undivided one-third part of the land, and to be entitled to possession of the whole. The individual defendants set up title to the land in the United States, and lawful possession thereof as officers and agents of the United States. At a subsequent stage of the case the United States District Attorney, by the direction of the Attorney-General, appeared for the United States. In the Texas Court of Civil Appeal, to which the case was eventually taken, a judgment was rendered for plaintiff against the individual defendants, for possession jointly with defendants and for damages, and against the United States for costs. The individual defendants and the United States then sued out a writ of error to this court, and reversal was asked by the United States upon the ground, among others, that the suit is against the United States and the property of the United States.]

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

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It is a fundamental principle of public law, affirmed by a long series of decisions of this court, and clearly recognized in its former opinion in this case, that no suit can be maintained against the United States or against their property, in any court, without express authority of Congress. 147 U. S. 512. See also Belknap *v.* Schild, 161 U. S. 10. The United States, by various acts of Congress, have consented to be sued in their own courts in certain classes of cases; but they have never consented to be sued in the courts of a State in any case. Neither the Secretary of War nor the Attorney-General, nor any subordinate of either, has been authorized to waive the exemption of the United States from judicial process, or to submit the United States or their property, to the jurisdiction of the court in a suit brought against their officers. Case *v.* Terrell, 11 Wall. 199, 202; Carr *v.* United States, 98 U. S. 433, 438; United States *v.* Lee, 106 U. S. 196, 205 [**720**]. The original instructions from the Attorney-General to the District Attorney, having now been filed and made part of the record, are shown to have been (as they were at the former stage of this case supposed by the Supreme Court of Texas and by this court to be) no more than "to appear and defend the interests of the United States involved" in this suit, that is to say, by appearing and taking part in the defence of the officers, and, if deemed advisable, by bringing the rights of the United States more distinctly to the notice of the court by formal suggestion in their name. 85 Texas, 354; 147 U. S. 513. As the present Chief Justice then remarked, repeating the words of Chief Justice Marshall in the leading case of The Exchange, 7 Cranch, 116, 147: "There seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States." The answer actually filed by the District Attorney, if treated as undertaking to make the United States a party defendant in the cause, and liable to have

judgment rendered against them, was in excess of the instructions of the Attorney-General, and of any power vested by law in him or in the District Attorney, and could not constitute a voluntary submission by the United States to the jurisdiction of the court.

The judgments of the courts of the State of Texas appear to have been largely based on United States *v.* Lee, above cited. In that case, an action of ejectment was brought in the Circuit Court of the United States against officers occupying in behalf of the United States lands used for a military station and for a national cemetery. The Attorney-General filed a suggestion of these facts, and insisted that the court had no jurisdiction. The plaintiffs produced sufficient evidence of their title and possession; and the United States proved no valid title. This court held that the officers were trespassers, and liable to the action; and therefore affirmed the judgment below, which, as appears by the record of that case, was simply a judgment that the plaintiffs recover against the individual defendants the possession of the lands described, and costs. And this court distinctly recognized that, if the title of the United States were good, it would be a justification of the defendants; that the United States could not be sued directly by original process as a defendant, except by virtue of an express act of Congress; and that the United States would not be bound or concluded by the judgment against their officers. 106 U. S. 199, 206, 222.

In an action of trespass to try title, under the laws of Texas, a judgment for the plaintiff is not restricted to the possession, but may be (as it was in this case) for title also. By section 4784 of the Revised Statutes of the State "the method of trying title to lands, tenements, or other real property shall be by action of trespass to try title." By section 4808, "upon the finding of the jury, or of the court where the case is tried by the court, in favor of the plaintiff for the whole or any part of the premises in controversy, the judgment shall be that the plaintiff recover of the defendant the title, or possession, or both, as the case may be, of such premises, describing them, and where he recovers the possession, that he have his writ of possession." By section 4811, the judgment "shall be conclusive, as to the title or right of possession established in such action, upon the party against whom it is recovered, and upon all persons claiming from, through, or under such party, by title arising after the commencement of such action." And it has been declared by the Supreme Court of the State that, by the statutory action of trespass to try title, "it was unquestionably the legislative intention to provide a simple and effectual remedy for determining every character of conflicting titles and disputed claims to land, irrespective of the fact of its actual occupancy or mere pedal possession;" and "a method of vesting and divesting the title to real estate, in all cases where the right or title, or interest and possession, of land may be involved," by partition or otherwise. Bridges *v.* Cundiff, 45 Texas,

440; Titus *v.* Johnson, 50 Texas, 224, 238; Hardy *v.* Beaty, 84 Texas, 562, 568.

In the case at bar, the United States, and their officers in their behalf, claimed title in the whole land. The plaintiffs claimed title in one undivided third part only. The final decision below was against the claim of the intervenor for another third part of the land. It was thus adjudged that the United States had the title in that part, if not also in the remaining third, to which no adverse claim was made. Such being the state of the case, the final judgment in favor of the plaintiffs for the third part awarded to them, and for possession of the whole jointly with the individual defendants, was directly against the United States and against their property, and not merely against their officers.

The judgment for costs against the United States was clearly erroneous, in any aspect of the case. United States *v.* Hooe, 3 Cranch, 73, 91, 92; United States *v.* Barker, 2 Wheat. 395; The Antelope, 12 Wheat. 546, 550; United States *v.* Ringgold, 8 Pet. 150, 163; United States *v.* Boyd, 5 How. 29, 51.

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## UNITED STATES *v.* TEXAS.

143 United States, 621. 1892.

Mr. Justice Harlan delivered the opinion of the court.

This suit was brought by original bill in this court pursuant to the act of May 2, 1890, providing a temporary government for the Territory of Oklahoma. The 25th section recites the existence of a controversy between the United States and the State of Texas as to the ownership of what is designated on the map of Texas as "Greer County," and provides that the act shall not be construed to apply to that county until the title to the same has been adjudicated and determined to be in the United States. In order that there might be a speedy and final judicial determination of this controversy the Attorney-General of the United States was authorized and directed to commence and prosecute on behalf of the United States a proper suit in equity in this court against the State of Texas, setting forth the title of the United States to the country lying between the North and South Forks of the Red River where the Indian Territory and the State of Texas adjoin, east of the one hundredth degree of longitude, and claimed by the State of Texas as within its boundary. 26 Stat. 81, 92, c. 182, § 25.

The State of Texas appeared and filed a demurrer, and, also, an answer denying the material allegations of the bill. The case is

now before the court only upon the demurrer, the principal grounds of which are: That the question presented is political in its nature and character, and not susceptible of judicial determination by this court in the exercise of its jurisdiction as conferred by the Constitution and laws of the United States; that it is not competent for the general government to bring suit against a State of the Union in one of its own courts, especially when the right to be maintained is mutually asserted by the United States and the State, namely, the ownership of certain designated territory; and that the plaintiff's cause of action, being a suit to recover real property, is legal and not equitable, and, consequently, so much of the act of May 2, 1890, as authorizes and directs the prosecution of a suit in equity to determine the rights of the United States to the territory in question is unconstitutional and void.

The necessity of the present suit as a measure of peace between the general government and the State of Texas, and the nature and importance of the questions raised by the demurrer, will appear from a statement of the principal facts disclosed by the bill and amended bill.

[The jurisdiction of Texas over the territory in question is discussed with reference to treaties with Spain and Mexico and negotiations with Texas touching its boundaries.]

The relief asked is a decree determining the true line between the United States and the State of Texas, and whether the land constituting what is called "Greer County" is within the boundary and jurisdiction of the United States or of the State of Texas. The government prays that its rights, as asserted in the bill, be established, and that it have such other relief as the nature of the case may require.

In support of the contention that the ascertainment of the boundary between a Territory of the United States and one of the States of the Union is political in its nature and character, and not susceptible of judicial determination, the defendant cites Foster *v.* Neilson, 2 Pet. 253, 307, 309; Cherokee Nation *v.* Georgia, 5 Pet. 1, 21; United States *v.* Arredondo, 6 Pet. 691, 711; and Garcia *v.* Lee, 12 Pet. 511, 517.

In Foster *v.* Neilson, which was an action to recover certain lands in Louisiana, the controlling question was as to whom the country between the Iberville and the Perdido rightfully belonged at the time the title of the plaintiff in that case was acquired. The United States, the court said, had perseveringly insisted that by the treaty of St. Ildefonso made October 1, 1800, Spain ceded the disputed territory as part of Louisiana to France, and that France by the treaty of Paris of 1803 ceded it to the United States. Spain insisted that the cession to France comprehended only the territory which at that time was denominated "Louisiana." After examining various articles of the treaty of St. Ildefonso, Chief Justice Marshall,

speaking for the court, said: "In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights, and if they cannot adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous." Again: "After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the government claims it, to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations is, as has been truly said, more a political than a legal question; and in its discussion the courts of every country must respect the pronounced will of the legislature."

In United States *v.* Arredondo the court, referring to Foster *v.* Neilson, said: "This court did not deem the settlement of boundaries a judicial but a political question — that it was not its duty to lead, but to follow the action of the other departments of the government." The same principles were recognized in Cherokee Nation *v.* Georgia and Garcia *v.* Lee.

These authorities do not control the present case. They relate to questions of boundary between independent nations, and have no application to a question of that character arising between the general government and one of the States composing the Union, or between two States of the Union. By the Articles of Confederation, Congress was made "the last resort on appeal in all disputes and differences" then subsisting or which thereafter might arise "between two or more States concerning boundary, jurisdiction, or any other cause whatever;" the authority so conferred to be exercised by a special tribunal to be organized in the mode prescribed in those Articles, and its judgment to be final and conclusive. Art 9. At the time of the adoption of the Constitution there existed, as this court said in Rhode Island *v.* Massachusetts, 12 Pet. 657, 723, 724, controversies between eleven States in respect to boundaries which had continued from the first settlement of the colonies. The

necessity for the creation of some tribunal for the settlement of these and like controversies that might arise under the new government to be formed must therefore have been perceived by the framers of the Constitution, and consequently among the controversies to which the judicial power of the United States was extended by the Constitution we find those between two or more States. And that a controversy between two or more States, in respect to boundary, is one to which, under the Constitution, such judicial power extends, is no longer an open question in this court. The cases of Rhode Island *v.* Massachusetts, 12 Pet. 657; New Jersey *v.* New York, 5 Pet. 284, 290; Missouri *v.* Iowa, 7 How. 660; Florida *v.* Georgia, 17 How. 478; Alabama *v.* Georgia, 23 How. 505; Virginia *v.* West Virginia, 11 Wall. 39, 55; Missouri *v.* Kentucky, 11 Wall. 395; Indiana *v.* Kentucky, 136 U. S. 479; and Nebraska *v.* Iowa, [143 U. S. 359], were all original suits, in this court, for the judicial determination of disputed boundary lines between States. In New Jersey *v.* New York, 5 Pet. 284, 290, Chief Justice Marshall said: "It has then been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in suits against a State, under the authority conferred by the Constitution and existing acts of Congress." And in Virginia *v.* West Virginia it was said by Mr. Justice Miller to be the established doctrine of this court "that it has jurisdiction of questions of boundary between two States of this Union, and that this jurisdiction is not defeated because in deciding that question it becomes necessary to examine into and construe compacts or agreements between those States, or because the decree which the court may render, affects the territorial limits of the political jurisdiction and sovereignty of the States which are parties to the proceeding." So, in Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 287, 288 [**692**]: "By the Constitution, therefore, this court has original jurisdiction of suits brought by a State against citizens of another State, as well as of controversies between two States. . . . As to 'controversies between two or more States.' The most numerous class of which this court has entertained jurisdiction is that of controversies between two States as to the boundaries of their territory, such as were determined before the Revolution by the King in Council, and under the Articles of Confederation (while there was no national judiciary) by committees or commissioners appointed by Congress."

In view of these cases, it cannot with propriety be said that a question of boundary between a Territory of the United States and one of the States of the Union is of a political nature, and not susceptible of judicial determination by a court having jurisdiction of such a controversy. The important question therefore, is, whether this court can, under the Constitution, take cognizance of an original suit brought by the United States against a State to determine the boundary between one of the Territories and such

State. Texas insists that no such jurisdiction has been conferred upon this court, and that the only mode in which the present dispute can be peaceably settled is by agreement, in some form, between the United States and that State. Of course, if no such agreement can be reached — and it seems that one is not probable — and if neither party will surrender its claim of authority and jurisdiction over the disputed territory, the result, according to the defendant's theory of the Constitution, must be that the United States, in order to effect a settlement of this vexed question of boundary, must bring its suit in one of the courts of Texas, — that State consenting that its courts may be open for the assertion of claims against it by the United States, — or that, in the end, there must be a trial of physical strength between the government of the Union and Texas. The first alternative is unwarranted both by the letter and spirit of the Constitution. Mr. Justice Story has well said: "It scarcely seems possible to raise a reasonable doubt as to the propriety of giving to the national courts jurisdiction of cases in which the United States are a party. It would be a perfect novelty in the history of national jurisprudence, as well as of public law, that a sovereign had no authority to sue in his own courts. Unless this power were given to the United States, the enforcement of all their rights, powers, contracts, and privileges in their sovereign capacity would be at the mercy of the States. They must be enforced, if at all, in the State tribunals." Story, Const. § 1674. The second alternative, above mentioned, has no place in our constitutional system, and cannot be contemplated by any patriot except with feelings of deep concern.

The cases in this court show that the framers of the Constitution did provide, by that instrument, for the judicial determination of all cases in law and equity between two or more States, including those involving questions of boundary. Did they omit to provide for the judicial determination of controversies arising between the United States and one or more of the States of the Union? This question is in effect answered by United States *v.* North Carolina, 136 U. S. 211. That was an action of debt brought in this court by the United States against the State of North Carolina, upon certain bonds issued by that State. The State appeared, the case was determined here upon its merits, and judgment was rendered for the State. It is true that no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against a State. As, however, the question of jurisdiction is vital in this case, and is distinctly raised, it is proper to consider it upon its merits.

The Constitution extends the judicial power of the United States "to all cases, in law and equity, arising under this Constitution, the

laws of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens or subjects.

"In all cases, affecting ambassadors or other public ministers and consuls and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make." Art. 3, § 2. "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." 11th Amendment.

It is apparent upon the face of these clauses that in one class of cases the jurisdiction of the courts of the Union depends "on the character of the cause, whoever may be the parties," and, in the other, on the character of the parties, whatever may be the subject of controversy. Cohens *v.* Virginia, 6 Wheat. 264, 378, 393. The present suit falls in each class, for it is, plainly, one arising under the Constitution, laws, and treaties of the United States, and, also, one in which the United States is a party. It is, therefore, one to which, by the express words of the Constitution, the judicial power of the United States extends. That a Circuit Court of the United States has not jurisdiction, under existing statutes, of a suit by the United States against a State, is clear; for by the Revised Statutes it is declared — as was done by the Judiciary Act of 1789 — that "the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction." Rev. Stat. § 687; Act of September 24, 1789, c. 20, § 13; 1 Stat. 80. Such exclusive jurisdiction was given to this court, because it best comported with the dignity of a State, that a case in which it was a party should be determined in the highest, rather than in a subordinate, judicial tribunal of the nation. Why then may not this court take original cognizance of the present suit involving a question of boundary between a Territory of the United States and a State?

The words, in the Constitution, "in all cases . . . in which a State shall be party, the Supreme Court shall have original jurisdiction," necessarily refer to all cases mentioned in the preceding

clause in which a State may be made, of right, a party defendant, or in which a State may, of right, be a party plaintiff. It is admitted that these words do not refer to suits brought against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States, even where such suits arise under the Constitution, laws, and treaties of the United States, because the judicial power of the United States does not extend to suits of individuals against States. Hans *v.* Louisiana, 134 U. S. 1, and authorities there cited; North Carolina *v.* Temple, 134 U. S. 22, 30. It is, however, said that the words last quoted refer only to suits in which a State is a party, and in which, also, the opposite party is another State of the Union or a foreign State. This cannot be correct, for it must be conceded that a State can bring an original suit in this court against a citizen of another State. Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 287. Besides, unless a State is exempt altogether from suit by the United States, we do not perceive upon what sound rule of construction suits brought by the United States in this court — especially if they be suits the correct decision of which depends upon the Constitution, laws, or treaties of the United States — are to be excluded from its original jurisdiction as defined in the Constitution. That instrument extends the judicial power of the United States "to *all* cases," in law and equity, arising under the Constitution, laws, and treaties of the United States, and to controversies in which the United States shall be a party, and confers upon this court original jurisdiction "in *all* cases" "in which a State shall be party," that is, in all cases mentioned in the preceding clause in which a State may, of right, be made a party defendant, as well as in all cases in which a State may, of right, institute a suit in a court of the United States. The present case is of the former class. We cannot assume that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more States of the Union, and between a State of the Union and foreign States, intended to exempt a State altogether from suit by the general government. They could not have overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the States, and that the permanence of the Union might be endangered if to some tribunal was not intrusted the power to determine them according to the recognized principles of law. And to what tribunal could a trust so momentous be more appropriately committed than to that which the people of the United States, in order to form a more perfect Union, establish justice and insure domestic tranquillity, have constituted with authority to speak for all the people and all the States, upon questions before it to which the judicial power of the nation extends? It would be difficult to suggest any reason why this court should have jurisdiction to determine questions of boundary between two

or more States, but not jurisdiction of controversies of like character between the United States and a State.

Mr. Justice Bradley, speaking for the court in Hans *v.* Louisiana, 134 U. S. 1, 15, referred to what had been said by certain statesmen at the time the Constitution was under submission to the people, and said: "The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. . . . The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution. And yet the case of Penn *v.* Lord Baltimore, 1 Ves. Sr. 444, shows that some of these unusual subjects of litigation were not unknown to the courts even in colonial times; and several cases of the same general character arose under the Articles of Confederation, and were brought before the tribunal provided for that purpose in those articles. 131 U. S., Append. 50. The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the States." That case, and others in this court relating to the suability of States, proceeded upon the broad ground that "it is inherent in the nature of sovereignty not to be amenable to the suit of an *individual* without its consent."

The question as to the suability of one government by another government rests upon wholly different grounds. Texas is not called to the bar of this court at the suit of an individual, but at the suit of the government established for the common and equal benefit of the people of all the States. The submission to judicial solution of controversies arising between these two governments, "each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other," McCulloch *v.* State of Maryland, 4 Wheat. 316, 400, 410, but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty. The States of the Union have agreed, in the Constitution, that the judicial power of the United States shall extend to *all* cases arising under the Constitution, laws, and treaties of the United States, without regard to the character of the parties (excluding, of course, suits against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States), and equally to controversies to which the United States shall be a party, without regard to the subject of such controversies, and that this court may exercise original jurisdiction in all such cases, "in which a State shall be party," without excluding those in which the United States may be the opposite party. The exercise, therefore, by this court, of such original jurisdiction in a

suit brought by one State against another to determine the boundary line between them, or in a suit brought by the United States against a State to determine the boundary between a Territory of the United States and that State, so far from infringing, in either case, upon the sovereignty, is with the consent of the State sued. Such consent was given by Texas when admitted into the Union upon an equal footing in all respects with the other States.

We are of opinion that this court has jurisdiction to determine the disputed question of boundary between the United States and Texas.

It is contended that, even if this court has jurisdiction, the dispute as to boundary must be determined in an action at law, and that the act of Congress requiring the institution of this suit in equity is unconstitutional and void as, in effect, declaring that legal rights shall be tried and determined as if they were equitable rights. This is not a new question in this court. It was suggested in argument, though not decided, in Fowler *v.* Lindsey, 3 Dall. 411, 413. Mr. Justice Washington, in that case, said: "I will not say that a State could sue at law for such an incorporeal right as that of sovereignty and jurisdiction; but even if a court of law would not afford a remedy, I can see no reason why a remedy should not be obtained in a court of equity. The State of New York might, I think, file a bill against the State of Connecticut, praying to be quieted as to the boundaries of the disputed territory; and this court, in order to effectuate justice, might appoint commissioners to ascertain and report those boundaries." But the question arose directly in Rhode Island *v.* Massachusetts, 12 Pet. 657, 734, which was a suit in equity in this court involving the boundary line between two States. The court said: "No court acts differently in deciding on boundary between States, than on lines between separate tracts of land; if there is uncertainty where the line is, if there is a confusion of boundaries by the nature of interlocking grants, the obliteration of marks, the intermixing of possession under different proprietors, the effects of accident, fraud, or time or other kindred causes, it is a case appropriate to equity. An issue at law is directed, a commission of boundary awarded; or, if the court are satisfied without either, they decree what and where the boundary of a farm, a manor, province, or State is and shall be." When that case was before the court at a subsequent term, Chief Justice Taney, after stating that the case was of peculiar character, involving a question of boundary between two sovereign States, litigated in a court of justice, and that there were no precedents as to forms and modes of proceedings, said: "The subject was however fully considered at January term, 1838, when a motion was made by the defendant to dismiss this bill. Upon that occasion the court determined to frame their proceedings according to those which had been adopted in the English courts, in cases most analogous to this, where the boundaries of great political bodies had been brought into question. And, acting upon this

principle, it was then decided that the rules and practice of the Court of Chancery should govern in conducting this suit to a final issue. The reasoning upon which that decision was founded is fully stated in the opinion then delivered; and upon re-examining the subject we are quite satisfied as to the correctness of this decision." 14 Pet. 210, 256. The above cases, New Jersey *v.* New York, Missouri *v.* Iowa, Florida *v.* Georgia, Alabama *v.* Georgia, Virginia *v.* West Virginia, Missouri *v.* Kentucky, Indiana *v.* Kentucky, and Nebraska *v.* Iowa, were all original suits in equity in this court, involving the boundary of States. In view of these precedents, it is scarcely necessary for the court to examine this question anew. Of course, if a suit in equity is appropriate for determining the boundary between two States, there can be no objection to the present suit as being in equity and not at law. It is not a suit simply to determine the legal title to, and the ownership of, the lands constituting Greer County. It involves the larger question of governmental authority and jurisdiction over that territory. The United States, in effect, asks the specific execution of the terms of the treaty of 1819, to the end that the disorder and public mischiefs that will ensue from a continuance of the present condition of things may be prevented. The agreement, embodied in the treaty, to fix the lines with precision, and to place landmarks to designate the limits of the two contracting nations, could not well be enforced by an action at law. The bill and amended bill make a case for the interposition of a court of equity. *Demurrer overruled.*

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE LAMAR, dissenting.

Mr. Justice Lamar and myself are unable to concur in the decision just announced.

This court has original jurisdiction of two classes of cases only, those affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party.

The judicial power extends to "controversies between two or more States;" "between a State and citizens of another State;" and "between a State or the citizens thereof, and foreign States, citizens or subjects." Our original jurisdiction, which depends solely upon the character of the parties, is confined to the cases enumerated, in which a State may be a party, and this is not one of them.

The judicial power also extends to controversies to which the United States shall be a party, but such controversies are not included in the grant of original jurisdiction. To the controversy here the United States is a party.

We are of opinion, therefore, that this case is not within the original jurisdiction of the court.

### 2. Controversies between States.

[See United States *v.* Texas, *supra*, p. 676, where the questions involved in suits between States relating to boundaries are sufficiently discussed, and South Dakota *v.* North Carolina, *infra*, p. 713, where the right of one State to sue another for an indebtedness is considered.]

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### 3. Controversies between a State and its own Citizens or Citizens of another State.

### AMES *v.* KANSAS.

111 United States, 449. 1884.

[Suits which were brought by the State of Kansas in her own courts to forfeit the charter of corporations of Kansas, on the ground that they had unlawfully consolidated with the Union Pacific Railroad Company under the act of Congress incorporating that company, were removed from the State courts to the Circuit Court of the United States, but were by the latter remanded to the State courts on the ground that they were not removable to the Federal courts. This decision of the United States Circuit Court was brought up for review by writ of error.]

Mr. Chief Justice Waite delivered the opinion of the court.

. . . . . .

That the records present cases arising under the laws of the United States we do not doubt. The Attorney-General was instructed by the legislature to institute proceedings against the Kansas Pacific Company "for an abandonment, relinquishment, and surrender of its powers and duties as a corporation to the consolidated company," and against the consolidated company, "for usurping, seizing, holding, possessing, and using the franchises and privileges, powers and immunities, of the Kansas Pacific Railway Company of Kansas." The whole purpose of the suits is to test the validity of the consolidation. The charge is of an unlawful and wrongful consolidation, and from the beginning to the end of the petition against the Kansas Pacific Company there is not an allegation of default that does not grow out of this single act. It is, indeed, alleged that the company has not, since the consolidation, made its proper reports, and has not appointed agents on whom process can be served, and has established its general offices out of the State; but no such averments are made as to the consolidated company, and it is apparent that these specifications are relied on only as incidents of the main ground of complaint.

That the validity of the consolidation, so far as the State is concerned, rests alone on the authority conferred for that purpose by the acts of Congress is not denied. If the acts of Congress confer the authority, the consolidation is valid; if not, it is invalid. Clearly, therefore, the cases arise under these acts of Congress, for, to use the language of Chief Justice Marshall in Osborn *v.* United States Bank, 9 Wheat. 825, an act of Congress "is the first ingredient in the case — is its origin — is that from which every other part arises." The right set up by the company, and by the directors as well, will be defeated by one construction of these acts and sustained by the opposite construction. When this is so, it has never been doubted that a case is presented which arises under the laws of the United States. Cohens *v.* Virginia, 6 Wheat. 264, 379; Gold Washing & Water Company *v.* Keyes, 96 U. S. 201; Railroad Company *v.* Mississippi, 102 U. S. 140.

We come now to the question whether a suit brought by a State in one of its own courts, against a corporation amenable to its own process, to try the right of the corporation to exercise corporate powers within the territorial limits of the State, can be removed to the Circuit Court of the United States, under the act of March 3d, 1875, c. 137, if the suit presents a case arising under the laws of the United States. The language of the act is "any suit of a civil nature . . . brought in any State court, . . . arising under the Constitution or laws of the United States," may be removed by either party. This is broad enough to cover such a case as this, unless the language is limited in its operation by some other law, or by the Constitution. The statute itself makes no exception of suits to which a State is a party.

[Sections 1 and 2 of article 3 of the Constitution are then quoted.]

Within six months after the inauguration of the government under the Constitution, the Judiciary Act of 1789, c. 20, 1 Stat. 73, was passed. The bill was drawn by Mr. Ellsworth, a prominent member of the convention that framed the Constitution, who took an active part in securing its adoption by the people, and who was afterwards Chief Justice of this court. Section 13 was as follows: "That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens; and except also between a State and citizens of other States or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive, jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or vice-consul shall be a party." The same act also, by section 9, gave the District Court jurisdiction exclusively of the courts of the several States of suits

against consuls or vice-consuls, except for certain offences, and by section 25 conferred upon the Supreme Court appellate jurisdiction for the review, under some circumstances, of the final judgments and decrees of the highest courts of the States in certain classes of suits arising under the Constitution and laws of the United States.

It thus appears that the first Congress, in which were many who had been leading and influential members of the convention, and who were familiar with the discussions that preceded the adoption of the Constitution by the States and with the objections urged against it, did not understand that the original jurisdiction vested in the Supreme Court was necessarily exclusive. That jurisdiction included all cases affecting ambassadors, other public ministers and consuls, and those in which a State was a party. The evident purpose was to open and keep open the highest court of the nation for the determination, in the first instance, of suits involving a State or a diplomatic or commercial representative of a foreign government. So much was due to the rank and dignity of those for whom the provision was made; but to compel a State to resort to this one tribunal for the redress of all its grievances, or to deprive an ambassador, public minister, or consul of the privilege of suing in any court he chose having jurisdiction of the parties and the subject-matter of his action, would be, in many cases, to convert what was intended as a favor into a burden.

Acting on this construction of the Constitution, Congress took care to provide that no suit should be brought *against* an ambassador or other public minister except in the Supreme Court, but that he might sue in any court he chose that was open to him. As to consuls, the commercial representatives of foreign governments, the jurisdiction of the Supreme Court was made concurrent with the District Courts, and suits of a civil nature could be brought against them in either tribunal. With respect to States, it was provided that the jurisdiction of the Supreme Court should be exclusive in all controversies of a civil nature where a State was a party, except between a State and its citizens, and except, also, between a State and citizens of other States or aliens, in which latter case its jurisdiction should be original but not exclusive. Thus the original jurisdiction of the Supreme Court was made concurrent with any other court to which jurisdiction might be given in suits between a State and citizens of other States or aliens. No jurisdiction was given in such cases to any other court of the United States, and the practical effect of the enactment was, therefore, to give the Supreme Court exclusive original jurisdiction in suits against a State begun without its consent, and to allow the State to sue for itself in any tribunal that could entertain its case. In this way States, ambassadors, and public ministers were protected from the compulsory process of any court other than one suited to their high positions, but were left free to seek redress for their own grievances in any court that had the requisite

jurisdiction. No limits were set on their powers of choice in this particular. This, of course, did not prevent a State from allowing itself to be sued in its own courts or elsewhere in any way or to any extent it chose.

The Judiciary Act was passed on the 24th of September, 1789, and at the April Term, 1793, of the Circuit Court of the United States for the District of Pennsylvania, an indictment was found against Ravara, a consul from Genoa, for a misdemeanor in sending anonymous and threatening letters to the British minister and others with a view to extort money. Objection was made to the jurisdiction for the reason that the exclusive cognizance of the case belonged to the Supreme Court on account of the official character of the defendant. The court was held by Wilson and Iredell, Justices of the Supreme Court, and Peters, the District Judge. Mr. Justice Wilson, who had been a member of the convention that framed the Constitution, was of opinion "that although the Constitution vests in the Supreme Court an original jurisdiction, in cases like the present, it does not preclude the legislature from exercising the power of vesting a concurrent jurisdiction in such inferior courts as might by law be established." Mr. Justice Iredell thought "that, for obvious reasons of public policy, the Constitution intended to vest an exclusive jurisdiction in the Supreme Court upon all questions relating to the public agents of foreign nations. Besides, the context of the judiciary article of the Constitution seems fairly to justify the interpretation that the word 'original' means exclusive jurisdiction." The district judge agreed in opinion with Mr. Justice Wilson, and consequently the jurisdiction was sustained. United States *v.* Ravara, 2 Dall. 297.

On the 18th of February, 1793, just before the indictment against Ravara in the Circuit Court, the case of Chisholm *v.* Georgia, 2 Dall. 419, was decided in the Supreme Court, holding that a State might be sued in that court by an individual citizen of another State. The judgment was concurred in by four of the five justices then composing the court, including Mr. Justice Wilson, but Mr. Justice Iredell dissented. This decision, as is well known, led to the adoption of the eleventh article of amendment to the Constitution, which provides that the judicial power of the United States shall not be construed to extend to a suit against a State by a citizen of another State, or by a citizen or subject of a foreign State.

It is a fact of some significance, in this connection, that although the decision in Chisholm's case attracted immediate attention and caused great irritation in some of the States, that in Ravara's case, which in effect held that the original jurisdiction of the Supreme Court was not necessarily exclusive, seems to have provoked no special comment. The efforts of the States before Congress assembled, and of Congress afterwards, were directed exclusively to obtaining "such amendments in the Constitution of the United States as will remove any clause or articles of the said Constitution which

can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any court of the United States." Resolve of the Legislature of Mass., Sept. 27th, 1793.

In Marbury *v.* Madison, 1 Cranch, 137, decided in 1803, it was held that Congress had no power to give the Supreme Court original jurisdiction in other cases than those described in the Constitution, and Chief Justice Marshall, in delivering the opinion, used language, on page 175, which might, perhaps, imply that such original jurisdiction as had been granted by the Constitution was exclusive; but this was not necessary to the determination of the cause, and the Chief Justice himself afterwards, in Cohens *v.* Virginia, 6 Wheat. 264, 399, referred to many expressions in that opinion as *dicta* in which (p. 401), "the court lays down a principle which is generally correct, in terms much broader than the decision, and not only much broader than the reasoning with which that decision is supported, but in some instances contradictory to its principle." In concluding that branch of the case he said, "The general expressions in the case of Marbury *v.* Madison must be understood with the limitations which are given to them in this opinion; limitations which, in no degree, affect the decision of that case or the tenor of its reasoning."

[Börs *v.* Preston, *supra*, p. 628, is referred to, and the same cases are discussed which are considered in that case.]

In view of the practical construction put on this provision of the Constitution by Congress at the very moment of the organization of the government, and of the significant fact that from 1789 until now no court of the United States has ever in its actual adjudications determined to the contrary, we are unable to say that it is not within the power of Congress to grant to the inferior courts of the United States jurisdiction in cases where the Supreme Court has been vested by the Constitution with original jurisdiction. It rests with the legislative department of the government to say to what extent such grants shall be made, and it may safely be assumed that nothing will ever be done to encroach upon the high privileges of those for whose protection the constitutional provision was intended. At any rate, we are unwilling to say that the power to make the grant does not exist.

It remains to consider whether jurisdiction has been given to the Circuit Courts of the United States in cases of this kind. As has been seen, it was not given by the Judiciary Act of 1789, and it did not exist in 1873, when the case of Wisconsin *v.* Duluth, 2 Dill. 406, was decided by Mr. Justice Miller on the circuit. But the act of March 3d, 1875, ch. 137, 18 Stat. 470, "to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from the State courts, and for other purposes," does, in express terms, provide "that the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the sev-

eral States, of all suits of a civil nature at common law, or in equity, . . . arising under the Constitution or laws of the United States;" and also that suits of the same nature begun in a State court may be removed to the Circuit Courts. And here it is to be remarked, that there is nothing in this which manifests an intention to interfere with the exclusive original jurisdiction of the Supreme Court as established by the act of 1789, and continued by section 687 of the Revised Statutes. The only question we have to consider is, therefore, whether suits cognizable in the courts of the United States on account of the nature of the controversy, and which need not be brought originally in the Supreme Court, may now be brought in or removed to the Circuit Courts without regard to the character of the parties. All admit that the act does give the requisite jurisdiction in suits where a State is not a party, so that the real question is, whether the Constitution exempts the States from its operation.

The same exemption was claimed in Cohens *v.* Virginia, *supra*, to show that the appellate jurisdiction of this court did not extend to the review of the judgments of a State court in a suit by a State against one of its citizens; but Chief Justice Marshall said, "The argument would have great force if urged to prove that this court could not establish the demand of a citizen upon his State, but is not entitled to the same force, when urged to prove that this court cannot inquire whether the Constitution or laws of the United States protect a citizen from a prosecution instituted against him by a State. . . . It may be true that the partiality of the State tribunals, in ordinary controversies between a State and its citizens, was not apprehended, and, therefore, the judicial power of the Union was not extended to such cases; but this was not the sole nor the greatest object for which this department was created. A more important, a much more interesting, object was the preservation of the Constitution and laws of the United States, so far as they can be preserved by judicial authority; and, therefore, the jurisdiction of the courts of the Union was expressly extended to all cases arising under the Constitution and those laws. If the Constitution or laws may be violated by proceedings instituted by a State against its own citizens, and if that violation may be such as essentially to affect the Constitution and the laws, such as to arrest the progress of government in its constitutional course, why should these cases be excepted from that provision which expressly extends the judicial power of the Union to *all* cases arising under the Constitution and laws? After bestowing on this subject the most attentive consideration, the court can perceive no reason, founded on the character of the parties, for introducing an exception which the Constitution has not made; and we think the judicial power, as originally given, extends to all cases arising under the Constitution or a law of the United States, whoever may be the parties," pp. 391–2.

The language of the act of 1875 in this particular is identical with

that of the Constitution, and the evident purpose of Congress was to make the original jurisdiction of the Circuit Courts coextensive with the judicial power in all cases where the Supreme Court had not already been invested by law with exclusive cognizance. To quote again from Chief Justice Marshall, in Cohens *v.* Virginia, p. 379, "the jurisdiction of the court, then, being extended by the letter of the Constitution to all cases arising under it, or under the laws of the United States, it follows, that those who would withdraw any case of this kind from that jurisdiction must sustain the exemption they claim, on the spirit and true meaning of the Constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed." This rule is equally applicable to the statute we have now under consideration. The judicial power of the United States extends to *all* cases arising under the Constitution and laws, and the act of 1875 commits the exercise of that power to the Circuit Courts. It rests, therefore, on those who would withdraw any case within that power from the cognizance of the Circuit Courts to sustain their exception "on the spirit and true meaning of the" act, "which spirit and true meaning must be so apparent as to overrule the words its framers have employed." To the extent that the words conflict with other laws giving exclusive original jurisdiction to the Supreme Court this has been done, but no more. The judicial power of the United States exists under the Constitution, and Congress alone is authorized to distribute that power among the courts.

We conclude, therefore, that the cases were removable under the act of March 3d, 1875.

*The order to remand in each case is reversed, and the Circuit Court directed to entertain the cases as properly removed from the State court and proceed accordingly.*

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## STATE OF WISCONSIN *v.* PELICAN INSURANCE COMPANY.

127 United States, 265. 1888.

Mr. Justice Gray, after stating the facts, delivered the opinion of the court.

This action is brought upon a judgment recovered by the State of Wisconsin in one of her own courts against the Pelican Insurance Company, a Louisiana corporation, for penalties imposed by a statute of Wisconsin for not making returns to the insurance commissioner of the State, as required by that statute. The leading question

argued at the bar is whether such an action is within the original jurisdiction of this court.

The ground on which the jurisdiction is invoked is not the nature of the cause, but the character of the parties, the plaintiff being one of the States of the Union, and the defendant a corporation of another of those States.

[Quotations are made from Const. art. 3, sect. 2, and the Eleventh Amendment.]

By the Constitution, therefore, this court has original jurisdiction of suits brought by a State against citizens of another State, as well as of controversies between two States; and it is well settled that a corporation created by a State is a citizen of the State, within the meaning of those provisions of the Constitution and statutes of the United States which define the jurisdiction of the Federal courts. Kansas Pacific R. R. Co. *v.* Atchison, &c. R. R. Co., 112 U. S. 414; Paul *v.* Virginia, 8 Wall. 168, 178; Pennsylvania *v.* Wheeling, &c. Bridge Co., 13 How. 518.

Yet, notwithstanding the comprehensive words of the Constitution, the mere fact that a State is the plaintiff is not a conclusive test that the controversy is one in which this court is authorized to grant relief against another State or her citizens; and a consideration of the cases in which it has heretofore had occasion to pass upon the construction and effect of these provisions of the Constitution may throw light on the determination of the question before us.

As to "controversies between two or more States." The most numerous class of which this court has entertained jurisdiction is that of controversies between two States as to the boundaries of their territory, such as were determined before the Revolution by the King in Council, and under the Articles of Confederation (while there was no national judiciary) by committees or commissioners appointed by Congress. 2 Story, Constitution, § 1681; New Jersey *v.* New York, 3 Pet. 461; 5 Pet. 284; 6 Pet. 323; Rhode Island *v.* Massachusetts, 12 Pet. 657, 724, 736, 754; 13 Pet. 23; 14 Pet. 210; 15 Pet. 233; 4 How. 591, 628; Missouri *v.* Iowa, 7 How. 660, and 10 How. 1; Florida *v.* Georgia, 17 How. 478; Alabama *v.* Georgia, 23 How. 505; Virginia *v.* West Virginia, 11 Wall. 39; Missouri *v.* Kentucky, 11 Wall. 395. See also Georgia *v.* Stanton, 6 Wall. 50, 72, 73.

The books of reports contain but few other cases in which the aid of this court has been invoked in controversies between two States.

In Fowler *v.* Lindsey and Fowler *v.* Miller, actions of ejectment were pending in the Circuit Court of the United States for the District of Connecticut between private citizens for lands over which the States of Connecticut and New York both claimed jurisdiction; and a writ of *certiorari* to remove those actions into this court as belonging exclusively to its jurisdiction was refused, because a State was neither nominally nor substantially a party to them. 3 Dall.

411. Upon a bill in equity afterwards filed in this court by the State of New York against the State of Connecticut to stay the actions of ejectment, this court refused the injunction prayed for, because the State of New York was not a party to them, and had no such interest in their decision as would support the bill. New York *v.* Connecticut, 4 Dall. 1, 3.

This court has declined to take jurisdiction of suits between States to compel the performance of obligations which, if the States had been independent nations, could not have been enforced judicially, but only through the political departments of their governments. Thus, in Kentucky *v.* Dennison, 24 How. 66, where the State of Kentucky, by her governor, applied to this court in the exercise of its original jurisdiction for a writ of mandamus to the governor of Ohio to compel him to surrender a fugitive from justice, this court, while holding that the case was a controversy between two States, decided that it had no authority to grant the writ. And in New Hampshire *v.* Louisiana and New York *v.* Louisiana, 108 U. S. 76, it was adjudged that a State, to whom, pursuant to her statutes, some of her citizens, holding bonds of another State, had assigned them in order to enable her to sue on and collect them for the benefit of the assignors, could not maintain a suit against the other State in this court. See also Cherokee Nation *v.* Georgia, 5 Pet. 1, 20, 28, 51, 75.

In South Carolina *v.* Georgia, 93 U. S. 4, this court, speaking by Mr. Justice Strong, left the question open, whether "a State, when suing in this court for the prevention of a nuisance in a navigable river of the United States, must not aver and show that it will sustain some special and peculiar injury therefrom, such as would enable a private person to maintain a similar action in another court;" and dismissed the bill, because no unlawful obstruction of navigation was proved. 93 U. S. 14.

As to "controversies between a State and citizens of another State." The object of vesting in the courts of the United States jurisdiction of suits by one State against the citizens of another was to enable such controversies to be determined by a national tribunal, and thereby to avoid the partiality, or suspicion of partiality, which might exist if the plaintiff State were compelled to resort to the courts of the State of which the defendants were citizens. Federalist, No. 80; Chief Justice Jay, in Chisholm *v.* Georgia, 2 Dall. 419, 475; 2 Story, Constitution, §§ 1638, 1682. The grant is of "judicial power," and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one State, of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other State at all.

By the law of England and of the United States, the penal laws of a country do not reach beyond its own territory, except when

extended by express treaty or statute to offences committed abroad by its own citizens; and they must be administered in its own courts only, and cannot be enforced by the courts of another country. Wheaton, Int. Law (8th ed.), §§ 113, 121.

Chief Justice Marshall stated the rule in the most condensed form, as an incontrovertible maxim, "The courts of no country execute the penal laws of another." The Antelope, 10 Wheat. 66, 123.

The only cases in which the courts of the United States have entertained suits by a foreign State have been to enforce demands of a strictly civil nature. The Sapphire, 11 Wall. 164; King of Spain *v.* Oliver, 2 Wash. C. C. 429, and Pet. C. C. 217, 276. The case of The Sapphire was a libel in admiralty, filed by the late Emperor of the French, and prosecuted by the French Republic after his deposition, to recover damages for a collision between an American ship and a French transport; and Mr. Justice Bradley, delivering the judgment of this court sustaining the suit, said: "A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts." 11 Wall. 167. The case of The King of Spain *v.* Oliver, although a suit to recover duties imposed by the revenue laws of Spain, was not founded upon those laws, or brought against a person who had broken them, but was in the nature of an action of assumpsit against other persons alleged to be bound by their own contract to pay the duties; and the action failed because no express or implied contract of the defendants was proved. Pet. C. C. 286, 290.

The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties. If this were not so, all that would be necessary to give ubiquitous effect to a penal law would be to put the claim for a penalty into the shape of a judgment. Wharton, Confl. of Laws, § 833; Westlake, Int. Law (1st ed.), § 388; Pigott, Judg. 209, 210.

Lord Kames, in his Principles of Equity, cited and approved by Mr. Justice Story in his Commentaries on the Conflict of Laws, after having said, "The proper place for punishment is where the crime is committed, and no society takes concern in any crime but what is hurtful to itself;" and recognizing the duty to enforce foreign judgments or decrees for civil debts or damages; adds, "But this includes not a decree decerning for a penalty; because no court reckons itself bound to punish, or to concur in punishing, any delict committed *extra territorium.*" 2 Kames, Equity (3d ed.), 326, 366; Story, Conflict of Laws, §§ 600, 622.

It is true that if the prosecution in the courts of one country for a violation of its municipal law is *in rem*, to obtain a forfeiture of

specific property within its jurisdiction, a judgment of forfeiture, rendered after due notice, and vesting the title of the property in the State, will be recognized and upheld in the courts of any other country in which the title to the property is brought in issue. Rose *v.* Himely, 4 Cranch, 241; Hudson *v.* Guestier, 4 Cranch, 293; Bradstreet *v.* Neptune Ins. Co., 3 Sumner, 600, 605; Pigott, Judg. 264. But the recognition of a vested title in property is quite different from the enforcement of a claim for a pecuniary penalty. In the one case, a complete title in the property has been acquired by the foreign judgment; in the other, further judicial action is sought to compel the payment by the defendant to the plaintiff of money in which the plaintiff has not as yet acquired any specific right.

The application of the rule to the courts of the several States and of the United States is not affected by the provisions of the Constitution and of the act of Congress, by which the judgments of the courts of any State are to have such faith and credit given to them in every court within the United States as they have by law or usage in the State in which they were rendered. Constitution, art. 4, sect. 1; Act of May 26, 1790, c. 11, 1 Stat. 122; Rev. Stat. § 905. Those provisions establish a rule of evidence, rather than of jurisdiction. While they make the record of a judgment, rendered after due notice in one State, conclusive evidence in the courts of another State, or of the United States, of the matter adjudged, they do not affect the jurisdiction, either of the court in which the judgment is rendered, or of the court in which it is offered in evidence. Judgments recovered in one State of the Union, when proved in the courts of another government, whether State or National, within the United States, differ from judgments recovered in a foreign country in no other respect than in not being re-examinable on their merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties. Hanley *v.* Donoghue, 116 U. S. 1, 4.

In the words of Mr. Justice Story, cited and approved by Mr. Justice Bradley speaking for this court, "The Constitution did not mean to confer any new power upon the States, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other States. And they enjoy not the right of priority or lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments." Story, Conflict of Laws, § 609; Thompson *v.* Whitman, 18 Wall. 457, 462, 463.

A judgment recovered in one State, as was said by Mr. Justice Wayne, delivering an earlier judgment of this court, "does not carry

with it, into another State, the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another State, it must be made a judgment there; and can only be executed in the latter as its laws may permit." McElmoyle *v.* Cohen, 13 Pet. 312, 325.

The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules, which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action (while it cannot go behind the judgment for the purpose of examining into the validity of the claim), from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it. Louisiana *v.* New Orleans, 109 U. S. 285, 288, 291; Louisiana *v.* St. Martin's Parish, 111 U. S. 716; Chase *v.* Curtis, 113 U. S. 452, 464; Boynton *v.* Ball, 121 U. S. 457, 466.

The only cases cited in the learned argument for the plaintiff, which tend to support the view that the courts of one State will maintain an action upon a judgment rendered in another State for a penalty incurred by a violation of her municipal laws, are Spencer *v.* Brockway, 1 Ohio, 259, in which an action was sustained in Ohio upon a judgment rendered in Connecticut upon a forfeited recognizance to answer for a violation of the penal laws of that State; Healy *v.* Root, 11 Pick. 389, in which an action was sustained in Massachusetts upon a judgment rendered in Pennsylvania in a *qui tam* action on a penal statute for usury; and Indiana *v.* Helmer, 21 Iowa, 370, in which an action by the State of Indiana was sustained in the courts of Iowa upon a judgment rendered in Indiana in a prosecution for the maintenance of a bastard child.

The decision in each of those cases appears to have been mainly based upon the supposed effect of the provisions of the Constitution and the act of Congress as to the faith and credit due to a judgment rendered in another State, which had not then received a full exposition from this court; and the other reasons assigned are not such as to induce us to accept those decisions as satisfactory precedents to guide our judgment in the present case.

From the first organization of the courts of the United States, nearly a century ago, it has always been assumed that the original jurisdiction of this court over controversies between a State and citizens of another State, or of a foreign country, does not extend to a suit by a State to recover penalties for a breach of her own municipal law. This is shown both by the nature of the cases in which relief has been granted or sought, and by acts of Congress and opinions of this court more directly bearing upon the question.

The earliest controversy in this court, so far as appears by the reports of its decisions, in which a State was the plaintiff, is that of Georgia *v.* Brailsford.

At February term, 1792, the State of Georgia filed in this court a bill in equity against Brailsford, Powell, and Hopton, British merchants and copartners, alleging that on August 4, 1782, during the Revolutionary War, the State of Georgia enacted a law, confiscating to the State all the property within it (including debts due to British merchants or others residing in Great Britain) of persons who had been declared guilty or convicted, in one or other of the United States, of offences which induced a like confiscation of their property within the States of which they were citizens; and also sequestering, and directing to be collected for the benefit of the State, all debts due to merchants or others residing in Great Britain, and confiscating to the State all the property belonging and debts due to subjects of Great Britain; and that by the operation of this law all the debts due from citizens of Georgia to persons who had been subjected to the penalties of confiscation in other States, and of British merchants and others residing in Great Britain, and of all other British subjects, were vested in the State of Georgia. The bill further alleged that one Spalding, a citizen of Georgia, was indebted to the defendants upon a bond, which by virtue of this law was transferred from the obligees and vested in the State; that Brailsford was a citizen of Great Britain, and resided there from 1767 till after the passing of the law, and that Hopton's and Powell's property (debts excepted) had been confiscated by acts of the legislature of South Carolina; that Brailsford, Hopton, and Powell had brought an action and recovered judgment against Spalding upon this bond, and had taken out execution against him, in the Circuit Court of the United States for the District of Georgia, and that the parties to that action had confederated together to defraud the State. Upon the filing of the bill, this court, without expressing any opinion upon the merits of the case, granted a temporary injunction to stay the money in the hands of the marshal of the Circuit Court, until the title to the bond as between the State of Georgia and the defendants could be tried. 2 Dall. 402.

At February term, 1793, upon a motion to dissolve that injunction, this court held that if the State of Georgia had the title in the debt (upon which no opinion was then expressed) she had an adequate remedy at law by action upon the bond; but, in order that the money might be kept for the party to whom it belonged, ordered the injunction to be continued till the next term, and, if Georgia should not then have instituted her action at common law, to be dissolved. 2 Dall. 415.

Such an action was brought accordingly, and was tried by a jury at the bar of this court at February term, 1794, when the court was of opinion, and so charged the jury, that the act of the State of Georgia did not vest the title in the debt in the State at the time of passing it, and that by the terms of the act the debt was not confiscated, but only sequestered, and the right of the obligees to recover

it revived on the treaty of peace; and the jury returned a verdict for the defendants. 3 Dall. 1.

It thus appears that in Georgia *v.* Brailsford the State did not sue for a penalty, or upon a judgment for a penalty, imposed by a municipal law, but to assert a title, claimed to have absolutely vested in her, not under an ordinary act of municipal legislation, but by an act of war, done by the State of Georgia as one of the United States (the Congress of which had not then been vested with the power of legislating to that effect) to assist them against their common enemy by confiscating the property of his subjects; and that the only point decided by this court, except as to matters of procedure, was that the title had not vested in the State of Georgia by the act in question.

In Pennsylvania *v.* Wheeling Bridge Co., 13 How. 518, this court, upon a bill in equity by the State of Pennsylvania against a corporation of Virginia, ordered the taking down or heightening of a bridge built by the defendant over the Ohio River, under a statute of Virginia, which the court held to have obstructed the navigation of the river, in violation of a compact of the State, confirmed by act of Congress. 13 How. 561. See also Willamette Bridge Co. *v.* Hatch, 125 U. S. 1, 15, 16. All the judges who took part in the decision in the Wheeling Bridge Case treated the suit as brought to protect the property of the State of Pennsylvania. Mr. Justice McLean, delivering the opinion of the majority of the court, said: "In the present case, the State of Pennsylvania claims nothing connected with the exercise of its sovereiguty. It asks from the court a protection of its property on the same ground and to the same extent as a corporation or individual may ask it. 13 How. 560, 561. So Chief Justice Taney, who dissented from the judgment, said: "She proceeds, and is entitled to proceed, only for the private and particular injury to her property which this public nuisance has occasioned. 13 How. 589. And Mr. Justice Daniel, the other dissenting judge, took the same view. 13 How. 596.

Mississippi *v.* Johnson, 4 Wall. 475, and Georgia *v.* Stanton, 6 Wall. 50, were cases of unsuccessful attempts by a State, by a bill in equity against the President or the Secretary of War, described as a citizen of another State, to induce this court to restrain the defendant from executing, in the course of his official duty, an act of Congress alleged to unconstitutionally affect the political rights of the State.

Texas *v.* White, 7 Wall. 700, Florida *v.* Anderson, 91 U. S. 667, and Alabama *v.* Burr, 115 U. S. 413, were suits to protect rights of property of the State. In Texas *v.* White, the bill was maintained to assert the title of the State of Texas to bonds belonging to her, and held by the defendants, citizens of other States, under an unlawful negotiation and transfer of the bonds. In Florida *v.* Anderson, the suit concerned the title to a railroad, and was main-

tained because the State of Florida was the holder of bonds secured by a statutory lien upon the road, and had an interest in an internal improvement fund pledged to secure the payment of those bonds. In Alabama *v.* Burr, the object of the suit was to indemnify the State of Alabama against a pecuniary liability which she alleged that she had incurred by reason of fraudulent acts of the defendants; and upon the facts of the case the bill was not maintained.

In Pennsylvania *v.* Quicksilver Co., 10 Wall. 553, an action brought in this court by the State of Pennsylvania was dismissed for want of jurisdiction, without considering the nature of the claim, because the record did not show that the defendant was a corporation created by another State.

In Wisconsin *v.* Duluth, 96 U. S. 379, the bill sought to restrain the improvement of a harbor on Lake Superior, according to a system adopted and put in execution under authority of Congress, and was for that reason dismissed, without considering the general question whether a State, in order to maintain a suit in this court, must have some proprietary interest that has been affected by the defendant.

The cases heretofore decided by this court in the exercise of its original jurisdiction have been referred to, not as fixing the outermost limit of that jurisdiction, but as showing that the jurisdiction has never been exercised, or even invoked, in any case resembling the case at bar.

The position that the jurisdiction conferred by the Constitution upon this court, in cases to which a State is a party, is limited to controversies of a civil nature, does not depend upon mere inference from the want of any precedent to the contrary, but has express legislative and judicial sanction.

By the Judiciary Act of September 24, 1789, c. 20, § 13, it was enacted that "the Supreme Court shall have exclusive jurisdiction of controversies of a civil nature, where a State is a party, except between a State and its citizens; and except also between a State and citizens of other States, or aliens, in which latter case it shall have original but not exclusive jurisdiction. 1 Stat. 80. That act, which has continued in force ever since, and is embodied in § 687 of the Revised Statutes, was passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning. Ames *v.* Kansas, 111 U. S. 449, 463, 464.

In Chisholm *v.* Georgia, 2 Dall. 419, decided at August term, 1793, in which the judges delivered their opinions *seriatim*, Mr. Justice Iredell, who spoke first, after citing the provisions of the original Constitution, and of § 13 of the Judiciary Act of 1789, said: "The Constitution is particular in expressing the parties who may be the objects of the jurisdiction in any of these cases, but, in respect to the subject-matter upon which such jurisdiction is to be

exercised, uses the word 'controversies' only. The act of Congress more particularly mentions civil controversies, a qualification of the general word in the Constitution, which I do not doubt every reasonable man will think was well warranted, for it cannot be presumed that the general word 'controversies' was intended to include any proceedings that relate to criminal cases, which, in all instances that respect the same government only, are uniformly considered of a local nature, and to be decided by its particular laws." 2 Dall. 431, 432. None of the other judges suggested any doubt upon this point; and Chief Justice Jay, in summing up the various classes of cases to which the judicial power of the United States extends, used "demands" (a word quite inappropriate to designate criminal or penal proceedings) as including everything that a State could prosecute against citizens of another State in a national court. 2 Dall. 475.

In Cohens *v.* Virginia, 6 Wheat. 264, decided at October term, 1821, Chief Justice Marshall, after showing that the Constitution had given jurisdiction to the courts of the Union in two classes of cases, in one of which, comprehending cases arising under the Constitution, laws, and treaties of the United States, the jurisdiction depended on the character of the cause, and in the other, comprehending controversies between two or more States, or between a State and citizens of another State, the jurisdiction depended entirely on the character of the parties, said: "The original jurisdiction of the Supreme Court, in cases where a State is a party, refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party, and an original suit might be instituted in any of the Federal courts; not to those cases in which an original suit might not be instituted in a Federal court. Of the last description is every case between a State and its citizens, and perhaps every case in which a State is enforcing its penal laws. In such cases, therefore, the Supreme Court cannot take original jurisdiction." 6 Wheat. 398, 399.

The soundness of the definition, given in the Judiciary Act of 1789, of the cases coming within the original jurisdiction of this court by reason of a State being a party, as "controversies of a civil nature," was again recognized by this court in Rhode Island *v.* Massachusetts, 12 Pet. 657, 722, 731, decided at January term, 1838.

The statute of Wisconsin, under which the State recovered in one of her own courts the judgment now and here sued on, was in the strictest sense a penal statute, imposing a penalty upon any insurance company of another State, doing business in the State of Wisconsin without having deposited with the proper officer of the State a full statement of its property and business during the previous year. Rev. Stat. Wis. § 1920. The cause of action was

not any private injury, but solely the offence committed against the State by violating her law. The prosecution was in the name of the State, and the whole penalty, when recovered, would accrue to the State, and be paid, one half into her treasury, and the other half to her insurance commissioner, who pays all expenses of prosecuting for and collecting such forfeitures. Stat. Wis. 1885, c. 395. The real nature of the case is not affected by the forms provided by the law of the State for the punishment of the offence. It is immaterial whether, by the law of Wisconsin, the prosecution must be by indictment or by action; or whether, under that law, a judgment there obtained for the penalty might be enforced by execution, by *scire facias*, or by a new suit. In whatever form the State pursues her right to punish the offence against her sovereignty, every step of the proceeding tends to one end, the compelling the offender to pay a pecuniary fine by way of punishment for the offence.

This court, therefore, cannot entertain an original action to compel the defendant to pay to the State of Wisconsin a sum of money in satisfaction of the judgment for that fine.

The original jurisdiction of this court is conferred by the Constitution, without limit of the amount in controversy, and Congress has never imposed (if indeed it could impose) any such limit. If this court has original jurisdiction of the present case, it must follow that any action upon a judgment obtained by a State in her own courts against a citizen of another State for the recovery of any sum of money, however small, by way of a fine for any offence, however petty, against her laws, could be brought in the first instance in the Supreme Court of the United States. That cannot have been the intention of the Convention in framing, or of the people in adopting, the Federal Constitution.

*Judgment for the defendant on the demurrer.*

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### 4. Suits against States.

## HANS *v.* LOUISIANA.

134 United States, 1. 1890.

Mr. Justice Bradley delivered the opinion of the court.

This was an action brought in the Circuit Court of the United States, in December, 1884, against the State of Louisiana by Hans, a citizen of that State, to recover the amount of certain coupons annexed to bonds of the State, issued under the provisions of an act of the legislature approved January 24, 1874. The bonds are known and designated as the "consolidated bonds of the State of

Louisiana," and the coupons sued on are for interest which accrued January 1, 1880.

[Plaintiff's claim is that the issuance of the bonds in question was sanctioned by an amendment to the State constitution proposed by the legislature at the time the bonds were authorized, in which it was declared that the State should not impair the obligation of the contract thereby created, and that the judicial power should be exercised when necessary to secure the levy, collection, and payment of taxes to satisfy such claim; but that subsequently this constitutional amendment was superseded by a new constitution, which remitted the taxes thus provided for and prohibited the payment of such bonds, whereby the obligations of the State were repudiated, and taxes already collected to be applied on the interest of such bonds were diverted to other purposes. Plaintiff avers that these provisions of the later constitution violated the obligations of the contract, and asked that the State be required to pay plaintiff the interest represented by the coupons in suit. The State appeared and excepted to the suit on the ground that the State could not be sued without its permission, and asked that the suit be dismissed. This exception was sustained and the case was brought to this court by plaintiff on writ of error.]

The question is presented, whether a State can be sued in a Circuit Court of the United States by one of its own citizens upon a suggestion that the case is one that arises under the Constitution or laws of the United States.

The ground taken is, that under the Constitution, as well as under the act of Congress passed to carry it into effect, a case is within the jurisdiction of the Federal courts, without regard to the character of the parties, if it arises under the Constitution or laws of the United States, or, which is the same thing, if it necessarily involves a question under said Constitution or laws. The language relied on is that clause of the 3d article of the Constitution which declares that "the judicial power of the United States shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;" and the corresponding clause of the act conferring jurisdiction upon the Circuit Court, which, as found in the act of March 3, 1875, c. 137, § 1, 18 Stat. 470, is as follows, to wit: "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority." It is said that these jurisdictional clauses make no exception arising from the character of the parties, and, therefore, that a State can claim no exemption from suit, if the case is really one arising under the Constitution, laws, or treaties of the United States. It is conceded that

where the jurisdiction depends alone upon the character of the parties, a controversy between a State and its own citizens is not embraced within it; but it is contended that though jurisdiction does not exist on that ground, it nevertheless does exist if the case itself is one which necessarily involves a Federal question; and with regard to ordinary parties this is undoubtedly true. The question now to be decided is, whether it is true where one of the parties is a State, and is sued as a defendant by one of its own citizens.

That a State cannot be sued by a citizen of another State, or of a foreign State, on the mere ground that the case is one arising under the Constitution or laws of the United States, is clearly established by the decisions of this court in several recent cases. Louisiana *v.* Jumel, 107 U. S. 711; Hagood *v.* Southern, 117 U. S. 52; *In re* Ayers, 123 U. S. 443. Those were cases arising under the Constitution of the United States, upon laws complained of as impairing the obligation of contracts, one of which was the constitutional amendment of Louisiana complained of in the present case. Relief was sought against State officers who professed to act in obedience to those laws. This court held that the suits were virtually against the States themselves and were consequently violative of the Eleventh Amendment of the Constitution and could not be maintained. It was not denied that they presented cases arising under the Constitution; but, notwithstanding that, they were held to be prohibited by the amendment referred to.

In the present case the plaintiff in error contends that he, being a citizen of Louisiana, is not embarrassed by the obstacle of the Eleventh Amendment, inasmuch as that amendment only prohibits suits against a State which are brought by the citizens of another State, or by citizens or subjects of a foreign State. It is true, the amendment does so read: and if there were no other reason or ground for abating his suit, it might be maintainable; and then we should have this anomalous result, that in cases arising under the Constitution or laws of the United States, a State may be sued in the Federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign State; and may be thus sued in the Federal courts, although not allowing itself to be sued in its own courts. If this is the necessary consequence of the language of the Constitution and the law, the result is no less startling and unexpected than was the original decision of this court, that under the language of the Constitution and of the judiciary act of 1789, a State was liable to be sued by a citizen of another State, or of a foreign country. That decision was made in the case of Chisholm *v.* Georgia, 2 Dall. 419, and created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures

of the States. This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court. It did not in terms prohibit suits by individuals against the States, but declared that the Constitution should not be construed to import any power to authorize the bringing of such suits. The language of the amendment is that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State." The Supreme Court had construed the judicial power as extending to such a suit, and its decision was thus overruled. The court itself so understood the effect of the amendment, for, after its adoption, Attorney-General Lee, in the case of Hollingsworth *v.* Virginia, 3 Dall. 378, submitted this question to the court, "whether the amendment did, or did not, supersede all suits depending, as well as prevent the institution of new suits, against any one of the United States, by citizens of another State." Tilghman and Rawle argued in the negative, contending that the jurisdiction of the court was unimpaired in relation to all suits instituted previously to the adoption of the amendment. But, on the succeeding day, the court delivered an unanimous opinion, "that the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case past or future, in which a State was sued by the citizens of another State, or by citizens or subjects of any foreign State."

This view of the force and meaning of the amendment is important. It shows that, on this question of the suability of the States by individuals, the highest authority of this country was in accord rather with the minority than with the majority of the court in the decision of the case of Chisholm *v.* Georgia; and this fact lends additional interest to the able opinion of Mr. Justice Iredell on that occasion. The other justices were more swayed by a close observance of the letter of the Constitution, without regard to former experience and usage; and because the letter said that the judicial power shall extend to controversies "between a State and citizens of another State;" and "between a State and foreign States, citizens or subjects," they felt constrained to see in this language a power to enable the individual citizens of one State, or of a foreign State, to sue another State of the Union in the Federal courts. Justice Iredell, on the contrary, contended that it was not the intention to create new and unheard-of remedies, by subjecting sovereign States to actions at the suit of indivduals (which he conclusively showed was never done before), but only, by proper legislation, to invest the Federal courts with jurisdiction to hear and determine controversies and cases, between the parties designated, that were properly susceptible of litigation in courts.

Looking back from our present standpoint at the decision in

Chisholm *v.* Georgia, we do not greatly wonder at the effect which it had upon the country. Any such power as that of authorizing the Federal judiciary to entertain suits by individuals against the States, had been expressly disclaimed, and even resented, by the great defenders of the Constitution whilst it was on its trial before the American people. As some of their utterances are directly pertinent to the question now under consideration, we deem it proper to quote them.

The eighty-first number of the Federalist, written by Hamilton, has the following profound remarks: —

"It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the Federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation: —

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State; and to ascribe to the Federal courts by mere implication, and in destruction of a preexisting right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable."

The obnoxious clause to which Hamilton's argument was directed, and which was the ground of the objections which he so forcibly met, was that which declared that "the judicial power shall extend to all . . . controversies between a State and citizens of another State, . . . and between a State and foreign States, citizens or subjects." It was argued by the opponents of the Constitution that this clause would authorize jurisdiction to be given to the Federal courts to entertain suits against a State brought by the citizens of another

State, or of a foreign State. Adhering to the mere letter, it might be so; and so, in fact, the Supreme Court held in Chisholm *v.* Georgia; but looking at the subject as Hamilton did, and as Mr. Justice Iredell did, in the light of history and experience and the established order of things, the views of the latter were clearly right, — as the people of the United States in their sovereign capacity subsequently decided.

But Hamilton was not alone in protesting against the construction put upon the Constitution by its opponents. In the Virginia convention the same objections were raised by George Mason and Patrick Henry, and were met by Madison and Marshall as follows. Madison said: "Its jurisdiction [the Federal jurisdiction] in controversies between a State and citizens of another State is much objected to, and perhaps without reason. It is not in the power of individuals to call any State into court. The only operation it can have is that, if a State should wish to bring a suit against a citizen, it must be brought before the Federal court. This will give satisfaction to individuals, as it will prevent citizens on whom a State may have a claim being dissatisfied with the State courts. . . . It appears to me that this [clause] can have no operation but this — to give a citizen a right to be heard in the Federal courts; and, if a State should condescend to be a party, this court may take cognizance of it." 3 Elliott's Debates, 533. Marshall, in answer to the same objection, said: "With respect to disputes between a State and the citizens of another State, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a State will be called at the bar of the Federal court. . . . It is not rational to suppose that the sovereign power should be dragged before a court. The intent is to enable States to recover claims of individuals residing in other States. . . . But, say they, there will be partiality in it if a State cannot be a defendant — if an individual cannot proceed to obtain judgment against a State, though he may be sued by a State. It is necessary to be so, and cannot be avoided. I see a difficulty in making a State defendant which does not prevent its being plaintiff." Ib. 555.

It seems to us that these views of those great advocates and defenders of the Constitution were most sensible and just; and they apply equally to the present case as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own State in the Federal courts, whilst the idea of suits by citizens of other States, or of foreign States, was indignantly repelled? Suppose that Congress, when proposing

the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.

The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution. And yet the case of Penn *v.* Lord Baltimore, 1 Ves. Sr. 444, shows that some of these unusual subjects of litigation were not unknown to the courts even in colonial times; and several cases of the same general character arose under the Articles of Confederation, and were brought before the tribunal provided for that purpose in those articles. 131 U. S. Append. 50. The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the States. Of other controversies between a State and another State or its citizens, which, on the settled principles of public law, are not subjects of judicial cognizance, this court has often declined to take jurisdiction. See Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 288, 289, and cases there cited.

The suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. It was fully shown by an exhaustive examination of the old law by Mr. Justice Iredell in his opinion in Chisholm *v.* Georgia; and it has been conceded in every case since, where the question has, in any way, been presented, even in the cases which have gone farthest in sustaining suits against the officers or agents of States. Osborn *v.* Bank of United States, 9 Wheat. 738; Davis *v.* Gray, 16 Wall. 203; Board of Liquidation *v.* McComb, 92 U. S. 531; United States *v.* Lee, 106 U. S. 196; Poindexter *v.* Greenhow, 109 U. S. 63; Virginia Coupon Cases, 114 U. S. 269. In all these cases the effort was to show, and the court held, that the suits were not against the State or the United States, but against the individuals; conceding that if they had been against either the State or the United States, they could not be maintained.

Mr. Webster stated the law with precision in his letter to Baring Brothers & Co., of October 16, 1839. Works, Vol. VI. 537. "The security for State loans," he said, "is the plighted faith of the State as a political community. It rests on the same basis as other contracts with established governments, the same basis, for example, as loans made by the United States under the authority

of Congress; that is to say, the good faith of the government making the loan, and its ability to fulfil its engagements."

In Briscoe *v.* Bank of Kentucky, 11 Pet. 257, 321, Mr. Justice McLean, delivering the opinion of the court, said: "What means of enforcing payment from the State had the holder of a bill of credit? It is said by the counsel for the plaintiffs, that he could have sued the State. But was a State liable to be sued? . . . No sovereign State is liable to be sued without her consent. Under the Articles of Confederation, a State could be sued only in cases of boundary. It is believed that there is no case where a suit has been brought, at any time, on bills of credit against a State; and it is certain that no suit could have been maintained on this ground prior to the Constitution."

"It may be accepted as a point of departure unquestioned," said Mr. Justice Miller, in Cunningham *v.* Macon & Brunswick R. R. Co., 109 U. S. 446, 451, "that neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution."

Undoubtedly a State may be sued by its own consent, as was the case in Curran *v.* Arkansas, 15 How. 304, 309, and in Clark *v.* Barnard, 108 U. S. 436, 447. The suit in the former case was prosecuted by virtue of a State law which the legislature passed in conformity to the constitution of that State. But this court decided, in Beers *v.* Arkansas, 20 How. 527, that the State could repeal that law at any time; that it was not a contract within the terms of the Constitution prohibiting the passage of State laws impairing the obligation of a contract. In that case the law allowing the State to be sued was modified pending certain suits against the State on its bonds, so as to require the bonds to be filed in court, which was objected to as an unconstitutional change of the law. Chief Justice Taney, delivering the opinion of the court, said: "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it. . . . The prior law was not a contract. It was an ordinary act of legislation, prescribing the conditions upon which the State consented to waive the privilege of sovereignty. It contained no stipulation that these regulations should not be modified

afterwards if, upon experience, it was found that further provisions were necessary to protect the public interest; and no such contract can be implied from the law, nor can this court inquire whether the law operated hardly or unjustly upon the parties whose suits were then pending. That was a question for the consideration of the legislature. They might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the State, if they had thought proper to do so, or prescribe new conditions upon which the suits might still be allowed to proceed. In exercising this power the State violated no contract with the parties." The same doctrine was held in Railroad Company *v.* Tennessee, 101 U. S. 337, 339; Railroad Company *v.* Alabama, 101 U. S. 832; and *In re* Ayers, 123 U. S. 443, 505.

But besides the presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution — anomalous and unheard-of when the Constitution was adopted — an additional reason why the jurisdiction claimed for the Circuit Court does not exist, is the language of the act of Congress by which its jurisdiction is conferred. The words are these: "The Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States, or treaties," &c., "concurrent with the courts of the several States." Does not this qualification show that Congress, in legislating to carry the Constitution into effect, did not intend to invest its courts with any new and strange jurisdictions? The State courts have no power to entertain suits by individuals against a State without its consent. Then how does the Circuit Court, having only concurrent jurisdiction, acquire any such power? It is true that the same qualification existed in the judiciary act of 1789, which was before the court in Chisholm *v.* Georgia, and the majority of the court did not think that it was sufficient to limit the jurisdiction of the Circuit Court. Justice Iredell thought differently. In view of the manner in which that decision was received by the country, the adoption of the Eleventh Amendment, the light of history and the reason of the thing, we think we are at liberty to prefer Justice Iredell's views in this regard.

Some reliance is placed by the plaintiff upon the observations of Chief Justice Marshall, in Cohens *v.* Virginia, 6 Wheat. 264, 410. The Chief Justice was there considering the power of review exercisable by this court over the judgments of a State court, wherein it might be necessary to make the State itself a defendant in error. He showed that this power was absolutely necessary in order to enable the judiciary of the United States to take cognizance of all cases arising under the Constitution and laws of the United States. He also showed that making a State a defendant in error was entirely

different from suing a State in an original action in prosecution of a demand against it, and was not within the meaning of the Eleventh Amendment; that the prosecution of a writ of error against a State was not the prosecution of a suit in the sense of that amendment, which had reference to the prosecution, by suit, of claims against a State. "Where," said the Chief Justice, "a State obtains a judgment against an individual, and the court rendering such judgment overrules a defence set up under the Constitution or laws of the United States, the transfer of this record into the Supreme Court for the sole purpose of inquiring whether the judgment violates the Constitution or laws of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the State whose judgment is so far re-examined. Nothing is demanded from the State. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of anything. . . . He only asserts the constitutional right to have his defence examined by that tribunal whose province it is to construe the Constitution and laws of the Union. . . . The point of view in which this writ of error, with its citation, has been considered uniformly in the courts of the Union has been well illustrated by a reference to the course of this court in suits instituted by the United States. The universally received opinion is that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits. Yet writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favor of the United States into a superior court. . . . It has never been suggested that such writ of error was a suit against the United States, and, therefore, not within the jurisdiction of the appellate court."

After thus showing by incontestable argument that a writ of error to a judgment recovered by a State, in which the State is necessarily the defendant in error, is not a suit commenced or prosecuted against a State in the sense of the amendment, he added, that if the court were mistaken in this, its error did not affect that case, because the writ of error therein was not prosecuted by "a citizen of another State" or "of any foreign State," and so was not affected by the amendment; but was governed by the general grant of judicial power, as extending "to all cases arising under the Constitution or laws of the United States, without respect to parties." p. 412.

It must be conceded that the last observation of the Chief Justice does favor the argument of the plaintiff. But the observation was unnecessary to the decision, and in that sense extrajudicial, and though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion. With regard to the question then before the court, it may be observed, that writs of error to judgments in favor of the crown, or of the State, had been known to

the law from time immemorial; and had never been considered as exceptions to the rule, that an action does not lie against the sovereign.

To avoid misapprehension it may be proper to add that, although the obligations of a State rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance unless the State consents to be sued, or comes itself into court; yet where property or rights are enjoyed under a grant or contract made by a State, they cannot wantonly be invaded. While the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts, may be judicially resisted; and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment.

It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence. The legislative department of a State represents its polity and its will; and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent (of which the legislature, and not the courts, is the judge), never fails in the end to incur the odium of the world, and to bring lasting injury upon the State itself. But to deprive the legislature of the power of judging what the honor and safety of the State may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause.

The judgment of the Circuit Court is *Affirmed.*

MR. JUSTICE HARLAN concurring.

I concur with the court in holding that a suit directly against a State by one of its own citizens is not one to which the judicial power of the United States extends, unless the State itself consents to be sued. Upon this ground alone I assent to the judgment. But I cannot give my assent to many things said in the opinion. The comments made upon the decision in Chisholm *v.* Georgia do not meet my approval. They are not necessary to the determination of the present case. Besides, I am of opinion that the decision in that case was based upon a sound interpretation of the Constitution as that instrument then was.

## SOUTH DAKOTA *v.* NORTH CAROLINA

192 U. S. 286, 24 Sup. Ct. Rep. 269. 1904.

[Bonds of the State of North Carolina specifically secured by shares of railroad stock belonging to that State were donated by their owner to the State of South Dakota in pursuance of a statute of the latter State which authorized the Governor thereof to receive and accept gifts and donations, to the end that the same might be covered into the public treasury. The statute provided for action by the State to protect or assert the right or title of the State to any property so received or to collect any bond, etc. In pursuance of this authority an original action was brought in the Supreme Court of the United States by the State of South Dakota, through its Attorney General, against the State of North Carolina to recover judgment on the bonds and subject the railroad stock as security to the payment thereof.]

Mr. Justice Brewer delivered the opinion of the court.

[After holding the bonds to be valid obligations of the State of North Carolina secured by lien on the railroad stock held by it, the opinion proceeds.]

Neither can there be any question respecting the title of South Dakota to these bonds. They are not held by the State as representative of individual owners, as in the case of New Hampshire *v.* Louisiana, 108 U. S. 76, for they were given outright and absolutely to the State. It is true that the gift may be considered a rare and unexpected one. Apparently the statute of South Dakota was passed in view of the expected gift, and probably the donor made the gift under a not unreasonable expectation that South Dakota would bring an action against North Carolina to enforce these bonds, and that such action might enure to his benefit as the owner of other like bonds. But the motive with which a gift is made whether good or bad, does not affect its validity or the question of jurisdiction.

. . . . . .

Coming now to the right of South Dakota to maintain this suit against North Carolina, we remark that it is a controversy between two States; that by sec. 2, art. III, of the Constitution this court is given original jurisdiction of "controversies between two or more States." In Missouri *v.* Illinois and the Sanitary District of Chicago, 180 U. S. 208, Mr. Justice Shiras, speaking for the court, reviewed at length the history of the incorporation of the provision into the Federal Constitution and the decisions rendered by this court in respect to such jurisdiction, closing with these words (p. 240):

"The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their

inhabitants, and in cases directly affecting the property rights and interests of a State." The present case is one "directly affecting the property rights and interests of a State."

. . . . . .

We are not unmindful of the fact that in Hans *v.* Louisiana, 134 U. S. 1 [**702**], Mr. Justice Bradley, delivering the opinion of the court, expressed his concurrence in the views announced by Mr. Justice Iredell, in the dissenting opinion in Chisholm *v.* Georgia, but such expression cannot be considered as a judgment of the court, for the point decided was that, construing the Eleventh Amendment according to its spirit rather than by its letter, a State was relieved from liability to suit at the instance of an individual, whether one of its own citizens or a citizen of a foreign State. Without noticing in detail the other cases referred to by Mr. Justice Shiras in Missouri *v.* Illinois et al, *supra*, it is enough to say that the clear import of the decisions of this court from the beginning to the present time is in favor of its jurisdiction over an action brought by one State against another to enforce a property right. Chisholm *v.* Georgia was an action of assumpsit, United States *v.* North Carolina an action of debt, United States *v.* Michigan a suit for an accounting, and that which was sought in each was a money judgment against the defendant State.

. . . . . .

We have, then, on the one hand the general language of the Constitution vesting jurisdiction in this court over "controversies between two or more States," the history of that jurisdictional clause in the convention, the cases of Chisholm *v.* Georgia [2 Dallas (U. S.), 419], United States *v.* North Carolina [136 U. S. 211] and United States *v.* Michigan [190 U. S. 379] (in which this court sustained jurisdiction over actions to recover money from a State), the manifest trend of other decisions, the necessity of some way of ending controversies between States, and the fact that this claim for the payment of money is one justiciable in its nature; on the other, certain expression of individual opinions of justices of this court, the difficulty of enforcing a judgment for money against a State, by reason of its ordinary lack of private property subject to seizure upon execution, and the absolute inability of a court to compel a levy of taxes by the legislature. Notwithstanding the embarrassments which surround the question it is directly presented and may have to be determined before the case is finally concluded, but for the present it is sufficient to state the question with its difficulties.

There is in this case a mortgage of property, and the sale of that property under a foreclosure may satisfy the plaintiff's claim. If that should be the result there would be no necessity for a personal judgment against the State. That the State is a necessary party to the foreclosure of the mortgage was settled by Christian *v.* Atlantic

& North Carolina Railroad Company, 133 U. S. 233. Equity is satisfied by a decree for a foreclosure and sale of the mortgaged property, leaving the question of a judgment over for any deficiency, to be determined when, if ever, it arises. And surely if, as we have often held, this court has jurisdiction of an action by one State against another to recover a tract of land, there would seem to be no doubt of the jurisdiction of one to enforce the delivery of personal property.

A decree will, therefore, be entered, which, after finding the amount due on the bonds and coupons in suit to be twenty-seven thousand four hundred dollars ($27,400) (no interest being recoverable, United States *v.* North Carolina, 136 U. S. 211), and that the same are secured by one hundred shares of the stock of the North Carolina Railroad Company, belonging to the State of North Carolina, shall order that the said State of North Carolina pay said amount with costs of suit to the State of South Dakota on or before the 1st Monday of January, 1905, and that in default of such payment an order of sale be issued to the Marshal of this court, directing him to sell at public auction all the interest of the State of North Carolina in and to one hundred shares of the capital stock of the North Carolina Railroad Company, such sale to be made at the east front door of the Capitol Building in this city, public notice to be given of such sale by advertisements once a week for six weeks in some daily paper published in the city of Raleigh, North Carolina, and also in some daily paper published in the city of Washington.

And either of the parties to this suit may apply to the court upon the foot of this decree, as occasion may require.[1]

[1] Mr. Justice White, with whom concurred Mr. Chief Justice Fuller, Mr. Justice McKenna, and Mr. Justice Day, dissented, stating his views in part as follows:

"I take it to be an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from all the others, and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument. If, in following this rule, it be found that an asserted construction of any one provision of the Constitution would, if adopted, neutralize a positive prohibition of another provision of that instrument, then it results that such asserted construction is erroneous, since its enforcement would mean, not to give effect to the Constitution, but to destroy a portion thereof. My mind cannot escape the conclusion that if, wherever an individual has a claim, whether in contract or tort, against a State, he may, by transferring it to another State, bring into play the judicial power of the United States to enforce such claim, then the prohibition contained in the Eleventh Amendment is a mere letter, without spirit and without force. This is said because no escape is seen from the conclusion if the application of the prohibition is to depend solely upon the willingness of the creditor of a State, whether citizen or alien, to transfer, and the docility or cupidity of another State in accepting such transfer, that the provision will have no efficacy whatever. And this becomes doubly cogent when the history of the Eleventh Amendment is considered and the purpose of its adoption is borne in mind.

"It is familiar that the amendment was adopted because of the decision of this court in 1793, in Chisholm *v.* Georgia, 2 Dall. 419, holding that the grant of judicial power

to the United States to determine controversies between a State and a citizen of another State vested authority to determine a controversy wherein a citizen of a State asserted a claim against another State. That the purpose of the amendment was to remove the possibility of the assertion of such a claim is aptly shown by the passage from the opinion of Mr. Chief Justice Marshall in Cohens *v.* Virginia, 6 Wheat. 264, as quoted in the opinion of the court in this case, saying (p. 406):

"'It is a part of our history, that, at the adoption of the Constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the Federal courts, formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislatures.'

"As the purpose of the amendment was to prohibit the enforcement of individual claims against the several States by means of the judicial power of the United States, and as the amendment was subsequent to the grant of judicial power made by the Constitution, the amendment qualified the whole grant of judicial power to the extent necessary to render it impossible by indirection to escape the operation of the avowed purpose which the people of the United States expressed in adopting the amendment. How, as declared by Chief Justice Marshall, could the adoption of the amendment have quieted the apprehensions concerning the right to enforce private claims against the States, if the power was left open after the amendment to do so, if only they were transferred to another State? It is also to be observed that the construction now given causes the judicial power of the United States to embrace claims not within even the reach of the ruling in Chisholm *v.* Georgia, for that case only decided that under the grant of power a citizen of one State might sue another State. But under the rule of construction, now announced, not only claims held by citizens of other States and aliens, but those held by a citizen of the State, become capable of enforcement, if only the holders of such claims, after the State has refused to pay them, choose to sell or make gift thereof to another State found willing to become a party to a plan to evade a constitutional provision inserted for the protection of all the States.

. . . . . .

"It is true that the greater number of cases decided by this court concerning the right to enforce a private claim against a State concerned controversies where suit was brought by citizens of other States or aliens, who were therefore persons expressly within the terms of the Eleventh Amendment. An analysis of those cases, however, will show that they were decided, not upon the mere ground that the person who sued was within the Eleventh Amendment, but upon the broad proposition that, by the effect of that amendment, claims of private individuals could not be enforced against a State, and that in upholding this constitutional limitation the court would look at the real nature of the controversy, irrespective of the parties on the record. If it were found by doing so that in effect the consequence of the granting of the relief would be to enforce by the Federal judicial power the claim of a private individual against a State, such relief would be denied. I content myself with the reference in the margin to the leading cases of this character, and come at once to consider the adjudications of this court rendered in two cases which directly related to the operation of the prohibitions of the Eleventh Amendment on the grant of judicial power to the United States over controversies between States, and to two other cases which directly concerned the effect of the prohibitions of the Eleventh Amendment in suits brought by persons who were within the grant of the judicial power but were not embraced within the category of persons specifically referred to in the Eleventh Amendment. The first two cases referred to are New Hampshire *v.* Louisiana and New York *v.* Louisiana. The opinion of the court in both was delivered by Mr. Chief Justice Waite, and is reported (1883) in 108 U. S. 76. The suits were originally brought in this court. The complainants were, in the one case, the State of New Hampshire, and in the other the State of New York; the principal defendant in both cases being the State of Louisiana. The complainant States asserted the right to enforce certain pecuniary claims against the State of Louisiana, as the holders of the naked legal title to certain coupons and

bonds of the State of Louisiana, which, pursuant to legislative authority, by assignment, had been acquired from citizens of the respective States, for the purpose of collection for the benefit of such citizens. The defendant State challenged the jurisdiction of this court over the controversy. To sustain such jurisdiction it was pressed by the complainant that the bonds and coupons were negotiable instruments, of which the assignee States became the legal owners, and that as such they as a matter of law were the real parties in interest, whether the transfer was a complete sale or merely made for the purpose of collection for the benefit of the assignors. The court first considered the grant of judicial power to the United States prior to the adoption of the Eleventh Amendment and held that as such power, when originally conferred, as interpreted in Chisholm *v.* Georgia, embraced the right of a citizen of one State to enforce his claims by suit directly against another State, a State could not, as the holder of the legal title, champion for its citizens a right for the prosecution of which a particular remedy had been provided by the Constitution. Coming to generally consider the effect of the Eleventh Amendment as elucidated by the history connected with its adoption, it was decided that as that amendment had expressly taken away the right of a citizen of one State to sue another State, a State could not enforce a right the assertion of which in the courts was prohibited to the citizen himself. Noticing the contention that the grant of judicial power over controversies between States was but a substitute for the surrender to the national government which each State had made, of the power of prosecuting against another State, by force if necessary as a sovereign trustee for its citizens, the claims of such citizens, the proposition was held not to be sustainable, under the Constitution of the United States. It was decided that the special remedy originally granted to the citizen himself 'must be deemed to have been the only remedy the citizen of one State could have under the Constitution against another State for the redress of his grievances, except such as the delinquent State saw fit itself to grant.' Having announced this doctrine, it was then, as an inevitable deduction from it decided that, as the Eleventh Amendment had taken away the special remedy originally provided by the Constitution, there was no other remedy whatever left. The opinion of the court concluded as follows (p. 91):

"'The evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued and, in our opinion, one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens. Such being the case we are satisfied that we are prohibited, both by the letter and the spirit of the Constitution, from entertaining these suits, and the bill in each case is dismissed.'"

## RAILROAD COMPANY *v.* TENNESSEE.

101 United States, 337. 1879.

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

On the 19th of January, 1838, the State of Tennessee established a bank in its own name and for its own benefit, and pledged its faith and credit to give indemnity for all losses arising from any deficiency in the funds specifically appropriated as capital. The State was the only stockholder, and entitled to all the profits of the business. The bank was by its charter capable of suing and being sued. At that time the Constitution of the State contained this provision: "Suits may be brought against the State in such manner and in such courts as the legislature may by law direct." Art. 1, sect. 17. No law had then been passed giving effect to this express grant of power, but in 1855 it was enacted that actions might be instituted against the State under the same rules and regulations that govern actions between private citizens, process being served on the district attorney of the district in which the suit was instituted. Code, sect. 2807. No power was given the courts to enforce their judgments, and the money could only be got through an appropriation by the legislature.

In 1865 this law was repealed, and after that there was no law prescribing the manner or the courts in which suits could be brought against the State. On the 16th of February, 1866, an act was passed to wind up and settle the affairs of the bank, under which an assignment of all the property was made to Samuel Watson, trustee. Afterwards, on the 16th of May, 1866, the State and the trustee filed a bill in equity, in the Chancery Court at Nashville, against the bank and its creditors, for an account of debts and assets and a decree of distribution. At the November Term, 1872, of the court, the Memphis and Charlestown Railroad Company was admitted as a defendant to this suit, and given leave to file a cross-bill. This cross-bill was accordingly filed, and set forth an indebtedness from the bank to the railroad company, which accrued while the law allowing suits against the State was in existence, and sought to enforce the liability of the State under the indemnity clause of the charter. To this bill both the State and Watson, the trustee, demurred, and assigned for cause, among others, that the State could not be sued. The demurrer was sustained by the Chancery Court, and the cross-bill dismissed. An appeal was then taken to the Supreme Court of the State, where the decree below was affirmed, upon the express ground that the repeal of the law authorizing suits against the State was valid, and did not impair the obligation of the contract which the railroad company had. All other questions were waived by the court, and the decision placed entirely on the ground that as the

State could not be sued in its own courts, the bill must be dismissed. To reverse that judgment this writ of error was brought.

The question we have to decide is not whether the State is liable for the debts of the bank to the railroad company, but whether it can be sued in its own courts to enforce that liability. The principle is elementary that a State cannot be sued in its own courts without its consent. This is a privilege of sovereignty. It is conceded that when this suit was begun the State had withdrawn its consent to be sued, and the only question now to be determined is whether that withdrawal impaired the obligation of the contract which the railroad company seeks to enforce. If it did, it was inoperative, so far as this suit is concerned, and the original consent remains in full force, for all the purposes of the particular contract or liability here involved.

The remedy, which is protected by the contract clause of the Constitution, is something more than the privilege of having a claim adjudicated. Mere judicial inquiry into the rights of parties is not enough. There must be the power to enforce the results of such an inquiry before there can be said to be a remedy which the Constitution deems part of a contract. Inquiry is one thing; remedy another. Adjudication is of no value as a remedy unless enforcement follows. It is of no practical importance that a right has been established if the right is no more available afterwards than before. The Constitution preserves only such remedies as are required to *enforce* a contract.

Here the State has consented to be sued only for the purposes of adjudication. The power of the courts ended when the judgment was rendered. In effect, all that has been done is to give persons holding claims against the State the privilege of having them audited by the courts instead of some appropriate accounting officer. When a judgment has been rendered, the liability of the State has been judicially ascertained, but there the power of the court ends. The State is at liberty to determine for itself whether to pay the judgment or not. The obligations of the contract have been finally determined, but the claimant has still only the faith and credit of the State to rely on for their fulfilment. The courts are powerless. Everything after the judgment depends on the will of the State. It is needless to say that there is no remedy to enforce a contract if performance is left to the will of him on whom the obligation to perform rests. A remedy is only wanted after entreaty is ended. Consequently, that is not a remedy in the legal sense of the term, which can only be carried into effect by entreaty.

It is clear, therefore, that the right to sue, which the State of Tennessee once gave its creditors, was not, in legal effect, a judicial remedy for the enforcement of its contracts, and that the obligations of its contracts were not impaired, within the meaning of the prohibitory clause of the Constitution of the United States, by taking

away what was thus given. This renders it unnecessary to consider whether in this suit a cross-bill could have been maintained by the railroad company if the right to sue had been continued, and also whether a remedy given after the charter of the bank was granted, but in force when the debt of the bank was incurred, might be taken away without impairing the obligation of the contract of the State to indemnify the creditors against loss by reason of any deficiency in the capital. Neither do we find it necessary to determine what would be a complete judicial remedy against a State, nor whether, if such a remedy had been given, the obligation of a contract entered into by the State when it was in existence would be impaired by taking it away. What we do decide is that no such remedy was given in this case. *Judgment affirmed.*

MR. JUSTICE SWAYNE and MR. JUSTICE STRONG dissented.

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### 5. Suits against Officers, Agents, or Agencies of the United States or a State.

### UNITED STATES *v.* LEE.

106 United States, 196. 1882.

MR. JUSTICE MILLER delivered the opinion of the court.

These are two writs of error to the same judgment: one prosecuted by the United States, *eo nomine;* and the other by the Attorney-General of the United States, in the names of Frederick Kaufman and Richard P. Strong, the defendants against whom judgment was rendered in the Circuit Court.

The action was originally commenced in the Circuit Court for the county of Alexandria, in the State of Virginia, by the present defendant in error, against Kaufman and Strong and a great number of others, to recover possession of a parcel of land of about eleven hundred acres, known as the Arlington estate. It was an action of ejectment in the form prescribed by the statutes of Virginia, under which the pleadings are in the names of the real parties, plaintiff and defendant.

[It is suggested in the opinion that the question whether the United States can prosecute a writ of error in the case, in view of the fact that it is not a party, is immaterial, as Kaufman and Strong bring up for review the judgment against them, and the objections to the action of the lower court are thus properly raised. The title set up in behalf of the United States is then considered, and it is found that the proceedings relied upon as divesting the title of the former owners of the Arlington estate, under whom plaintiff in the lower court claimed the property, were invalid, and that the jury were jus-

tified in finding, as they did, that the United States acquired no title. The Court states the remaining question in the case as follows: Could any action be maintained against the defendants for the possession of the land in controversy under the circumstances of the relation of that possession to the United States, however clear the legal right to that possession might be in the plaintiff?]

In approaching the other question which we are called on to decide, it is proper to make a clear statement of what it is.

The counsel for plaintiffs in error and in behalf of the United States assert the proposition, that though it has been ascertained by the verdict of the jury, in which no error is found, that the plaintiff has the title to the land in controversy, and that what is set up in behalf of the United States is no title at all, the court can render no judgment in favor of the plaintiff against the defendants in the action, because the latter hold the property as officers and agents of the United States, and it is appropriated to lawful public uses.

This proposition rests on the principle that the United States cannot be lawfully sued without its consent in any case, and that no action can be maintained against any individual without such consent, where the judgment must depend on the right of the United States to property held by such persons as officers or agents for the government.

The first branch of this proposition is conceded to be the established law of this country and of this court at the present day; the second, as a necessary or proper deduction from the first, is denied.

In order to decide whether the inference is justified from what is conceded, it is necessary to ascertain, if we can, on what principle the exemption of the United States from a suit by one of its citizens is founded, and what limitations surround this exemption. In this, as in most other cases of like character, it will be found that the doctrine is derived from the laws and practices of our English ancestors; and while it is beyond question that from the time of Edward the First until now the King of England was not suable in the courts of that country, except where his consent had been given on petition of right, it is a matter of great uncertainty whether prior to that time he was not suable in his own courts and in his kingly character as other persons were. We have the authority of Chief Baron Comyns, 1 Digest, 132, Action, C. 1, and 6 Digest, 67, Prerogative; and of the Mirror of Justices, chap. 1, sect. 3, and chap. 5, sect. 1, that such was the law; and of Bracton and Lord Holt, that the King never was suable of common right. It is certain, however, that after the establishment of the petition of right about that time as the appropriate manner of seeking relief where the ascertainment of the parties' rights required a suit against the King, no attempt has been made to sue the King in any court except as allowed on such petition.

It is believed that this petition of right, as it has been practised and observed in the administration of justice in England, has been as

efficient in securing the rights of suitors against the crown in all cases appropriate to judicial proceedings, as that which the law affords to the subjects of the King in legal controversies among themselves. "If the mode of proceeding to enforce it be formal and ceremonious, it is nevertheless a practical and efficient remedy for the invasion by the sovereign power of individual rights." United States *v.* O'Keefe, 11 Wall. 178.

There is in this country, however, no such thing as the petition of right, as there is no such thing as a kingly head to the nation, or to any of the States which compose it. There is vested in no officer or body the authority to consent that the State shall be sued except in the law-making power, which may give such consent on the terms it may choose to impose. The Davis, 10 Wall. 15. Congress has created a court in which it has authorized suits to be brought against the United States, but has limited such suits to those arising on contract, with a few unimportant exceptions.

What were the reasons which forbid that the King should be sued in his own court, and how do they apply to the political body corporate which we call the United States of America? As regards the King, one reason given by the old judges was the absurdity of the King's sending a writ to himself to command the King to appear in the King's court. No such reason exists in our government, as process runs in the name of the President, and may be served on the Attorney-General, as was done in Chisholm *v.* Georgia, 2 Dall. 419. Nor can it be said that the dignity of the government is degraded by appearing as a defendant in the courts of its own creation, because it is constantly appearing as a party in such courts, and submitting its rights as against the citizen to their judgment.

Mr. Justice Gray, of the Supreme Court of Massachusetts, in an able and learned opinion which exhausts the sources of information on this subject, says: "The broader reason is, that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right, at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on his government in war and in peace, and the money in his treasury." Briggs *v.* The Light Boats, 11 Allen (Mass.), 157. As no person in this government exercises supreme executive power, or performs the public duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests. It seems most probable that it has been adopted in our courts as a part of the general doctrine of publicists, that the supreme power in every State, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself from assaults in those courts.

It is obvious that in our system of jurisprudence the principle is as

applicable to each of the States as it is to the United States, except in those cases where by the Constitution a State of the Union may be sued in this court. Railroad Company v. Tennessee, 101 U. S. 337; Railroad Company v. Alabama, id. 832.

That the doctrine met with a doubtful reception in the early history of this court may be seen from the opinions of two of its justices in the case of Chisholm v. Georgia, where Mr. Justice Wilson, a member of the convention which framed our Constitution, after a learned examination of the laws of England and other states and kingdoms, sums up the result by saying: "We see nothing against, but much in favor of, the jurisdiction of this court over the State of Georgia, a party to this cause." 2 Dall. 461. Chief Justice Jay also considered the question as affected by the difference between a republican State like ours and a personal sovereign, and held that there is no reason why a State should not be sued, though doubting whether the United States would be subject to the same rule. 2 Dall. 78.

The first recognition of the general doctrine by this court is to be found in the case of Cohens v. Virginia, 6 Wheat. 380.

The terms in which Chief Justice Marshall there gives assent to the principle does not add much to its force. "The counsel for the defendant," he says, "has laid down the general proposition that a sovereign independent State is not suable except by its own consent." This general proposition, he adds, will not be controverted. And while the exemption of the United States and of the several States from being subjected as defendants to ordinary actions in the courts has since that time been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine. United States v. Clarke, 8 Pet. 436; United States v. McLemore, 4 How. 286; Hill v. United States, 9 id. 386; Nations v. Johnson, 24 id. 195; The Siren, 7 Wall. 152; The Davis, 10 id. 15.

On the other hand, while acceding to the general proposition that in no court can the United States be sued directly by original process as a defendant, there is abundant evidence in the decisions of this court that the doctrine, if not absolutely limited to cases in which the United States are made defendants by name, is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs when the United States is not a defendant or a necessary party to the suit.

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The fact that the property which is the subject of this controversy is devoted to public uses, is strongly urged as a reason why those who are so using it under the authority of the United States shall not be sued for its possession even by one who proves a clear title to that possession. In this connection many cases of imaginary evils have been suggested, if the contrary doctrine should prevail. Among these are a supposed seizure of vessels of war, and invasions of forts

and arsenals of the United States. Hypothetical cases of great evils may be suggested by a particularly fruitful imagination in regard to almost every law upon which depend the rights of the individual or of the government, and if the existence of laws is to depend upon their capacity to withstand such criticism, the whole fabric of the law must fail.

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Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defence cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Mr. Chief Justice Marshall says [in Osborn *v.* Bank of United States, 9 Wheat. 738], to examine whether this authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question. The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption that the parties setting up such authority are lawfully possessed of it; for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion.

But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation?

In the case supposed, the court has before it a plaintiff capable of suing, a defendant who has no personal exemption from suit, and a cause of action cognizable in the court, — a *case* within the meaning of that term, as employed in the Constitution and defined by the decisions of this court. It is to be presumed in favor of the jurisdiction of the court that the plaintiff may be able to prove the right which he asserts in his declaration.

What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff — a right to recover that which has been taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery.

It is not pretended, as the case now stands, that the President had any lawful authority to do this, or that the legislative body could

give him any such authority except upon payment of just compensation. The defence stands here solely upon the absolute immunity from judicial inquiry of every one who *asserts* authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only no such power is given, but it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation.

These provisions for the security of the rights of the citizen stand in the Constitution in the same connection and upon the same ground, as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the government established by that Constitution. As we have already said, the writ of *habeas corpus* has been often used to defend the liberty of the citizen, and even his life, against the assertion of unlawful authority on the part of the executive and the legislative branches of the government. See *Ex parte* Milligan, 4 Wall. 2; Kilbourn *v.* Thompson, 103 U. S. 168.

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government; and the docket of this court is crowded with controversies of the latter class. Shall it be said in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession? If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights.

It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial

procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, "Stop here, I hold by order of the President, and the progress of justice must be stayed." That, though the nature of the controversy is one peculiarly appropriate to the judicial function, though the United States is no party to the suit, though one of the three great branches of the government to which by the Constitution this duty has been assigned has declared its judgment after a fair trial, the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the Secretary of War, which that officer had no more authority to make than the humblest private citizen.

The evils supposed to grow out of the possible interference of judicial action with the exercise of powers of the government essential to some of its most important operations, will be seen to be small indeed compared to this evil, and much diminished, if they do not wholly disappear, upon a recurrence to a few considerations.

One of these, of no little significance, is, that during the existence of the government for now nearly a century under the present Constitution, with this principle and the practice under it well established, no injury from it has come to that government. During this time at least two wars, so serious as to call into exercise all the powers and all the resources of the government, have been conducted to a successful issue. One of these was a great civil war, such as the world has seldom known, which strained the powers of the national government to their utmost tension. In the course of this war persons hostile to the Union did not hesitate to invoke the powers of the courts for their protection as citizens, in order to cripple the exercise of the authority necessary to put down the rebellion; yet no improper interference with the exercise of that authority was permitted or attempted by the courts. Mississippi *v.* Johnson, 4 Wall. 475; Georgia *v.* Stanton, 6 id. 50; Georgia *v.* Grant, id. 241; *Ex parte* Tarble, 13 id. 397.

Another consideration is, that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the government, as is decided by this court in the case of Carr *v.* United States [98 U. S. 433], already referred to, the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights. Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. Or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff, and the present plaintiff as defendant, the title of the United States could be judicially determined. Or, if satisfied that its title has been shown

to be invalid, and it still desires to use the property, or any part of it, for the purposes to which it is now devoted, it may purchase such property by fair negotiation, or condemn it by a judicial proceeding, in which a just compensation shall be ascertained and paid according to the Constitution.

If it be said that the proposition here established may subject the property, the officers of the United States, and the performance of their indispensable functions to hostile proceedings in the State courts, the answer is, that no case can arise in a State court, where the interests, the property, the rights, or the authority of the Federal government may come in question, which cannot be removed into a court of the United States under existing laws. In all cases, therefore, where such questions can arise, they are to be decided, at the option of the parties representing the United States, in courts which are the creation of the Federal government. The slightest consideration of the nature, the character, the organization, and the powers of these courts will dispel any fear of serious injury to the government at their hands. While by the Constitution the judicial department is recognized as one of the three great branches among which all the powers and functions of the government are distributed, it is inherently the weakest of them all. Dependent as its courts are for the enforcement of their judgments upon officers appointed by the executive and removable at his pleasure, with no patronage and no control of the purse or the sword, their power and influence rest solely upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the assertion and protection of rights guaranteed by the Constitution and by the laws of the land, and on the confidence reposed in the soundness of their decisions and the purity of their motives. From such a tribunal no well-founded fear can be entertained of injustice to the government, or of a purpose to obstruct or diminish its just authority.

The Circuit Court was competent to decide the issues in this case between the parties that were before it; in the principles on which these issues were decided no error has been found; and its judgment is *Affirmed.*[1]

[1] Mr. Justice Gray delivered a dissenting opinion, in which Mr. Chief Justice Waite, Mr. Justice Bradley, and Mr. Justice Woods concurred.

## CUNNINGHAM *v.* MACON & BRUNSWICK RAILROAD COMPANY.

109 United States, 446. 1883.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an appeal from the decree of the Circuit Court for the Southern District of Georgia, dismissing the bill of complainant on demurrer.

The bill is filed by Cunningham, a citizen of the State of Virginia, against Alfred H. Colquitt, as governor of the State of Georgia, J. W. Renfroe, as treasurer of the State, the Macon and Brunswick Railroad Company, and A. Flewellen, W. A. Lofton, and George S. Jones, styling themselves directors of said railroad company, John H. James, a citizen of Georgia, and the First National Bank of Macon.

The bill sets out, with reasonable fulness and with references to exhibits which make its statements clear, what we will try to state, as far as necessary, in shorter terms.

[In pursuance of authority given by statute, the Governor of Georgia indorsed the bonds of the defendant railroad, under an arrangement by which the State became the holder of a first mortgage on the road, and on default in payment of this indebtedness the road was put into the hands of a receiver and by him transferred to the State. Complainants are holders of second-mortgage bonds of the railroad company, and bring this bill to foreclose their own mortgage and to set aside the previous sale by the receiver to the State. The bill was dismissed in the lower court on the ground that the suit, to all intents and purposes, was against the State of Georgia.]

The failure of several of the States of the Union to pay the debts which they have contracted and to discharge other obligations of a contract character, when taken in connection with the acknowledged principle that no State can be sued in the ordinary courts as a defendant except by her own consent, has led, in recent times, to numerous efforts to compel the performance of their obligations by judicial proceedings to which the State is not a party.

These suits have generally been instituted in the Circuit Courts of the United States, or have been removed into them from the State courts.

The original jurisdiction of this court has also been invoked in the recent cases of The State of New Hampshire *v.* The State of Louisiana and The State of New York *v.* The State of Louisiana, [108 U. S. 76.] These latter suits were based on the proposition that the constitutional provision that States might sue each other in this court would enable a State whose citizens were owners of obligations

of another State to take a transfer of those obligations to herself and sue the defaulting State in the court. The doctrine was overruled in those cases at the last term by the unanimous opinion of the court.

In the suits which have been instituted in the Circuit Courts the effort has been, while acknowledging the incapacity of those courts to assume jurisdiction of a State as a party, to proceed in such a manner against the officers or agents of the State government, or against property of the State in their hands, that relief can be had without making the State a party.

The same principle of exemption from liability to suit as applied to the government of the United States has led to like efforts to enforce rights against the government in a similar manner. And it must be confessed that, in regard to both classes of cases, the questions raised have rarely been free from difficulty, and the judges of this court have not always been able to agree in regard to them. Nor is it an easy matter to reconcile all the decisions of the court in this class of cases. While no attempt will be made here to do this, it may not be amiss to try to deduce from them some general principles, sufficient to decide the case before us.

It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on that court by the Constitution.

This principle is conceded in all the cases, and whenever it can be clearly seen that the State is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. But in the desire to do that justice, which in many cases the courts can see will be defeated by an unwarranted extension of this principle, they have in some instances gone a long way in holding the State not to be a necessary party, though some interest of hers may be more or less affected by the decision. In many of these cases the action of the court has been based upon principles whose soundness cannot be disputed. A reference to a few of them may enlighten us in regard to the case now under consideration.

1. It has been held in a class of cases where property of the State, or property in which the State has an interest, comes before the court and under its control, in the regular course of judicial administration, without being forcibly taken from the possession of the government, the court will proceed to discharge its duty in regard to that property. And the State, if it choose to come in as plaintiff, as in prize cases, or to intervene in other cases when she may have a lien or other claim on the property, will be permitted to do so, but subject to the rule that her rights will receive the same

consideration as any other party interested in the matter, and be subjected in like manner to the judgment of the court. Of this class are the cases of The Siren, 7 Wall. 152, 157; The Davis, 10 Wall. 15, 20; and Clark *v.* Barnard, 108 U. S. 436.

2. Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defence is that he has acted under the orders of the government.

In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defence he must show that his authority was sufficient in law to protect him. See Mitchell *v.* Harmony, 13 How. 115; Bates *v.* Clark, 95 U. S. 204; Meigs *v.* McClung, 9 Cranch, 11; Wilcox *v.* Jackson, 13 Pet. 498; Brown *v.* Huger, 21 How. 305; Grisar *v.* McDowell, 6 Wall. 363.

To this class also belongs the recent case of United States *v.* Lee, 106 U. S. 196, for the action of ejectment in that case is, in its essential character, an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment. And the defendants, Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be unlawful, and therefore insufficient as a defence. The judgment in that case did not conclude the United States, as the opinion carefully stated, but held the officers liable as unauthorized trespassers, and turned them out of their unlawful possession.

3. A third class, which has given rise to more controversy, is where the law has imposed upon an officer of the government a well-defined duty in regard to a specific matter, not affecting the general powers or functions of the government, but in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process. Of this class are writs of mandamus to public officers, as in Marbury *v.* Madison, 1 Cranch, 137; Kendall *v.* Stokes, 3 How. 87; United States *v.* Schurtz, 102 U. S. 378; United States *v.* Boutwell, 17 Wall. 604.

But in all such cases from the nature of the remedy by mandamus, the duty to be performed must be merely ministerial, and must involve no element of discretion to be exercised by the officer.

It has, however, been much insisted on that in this class of cases, where it shall be found necessary to enforce the rights of the individual, a court of chancery may, by a mandatory decree or by an injunction, compel the performance of the appropriate duty, or enjoin the officer from doing that which is inconsistent with that duty and with plaintiff's rights in the premises.

Perhaps the strongest assertion of this doctrine is found in the case of Davis *v.* Gray, 16 Wall. 203.

In that case, the State of Texas having made a grant of the alternate sections of land along which a railroad should thereafter be located, and the railroad company having surveyed the land at its own expense and located its road through it, the commissioner of the State land office and the governor of the State were, in violation of the rights of the company, selling and delivering patents for the sections to which the company had an undoubted vested right. The Circuit Court enjoined them from doing this by its decree, which was affirmed in this court.

Judge Hunt did not sit in the case, and Justice Davis and Chief Justice Chase dissented, on the ground that it was in effect a suit against the State. Though there are some expressions in the opinion which are unfavorably criticised in the opinions of both the majority and minority of this court in the recent case of United States *v.* Lee, the action of the court has not been overruled.

But it is clear that in enjoining the governor of the State in the performance of one of his executive functions, the case goes to the verge of sound doctrine, if not beyond it, and that the principle should be extended no further. Nor was there in that case any affirmative relief granted by ordering the governor and land commissioner to perform any act towards perfecting the title of the company.

The case of the Board of Liquidation *v.* McComb, 92 U. S. 531, is to the same effect. The board of liquidation was charged by the statute of Louisiana with certain duties in regard to issuing new bonds of the State in place of old ones which might be surrendered for exchange by the holders of the latter. The amount of new bonds to be issued was limited by a constitutional provision. McComb, the owner of some of the new bonds already issued, filed his bill to restrain the board from issuing that class of bonds in exchange for a class of indebtedness not included within the purview of the statute, on the ground that his own bonds would thereby be rendered less valuable. This court affirmed the decree of the Circuit Court enjoining the board from exceeding its power in taking up by the new issue a class of State indebtedness not within the provisions of the law on that subject.

In the opinion in that case the language used by Mr. Justice Bradley well and tersely thus expresses the rule and its limitations: "The objections to proceeding against State officers by mandamus or injunction are, first, that it is in effect proceeding against the State itself; and, second, that it interferes with the official discretion vested in the officers. It is conceded that neither of these can be done. A State, without its consent, cannot be sued as an individual; and a court cannot substitute its own discretion for that of executive officers, in matters belonging to the proper jurisdiction of the latter. But it has been settled that where a plain official duty requiring no exercise of discretion is to be performed, and perform-

ance is refused, any person who will sustain a personal injury by such refusal may have a mandamus to compel performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it."

It is believed that this is as far as this court has gone in granting relief in this class of cases. The case of Osborn *v.* Bank of the United States, 9 Wheat. 738, often referred to, was decided upon this principle, and goes no further; for in that case, a preliminary injunction of the court forbidding a State officer from placing the money of the bank, which he had seized, in the treasury of the State, having been disregarded, the final decree corrected this violation of the injunction, by requiring the restoration of the money thus removed. See Louisiana *v.* Jumel, 107 U. S. 711.

On the other hand, in the cases of Louisiana *v.* Jumel and Elliott *v.* Wiltz, 107 U. S. 711, decided at the last term, very ably argued and very fully considered, the court declined to go any further.

In the first of these cases the owners of the new bonds issued by the board of liquidation mentioned in McComb's case, *supra*, brought the bill in equity, in the Circuit Court of the United States, to compel the auditor of the State and the treasurer of the State to pay, out of the treasury of the State, the overdue interest coupons on their bonds, and to enjoin them from paying any part of the taxes collected for that purpose for the ordinary expenses of the government. They at the same time applied to the State court for a writ of mandamus to the same officers, which suit was removed into the Circuit Court of the United States. In this they asked that these officers be commanded to pay, out of the moneys in the treasury, the taxes which they maintained had been assessed for the purpose of paying the interest on their bonds, and to pay such sums as had already been diverted from that purpose to others by the officers of the government. The Circuit Court refused the relief asked in each case and this court affirmed the judgment of that court.

The short statement of the reason for this judgment is, that as the State could not be sued or made a party to such proceeding, there was no jurisdiction in the Circuit Court either by mandamus at law, or by a decree in chancery, to take charge of the treasury of the State, and seizing the hands of the auditor and treasurer, to make distribution of the funds found in the treasury in the manner which the court might think just.

The Chief Justice said: "The treasurer of the State is the keeper of the money collected from this tax, just as he is the keeper of other public moneys. The taxes were collected by the tax collectors and paid over to him, that is to say, into the State treasury, just as other taxes were when collected. He is no more a trustee of these

moneys than he is of all other public moneys. He holds them only as agent of the State. If there is any trust the State is the trustee, and unless the State can be sued the trustee cannot be enjoined. The officers owe duty to the State alone, and have no contract relations with the bondholders. They can only act as the State directs them to act and hold as the State allows them to hold. It was never agreed that their relations with the bondholders should be other than as officers of the State, or that they should have any control over this fund except to keep it like other funds in the treasury, and pay it out according to law. They can be moved through the State, but not the State through them."

We think the foregoing cases mark, with reasonable precision, the limit of the power of the courts in cases affecting the rights of the State or Federal governments in suits to which they are not voluntary parties.

In actions at law, of which mandamus is one, where an individual is sued, as for injuries to person or to property, real or personal, or in regard to a duty which he is personally bound to perform, the government does not stand behind him to defend him. If he has the authority of law to sustain him in what he has done, like any other defendant, he must show it to the court and abide the result. In either case the State is not bound by the judgment of the court, and generally its rights remain unaffected. It is no answer for the defendant to say I am an officer of the government and acted under its authority unless he shows the sufficiency of that authority.

Courts of equity proceed upon different principles in regard to parties. As was said in Barney *v.* Baltimore, 6 Wall. 280, there are persons who are merely formal parties without real interest, and there are those who have an interest in the suit, but which will not be injured by the relief sought, and there are those whose interest in the subject-matter of the suit renders them indispensable as parties to it. Of this latter class the court said, in Shields *v.* Barrow, 17 How. 130, "they are persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without affecting that interest or leaving the controversy in such a condition that its final disposition may be wholly inconsistent with equity and good conscience." "In such cases," says the court in Barney *v.* Baltimore, *supra*, "the court refuses to entertain the suit when these parties cannot be subjected to its jurisdiction."

In the case now under consideration the State of Georgia is an indispensable party. It is in fact the only proper defendant in the case. No one sued has any personal interest in the matter or any official authority to grant the relief asked.

No foreclosure suit can be sustained without the State, because she has the legal title to the property, and the purchaser under a foreclosure decree would get no title in the absence of the State.

The State is in the actual possession of the property, and the court can deliver no possession to the purchaser. The entire interest adverse to plaintiff in this suit is the interest of the State of Georgia in the property, of which she has both the title and possession.

On the hypothesis that the foreclosure by the governor was valid, the trust asserted by plaintiff is vested in the State as trustee, and not in any of the officers sued.

No money decree can be rendered against the State, nor against its officers, nor any decree against the treasurer, as settled in Louisiana *v.* Jumel, *supra.*

If any branch of the State government has power to give plaintiff relief it is the legislative. Why is it not sued as a body, or its members by mandamus, to compel them to provide means to pay the State's indorsement? The absurdity of this proposition shows the impossibility of compelling a State to pay its debts by judicial process.

*The decree of the Circuit Court is affirmed.*[1]

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### e. *Cases of Diverse Citizenship.*

### HOOE *v.* JAMIESON.

166 United States, 395. 1897.

Mr. Chief Justice Fuller delivered the opinion of the court.

This was an action of ejectment brought in the Circuit Court of the United States for the Western District of Wisconsin, by the complainant, in which plaintiffs in error alleged that they resided in and were citizens of the city of Washington, D. C., and that defendants all resided in and were citizens of the State of Wisconsin. Defendants moved to dismiss the action on the ground that the Circuit Court had no jurisdiction, as the controversy was not between citizens of different States. The Circuit Court ordered that the action be dismissed unless plaintiffs within five days thereafter should so amend their complaint as to allege the necessary jurisdictional facts. Plaintiffs then moved for leave to amend their complaint by averring that three of them were when the suit was commenced, and continued to be, citizens of the District of Columbia, but that one of them was a citizen of the State of Minnesota, and that each was the owner of an undivided one-fourth of the lands and premises described in the complaint, and that they severally claimed damages and demanded judgment. This motion was denied and the action

[1] Mr. Justice Harlan delivered a dissenting opinion, in which Mr. Justice Field concurred.

dismissed. Plaintiffs sued out this writ of error under the act of March 3, 1891, c. 517, § 5, and the Circuit Court certified to this court these questions of jurisdiction: —

"First. Whether or not said complaint sets forth any cause of action in which there is a controversy between citizens of different States, so as to give said Circuit Court jurisdiction thereof.

"Second. Whether or not said complaint as so proposed to be amended would, if so amended, set forth any cause of action in which there is a controversy between citizens of different States, so as to give said Circuit Court jurisdiction thereof."

The judicial power extends under the Constitution to controversies between citizens of different States, and the Judiciary Act of 1789 provided, as does the act of March 3, 1887, as corrected by the act of August 13, 1888, 25 Stat. 433, c. 866, that the Circuit Courts of the United States should have original cognizance of all suits of a civil nature at common law or in equity in which there should be a controversy between citizens of different States.

We see no reason for arriving at any other conclusion than that announced by Chief Justice Marshall in Hepburn *v.* Ellzey, 2 Cranch, 445, February term, 1805, "that the members of the American confederacy only are the States contemplated in the Constitution;" that the District of Columbia is not a State within the meaning of that instrument; and that the courts of the United States have no jurisdiction of cases between citizens of the District of Columbia and citizens of a State.

In Strawbridge *v.* Curtiss, 3 Cranch, 267, it was held that if there be two or more joint plaintiffs and two or more joint defendants, each of the plaintiffs must be capable of suing each of the defendants in the courts of the United States in order to support the jurisdiction; and in Smith *v.* Lyon, 133 U. S. 315, Strawbridge *v.* Curtiss was followed, and it was decided that under the acts of 1887 and 1888 the Circuit Court has not jurisdiction, on the ground of diverse citizenship, if there are two plaintiffs to the action who are citizens of and residents in different States and the defendant is a citizen of and resident in a third State, and the action is brought in the State in which one of the plaintiffs resides.

New Orleans *v.* Winter, 1 Wheat. 91, was an action in ejectment brought by two plaintiffs claiming as joint heirs, and it appeared that one of them was a citizen of the State of Kentucky, and that the other was a citizen of the Territory of Mississippi. It was held that jurisdiction could not be maintained, and Chief Justice Marshall, delivering the opinion of the court, said: "Gabriel Winter, then, being a citizen of the Mississippi Territory, was incapable of maintaining a suit alone in the Circuit Court of Louisiana. Is his case mended by being associated with others who are capable of suing in that court? In the case of Strawbridge *v.* Curtiss, it was decided, that where a joint interest is prosecuted, the juris-

diction cannot be sustained, unless each individual be entitled to claim that jurisdiction. In this case it has been doubted, whether the parties might elect to sue jointly or severally. However this may be, having elected to sue jointly, the court is incapable of distinguishing their case, so far as respects jurisdiction, from one in which they were compelled to unite."

In Peninsular Iron Co. *v.* Stone, 121 U. S. 631, the interests of the parties being separate and distinct, but depending on one contract, plaintiffs elected to sue on the common obligation, and the case was dismissed under the rule in New Orleans *v.* Winter.

In Barney *v.* Baltimore, 6 Wall. 280, which was a bill for partition, it appeared that some of the defendants were citizens of the District of Columbia and some of them citizens of Maryland, and, in dismissing the case for want of jurisdiction, the court, through Mr. Justice Miller, said: "In the case of Hepburn *v.* Ellzey, it was decided by this court, speaking through Marshall, C. J., that a citizen of the District of Columbia was not a citizen of a State within the meaning of the Judiciary Act, and could not sue in a Federal court. The same principle was asserted in reference to a citizen of a Territory, in the case of New Orleans *v.* Winter, and it was there held to defeat the jurisdiction, although the citizen of the Territory of Mississippi was joined with a person who, in suing alone, could have maintained the suit. These rulings have never been disturbed, but the principle asserted has been acted upon ever since by the courts when the point has arisen."

Many other decisions are to the same effect, and in the late case of Merchants' Cotton Press Co. *v.* Insurance Co., 151 U. S. 368, 384, the rule in New Orleans *v.* Winter was applied and it was held that "the voluntary joinder of the parties has the same effect for purposes of jurisdiction as if they had been compelled to unite."

In the case at bar no application was made for leave to discontinue as to the three plaintiffs who were citizens of the District of Columbia, and to amend the complaint and proceed with the cause in favor of that one of the plaintiffs alleged to be a citizen of Minnesota. Jurisdiction of the case as to four plaintiffs could not be maintained on the theory that when the trial terminated it might be retained as to one. The Circuit Court was right and its judgment is

*Affirmed.*

## THE OHIO AND MISSISSIPPI RAILROAD COMPANY *v.* WHEELER.

1 Black, 286. 1861.

Mr. Chief Justice Taney delivered the opinion of the court.

This action was brought in the Circuit Court of the United States for the district of Indiana, to recover $2,400, with ten per cent damages, which the plaintiffs alleged to be due for fifty shares of the capital stock of the company, subscribed by the defendant.

The declaration states that the plaintiffs are "a corporation, created by the laws of the States of Indiana and Ohio, having its principal place of business in Cincinnati, in the State of Ohio; that the corporation is a citizen of the State of Ohio, and Henry D. Wheeler, the defendant, is a citizen of the State of Indiana."

The defendant pleaded to the jurisdiction of the court, averring that he was a citizen of the State of Indiana, and that the plaintiffs were a body politic and corporate, created, organized, and existing in the same State, under and by virtue of an act of assembly of the State. The plaintiffs demurred to this plea; and the judges being opposed in opinion upon the question whether their court had jurisdiction, ordered their division of opinion to be certified to this court.

A brief reference to cases heretofore decided will show how the question must be answered. And, as the subject was fully considered and discussed in the cases to which we are about to refer, it is unnecessary to state here the principles and rules of law which have heretofore governed the decisions of the court, and must decide the question now before us.

In the case of the Bank of Augusta *v.* Earle, 13 Pet. 512, the court held, that the artificial person or legal entity known to the common law as a corporation can have no legal existence out of the bounds of the sovereignty by which it is created; that it exists only in contemplation of law, and by force of law; and where that law ceases to operate, the corporation can have no existence. It must dwell in the place of its creation.

It had been decided, in the case of The Bank *v.* Deviary, 5 Cr. 61, long before the case of the Bank of Augusta *v.* Earle came before the court, that a corporation is not a citizen, within the meaning of the Constitution of the United States, and cannot maintain a suit in a court of the United States against the citizen of a different State from that by which it was chartered, unless the persons who compose the corporate body are all citizens of that State. But, if that be the case, they may sue by their corporate name, averring the citizenship of all of the members; and such a suit would be regarded as the

joint suit of the individual persons, united together in the corporate body, and acting under the name conferred upon them, for the more convenient transaction of business, and consequently entitled to maintain a suit in the courts of the United States against a citizen of another State.

This question, as to the character of a corporation, and the jurisdiction of the courts of the United States, in cases wherein they were sued, or brought suit in their corporate name, was again brought before the court in the case of The Louisville, Cincinnati, and Charleston Railroad Company *v.* Letson, reported in 2 How. 497; and the court in that case, upon full consideration, decided, that where a corporation is created by the laws of a State, the legal presumption is, that its members are citizens of the State in which alone the corporate body has a legal existence; and that a suit by or against a corporation, in its corporate name, must be presumed to be a suit by or against citizens of the State which created the corporate body; and that no averment or evidence to the contrary is admissible, for the purposes of withdrawing the suit from the jurisdiction of a court of the United States.

The question, however, was felt by this court to be one of great difficulty and delicacy; and it was again argued and maturely considered in the case of Marshall *v.* The Baltimore and Ohio Railroad Company, 16 How. 314, as will appear by the report, and the decision in the case of The Louisville, Cincinnati, and Charleston Railroad Company *v.* Letson reaffirmed.

And again, in the case of The Covington Drawbridge Company *v.* Shepherd and others, 20 How. 232, the same question of jurisdiction was presented, and the rule laid down in the two last-mentioned cases fully maintained. After these successive decisions, the law upon this subject must be regarded as settled; and a suit by or against a corporation in its corporate name, as a suit by or against citizens of the State which created it.

It follows from these decisions that this suit in the corporate name is, in contemplation of law, the suit of the individual persons who compose it, and must, therefore, be regarded and treated as a suit in which citizens of Ohio and Indiana are joined as plaintiffs in an action against a citizen of the last-mentioned State. Such an action cannot be maintained in a court of the United States, where jurisdiction of the case depends altogether on the citizenship of the parties. And, in such a suit, it can make no difference whether the plaintiffs sue in their own proper names, or by the corporate name and style by which they are described.

The averments in the declaration would seem to imply that the plaintiffs claim to have been created a corporate body, and to have been endued with the capacities and faculties it possesses by the co-operating legislation of the two States, and to be one and the same legal being in both States.

If this were the case, it would not affect the question of jurisdiction in this suit. But such a corporation can have no legal existence upon the principles of the common law, or under the decision of this court in the case of the Bank of Augusta *v.* Earle, before referred to.

It is true that a corporation by the name and style of the plaintiffs appears to have been chartered by the States of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects, and it is spoken of in the laws of the States as one corporate body, exercising the same powers and fulfilling the same duties in both States. Yet it has no legal existence in either State, except by the law of the State. And neither State could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be composed of and represent, under the corporate name, the same natural persons. But the legal entity or person, which exists by force of law, can have no existence beyond the limits of the State or sovereignty which brings it into life and endues it with its faculties and powers. The President and Directors of the Ohio and Mississippi Railroad Company is, therefore, a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio, and they cannot be joined in a suit as one and the same plaintiff, nor maintain a suit in that character against a citizen of Ohio or Indiana in a Circuit Court of the United States.

These questions, however, have been so fully examined in the cases above referred to, that further discussion can hardly be necessary in deciding the case before us. And we shall certify to the Circuit Court that it has no jurisdiction of the case on the facts presented by the pleadings.

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## ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY *v.* JAMES.

161 United States, 545. 1896.

On December 24, 1892, Etta James, defendant in error, brought this action in the Circuit Court for the Western District of Arkansas against the St. Louis and San Francisco Railway Company, plaintiff in error, for negligence in maintaining a switch target at Monett, in Barry County, in the State of Missouri, so near its tracks that her husband was struck and killed by it on July 3, 1889, while employed as a fireman on one of the company's engines. Her husband resided at Monett and died intestate. The defendant in error was the widow and sole heir at law of her husband, and no administrator of his estate was appointed in Arkansas. She recovered a judgment of $5,000.

Etta James, the defendant in error, resided at Monett, and was a citizen of the State of Missouri. Monett is a station in Missouri, on the railroad of the plaintiff in error, about fifty miles from the southern border of that State.

The St. Louis and San Francisco Railway Company was organized and incorporated under the laws of the State of Missouri in 1876, and soon thereafter became the owner of and has ever since owned and operated a railroad in that State extending from Monett southerly to the southern border of the State of Missouri.

[The provisions of the constitution and statutes of Arkansas, which are set out in full in the statement, are sufficiently referred to in the opinion, and are therefore omitted here. The objection was raised in the lower court by the railroad company that the court had no jurisdiction, on the ground that the company was not a citizen of Arkansas, but was a citizen of Missouri, of which State the plaintiff in the trial court was also a citizen; but the company waived its personal privilege of being sued in the district of which it was an inhabitant. The question raised by this objection was taken to the Circuit Court of Appeals, which certified to the Supreme Court the following question, with others: —

2d. In view of the provisions of the act of the General Assembly of Arkansas, approved March 13, 1889, did the St. Louis and San Francisco Railway Company, by filing a certified copy of its articles of incorporation under the laws of Missouri with the Secretary of State of Arkansas, and continuing to operate its railroad through that State, become a citizen of the State of Arkansas, so as to give the Circuit Court of the United States for the Western District of Arkansas jurisdiction of this action, in which the defendant in error was and is a citizen of the State of Missouri ?]

Mr. Justice Shiras, after stating the facts, delivered the opinion of the court.

Etta James, as a citizen of the State of Missouri, and having a cause of action against the St. Louis and San Francisco Railway Company, a corporation of the State of Missouri, could, of course, sue the latter in the courts of that State, but equally, of course, could not sue such State corporation in the Circuit Court of the United States for the District of Missouri. Can she, as such citizen of the State of Missouri, lawfully assert her cause of action in the Circuit Court of the United States for the District of Arkansas against the St. Louis and San Francisco Railway Company by showing that the latter had availed itself of the rights and privileges conferred by the State of Arkansas on railroad corporations of other States coming within her borders and complying with the terms and conditions of her statutes ?

Before addressing ourselves directly to this question, it must be conceded that the plaintiff's cause of action, though arising in Missouri, is transitory in its nature, and that the St. Louis and San

Francisco Railway Company, though denying the plaintiff's right to sue it in the Circuit Court of Arkansas, waives its statutory privilege of being sued only in the district in which it has its habitat ?

It must be regarded, to begin with, as finally settled, by repeated decisions of this court, that, for the purpose of jurisdiction in the Federal courts, a State corporation is deemed to be indisputably composed of citizens of such State. It is equally true that, without objection so far from the Federal authority, whether legislative or judicial, it has become customary for a State, adjacent to the State creating a railroad corporation, to legislatively grant authority to such foreign corporation to enter its territory with its road — to make running arrangements with its own railroads — to buy or lease them or to consolidate with the companies owning them. Sometimes, as in the present case, such foreign corporation is declared, upon its acceptance of prescribed terms and conditions, to become a domestic corporation of such adjacent State, and to be endowed with all the rights and privileges enjoyed by similar corporations created by such State.

We have already said that the rule that State corporations are indisputably composed of citizens of the States creating them is finally settled. But, in view of the question now before us, it may be well to briefly review some of the cases.

[Earlier cases are referred to at length, especially the case of Ohio & Mississippi Railroad Co. *v.* Wheeler, *supra*, p. 737.]

Memphis & Charleston R. R. Co. *v.* Alabama, 107 U. S. 581, was where an action had been brought by the State of Alabama, for the use of a county of that State, in a court of that State, against a railroad corporation whose road passed through that State and county, to recover the amount of a county tax assessed upon its property; and the cause was removed into the Circuit Court of the United States for the Northern District of Alabama; and upon motion the cause was remanded to the State court upon the ground that the defendant, although incorporated in Tennessee also, was a corporation of the State of Alabama. On error the judgment of the court below was affirmed, and this court, per Mr. Justice Gray, said: "The defendant, being a corporation of the State of Alabama, has no existence in this State as a legal entity or person, except under and by force of its incorporation by this State; and although also incorporated in the State of Tennessee, must, as to all its doings within the State of Alabama, be considered a citizen of the State of Alabama, which cannot sue or be sued by another citizen of Alabama in the courts of the United States."

In this case, Ohio & Mississippi R. R. Co. *v.* Wheeler, 1 Black, 286, and Railway Company *v.* Whitton, 13 Wall. 270, were cited. The former has already been noticed, and of the latter it may be said, by way of distinguishing it from the present case, that while it was held

that a citizen of Illinois might sue the railroad company in the Circuit Court of Wisconsin, although the company had been likewise incorporated in Illinois, yet the cause of action arose in Wisconsin — nor does it appear in the report of that case what was the character of the legislation by which the Wisconsin company was created, nor was the question now before us there considered. It is also observable that in the latter case Ohio & Mississippi R. R. Co. *v.* Wheeler was cited with approval.

One phase of the subject was before the court in the case of the Pennsylvania R. Co. *v.* St. Louis, &c. R. R. Co., 118 U. S. 290. A suit had been brought in the Circuit Court of the United States for the District of Indiana, by the St. Louis, Alton, and Terre Haute Railroad Company, alleging that it was a corporation organized under the laws of the State of Illinois, and a citizen of that State, against the Indianapolis and St. Louis Company, a corporation organized under the laws of the State of Indiana, and a citizen of that State, and against other corporations mentioned in the bill as citizens of Indiana, or of other States than Illinois. An objection to the jurisdiction was made on the ground that the St. Louis, Alton, and Terre Haute Railroad Company was organized under laws of both Illinois and Indiana, and was therefore a citizen of the latter State. In treating this question this court said, by Mr. Justice Miller: "It does not seem to admit of question that a corporation of one State, owning property and doing business in another State by permission of the latter, does not become a citizen of this State also. And so a corporation of Illinois, authorized by its laws to build a railroad across the State from the Mississippi River to its eastern boundary, may by permission of the State of Indiana extend its road a few miles within the limits of the latter, or, indeed, through the entire State, . . . without thereby becoming a corporation or a citizen of the State of Indiana. Nor does it seem to us that an act of the legislature conferring upon this corporation of Illinois, by its Illinois corporate name, such powers to enable it to use and control that part of the road within the State of Indiana as have been conferred on it by the State which created it, constitutes it a corporation of the State of Indiana. It may not be easy in all such cases to distinguish between the purpose to create a new corporation which shall owe its existence to the law or statute under consideration, and the intent to enable the corporation already in existence under laws of another State to exercise its functions in the State where it is so received. The latter class of laws are common in authorizing insurance companies, banking companies, and others to do business in other States than those which have chartered them. To make such a company a corporation of another State, the language must imply creation or adoption in such form as to confer the power usually exercised over corporations by the State, or by the legislature, and such allegiance as a State corporation owes to its creator. The mere grant of privileges or powers

to it as an existing corporation, without more, does not do this, and does not make it a citizen of the State conferring such powers."

So in Nashua Railroad *v.* Lowell Railroad, 136 U. S. 356, it was held that railroad corporations, created by two or more States, though joined in their interests, in the operation of their roads, in the issue of their stock, and in the division of their profits, so as practically to be a single corporation, do not lose their identity; but each has its existence and its standing in the courts of the country only by virtue of the legislation of the State by which it was created, and the union of name, of officers, of business and property does not change their distinctive character as separate corporations.

To fully reconcile all the expressions used in these cases would be no easy task, but we think the following propositions may be fairly deduced from them: There is an indisputable legal presumption that a State corporation, when sued or suing in a Circuit Court of the United States, is composed of citizens of the State which created it, and hence such a corporation is itself deemed to come within that provision of the Constitution of the United States which confers jurisdiction upon the Federal courts in "controversies between citizens of different States."

It is competent for a railroad corporation organized under the laws of one State, when authorized so to do by the consent of the State which created it, to accept authority from another State to extend its railroad into such State and to receive a grant of powers to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second State. Such legislation on the part of two or more States is not, in the absence of inhibitory legislation by Congress, regarded as within the constitutional prohibition of agreements or compacts between States.

Such corporations may be treated by each of the States whose legislative grants they accept as domestic corporations.

The presumption that a corporation is composed of citizens of the State which created it accompanies such corporation when it does business in another State, and it may sue or be sued in the Federal courts in such other State as a citizen of the State of its original creation.

We are now asked to extend the doctrine of indisputable citizenship, so that if a corporation of one State, indisputably taken, for the purpose of Federal jurisdiction, to be composed of citizens of such State, is authorized by the law of another State to do business therein, and to be endowed, for local purposes, with all the powers and privileges of a domestic corporation, such adopted corporation shall be deemed to be composed of citizens of the second State, in such a sense as to confer jurisdiction on the Federal courts at the suit of a citizen of the State of its original creation.

We are unwilling to sanction such an extension of a doctrine which,

as heretofore established, went to the very verge of judicial power. That doctrine began, as we have seen, in the assumption that State corporations were composed of citizens of the State which created them; but such assumption was one of fact, and was the subject of allegation and traverse, and thus the jurisdiction of the Federal courts might be defeated. Then, after a long contest in this court, it was settled that the presumption of citizenship is one of law, not to be defeated by allegation or evidence to the contrary. There we are content to leave it.

It should be observed that, in the present case, the corporation defendant was not incorporated as such by the State of Arkansas. The legislation of that State was professedly dealing with the railroad corporation of other States. The Constitution of Arkansas provides that "foreign corporations may be authorized to do business in this State under such limitations and restrictions as may be prescribed by law," but "they shall not have power to condemn or appropriate private property."

Section 5 of the act of March 16, 1881, as shown in the preliminary statement, provides that "any railroad company incorporated by or under the laws of any other State, and having a line of railroad built, or partly built, to or near any boundary of this State, and desiring to continue its line of railroad into or through this State, or any branch thereof, may, for the purpose of acquiring the right to build its line of railroad, lease or purchase the property, rights, privileges, lands, tenements, immunities, and franchises of any railroad company organized under the laws of this State, which said lease or purchase shall carry with it the right of eminent domain held and acquired by said company at the time of lease or sale, and thereafter hold, use, maintain, build, construct, own, and operate the said railroad so leased or purchased as fully and to the same extent as the company organized under the laws of this State might or could have done; and the rights and powers of such company, and its corporate name, may be held and used by such foreign railroad company as will best subserve its purpose and the building of said line of railroad. . . . In all other matters said foreign railroad company shall be subject to all the provisions of all acts in relation to railroads, the liabilities and forfeitures thereby imposed, and may sue and be sued in the same manner as other railroad corporations, and subject to the same service of process, and shall keep an office or offices in said State as required by . . . the Constitution of this State."

It was under the provisions of this section that the St. Louis and San Francisco Railway Company, in 1882, purchased from corporations of Arkansas the railroad already built by them extending from the southern boundary of Missouri to Fort Smith in Arkansas. These Arkansas corporations have since maintained their separate organizations as corporations of that State, but do not operate railroads. It is, therefore, obvious that such purchase by the Missouri corporation

of the railroad and franchises of the Arkansas companies did not convert it into an Arkansas corporation. The terms of the statute show that it merely granted rights and powers to an existing foreign corporation, which was to continue to exist as such, subject only to certain conditions — among others that of keeping an office in the State, so as to be subject to process of the Arkansas courts.

It is true that by the subsequent act of 1889, by the proviso to the second section, it was provided that every railroad corporation of any other State, which had theretofore leased or purchased any railroad in Arkansas, should, within sixty days from the passage of the act, file a certified copy of its articles of incorporation or charter with the Secretary of State, and shall thereupon become a corporation of Arkansas, anything in its articles of incorporation or charter to the contrary notwithstanding; and it appears that the defendant company did accordingly file a copy of its articles of incorporation with the secretary of the State. But whatever may be the effect of such legislation, in the way of subjecting foreign railroad companies to control and regulation by the local laws of Arkansas, we cannot concede that it availed to create an Arkansas corporation out of a foreign corporation in such a sense as to make it a citizen of Arkansas within the meaning of the Federal Constitution so as to subject it as such to a suit by a citizen of the State of its origin. In order to bring such an artificial body as a corporation within the spirit and letter of that Constitution, as construed by the decisions of this court, it would be necessary to create it out of natural persons, whose citizenship of the State creating it could be imputed to the corporation itself. But it is not pretended in the present case that natural persons, resident in and citizens of Arkansas, were by the legislation in question created a corporation, and that therefore the citizenship of the individual corporators is imputable to the corporation.

It is further contended, on behalf of the defendant in error, the plaintiff below, that, as the plaintiff described herself as a citizen of Missouri, and the defendant company as a citizen of Arkansas, and as the cause of action, though arising in Missouri, was transitory in its nature, jurisdiction was thus formally conferred upon the Circuit Court of the United States for the District of Arkansas, and that the only question left for inquiry was whether the defendant company, alleged to be a citizen of Arkansas, was legally responsible for the conduct of the Missouri company of the same name, and such responsibility is supposed to be found in the fact that the railroad running through both States was under the common management of both companies.

But even if it be admitted that a common management of a railroad running through two States, and participation in its earnings and losses, by two companies, might make both responsible, jointly and severally, for a tortious cause of action, and that such cause of action might be maintained in the courts of either State, the question of the

jurisdiction of the Federal court still remains. The defendant was not content to leave that question to be decided by the plaintiff's allegations, but pleaded that it was in law a corporation of the State of Missouri, and that, therefore, an action could not be maintained against it, in the Federal court, by a citizen of that State. In other words, the defendant company claimed that, while it had voluntarily subjected itself to the laws of Arkansas, as interpreted and enforced by the courts of that State, it still remained a corporation of the State of Missouri, disabled from suing or being sued by a citizen of that State in a Federal court, and that such disability was not and could not be removed by State legislation.

*The result of these views is that we answer the second question put to us by the Circuit Court of Appeals in the negative, and to render it unnecessary to answer the other questions.*[1]

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## Section II. — Exercise of Jurisdiction.

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### a. *Original in Supreme Court.*

[See Osborn *v.* Bank of United States, 9 Wheat. 738, *supra*, p. 617; Börs *v.* Preston, 111 U. S. 252, *supra*, p. 628; United States *v.* Texas, 143 U. S. 621, *supra*, p. 676; Ames *v.* Kansas, 111 U. S. 449, *supra*, p. 686; Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, *supra*, p. 692; and *Ex parte* Vallandigham, 1 Wall. 243, *infra*, p. 763.]

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### b. *Appellate.*

### MARTIN *v.* HUNTER'S LESSEE.

1 Wheaton, 304; 3 Curtis, 562. 1816.

Story, J., delivered the opinion of the court.

This is a writ of error from the Court of Appeals of Virginia, founded upon the refusal of that court to obey the mandate of this court, requiring the judgment rendered in this very cause, at February term, 1813, to be carried into due execution. The following is the judgment of the Court of Appeals rendered on the mandate: "The court is unanimously of opinion, that the appellate power of

[1] Mr. Justice Harlan delivered a dissenting opinion.

the Supreme Court of the United States does not extend to this court, under a sound construction of the Constitution of the United States; that so much of the 25th section of the act of Congress to establish the judicial courts of the United States, as extends the appellate jurisdiction of the Supreme Court to this court, is not in pursuance of the Constitution of the United States; that the writ of error in this cause was improvidently allowed under the authority of that act; that the proceedings thereon in the Supreme Court were *coram non judice*, in relation to this court, and that obedience to its mandate be declined by the court."

The questions involved in this judgment are of great importance and delicacy. Perhaps it is not too much to affirm, that, upon their right decision, rest some of the most solid principles which have hitherto been supposed to sustain and protect the Constitution itself. The great respectability, too, of the court whose decisions we are called upon to review, and the entire deference which we entertain for the learning and ability of that court, add much to the difficulty of the task which has so unwelcomely fallen upon us. It is, however, a source of consolation that we have had the assistance of most able and learned arguments to aid our inquiries; and that the opinion which is now to be pronounced has been weighed with every solicitude to come to a correct result, and matured after solemn deliberation.

Before proceeding to the principal questions, it may not be unfit to dispose of some preliminary considerations which have grown out of the arguments at the bar.

The Constitution of the United States was ordained and established, not by the States in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by "the people of the United States." There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be that the people had a right to prohibit to the States the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the State governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. The Constitution was not, therefore, necessarily carved out of existing State sovereignties, nor a surrender of powers already existing in State institutions, for the powers of the States depend upon their own constitutions; and the people of every State had the right to modify and restrain them, according to their own views of policy or principle. On the other hand, it is perfectly clear that the sovereign powers vested in the State governments, by their respective constitutions, remained unal-

tered and unimpaired, except so far as they were granted to the government of the United States.

These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognized by one of the articles in amendment of the Constitution, which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction, according to the import of its terms; and where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grows out of the context expressly, or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.

The Constitution, unavoidably, deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which at the present might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom and the public interests should require.

With these principles in view, principles in respect to which no difference of opinion ought to be indulged, let us now proceed to the interpretation of the Constitution, so far as regards the great points in controversy.

The third article of the Constitution is that which must principally attract our attention. [Sections 1 and 2 are quoted.]

Such is the language of the article creating and defining the judicial power of the United States. It is the voice of the whole American people solemnly declared, in establishing one great department of that government which was, in many respects, national, and in all supreme. It is a part of the very same instrument which was to act not merely upon individuals, but upon States; and to deprive

them altogether of the exercise of some powers of sovereignty, and to restrain and regulate them in the exercise of others.

Let this article be carefully weighed and considered. The language of the article throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative, that Congress could not, without a violation of its duty, have refused to carry it into operation. The judicial power of the United States shall be vested (not may be vested) in one supreme court, and in such inferior courts as Congress may, from time to time, ordain and establish. Could Congress have lawfully refused to create a supreme court, or to vest in it the constitutional jurisdiction? "The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive, for their services, a compensation which shall not be diminished during their continuance in office." Could Congress create or limit any other tenure of the judicial office? Could they refuse to pay, at stated times, the stipulated salary, or diminish it during their continuance in office? But one answer can be given to these questions; it must be in the negative. The object of the Constitution was to establish three great departments of government: the Legislative, the Executive, and the Judicial Departments. The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them. Without the latter, it would be impossible to carry into effect some of the express provisions of the Constitution. How, otherwise, could crimes against the United States be tried and punished? How could causes between two States be heard and determined? The judicial power must, therefore, be vested in some court, by Congress; and to suppose that it was not an obligation binding on them, but might, at their pleasure, be omitted or declined, is to suppose that under the sanction of the Constitution they might defeat the Constitution itself. A construction which would lead to such a result cannot be sound.

The same expression, "shall be vested," occurs in other parts of the Constitution, in defining the powers of the other co-ordinate branches of the government. The first article declares that "all legislative powers herein granted shall be vested in a Congress of the United States." Will it be contended that the legislative power is not absolutely vested? that the words merely refer to some future act, and mean only that the legislative power may hereafter be vested? The second article declares that "the executive power shall be vested in a President of the United States of America." Could Congress vest it in any other person; or, is it to await their good pleasure, whether it is to vest at all? It is apparent that such a construction, in either case, would be utterly inadmissible. Why, then, is it entitled to a better support in reference to the Judicial Department?

If, then, it is a duty of Congress to vest the judicial power of the

United States, it is a duty to vest the whole judicial power. The language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist, that Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the Constitution and thereby defeat the jurisdiction as to all; for the Constitution has not singled out any class on which Congress are bound to act in preference to others.

The next consideration is as to the courts in which the judicial power shall be vested. It is manifest that a supreme court must be established; but whether it be equally obligatory to establish inferior courts, is a question of some difficulty. If Congress may lawfully omit to establish inferior courts, it might follow, that in some of the enumerated cases the judicial power could nowhere exist. The Supreme Court can have original jurisdiction in two classes of cases only, namely, in cases affecting ambassadors, other public ministers and consuls, and in cases in which a State is a party. Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself; and if in any of the cases enumerated in the Constitution, the State courts did not then possess jurisdiction, the appellate jurisdiction of the Supreme Court (admitting that it could act on State courts) could not reach those cases, and consequently the injunction of the Constitution, that the judicial power "shall be vested," would be disobeyed. It would seem, therefore, to follow, that Congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the Constitution, is exclusively vested in the United States, and of which the Supreme Court cannot take original cognizance. They might establish one or more inferior courts; they might parcel out the jurisdiction among such courts, from time to time, at their own pleasure. But the whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority.

This construction will be fortified by an attentive examination of the second section of the third article. The words are "the judicial power shall extend," &c. Much minute and elaborate criticism has been employed upon these words. It has been argued that they are equivalent to the words "may extend," and that "extend" means to widen to new cases not before within the scope of the power. For the reasons which have been already stated, we are of opinion that the words are used in an imperative sense. They import an absolute grant of judicial power. They cannot have a relative signification applicable to powers already granted; for the American people had not made any previous grant. The Constitution was for a new government, organized with new substantive powers, and not a mere supplementary charter to a government already existing. The confederation was a compact between States; and its structure and powers were wholly unlike those of the national government. The

Constitution was an act of the people of the United States to supersede the confederation, and not to be engrafted on it, as a stock through which it was to receive life and nourishment.

If, indeed, the relative signification could be fixed upon the term "extend," it could not, as we shall hereafter see, subserve the purposes of the argument in support of which it has been adduced. This imperative sense of the words "shall extend," is strengthened by the context. It is declared that "in all cases affecting ambassadors, &c., the Supreme Court shall have original jurisdiction." Could Congress withhold original jurisdiction in these cases from the Supreme Court? The clause proceeds: "In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make." The very exception here shows that the framers of the Constitution used the words in an imperative sense. What necessity could there exist for this exception if the preceding words were not used in that sense? Without such exception, Congress would, by the preceding words, have possessed a complete power to regulate the appellate jurisdiction, if the language were only equivalent to the words "may have" appellate jurisdiction. It is apparent, then, that the exception was intended as a limitation upon the preceding words, to enable Congress to regulate and restrain the appellate power, as the public interests might, from time to time, require.

Other clauses in the Constitution might be brought in aid of this construction; but a minute examination of them cannot be necessary, and would occupy too much time. It will be found that whenever a particular object is to be effected, the language of the Constitution is always imperative, and cannot be disregarded without violating the first principles of public duty. On the other hand, the legislative powers are given in language which implies discretion, as from the nature of legislative power such a discretion must ever be exercised.

It being, then, established that the language of this clause is imperative, the next question is as to the cases to which it shall apply. The answer is found in the Constitution itself. The judicial power shall extend to all the cases enumerated in the Constitution. As the mode is not limited, it may extend to all such cases, in any form, in which judicial power may be exercised. It may, therefore, extend to them in the shape of original or appellate jurisdiction, or both; for there is nothing in the nature of the cases which binds to the exercise of the one in preference to the other.

In what cases, if any, is this judicial power exclusive, or exclusive at the election of Congress? It will be observed that there are two classes of cases enumerated in the Constitution, between which a distinction seems to be drawn. The first class includes cases arising under the Constitution, laws, and treaties of the United States;

cases affecting ambassadors, other public ministers, and consuls, and cases of admiralty and maritime jurisdiction. In this class the expression is, "and that the judicial power shall extend to all cases;" but in the subsequent part of the clause, which embraces all the other cases of national cognizance, and forms the second class, the word "all" is dropped seemingly *ex industria*. Here the judicial authority is to extend to controversies (not to all controversies) to which the United States shall be a party, &c. From this difference of phraseology, perhaps a difference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed that the variation in the language could have been accidental. It must have been the result of some determinate reason; and it is not very difficult to find a reason sufficient to support the apparent change of intention. In respect to the first class, it may well have been the intention of the framers of the Constitution imperatively to extend the judicial power either in an original or appellate form to all cases; and in the latter class to leave it to Congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate.

The vital importance of all the cases enumerated in the first class to the national sovereignty might warrant such a distinction. In the first place, as to cases arising under the Constitution, laws, and treaties of the United States. Here the State courts could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist in the State courts previous to the adoption of the Constitution, and it could not afterwards be directly conferred on them; for the Constitution expressly requires the judicial power to be vested in courts ordained and established by the United States. This class of cases would embrace civil as well as criminal jurisdiction, and affect not only our internal policy, but our foreign relations. It would, therefore, be perilous to restrain it in any manner whatsoever, inasmuch as it might hazard the national safety. The same remarks may be urged as to cases affecting ambassadors, other public ministers, and consuls, who are emphatically placed under the guardianship of the law of nations; and as to cases of admiralty and maritime jurisdiction, the admiralty jurisdiction embraces all questions of prize and salvage, in the correct adjudication of which foreign nations are deeply interested; it embraces also maritime torts, contracts, and offences, in which the principles of the law and comity of nations often form an essential inquiry. All these cases, then, enter into the national policy, affect the national rights, and may compromit the national sovereignty. The original or appellate jurisdiction ought not, therefore, to be restrained, but should be commensurate with the mischiefs intended to be remedied, and, of course, should extend to all cases whatsoever.

A different policy might well be adopted in reference to the second class of cases; for although it might be fit that the judicial power

should extend to all controversies to which the United States should be a party, yet this power might not have been imperatively given, lest it should imply a right to take cognizance of original suits brought against the United States as defendants in their own courts. It might not have been deemed proper to submit the sovereignty of the United States, against their own will, to judicial cognizance, either to enforce rights or to prevent wrongs; and as to the other cases of the second class, they might well be left to be exercised under the exceptions and regulations which Congress might, in their wisdom, choose to apply. It is also worthy of remark, that Congress seem, in a good degree, in the establishment of the present judicial system, to have adopted this distinction. In the first class of cases, the jurisdiction is not limited except by the subject-matter; in the second, it is made materially to depend upon the value in controversy.

We do not, however, profess to place any implicit reliance upon the distinction which has here been stated and endeavored to be illustrated. It has the rather been brought into view in deference to the legislative opinion, which has so long acted upon and enforced this distinction. But there is, certainly, vast weight in the argument which has been urged, that the Constitution is imperative upon Congress to vest all the judicial power of the United States, in the shape of original jurisdiction, in the supreme and inferior courts created under its own authority. At all events, whether the one construction or the other prevail, it is manifest that the judicial power of the United States is unavoidably, in some cases, exclusive of all State authority, and in all others may be made so at the election of Congress. No part of the criminal jurisdiction of the United States can, consistently with the Constitution, be delegated to State tribunals. The admiralty and maritime jurisdiction is of the same exclusive cognizance; and it can only be in those cases where, previous to the Constitution, State tribunals possessed jurisdiction independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction. Congress, throughout the Judicial Act, 1 Stats. at Large, 73, and particularly in the 9th, 11th, and 13th sections, have legislated upon the supposition that in all the cases to which the judicial powers of the United States extended, they might rightfully vest exclusive jurisdiction in their own courts.

But even admitting that the language of the Constitution is not mandatory, and that Congress may constitutionally omit to vest the judicial power in courts of the United States, it cannot be denied that when it is vested, it may be exercised to the utmost constitutional extent.

This leads us to the consideration of the great question as to the nature and extent of the appellate jurisdiction of the United States. We have already seen that appellate jurisdiction is given by the

Constitution to the Supreme Court in all cases where it has not original jurisdiction, subject, however, to such exceptions and regulations as Congress may prescribe. It is, therefore, capable of embracing every case enumerated in the Constitution, which is not exclusively to be decided by way of original jurisdiction. But the exercise of appellate jurisdiction is far from being limited by the terms of the Constitution to the Supreme Court. There can be no doubt that Congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. The judicial power is delegated by the Constitution in the most general terms, and may, therefore, be exercised by Congress under every variety of form, of appellate or original jurisdiction. And as there is nothing in the Constitution which restrains or limits this power, it must, therefore, in all other cases, subsist in the utmost latitude of which, in its own nature, it is susceptible.

As, then, by the terms of the Constitution, the appellate jurisdiction is not limited as to the Supreme Court, and as to this court it may be exercised in all other cases than those of which it has original cognizance, what is there to restrain its exercise over State tribunals in the enumerated cases? The appellate power is not limited by the terms of the third article to any particular courts. The words are, "the judicial power (which includes appellate power) shall extend to all cases," &c., and "in all other cases before mentioned the Supreme Court shall have appellate jurisdiction." It is the case, then, and not the court, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the Constitution for any qualification as to the tribunal where it depends. It is incumbent, then, upon those who assert such a qualification to show its existence by necessary implication. If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible.

If the Constitution meant to limit the appellate jurisdiction to cases pending in the courts of the United States, it would necessarily follow that the jurisdiction of these courts would, in all the cases enumerated in the Constitution, be exclusive of State tribunals. How otherwise could the jurisdiction extend to all cases arising under the Constitution, laws, and treaties of the United States or to all cases of admiralty and maritime jurisdiction? If some of these cases might be entertained by State tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not extend to all, but to some, cases. If State tribunals might exercise concurrent jurisdiction over all or some of the other classes of cases in the Constitution without control, then the appellate jurisdiction of the United States might, as to such cases, have no real existence, contrary to the manifest intent of the Constitution. Under such circumstances, to give effect to the judicial power, it must be construed to be exclusive; and this not only when the

*casus fœderis* should arise directly, but when it should arise, incidentally, in cases pending in State courts. This construction would abridge the jurisdiction of such court far more than has been ever contemplated in any act of Congress.

On the other hand, if, as has been contended, a discretion be vested in Congress to establish, or not to establish, inferior courts at their own pleasure, and Congress should not establish such courts, the appellate jurisdiction of the Supreme Court would have nothing to act upon, unless it could act upon cases pending in the State courts. Under such circumstances, it must be held that the appellate power would extend to State courts; for the Constitution is peremptory that it shall extend to certain enumerated cases, which cases could exist in no other courts. Any other construction, upon this supposition, would involve this strange contradiction, that a discretionary power vested in Congress, and which they might rightfully omit to exercise, would defeat the absolute injunctions of the Constitution in relation to the whole appellate power.

But it is plain that the framers of the Constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the State courts, in the exercise of their ordinary jurisdiction. With this view the sixth article declares, that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." It is obvious that this obligation is imperative upon the State judges in their official, and not merely in their private, capacities. From the very nature of their judicial duties they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or Constitution of the State, but according to the Constitution, laws, and treaties of the United States, "the supreme law of the land."

A moment's consideration will show us the necessity and propriety of this provision in cases where the jurisdiction of the State courts is unquestionable. Suppose a contract for the payment of money is made between citizens of the same State, and performance thereof is sought in the courts of that State; no person can doubt that the jurisdiction completely and exclusively attaches, in the first instance, to such courts. Suppose, at the trial, the defendant sets up in his defence a tender under a State law, making paper money a good tender, or a State law, impairing the obligation of such contract, which law, if binding, would defeat the suit. The Constitution of the United States has declared that no State shall make anything but gold or silver coin a tender in payment of debts, or pass a law impairing the obligation of contracts. If Congress

shall not have passed a law providing for the removal of such a suit to the courts of the United States, must not the State court proceed to hear and determine it? Can a mere plea in defence be of itself a bar to further proceedings, so as to prohibit an inquiry into its truth or legal propriety, when no other tribunal exists to whom judicial cognizance of such cases is confided? Suppose an indictment for a crime in a State court, and the defendant should allege in his defence that the crime was created by an *ex post facto* act of the State, must not the State court, in the exercise of a jurisdiction which has already rightfully attached, have a right to pronounce on the validity and sufficiency of the defence? It would be extremely difficult, upon any legal principles, to give a negative answer to these inquiries. Innumerable instances of the same sort might be stated in illustration of the position; and unless the State courts could sustain jurisdiction in such cases, this clause of the sixth article would be without meaning or effect, and public mischiefs, of a most enormous magnitude, would inevitably ensue.

It must, therefore, be conceded that the Constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before State tribunals. It was foreseen that, in the exercise of their ordinary jurisdiction, State courts would incidentally take cognizance of cases arising under the Constitution, the laws, and treaties of the United States. Yet to all these cases the judicial power, by the very terms of the Constitution, is to extend. It cannot extend by original jurisdiction if that was already rightfully and exclusively attached in the State courts, which (as has been already shown) may occur; it must therefore extend by appellate jurisdiction or not at all. It would seem to follow that the appellate power of the United States must, in such cases, extend to State tribunals; and if in such cases, there is no reason why it should not equally attach upon all others within the purview of the Constitution.

It has been argued that such an appellate jurisdiction over State courts is inconsistent with the genius of our governments, and the spirit of the Constitution. That the latter was never designed to act upon State sovereignties, but only upon the people, and that, if the power exists, it will materially impair the sovereignty of the States, and the independence of their courts. We cannot yield to the force of this reasoning; it assumes principles which we cannot admit, and draws conclusions to which we do not yield our assent.

It is a mistake that the Constitution was not designed to operate upon States, in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the States in some of the highest branches of their prerogatives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon the States. Surely, when such essential portions of State sovereignty are taken away, or prohibited to be exercised, it

cannot be correctly asserted that the Constitution does not act upon the States. The language of the Constitution is also imperative upon the States, as to the performance of many duties. It is imperative upon the State legislatures to make laws prescribing the time, places, and manner of holding elections for senators and representatives, and for electors of President and Vice-President. And in these, as well as some other cases, Congress have a right to revise, amend, or supersede the laws which may be passed by State legislatures. When, therefore, the States are stripped of some of the highest attributes of sovereignty, and the same are given to the United States; when the legislatures of the States are, in some respects, under the control of Congress, and in every case are, under the Constiution, bound by the paramount authority of the United States; it is certainly difficult to support the argument that the appellate power over the decisions of State courts is contrary to the genius of our institutions. The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the States, and if they are found to be contrary to the Constitution, may declare them to be of no legal validity. Surely, the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power.

Nor can such a right be deemed to impair the independence of State judges. It is assuming the very ground in controversy to assert that they possess an absolute independence of the United States. In respect to the powers granted to the United States, they are not independent; they are expressly bound to obedience by the letter of the Constitution; and if they should unintentionally transcend their authority, or misconstrue the Constitution, there is no more reason for giving their judgments an absolute and irresistible force, than for giving it to the acts of the other co-ordinate departments of State sovereignty.

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It is further argued, that no great public mischief can result from a construction which shall limit the appellate power of the United States to cases in their own courts: first, because State judges are bound by an oath to support the Constitution of the United States, and must be presumed to be men of learning and integrity; and, secondly, because Congress must have an unquestionable right to remove all cases within the scope of the judicial power, from the State courts to the courts of the United States, at any time before final judgment, though not after final judgment. As to the first reason, — admitting that the judges of the State courts are, and always will be, of as much learning, integrity, and wisdom as those of the courts of the United States (which we very cheerfully admit), it does not aid the argument. It is manifest that the Constitution has proceeded upon a theory of its own, and given or withheld powers according to the judgment of the American people, by whom

it was adopted. We can only construe its powers, and cannot inquire into the policy or principles which induced the grant of them. The Constitution has presumed (whether rightly or wrongly we do not inquire) that State attachments, State prejudices, State jealousies, and State interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between States; between citizens of different States; between citizens claiming grants under different States; between a State and its citizens, or foreigners, and between citizens and foreigners, it enables the parties, under the authority of Congress, to have the controversies heard, tried, and determined before the national tribunals. No other reason than that which has been stated can be assigned, why some, at least, of those cases should not have been left to the cognizance of the State courts. In respect to the other enumerated cases — the cases arising under the Constitution, laws, and treaties of the United States, cases affecting ambassadors and other public ministers, and cases of admiralty and maritime jurisdiction — reasons of a higher and more extensive nature, touching the safety, peace, and sovereignty of the nation, might well justify a grant of exclusive jurisdiction.

This is not all. A motive of another kind, perfectly compatible with the most sincere respect for State tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the Constitution. Judges of equal learning and integrity, in different States, might differently interpret a statute, or a treaty of the United States, or even the Constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be different in different States, and might perhaps never have precisely the same construction, obligation, or efficacy in any two States. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the Constitution. What, indeed, might then have been only prophecy has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.

There is an additional consideration, which is entitled to great weight. The Constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum.

Yet, if the construction contended for be correct, it will follow, that as the plaintiff may always elect the State court, the defendant may be deprived of all the security which the Constitution intended in aid of his rights. Such a state of things can, in no respect, be considered as giving equal rights. To obviate this difficulty, we are referred to the power which it is admitted Congress possess to remove suits from State courts to the national courts; and this forms the second ground upon which the argument we are considering has been attempted to be sustained.

This power of removal is not to be found in express terms in any part of the Constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power. The power of removal is certainly not, in strictness of language; it presupposes an exercise of original jurisdiction to have attached elsewhere. The existence of this power of removal is familiar in courts acting according to the course of the common law in criminal as well as civil cases, and it is exercised before as well as after judgment. But this is always deemed in both cases an exercise of appellate, and not of original jurisdiction. If, then, the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power, and as Congress is not limited by the Constitution to any particular mode, or time of exercising it, it may authorize a removal either before or after judgment. The time, the process, and the manner must be subject to its absolute legislative control. A writ of error is, indeed, but a process which removes the record of one court to the possession of another court, and enables the latter to inspect the proceedings, and give such judgment as its own opinion of the law and justice of the case may warrant. There is nothing in the nature of the process which forbids it from being applied, by the legislature, to interlocutory as well as final judgments. And if the right of removal from State courts exists before judgment, because it is included in the appellate power, it must, for the same reason, exist after judgment. And if the appellate power by the Constitution does not include cases pending in State courts, the right of removal, which is but a mode of exercising that power, cannot be applied to them. Precisely the same objections, therefore, exist as to the right of removal before judgment, as after, and both must stand or fall together. Nor, indeed, would the force of the arguments on either side materially vary, if the right of removal were an exercise of original jurisdiction. It would equally trench upon the jurisdiction and independence of State tribunals.

The remedy, too, of removal of suits would be utterly inadequate to the purposes of the Constitution, if it could act only on the parties, and not upon the State courts. In respect to criminal prosecutions, the difficulty seems admitted to be insurmountable; and, in respect to civil suits, there would, in many cases, be rights without corre-

sponding remedies. If State courts should deny the constitutionality of the authority to remove suits from their cognizance, in what manner could they be compelled to relinquish the jurisdiction? In respect to criminal cases, there would at once be an end of all control, and the State decisions would be paramount to the Constitution; and though in civil suits the courts of the United States might act upon the parties, yet the State courts might act in the same way; and this conflict of jurisdictions would not only jeopardize private rights, but bring into imminent peril the public interests.

On the whole, the court are of opinion that the appellate power of the United States does extend to cases pending in the State courts; and that the 25th section of the Judiciary Act, which authorizes the exercise of this jurisdiction in the specified cases, by a writ of error, is supported by the letter and spirit of the Constitution. We find no clause in that instrument which limits this power; and we dare not interpose a limitation where the people have not been disposed to create one.

Strong as this conclusion stands upon the general language of the Constitution, it may still derive support from other sources. It is an historical fact, that this exposition of the Constitution, extending its appellate power to State courts, was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings, both in and out of the State conventions. It is an historical fact, that at the time when the Judiciary Act was submitted to the deliberations of the first Congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that Constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. It is an historical fact, that the Supreme Court of the United States have, from time to time, sustained this appellate jurisdiction in a great variety of cases, brought from the tribunals of many of the most important States in the Union, and that no State tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the Supreme Court, until the present occasion. This weight of contemporaneous exposition by all parties, this acquiescence of enlightened State courts, and these judicial decisions of the Supreme Court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremediable doubts.

The next question which has been argued, is, whether the case at bar be within the purview of the 25th section of the Judiciary Act, so that this court may rightfully sustain the present writ of error. This section, stripped of passages unimportant in this inquiry, enacts, in substance, that a final judgment or decree in any suit in the highest court of law or equity of a State, where is drawn in question

the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such, their validity; or of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption, specially set up or claimed by either party under such clause of the said Constitution, treaty, statute, or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon a writ of error, in the same manner, and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a Circuit Court, and the proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision, as before provided, may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears upon the face of the record, and immediately respects the before-mentioned question of vaidity, or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute.

That the present writ of error is founded upon a judgment of the court below, which drew in question and denied the validity of a statute of the United States, is incontrovertible, for it is apparent upon the face of the record. That this judgment is final upon the rights of the parties is equally true; for if well founded, the former judgment of that court was of conclusive authority, and the former judgment of this court utterly void. The decision was, therefore, equivalent to a perpetual stay of proceedings upon the mandate, and a perpetual denial of all the rights acquired under it. The case, then, falls directly within the terms of the act. It is a final judgment in a suit in a State court, denying the validity of a statute of the United States; and unless a distinction can be made between proceedings under a mandate, and proceedings in an original suit, a writ of error is the proper remedy to revise that judgment. In our opinion no legal distinction exists between the cases.

In causes remanded to the Circuit Courts, if the mandate be not correctly executed, a writ of error or appeal has always been supposed to be a proper remedy, and has been recognized as such in the former decisions of this court. The statute gives the same effect to writs of error from the judgments of State courts as of the Circuit Courts; and in its terms provides for proceedings where the same cause may be a second time brought up on writ of error before the Supreme Court. There is no limitation or description of the cases

to which the second writ of error may be applied; and it ought, therefore, to be coextensive with the cases which fall within the mischiefs of the statute. It will hardly be denied that this cause stands in that predicament; and if so, then the appellate jurisdiction of this court has rightfully attached.

[The nature of the case in the courts of Virginia is explained, to show that the decision of the Supreme Court of that State denied to appellant a right claimed under a treaty of the United States.]

The objection urged at the bar is, that this court cannot inquire into the title, but simply into the correctness of the construction put upon the treaty by the Court of Appeals; and that their judgment is not re-examinable here, unless it appear on the face of the record that some construction was put upon the treaty. If, therefore, that court might have decided the case upon the invalidity of the title (and, *non constat*, that they did not), independent of the treaty, there is an end of the appellate jurisdiction of this court. In support of this objection, much stress is laid upon the last clause of the section, which declares that no other cause shall be regarded as a ground of reversal than such as appears on the face of the record and immediately respects the construction of the treaty, &c., in dispute.

If this be the true construction of the section, it will be wholly inadequate for the purposes which it professes to have in view, and may be evaded at pleasure. But we see no reason for adopting this narrow construction; and there are the strongest reasons against it, founded upon the words as well as the intent of the legislature. What is the case for which the body of the section provides a remedy by writ of error? The answer must be in the words of the section, a suit where is drawn in question the construction of a treaty, and the decision is against the title set up by the party. It is, therefore, the decision against the title set up with reference to the treaty, and not the mere abstract construction of the treaty itself, upon which the statute intends to found the appellate jurisdiction. How, indeed, can it be possible to decide whether a title be within the protection of a treaty, until it is ascertained what that title is, and whether it have a legal validity? From the very necessity of the case, there must be a preliminary inquiry into the existence and structure of the title, before the court can construe the treaty in reference to that title. If the court below should decide that the title was bad, and, therefore, not protected by the treaty, must not this court have a power to decide the title to be good, and, therefore, protected by the treaty? Is not the treaty, in both instances, equally construed, and the title of the party, in reference to the treaty, equally ascertained and decided? Nor does the clause relied on in the objection impugn this construction. It requires that the error upon which the appellate court is to decide shall appear on the face of the record, and immediately respect the questions before

mentioned in the section. One of the questions is as to the construction of a treaty upon a title specially set up by a party, and every error that immediately respects that question must, of course, be within the cognizance of the court. The title set up in this case is apparent upon the face of the record, and immediately respects the decision of that question; any error, therefore, in respect to that title must be re-examinable, or the case could never be presented to the court.

The restraining clause was manifestly intended for a very different purpose. It was foreseen that the parties might claim under various titles, and might assert various defences, altogether independent of each other. The court might admit or reject evidence applicable to one particular title, and not to all, and in such cases it was the intention of Congress to limit what would otherwise have unquestionably attached to the court, the right of revising all the points involved in the cause. It therefore restrains this right to such errors as respect the questions specified in the section; and in this view it has an appropriate sense, consistent with the preceding clauses. We are, therefore, satisfied, that, upon principle, the case was rightfully before us, and if the points were perfectly new, we should not hesitate to assert the jurisdiction.

But the point has been already decided by this court upon solemn argument. In Smith *v.* The State of Maryland, 6 Cranch, 286, precisely the same objection was taken by counsel, and overruled by the unanimous opinion of the court. That case was, in some respects, stronger than the present; for the court below decided, expressly, that the party had no title, and, therefore, the treaty could not operate upon it. This court entered into an examination of that question, and being of the same opinion, affirmed the judgment. There cannot, then, be an authority which could more completely govern the present question.[1]

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## EX PARTE VALLANDIGHAM.

1 Wallace, 243. 1863.

[THIS was an original proceeding in the Supreme Court for a *certiorari* to the Judge Advocate General of the army to send up for review the proceedings of a military commission by which one Vallandigham had been tried and sentenced to imprisonment for violating an order of Major-General Burnside, commanding the military Department of Ohio, declaring that any person found within his lines who should express sympathies for those in arms against the govern-

[1] MR. JUSTICE JOHNSON delivered a concurring opinion.

ment, or should commit acts for the benefit of its enemies, would be punished, which sentence had been approved by Major-General Burnside, but commuted by the President to being put beyond the military lines of the United States.]

Mr. Justice Wayne, after stating the case, delivered the opinion of the court.

General Burnside acted in the matter as the general commanding the Ohio Department, in conformity with the instructions for the government of the armies of the United States, approved by the President of the United States, and published by the Assistant Adjutant-General, by order of the Secretary of War, on the 24th of April, 1863.

It is affirmed in these instructions (§ 1, ¶ 13) that military jurisdiction is of two kinds. First, that which is conferred and defined by statute; second, that which is derived from the common law of war. "Military offences, under the statute, must be tried in the manner therein directed; but military offences, which do not come within the statute, must be tried and punished under the common law of war. The character of the courts which exercise these jurisdictions depends upon the local law of each particular county."

In the armies of the United States, the first is exercised by courts-martial, while cases which do not come within the "rules and regulations of war," or the jurisdiction conferred by statute or court-martial, are tried by *military commissions.*

These jurisdictions are applicable, not only to war with foreign nations, but to a rebellion, when a part of a country wages war against its legitimate government, seeking to throw off all allegiance to it, to set up a government of its own.

Our first remark upon *the motion for a certiorari* is, that there is no analogy between the power given by the Constitution and law of the United States to the Supreme Court, and the other inferior courts of the United States, and to the judges of them, to issue such processes, and the prerogative power by which it is done in England. The purposes for which the writ is issued are alike, but there is no similitude in the origin of the power to do it. In England, the Court of King's Bench has a superintendence over all courts of an inferior criminal jurisdiction, and may, by the plenitude of its power, award a *certiorari* to have any indictment removed and brought before it; and where such *certiorari* is allowable, it is awarded at the instance of the king, because every indictment is at the suit of the king, and he has a prerogative of suing in whatever court he pleases. The courts of the United States derive authority to issue such a writ from the Constitution and the legislation of Congress. To place the two sources of the right to issue the writ in obvious contrast, and in application to the motion we are considering for its exercise by this court, we will cite so much of the third article of the Constitution as we think will best illustrate the subject.

[Portions of sections 1 and 2 are quoted.]

Then Congress passed the act to establish the judicial courts of the United States, 1 Stat. at Large, 73, chap. 20, and in the 13th section of it declared that the Supreme Court shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers or their domestics or their domestic servants as a court of law can have or exercise *consistently with the laws of nations*, and original, but not exclusive jurisdiction of suits brought by ambassadors, or other public ministers, or in which a consul or vice-consul shall be a party. In the same section, the Supreme Court is declared to have appellate jurisdiction in cases hereinafter expressly provided. In this section, it will be perceived that the jurisdiction given, besides that which is mentioned in the preceding part of the section, is an exclusive jurisdiction of suits or proceedings against ambassadors or other public ministers or their domestics or domestic servants, as a court of law can have or exercise consistently with the laws of nations, and original but not exclusive jurisdiction of all suits *brought by ambassadors or other public ministers*, or in which a consul or vice-consul shall be a party, thus guarding them from all other judicial interference, and giving to them the right to prosecute for their own benefit in the courts of the United States. Thus substantially reaffirming the constitutional declaration, that the Supreme Court had original jurisdiction in all cases affecting ambassadors and other public ministers and consuls, and those in which a State shall be a party, and that it shall have appellate jurisdiction in all other cases before mentioned, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

The appellate powers of the Supreme Court, as granted by the Constitution, are limited and regulated by the acts of Congress, and must be exercised subject to the exceptions and regulations made by Congress. Durousseau *v.* The United States, 6 Cranch, 314; Barry *v.* Mercein, 5 How. 119; United States *v.* Curry, 6 id. 113; Forsyth *v.* United States, 9 id. 571. In other words, the petition before us we think not to be within the letter or spirit of the grants of appellate jurisdiction to the Supreme Court. It is not in law or equity within the meaning of those terms as used in the 3d article of the Constitution. Nor is a military commission a court within the meaning of the 14th section of the Judiciary Act of 1789. That act is denominated to be one to establish the judicial courts of the United States, and the 14th section declares that all the "before-mentioned courts" of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, agreeably to the principles and usages of law. The words in the section, "the before-mentioned" courts, can only have reference to such courts as were established in the

preceding part of the act, and excludes the idea that a court of military commission can be one of them.

Whatever may be the force of Vallandigham's protest, that he was not triable by a court of military commission, it is certain that his petition cannot be brought within the 14th section of the act; and further, that the court cannot, without disregarding its frequent decisions and interpretation of the Constitution in respect to its judicial power, originate a writ of *certiorari* to review or pronounce any opinion upon the proceedings of a military commission. It was natural, before the sections of the 3d article of the Constitution had been fully considered in connection with the legislation of Congress, giving to the courts of the United States power to issue writs of *scire facias, habeas corpus*, and all other writs not specially provided for by statute, which might be necessary for the exercise of their respective jurisdiction, that by some members of the profession it should have been thought, and some of the early judges of the Supreme Court also, that the 14th section of the act of 24th September, 1789, gave to this court a right to originate processes of *habeas corpus ad subjiciendum*, writs of *certiorari* to review the proceedings of the inferior courts as a matter of original jurisdiction, without being in any way restricted by the constitutional limitation, that in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. This limitation has always been considered restrictive of any other original jurisdiction. *The rule of construction of the Constitution being, that affirmative words in the Constitution, declaring in what cases the Supreme Court shall have original jurisdiction, must be construed negatively as to all other cases.* Marbury *v.* Madison, 1 Cranch, 137; State of New Jersey *v.* State of New York, 5 Pet. 284; Kendall *v.* The United States, 12 id. 637; Cohens *v.* Virginia, 6 Wheat. 264. The nature and extent of the court's appellate jurisdiction and its want of it to issue writs of *habeas corpus ad subjiciendum* have been fully discussed by this court at different times. We do not think it necessary, however, to examine or cite many of them at this time.

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For the reasons given, our judgment is, that the writ of *certiorari* prayed for to revise and review the proceedings of the military commission, by which Clement L. Vallandigham was tried, sentenced, and imprisoned, must be denied, and so do we order accordingly.

NELSON, J., GRIER, J., and FIELD, J., concurred in the result of this opinion.[1]

[1] In the case of MARBURY *v.* MADISON, 1 Cranch, 137 (1803), the court had under consideration an application for a writ of *mandamus* to be directed to defendant as Secretary of State of the United States requiring him to issue to plaintiff a commission as justice of the peace, such commission having been duly signed by the President of the United States, and placed in the hands of the Secretary of State for delivery but not

delivered. CHIEF JUSTICE MARSHALL, delivering the opinion of the court, after holding that the plaintiff was entitled to the commission and that *mandamus* was the proper remedy to compel its delivery, considered the question whether the writ could issue on an application to the Supreme Court, and used the following language: —

"The act to establish the judicial courts of the United States authorizes the Supreme Court 'to issue writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.'

"The Secretary of State, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of *mandamus* to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

"The Constitution vests the whole judicial power of the United States in one Supreme Court, and such inferior courts as Congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently in some form may be exercised over the present case, because the right claimed is given by a law of the United States.

"In the distribution of this power it is declared that 'the Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction.'

"It has been insisted, at the bar, that as the original grant of jurisdiction, to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the Supreme Court, contains no negative or restrictive words, the power remains to the legislature to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

"If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If Congress remains at liberty to give this court appellate jurisdiction, where the Constitution has declared their jurisdiction shall be original; and original jurisdiction where the Constitution has declared it shall be appellate; the distribution of jurisdiction, made in the Constitution, is form without substance.

"Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all.

"It cannot be presumed that any clause in the Constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.

"If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the Supreme Court should take original jurisdiction in cases which might be supposed to affect them, yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of Congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as Congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.

"When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the Supreme Court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original and not appellate; in the other it is appellate, and not original. If any other construction

would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

"To enable this court, then, to issue a *mandamus*, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

"It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a *mandamus* should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.

"It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a *mandamus* may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and, therefore, seems not to belong to appellate, but to original jurisdiction. Neither is it necessary, in such a case as this, to enable the court to exercise its appellate jurisdiction."

The portion of the opinion in which it is held that the court had the power to declare the act of Congress unconstitutional and of no effect is given *infra*, p. 815.

In the case of Ex parte Watkins, 7 Pet. 568 (1833), it was considered whether the Supreme Court had jurisdiction to issue a writ of *habeas corpus* on an application in behalf of a person imprisoned under a *capias ad satisfaciendum* issued from the Circuit Court of the District of Columbia, and Mr. Justice Story, delivering the opinion of the court, used this language: —

"Upon this state of the facts several questions have arisen and been argued at the bar; and one, which is preliminary in its nature, at the suggestion of the court. This is, whether, under the circumstances of the case, the court possess jurisdiction to award the writ. And upon full consideration we are of opinion that the court do possess jurisdiction. The question turns upon this, whether it is an exercise of original or appellate jurisdiction. If it be the former, then, as the present is not one of the cases in which the Constitution allows this court to exercise original jurisdiction, the writ must be denied. Marbury *v.* Madison, 1 Cranch, 137. If the latter, then, it may be awarded, since the Judiciary Act of 1789, c. 20, § 14, 1 Stats. at Large, 81, has clearly authorized the court to issue it. This was decided in the case *Ex parte* Hamilton, 3 Dall. 17; *Ex parte* Bollman and Swartwout, 4 Cranch, 75; and *Ex parte* Kearney, 7 Wheat. 38. The doubt was whether, in the actual case before the court, the jurisdiction sought to be exercised was not original, since it brought into question, not the validity of the original process of *capias ad satisfaciendum*, but the present right of detainer of the prisoner under it. Upon further reflection, however, the doubt has been removed.

"The award of the *capias ad satisfaciendum* must be considered as the act of the Circuit Court, it being judicial process, issuing under the authority of the court. The party is in custody under that process. He is then in custody, in contemplation of law, under the award of process by the court. Whether he is rightfully so, is the very question now to be decided. If the court should, upon the hearing, decide that the *capias ad satisfaciendum* justifies the present detainer, and should remand the prisoner, it would clearly be an exercise of appellate jurisdiction; for it would be a revision and confirmation of the act of the court below. But the jurisdiction of the court can never depend upon its decision upon the merits of a case brought before it, but upon its right to hear and decide it at all. In Marbury *v.* Madison, 1 Cranch, 137, it was said, that it is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted; and does not create that cause.

"Tried by this criterion, the case before us comes in an appellate form, for it seeks to revise the acts of the Circuit Court. In *Ex parte* Bollman and Swartwout, 4 Cranch, 75, the prisoners were in custody under an order of commitment of the Circuit Court; and it was held that an award of a writ of *habeas corpus* by the Supreme Court was an exercise of appellate jurisdiction. On that occasion, the court said, so far as the

## c. *By Removal.*

### GAINES *v.* FUENTES.

92 United States, 10. 1875.

Mr. Justice Field delivered the opinion of the court.

. . . . . .

In the view we take of the application of the plaintiff in error to remove the cause to the Federal court, no other question than the one raised upon that application is open for our consideration. If the application should have been granted, the subsequent proceedings were without validity; and no useful purpose would be subserved by an examination of the merits of the defence, upon the supposition that the State court rightfully retained its original jurisdiction.

The action is in form to annul the alleged will of 1813 of Daniel Clark, and to recall the decree by which it was probated; but as the petitioners are not heirs of Clark, nor legatees, nor next of kin, and do not ask to be substituted in place of the plaintiff in error, the action cannot be treated as properly instituted for the revocation of the probate, but must be treated as brought against the devisee by strangers to the estate to annul the will as a muniment of title, and to restrain the enforcement of the decree by which its validity was established, so far as it affects their property. It is, in fact, an action between parties; and the question for determination is, whether the Federal court can take jurisdiction of an action brought for the object mentioned between citizens of different States, upon its removal from a State court. The Constitution declares that the judicial power of the United States shall extend to "controversies between citizens of different States," as well as to cases arising under the Constitution, treaties, and laws of the United States; but the conditions upon which the power shall be exercised, except so far as

case of Marbury *v.* Madison, 1 Cranch, 137, had distinguished between original and appellate jurisdiction, that which the court is asked to exercise is clearly appellate. It is the decision of an inferior court, by which a citizen has been committed to jail. *Ex parte* Hamilton, 3 Dall. 17, was a commitment under a warrant by a district judge; and the Supreme Court awarded a writ of *habeas corpus* to revise the decision, and admitted the party to bail. In *Ex parte* Burford, 3 Cranch, 448, the prisoner was in custody under a commitment by the Circuit Court for want of giving a recognizance for his good behavior, as awarded by the court. The Supreme Court relieved him on a writ of *habeas corpus*. In all these cases the issuing of the writ was treated as an exercise of appellate jurisdiction; and it could make no difference in the right of the court to entertain jurisdiction, whether the proceedings of the court below were annulled or confirmed. Considering then, as we do, that we are but revising the effect of the process awarded by the Circuit Court, under which the prisoner is detained, we cannot say that it is the exercise of an original jurisdiction."

the original or appellate character of the jurisdiction is designated in the Constitution, are matters of legislative direction. Some cases there are, it is true, in which, from their nature, the judicial power of the United States, when invoked, is exclusive of all State authority. Such are cases in which the United States are parties, — cases of admiralty and maritime jurisdiction, and cases for the enforcement of rights of inventors and authors under the laws of Congress. The Moses Taylor, 4 Wall. 429; Railway Co. *v.* Whitton, 13 id. 288. But, in cases where the judicial power of the United States can be applied only because they involve controversies between citizens of different States, it rests entirely with Congress to determine at what time the power may be invoked, and upon what conditions, — whether originally in the Federal court, or after suit brought in the State court; and, in the latter case, at what stage of the proceedings, — whether before issue or trial by removal to a Federal court, or after judgment upon appeal or writ of error. The Judiciary Act of 1789, in the distribution of jurisdiction to the Federal courts, proceeded upon this theory. It declared that the circuit courts should have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, involving a specified sum or value, where the suits were between citizens of the State in which they were brought and citizens of other States; and it provided that suits of that character by citizens of the State in which they were brought might be transferred, upon application of the defendants, made at the time of entering their appearance, if accompanied with sufficient security for subsequent proceedings in the Federal court. The validity of this legislation is not open to serious question, and the provisions adopted have been recognized and followed with scarcely an exception by the Federal and State courts since the establishment of the government. But the limitation of the original jurisdiction of the Federal court, and of the right of removal from a State court, to a class of cases between citizens of different States involving a designated amount, and brought by or against resident citizens of the State, was only a matter of legislative discretion. The Constitution imposes no limitation upon the class of cases involving controversies between citizens of different States, to which the judicial power of the United States may be extended; and Congress may, therefore, lawfully provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the Federal judiciary.

As we have had occasion to observe in previous cases, the provision of the Constitution, extending the judicial power of the United States to controversies between citizens of different States, had its existence in the impression that State attachments and State prejudices might affect injuriously the regular administration of justice in the State courts. It was originally supposed that adequate protection against such influences was secured by allowing to the plaintiff an election

of courts before suit; and, when the suit was brought in a State court, a like election to the defendant afterwards. Railway Co. *v.* Whitton, 13 Wall. 289. But the experience of parties immediately after the late war, which powerfully excited the people of different States, and in many instances engendered bitter enmities, satisfied Congress that further legislation was required fully to protect litigants against influences of that character. It therefore provided, by the act of March 2, 1867 (14 Stat. 558), greater facilities for the removal of cases involving controversies between citizens of different States from a State court to a Federal court, when it appeared that such influences existed. That act declared, that where a suit was then pending, or should afterwards be brought in *any* State court, in which there was a controversy between a citizen of the State in which the suit was brought and a citizen of another State, and the matter in dispute exceeded the sum of $500, exclusive of costs, such citizen of another State, whether plaintiff or defendant, upon making and filing in the State court an affidavit that he had reason to believe, and did believe, that from prejudice or local influence he would not be able to obtain justice in the State court, might, at any time before final hearing or trial of the suit, obtain a removal of the case into the Circuit Court of the United States, upon petition for that purpose, and the production of sufficient security for subsequent proceedings in the Federal court. This act covered every possible case involving controversies between citizens of the State where the suit was brought and citizens of other States, if the matter in dispute, exclusive of costs, exceeded the sum of $500. It mattered not whether the suit was brought in a State court of limited or general jurisdiction. The only test was, did it involve a controversy between citizens of the State and citizens of other States? and did the matter in dispute exceed a specified amount? And a controversy was involved in the sense of the statute whenever any property or claim of the parties, capable of pecuniary estimation, was the subject of the litigation, and was presented by the pleadings for judicial determination.

With these provisions in force, we are clearly of opinion that the State court of Louisiana erred in refusing to transfer the case to the Circuit Court of the United States upon the application of the plaintiff in error. If the Federal court had, by no previous act, jurisdiction to pass upon and determine the controversy existing between the parties in the parish court of Orleans, it was invested with the necessary jurisdiction by this act itself so soon as the case was transferred. In authorizing and requiring the transfer of cases involving particular controversies from a State court to a Federal court, the statute thereby clothed the latter court with all the authority essential for the complete adjudication of the controversies, even though it should be admitted that that court could not have taken original cognizance of the cases. The language used in

Smith *v.* Rines, cited from the 2d of Sumner's Reports, in support of the position that such cases are only liable to removal from the State to the Circuit Court as might have been brought before the Circuit Court by original process, applied only to the law as it then stood. No case could then be transferred from a State court to a Federal court, on account of the citizenship of the parties, which could not originally have been brought in the Circuit Court.

But the admission supposed is not required in this case. The suit in the parish court is not a proceeding to establish a will, but to annul it as a muniment of title, and to limit the operation of the decree admitting it to probate. It is, in all essential particulars, a suit for equitable relief, — to cancel an instrument alleged to be void, and to restrain the enforcement of a decree alleged to have been obtained upon false and insufficient testimony. There are no separate equity courts in Louisiana, and suits for special relief of the nature here sought are not there designated suits in equity. But they are none the less essentially such suits; and if by the law obtaining in the State, customary or statutory, they can be maintained in a State court, whatever designation that court may bear, we think they may be maintained by original process in a Federal court, where the parties are, on the one side, citizens of Louisiana, and, on the other, citizens of other States.

. . . . . .

There are, it is true, in several decisions of this court, expressions of opinion that the Federal courts have no probate jurisdiction, referring particularly to the establishment of wills; and such is undoubtedly the case under the existing legislation of Congress. The reason lies in the nature of the proceeding to probate a will as one *in rem*, which does not necessarily involve any controversy between parties: indeed, in the majority of instances, no such controversy exists. In its initiation all persons are cited to appear, whether of the State where the will is offered, or of other States. From its nature, and from the want of parties, or the fact that all the world are parties, the proceeding is not within the designation of cases at law or in equity between parties of different States, of which the Federal courts have concurrent jurisdiction with the State courts under the Judiciary Act; but whenever a controversy in a suit between such parties arises respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the Federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties.

But, as already observed, it is sufficient for the disposition of this case that the statute of 1867, in authorizing a transfer of the cause to the Federal court, does, in our judgment, by that fact, invest that court with all needed jurisdiction to adjudicate finally and settle the controversy involved.

It follows from the views thus expressed that the judgment of the Supreme Court of Louisiana must be reversed, with directions to reverse the judgment of the parish court of Orleans, and to direct a transfer of the cause from that court to the Circuit Court of the United States, pursuant to the application of the appellant; and it is so ordered.[1]

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## TENNESSEE *v.* DAVIS.

100 United States, 257. 1879.

[See *supra*, p. 51.]

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## SECURITY MUTUAL LIFE INSURANCE COMPANY *v.* PREWITT.

202 U. S. 246; 26 Sup. Ct. Rep. 619. 1906.

[This is an appeal from a decision of the Court of Appeals of Kentucky, sustaining the validity of a statute providing that if any foreign insurance company licensed to transact business in the State shall remove to the Federal court any suit instituted against it in the State, the insurance commissioner shall forthwith revoke all authority to such company and its agents to do business in the State.]

MR. JUSTICE PECKHAM delivered the opinion of the court.

. . . . . .

A State has the right to prohibit a foreign corporation from doing business within its borders, unless such prohibition is so conditioned

[1] MR. JUSTICE BRADLEY delivered a dissenting opinion, in which MR. JUSTICE SWAYNE concurred.

In UPSHUR COUNTY *v.* RICH, 135 U. S. 467 (1890), the question was whether an appeal from an assessment of taxes to a county court which was, by the State law, charged with administrative and not judicial functions in such matters, was a suit which could be removed to the Federal courts. MR. JUSTICE BRADLEY, delivering the opinion of the court, after citing the above case and others, used this language: —

"The principle to be deduced from these cases is, that a proceeding, not in a court of justice, but carried on by executive officers in the exercise of their proper functions, as in the valuation of property for the just distribution of taxes or assessments, is purely administrative in its character, and cannot, in any just sense, be called a 'suit'; and that an appeal in such a case, to a board of assessors or commissioners having no judicial powers, and only authorized to determine questions of quantity, proportion, and value, is not a suit; but that such an appeal may become a suit, if made to a court or tribunal having power to determine questions of law and fact, either with or without a jury, and there are parties litigant to contest the case on the one side and on the other."

as to violate some provision of the Federal Constitution. Among the later authorities on that proposition are Hooper *v.* California, 155 U. S. 648; Allgeyer *v.* Louisiana, 165 U. S. 578, 583; Orient Ins. Co. *v.* Daggs, 172 U. S. 557; Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28; New York L. Ins. Co. *v.* Cravens, 178 U. S. 389, 395; Hancock Mut. L. Ins. Co. *v.* Warren, 181 U. S. 73.

Having the power to prevent a foreign insurance company from doing business at all within the State, we think the State can enact a statute such as is above set forth.

The question is, in our opinion, settled by the decisions of this court. In Insurance Company *v.* Morse, 20 Wall. 445, a statute of Wisconsin, passed in 1870, in relation to fire insurance companies, after providing for certain conditions upon which the foreign company might do business within the State, continued:

"Any such company desiring to transact any such business as aforesaid by any agent or agents in this State shall first appoint an attorney in this State, on whom process of law can be served, containing an agreement that such company will not remove the suit for trial into the United States Circuit Court or Federal courts, and file in the office of the Secretary of State a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted."

While that statute was in force the Home Insurance Company of the State of New York established an agency in Wisconsin, and, in compliance with the provisions of the statute, the company duly filed in the office of the Secretary of State of Wisconsin the appointment of one Durand as its agent, upon whom process might be served. The power of attorney was filed, containing the following agreement: "Said company agrees that suits commenced in the State courts of Wisconsin shall not be removed by the acts of said company into the United States Circuit or Federal courts."

After doing business in the State for some time, the company issued a policy to Morse, and a loss having occurred, Morse sued the company in one of the state courts of Wisconsin to recover the amount alleged to be due on the policy. The company entered its appearance in the suit and filed its petition to remove the case, which petition was in proper form, and was accompanied by the required bond and bail. Being presented to the State court of Wisconsin, in which the suit was brought, that court held that the statute justified the denial of the petition to remove the case into the Federal court, and a trial having been had in the state court, it gave judgment for the plaintiff on a verdict found in his favor. Upon a review of the judgment by the Supreme Court of Wisconsin, it was affirmed. Thereupon the insurance company sued out a writ of error from this court, and the sole question was whether the statute and agreement were sufficient to justify the state court in refusing to permit the removal of the case to the Federal court, and proceeding to judgment therein.

This court held that the agreement was void, inasmuch as, if carried out, it would oust the Federal courts of a jurisdiction given them by the Constitution and statutes of the United States. It was said that the statute of Wisconsin was an obstruction to the right of removal provided for by the Constitution of the United States and the laws made in pursuance thereof, and that the agreement of the insurance company derived no support from the unconstitutional statute, and it was void as it would have been had no such statute been passed. The Chief Justice, with whom concurred Mr. Justice Davis, dissented, holding that, as the State had the right to exclude foreign insurance companies from the transaction of business within its jurisdiction, it had the right to impose conditions upon their admission, which was a necessary consequence from the right to exclude altogether.

It will be seen the statute provided that in the power of attorney, appointing an agent for the company within the State, there should be an agreement that the company would not remove a case to a Federal court, and the statute was held to be void.

Subsequently the case of Doyle *v.* Continental Ins. Co., 94 U. S. 535, involving the same statute, came before this court. In that case the court reaffirmed the decision of the Morse case, *supra*, as to the invalidity of the agreement. But, in distinguishing the two cases, it was said, in the course of the opinion, that, as the State had the right to entirely exclude such company from doing business in the State, the means by which it caused such exclusion or the motives of its action were not the subject of judicial inquiry; that the conclusion reached in the Morse case that the statute of Wisconsin was illegal was to be understood as spoken of the provision of the statute then under review, *viz.*, that portion thereof requiring a stipulation against transferring cases to the courts of the United States; that the decision was upon the portion of the statute only, and that other portions thereof, when presented, must be judged on their merits. The court further said that the Morse case had not undertaken to decide what the powers of the State of Wisconsin were in revoking a license previously granted, as no such question had arisen upon the facts therein, and was neither argued by counsel nor referred to in the opinion; but that in the case then before the court (that of Doyle) the point as to the power of the State to revoke a license was distinctly presented. It is stated in the opinion, as follows:

"We have not decided that the State of Wisconsin had not the power to impose terms and conditions as preliminary to the right of an insurance company to appoint agents, keep offices, and issue policies in that State. On the contrary, the case of Paul *v.* Virginia, 8 Wall. 168 [**855**], where it is held such conditions may be imposed, was cited with approval in Insurance Company *v.* Morse."

The opinion concludes as follows:

"It is said that we thus indirectly sanction what we condemn when presented directly; to wit, that we enable the State of Wiscon-

sin to enforce an agreement to abstain from Federal courts. This is an 'inexact statement.' The effect of our decision in this respect is that the State may compel the foreign company to abstain from the Federal courts, or to cease to do business in the State. It gives the company the option. This is justifiable, because the complainant has no constitutional right to do business in that State; that State has authority at any time to declare that it shall not transact business there. This is the whole point of the case and, without reference to the injustice, the prejudice, or the wrong that is alleged to exist, must determine the question. No right of the complainant under the laws or Constitution of the United States, by its exclusion from the State, is infringed; and this is what the State now accomplishes. There is nothing, therefore, that will justify the interference of this court."

In these two cases this court decided that any agreement made by a foreign insurance company not to remove a cause to the Federal court was void, whether made pursuant to a statute of the State providing for such agreement, or in the absence of such statute; but that the State, having power to exclude altogether a foreign insurance company from doing business within the State, had power to enact a statute which, in addition to providing for the agreement mentioned, also provided that if the company did remove a case from the state to a Federal court, its right to do business within the State should cease, and its permit should be revoked. It was held there was a distinction between the two propositions, and one might be held void and the other not.

[The case of Barron *v.* Burnside, 121 U. S. 186, is then distinguished from the cases above cited on the ground that the State statute therein held invalid exacted an agreement in addition not to remove a case to the Federal court. The judgment of the Court of Appeals of Kentucky was therefore affirmed.[1]]

[1] Mr. Justice Day, with whom concurred Mr. Justice Harlan, dissented, stating his views in part as follows:

"If a State may lawfully withhold the right of transacting business within its borders or exclude foreign corporations from the State upon the condition that they shall surrender a constitutional right given in the privilege of the companies to appeal to the courts of the United States, there is nothing to prevent the State from applying the same doctrine to any other constitutional right, which, though differing in character, has no higher or better protection in the Constitution than the one under consideration. If the State may make the right to transact business dependent upon the surrender of one constitutional privilege, it may do so upon another, and finally upon all. In pursuance of the principle announced in this case, that the right of the State to exclude, includes the right, when exercised for any reason or for no reason, the State may say to the foreign corporation, — You may do business within this State, provided you will yield all right to be protected against deprivation of property without due process of law; or provided you surrender your right to have compensation for your property when taken for private use, or provided you surrender all right to the equal protection of laws; and so on through the category of rights secured by the Constitution and deemed essential to the protection of people and corporations living under our institutions. This dangerous doctrine, asserted in the majority opinion in

## d. *By Habeas Corpus Proceedings.*

### WHITTEN *v.* TOMLINSON.

160 United States, 231. 1895.

THIS was a petition, filed March 26, 1895, in the Circuit Court of the United States for the District of Connecticut, and addressed to the Honorable William K. Townsend, the district judge, as a judge of the Circuit Court, for a writ of *habeas corpus* to the sheriff of the county of New Haven in the State of Connecticut.

[The petition and return show that petitioner was detained in custody by the sheriff under commitment after having been brought from Massachusetts to Connecticut in consequence of extradition proceedings on the application of the governor of the latter State.]

The petitioner moved to quash the return, as insufficient to justify his detention.

The Circuit Court, upon a hearing, denied the motion, and discharged the writ of *habeas corpus*, without prejudice to the right of the petitioner to renew the motion; and filed an opinion by the district judge (67 Fed. Rep. 230) in which the grounds of decisions were stated.

[Petitioner appealed from the decree of the Circuit Court.]

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

By the judicial system of the United States, established by Congress under the power conferred upon it by the Constitution, the jurisdiction of the courts of the several States has not been controlled or interfered with, except so far as necessary to secure the supremacy of the Constitution, laws, and treaties of the United States.

With this end, three different methods have been provided by statute for bringing before the courts of the United States proceedings begun in the courts of the States.

First. From the earliest organization of the courts of the United States, final judgments, whether in civil or in criminal cases, rendered by the highest court of a State in which a decision in the case could be had, against a right specially set up or claimed under the Con-

the Doyle case, destroyed and overthrown, as we think, in Barron *v.* Burnside, which latter case has been consistently and repeatedly followed in this court and in other courts, Federal and State, from that day to this, ought not now to be rehabilitated and restored to its power to work destruction of rights deemed so essential to the safety of citizens, natural and artificial, that they have been secured by the provisions of the Federal Constitution.

. . . . . .

"We are of opinion that the statute in question, so far as it authorizes the cancellation of a license given by a State to a corporation to do business within its limits, whenever such corporation, in the exercise of a constitutional right, has a suit brought against it in a State court removed to the Federal court for trial, is unconstitutional and void."

stitution, laws, or treaties of the United States, may be re-examined and reversed or affirmed by this court on writ of error. Acts of September 24, 1789, c. 20, § 25, 1 Stat. 85; February 5, 1867, c. 28, § 2, 14 Stat. 386; Rev. Stat. § 709; Martin *v.* Hunter, 1 Wheat. 304; Cohens *v.* Virginia, 6 Wheat. 264. Such appellate jurisdiction is expressly limited to cases in which the decision of the State court is against the right claimed under the Constitution, laws, or treaties of the United States, because, when the decision of that court is in favor of such a right, no revision by this court is necessary to protect the national government in the exercise of its rightful powers. Gordon *v.* Caldcleugh, 3 Cranch, 268; Montgomery *v.* Hernandez, 12 Wheat. 129; Commonwealth Bank of Kentucky *v.* Griffith, 14 Pet. 56, 58; Missouri *v.* Andriano, 138 U. S. 496, 500, 501.

Second. By the Judiciary Act of 1789, the only other way of transferring a case from a State court to a court of the United States was under section 12, by removal into the Circuit Court of the United States, before trial, of civil actions against aliens, or between citizens of different States. 1 Stat. 79. Such right of removal for trial has been regulated and extended to cases arising under the Constitution, laws, or treaties of the United States, by successive acts of Congress, which need not be particularly referred to, inasmuch as the present case is not one of such a removal.

Third. By section 14 of the old Judiciary Act, the courts of the United States were authorized, in general terms, to issue writs of *habeas corpus* and other writs necessary for the exercise of their respective jurisdictions; "provided that writs of *habeas corpus* shall in no case extend to prisoners in jail, unless when they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." 1 Stat. 81. Under that act, no writ of *habeas corpus*, except *ad testificandum*, could be issued in the case of a prisoner in jail under commitment by a court or magistrate of a State. *Ex parte* Dorr, 3 How. 103; *In re* Burrus, 136 U. S. 586, 593.

By subsequent acts of Congress, however, the power of the courts of the United States to issue writs of *habeas corpus* of prisoners in jail has been extended to the case of any person in custody for an act done or omitted in pursuance of a law of the United States, or of an order or process of a court or judge thereof; or in custody in violation of the Constitution, or of a law or treaty of the United States; or who, being a subject or citizen of and domiciled in a foreign State, is in custody for an act done or omitted under any right or exemption claimed under a foreign State, and depending upon the law of nations. Acts of March 2, 1833, c. 57, § 7, 4 Stat. 634; August 29, 1842, c. 257, 5 Stat. 539; February 5, 1867, c. 28, § 1, 14 Stat. 385; Rev. Stat. § 753.

By the existing statutes, this court and the Circuit and District Courts, and any justice or judge thereof, have power to grant writs

of *habeas corpus* for the purpose of inquiring into the cause of restraint of liberty of any prisoner in jail, who "is in custody in violation of the Constitution, or of a law or treaty of the United States;" and "the court or justice or judge, to whom the application is made, shall forthwith award a writ of *habeas corpus*, unless it appears from the petition itself that the party is not entitled thereto;" and "shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice may require." Rev. Stat. §§ 751–755, 761.

The power thus granted to the courts and judges of the United States clearly extends to prisoners held in custody, under the authority of a State, in violation of the Constitution, laws, or treaties of the United States. But in the exercise of this power the courts of the United States are not bound to discharge by writ of *habeas corpus* every such prisoner.

The principles which should govern their action in this matter were stated, upon great consideration, in the leading case of *Ex parte* Royall, 117 U. S. 241, and were repeated in one of the most recent cases upon the subject, as follows: —

"We cannot suppose that Congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in State courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require,' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." "Where a person is in custody, under process from a State court of original jurisdiction, for an alleged offence against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court has a discretion, whether it will discharge him, upon *habeas corpus*, in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the State court shall have finally acted upon the case, the Circuit Court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the State, or whether it will proceed, by writ of *habeas corpus*, summarily to determine whether the petitioner is re-

strained of his liberty in violation of the Constitution of the United States." *Ex parte* Royall, 117 U. S. 241, 251–253; New York *v.* Eno, 155 U. S. 89, 93–95.

In *Ex parte* Royall and in New York *v.* Eno, it was recognized that in cases of urgency, such as those of prisoners in custody, by authority of a State, for an act done or omitted to be done in pursuance of a law of the United States, or of an order or process of a court of the United States, or otherwise involving the authority and operations of the general government, or its relations to foreign nations, the courts of the United States should interpose by writ of *habeas corpus*.

Such an exceptional case was *In re* Neagle, 135 U. S. 1, in which a deputy marshal of the United States, charged under the Constitution and laws of the United States with the duty of guarding and protecting a judge of a court of the United States, and of doing whatever might be necessary for that purpose, even to the taking of human life, was discharged on *habeas corpus* from custody under commitment by a magistrate of a State on a charge of homicide committed in the performance of that duty.

Such also was *In re* Loney, 134 U. S. 372, in which a person arrested by order of a magistrate of a State, for perjury in testimony given in the case of a contested congressional election, was discharged on *habeas corpus*, because a charge of such perjury was within the exclusive cognizance of the courts of the United States, and to permit it to be prosecuted in the State courts would greatly impede and embarrass the administration of justice in a national tribunal.

Such, again, was Wildenhus's Case, 120 U. S. 1, in which the question was decided on *habeas corpus* whether an arrest, under authority of a State, of one of the crew of a foreign merchant vessel, charged with the commission of a crime on board of her while in a port within the State, was contrary to the provisions of a treaty between the United States and the country to which the vessel belonged.

But, except in such peculiar and urgent cases, the courts of the United States will not discharge the prisoner by *habeas corpus* in advance of a final determination of his case in the courts of the State; and, even after such final determination in those courts, will generally leave the petitioner to the usual and orderly course of proceeding by writ of error from this court. *Ex parte* Royall, 117 U. S. 241; *Ex parte* Fonda, 117 U. S. 516; *In re* Duncan, 139 U. S. 449; *In re* Wood, 140 U. S. 278; *In re* Jugiro, 140 U. S. 291; Cook *v.* Hart, 146 U. S. 183; *In re* Frederich, 149 U. S. 70; New York *v.* Eno, 155 U. S. 89; Pepke *v.* Cronan, 155 U. S. 100; Bergemann *v.* Backer, 157 U. S. 655.

[The sufficiency of the petition and the showing made thereunder is discussed.]

As to those proceedings, the opinion (consistently with the allegations of the petition, so far as anything upon the subject is distinctly and unequivocally alleged therein) not only states, as uncontro-

verted facts, that the petitioner was arrested in Massachusetts and brought into Connecticut under a warrant of extradition issued by the Governor of Massachusetts, upon a requisition of the Governor of Connecticut, accompanied by a certified copy of the indictment, and by an affidavit that the petitioner was a fugitive from justice; but expressly says that it was not denied that the demand upon the executive authority of Massachusetts, and his action thereon, were proper in form.

A warrant of extradition of the governor of a State, issued upon the requisition of the governor of another State, accompanied by a copy of an indictment, is *prima facie* evidence, at least, that the accused had been indicted and was a fugitive from justice; and, when the court in which the indictment was found has jurisdiction of the offence (which there is nothing in this case to impugn), is sufficient to make it the duty of the courts of the United States to decline interposition by writ of *habeas corpus*, and to leave the question of the lawfulness of the detention of the prisoner, in the State in which he was indicted, to be inquired into and determined, in the first instance, by the courts of the State, which are empowered and obliged, equally with the courts of the United States, to recognize and uphold the supremacy of the Constitution and laws of the United States. Robb *v.* Connolly, 111 U. S. 624; *Ex parte* Reggel, 114 U. S. 642; Roberts *v.* Reilly, 116 U. S. 80; Cook *v.* Hart, 146 U. S. 183; Pearce *v.* Texas, 155 U. S. 311.

[The return and mittimus are considered.]

There could be no better illustration than this case affords of the wisdom, if not necessity, of the rule, established by the decisions of this court, above cited, that a prisoner in custody under the authority of a State should not, except in a case of peculiar urgency, be discharged by a court or judge of the United States upon a writ of *habeas corpus*, in advance of any proceedings in the courts of the State to test the validity of his arrest and detention. To adopt a different rule would unduly interfere with the exercise of the criminal jurisdiction of the several States, and with the performance by this court of its appropriate duties.

*Order affirmed.*

### e. *Grants of Federal Judicial Power to State Courts or Officers.*

## ROBERTSON *v.* BALDWIN.

165 United States, 275. 1897.

[PETITIONER Robertson and others, who were seamen on board an American vessel, "the Arago," escaped therefrom, and were arrested under the provisions of Rev. Stat. §§ 4596–4599, and taken before a justice of the peace of the State of Oregon and by him committed to the United States marshal to be returned to said vessel. Being thereafter, and in pursuance of this return, detained on the vessel by its officers, they refused to work, and at San Francisco were arrested and brought before a commissioner of the United States charged with such refusal, as a violation of Rev. Stat. § 4596. Being held to answer for this offence, they sued out a writ of *habeas corpus* in the District Court of the United States for the Northern District of California, alleging that their arrest and return to the vessel in Oregon were without authority because of the unconstitutionality of the statutory provisions above referred to, and because the proceedings thereunder were before a justice of the peace of a State. The District Court refused to discharge them under the writ, and they appealed to this court. The facts of the case are more fully stated, and the portion of the opinion relating to another question is given, *infra*, p. 891.]

MR. JUSTICE BROWN delivered the opinion of the court.

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1. The first proposition, that Congress has no authority under the Constitution to vest judicial power in the courts or judicial officers of the several States, originated in an observation of Mr. Justice Story in Martin *v.* Hunter's Lessee, 1 Wheat. 304, 330, to the effect that "Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself." This was repeated in Houston *v.* Moore, 5 Wheat. 1, 27; and the same general doctrine has received the approval of the courts of several of the States. United States *v.* Lathrop, 17 Johns. 4; Ely *v.* Peck, 7 Conn. 239; United States *v.* Campbell, 6 Hall's Law Jour. 113 [Ohio Com. Pleas]. These were all actions for penalties, however, wherein the courts held to the familiar doctrine that the courts of one sovereignty will not enforce the penal laws of another. Huntington *v.* Attrill, 146 U. S. 657, 672. In Commonwealth *v.* Feely, 1 Va. Cases, 325, it was held by the General Court of Virginia in 1813 that the State courts could not take jurisdiction of an indictment for a crime committed against an act of Congress.

In *Ex parte* Knowles, 5 Cal. 300, it was also held that Congress had no power to confer jurisdiction upon the courts of a State to

naturalize aliens, although, if such power be recognized by the legislature of a State, it may be exercised by the courts of such State of competent jurisdiction.

In State *v.* Rutter, 12 Niles' Register, 115, 231, it was held in 1817, by Judges Bland and Hanson of Maryland, that Congress had no power to authorize justices of the peace to issue warrants for the apprehension of offenders against the laws of the United States. A directly contrary view, however, was taken by Judge Cheves of South Carolina in *Ex parte* Rhodes, 12 Niles' Reg. 264.

The general principle announced by these cases is derived from the third article of the Constitution, the first section of which declares that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish," the judges of which courts "shall hold their offices during good behavior," &c.; and by the second section, "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof, and foreign States, citizens, or subjects."

The better opinion is that the second section was intended as a constitutional definition of the judicial power (Chisholm *v.* Georgia, 2 Dall. 419, 475), which the Constitution intended to confine to courts created by Congress; in other words, that such power extends only to the trial and determination of "cases" in courts of record, and that Congress is still at liberty to authorize the judicial officers of the several States to exercise such power as is ordinarily given to officers of courts not of record; such, for instance, as the power to take affidavits, to arrest and commit for trial offenders against the laws of the United States, to naturalize aliens, and to perform such other duties as may be regarded as incidental to the judicial power rather than a part of the judicial power itself. This was the view taken by the Supreme Court of Alabama in *Ex parte* Gist, 26 Ala. 156, wherein the authority of justices of the peace and other such officers to arrest and commit for a violation of the criminal law of the United States was held to be no part of the judicial power within the third article of the Constitution. And in the case of Prigg *v.* Pennsylvania, 16 Pet. 539, it was said that, as to the authority conferred on State magistrates to arrest fugitive slaves and deliver them to their owners, under the act of February 12, 1793, while a difference of opinion existed, and might still exist upon this point in different

States, whether State magistrates were bound to act under it, no doubt was entertained by this court that State magistrates might, if they chose, exercise the authority, unless prohibited by State legislation. See also Moore *v.* Illinois, 14 How. 13; *In re* Kaine, 14 How. 103.

We think the power of justices of the peace to arrest deserting seamen and deliver them on board their vessel is not within the definition of the "judicial power" as defined by the Constitution, and may be lawfully conferred upon State officers. That the authority is a most convenient one to intrust to such officers cannot be denied, as seamen frequently leave their vessels in small places, where there are no Federal judicial officers, and where a justice of the peace may usually be found, with authority to issue warrants under the State laws.

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### f. *Conflicting Jurisdiction of Federal and State Courts.*

### RIGGS *v.* JOHNSON COUNTY.

6 Wallace, 166. 1867.

[A SUIT was brought by plaintiff against defendant in the Circuit Court of the United States on bonds of defendant issued in aid of a railroad, in pursuance of a State statute of Iowa which had been upheld by the State courts at the time these bonds were thus issued. (See Gelpcke *v.* Dubuque, 1 Wall. 175, *infra*, p. 802.) Judgment being rendered in plaintiff's favor against the county, and execution having been returned unsatisfied, plaintiff applied to the same court for the issuance of a writ of mandamus requiring the proper officers of the county to levy a tax to pay his judgment. The officers set up as a defence the fact that, after the rendition of the judgment and prior to the application for the writ, they had been enjoined in a suit in the courts of the State, brought by taxpayers of the county, from levying such tax; but it appears that this plaintiff was not a party to such suit. Plaintiff's demurrer to this answer of the officers was overruled and he sued out a writ of error to this court.]

MR. JUSTICE CLIFFORD delivered the opinion of the court.

[It is pointed out at length that under the statutes of Iowa the proceeding by mandamus was a proper one in such case, and therefore that it was proper in the Federal court under the provisions of the acts of Congress (1 Stat. at Large, 93 and 276; 4 id. 274; 5 id. 499 and 789), providing that procedure in the Federal courts in actions at law should conform to that provided for the State courts.]

Regularity of the proceedings in the primary suit are not open to inquiry, and it is conceded that the judgment was in regular form; and if so, then the power of the Circuit Court to issue final process, agreeably to the principles and usages of law, to enforce the judgment, is undeniable. Wayman *v.* Southard, 10 Wheat. 22; Bank of the United States *v.* Halstead, id. 56.

Authority of the Circuit Courts to issue process of any kind which is necessary to the exercise of jurisdiction and agreeable to the principles and usages of law, is beyond question, and the power so conferred cannot be controlled either by the process of the State courts or by any act of a State legislature. Such an attempt was made in the early history of Federal jurisprudence, but it was wholly unsuccessful. McKim *v.* Voorhies, 7 Cranch, 281. Suit in that case was ejectment and the verdict was for the plaintiff. Defeated in the Circuit Court, the defendant went into the State court and obtained an injunction staying all proceedings. Plaintiff applied for a writ of *habere facias possessionem*, but the judges of the Circuit Court being opposed in opinion whether the writ ought to issue, the point was certified to this court; and the decision was that the State court had no jurisdiction to enjoin a judgment of the Circuit Court, and the directions were that the writ of possession should issue. Prior decisions of the court had determined that a Circuit Court could not enjoin the proceedings in a State court, and any attempt of the kind is forbidden by an act of Congress. Diggs *et al. v.* Wolcott, 4 Cranch, 179; 1 Stat. at Large, 335.

Repeated decisions of this court have also determined that State laws, whether general or enacted for the particular case, cannot in any manner limit or affect the operation of the process or proceedings in the Federal courts. United States *v.* Peters, 5 Cranch, 136.

The Constitution itself becomes a mockery, say the court in that case, if the State legislatures may at will annul the judgments of the Federal courts, and the nation is deprived of the means of enforcing its own laws by the instrumentality of its own tribunals. Slocum *v.* Mayberry, 2 Wheat. 9; Beers *et al. v.* Haughton, 9 Pet. 359.

Congress may adopt State laws for such a purpose directly, or confide the authority to adopt them to the Federal courts; but their whole efficacy when adopted depends upon the enactments of Congress, and they are neither controlled or controllable by any State regulation. United States *v.* Peters, 5 Cranch, 136; Boyle *v.* Zacharie *et al.*, 6 Pet. 658.

State courts are exempt from all interference by the Federal tribunals, but they are destitute of all power to restrain either the process or proceedings in the national courts. Duncan *v.* Darst *et al.*, 1 How. 306; Peck *v.* Jenness, 7 id. 625. Circuit Courts and State courts act separably and independently of each other, and in their

respective spheres of action the process issued by the one is as far beyond the reach of the other, as if the line of division between them "was traced by landmarks and monuments visible to the eye." Ableman *v.* Booth, 21 How. 516. Appellate relations exist in a class of cases between the State courts and this court, but there are no such relations between the State courts and the Circuit Courts.

Viewed in any light, therefore, it is obvious that the injunction of a State court is inoperative to control, or in any manner to affect, the process or proceedings of a Circuit Court, not on account of any paramount jurisdiction in the latter courts, but because, in their sphere of action, Circuit Courts are wholly independent of the State tribunals. Based on that consideration, the settled rule is, that the remedy of a party, whose property is wrongfully attached under process issued from a Circuit Court, if he wishes to pursue it in a State tribunal, is trespass, and not replevin, as the sheriff cannot take the property out of the possession and custody of the marshal. Freeman *v.* Howe *et al.*, 24 id. 455; Buck *v.* Colbath, 3 Wall. 341. Suppose that to be so, still the defendants insist that the writ was properly refused, because the injunction was issued before the plaintiff's application was presented to the Circuit Court. Undoubtedly Circuit Courts and State courts, in certain controversies between citizens of different States, are courts of concurrent and co-ordinate jurisdiction; and the general rule is, that as between courts of concurrent jurisdiction, the court that first obtains possession of the controversy, or of the property in dispute, must be allowed to dispose of it without interference or interruption from the co-ordinate court. Such questions usually arise in respect to property attached on mesne process, or property seized upon execution; and the general rule is, that where there are two or more tribunals competent to issue process to bind the goods of a party, the goods shall be considered as effectually bound by the authority of the process under which they were first attached or seized. Payne *v.* Drewe, 4 East, 523.

Corresponding decisions have been made in this court, as in the case of Hagan *v.* Lucas, 10 Pet. 400, where it was held that the marshal could not seize property previously attached by the sheriff, and held by him or his agent, under valid process from a State court. Rule laid down in the case of Taylor *v.* Carryl *et al.*, 20 How. 595, is to the same effect as understood by a majority of the court. Mallett *v.* Dexter, 1 Curtis C. C. 174.

Argument for the defendants is, that the rule established in those and kindred cases controls the present controversy; but the court is of a different opinion, for various reasons, in addition to those already mentioned. Unless it be held that the application of the plaintiff for the writ is a new suit, it is quite clear that the proposition is wholly untenable. Theory of the plaintiff is, that the writ of mandamus, in a case like the present, is a writ in aid of jurisdiction

which has previously attached, and that, in such cases, it is a process ancillary to the judgment, and is the proper substitute for the ordinary process of execution, to enforce the payment of the same, as provided in the contract. Grant that such is the nature and character of the writ, as applied in such a case, and it is clear that the proposition of the defendants must utterly fail, as in that view there can be no conflict of jurisdiction, because it has already appeared that a State court cannot enjoin the process or proceedings of a Circuit Court.

Complete jurisdiction of the case, which resulted in the judgment, is conceded; and if it be true that the writ of mandamus is a remedy ancillary to the judgment, and is the proper process to enforce the payment of the same, then there is an end of the argument, as it cannot be contended that a State court can enjoin any such process of a Federal court. When issued by a Federal court, the writ of mandamus is never a prerogative writ. Kentucky *v.* Dennison, 24 How. 97. Outside of this district no Circuit Court can issue it at all in the exercise of original jurisdiction.

Power of the Circuit Courts in the several States to issue the writ of mandamus is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. Express determination of this court is, that it can only be issued by those courts in cases *where the jurisdiction already exists,* and not where it is to be acquired by means of the writ. Kendall *v.* United States, 12 Pet. 615-627; McClung *v.* Silliman, 6 Wheat. 601; McIntire *v.* Wood, 7 Cranch, 506.

Proposition of the defendants proves too much; for if it be correct, the Circuit Courts in the several States cannot issue the writ in any case. Such a proposition finds no support in the language of the Judiciary Act, or in the decisions of this court. Twice this court has affirmed the ruling of the Circuit Court in granting the writ in analogous cases, and once or more this court has reversed the ruling of the Circuit Court in refusing the writ, and remanded the cause, with directions that it should be issued. Knox County *v.* Aspinwall *et al.,* 24 How. 385; Von Hoffman *v.* Quincy, 4 Wall. 554; Supervisors *v.* United States, id. 446. Learned courts in the States have advanced the same views, and it does not appear that there is any contrariety of decision. Thomas *v.* Allegheny County, 32 Penn. St. 225; Hamilton *v.* Pittsburg, 34 id. 509; Armstrong *v.* Allegheny, 37 id. 279; Graham *et al. v.* Maddox *et al.,* 6 Am. Law Reg. 620; Carroll *v.* Board of Police, 28 Miss. 38; Moses on Mandamus, 126.

Tested by all these considerations, our conclusion is, that the propositions of the defendants cannot be sustained, and that the Circuit Courts in the several States may issue the writ of mandamus in a proper case, where it is necessary to the exercise of their respective jurisdictions, agreeably to the principles and usages of law. Where

such an exigency arises, they may issue it; but when so employed, it is neither a prerogative writ nor a new suit, in the jurisdictional sense. On the contrary, it is a proceeding ancillary to the judgment which gives the jurisdiction, and when issued, becomes a substitute for the ordinary process of execution to enforce the payment of the same, as provided in the contract. Kentucky *v.* Dennison, 24 How. 97.

Next suggestion of the defendants is, that if the writ is issued, and they should obey its commands, they may be exposed to a suit for damages or to attachment for contempt, and imprisonment. No such apprehensions are entertained by the court, as all experience shows that the State courts at all times have readily acquiesced in the judgments of this court in all cases confided to its determination under the Constitution and laws of Congress. Guided by the experience of the past, our just expectations of the future are that the same just views will prevail. Should it be otherwise, however, the defendants will find the most ample means of protection at hand. Proper course for them to pursue, in case they are sued for damages, is to plead the commands of the writ in bar of the suit; and if their defence is overruled, and judgment is rendered against them, a writ of error will lie to the judgment, under the twenty-fifth section of the Judiciary Act.

Remedy in case of imprisonment is a very plain one, under the seventh section of the act of the second of March, 1833, entitled An Act further to provide for the collection of the duties on imports. Prisoners in jail or confinement for any act done or omitted to be done in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof, may apply to either of the justices of the Supreme, or a judge of any District Court of the United States for the writ of *habeas corpus*, and they are severally authorized to grant it, in addition to the authority otherwise conferred by law. 4 Stat. at Large, 634.

Under any such circumstances, the wisdom of Congress has provided the means of protection to all persons sued or imprisoned for any act done or omitted to be done in pursuance of a law of the United States, or any order, process, or decree of any Federal judge or court of competent jurisdiction.

*Judgment reversed, and the cause remanded with directions to sustain the demurrer and for further proceedings in conformity to the opinion of the court.*[1]

[1] Mr. Justice Miller delivered a dissenting opinion, in which Mr. Chief Justice Chase and Mr. Justice Grier concurred.

## SECTION III. — THE LAW ADMINISTERED.

### a. *Following the Law of the State.*

### GREEN v. NEAL'S LESSEE.

6 Peters, 291; 10 Curtis, 119. 1832.

M'LEAN, J., delivered the opinion of the court.

This writ of error is prosecuted to reverse a judgment of the Circuit Court for West Tennessee. An action of ejectment was prosecuted by Neal in that court, to recover the possession of six hundred and forty acres of land. The issue was joined, and at the trial the defendant relied upon the statute of limitations, and prayed certain instructions of the court to the jury. Instructions were given, as stated in the following bill of exceptions.

"In the trial, the plaintiff introduced in evidence a grant from the State of North Carolina, dated , to Willoughby Williams, for the land in controversy, and deduced a regular chain of conveyances to plaintiff's lessor, and proved defendant in possession of the land in question at the time suit was brought; defendant introduced a deed from Andrew Jackson to Edward Dillon, and proved that defendant held by a lease from Dillon; and also in support of Dillon's title, introduced evidence tending to prove that persons claiming under and for Dillon, had been more than seven years in possession of the premises in dispute, adverse to the plaintiffs; upon which the court charged the jury that, according to the present state of decision in the Supreme Court of the United States, they could not charge that defendant's title was made good by the statute of limitations."

The decision of the point raised by the bill of exceptions in this case is one of great importance, both as it respects the amount of property which may be affected by it, and the principle which it involves.

In the case of Patton's Lessee *v.* Easton, 1 Wheat. 476, which was brought to this court by writ of error in 1816, the same question, which was raised by the bill of exceptions, was then decided. But it is contended that, under the peculiar circumstances of the case now before the court, they ought not to feel themselves bound by their former decision. This court, in the case of Powell's Lessee *v.* Harman, 2 Pet. 241, gave another decision, under the authority of the one just named; but the question was not argued before the court.

The question involves, in the first place, the construction of the statutes of limitations, passed in 1715 and in 1797. The former was adopted by the State of Tennessee, from North Carolina; the third section of which provides, "that no person or persons, or their heirs, which hereafter shall have any right or title to any lands, tenements, or hereditaments, shall thereunto enter or make claim, but within seven years after his, her, or their right or title shall descend or accrue; and in default thereof, such person or persons so not entering or making default, shall be utterly excluded and disabled from any entry or claim thereafter to be made." The fourth section provides, after enumerating certain disabilities, and the time within which suit must be brought, after they shall cease, that "all possessions held without suing such claim as aforesaid, shall be a perpetual bar against all and all manner of persons whatever, that the expectation of heirs may not, in a short time, leave much land unpossessed, and titles so perplexed that no man will know from whom to take or buy land."

In the year 1797, the legislature, in order to settle the "true construction of the existing laws respecting seven years' possession," enact "that in all cases, wherever any person or persons shall have had seven years' peaceable possession of any land, by virtue of a grant or deed of conveyance founded upon a grant, and no legal claim by suit in law, by such, set up to said land, within the above term, that then, and in that case, the person or persons so holding possession as aforesaid, shall be entitled to hold possession in preference to all other claimants, such quantity of land as shall be specified in his, her, or their said grant or deed of conveyance, founded on a grant as aforesaid."

This act further provides that those who neglect, for the term of seven years, to assert their claim, shall be barred.

This court, in the conclusion of their opinion in the case of Patton's Lessee *v.* Easton, 1 Wheat. 481, say, "This question, too, has at length been decided in the Supreme Court of the State. Subsequent to the division of opinion on this question in the Circuit Court, two cases have been decided in the Supreme Court for the State of Tennessee, which have settled the construction of the act of 1797. It has been decided, that a possession of seven years is a bar only when held 'under a grant, or a deed founded on a grant.' The deed must be connected with the grant. This court concurs in that opinion. A deed cannot be 'founded on a grant,' which gives a title not derived in law or equity from that grant; and the words, 'founded on a grant,' are too important to be discarded."

The two decided cases, to which reference is made above, are Lillard *v.* Elliott, and Douglass *v.* Bledsoe's Heirs. These cases were decided in the year 1815; and this court considered that they settled the construction of the statute of 1797. But it is now made to appear that these decisions were made under such circumstances

that they were never considered, in the State of Tennessee, as fully settling the construction of the act.

In the case of Lillard v. Elliott, it seems but two judges concurred on the point, the court being composed of four; and, in the case of Weatherhead v. Bledsoe, 2 Overton, 352, there was great contrariety of opinion among the judges, on the point of either legal or equitable connection. The question was frequently raised before the Supreme Court of Tennessee; but the construction of the two statutes of limitations was never considered as finally settled until 1825, when the case of Gray and Reeder v. Darby's Lessee, Mart. & Yerg. 396, was decided.

In this cause, an elaborate review of the cases which had arisen under the statute is taken, and the construction of both statutes was given, that it is not necessary, to entitle an individual to the benefits of the statutes, that he should show a connected title, either legal or equitable. That if he prove an adverse possession of seven years under a deed, before suit is brought, and show that the land has been granted, he brings himself within the statutes.

Since this decision, the law has been considered as settled in Tennessee; and there has been so general an acquiescence in all the courts of the State, that the point is not now raised or discussed. This construction has become a rule of property in the State, and numerous suits involving title have been settled by it.

Had this been the settled construction of these statutes when the decision was made by this court, in the case of Patton's Lessee v. Easton, there can be no doubt that that opinion would have conformed to it. But the question is now raised, whether this court will adhere to its own decision, made under the circumstances stated, or yield to that of the judicial tribunals of Tennessee. This point has never before been directly decided by this court, on a question of general importance. The cases are numerous where the court have adopted the constructions given to the statute of a State by its supreme judicial tribunal; but it has never been decided that this court will overrule their own adjudication, establishing an important rule of property, where it has been founded on the construction of a statute made in conformity to the decisions of the State at the time, so as to conform to a different construction adopted afterwards by the State.

This is a question of grave import, and should be approached with great deliberation. It is deeply interesting in every point of view in which it may be considered. As a rule of property it is important; and equally so, as it regards the system under which the powers of this tribunal are exercised.

It may be proper to examine in what light the decisions of the State courts, in giving a construction to their own statutes, have been considered by this court.

In the case of M'Keen v. Delancy's Lessee, reported in 5 Cranch,

22, this court held, that the acknowledgment of a deed before a justice of the Supreme Court, under a statute which required the acknowledgment to be made before a justice of the peace, having been long practised in Pennsylvania, and sanctioned by her tribunals, must be considered as within the statute.

The Chief Justice, in giving the opinion of the court in the case of Bodley *v.* Taylor, 5 Cranch, 221, says, in reference to the jurisdiction of a court of equity: "Had this been a case of the first impression, some contrariety of opinion would, perhaps, have existed on this point. But it has been sufficiently shown, that the practice of resorting to a court of chancery, in order to set up an equitable against the legal title, received in its origin the sanction of the Court of Appeals, while Kentucky remained a part of Virginia, and has been so confirmed by an uninterrupted series of decisions, as to be incorporated into their system, and to be taken into view in the consideration of every title to lands in that country. Such a principle cannot now be shaken."

In the case of Taylor *v.* Brown, 5 Cranch, 255, the court say, in reference to their decision in the case of Bodley *v.* Taylor: "This opinion is still thought perfectly correct in itself. Its application to particular cases, and indeed its being considered as a rule of decision on Kentucky titles, will depend very much on the decisions of that country. For, in questions respecting title to real estate, especially, the same rule ought certainly to prevail in both courts."

This court, in laying down the requisites of a valid entry, in the case of Massie *v.* Watts, 6 Cranch, 165, say: "These principles have been laid down by the courts, and must be considered as expositions of the statute. A great proportion of the landed property of the country depends on adhering to them."

In 9 Cranch, 98, the court say, that "in cases depending on the statute of a State, and more especially in those respecting titles to lands, the Federal courts adopt the construction of the State, where that construction is settled and can be ascertained. And in 5 Wheat. 279, it is stated, that "the Supreme Court uniformly acts under a desire to conform its decisions to those of the State courts, on their local laws."

The Supreme Court holds in the highest respect decisions of State courts upon local laws forming rules of property. 2 Wheat. 316. In construing local statutes respecting real property, the courts of the Union are governed by the decisions of the State tribunals. 6 Wheat. 119. The court say, in the case of Elmendorf *v.* Taylor *et al.*, 10 Wheat. 152, "that the courts of the United States, in cases depending on the laws of a particular State, will, in general, adopt the construction which the courts of the State have given to those laws." "This course is founded upon the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government."

In 7 Wheat. 361, the court again declare, that "the statute laws of the States must furnish the rule of decision to the Federal courts, as far as they comport with the Constitution of the United States, in all cases arising within the respective States; and a fixed and received construction of their respective statute laws, in their own courts, makes a part of such statute law. The court again say, in 12 Wheat. 153, "that this court adopts the local law of real property, as ascertained by the decisions of the State courts, whether these decisions are grounded on the construction of the statutes of the State, or form a part of the unwritten law of the State, which has become a fixed rule of property."

Quotations might be multiplied, but the above will show that this court have uniformly adopted the decisions of the State tribunals respectively, in the construction of their statutes. That this has been done as a matter of principle, in all cases where the decision of a State court has become a rule of property.

In a great majority of the causes brought before the Federal tribunals, they are called to enforce the laws of the States. The rights of parties are determined under those laws, and it would be a strange perversion of principle, if the judicial exposition of those laws, by the State tribunals, should be disregarded. These expositions constitute the law, and fix the rule of property. Rights are acquired under this rule, and it regulates all the transactions which come within its scope.

It is admitted in the argument, that this court, in giving a construction to a local law, will be influenced by the decisions of the local tribunals; but, it is contended, that when such a construction shall be given in conformity to those decisions, it must be considered final. That if the State shall change the rule, it does not comport either with the consistency or dignity of this tribunal to adopt the change. Such a course, it is insisted, would recognize in the State courts a power to revise the decisions of this court, and fix the rule of property differently from its solemn adjudications. That the Federal court, when sitting within a State, is the court of that State, being so constituted by the Constitution and laws of the Union; and as such, has an equal right with the State courts to fix the construction of the local law.

On all questions arising under the Constitution and laws of the Union, this court may exercise a revising power, and its decisions are final and obligatory on all other judicial tribunals, State as well as Federal. A State tribunal has a right to examine any such questions and to determine them, but its decision must conform to that of the Supreme Court, or the corrective power may be exercised. But the case is very different where a question arises under a local law. The decision of this question, by the highest judicial tribunal of a State, should be considered as final by this court; not because the State tribunal, in such a case, has any power to bind this court;

but because, in the language of the court, in the case of Shelby *et al.* *v.* Guy, 11 Wheat. 361, "a fixed and received construction by a State, in its own courts, makes a part of the statute law."

The same reason which influences this court to adopt the construction given to the local law, in the first instance, is not less strong in favor of following it in the second, if the State tribunals should change the construction. A reference is here made, not to a single adjudication, but to a series of decisions which shall settle the rule. Are not the injurious effects on the interests of the citizens of a State as great in refusing to adopt the change of construction, as in refusing to adopt the first construction? A refusal in the one case as well as in the other has the effect to establish, in the State, two rules of property.

Would not a change in the construction of a law of the United States, by this tribunal, be obligatory on the State courts? The statute, as last expounded, would be the law of the Union; and why may not the same effect be given to the last exposition of a local law by the State court? The exposition forms a part of the local law, and is binding on all the people of the State, and its inferior judicial tribunals. It is emphatically the law of the State, which the Federal court, while sitting within the State, and this court, when a case is brought before them, are called to enforce. If the rule as settled should prove inconvenient or injurious to the public interests, the legislature of the State may modify the law or repeal it.

If the construction of the highest judicial tribunal of a State form a part of its statute law, as much as an enactment by the legislature, how can this court make a distinction between them? There could be no hesitation in so modifying our decisions as to conform to any legislative alteration in a statute; and why should not the same rule apply where the judicial branch of the State government, in the exercise of its acknowledged functions, should, by construction, give a different effect to a statute, from what had at first been given to it. The charge of inconsistency might be made with more force and propriety against the Federal tribunals for a disregard of this rule, than by conforming to it. They profess to be bound by the local law; and yet they reject the exposition of that law which forms a part of it. It is no answer to this objection that a different exposition was formerly given to the act which was adopted by the Federal court. The inquiry is, what is the settled law of the State at the time the decision is made. This constitutes the rule of property within the State, by which the rights of litigant parties must be determined.

As the Federal tribunals profess to be governed by this rule, they can never act inconsistently by enforcing it. If they change their decision, it is because the rule on which that decision was founded has been changed.

The case under consideration illustrates the propriety and necessity of this rule. It is now the settled law of Tennessee that an adverse possession of seven years, under a deed for land that has been granted, will give a valid title. But by the decision of this court such a possession, under such evidence of right, will not give a valid title. In addition to the above requisites, this court have decided that the tenant must connect his deed with a grant. It therefore follows that the occupant whose title is protected under the statutes before a State tribunal, is unprotected by them before the Federal court. The plaintiff in ejectment, after being defeated in his action before a State court, on the above construction, to insure success has only to bring an action in the Federal court. This may be easily done by a change of his residence, or a *bona fide* conveyance of the land.

Here is a judicial conflict arising from two rules of property in the same State, and the consequences are not only deeply injurious to the citizens of the State, but calculated to engender the most lasting discontents. It is therefore essential to the interests of the country, and to the harmony of the judicial action of the Federal and State governments, that there should be but one rule of property in a State.

In several of the States, the English statute of limitations has been adopted with various modifications; but in the saving clause, the expression "beyond the seas" is retained. These words in some of the States are construed to mean "out of the State," and in others a literal construction has been given to them.

In the case of Murray's Lessee *v.* Baker *et al.*, 3 Wheat. 541, this court decided that the expressions "beyond seas," and "out of the State," are analogous, and are to have the same construction. But suppose the same question should be brought before this court from a State where the construction of the same words had been long settled to mean literally beyond seas, would not this court conform to it? And might not the same arguments be used in such a case, as are now urged against conforming to the local construction of the law of Tennessee. Apparent inconsistencies in the construction of the statute laws of the States may be expected to arise from the organization of our judicial systems; but an adherence by the Federal courts to the exposition of the local law, as given by the courts of the State, will greatly tend to preserve harmony in the exercise of the judicial power, in the State and Federal tribunals. This rule is not only recommended by strong considerations of propriety, growing out of our system of jurisprudence, but it is sustained by principle and authority.

As it appears to this court that the construction of the statutes of limitations is now well settled, differently from what was supposed to be the rule at the time this court decided the case of Patton's Lessee *v.* Easton, 1 Wheat. 476, and the case of Powell's Lessee *v.*

Harman, 2 Pet. 241; and as the instructions of the Circuit Court were governed by these decisions, and not by the settled law of the State; the judgment must be reversed, and the cause remanded for further proceedings.

BALDWIN, J., dissented.[1]

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## SWIFT *v.* TYSON.

16 Peters, 1; 14 Curtis, 166. 1842.

STORY, J., delivered the opinion of the court.

This cause comes before us from the Circuit Court of the Southern District of New York, upon a certificate of division of the judges of that court.

The action was brought by the plaintiff, Swift, as indorsee, against the defendant, Tyson, as acceptor, upon a bill of exchange dated at Portland, Maine, on the 1st day of May, 1836, for the sum of $1,540.30, payable six months after date and grace, drawn by one Nathaniel Norton and one Jairus S. Keith upon and accepted by Tyson, at the city of New York, in favor of the order of Nathaniel Norton, and by Norton indorsed to the plaintiff. The bill was dishonored at maturity.

At the trial, the acceptance and indorsement of the bill were admitted, and the plaintiff there rested his case. The defendant then introduced in evidence the answer of Swift to a bill of discovery, by which it appeared that Swift took the bill before it became due, in payment of a promissory note due to him by Norton and Keith; that he understood that the bill was accepted in part payment of some lands sold by Norton to a company in New York; that Swift was a *bona fide* holder of the bill, not having any notice of anything in the sale or title to the lands, or otherwise, impeaching the transaction, and with the full belief that the bill was justly due. The particular circumstances are fully set forth in the answer in the record; but it does not seem necessary further to state them.

[1] In TOWNSEND *v.* TODD, 91 U. S. 452 (1875), which involved the validity of a mortgage, for advances to be made, MR. JUSTICE HUNT, delivering the opinion of the court, uses this language: —

"The question depends upon the recording acts of the State of Connecticut; and we are bound to follow the decisions of the courts of the State in their construction of those acts, if there has been a uniform course of decisions respecting them." . . .

[After stating the result of the Connecticut cases on the question, and also that in other States a contrary principle has been recognized, the court continues: —]

"We should be quite willing to give the appellant the benefit of this principle to the extent of his advances; but the contrary rule seems to be so well settled in Connecticut that we are not at liberty to do so. The decree below vacating and cancelling the appellant's mortgage, being in conformity with that rule, is affirmed."

The defendant then offered to prove that the bill was accepted by the defendant as part consideration for the purchase of certain lands in the State of Maine, which Norton and Keith represented themselves to be the owners of, and also represented to be of great value, and contracted to convey a good title thereto; and that the representations were in every respect fraudulent and false, and Norton and Keith had no title to the lands, and that the same were of little or no value. The plaintiff objected to the admission of such testimony, or of any testimony, as against him, impeaching or showing a failure of the consideration on which the bill was accepted, under the facts admitted by the defendant, and those proved by him, by reading the answer of the plaintiff to the bill of discovery. The judges of the Circuit Court thereupon divided in opinion upon the following point or question of law: Whether, under the facts last mentioned, the defendant was entitled to the same defence to the action, as if the suit was between the original parties to the bill, that is to say, Norton, or Norton and Keith, and the defendant; and whether the evidence so offered was admissible as against the plaintiff in the action. And this is the question certified to us for our decision.

There is no doubt that a *bona fide* holder of a negotiable instrument for a valuable consideration, without any notice of facts which impeach its validity as between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity. This is a doctrine so long and so well established, and so essential to the security of negotiable paper, that it is laid up among the fundamentals of the law, and requires no authority or reasoning to be now brought in its support. As little doubt is there, that the holder of any negotiable paper, before it is due, is not bound to prove that he is a *bona fide* holder for a valuable consideration, without notice; for the law will presume that, in the absence of all rebutting proofs, and therefore it is incumbent upon the defendant to establish by way of defence satisfactory proofs of the contrary, and thus to overcome the *prima facie* title of the plaintiff.

In the present case, the plaintiff is a *bona fide* holder without notice for what the law deems a good and valid consideration, that is, for a pre-existing debt; and the only real question in the cause is, whether, under the circumstances of the present case, such a pre-existing debt constitutes a valuable consideration in the sense of the general rule applicable to negotiable instruments. We say, under the circumstances of the present case, for the acceptance having been made in New York, the argument on behalf of the defendant is, that the contract is to be treated as a New York contract, and therefore to be governed by the laws of New York, as expounded

by its courts, as well upon general principles, as by the express provisions of the 34th section of the Judiciary Act of 1789, c. 20. And then it is further contended that, by the law of New York, as thus expounded by its courts, a pre-existing debt does not constitute, in the sense of the general rule, a valuable consideration applicable to negotiable instruments.

[Cases in the New York courts are cited as tending to show that one who takes negotiable paper for a pre-existing debt does not hold it free from equities existing between the original parties.]

But, admitting the doctrine to be fully settled in New York, it remains to be considered whether it is obligatory upon this court, if it differs from the principles established in the general commercial law. It is observable that the courts of New York do not found their decisions upon this point upon any local statute or positive, fixed or ancient local usage; but they deduce the doctrine from the general principles of commercial law. It is, however, contended that the 34th section of the Judiciary Act of 1789, c. 20, furnishes a rule obligatory upon this court to follow the decisions of the State tribunals in all cases to which they apply. That section provides "that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." In order to maintain the argument, it is essential, therefore, to hold that the word "laws," in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often reexamined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded or otherwise incorrect. The laws of a State are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws. In all the various cases, which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the 34th section limited its application to State laws strictly local, that is to say, to the positive statutes of the State, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law.

where the State tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed. The law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord Mansfield in Luke *v.* Lyde, 2 Burr. R. 882, 887, to be in a great measure, not the law of a single country only, but of the commercial world. "Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit."

It becomes necessary for us, therefore, upon the present occasion, to express our own opinion of the true result of the commercial law upon the question now before us. And we have no hesitation in saying, that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated, as applicable to negotiable instruments. Assuming it to be true (which, however, may well admit of some doubt from the generality of the language), that the holder of a negotiable instrument is unaffected with the equities between the antecedent parties, of which he has no notice, only where he receives it in the usual course of trade and business for a valuable consideration, before it becomes due; we are prepared to say, that receiving it in payment of, or as security for a pre-existing debt, is according to the known usual course of trade and business. And why upon principle should not a pre-existing debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of and as security for pre-existing debts. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion, that negotiable paper cannot be applied in payment of or as security for

pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuity to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine, would become of that large class of cases where new notes are given by the same or by other parties, by way of renewal or security to banks, in lieu of old securities discounted by them, which have arrived at maturity? Probably more than one half of all bank transactions in our country, as well as those of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts.

This question has been several times before this court, and it has been uniformly held, that it makes no difference whatsoever as to the rights of the holder, whether the debt, for which the negotiable instrument is transferred to him, is a pre-existing debt or is contracted at the time of the transfer. In each case, he equally gives credit to the instrument. The cases of Coolidge *v.* Payson, 2 Wheat. 66, 70, 73, and Townsley *v.* Sumrall, 2 Pet. 170, 182, are directly in point.

[English and American cases are cited supporting the doctrine of this court on that question.]

We are all, therefore, of opinion that the question on this point, propounded by the Circuit Court for our consideration, ought to be answered in the negative; and we shall accordingly direct it so to be certified to the Circuit Court.[1]

[1] Mr. Justice Catron declined to express an opinion on the question, on the ground that it was not presented in the case.

In Railroad Company *v.* National Bank, 102 U. S. 14 (1880), which was also an appeal from the Circuit Court of the United States for the Southern District of New York, the same question was under consideration, and Mr. Justice Harlan stated the conclusions of the court in part as follows, with a quotation also from Swift *v.* Tyson, *supra*, which is approved: —

"Our conclusion, therefore, is that the transfer, before maturity, of negotiable paper, as security for an antecedent debt merely, without other circumstances, if the paper be so indorsed that the holder becomes a party to the instrument, although the transfer is without express agreement by the creditor for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of such debt. In either case, the *bona fide* holder is unaffected by equities or defences between prior parties, of which he had no notice. This conclusion is abundantly sustained by authority. A different determination by this court would, we apprehend, greatly surprise both the legal profession and the commercial world. See Bigelow's Bills and Notes, 502 *et seq.*; 1 Daniel, Neg. Inst. (2d ed.) c. 25, sects. 820–833; Story, Promissory Notes, sects. 186, 195 (7th ed.), by Thorndyke; 1 Parsons, Notes and Bills (2d ed.), 218, sect. 4, c. 6; and Redfield & Bigelow's Leading Cases upon Bills of Exchange and Promissory Notes, where the authorities are cited by the authors.

"It is, however, insisted that, by the course of judicial decision in New York, negotiable paper transferred merely as collateral security for an antecedent debt, is subject

to the equities of prior parties existing at the time of transfer; that the bank being located in New York, and the other parties being citizens of the same State, and the contract having been there made, this court is bound to accept and follow the decision of the State court, whether it meets our approval or not. This contention rests upon the provision of the statute which declares that 'the laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.'

"It is undoubtedly true that if we should apply to this case the principles announced in the highest court of the State of New York, a different conclusion would have been reached from that already announced. That learned court has held that the holder of negotiable paper transferred *merely* as collateral security for an antecedent debt, nothing more, is not a holder for value, within those rules of commercial law which protect such paper against the equities of prior parties.

"The question here presented is concluded by our former decisions.

. . . . . .

"To this doctrine, which received the approval of all the members of this court when first announced, we have, as our decisions show, steadily adhered. We perceive no reason for its modification in any degree whatever. We could not infringe upon it, in this case, without disturbing or endangering that stability which is essential to be maintained in the rules of commercial law. The decisions of the New York court, which we are asked to follow in determiuing the rights of parties under a contract there made, are not in exposition of any legislative enactment of that State. They express the opinion of that court, not as to the rights of parties under any law local to that State, but as to their rights under the general commercial law existing throughout the Union, except where it may have been modified or changed by some local statute. It is a law not peculiar to one State, or dependent upon local authority, but one arising out of the usages of the commercial world. Suppose a State court, in a case before it, should determine what were the laws of war as applicable to that and similar cases. The Federal courts, sitting in that State, possessing, it must be conceded, equal power with the State court in the determination of such questions, must, upon the theory of counsel for the plaintiff in error, accept the conclusions of the State court as the true interpretation, for that locality, of the laws of war, and as the 'law' of the State in the sense of the statute which makes the 'laws of the States rules of decision in trials at common law.' We apprehend, however, that no one would go that far in asserting the binding force of State decisions upon the courts of the United States when the latter are required, in the discharge of their judicial functions, to consider questions of general law, arising in suits to which their jurisdiction extends. To so hold would be to defeat one of the objects for which those courts were established, and introduce infinite confusion in their decisions of such questions. Further elaboration would seem to be unnecessary."

Mr. Justice Miller and Mr. Justice Field dissented. Mr. Justice Clifford rendered a concurring opinion, not differing from the majority on the point here involved, and Mr. Justice Bradley concurred therein.

In Pana *v.* Bowler, 107 U. S. 529 (1882), was involved the validity of certain township bonds in aid of a railroad, which the Supreme Court of Illinois had held invalid on account of irregularities in the election by which such bonds were authorized. Mr. Justice Woods, rendering the decision of the court, uses this language: —

"It is insisted that this court is bound to follow this decision of the Supreme Court of Illinois and hold the bonds in question void. We do not so understand our duty. Where the construction of a State constitution or law has become settled by the decision of the State courts, the courts of the United States will, as a general rule, accept it as evidence of what the local law is. Thus, we may be required to yield against our own judgment to the proposition that, under the charter of the railway company, the election in this case, which was held under the supervision of a moderator chosen by the electors present, was irregnlar and therefore void. But we are

## GELPCKE *v.* CITY OF DUBUQUE.

1 Wallace, 175. 1863.

[This action was commenced in the Federal court for Iowa on interest coupons of certain bonds issued by the city of Dubuque in aid of the construction of a certain railroad. Judgment was entered for the defendant. Plaintiff brings the case to this court on writ of error.]

Mr. Justice Swayne delivered the opinion of the court.

The whole case resolves itself into a question of the power of the city to issue bonds for the purpose stated.

[Provisions of the act incorporating the city and an act amendatory thereto, by which the city was authorized to borrow money for a public purpose and also specifically to aid in the construction of a railroad mentioned, by issuing bonds thereto, are set out in the opinion,

not bound to accept the inference drawn by the Supreme Court of Illinois, that in consequence of such irregularity in the election the bonds issued in pursuance of it by the officers of the township, which recite on their face that the election was held in accordance with the statute, are void in the hands of *bona fide* holders. This latter proposition is one which falls among the general principles and doctrines of commercial jurisprudence, upon which it is our duty to form an independent judgment, and in respect of which we are under no obligation to follow implicitly the conclusions of any other court, however learned or able it may be. Swift *v.* Tyson, 16 Pet. 1; Russell *v.* Southard, 12 How. 139; Watson *v.* Tarpley, 18 id. 517; Butz *v.* City of Muscatine, 8 Wall. 575; Boyce *v.* Tabb, 18 id. 546; Oates *v.* National Bank, 100 U. S. 239; Railroad Company *v.* National Bank, 102 id. 14."

In State Bank of Ohio *v.* Knoop, 16 How. 369 (1853), the question was whether provisions as to taxation in an act providing for the incorporation of banks became binding on the State as a contract and were irrepealable as to banks incorporated thereunder. The decision of the State Supreme Court in the case was that the provisions in the banking act did not constitute a contract, and that a later statute changing the method and rate of taxation of such banks was valid. On writ of error to the Supreme Court of the United States it was urged that the construction of the State statute by the State Supreme Court should be followed, but Mr. Justice McLean, delivering the opinion of the court, said:—

"The rule observed by this court, to follow the construction of the statute of the State by its Supreme Court, is strongly urged. This is done when we are required to administer the laws of the State. The established construction of a statute of the State is received as a part of the statute. But we are called in the case before us, not to carry into effect a law of the State, but to test the validity of such a law by the Constitution of the Union. We are exercising an appellate jurisdiction. The decision of the Supreme Court of the State is before us for revision, and if their construction of the contract in question impairs its obligation, we are required to reverse their judgment. To follow the construction of a State court in such a case would be to surrender one of the most important provisions in the Federal Constitution.

"There is no jurisdiction which we are called to exercise, of higher importance, nor one of deeper interest to the people of the States. It is, in the emphatic language of Chief Justice Marshall, a bill of rights to the people of the States, incorporated into the fundamental law of the Union. And whilst we have all the respect for the learning and ability which the opinions of the judges of the Supreme Court of the State command, we are called upon to exercise our own judgments in the case."

and the question in the case is stated to be whether such legislation is valid in view of certain provisions in the State constitution.]

Under these provisions it is insisted, —

1. That the general grant of power to the legislature did not warrant it in conferring upon municipal corporations the power which was exercised by the city of Dubuque in this case.

2. That the seventh article of the Constitution prohibits the conferring of such power under the circumstances stated in the answer, debts of counties and cities being, within the meaning of the Constitution, debts of the State.

3. That the eighth article forbids the conferring of such power upon municipal corporations by special laws.

All these objections have been fully considered and repeatedly overruled by the Supreme Court of Iowa. Dubuque Co. *v.* The Dubuque & Pacific R. R. Co., 4 Greene, 1; The State *v.* Bissel, 4 id. 328; Clapp *v.* Cedar Co., 5 Iowa, 15; Ring *v.* County of Johnson, 6 id. 265; McMillen *v.* Boyles, 6 id. 304; McMillen *v.* The County Judge of Lee Co., 6 id. 393; Games *v.* Robb, 8 id. 193; State *v.* The Board of Equalization of the County of Johnson, 10 id. 157. The earliest of these cases was decided in 1853, the latest in 1859. The bonds were issued and put upon the market between the periods named. These adjudications cover the entire ground of this controversy. They exhaust the argument upon the subject. We could add nothing to what they contain. We shall be governed by them, unless there be something which takes the case out of the established rule of this court upon that subject.

It is urged that all these decisions have been overruled by the Supreme Court of the State, in the later case of the State of Iowa, *ex relatione*, *v.* The County of Wapello, 13 Iowa, 390, and it is insisted that in cases involving the construction of a State law or constitution, this court is bound to follow the latest adjudication of the highest court of the State. Leffingwell *v.* Warren, 2 Black, 599, is relied upon as authority for the proposition. In that case this court said it would follow "the latest *settled* adjudications." Whether the judgment in question can, under the circumstances, be deemed to come within that category, it is not now necessary to determine. It cannot be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur. The earlier decisions, we think, are sustained by reason and authority. They are in harmony with the adjudications of sixteen States of the Union. Many of the cases in the other States are marked by the profoundest legal ability.

The late case in Iowa, and two other cases of a kindred character in another State, also overruling earlier adjudications, stand out, as far as we are advised, in unenviable solitude and notoriety. However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. "The sound and true rule is, that if

the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law." The Ohio Life & Trust Co. *v.* Debolt, 16 How. 432.

The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case.

Bonds and coupons like these, by universal commercial usage and consent, have all the qualities of commercial paper. If the plaintiffs recover in this case, they will be entitled to the amount specified in the coupons, with interest and exchange as claimed. White *v.* The V. & M. R. R. Co., 21 How. 575; Commissioners of the County of Knox *v.* Aspinwall *et al.*, 21 id. 539.

We are not unmindful of the importance of uniformity in the decisions of this court, and those of the highest local courts, giving constructions to the laws and constitutions of their own States. It is the settled rule of this court in such cases to follow the decisions of the State courts. But there have been heretofore, in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases. We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice.

The judgment below is reversed, and the cause remanded for further proceedings in conformity to this opinion.[1]

[1] Mr. Justice Miller delivered a dissenting opinion, in which this language is used: —

"The general principle is not controverted by the majority, that to the highest courts of the State belongs the right to construe its statutes and its constitution, except where they may conflict with the Constitution of the United States, or some statute or treaty made under it. Nor is it denied that when such a construction has been given by the State court, that this court is bound to follow it. The cases on this subject are numerous, and the principle is as well settled, and is as necessary to the harmonious working of our complex system of government, as the correlative proposition that to this court belongs the right to expound conclusively, for all other courts, the Constitution and laws of the Federal government. See Shelby *v.* Guy, 11 Wheat. 361; McCluny *v.* Silliman, 3 Pet. 277; Van Rensselaer *v.* Kearney, 11 How. 297; Webster *v.* Cooper, 14 id. 504; Elmendorf *v.* Taylor, 10 Wheat. 152; The Bank *v.* Dudley, 2 Pet. 492.

"But while admitting the general principle thus laid down, the court says it is inapplicable to the present case, because there have been conflicting decisions on this very point by the Supreme Court of Iowa, and that as the bonds issued while the decisions of that court holding such instruments to be constitutional were unreversed, that this construction of the Constitution must now govern this court instead of the later one. The moral force of this proposition is unquestionably very great. And I think, taken in connection with some fancied duty of this court to enforce contracts,

## BURGESS v. SELIGMAN.

107 United States, 20. 1883.

Mr. Justice Bradley delivered the opinion of the court.

This is an action brought [in the Circuit Court of the United States for the Eastern District of Missouri] by the plaintiff, Burgess, against J. & W. Seligman & Co., as stockholders of the Memphis, Carthage, and Northwestern Railroad Company, under a statute of the State of Missouri to recover a debt due to him by the company. The plaintiff, in his petition, alleges that on the 5th of November, 1874, judgment was rendered in his favor against the corporation by the District Court of Cherokee County, Kansas, for $73,661, which remains unsatisfied; that in December, 1874, the corporation was dissolved; and that the defendants at the date of the dissolution and of the judgment, were, and still are, stockholders of the corporation to the amount of $6,000,000, on which there is due an unpaid $1,000,000; and he demands judgment for the amount of his debt. Joseph Seligman, the principal defendant, answered, denying that the defendants were ever stockholders, or subscribers to the stock, of the corporation, and setting forth certain facts and circumstances (stated in the findings) under which the stock alleged to be theirs was merely deposited in their hands by the corporation in trust for a

over and beyond that appertaining to other courts, has given the majority a leaning towards the adoption of a rule, which in my opinion cannot be sustained either on principle or authority.

"The only special charge which this court has over contracts, beyond any other court, is to declare judicially whether the statute of a State impairs their obligation. No such question arises here, for the plaintiff claims under and by virtue of the statute which is here the subject of discussion. Neither is there any question of the obligation of contracts, or the right to enforce them. The question goes behind that. We are called upon, not to construe a contract, nor to determine how one shall be enforced, but to decide whether there ever was a contract made in the case. To assume that there was a contract, which contract is about to be violated by the decisions of the State court of Iowa, is to beg the very question in dispute. In deciding this question the court is called upon, as the court in Iowa was, to construe the constitution of the State. It is a grave error to suppose that this court must, or should, determine this upon any principle which would not be equally binding on the courts of Iowa, or that the decision should depend upon the fact that certain parties had purchased bonds which were supposed to be valid contracts, when they really were not.

"The Supreme Court of Iowa is not the first or the only court which has changed its rulings on questions as important as the one now presented. I understand the doctrine to be in such cases, not that the law is changed, but that it was always the same as expounded by the latter decision, and that the former decision was not, and never had been, the law, and is overruled for that very reason. The decision of this court contravenes this principle, and holds that the decision of the court makes the law, and, in fact, that the same statute or constitution means one thing in 1853, and another thing in 1859. For it is impliedly conceded, that if these bonds had been issued since the more recent decision of the Iowa court, this court would not hold them valid."

temporary purpose by way of collateral security, to be returned when that purpose was accomplished.

The cause was tried by the court, and judgment was rendered for the defendants on certain findings of fact; and the question here is, whether the facts as found are sufficient to support the judgment.

[It appears that defendants received from the railroad company the stock in question to be held in trust as collateral security for themselves and holders of bonds, and voted at stockholders' meetings as owners of such stock. The court below held that defendants did not thereby become liable to creditors of the company under a State statute rendering stockholders liable for the debts of the company after its property was exhausted, but that they were within an exception of the statute exempting from such liability those holding stock as trustees or by way of collateral security. Authorities supporting the ruling of the lower court are cited, and the court continues: —]

But the appellant's counsel, with much confidence, press upon our attention the decisions of the Supreme Court of Missouri on the questions involved in this case, and on the very transactions which we are considering. That court, since the determination of this case by the Circuit Court, has given judgment in two cases adversely to the judgment in this, and to the views above expressed. The first case was that of Griswold *v.* Seligman, decided in November, 1880; the other, that of Fisher *v.* Seligman, decided in February, 1882, in which the former case was substantially followed and confirmed. The case of Griswold *v.* Seligman seems to have been very fully and carefully considered. We have read the opinion of the court and the dissenting opinion of one of the judges with much attention, but we are unable to come to the conclusion reached by the majority.

We do not consider ourselves bound to follow the decisions of the State court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the State tribunals contrary to that given by the Circuit Court. The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as

anthoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts, if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the State courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions.

. . . . . .

In the present case, as already observed, when the transactions in question took place, and when the decision of the Circuit Court was rendered, not only was there no settled construction of the statute on the point under consideration, but the Missouri cases referred to arose upon the identical transactions which the Circuit Court was called upon, and which we are now called upon, to consider. It can hardly be contended that the Federal court was to wait for the State courts to decide the merits of the controversy and then simply register their decision; or that the judgment of the Circuit Court should be reversed merely because the State court has since adopted a different view. If we could see fair and reasonable ground to acquiesce in that view, we should gladly do so; but in the exercise of that independent judgment which it is our duty to apply to the case, we are forced to a different conclusion. The cases of Pease *v.* Peck, 18 How. 595, and Morgan *v.* Curtenius, 20 id. 1, in which the opinions of the court were delivered by Mr. Justice Grier, are precisely in point.

[The general law on the questions whether defendants were estopped by voting the stock, and whether one who received stock

directly from the company could be within the exception of the State statute as to trustees and holders for collateral security, is discussed and the judgment of the lower court affirmed.]

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## BUCHER *v.* CHESHIRE RAILROAD COMPANY.

125 United States, 555. 1888.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the District of Massachusetts.

The plaintiff in error was plaintiff in that court, and sought to recover of the defendants for injuries which he sustained by reason of their negligence while travelling upon their roads. The court on the trial substantially instructed the jury that the plaintiff could not recover because the injury complained of occurred while he was travelling upon the Sabbath day, in violation of the law of the State of Massachusetts.

[After disposing of another question, the Court considers the question whether the fact of travelling on the Lord's Day in violation of statute should preclude plaintiff from recovering.]

The language of the court in Stanton *v.* Metropolitan Railroad Co. [14 Allen, 485] is that "because the plaintiff was engaged in the violation of law, without which he would not have received the injury sued for, he cannot obtain redress in a court of justice." This principle would seem to be as applicable to a man engaged in any other transaction forbidden by law as to that of violating the Sabbath. Whether the doctrine thus laid down is a sound one, and whether, if it be not sound, as it commends itself to our judgment, we should follow it as being supported by the decisions of the Supreme Court of Massachusetts in numerous instances, presents in this case the only serious question for our consideration. Hamilton *v.* City of Boston, 14 Allen, 475; Bosworth *v.* Swansey, 10 Met. 363; Jones *v.* Andover, 10 Allen, 18; Day *v.* Highland Street Railway Co., 135 Mass. 113; Read *v.* Boston & Albany Railroad Co., 140 Mass. 199.

If the proposition, as established by the repeated decisions of the highest court of that State, were one which we ourselves believed to be a sound one, there would be no difficulty in agreeing with that court, and, consequently, affirming the ruling of the Circuit Court, in the present case. But without entering into the argument of that subject, we are bound to say that we do not feel satisfied, that, upon any general principles of law by which the courts that have adopted the common-law system are governed, this is a true exposition of that law.

On the contrary, in the case of Phila., Wilmington, & Balt. Railroad v. Steam Towboat Co., 23 How. 209, this court had under consideration the same question. It arose in regard to the effect of a statute of Maryland forbidding persons "to work or do any bodily labor, or willingly suffer any of their servants to do any manner of labor on the Lord's Day, works of charity or necessity excepted," and prescribing a penalty for a breach thereof. It was held by this court that where a vessel was prosecuting her voyage on Sunday, and was injured by piles negligently left in the river, this statute making travelling on Sunday an offence and punishing it by a penalty, constituted no defence to an action for damages by the vessel. A number of cases were cited sustaining that view of the subject, and the court, through Mr. Justice Grier, used this language: "We do not feel justified, therefore, on any principles of justice, equity, or of public policy, in inflicting an additional penalty of seven thousand dollars on the libellants, by way of set off, because their servants may have been subject to a penalty of twenty shillings each for the breach of the statute."

In that case, however, there had been no decision of the courts of Maryland, holding that a violation of the Sabbath would constitute a defence to the action against the company which had left the piles in the river. In this view of the matter it is not unworthy of consideration that, shortly after the injury in the present case was inflicted, the General Court of Massachusetts passed a statute, to which we have already referred, declaring that travelling on the Lord's Day should not "constitute a defence to an action against a common carrier of passengers for any tort or injury suffered by a person so travelling."

The question then arises, how far is this court bound to follow the decisions of the Massachusetts Supreme Court on that subject?

The Congress of the United States, in the act by which the Federal courts were organized, enacted that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." Rev. Stat. § 721; Judiciary Act, c. 20, § 34, 1 Stat. 92. This statute has been often the subject of construction in this court, and its opinions have not always been expressed in language that is entirely harmonious. What are the laws of the several States which are to be regarded "as rules of decision in trials at common law" is a subject which has not been ascertained and defined with that uniformity and precision desirable in a matter of such great importance.

The language of the statute limits its application to cases of trials at common law. There is, therefore, nothing in the section which requires it to be applied to proceedings in equity, or in admiralty: nor is it applicable to criminal offences against the United States

(see United States *v.* Reid, 12 How. 361), or where the Constitution, treaties, or statutes of the United States require other rules of decision. But with these, and some other exceptions which will be referred to presently, it must be admitted that it does provide that the *laws* of the several States shall be received in the courts of the United States, in cases where they apply, as the rules of decision in trials at common law.

It has been held by this court that the decisions of the highest court of the State in regard to the validity or meaning of the constitution of that State, or its statutes, are to be considered as the law of that State, within the requirement of this section. In Leffingwell *v.* Warren, 2 Black, 599, this court said, in regard to the statutes of limitations of a State: "The construction given to a statute of a State by the highest tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text."

In the case of Luther *v.* Borden, 7 How. 1, 40, Chief Justice Taney said: "The point then raised here has been already decided by the courts of Rhode Island. The question relates altogether to the constitution and laws of that State; and the well-settled rule in this court is, that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of the State." See also Post *v.* Supervisors, 105 U. S. 667.

It is also well settled that where a course of decisions, whether founded upon statutes or not, have become rules of property as laid down by the highest courts of the State, by which is meant those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereto, they are to be treated as laws of that State to the Federal courts.

The principle also applies to the rules of evidence. In *Ex parte* Fisk, 113 U. S. 713, 720, the court said: "It has been often decided in this court that in actions at law in the courts of the United States the rules of evidence and the law of evidence generally of the State prevail in those courts." See also Wilcox *v.* Hunt, 13 Pet. 378; Ryan *v.* Bindley, 1 Wall. 66.

There are undoubtedly exceptions to the principle that the decisions of the State courts, as to what are the laws of that State, are in all cases binding upon the Federal courts. The case of Swift *v.* Tyson, 16 Pet. 1, which has been often followed, established the principle that if this court took a different view of what the law was in certain classes of cases which ought to be governed by the general principles of commercial law, from the State court, it was not bound to follow the latter. There is, therefore, a large field of jurisprudence left in which the question of how far the decisions of State courts constitute the law of those States is an embarrassing one.

There is no common law of the United States, and yet the main

body of the rights of the people of this country rest upon and are governed by principles derived from the common law of England, and established as the laws of the different States. Each State of the Union may have its local usages, customs, and common law. Wheaton *v.* Peters, 8 Pet. 591; Pennsylvania *v.* Wheeling, &c., Bridge Co., 13 How. 518.

When, therefore, in an ordinary trial in an action at law we speak of the common law we refer to the law of the State as it has been adopted by statute or recognized by the courts as the foundation of legal rights. It is in regard to decisions made by the State courts in reference to this law, and defining what is the law of the State as modified by the opinions of its own courts, by the statutes of the State, and the customs and habits of the people, that the trouble arises.

It may be said generally that wherever the decisions of the State courts relate to some law of a local character, which may have become established by those courts, or has always been a part of the law of the State, that the decisions upon the subject are usually conclusive, and always entitled to the highest respect of the Federal courts. The whole of this subject has recently been very ably reviewed in the case of Burgess *v.* Seligman, 107 U. S. 20 [**805**]. Where such local law or custom has been established by repeated decisions of the highest courts of a State, it becomes also the law governing the courts of the United States sitting in that State.

We are of opinion that the adjudications of the Supreme Court of Massachusetts, holding that a person engaged in travel on the Sabbath day, contrary to the statute of the State, being thus in the act of violating a criminal law of the State, shall not recover against a corporation upon whose road he travels for the negligence of its servants, thereby establish this principle as a local law of that State, declaring, as they do, the effect of its statute in its operation upon the obligation of the carrier of passengers. The decisions on this subject by the Massachusetts court are numerous enough and of sufficiently long standing to establish the rule, so far as they can establish it, and we think that, taken in connection with the relation which they bear to the statute itself, though giving an effect to it which may not meet the approval of this court, they nevertheless determine the law of Massachusetts on that subject.[1]

[1] In Chicago Union Bank *v.* Kansas City Bank, 136 U. S. 223 (1890), which involved the question as to the validity of a deed of trust of all the debtor's property under the assignment laws of Missouri, it was found that under the decisions of the Supreme Court of the State the instrument would be valid, while in the Circuit Courts of the United States for Missouri similar instruments had been held void. The court thereupon followed the rule of decision of the State courts, using this language: —

"The question of the construction and effect of a statute of a State, regulating assignments for the benefit of creditors, is a question upon which the decisions of the highest court of the State, establishing a rule of property, are of controlling authority

## b. *Common Law in Federal Jurisprudence.*

### SMITH *v.* ALABAMA.

124 United States, 465. 1888.

[PLAINTIFF in error was arrested for violation of a statute of Alabama making it criminal for an engineer to operate a railroad engine without a license, which could be obtained by examination before a State board. He claimed that he was engaged only in operating a train from a point in Alabama to a point in Mississippi, and that as to him the State statute was invalid as a regulation of interstate commerce, and sought release from imprisonment under the charge by writ of error in the State courts; and the writ being refused, appealed to this court. The court held that the matter, although affecting interstate commerce, was within the regulation of the States, unless such regulation contravenes some Federal law on the subject; and that the general rights and duties of persons within the State are to be determined by the common and statutory law of the State. On this question the following language is used: —]

MR. JUSTICE MATTHEWS delivered the opinion of the court.

. . . . . .

It is that law which defines who are or may be common carriers, and prescribes the means they shall adopt for the safety of that which is committed to their charge, and the rules according to which, under varying conditions, their conduct shall be measured and judged; which declares that the common carreir owes the duty of care, and what shall constitute that negligence for which he shall be responsible.

in the courts of the United States. Brashear *v.* West, 7 Pet. 608, 615; Allen *v.* Massey, 17 Wall. 351; Lloyd *v.* Fulton, 91 U. S. 479, 485; Sumner *v.* Hicks, 2 Black, 532, 534; Jaffray *v.* McGehee, 107 U. S. 361, 365; Peters *v.* Bain, 133 U. S. 670, 686; Randolph's Executor *v.* Quidnick Co., 135 U. S. 457. The decision in White *v.* Cotzhausen, 129 U. S. 329, construing a similar statute of Illinois in accordance with the decisions of the Supreme Court of that State as understood by this court, has therefore no bearing upon the case at bar. The fact that similar statutes are allowed different effects in different States is immaterial. As observed by Mr. Justice Field, speaking for this court, 'The interpretation within the jurisdiction of one State becomes a part of the law of that State, as much so as if incorporated into the body of it by the legislature. If, therefore, different interpretations are given in different States to a similar local law, that law in effect becomes by the interpretations, so far as it is a rule for our action, a different law in one State from what it is in the other.' Christy *v.* Pridgeon, 4 Wall. 196, 203. See also Detroit *v.* Osborne, 135 U. S. 492."

This last case is followed in ETHERIDGE *v.* SPERRY, 139 U. S. 266 (1891), with reference to the validity of a chattel mortgage authorizing mortgagee to retain possession and sell, the decisions of Iowa, where the case arose, being followed rather than certain decisions of the Supreme Court of the United States on that subject.

But for the provisions on the subject found in the local law of each State, there would be no legal obligation on the part of the carrier, whether *ex contractu* or *ex delicto*, to those who employ him; or if the local law is held not to apply where the carrier is engaged in foreign or interstate commerce, then, in the absence of laws passed by Congress or presumed to be adopted by it, there can be no rule of decision based upon rights and duties supposed to grow out of the relation of such carriers to the public or to individuals. In other words, if the law of the particular State does not govern that relation, and prescribe the rights and duties which it implies, then there is and can be no law that does until Congress expressly supplies it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce. The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the State law which until displaced discovers the subject.

There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several States each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. Wheaton *v.* Peters, 8 Pet. 591. A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular State. This arises from the circumstance that the courts of the United States in cases within their jurisdiction, where they are called upon to administer the law of the State in which they sit or by which the transaction is governed, exercise an independent though concurrent jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of Railroad Co. *v.* Lockwood, 17 Wall. 357, where the common law prevailing in the State of New York, in reference to the liability of common carriers for negligence, received a different interpretation from that placed upon it by the judicial tribunals of the State; but the law as applied was none the less the law of that State.

In cases, also, arising under the *lex mercatoria*, or law merchant, by reason of its international character, this court has held itself less bound by the decisions of the State courts than in other cases. Swift *v.* Tyson, 16 Pet. 1; Carpenter *v.* Providence Washington Insurance Co., 16 Pet. 495; Oates *v.* National Bank, 100 U. S. 239; Railroad Company *v.* National Bank, 102 U. S. 14.

There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of consti-

tutional and statutory construction which, therefore, is gradually formed by the judgments of this court, in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority. Moore *v.* United States, 91 U. S. 270.

. . . . . .

*Judgment affirmed.*[1]

[1] Mr. Justice Bradley dissented.

In the following cases expressions are used or decisions made indicating that there is no common law of the United States as distinct from the States: U. S. *v.* Worrall, 2 Dall. 384; U. S. *v.* Hudson, 7 Cranch, 32; U. S. *v.* Coolidge, 1 Wheat. 415; Wheaton *v.* Peters, 8 Pet. 591, 658; Kendall *v.* U. S., 12 Pet. 524, 621; Bucher *v.* Railroad Co., 125 U. S. 583; *In re* Barry, a case in the United States Circuit Court for the Southern District of New York, reported as a note to the case of *In re* Burrus, 136 U. S. 586, 597. These cases and others are cited and considered in Gatton *v.* Chicago, R. I., & P. R. Co., 95 Iowa, 112.

In the case of the Western Union Telegraph Company *v.* Call Publishing Company, 181 U. S. 92, 21 Sup. Ct. Rep. 561 (1901), it is said: "There is no body of Federal common law separate and distinct from the common law existing in the several States in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several States. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress." And it is held that the principles of the common law applicable to common carriers, forbidding unreasonable discriminations in charges, are in force as to interstate commerce so far as they are not superseded by Federal legislation.

# CHAPTER VII.

## CHECKS AND BALANCES IN GOVERNMENT.

### SECTION I. — JUDICIAL RESTRAINTS ON LEGISLATIVE ENCROACHMENTS.

### MARBURY *v.* MADISON.

**1 Cranch, 137; 1 Curtis, 368. 1803.**

[THIS was an original proceeding in this court for *mandamus* to the Secretary of State to require him to deliver a commission to plaintiff as justice of the peace for the District of Columbia. By the Judiciary Act the Supreme Court was authorized "to issue writs of *mandamus* in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States. The court holds that the case is a proper one for *mandamus*, but comes to the conclusion (see *supra*, p. 766, in note) that the power to issue such a writ to an officer is an exercise of original jurisdiction, but is not within the scope of the original jurisdiction conferred by the Constitution on the Supreme Court.]

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the court.

. . . . . .

The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of *mandamus* to public officers, appears not to be warranted by the Constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question whether an act repugnant to the Constitution can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated.

The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act.

Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the Constitution.

Could it be the intention of those who gave this power, to say that in using it the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the Constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the Constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any State." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the Constitution, and only see the law?

The Constitution declares "that no bill of attainder or *ex post facto* law shall be passed."

If, however, such a bill should be passed, and a person should be prosecuted under it, must the court condemn to death those victims whom the Constitution endeavors to preserve?

"No person," says the Constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the Constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as , according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government — if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument. *The rule must be discharged.*

## SECTION II. — EXERCISE OF POWER TO PASS ON CONSTITUTIONALITY OF STATUTES.

### FREES *v.* FORD.

6 New York, 176. 1852.

APPEALS, by the defendants, from judgments of the Supreme Court, affirming judgments rendered in the County Court of the County of Columbia, in favor of the plaintiffs. The facts in the two cases were alike in substance, and presented the same questions. The suits were commenced in January, 1848, by the filing and service of declarations, in the usual form in assumpsit, on the common counts. In the first action, the damages claimed were two hundred, and in the last one hundred dollars. Neither declaration contained any allegation as to the residence of the defendants.

The defendants in their pleas alleged that the Supreme Court had exclusive jurisdiction of the causes of action, and that the same were not subject to the jurisdiction of the County Court. The plaintiffs demurred to the pleas, assigning various special causes, and the defendants joined in demurrer.

JOHNSON, J. There is a ground on which these judgments ought to be reversed, leaving untouched the question of the constitutionality of the Judiciary Act so far as it relates to the jurisdiction of the County Courts. We ought not to pass upon the question of the constitutionality of a statute, unless the determination of the point is necessary to the determination of the cause. Indeed we cannot, if we would, so pass upon it as to render our decision efficient as authority, when there is another and clear ground on which our judgment may be supported.

The 30th section of the Judiciary Act provides, that the County Courts shall have jurisdiction "to hear, try, and determine according to law, the following actions when all of the defendants at the time of commencing the action reside in the county in which said court is held; actions of debt, assumpsit and covenant, when the debt or damages claimed shall not exceed two thousand dollars," &c. This County Court is not a court of general jurisdiction, as was the old Court of Common Pleas; on the contrary, it is a new court with a limited statutory jurisdiction. To all such courts the rule universally applies, that their jurisdiction must appear upon the record. Turner, adm'r, *v.* The Bank of North America, 4 Dallas, 8. In these cases it does not appear upon the records that the defendants were, at the time when the suits were commenced, residents of the county of Columbia. This being a jurisdictional fact, and not averred upon the records, the judgments must be reversed.

## CHICAGO AND GRAND TRUNK RAILWAY COMPANY *v.* WELLMAN.

143 United States, 339. 1892.

[This suit was prosecuted by defendant in error in the State courts of Michigan against plaintiff in error for damages resulting from the refusal of the latter to transport the former as a passenger for the rate of passenger fare fixed by statute of the State. In the trial court the case was submitted on an agreed statement of facts and the testimony of two witnesses as to the capital stock, debts, earnings, and expenses of the company. The defendant below asked an instruction that the statute was unconstitutional, which was refused, and judgment was rendered for plaintiff, which, on appeal, was affirmed by the Supreme Court of the State and the case was brought to this court on writ of error. In the first part of the opinion it is suggested that the facts in the record are not sufficient to enable the court to say as matter of law that the State statute would reduce the earnings of the company below a just compensation, and that the question was one for the jury. Certain facts set out as to the peculiar incidents of the bringing of suit and trial of the case are sufficiently referred to in the portion of the opinion set out below.]

Mr. Justice Brewer delivered the opinion of the court.

. . . . . .

The Supreme Court of Michigan in passing upon the present case felt constrained to make this observation: —

"It being evident from the record that this was a friendly suit between the plaintiff and the defendant to test the constitutionality of this legislation, the Attorney-General, when it was brought into this court upon writ of error, very properly interposed and secured counsel to represent the public interest. In the stipulation of facts or in the taking of testimony in the court below neither the Attorney-General nor any other person interested for or employed in behalf of the people of the State took any part. What difference there might have been in the record had the people been represented in the court below, however, under our view of the case, is not of material inquiry."

Counsel for plaintiff in error, referring to this, does not question or deny, but says: "The Attorney-General speaks of the case as evidently a friendly case, and Justice Morse, in his opinion, also so speaks of it. This may be conceded; but what of it? There is no ground for the claim that any fraud or trickery has been practised in presenting the testimony."

We think there is much in the suggestion. The theory upon which, apparently, this suit was brought is that parties have an

appeal from the legislature to the courts; and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.

These observations are pertinent here. On the very day the act went into force the application for a ticket is made, a suit commenced, and within two months a judgment obtained in the trial court; a judgment rendered not upon the presentation of all the facts from the lips of witnesses, and a full inquiry into them, but upon an agreed statement which precludes inquiry into many things which necessarily largely enter into the determination of the matter in controversy. A single suggestion in this direction: It is agreed that the defendant's operating expenses for 1888 were $2,404,516.54. Of what do these operating expenses consist? Are they made up partially of extravagant salaries — fifty to one hundred thousand dollars to the president, and in like proportion to subordinate officers? Surely, before the courts are called upon to adjudge an act of the legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call "operating expenses."

We do not mean to insinuate aught against the actual management of the affairs of this company. The silence of the record gives us no information, and we have no knowledge outside thereof, and no suspicion of wrong. Our suggestion is only to indicate how easily courts may be misled into doing grievous wrong to the public,

and how careful they should be to not declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts.

*Judgment affirmed.*

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## SECTION III. — EFFECT OF PARTIAL UNCONSTITUTIONALITY.

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### POLLOCK *v.* FARMERS' LOAN AND TRUST COMPANY.

(REHEARING.)

158 United States, 601. 1895.

[See page 223, *supra*.]

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### FIELD *v.* CLARK.

143 United States, 649. 1892.

[See page 95, *supra*.]

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## SECTION IV. — RESPONSIBILITY FOR OFFICIAL ACTS UNDER UNCONSTITUTIONAL STATUTE.

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### CAMPBELL *v.* SHERMAN.

35 Wisconsin, 103. 1874.

APPEAL from the Circuit Court for Eau Claire County.

Action for the unlawful seizure and conversion by the defendant, sheriff of Eau Claire County, through his deputy, and under color of his office, of a steamboat with its tackle and furniture, the property of the plaintiff. The complaint demands damages for the value of the property and for the loss caused plaintiff in his business by the seizure.

[The steamboat was seized by the sheriff under a writ issued from a State court in a proceeding in accordance with the laws of the State to enforce a lien on such boat for a sum due to one Heylmun under

contract for services as a pilot. After such seizure the steamboat was accidentally destroyed by fire. These facts being set up by answer as a defence, the plaintiff demurred thereto, and appealed from an order overruling his demurrer. The court, in its opinion, holds that the statute authorizing proceedings in the courts of the State to enforce a maritime lien such as that claimed in the action in which the sheriff made the seizure was unconstitutional, and then proceeds.]

COLE, J.

. . . . . .

This being the case, the further question arises, Did the warrant thus issued in a cause over which that court had no jurisdiction, afford any protection to the officer for acts done in its execution? The counsel for the defendant contends that it would protect the officer, and that, if fair and regular on its face, he had no right and it was not his duty to inquire whether the court which issued it had jurisdiction of the cause. Where the subject-matter of the suit is within the jurisdiction of the court, yet jurisdiction in the particular case is wanting, there is certainly reason and authority for holding that an officer who executes a process fair upon its face shall be protected. But a clear distinction exists between that case and a proceeding in which the process itself shows that the court has exceeded its jurisdiction. The rule is stated by Mr. Justice Smith in Bagnall *v.* Ableman, 4 Wis. 163, in the following language: "When the process is fair on its face, and issued by a court or magistrate of competent jurisdiction, it is a protection to the officer. But if it be not fair and regular upon its face, or its recitals or commands show a want or excess of jurisdiction in the court or magistrate issuing it, the officer is not protected in its execution." p. 179. The form of the warrant issued in the present case is not set forth in the answer. But it was undoubtedly such a process as the clerk was required to issue upon the filing of the complaint, and it would show upon its face that it was issued in a proceeding instituted under the provisions of ch. 184 [Laws of 1869]. It would command the officer to attach and seize the steamer "Ida Campbell," her tackle, apparel, and furniture, if found within his county, and safely keep the same to answer all such liens as should be established against it in favor of the plaintiff in the cause. It would properly contain recitals showing that a complaint had been filed with the clerk, and state the nature and amount of the demand for which a lien was claimed against the vessel. We must presume from the matters stated in the answer that such was the form of the warrant under which the officer acted; and furthermore, a process setting forth these facts would be required by the law under which the proceeding was taken. And it is very apparent that such a warrant would show upon its face the nature of the proceeding, and that the suit was instituted to enforce a maritime lien. In other words, it would show that the Circuit Court had no jurisdiction of the subject-matter of the action, and no power to hear and deter-

mine it. And we understand the rule to be, that where the process does thus show a want of jurisdiction in the court of the subject-matter of the action, it is void, and does not protect the officer. In this all the cases agree.

But it is said that this rule imposed upon the officer in the present case the duty of determining, in advance of any decision of the courts of this State, the validity of an act of the legislature. How can it be expected, it is asked, that a mere ministerial officer could decide such a question, and thus find out that his process was void for want of jurisdiction in the court which issued it? The maxim *ignorantia juris non excusat*, — ignorance of the law, which every man is presumed to know, does not afford excuse, — in its application to human affairs, frequently operates harshly; and yet it is manifest that if ignorance of the law were a ground of exemption, the administration of justice would be arrested, and society could not exist. For in every case ignorance of the law would be alleged. And consequently the answer must be given in this case, that the ignorance of the officer is of the law, and the rule is almost without an exception, that this does not excuse. It may devolve upon the officer a vast responsibility in some cases, to say that he must notice at his peril that an act of the legislature attempting to confer jurisdiction upon the courts is unconstitutional. But if the officer does not wish to assume all the hazard which such a rule of law imposes on him, he must require a bond of indemnity from the party for whom he is acting. It is further said that it was the duty of the officer to obey the mandate of the warrant and seize the identical steamboat which he did attach, and that he had no alternative but to obey. If the act which the writ commanded him to do was a trespass, he was not required to perform it. Nor would he be liable in that case to the plaintiff for refusing to execute a process void for want of jurisdiction.

We have examined the authorities cited on the brief of counsel for the defendant, but we find nothing in them inconsistent with the views above expressed.

The conclusion which we have reached is, that the answer does not state a defence to the action, and that the demurrer to it should have been sustained.

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## STATE *v.* GODWIN.

123 North Carolina, 697. 1898.

[DEFENDANTS were justices of the peace whose duty by a certain statute of the State was to take action with reference to the public roads in their township. A subsequent statute purported to repeal the statute above referred to, so far as it applied to the county of

which defendants were officers, and relieve them from the duty thereby imposed. Defendants were indicted for refusal to perform an official duty in not acting under the former statute. On the trial the jury found a special verdict reciting that the county commissioners had, on advice of counsel, determined not to act under the later statute on the ground that it was void, and that defendants also, on advice of counsel, were of opinion that nevertheless the later statute repealed the earlier, and therefore failed to do the official acts required by the earlier statute, believing that those acts devolved, in accordance with the later statute, on other officers as therein provided. From a judgment of not guilty the State appealed. The court in its opinion reaches the conclusion that the later statute was unconstitutional by reason of some provisions therein, and that the earlier statute was not thereby repealed, and then continues.]

MONTGOMERY, J.

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The question for decision, then, is, is one who is a public officer under a former provision of law compelled, under pain of indictment and punishment, to perform the duties of the office during the time when there was on the statute books a subsequent act unconstitutional in all of its provisions? The matter is an important one, both to the public and to the individual. With us, public office is a public trust, and public officers are merely the agents of the people. This fundamental principle of republican government may not always be recognized by the officer, but it is nevertheless the true theory. When the people, through their representatives, create a public office, and prescribe the duties of the officer, the people act for the common good, and the incumbent of the office is the mere instrument used for the general welfare. His gain or profit is not in contemplation of the lawmakers. The public interest is the chief consideration. What an anomalous state of things would we have, then, if a person believing himself to be a public officer, because of the discharge of the duties which he thought he owed to the public, should afterwards be indicted and punished, because the courts had held the act which created the office and prescribed its duties to be against the provisions of the Constitution and void! Such a proposition would be equivalent to declaring that the individual officeholder must be wiser than the whole people, represented in their general assembly. Such a proposition, to us, seems opposed to every idea of justice. It could not be true. The criminal law cannot be invoked to punish one who acts as a public officer, — as an agent of the people, — and who in the discharge of a public duty had obeyed an act of the law-making power, even though the law be unconstitutional, unless the act itself had required the committal of a crime, — a thought which could not be entertained for a moment. And it makes no difference that in the case before the court the defendants are indicted for a refusal to perform certain duties under a former

law attempted to be repealed by a subsequent unconstitutional statute, and not for doing positive acts under an unconstitutional law. The principle is the same in both cases. The defendants here cannot be punished under the criminal law for failing and refusing to perform the duties of an office, which office, and the duties pertaining to it, had been sought to be repealed by a subsequent act of the legislature, afterwards declared by the courts to be unconstitutional. Until the subsequent statute was declared to be unconstitutional by competent authority, the defendants, under every idea of justice and under our theory of government, had a right to presume that the law-making power had acted within the bounds of the Constitution, and their highest duty was to obey.

It is not necessary, to a proper determination of this case, to go into the realm of the effect of contracts, executed or executory, made by a person claiming to be a public officer, but where there is no lawfully created office. The counsel for the prosecution cited to the court, in support of his position, the case of Norton *v.* Shelby Co., 118 U. S. 425, and especially to that portion of the opinion wherein it was declared by the court that "an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never passed." The opinion in that case was rendered upon the effect of an executory contract made by one who claimed to be a public officer, the office having been created without authority of law. For the reasons given in this opinion, the case of Norton *v.* Shelby Co., *supra*, does not apply to the facts in this case. Upon the special verdict the judgment of the court below was that the defendants were not guilty, and the judgment is affirmed. *Affirmed.*[1]

[1] In 12 Harvard Law Review, at p. 352, is the following note to a brief statement of the foregoing case: —

"The case seems to be correct in principle, although there is a direct conflict of authority on the question. Many jurisdictions hold that when a legislative enactment proves to be invalid, it is, for all legal purposes, as if it had never existed; and, before it has been declared unconstitutional by the courts, acts done or duties neglected by a public officer, *bona fide* believing it to be valid and in reliance upon it, are, according to the general rule, not excused by his ignorance of the law. Sumner *v.* Beeler, 50 Ind. 341; Campbell *v.* Sherman, 35 Wis. 103. The better and more just doctrine, however, appears to be that the officer is protected unless the statute relied upon appears on its face clearly unconstitutional. Henke *v.* McCord, 55 Iowa, 378; Sessums *v.* Botts, 34 Tex. 335."

# CHAPTER VIII.

## THE GOVERNMENT OF THE TERRITORIES.

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### THE AMERICAN INSURANCE COMPANY *v.* CANTER.

1 Peters, 511; 7 Curtis, 685. 1828.

MARSHALL, C. J., delivered the opinion of the court.

The plaintiffs filed their libel in this cause in the District Court of South Carolina, to obtain restitution of 356 bales of cotton, part of the cargo of the ship "Point a Petre;" which had been insured by them on a voyage from New Orleans to Havre de Grace, in France. The "Point a Petre" was wrecked on the coast of Florida, the cargo saved by the inhabitants, and carried into Key West, where it was sold for the purpose of satisfying the salvors, by virtue of a decree of a court consisting of a notary and five jurors, which was erected by an act of the territorial legislature of Florida. The owners abandoned to the underwriters, who, having accepted the same, proceeded against the property, alleging that the sale was not made by order of a court competent to change the property.

David Canter claimed the cotton as a *bona fide* purchaser, under the decree of a competent court, which awarded seventy-six per cent to the salvors on the value of the property saved.

The district judge pronounced the decree of the territorial court a nullity, and awarded restitution to the libellants of such part of the cargo as he supposed to be identified by the evidence, deducting therefrom a salvage of fifty per cent.

The libellants and claimant both appealed. The Circuit Court reversed the decree of the District Court, and decreed the whole cotton to the claimant, with costs, on the ground that the proceedings of the court at Key West were legal, and transferred the property to the purchaser.

From this decree the libellants have appealed to this court.

The cause depends mainly on the question whether the property in the cargo saved was changed by the sale at Key West. The conformity of that sale to the order under which it was made has not been controverted. Its validity has been denied, on the ground that it was ordered by an incompetent tribunal.

The tribunal was constituted by an act of the territorial legislature of Florida, passed on the 4th July, 1823, which is inserted in the record. That act purports to give the power which has been exercised; consequently the sale is valid, if the territoral legislature was competent to enact the law.

The course which the argument has taken will require that in deciding this question the court should take into view the relation in which Florida stands to the United States.

The constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.

The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country, transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the State.

On the 2d of February, 1819, Spain ceded Florida to the United States. The sixth article of the treaty of cession (8 Stats. at Large, 252) contains the following provision: "The inhabitants of the territories which his Catholic majesty cedes to the United States by this treaty shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States."

This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government till Florida shall become a State. In the mean time, Florida continues to be a Territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress "to make all needful rules and regulations respecting the territory or other property belonging to the United States."

Perhaps the power of governing a Territory belonging to the United

States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned. In execution of it, Congress, in 1822, passed "An Act for the establishment of a territorial government in Florida" (3 Stats. at Large, 654), and on the 3d of March, 1823, passed another act to amend the act of 1822. Under this act the territorial legislature enacted the law now under consideration.

[Portions of the act last above referred to, which provide for certain territorial courts, are set out and discussed, but it is held that the territorial court in question did not have admiralty power under that act. Such power is found to have been derived from the territorial legislature under the authority to pass laws with reference to all rightful objects of legislation not "inconsistent with the laws and Constitution of the United States."]

It has been contended that, by the Constitution, the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and that the whole of this judicial power must be vested "in one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish." Hence it has been argued that Congress cannot vest admiralty jurisdiction in courts created by the territorial legislature.

We have only to pursue this subject one step further to perceive that this provision of the Constitution does not apply to it. The next sentence declares that "the judges, both of the supreme and inferior courts, shall hold their offices during good behavior." The judges of the superior courts of Florida hold their offices for four years. These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the Territories of the United States. Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the third article of the Constitution, the same limitation does not extend to the Territories. In legislating for them Congress exercises the combined powers of the general and of a State government.

We think, then, that the act of the territorial legislature erecting

the court by whose decree the cargo of the "Point a Petre" was sold, is not "inconsistent with the laws and Constitution of the United States," and is valid. Consequently, the sale made in pursuance of it changed the property, and the decree of the Circuit Court, awarding restitution of the property to the claimant, ought to be affirmed with costs.[1]

[1] In MINERS' BANK *v.* IOWA, 12 How. 1 (1851), the validity of an act of the territorial legislature of Iowa repealing the charter of the bank, which was granted by the territorial legislature of Wisconsin when Iowa was a part of the latter Territory, was in question. From a judgment of the State Supreme Court against the bank, it took a writ of error to the Supreme Court of the United States. In rendering the opinion of the court MR. JUSTICE DANIEL said: —

"It has been argued in this case, that, as Congress, in creating the territorial governments of Wisconsin and Iowa, reserved to themselves the power of disapproving and thereby annulling the acts of those governments, and had, in the exercise of that power, stricken out several of the provisions of the charter of the Bank of Dubuque, enacted by the legislature of Wisconsin, assenting to the residue; that, therefore, the charter of this bank should be regarded as an act of Congress, rather than of the territorial government; and consequently the decision of the State court, in favor of the repealing law of Iowa, must be held to be one in which was drawn in question and overruled the validity of a statute of or an authority exercised under the United States, and as a decision also against a right, title, or privilege set up under a statute of the United States. The fallacy of this argument is easily detected. Congress, in creating the territorial governments, and in conferring upon them powers of general legislation, did not, from obvious principles of policy and necessity, ordain a suspension of all acts proceeding from those powers, until expressly sanctioned by themselves, whilst, for considerations equally strong, they reserved the power of disapproving or annulling such acts of territorial legislation as might be deemed detrimental. A different system of procedure would have been fatal to all practical improvement in those Territories, however urgently called for; nay, might have disarmed them of the very power of self-preservation. An invasion, or insurrection, or any other crisis demanding the most strenuous action, would have had to remain without preventive or remedy till Congress, if not in session, could be convened, or, when in session, must have awaited its possibly procrastinated aid.

"The argument would render, also, the acts of the territorial governments, even the most wholesome and necessary, and though indispensably carried to the extreme of authority, obnoxious to the charge of usurpation or criminality. The reverse of this argument, whilst it is accordant with the investiture of general legislative power in the territorial governments, places them in the position of usefulness and advantage towards those they were bound to foster, and subjects them at the same time to proper restraints from their superior. The charter of the Bank of Dubuque, enacted in all its details and powers ever possessed by it (and according to which it was in fact organized) by the legislature of Wisconsin, must be looked upon as the creature of that legislature. To regard it, as we are urged to do by the argument for the plaintiff in error, would constitute it rather a bank of the United States, situated without the United States, and operating within the Territory of Wisconsin, now the State of Iowa, independently of the power or local policy of that State, and beyond the reach of its faculties or obligations to be exerted for its own citizens. We think that the positions urged for the plaintiff in error leave the objections to the jurisdiction, as above stated, in their full force. We regard both the charter granted by Wisconsin, and the repeal of that charter by Iowa, alike as acts of the territorial authorities, and not as the acts of any State of this Union; and that, as such, this court has no power, by writ of error, to take cognizance of them in virtue of, and for the objects designated by, the 25th section of the Judiciary Act."

In NATIONAL BANK *v.* COUNTY OF YANKTON, 101 U. S. 129 (1879), which was an action brought in the court of Dakota Territory against a county on bonds issued in

## THOMPSON *v.* UTAH.

170 United States, 343. 1898.

MR. JUSTICE HARLAN delivered the opinion of the court.

By an indictment returned in the District Court of the Second Judicial District of the Territory of Utah, at its May term, 1895, — that being a court of general jurisdiction, — the plaintiff in error and one Jack Moore were charged with the crime of grand larceny alleged to have been committed March 2, 1895, in Wayne County of that Territory, by unlawfully and feloniously stealing, taking and driving away one calf, the property of Heber Wilson.

aid of a railroad, it was contended by defendant that the Territory had no authority to pass the act authorizing the issuance of such bonds. On the other hand it was contended that an act of Congress annulling the act of the legislature of Dakota Territory, except so far as bonds were authorized to be issued thereunder to a certain railroad (and this description covered the bonds in suit), amounted to an authorization of these bonds and made them valid. MR. CHIEF JUSTICE WAITE, rendering the opinion of the court reversing the decision of the Supreme Court of the Territory, declared that the act of Congress above referred to was a direct grant of power by Congress to the county to issue the bonds in dispute, and continued: —

"We do not consider it necessary to decide whether the governor of Dakota had authority to call an extra session of the legislative assembly, nor whether a law passed at such a session or after the limited term of forty days had expired would be valid, because, as we think, the act of May 27, 1872, is equivalent to a direct grant of power by Congress to the county to issue the bonds in dispute. It is certainly now too late to doubt the power of Congress to govern the Territories. There have been some differences of opinion as to the particular clause of the Constitution from which the power is derived, but that it exists has always been conceded. The act to adapt the ordinance to provide for the government of the Territory northwest of the river Ohio to the requirements of the Constitution (1 Stat. 50) is chap. 8 of the first session of the first Congress, and the ordinance itself was in force under the confederation when the Constitution went into effect. All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress. The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme, and for the purposes of this department of its govermental authority has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution.

"In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the territorial legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments. It may do for the Territories what the people under the Constitution of the United States may do for the States."

The case was first tried when Utah was a Territory, and by a jury composed of twelve persons. Both of the defendants were found guilty as charged, and were recommended to the mercy of the court. A new trial having been granted, the case was removed for trial to another county. But it was not again tried until after the admission of Utah into the Union as a State.

At the second trial the defendant was found guilty. He moved for a new trial upon the ground among others that the jury that tried him was composed of only eight jurors; whereas by the law in force at the time of the commission of the alleged offence a lawful jury in his case could not be composed of less than twelve jurors. The application for a new trial having been overruled, and the accused having been called for sentence, he renewed his objection to the composition of the jury, and moved by counsel that the verdict be set aside and another trial ordered.

This objection was overruled, the accused duly excepting to the action of the court. He was then sentenced to the State prison for the term of three years. The judgment of conviction was affirmed by the Supreme Court of Utah, the court holding that the trial of the accused by a jury composed of eight persons was consistent with the Constitution of the United States.

By the statutes of the Territory of Utah in force at the time of the commission of the alleged offence it was provided that a trial jury in a District Court should consist of twelve, and in a justice's court of six, persons, unless the parties to the action or proceeding, in other than criminal cases, agreed upon a less number; that a felony was a crime punishable with death or by imprisonment in the penitentiary, every other crime being a misdemeanor; that the stealing of a calf was grand larceny and punishable by confinement in a penitentiary for not less than one nor more than ten years; that no person should be convicted of a public offence unless by the verdict of a jury, accepted and recorded by the court, or upon a plea of guilty, or upon judgment against him upon a demurrer, or upon the judgment of a court, a jury having been waived in a criminal action not amounting to a felony; and that issues of fact should be tried by jury, unless a trial in that mode was waived in criminal cases not amounting to a felony by the consent of both parties expressed in open court and entered in its minutes. 2 Comp. Laws, Utah, 1888, §§ 3065, 4380, 4643, 4644, 4790, 4997.

By the constitution of the State of Utah it is provided: "In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous." Const. art. 1, sec. 10. Also: "All criminal prosecutions and penal actions which may have arisen or which may arise before the change from a territorial to a state government, and which shall

then be pending, shall be prosecuted to judgment and execution in the name of the State, and in the court having jurisdiction thereof. All offences committed against the laws of the Territory of Utah, before the change from a territorial to a state government, and which shall not have been prosecuted before such change, may be prosecuted in the name and by the authority of the State of Utah, with like effect, as though such change had not taken place, and all penalties incurred shall remain the same, as if this constitution had not been adopted." Const. art. 24, sec. 6.

As the offence of which the plaintiff in error was convicted was a felony, and as by the law in force when the crime was committed he could not have been tried by a jury of a less number than twelve jurors, the question is presented whether the provision in the constitution of Utah, providing for a jury of eight persons in courts of general jurisdiction, except in capital cases, can be made applicable to a felony committed within the limits of the State while it was a Territory, without bringing that provision into conflict with the clause of the Constitution of the United States prohibiting the passage by any State of an *ex post facto* law.

The Constitution of the United States provides: "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed, but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed." Art. 3, sec. 2. And by the Sixth Amendment of the Constitution it is declared: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

That the provisions of the Constitution of the United States relating to the right of trial by jury in suits at common law apply to the Territories of the United States is no longer an open question. Webster *v.* Reid, 11 How. 437, 460; American Publishing Co. *v.* Fisher, 166 U. S. 464, 468; Springville *v.* Thomas, 166 U. S. 707. In the last named case it was claimed that the territorial legislature of Utah was empowered by the organic act of the Territory of September 9, 1850, 9 Stat. 453, c. 51, § 6, to provide that unanimity of action on the part of jurors in civil cases was not necessary to a valid verdict. This court said: "In our opinion the Seventh Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common-law cases, and the act of Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so."

It is equally beyond question that the provisions of the national Constitution relating to trials by jury for crimes and to criminal prosecutions apply to the Territories of the United States.

The judgment of this court in Reynolds *v.* United States, 98 U. S. 145, 154, which was a criminal prosecution in the Terrritory of Utah, assumed that the Sixth Amendment applied to criminal prosecutions in that Territory.

In Callan *v.* Wilson, 127 U. S. 540, 548, 551, which was a criminal prosecution by information in the Police Court of the District of Columbia, the accused claimed that the right of trial by jury was secured to him by the Third Article of the Constitution as well as by the Fifth and Sixth Amendments. The contention of the government was that the Constitution did not secure the right of trial by jury to the people of the District of Columbia, that the original provision, that when a crime was not committed within any State "the trial shall be at such place or places as the Congress may by law have directed," had, probably, reference only to offences committed on the high seas; that, in adopting the Sixth Amendment, the people of the States were solicitous about trial by jury in the States and nowhere else, leaving it entirely to Congress to declare in what way persons should be tried who might be accused of crime on the high seas and in the District of Columbia and in places to be thereafter ceded for the purposes respectively of a seat of Government, forts, magazines, arsenals, and dockyards; and, consequently, that that amendment should be deemed to have superseded so much of the third article of the Constitution as related to the trial of crimes by jury. That contention was overruled, this court saying: "As the guarantee of a trial by jury, in the third article, implied a trial in that mode and according to the settled rules of the common law, the enumeration, in the Sixth Amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have in the supreme law of the land, and so far as the agencies of the general government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty, and property. This recognition was demanded and secured for the benefit of all the people of the United States, as well those permanently or temporarily residing in the District of Columbia, as those residing or being in the several States. There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty, and property — especially of the privilege of trial by jury in criminal cases." "We cannot think," the court further said, "that the people of this District have, in that regard, less rights than those accorded to the people of the Territories of the United States."

In Mormon Church *v.* United States, 136 U. S. 1, 44, one of the questions considered was the extent of the authority which the United States might exercise over the Territories and their inhabitants. In the opinion of Mr. Justice Bradley reference was made to previous decisions of this court, in one of which, National Bank *v.* County of Yankton, 101 U. S. 129, 133, it was said that Congress, in virtue of the sovereignty of the United States, could not only abrogate the laws of the territorial legislatures, but may itself legislate directly for the local government; that it could make a void act of the territorial legislature valid, and a valid act void; that it had full and complete legislative authority over the people of the Territories and all the departments of the territorial governments; that it "may do for the Territories what the people, under the Constitution of the United States, may do for the States." Reference was also made to Murphy *v.* Ramsey, 114 U. S. 15, 44, in which it was said: "The people of the United States, as sovereign owners of the national Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms." The opinion of the court in Mormon Church *v.* United States then proceeded: "Doubtless Congress, in legislating for the Territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions. The supreme power of Congress over the Territories and over the acts of the territorial legislatures established therein is generally expressly reserved in the organic acts establishing governments in said Territories. This is true of the Territory of Utah. In the sixth section of the act establishing a territorial government in Utah, approved September 9, 1850, it is declared 'that the legislative powers of said Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act. . . . All the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect.' 9 Stat. 454."

Assuming then that the provisions of the Constitution relating to trials for crimes and to criminal prosecutions apply to the Territories of the United States, the next inquiry is whether the jury referred to in the original Constitution and in the Sixth Amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less. 2 Hale's P. C. 161; 1 Chitty's Cr. Law, 505. This

question must be answered in the affirmative. When Magna Charta declared that no freeman should be deprived of life, &c., "but by the judgment of his peers or by the law of the land," it referred to a trial by twelve jurors. Those who emigrated to this country from England brought with them this great privilege "as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power." 2 Story's Const. § 1779. In Bacon's Abridgment, title Juries, it is said: "The trial *per pais*, or by a jury of one's country, is justly esteemed one of the principal excellencies of our Constitution; for what greater security can any person have in his life, liberty, or estate, than to be sure of not being divested of, or injured in, any of these, without the sense and verdict of twelve honest and impartial men of his neighborhood? And hence we find the common law herein confirmed by Magna Charta." So, in 1 Hale's P. C. 33: "The law of England hath afforded the best method of trial, that is possible, of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment, by the testimony of witnesses *viva voce* in the presence of the judge and jury, and by the inspection and direction of the judge." It must consequently be taken that the word "jury" and the words "trial by jury" were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument; and that when Thompson committed the offence of grand larceny in the Territory of Utah — which was under the complete jurisdiction of the United States for all purposes of government and legislation — the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons. And such was the requirement of the statutes of Utah while it was a Territory.

Was it then competent for the State of Utah, upon its admission into the Union, to do in respect of Thompson's crime what the United States could not have done while Utah was a Territory, namely, to provide for his trial by a jury of eight persons?

We are of opinion that the State did not acquire upon its admission into the Union the power to provide, in respect of felonies committed within its limits while it was a Territory, that they should be tried otherwise than by a jury such as is provided by the Constitution of the United States. When Thompson's crime was committed, it was his constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons. To hold that a State could deprive him of his liberty by the concurrent action of a court and eight jurors, would recognize the power of the State not only to do what the United States in respect of Thompson's crime could not, at any time, have done by legislation, but to

take from the accused a substantial right belonging to him when the offence was committed.

. . . . . .

In our opinion, the provision in the constitution of Utah providing for the trial in courts of general jurisdiction of criminal cases, not capital, by a jury composed of eight persons, is *ex post facto* in its application to felonies committed before the Territory became a State, because in respect of such crimes the Constitution of the United States gave the accused, at the time of the commission of his offence, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury.

*The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.*

MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissented.

[Later cases as to the effect of the annexation of territory to the United States are given in Appendix B, p. 1119.]

# CHAPTER IX.

## THE ADMISSION OF NEW STATES.

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### BOYD *v.* THAYER.

143 United States, 135. 1892.

[See this case, *supra*, p. 423.]

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### TEXAS *v.* WHITE.

7 Wallace, 700. 1868.

[This was an original suit in the Supreme Court to restrain defendants from receiving from the United States the proceeds of certain bonds issued by the United States to Texas in 1851 in settlement of certain boundary disputes, and transferred to defendants by persons claiming to represent the State after her secession from the Union and during her connection with the so-called Confederacy. In 1867 this suit was brought under authority of the reconstructed State government. Defendants question the right of Texas, after having attempted to throw off her allegiance to the government of the United States, to sue as a State of the Union. The court holds that Texas did not, by attempted acts of secession, cease to be a State of the Union, and then continues.]

Mr. Justice Chase delivered the opinion of the court.

. . . . . .

But in order to the exercise, by a State, of the right to sue in this court, there needs to be a State government, competent to represent the State in its relations with the national government, so far at least as the institution and prosecution of a suit is concerned.

And it is by no means a logical conclusion, from the premises which we have endeavored to establish, that the governmental relations of Texas to the Union remained unaltered. Obligations often remain unimpaired, while relations are greatly changed. The obligations of allegiance to the State, and of obedience to her laws, subject to the Constitution of the United States, are binding upon all citizens,

whether faithful or unfaithful to them; but the relations which subsist while these obligations are performed are essentially different from those which arise when they are disregarded and set at nought. And the same must necessarily be true of the obligations and relations of States and citizens to the Union. No one has been bold enough to contend that, while Texas was controlled by a government hostile to the United States, and in affiliation with a hostile confederation, waging war upon the United States, senators chosen by her legislature, or representatives elected by her citizens, were entitled to seats in Congress; or that any suit, instituted in her name, could be entertained in this court. All admit that, during this condition of civil war, the rights of the State as a member, and of her people as citizens of the Union, were suspended. The government and the citizens of the State, refusing to recognize their constitutional obligations, assumed the character of enemies, and incurred the consequences of rebellion.

These new relations imposed new duties upon the United States. The first was that of suppressing the rebellion. The next was that of re-establishing the broken relations of the State with the Union. The first of these duties having been performed, the next necessarily engaged the attention of the national government.

The authority for the performance of the first had been found in the power to suppress insurrection and carry on war; for the performance of the second, authority was derived from the obligation of the United States to guarantee to every State in the Union a republican form of government. The latter, indeed, in the case of a rebellion which involves the government of a State, and for the time excludes the national authority from its limits, seems to be a necessary complement to the former.

Of this, the case of Texas furnishes a striking illustration. When the war closed there was no government in the State except that which had been organized for the purpose of waging war against the United States. That government immediately disappeared. The chief functionaries left the State. Many of the subordinate officials followed their example. Legal responsibilities were annulled or greatly impaired. It was inevitable that great confusion should prevail. If order was maintained, it was where the good sense and virtue of the citizens gave support to local acting magistrates, or supplied more directly the needful restraints.

A good social change increased the difficulty of the situation. Slaves, in the insurgent States, with certain local exceptions, had been declared free by the Proclamation of Emancipation; and whatever questions might be made as to the effect of that act, under the Constitution, it was clear, from the beginning, that its practical operation, in connection with legislative acts of like tendency, must be complete enfranchisement. Wherever the national forces obtained control, the slaves became freemen. Support to the acts of Congress

and the proclamation of the President, concerning slaves, was made a condition of amnesty (13 Stat. at Large, 737) by President Lincoln, in December, 1863, and by President Johnson, in May, 1865 (13 Stat. at Large, 758). And emancipation was confirmed, rather than ordained, in the insurgent States, by the amendment to the Constitution prohibiting slavery throughout the Union, which was proposed by Congress in February, 1865, and ratified, before the close of the following autumn, by the requisite three-fourths of the States (13 Stat. at Large, 774, 775).

The new freemen necessarily became part of the people, and the people still constituted the State; for States, like individuals, retain their identity, though changed to some extent in their constituent elements. And it was the State, thus constituted, which was now entitled to the benefit of the constitutional guaranty.

There being then no government in Texas in constitutional relations with the Union, it became the duty of the United States to provide for the restoration of such a government. But the restoration of the government which existed before the rebellion, without a new election of officers, was obviously impossible; and before any such election could be properly held, it was necessary that the old constitution should receive such amendments as would conform its provisions to the new conditions created by emancipation, and afford adequate security to the people of the State.

In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution.

It is not important to review, at length, the measures which have been taken, under this power, by the executive and legislative departments of the national government. It is proper, however, to observe that almost immediately after the cessation of organized hostilities, and while the war yet smouldered in Texas, the President of the United States issued his proclamation appointing a provisional governor for the State, and providing for the assembling of a convention, with a view to the re-establishment of a republican government, under an amended constitution, and to the restoration of the State to her proper constitutional relations. A convention was accordingly assembled, the constitution amended, elections held, and a State government, acknowledging its obligations to the Union, established.

Whether the action then taken was, in all respects, warranted by the Constitution, it is not now necessary to determine. The power exercised by the President was supposed, doubtless, to be derived from his constitutional functions, as commander-in-chief; and, so

long as the war continued, it cannot be denied that he might institute temporary government within insurgent districts, occupied by the national forces, or take measures, in any State, for the restoration of State government faithful to the Union, employing, however, in such efforts, only such means and agents as were authorized by constitutional laws.

But the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress. "Under the fourth article of the Constitution, it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State, before it can determine whether it is republican or not."

This is the language of the late Chief Justice, speaking for this court, in a case from Rhode Island (Luther *v.* Borden, 7 How. 42), arising from the organization of opposing governments in that State. And we think that the principle sanctioned by it may be applied, with even more propriety, to the case of a State deprived of all rightful government, by revolutionary violence; though necessarily limited to cases where the rightful government is thus subverted, or in imminent danger of being overthrown by an opposing government, set up by force within the State.

The action of the President must, therefore, be considered as provisional, and, in that light, it seems to have been regarded by Congress. It was taken after the term of the 38th Congress had expired. The 39th Congress, which assembled in December, 1865, followed by the 40th Congress, which met in March, 1867, proceeded, after long deliberation, to adopt various measures for reorganization and restoration. These measures were embodied in proposed amendments to the Constitution, and in the acts known as the Reconstruction Acts, which have been so far carried into effect, that a majority of the States which were engaged in the rebellion have been restored to their constitutional relations, under forms of government adjudged to be republican by Congress, through the admission of their "Senators and Representatives into the councils of the Union."

Nothing in the case before us requires the court to pronounce judgment upon the constitutionality of any particular provision of these acts.

But it is important to observe that these acts themselves show that the governments which had been established and had been in actual operation under executive direction were recognized by Congress as provisional, as existing, and as capable of continuance.

By the act of March 2, 1867, 14 Stat. at Large, 428, the first of the series, these governments were, indeed, pronounced illegal and were subjected to military control, and were declared to be provisional only; and by the supplementary act of July 19, 1867, the third of the series, it was further declared that it was the true intent and

meaning of the act of March 2 that the governments then existing were not legal State governments, and if continued, were to be continued subject to the military commanders of the respective districts and to the paramount authority of Congress. We do not inquire here into the constitutionality of this legislation so far as it relates to military authority, or to the paramount authority of Congress. It suffices to say, that the terms of the acts necessarily imply recognition of actually existing governments; and that in point of fact the governments thus recognized, in some important respects, still exist.

What has thus been said generally describes, with sufficient accuracy, the situation of Texas. A provisional governor of the State was appointed by the President in 1865; in 1866 a governor was elected by the people under the constitution of that year; at a subsequent date a governor was appointed by the commander of the district. Each of the three exercised executive functions and actually represented the State in the executive department.

In the case before us each has given his sanction to the prosecution of the suit, and we find no difficulty, without investigating the legal title of either to the executive office, in holding that the sanction thus given sufficiently warranted the action of the solicitor and counsel in behalf of the State. The necessary conclusion is that the suit was instituted and is prosecuted by competent authority. [The court holds that the transfer of these bonds to defendants was without authority, and grants the relief sought by the bill.][1]

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## SANDS *v.* MANISTEE RIVER IMPROVEMENT COMPANY.

123 United States, 288. 1887.

[PLAINTIFF below, a corporation chartered under the laws of Michigan to improve the Manistee River, a stream wholly within the State, brought action in the State court to collect tolls. Defendant claimed that the statute authorizing plaintiff to collect such tolls was unconstitutional, on the ground that it impaired the obligation of the contract contained in the Ordinance of 1787, "for the government of the territory of the United States northwest of the river Ohio," giving to the people of that territory the right to the free use of the navigable waters, &c., and declaring such stipulation, with others, a compact between the original States and the people and States within such territory, unalterable save by common consent. Judgment having been rendered against defendant and affirmed in the State Supreme Court, defendant brings up the case on writ of error.]

[1] MR. JUSTICE GRIER delivered a dissenting opinion, in which MR. JUSTICE SWAYNE and MR. JUSTICE MILLER concurred.

MR. JUSTICE FIELD delivered the opinion of the court.

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There was no contract in the fourth article of the Ordinance of 1787 respecting the freedom of the navigable waters of the territory northwest of the Ohio River emptying into the St. Lawrence, which bound the people of the territory, or of any portion of it, when subsequently formed into a State and admitted into the Union.

The Ordinance of 1787 was passed a year and some months before the Constitution of the United States went into operation. Its framers, and the Congress of the confederation which passed it, evidently considered that the principles and declaration of rights and privileges expressed in its articles would always be of binding obligation upon the people of the territory. The ordinance in terms ordains and declares that its articles "shall be considered as articles of compact between the original States and the people and States in the said territory, and forever remain unalterable unless by common consent." And for many years after the adoption of the Constitution its provisions were treated by various acts of Congress as in force, except as modified by such acts. In some of the acts organizing portions of the territory under separate territorial governments it is declared that the rights and privileges granted by the ordinance are secured to the inhabitants of those territories. Yet from the very conditions on which the States formed out of that territory were admitted into the Union, the provisions of the ordinance became inoperative except as adopted by them. All the States thus formed were, in the language of the resolutions or acts of Congress, "admitted into the Union on an equal footing with the original States *in all respects whatever*." Michigan, on her admission, became, therefore, entitled to and possessed of all the rights of sovereignty and dominion which belonged to the original States, and could at any time afterwards exercise full control over its navigable waters except as restrained by the Constitution of the United States and laws of Congress passed in pursuance thereof. Permoli *v.* First Municipality of New Orleans, 3 How. 589, 600; Pollard *v.* Hagan, 3 How. 212; Escanaba Co. *v.* Chicago, 107 U. S. 678, 688; Van Brocklin *v.* Tennessee, 117 U. S. 151, 159; Huse *v.* Glover, 119 U. S. 543, 546.

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*The judgment of the Supreme Court of Michigan must be affirmed; and it is so ordered.*

# CHAPTER X.

## CONSTITUTIONAL RULES OF STATE COMITY.

### SECTION I. — FAITH AND CREDIT TO BE GIVEN TO ACTS, RECORDS, AND JUDGMENTS OF ANOTHER STATE.

### THOMPSON *v.* WHITMAN.

18 Wallace, 457. 1873.

[WHITMAN, a citizen of New York, sued Thompson, a citizen of New Jersey, in the Circuit Court of the United States for the Southern District of New York, for trespass committed by the defendant, as sheriff of Monmouth County, New Jersey, in wrongfully seizing and selling plaintiff's vessel in a proceeding before justices of the peace of Monmouth County for violation of the statutes of that State with regard to the gathering of clams by non-residents. Thompson relied on the recitals of the record in the proceeding before the justices to show that the seizure was within the limits of Monmouth County, and that the proceeding was therefore within the jurisdiction of the justices. The trial court ruled that the record was *prima facie* but not conclusive evidence of the facts relied upon to give the justices jurisdiction, and the jury found that the seizure was not made in Monmouth County, whereupon judgment was rendered for plaintiff. Thompson sued out this writ of error.]

MR. JUSTICE BRADLEY delivered the opinion of the court.

The main question in the cause is, whether the record produced by the defendant was conclusive of the jurisdictional facts therein contained. It stated, with due particularity, sufficient facts to give the justices jurisdiction under the law of New Jersey. Could that statement be questioned collaterally in another action brought in another State? If it could be, the ruling of the court was substantially correct. If not, there was error. It is true that the court charged generally that the record was only *prima facie* evidence of the facts stated therein; but as the jurisdictional question was the principal question at issue, and as the jury was required to find specially thereon, the charge may be regarded as having reference to the ques-

tion of jurisdiction. And if upon that question it was correct, no injury was done to the defendant.

Without that provision of the Constitution of the United States which declares that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," and the act of Congress passed to carry it into effect, it is clear that the record in question would not be conclusive as to the facts necessary to give the justices of Monmouth County jurisdiction, whatever might be its effect in New Jersey. In any other State it would be regarded like any foreign judgment; and as to a foreign judgment it is perfectly well settled that the inquiry is always open, whether the court by which it was rendered had jurisdiction of the person or the thing. "Upon principle," says Chief Justice Marshall, "it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject-matter which it has determined. In some cases that jurisdiction unquestionably depends as well on the state of the thing as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within, or without, their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence." Rose *v.* Himely, 4 Cranch, 269. To the same effect see Story on the Constitution, chap. xxix.; 1 Greenleaf on Evidence, § 540.

The act of Congress above referred to, which was passed 26th of May, 1790, after providing for the mode of authenticating the acts, records, and judicial proceedings of the States, declares, "and the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken." It has been supposed that this act, in connection with the constitutional provision which it was intended to carry out, had the effect of rendering the judgments of each State equivalent to domestic judgments in every other State, or at least of giving to them in every other State the same effect, in all respects, which they have in the State where they are rendered. And the language of this court in Mills *v.* Duryee, 7 Cranch, 484, seemed to give countenance to this idea. The court in that case held that the act gave to the judgments of each State the same conclusive effect, as records, in all the States, as they had at home; and that *nil debet* could not be pleaded to an action brought thereon in another State. This decision has never been departed from in relation to the general effect of such judgments where the

questions raised were not questions of jurisdiction. But where the jurisdiction of the court which rendered the judgment has been assailed, quite a different view has prevailed. Justice Story, who pronounced the judgment in Mills *v.* Duryee, in his Commentary on the Constitution, sec. 1313, after stating the general doctrine established by that case with regard to the conclusive effect of judgments of one State in every other State, adds: "But this does not prevent an inquiry into the jurisdiction of the court in which the original judgment was given, to pronounce it; or the right of the State itself to exercise authority over the person or the subject-matter. The Constitution did not mean to confer [upon the States] a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory." In the Commentary on the Conflict of Laws, sec. 609, substantially the same remarks are repeated, with this addition: "It" (the Constitution) "did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them, as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other States. And they enjoy not the right of priority or lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments." Many cases in the State courts are referred to by Justice Story in support of this view. Chancellor Kent expresses the same doctrine in nearly the same words, in a note to his Commentaries. Vol. 1, p. 281; see also vol. 2, 95, note and cases cited. "The doctrine in Mills *v.* Duryee," says he, "is to be taken with the qualification that in all instances the jurisdiction of the court rendering the judgment may be inquired into, and the plea of *nil debet* will allow the defendant to show that the court had no jurisdiction over his person. It is only when the jurisdiction of the court in another State is not impeached, either as to the subject-matter or the person, that the record of the judgment is entitled to full faith and credit. The court must have had jurisdiction not only of the *cause*, but of the *parties*, and in that case the judgment is final and conclusive." The learned commentator adds, however, this qualifying remark: "A special plea in bar of a suit on a judgment in another State, to be valid, must deny, by positive averments, every fact which would go to show that the court in another State had jurisdiction of the person, or of the subject-matter."

In the case of Hampton *v.* McConnel, 3 Wheat. 234, this court reiterated the doctrine of Mills *v.* Duryee, that "the judgment of a State court should have the same credit, validity, and effect in every other court of the United States which it had in the State courts where it was pronounced; and that whatever pleas would be good to a suit therein in such State, and none others, could be pleaded in any court in the United States." But in the subsequent case of McElmoyle

*v.* Cohen, 13 Pet. 312, the court explained that neither in Mills *v.* Duryee nor in Hampton *v.* McConnel was it intended to exclude pleas of avoidance and satisfaction, such as payment, statute of limitations, &c.; or pleas denying the jurisdiction of the court in which the judgment was given; and quoted, with approbation, the remark of Justice Story, that "the Constitution did not mean to confer a new power of jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the State."

The case of Landes *v.* Brant, 10 How. 348, has been quoted to show that a judgment cannot be attacked in a collateral proceeding. There a judgment relied on by the defendant was rendered in the Territory of Louisiana in 1808, and the objection to it was that no return appeared upon the summons, and the defendant was proved to have been absent in Mexico at the time; but the judgment commenced in the usual form, "And now at this day come the parties aforesaid by their attorneys," &c. The court pertinently remarked, page 371, that the defendant may have left behind counsel to defend suits brought against him in his absence, but that if the recital was false and the judgment voidable for want of notice, it should have been set aside by *audita querela* or motion in the usual way, and could not be impeached collaterally. Here it is evident the proof failed to show want of jurisdiction. The party assailing the judgment should have shown that the counsel who appeared were not employed by the defendant, according to the doctrine held in the cases of Shumway *v.* Stillman, 6 Wend. 453, Aldrich *v.* Kinney, 4 Conn. 380, and Price *v.* Ward, 1 Dutch. 225. The remark of the court that the judgment could not be attacked in a collateral proceeding was unnecessary to the decision, and was, in effect, overruled by the subsequent cases of D'Arcy *v.* Ketchum and Webster *v.* Reid. D'Arcy *v.* Ketchum, 11 How. 165, was an action in the Circuit Court of the United States for Louisiana, brought on a judgment rendered in New York under a local statute, against two defendants, only one of whom was served with process, the other being a resident of Louisiana. In that case it was held by this court that the judgment was void as to the defendant not served, and that the law of New York could not make it valid outside of that State; that the constitutional provision and act of Congress giving full faith, credit, and effect to the judgments of each State in every other State do not refer to judgments rendered by a court having no jurisdiction of the parties; that the mischief intended to be remedied was not only the inconvenience of retrying a cause which had once been fairly tried by a competent tribunal, but also the uncertainty and confusion that prevailed in England and this country as to the credit and effect which should be given to foreign judgments, some courts holding that they should be conclusive of the matters adjudged, and others that they should be regarded as only *prima facie* binding. But this uncertainty and confusion related only to

valid judgments; that is, to judgments rendered in a cause in which the court had jurisdiction of the parties and cause, or (as might have been added) in proceedings *in rem*, where the court had jurisdiction of the *res*. No effect was ever given by any court to a judgment rendered by a tribunal which had not such jurisdiction. "The international law as it existed among the States in 1790," say the court, page 176, "was that a judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State, when the defendant had not been served with process or voluntarily made defence, because neither the legislative jurisdiction, nor that of courts of justice, had binding force. Subject to this established principle, Congress also legislated; and the question is, whether it was intended to overthrow this principle and to declare a new rule, which would bind the citizens of one State to the laws of another. There was no evil in this part of the existing law, and no remedy called for, and in our opinion Congress did not intend to overthrow the old rule by the enactment that such faith and credit should be given to records of judgments as they had in the States where made."

In the subsequent case of Webster *v.* Reid, 11 How. 437, the plaintiff claimed, by virtue of a sale made under judgments in behalf of one Johnson and one Brigham against "The Owners of Half-Breed Lands lying in Lee County," Iowa Territory, in pursuance of a law of the Territory. The defendant offered to prove that no service had ever been made upon any person in the suits in which the judgments were rendered, and no notice by publication as required by the act. This court held that, as there was no service of process, the judgments were nullities. Perhaps it appeared on the face of the judgments in that case that no service was made; but the court held that the defendant was entitled to prove that no notice was given, and that none was published.

In Harris *v.* Hardeman *et al.*, 14 How. 334, which was a writ of error to a judgment held void by the court for want of service of process on the defendant, the subject now under consideration was gone over by Mr. Justice Daniel at some length, and several cases in the State courts were cited and approved, which held that a judgment may be attacked in a collateral proceeding by showing that the court had no jurisdiction of the person, or, in proceedings *in rem*, no jurisdiction of the thing. Amongst other cases quoted were those of Borden *v.* Fitch, 15 Johns. 141, and Starbuck *v.* Murray, 5 Wend. 156; and from the latter the following remarks were quoted with apparent approval: "But it is contended that if other matter may be pleaded by the defendant he is estopped from asserting anything against the allegation contained in the record. It imports perfect verity, it is said, and the parties to it cannot be heard to impeach it. It appears to me that this proposition assumes the very fact to be established, which is the only question in issue. For what purpose

does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgment are void, and, therefore, the supposed record is, in truth, no record. . . . The plaintiffs, in effect, declare to the defendant, — the paper declared on is a record, because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle."

The subject is adverted to in several subsequent cases in this court, and generally, if not universally, in terms implying acquiescence in the doctrine stated in D'Arcy *v.* Ketchum.

Thus, in Christmas *v.* Russell, 5 Wall. 290, where the court decided that fraud in obtaining a judgment in another State is a good ground of defence to an action on the judgment, it was distinctly stated, page 305, in the opinion, that such judgments are open to inquiry as to the jurisdiction of the court, and notice to the defendant. And in a number of cases, in which was questioned the jurisdiction of a court, whether of the same or another State, over the general subject-matter in which the particular case adjudicated was embraced, this court has maintained the same general language. Thus, in Elliott *et al. v.* Peirsol *et al.*, 1 Pet. 328, 340, it was held that the Circuit Court of the United States for the District of Kentucky might question the jurisdiction of a county court of that State to order a certificate of acknowledgment to be corrected; and for want of such jurisdiction to regard the order as void. Justice Trimble, delivering the opinion of this court in that case, said: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void."

The same views were repeated in the United States *v.* Arredondo, 6 Pet. 691, Vorhees *v.* Bank of the United States, 10 id. 475, Wilcox *v.* Jackson, 13 id. 511, Shriver's Lessee *v.* Lynn, 2 How. 59, 60, Hickey's Lessee *v.* Stewart, 3 id. 762, and Williamson *v.* Berry, 8 id. 540. In the last case the authorities are reviewed, and the court say: "The jurisdiction of any court exercising authority over a subject may be inquired into in every other court when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings;" and "the rule prevails whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery, or the municipal laws of States."

But it must be admitted that no decision has ever been made on the precise point involved in the case before us, in which evidence was admitted to contradict the record as to jurisdictional facts asserted therein, and especially as to facts stated to have been passed upon by the court.

But if it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done no statements contained therein have any force. If any such statements could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry. Recitals of this kind must be regarded like asseverations of good faith in a deed, which avail nothing if the instrument is shown to be fraudulent. The records of the domestic tribunals of England and some of the States, it is true, are held to import absolute verity as well in relation to jurisdictional as to other facts, in all collateral proceedings. Public policy and the dignity of the courts are supposed to require that no averment shall be admitted to contradict the record. But, as we have seen, that rule has no extra-territorial force.

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On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provision of the fourth article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself.

This is decisive of the case; for, according to the findings of the jury, the justices of Monmouth County could not have had any jurisdiction to condemn the sloop in question.

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*Affirmed.*

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## HANLEY *v.* DONOGHUE.

116 United States, 1. 1885.

Mr. Justice Gray delivered the opinion of the court.

This was an action brought by Michael Hanley and William F. Welch against Charles Donoghue in the Circuit Court for Baltimore County, in the State of Maryland, upon a judgment for $2,000, recovered by the plaintiffs on June 4, 1877, in an action of covenant against the defendant, Charles Donoghue, together with one John Donoghue, in the Court of Common Pleas of Washington County in the State of Pennsylvania, and there recorded.

The declaration contained three counts. The first count set forth the recovery and record of the judgment as aforesaid in said Court of Common Pleas, and alleged that it was still in force, and unreversed. The second count contained similar allegations, and also

alleged that in the former action Charles Donoghue was summoned, and property of John Donoghue was attached by process of foreign attachment, but he was never summoned and never appeared, and that the proceedings in that action were duly recorded in that court. The third count repeated the allegations of the second count, and further alleged that "by the law and practice of Pennsylvania the judgment so rendered against the two defendants aforesaid is in that State valid and enforceable against Charles Donoghue and void as against John Donoghue," and that "by the law of Pennsylvania any appeal from the judgment so rendered to the Supreme Court of Pennsylvania (which is the only court having jurisdiction of appeals from the said Court of Common Pleas) is required to be made within two years of the rendition of the judgment, nevertheless no appeal has ever been taken from the judgment so rendered against the said defendants, or either of them."

The defendant filed a general demurrer to each and all of the counts, which was sustained, and a general judgment rendered for him. Upon appeal by the plaintiffs to the Court of Appeals of the State of Maryland, the judgment was affirmed. 59 Md. 239. The plaintiffs thereupon sued out this writ of error, on the ground that the decision was against a right and privilege set up and claimed by them under the Constitution and laws of the United States.

The question presented by this writ of error is whether the judgment of the Court of Appeals of the State of Maryland has denied to the plaintiffs a right and privilege to which they are entitled under the first section of the fourth article of the Constitution of the United States, which declares that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State; and the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof;" and under § 905 of the Revised Statutes, which re-enacts the act of May 26, 1790, ch. 11, 1 Stat. 122, and prescribes the manner in which the records and judicial proceedings of the courts of any State shall be authenticated and proved, and enacts that "the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

By the settled construction of these provisions of the Constitution and statutes of the United States, a judgment of a State court, in a cause within its jurisdiction, and against a defendant lawfully summoned, or against lawfully attached property of an absent defendant, is entitled to as much force and effect against the person summoned or the property attached, when the question is presented for decision in a court of another State, as it has in the State in which it was rendered. Maxwell *v.* Stewart, 22 Wall. 77; Insurance Co. *v.* Harris, 97 U. S. 331; Green *v.* Van Buskirk, 7 Wall. 139; Cooper *v.*

Reynolds, 10 Wall. 308. And it is within the power of the legislature of a State to enact that judgments which shall be rendered in its courts in actions against joint defendants, one of whom has not been duly served with process, shall be valid as to those who have been so served, or who have appeared in the action. Mason *v.* Eldred, 6 Wall. 231; Eldred *v.* Bank, 17 Wall. 545; Hall *v.* Lanning, 91 U. S. 160, 168; Sawin *v.* Kenney, 93 U. S. 289.

Much of the argument at the bar was devoted to the discussion of questions which the view that we take of this case renders it unnecessary to consider; such as the proper manner of impeaching or avoiding judgments in the State in which they are rendered, for want of due service of process upon one or all of the defendants; or the effect which a judgment rendered in one State against two joint defendants, one of whom has been duly summoned and the other has not, should be allowed against the former in the courts of another State, without allegation or proof of the effect which such a judgment has against him by the law of the first State.

No court is to be charged with the knowledge of foreign laws; but they are well understood to be facts, which must, like other facts, be proved before they can be received in a court of justice. Talbot *v.* Seeman, 1 Cranch, 1, 38; Church *v.* Hubbart, 2 Cranch, 187, 236; Strother *v.* Lucas, 6 Pet. 763, 768; Dainese *v.* Hale, 91 U. S. 13, 20. It is equally well settled that the several States of the Union are to be considered as in this respect foreign to each other, and that the courts of one State are not presumed to know, and therefore not bound to take judicial notice of, the laws of another State. In Buckner *v.* Finley, 2 Pet. 586, in which it was held that bills of exchange drawn in one of the States on persons living in another were foreign bills, it was said by Mr Justice Washington, delivering the unanimous opinion of this court: "For all national purposes embraced by the Federal Constitution, the States and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects the States are necessarily foreign to and independent of each other. Their constitutions and forms of government being, although republican, altogether different, as are their laws and institutions." 2 Pet. 590.

Judgments recovered in one State of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties. Buckner *v.* Finley, 2 Pet. 592; M'Elmoyle *v.* Cohen, 13 Pet. 312, 324; D'Arcy *v.* Ketchum, 11 How. 165, 176; Christmas *v.* Russell, 5 Wall. 290, 305; Thompson *v.* Whitman, 18 Wall. 457.

Congress, in the execution of the power conferred upon it by the Constitution, having prescribed the mode of attestation of records of the courts of one State to entitle them to be proved in the courts of

another State, and having enacted that records so authenticated shall have such faith and credit in every court within the United States as they have by law or usage in the State from which they are taken, a record of a judgment so authenticated doubtless proves itself without further evidence; and if it appears upon its face to be a record of a court of general jurisdiction, the jurisdiction of the court over the cause and the parties is to be presumed unless disproved by extrinsic evidence or by the record itself. Knowles *v.* Gaslight & Coke Co., 19 Wall. 58; Settlemier *v.* Sullivan, 97 U. S. 444. But Congress has not undertaken to prescribe in what manner the effect that such judgments have in the courts of the State in which they are rendered shall be ascertained, and has left that to be regulated by the general rules of pleading and evidence applicable to the subject.

Upon principle, therefore, and according to the great preponderance of authority, whenever it becomes necessary for a court of one State, in order to give full faith and credit to a judgment rendered in another State, to ascertain the effect which it has in that State, the law of that State must be proved, like any other matter of fact. The opposing decisions in Ohio *v.* Hinchman, 27 Penn. St. 479, and Paine *v.* Schenectady Ins. Co., 11 R. I. 411, are based upon the misapprehension that this court, on a writ of error to review a decision of the highest court of one State upon the faith and credit to be allowed to a judgment rendered in another State, always takes notice of the laws of the latter State; and upon the consequent misapplication of the postulate that one rule must prevail in the court of original jurisdiction and in the court of last resort.

When exercising an original jurisdiction under the Constitution and laws of the United States, this court, as well as every other court of the national government, doubtless takes notice, without proof, of the laws of each of the United States.

But in this court, exercising an appellate jurisdiction, whatever was matter of law in the court appealed from is matter of law here, and whatever was matter of fact in the court appealed from is matter of fact here.

In the exercise of its general appellate jurisdiction from a lower court of the United States, this court takes judicial notice of the laws of every State of the Union, because those laws are known to the court below as laws alone, needing no averment or proof. Course *v.* Stead, 4 Dall. 22, 27, note; Hinde *v.* Vattier, 5 Pet. 398; Owings *v.* Hull, 9 Pet. 607, 625; United States *v.* Turner, 11 How. 663, 668; Pennington *v.* Gibson, 16 How. 65; Covington Drawbridge Co. *v.* Shepherd, 20 How. 227, 230; Cheever *v.* Wilson, 9 Wall. 108; Junction Railroad Co. *v.* Bank of Ashland, 12 Wall. 226, 230; Lamar *v.* Micou, 114 U. S. 218.

But on a writ of error to the highest court of a State, in which the revisory power of this court is limited to determining whether a question of law depending upon the Constitution, laws, or treaties of

the United States has been erroneously decided by the State court upon the facts before it, — while the law of that State, being known to its courts as law, is of course within the judicial notice of this court at the hearing on error, — yet, as in the State court the laws of another State are but facts, requiring to be proved in order to be considered, this court does not take judicial notice of them, unless made part of the record sent up, as in Green *v.* Van Buskirk, 7 Wall. 139. The case comes, in principle, within the rule laid down long ago by Chief Justice Marshall: "That the laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts, and that this court, with respect to facts, is limited to the statement made in the court below, cannot be questioned." Talbot *v.* Seeman, 1 Cranch, 1, 38.

Where by the local law of a State (as in Tennessee, Hobbs *v.* Memphis & C. R. Co., 9 Heisk. 873) its highest court takes judicial notice of the laws of other States, this court also, on writ of error, might take judicial notice of them. But such is not the case in Maryland, where the Court of Appeals has not only affirmed the general rule that foreign laws are facts, which, like other facts, must be proved before they can be received in evidence in courts of justice; but has held that the effect which a judgment rendered in another State has by the law of that State is a matter of fact, not to be judicially noticed without allegation and proof; and consequently that an allegation of the effect which such a judgment has by law in that State is admitted by demurrer. Baptiste *v.* De Volunbrun, 5 Har. & J. 86, 98; Wernwag *v.* Pawling, 5 Gill & J. 500, 508; Bank of United States *v.* Merchants' Bank, 7 Gill, 415, 431; Coates *v.* Mackey, 56 Md. 416, 419.

From these considerations it follows that the averment, in the third count of the declaration, that by the law of Pennsylvania the judgment rendered in that State against Charles Donoghue and John Donoghue was valid and enforceable against Charles, who had been served with process in that State, and void against John, who had not been so served, must be considered, both in the courts of Maryland, and in this court on writ of error to one of those courts, an allegation of fact, admitted by the demurrer.

[The judgment of the Maryland court was therefore reversed.[1]]

[1] As to the "due faith and credit" which must be given in one State to a decree of divorce rendered in another State see the case of HADDOCK *v.* HADDOCK, 201 U. S. 562, 26 Sup. Ct. Rep. 525 (1906), in which MR. JUSTICE WHITE delivered the opinion of the court and MR. JUSTICE BROWN and MR. JUSTICE HOLMES delivered dissenting opinions in both of which MR. JUSTICE HARLAN and MR. JUSTICE BREWER concurred.

## SECTION II. — PRIVILEGES AND IMMUNITIES OF CITIZENS.

### PAUL v. VIRGINIA.

8 Wallace, 168. 1868.

[THE plaintiff in error was prosecuted in the State courts of Virginia for acting as agent for a foreign insurance company (that is, a company incorporated in another State) without complying with the condition of procuring a license from the State to do so as required by its statutes, no such requirement being made as to agents of companies incorporated in the State. Being convicted in the State courts defendant brought the case to this court by writ of error.]

MR. JUSTICE FIELD, after stating the case, delivered the opinion of the court, as follows: —

On the trial in the court below the validity of the discriminating provisions of the statute of Virginia between her own corporations and corporations of other States was assailed. It was contended that the statute in this particular was in conflict with that clause of the Constitution which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States," and the clause which declares that Congress shall have power "to regulate commerce with foreign nations and among the several States." The same grounds are urged in this court for the reversal of the judgment.

The answer which readily occurs to the objection founded upon the first clause consists in the fact that corporations are not citizens within its meaning. The term "citizens" as there used applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed. It is true that it has been held that where contracts or rights of property are to be enforced by or against corporations, the courts of the United States will, for the purpose of maintaining jurisdiction, consider the corporation as representing citizens of the State under the laws of which it is created, and to this extent will treat a corporation as a citizen within the clause of the Constitution extending the judicial power of the United States to controversies between citizens of different States. In the early cases when this question of the right of corporations to litigate in the courts of the United States was considered, it was held that the right depended upon the citizenship of the members of the corporation, and its proper averment in the pleadings.

. . . . . .

But in no case which has come under our observation, either in the State or Federal courts, has a corporation been considered a citizen within the meaning of that provision of the Constitution which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. In Bank of Augusta *v.* Earle, 13 Pet. 586, the question arose whether a bank, incorporated by the laws of Georgia, with a power, among other things, to purchase bills of exchange, could lawfully exercise that power in the State of Alabama; and it was contended, as in the case at bar, that a corporation, composed of citizens of other States, was entitled to the benefit of that provision, and that the court should look beyond the act of incorporation and see who were its members, for the purpose of affording them its protection, if found to be citizens of other States, reference being made to an early decision upon the right of corporations to litigate in the Federal courts in support of the position. But the court, after expressing approval of the decision referred to (Bank of the United States *v.* Deveaux, 5 Cranch, 61), observed that the decision was confined in express terms to a question of jurisdiction; that the principle had never been carried further, and that it had never been supposed to extend to contracts made by a corporation, especially in another sovereignty from that of its creation; that if the principle were held to embrace contracts, and the members of a corporation were to be regarded as individuals carrying on business in the corporate name, and therefore entitled to the privileges of citizens, they must at the same time take upon themselves the liabilities of citizens, and be bound by their contracts in like manner; that the result would be to make the corporation a mere partnership in business with the individual liability of each stockholder for all the debts of the corporation; that the clause of the Constitution could never have intended to give citizens of each State the privileges of citizens in the several States, and at the same time to exempt them from the liabilities attendant upon the exercise of such privileges in those States; that this would be to give the citizens of other States higher and greater privileges than are enjoyed by citizens of the State itself, and would deprive each State of all control over the extent of corporate franchises proper to be granted therein. "It is impossible," continued the court, "upon any sound principle, to give such a construction to the article in question. Whenever a corporation makes a contract it is the contract of the legal entity, the artificial being created by the charter, and not the contract of the individual members. The only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a State."

It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of

alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. Lemmon *v.* The People, 20 N. Y. 607.

Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.

But the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States. They can have no such operation, except by the permission, express or implied, of those States. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other States to their enjoyment therein be given.

Now a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in Bank of Augusta *v.* Earle, "It must dwell in the place of its creation, and cannot migrate to another sovereignty." The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States — a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.

If, on the other hand, the provision of the Constitution could be construed to secure to citizens of each State in other States the peculiar privileges conferred by their laws, an extra-territorial operation would be given to local legislation utterly destructive of the independence and the harmony of the States. At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one State, their corporate powers and franchises could be exercised in other States without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those States would soon pass into their hands. The principal business of every State would, in fact, be controlled by corporations created by other States.

If the right asserted of the foreign corporation, when composed of citizens of one State, to transact business in other States were even restricted to such business as corporations of those States were authorized to transact it would still follow that those States would be unable to limit the number of corporations doing business therein. They could not charter a company for any purpose, however restricted, without at once opening the door to a flood of corporations from other States to engage in the same pursuits. They could not repel an intruding corporation, except on the condition of refusing incorporation for a similar purpose to their own citizens; and yet it might be of the highest public interest that the number of corporations in the State should be limited; that they should be required to give publicity to their transactions; to submit their affairs to proper examination; to be subject to forfeiture of their corporate rights in case of mismanagement, and that their officers should be held to a strict accountability for the manner in which the business of the corporations is managed, and be liable to summary removal.

"It is impossible," to repeat the language of this court in Bank of Augusta *v.* Earle, "upon any sound principle, to give such a construction to the article in question," — a construction which would lead to results like these.

[The question whether the State statute is unconstitutional as amounting to a regulation of interstate commerce is considered, and it is held that the insurance business does not constitute interstate commerce.]

We perceive nothing in the statute of Virginia which conflicts with the Constitution of the United States; and the judgment of the Supreme Court of Appeals of that State must, therefore, be

*Affirmed.*

## BLAKE v. McCLUNG.

172 United States, 239. 1898.

Mr. Justice Harlan delivered the opinion of the court.

[In brief the case, as stated in the opinion, was a proceeding by McClung and others in the State courts of Tennessee to wind up an insolvent corporation, designated as the Embreeville Company, organized under the laws of Great Britain and doing business in Tennessee. Plaintiffs were residents of that State, but Blake and others, citizens of Ohio, and the Hull Coal and Coke Company, a Virginia corporation, intervened as creditors, asking to participate in the distribution of the assets of the defendant company. In accordance with a State statute the Tennessee courts gave the creditors resident in Tennessee priority over the Ohio creditors and the Virginia corporation, holding the statute which authorized such preference to be constitutional. Intervenors brought up the case for review on writ of error, claiming that the State statute in question violated the provisions of Art. IV. sec. 2, and sec. 1 of Fourteenth Amendment of the Federal Constitution.]

Beyond question a State may, through judicial proceedings, take possession of the assets of an insolvent foreign corporation within its limits, and distribute such assets or their proceeds among creditors according to their respective rights. But may it exclude citizens of other States from such distribution until the claims of its own citizens shall have been first satisfied? In the administration of the property of an insolvent foreign corporation by the courts of the State in which it is doing business, will the Constitution of the United States permit discrimination against individual creditors of such corporations because of their being citizens of other States, and not citizens of the State in which such administration occurs?

These questions are presented for our determination. Let us see how far they have been answered by the former decisions of this court.

This court has never undertaken to give any exact or comprehensive definition of the words "privileges and immunities" in Article IV. of the Constitution of the United States. Referring to this clause, Mr. Justice Curtis, speaking for the court in Conner *v.* Elliott, 18 How. 591, 593, said: "We do not deem it needful to attempt to define the meaning of the word 'privileges' in this clause of the Constitution. It is safer, and more in accordance with the duty of a judicial tribunal, to leave its meaning to be determined, in each case, upon a view of the particular rights asserted and denied therein. And especially is this true when we are dealing with so broad a provision, involving matters not only of great delicacy and importance, but which are of such a character that any merely abstract definition could scarcely be correct; and a failure to make it so

would certainly produce mischief." Nevertheless, what has been said by this and other courts upon the general subject will assist us in determining the particular questions now pressed upon our attention.

One of the leading cases in which the general question has been examined is Corfield *v.* Coryell, decided by Mr. Justice Washington at the circuit. He said: "The inquiry is, what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, *fundamental;* which belong, of right, to the citizens of all free governments, and which have, at all times, been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one State to pass through or to reside in any other State for the purposes of trade, agriculture, professional pursuits or otherwise; to claim the benefit of the writ of *habeas corpus;* to institute and maintain actions of any kind in the courts of the State; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State, may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added, the elective franchise, as regulated and established by the laws or constitution of the State in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each State in every other State was manifestly calculated (to use the expression of the preamble to the corresponding provision in the old Articles of Confederation) 'the better to secure and perpetuate mutual friendship and intercourse among the people of the different States of the Union.'" 4 Wash. C. C. 371, 380.

These observations of Mr. Justice Washington were made in a case involving the validity of a statute of New Jersey regulating the taking of oysters and shells on banks or beds *within* that State, and which excluded inhabitants and residents of other States from the privilege of taking or gathering clams, oysters, or shells on any of the rivers, bays, or waters *in* New Jersey, not wholly owned by some person residing in the State. The statute was sustained upon

the ground that it only regulated the use of the common property of the citizens of New Jersey, which could not be enjoyed by others without the tacit consent or the express permission of the sovereign having the power to regulate its use. The court said: "The oyster beds belonging to a State may be abundantly sufficient for the use of the citizens of that State, but might be totally exhausted and destroyed if the legislature could not so regulate the use of them as to exclude the citizens of the other States from taking them, except under such limitations and restrictions as the laws may prescribe."

Upon these grounds rests the decision in McCready *v.* Virginia, 94 U. S. 391, 395, sustaining a statute of Virginia prohibiting the citizens of other States from planting oysters in a river in that State where the tide ebbed and flowed. Chief Justice Waite, speaking for the court in that case, said: "These [the fisheries of the State] remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tide waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is in fact a property right, and not a mere privilege or immunity of citizenship." Consequently, the decision was that the citizens of one State were not invested by the Constitution of the United States "with any interest in the common property of the citizens of another State."

[The court also quotes from Paul *v.* Virginia, *supra*, p. 855.]

Ward *v.* Maryland, 12 Wall. 418, 430, involved the validity of a statute of Maryland requiring all traders, not being permanent residents of the State, to take out licenses for the sale of goods, wares, or merchandise in Maryland, other than agricultural products and articles there manufactured. This court said: "Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property, to take and hold real estate, to maintain actions in the courts of the State, and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens. Comprehensive as the power of the States is to lay and collect taxes and excises, it is nevertheless clear, in the judgment of the court, that the power cannot be exercised to

any extent in a manner forbidden by the Constitution; and inasmuch as the Constitution provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, it follows that the defendant might lawfully sell, or offer or expose for sale, within the district described in the indictment, any goods which the permanent residents of the State might sell, or offer or expose for sale in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents."

In the Slaughter-House Cases, 16 Wall. 36, 77, the court, referring to what was said in Paul *v.* Virginia, above cited, in reference to the scope and meaning of section 2 of Article IV. of the Constitution, said: "The constitutional provision there alluded to did not create those rights which it called privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens. Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction."

In Cole *v.* Cunningham, 133 U. S. 107, 113, 114, this court cited with approval the language of Justice Story, in his Commentaries on the Constitution, to the effect that the object of the constitutional guarantee was to confer on the citizens of the several States "a general citizenship, and to communicate all the privileges and immunities which the citizens of the same State would be entitled to under like circumstances, and this includes the right to institute actions."

These principles have not been modified by any subsequent decision of this court.

The foundation upon which the above cases rest cannot however stand, if it be adjudged to be in the power of one State, when establishing regulations for the conduct of private business of a particular kind, to give its own citizens essential privileges connected with that business which it denies to citizens of other States. By the statute in question the British company was to be deemed and taken to be a corporation of Tennessee, with authority to carry on its business in that State. It was the right of citizens of Tennessee to deal with it, as it was their right to deal with corporations created by Tennessee. And it was equally the right of citizens of other States to deal with that corporation. The State did not assume to declare, even if it could legally have declared, that that company, being admitted to do business in Tennessee, should transact business only with citizens of Tennessee or should not transact

business with citizens of other States. No one would question the right of the individual plaintiffs in error, although not residents of Tennessee, to sell their goods to that corporation upon such terms in respect of payment as might be agreed upon, and to ship them to the corporation at its place of business in that State. But the enjoyment of these rights is materially obstructed by the statute in question; for that statute, by its necessary operation, excludes citizens of other States from transacting business with that corporation upon terms of equality with citizens of Tennessee. By force of the statute alone, citizens of other States, if they contracted at all with the British corporation, must have done so subject to the onerous condition that if the corporation became insolvent its assets in Tennessee should first be applied to meet its obligations to residents of that State, although liability for its debts and engagements was "to be enforced in the manner provided by law for the application of the property of natural persons to the payment of their debts, engagements, and contracts." But, clearly, the State could not in that mode secure exclusive privileges to its own citizens in matters of business. If a State should attempt, by statute regulating the distribution of the property of insolvent individuals among their creditors, to give priority to the claims of such individual creditors as were citizens of that State over the claims of individual creditors, citizens of other States, such legislation would be repugnant to the Constitution upon the ground that it withheld from citizens of other States as such, and because they were such, privileges granted to citizens of the State enacting it. Can a different principle apply, as between individual citizens of the several States, when the assets to be distributed are the assets of an insolvent private corporation lawfully engaged in business and having the power to contract with citizens residing in States other than the one in which it is located?

[The court states that in distributing the assets of a corporation in equity the rule is to recognize resident and non-resident creditors as entitled to share on the same footing.]

We hold such discrimination against citizens of other States to be repugnant to the second section of the fourth article of the Constitution of the United States, although, generally speaking, the State has the power to prescribe the conditions upon which foreign corporations may enter its territory for purposes of business. Such a power cannot be exerted with the effect of defeating or impairing rights secured to citizens of the several States by the supreme law of the land. Indeed, all the powers possessed by a State must be exercised consistently with the privileges and immunities granted or protected by the Constitution of the United States.

. . . . . .

We must not be understood as saying that a citizen of one State is entitled to enjoy in another State *every* privilege that may be

given in the latter to its own citizens. There are privileges that may be accorded by a State to its own people in which citizens of other States may not participate except in conformity to such reasonable regulations as may be established by the State. For instance, a State cannot forbid citizens of other States from suing in its courts, that right being enjoyed by its own people; but it may require a non-resident, although a citizen of another State, to give bond for costs, although such bond be not required of a resident. Such a regulation of the internal affairs of a State cannot reasonably be characterized as hostile to the fundamental rights of citizens of other States. So, a State may, by rule uniform in its operation as to citizens of the several States, require residence within its limits for a given time before a citizen of another State who becomes a resident thereof shall exercise the right of suffrage or become eligible to office. It has never been supposed that regulations of that character materially interfered with the enjoyment by citizens of each State of the privileges and immunities secured by the Constitution to citizens of the several States. The Constitution forbids only such legislation affecting citizens of the respective States as will substantially or practically put a citizen of one State in a condition of alienage when he is within or when he removes to another State, or when asserting in another State the rights that commonly appertain to those who are part of the political community known as the People of the United States, by and for whom the government of the Union was ordained and established.

Nor must we be understood as saying that a State may not, by its courts, retain within its limits the assets of a foreign corporation, in order that justice may be done to its own citizens; nor, by appropriate action of its judicial tribunals, see to it that its own citizens are not unjustly discriminated against by reason of the administration in other States of the assets there of an insolvent corporation doing business within its limits. For instance, if the Embreeville Company had property in Virginia at the time of its insolvency, the Tennessee court administering its assets in that State could take into account what a Virginia creditor, seeking to participate in the distribution of the company's assets in Tennessee, had received or would receive from the company's assets in Virginia, and make such order touching the assets of the company in Tennessee as would protect Tennessee creditors against wrongful discrimination arising from the particular action taken in Virginia for the benefit of creditors residing in that Commonwealth.

. . . . . .

We adjudge that when the general property and assets of a private corporation, lawfully doing business in a State, are in course of administration by the courts of such State, creditors who are citizens of other States are entitled, under the Constitution of the United States, to stand upon the same plane with creditors of like class who

are citizens of such State, and cannot be denied equality of right simply because they do not reside in that State, but are citizens residing in other States of the Union. The individual plaintiffs in error were entitled to contract with this British corporation, lawfully doing business in Tennessee, and deemed and taken to be a corporation of that State; and no rule in the distribution of its assets among creditors could be applied to them as resident citizens of Ohio, and because they were not residents of Tennessee, that was not applied by the courts of Tennessee to creditors of like character who were citizens of Tennessee.

As to the plaintiff in error, the Hull Coal and Coke Company of Virginia, different considerations must govern our decision. It has long been settled that, for purposes of suit by or against it in the courts of the United States, the members of a corporation are to be conclusively presumed to be citizens of the State creating such corporation: Louisville, Cincinnati, & Charleston Railroad Co. *v.* Letson, 2 How. 497; Covington Drawbridge Co. *v.* Shepherd, 20 How. 227, 232; Ohio & Miss. Railroad Co. *v.* Wheeler, 1 Black, 286, 296; Steamship Co. *v.* Tugman, 106 U. S. 118, 120; Barrow Steamship Co. *v.* Kane, 170 U. S. 100; and therefore it has been said that a corporation is to be deemed, for such purposes, a citizen of the State under whose laws it was organized. But it is equally well settled, and we now hold, that a corporation is not a citizen within the meaning of the constitutional provision that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Paul *v.* Virginia, 8 Wall. 168, 178, 179; Ducat *v.* Chicago, 10 Wall. 410, 415; Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566, 573. The Virginia corporation, therefore, cannot invoke that provision for protection against the decree of the State court denying its right to participate upon terms of equality with Tennessee creditors in the distribution of the assets of the British corporation in the hands of the Tennessee court.

Since, however, a corporation is a "person" within the meaning of the Fourteenth Amendment (Santa Clara County *v.* Southern Pacific Railroad Co., 118 U. S. 394, 396; Smyth *v.* Ames, 169 U. S. 466, 522), may not the Virginia corporation invoke for its protection the clause of the amendment declaring that no State shall deprive any person of property without due process, nor deny to any person within its jurisdiction the equal protection of the laws?

We are of opinion that this question must receive a negative answer. Although this court has adjudged that the prohibitions of the Fourteenth Amendment refer to all the instrumentalities of the State, to its legislative, executive, and judicial authorities (*Ex parte* Virginia, 100 U. S. 339, 346, 347; Yick Wo *v.* Hopkins, 118 U. S. 356, 373; Scott *v.* McNeal, 154 U. S. 34, 45; and Chicago, Burlington, &c. R. R. Co. *v.* Chicago, 166 U. S. 226, 233), it does not follow that, within the meaning of that amendment, the judgment below deprived

the Virginia corporation of property without due process of law, simply because its claim was subordinated to the claims of the Tennessee creditors. That corporation was not, in any legal sense, deprived of its claim, nor was its right to reach the assets of the British corporation in other States or countries disputed. It was only denied the right to participate upon terms of equality with Tennessee creditors in the distribution of particular assets of another corporation doing business in that State. It had notice of the proceedings in the State court, became a party to those proceedings, and the rights asserted by it were adjudicated. If the Virginia corporation cannot invoke the protection of the second section of Article IV. of the Constitution of the United States relating to the privileges and immunities of citizens in the several States, as its co-plaintiffs in error have done, it is because it is not a citizen within the meaning of that section; and if the State court erred in its decree in reference to that corporation, the latter cannot be said to have been thereby *deprived* of its property without due process of law within the meaning of the Constitution.

It is equally clear that the Virginia corporation cannot rely upon the clause declaring that no State shall "deny to any person within its jurisdiction the equal protection of the laws." That prohibition manifestly relates only to the denial by the State of equal protection to persons "within its jurisdiction." Observe, that the prohibition against the deprivation of property without due process of law is not qualified by the words "within its jurisdiction," while those words are found in the succeeding clause relating to the equal protection of the laws. The court cannot assume that those words were inserted without any object, nor is it at liberty to eliminate them from the Constitution and to interpret the clause in question as if they were not to be found in that instrument. Without attempting to state what is the full import of the words, "within its jurisdiction," it is safe to say that a corporation not created by Tennessee, nor doing business there under conditions that subjected it to process issuing from the courts of Tennessee at the instance of suitors, is not, under the above clause of the Fourteenth Amendment, within the jurisdiction of that State. Certainly, when the statute in question was enacted the Virginia corporation was not within the jurisdiction of Tennessee. So far as the record discloses, its claim against the Embreeville Company was on account of coke sold and shipped from Virginia to the latter corporation at its place of business in Tennessee. It does not appear to have been doing business in Tennessee under the statute here involved, or under any statute that would bring it directly under the jurisdiction of the courts of Tennessee by service of process on its officers or agents. Nor do we think it came within the jurisdiction of Tennessee, within the meaning of the amendment, simply by presenting its claim in the State court and thereby becoming a party to this cause. Under any other

interpretation the Fourteenth Amendment would be given a scope not contemplated by its framers or by the people, nor justified by its language. We adjudge that the statute, so far as it subordinates the claims of private business corporations not within the jurisdiction of the State of Tennessee (although such private corporations may be creditors of a corporation doing business in the State under the authority of that statute), to the claims against the latter corporation of creditors residing in Tennessee, is not a denial of the "equal protection of the laws" secured by the Fourteenth Amendment to persons within the jurisdiction of the State, however unjust such a regulation may be deemed.

What may be the effect of the judgment of this court in the present case upon the rights of creditors not residing in the United States, it is not necessary to decide. Those creditors are not before the court on this writ of error.

*The final judgment of the Supreme Court of Tennessee must be affirmed as to the Hull Coal and Coke Company, because it did not deny to that corporation any right, privilege, or immunity secured to it by the Constitution of the United States.* (*Rev. Stat.* § 709.) *As to the other plaintiffs in error, citizens of Ohio, the judgment must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion; and it is so ordered.*[1]

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## SECTION III. — EXTRADITION BETWEEN STATES.

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### EX PARTE REGGEL.

114 United States, 642. 1885.

[THIS was an application in a territorial court of Utah for release from arrest under warrant of the governor of that Territory for extradition on the demand of the governor of Pennsylvania. The applicant appealed to this court from an order refusing the writ of *habeas corpus*.]

MR. JUSTICE HARLAN delivered the opinion of the court.

This case arises under §§ 5278 and 5279 of the Revised Statutes of the United States, which provide: —

"SEC. 5278. Whenever the executive authority of any State or Territory demands any person as a fugitive from justice of the

[1] MR. JUSTICE BREWER delivered a dissenting opinion, in which MR. CHIEF JUSTICE FULLER concurred.

executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand shall be paid by such State or Territory.

"SEC. 5279. Any agent, so appointed, who receives the fugitive into his custody, shall be empowered to transport him to the State or Territory from which he has fled. And every person who, by force, sets at liberty or rescues the fugitive from such agent while so transporting him, shall be fined not more than five hundred dollars, or imprisoned not more than one year." 1 Stat. 302, ch. 7, §§ 1, 2.

It is not necessary to consider the question suggested by counsel as to the right of the governor of the Territory to have withheld the papers upon which he based his warrant for the arrest of the accused; for the record shows that the requisition and accompanying papers from the governor of Pennsylvania constituted the evidence upon which he acted, and were submitted to the court to which the writ of *habeas corpus* was returned.

Under the act of Congress, it became the duty of the governor of Utah to cause the arrest of Reggel, and his delivery to the agent appointed to receive him, when it appeared: 1. That the demand by the executive authority of Pennsylvania was accompanied by a copy of an indictment, or affidavit made before a magistrate, charging Reggel with having committed treason, felony, or other crime within that State, and certified as authentic by her governor. 2. That the person demanded was a fugitive from justice.

The first of these conditions was met by the production to the governor of Utah of the indictment (duly certified as authentic) of the grand jury of the Court of Quarter Sessions of the Peace for the City and County of Philadelphia, Pennsylvania, wherein the accused was charged with having committed the crime of obtaining by false pretences certain goods with the intent to cheat and defraud the persons therein named; which offence, as was made to appear from the statutes of that Commonwealth (a copy of which, duly certified as authentic, accompanied the indictment), is a misde-

meanor under the laws of Pennsylvania, punishable by a fine not exceeding $500, and imprisonment not exceeding three years.

It was objected in the court of original jurisdiction that there could be no valid requisition based upon an indictment for an offence less than a felony. This view is erroneous. It was declared in Kentucky *v.* Dennison, 24 How. 66, 99, that the words "treason, felony, or other crime" in section 2 of Article I. of the Constitution include every offence, from the highest to the lowest, known to the law of the State from which the accused had fled, including misdemeanors. It was there said by Chief Justice Taney, speaking for the whole court, that, looking to the words of the Constitution, "to the obvious policy and necessity of this provision to preserve harmony between the States and order and law within their respective borders, and to its early adoption by the Colonies, and then by the Confederate States whose mutual interest it was to give each other aid and support whenever it was needed, the conclusion is irresistible, that this compact engrafted in the Constitution included, and was intended to include, every offence made punishable by the law of the State in which it was committed." It is within the power of each State, except as her authority may be limited by the Constitution of the United States, to declare what shall be offences against her laws; and citizens of other States, when within her jurisdiction, are subject to those laws. In recognition of this right, so reserved to the States, the words of the clause in reference to fugitives from justice were made sufficiently comprehensive to include every offence against the laws of the demanding State, without exception as to the nature of the crime.

Although the constitutional provision in question does not, in terms, refer to fugitives from the justice of any State, who may be found in one of the Territories of the United States, the act of Congress has equal application in that class of cases, and the words "treason, felony, or other crime" must receive the same interpretation, when the demand for the fugitive is made, under that act, upon the governor of a Territory, as when made upon the executive authority of one of the States of the Union.

Another proposition advanced in behalf of the appellant is, that the indictment which accompanied the requisition does not sufficiently charge the commission of any crime; of which fact it was the duty of the governor of Utah to take notice, and which the court may not ignore in determining whether the appellant is lawfully in custody. In connection with this proposition, counsel discusses, in the light of the adjudged cases, the general question as to the authority of a court of the State or Territory, in which the fugitive is found, to discharge him from arrest, whenever in its judgment the indictment, according to the technical rules of criminal pleading, is defective in its statement of the crime charged. It is sufficient for the purposes of the present case to say that, by the laws of Pennsylvania,

every indictment is to be deemed and adjudged sufficient and good in law which charges the crime substantially in the language of the act of assembly prohibiting its commission and prescribing the punishment therefor, or, if at common law, so plainly that the nature of the offence charged may be easily understood by the jury; and that the indictment, which accompanied the requisition of the governor of Pennsylvania, does charge the crime substantially in the language of her statute. That Commonwealth has the right to establish the forms of pleadings and process to be observed in her own courts, in both civil and criminal cases, subject only to those provisions of the Constitution of the United States involving the protection of life, liberty, and property in all the States of the Union.

The only question remaining to be considered relates to the alleged want of competent evidence before the governor of Utah, at the time he issued the warrant of arrest, to prove that the appellant was a fugitive from the justice of Pennsylvania. Undoubtedly the act of Congress did not impose upon the executive authority of the Territory the duty of surrendering the appellant, unless it was made to appear, in some proper way, that he was a fugitive from justice. In other words, the appellant was entitled, under the act of Congress, to insist upon proof that he was within the demanding State at the time he is alleged to have committed the crime charged, and subsequently withdrew from her jurisdiction, so that he could not be reached by her criminal process. The statute, it is to be observed, does not prescribe the character of such proof; but that the executive authority of the Territory was not required, by the act of Congress, to cause the arrest of appellant, and his delivery to the agent appointed by the governor of Pennsylvania, without proof of the fact that he was a fugitive from justice, is, in our judgment, clear from the language of that act. Any other interpretation would lead to the conclusion that the mere requisition by the executive of the demanding State, accompanied by the copy of an indictment, or an affidavit before a magistrate, certified by him to be authentic, charging the accused with crime committed within her limits, imposes upon the executive of the State or Territory where the accused is found the duty of surrendering him, although he may be satisfied, from incontestable proof, that the accused had, in fact, never been in the demanding State, and, therefore, could not be said to have fled from its justice. Upon the executive of the State in which the accused is found rests the responsibility of determining, in some legal mode, whether he is a fugitive from the justice of the demanding State. He does not fail in duty if he makes it a condition precedent to the surrender of the accused that it be shown to him, by competent proof, that the accused is, in fact, a fugitive from the justice of the demanding State.

Did it sufficiently appear that the appellant was, as represented by

the executive authority of Pennsylvania, a fugitive from the justice of that Commonwealth? We are not justified by the record before us in saying that the governor of Utah should have held the evidence inadequate to establish that fact. The warrant of arrest refers to an affidavit taken before a notary public of Pennsylvania showing Reggel's flight from that Commonwealth. There was no such affidavit; but the reference, manifestly, was to the affidavit made by Frederick Gentner, which recited the finding by the grand jury of the city and county of Philadelphia, of a true bill of indictment charging Reggel with "the crime of false pretences," and stating that he "is a fugitive from justice," and was then in Salt Lake City, Utah Territory. This is sworn to, and is attested by the seal of the Court of Quarter Sessions, — the court in which the prosecution is pending. It is not entirely clear from the record, as presented to us, what is the official character of the person before whom the affidavit was made. The reasonable inference is, that the affidavit was made in the court where the prosecution is pending, and that it is one of the papers accompanying the requisition of the governor of Pennsylvania, and which he certified to be authentic.

It is contended that Gentner's affidavit that Reggel is a fugitive from justice is the statement of a legal conclusion, and is materially defective in not setting out the facts upon which that conclusion rested. Although that statement presents, in some aspects of it, a question of law, we cannot say that the governor of Utah erred in regarding it as the statement of a fact, and as sufficient evidence that appellant had fled from the State in which he stood charged with the commission of a particular crime, on a named day, at the city and county of Philadelphia, especially as no opposing evidence was brought to his attention. If the determination of that fact by the governor of Utah upon evidence introduced before him is subject to judicial review, upon *habeas corpus*, the accused, in custody, under his warrant, — which recites the demand of the governor of Pennsylvania, accompanied by an authentic indictment charging him, substantially in the language of her statutes, with a specific crime committed within her limits, — should not be discharged merely because, in the judgment of the court, the evidence as to his being a fugitive from justice was not as full as might properly have been required, or because it was so meagre as, perhaps, to admit of a conclusion different from that reached by him. In the present case, the proof before the governor of Utah may be deemed sufficient to make a *prima facie* case against the appellant as a fugitive from justice within the meaning of the act of Congress.

*Judgment affirmed.*

## LASCELLES *v.* GEORGIA.

148 United States, 537. 1893.

THIS case was brought here by writ of error to the Supreme Court of the State of Georgia. The single Federal question presented by the record, and relied on to confer upon this court the jurisdiction to review the judgment of the Supreme Court of Georgia, complained of by the plaintiff in error, is whether a fugitive from justice who has been surrendered by one State of the Union to another State thereof upon requisition charging him with the commission of a specific crime, has, under the Constitution and laws of the United States, a right, privilege, or immunity to be exempt from indictment and trial in the State to which he is returned, for any other or different offence than that designated and described in the requisition proceedings under which he was demanded by and restored to such State, without first having an opportunity to return to the State from which he was extradited.

[Plaintiff in error, as appears from the opinion, was extradited from New York to Georgia under indictments charging him (under the name of Beresford) with cheating and larceny under trust. Before trial on these indictments he was indicted and put on trial for forgery, against his objection that he could not be tried for another offence than that for which he was extradited, without reasonable opportunity being first allowed him to return to New York. This objection, raised at various stages of the proceedings, was overruled, and he was convicted, and the conviction was affirmed in the Supreme Court of the State.]

MR. JUSTICE JACKSON, after stating the facts, delivered the opinion of the court.

The plaintiff in error prosecutes the present writ of error to review and reverse this decision of the Supreme Court of Georgia, claiming that in its rendition a right, privilege, or immunity secured to him under the Constitution and laws of the United States, specially set up and insisted on, was denied. The particular right claimed to have been denied is the alleged exemption from indictment and trial except for the specific offences on which he had been surrendered.

The question presented for our consideration and determination is whether the Constitution and laws of the United States impose any such limitation or restriction upon the power and authority of a State to indict and try persons charged with offences against its laws, who are brought within its jurisdiction under interstate rendition proceedings. While cases involving questions of international extradition and interstate rendition of fugitives from justice have frequently been before this court for decision, this court has not passed upon the precise point here presented. The second clause

of section 2, article 4, of the Constitution of the United States declares that "a person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." To carry this provision into effect Congress passed the act of February 12, 1793, 1 Stat. 302, c. 7, the first and second sections of which have been re-enacted and embodied in sections 5278 and 5279 of the Revised Statutes of the United States, prescribing the methods of procedure on the part of the State demanding the surrender of the fugitive, and providing that "it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear," and providing further that the agent "so appointed, who shall receive the fugitive into his custody, shall be empowered to transport him to the State or Territory from which he has fled."

Upon these provisions of the organic and statutory law of the United States rest exclusively the right of one State to demand, and the obligation of the other State upon which the demand is made to surrender, a fugitive from justice. Now, the proposition advanced on behalf of the plaintiff in error in support of the Federal right claimed to have been denied him is, that, inasmuch as interstate rendition can only be effected when the person demanded as a fugitive from justice is duly charged with some particular offence or offences, his surrender upon such demand carries with it the implied condition that he is to be tried *alone* for the designated crime, and that in respect to all offences other than those specified in the demand for his surrender, he has the same right of exemption as a fugitive from justice extradited from a foreign nation. This proposition assumes, as is broadly claimed, that the States of the Union are independent governments, having the full prerogatives and powers of nations, except what have been conferred upon the general government, and not only have the right to grant, but do, in fact, afford to all persons within their boundaries an asylum as broad and secure as that which independent nations extend over their citizens and inhabitants. Having reached, upon this assumption or by this process of reasoning, the conclusion that the same rule should be recognized and applied in interstate rendition as in foreign extradition of fugitives from justice, the decision of this court in United States *v.* Rauscher, 119 U. S. 407 *et seq.*, is invoked as a controlling authority on the question under consideration. If the premises on which this argument is based were sound, the conclusion might be correct. But the fallacy of the argument lies in the assumption that the States

of the Union occupy towards each other, in respect to fugitives from justice, the relation of foreign nations, in the same sense in which the general government stands towards independent sovereignties on that subject; and in the further assumption that a fugitive from justice acquires in the State to which he may flee some State or personal right of protection, improperly called a right of asylum, which secures to him exemption from trial and punishment for a crime committed in another State, unless such crime is made the special object or ground of his rendition. This latter position is only a restatement, in another form, of the question presented for our determination. The sole object of the provision of the Constitution and the act of Congress to carry it into effect is to secure the surrender of persons accused of crime, who have fled from the justice of a State, whose laws they are charged with violating. Neither the Constitution, nor the act of Congress providing for the rendition of fugitives upon proper requisition being made, confers, either expressly or by implication, any right or privilege upon such fugitives under and by virtue of which they can assert, in the State to which they are returned, exemption from trial for any criminal act done therein. No purpose or intention is manifested to afford them any immunity or protection from trial and punishment for any offences committed in the State from which they flee. On the contrary, the provision of both the Constitution and the statutes extends to *all* crimes and offences punishable by the laws of the State where the act is done. Kentucky *v.* Dennison, 24 How. 66, 101, 102; *Ex parte* Reggel, 114 U. S. 642.

The case of United States *v.* Rauscher, 119 U. S. 407, has no application to the question under consideration, because it proceeded upon the ground of a right given impliedly by the terms of a *treaty* between the United States and Great Britain, as well as expressly by the acts of Congress in the case of a fugitive surrendered to the United States by a foreign nation. That treaty, which specified the offences that were extraditable, and the statutes of the United States passed to carry it and other like treaties into effect, constituted the supreme law of the land, and were construed to exempt the extradited fugitive from trial for any other offence than that mentioned in the demand for his surrender. There is nothing in the Constitution or statutes of the United States in reference to interstate rendition of fugitives from justice which can be regarded as establishing any compact between the States of the Union, such as the Ashburton treaty contains, limiting their operation to particular or designated offences. On the contrary, the provisions of the organic and statutory law embrace crimes and offences of every character and description punishable by the laws of the State where the forbidden acts are committed. It is questionable whether the States could constitutionally enter into any agreement or stipulation with each other for the purpose of defining or limiting the offences for which fugi-

tives would or should be surrendered. But it is settled by the decisions of this court that, except in the case of a fugitive surrendered by a foreign government, there is nothing in the Constitution, treaties, or laws of the United States which exempts an offender, brought before the courts of a State for an offence against its laws, from trial and punishment, even though brought from another State by unlawful violence, or by abuse of legal process. Ker *v.* Illinois, 119 U. S. 436, 444; Mahon *v.* Justice, 127 U. S. 700, 707, 708, 712; Cook *v.* Hart, 146 U. S. 183, 190, 192.

In the case of Mahon *v.* Justice, 127 U. S. 700, a fugitive from the justice of Kentucky was kidnapped in West Virginia and forcibly carried back to Kentucky, where he was held for trial on a criminal charge. The governor of West Virginia demanded his restoration to the jurisdiction of that State, which, being refused, his release was sought by *habeas corpus*, and it was there contended that, under the Constitution and laws of the United States, the fugitive had a right of asylum in the State to which he fled, which the courts of the United States should recognize and enforce, except when removed in accordance with regular proceedings authorized by law. Instead of acceding to this proposition, this court said: "But the plain answer to this contention is that the *laws* of the United States do not recognize any such right of asylum as is here claimed, on the part of the fugitive from justice in any State to which he has fled; nor have they, as already stated, made any provision for the return of parties, who, by violence and without lawful authority, have been abducted from a State." And the court further said: "As to the removal from the State of the fugitive from justice in a way other than that which is provided by the second section of the fourth article of the Constitution, which declares that 'a person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime,' and the laws passed by Congress to carry the same into effect — it is not perceived how that fact can affect his detention upon a warrant for the commission of a crime within the State to which he is carried. The jurisdiction of the court in which the indictment is found is not impaired by the manner in which the accused is brought before it. There are many adjudications to this purport cited by counsel on the argument, to some of which we will refer." (pp. 707, 708.) After reviewing a number of cases on this question, the court proceeded: "Other cases might be cited from the same courts holding similar views. There is, indeed, an entire concurrence of opinion as to the ground upon which a release of the appellant in the present case is asked, namely, that his forcible abduction from another State, and conveyance within the jurisdiction of the court holding him, is no objection to the detention and trial

for the offence charged. They all proceed upon the obvious ground that the offender against the law of the State is not relieved from liability because of personal injuries received from private parties, or because of indignities committed against another State. It would indeed be a strange conclusion, if a party charged with a criminal offence could be excused from answering to the government whose laws he had violated, because other parties had done violence to him, and also committed an offence against the laws of another State." (p. 712.) The same principle was applied in the case of Ker *v.* Illinois, 119 U. S. 436.

If a fugitive may be kidnapped or unlawfully abducted from the State or country of refuge, and be, thereafter, tried in the State to which he is forcibly carried, without violating any right or immunity secured to him by the Constitution and laws of the United States, it is difficult to understand upon what sound principle can be rested the denial of a State's authority or jurisdiction to try him for another or different offence than that for which he was surrendered. If the fugitive be regarded as not lawfully within the limits of the State in respect to any other crime than the one on which his surrender was effected, still that fact does not defeat the jurisdiction of its courts to try him for other offences, any more than if he had been brought within such jurisdiction forcibly and without any legal process whatever.

We are not called upon in the present case to consider what, if any, authority the surrendering State has over the subject of the fugitive's rendition, beyond ascertaining that he is charged with crime in the State from which he has fled, nor whether the States have any jurisdiction to legislate upon the subject, and we express no opinion on these questions. To apply the rule of international or foreign extradition, as announced in United States *v.* Rauscher, 119 U. S. 407, to interstate rendition involves the confusion of two essentially different things, which rest upon entirely different principles. In the former the extradition depends upon treaty contract or stipulation, which rests upon good faith, and in respect to which the sovereign upon whom the demand is made can exercise discretion, as well as investigate the charge on which the surrender is demanded, there being no rule of comity under and by virtue of which independent nations are required or expected to withhold from fugitives within their jurisdiction the right of asylum. In the matter of interstate rendition, however, there is the binding force and obligation, not of contract, but of the supreme law of the land, which imposes no conditions or limitations upon the jurisdiction and authority of the State to which the fugitive is returned.

There are decisions in the State courts and in some of the lower Federal courts which have applied the rule laid down in United States *v.* Rauscher, *supra*, to interstate rendition of fugitives under the Constitution and laws of the United States, but in our opinion

they do not rest upon sound principle, and are not supported by the weight of judicial authority.

The cases holding the other and sounder view, that a fugitive from justice surrendered by one State upon the demand of another is not protected from prosecution for offences other than that for which he was rendered up, but may, after being restored to the demanding State, be lawfully tried and punished for any and all crimes committed within its territorial jurisdiction, either before or after extradition, are the following: *In re* Noyes, 17 Albany L. J. 407; Ham *v.* The State [Texas], 4 Tex. App. 645; State *ex rel.* Brown *v.* Stewart, 60 Wis. 587; Post *v.* Cross, 135 N. Y. 536; Commonwealth *v.* Wright [Sup. Court of Mass.], 33 N. E. Rep. 82; and *In re* Miles, 52 Vt. 609.

These authorities are followed by the Supreme Court of Georgia in the clear opinion pronounced by Lumpkin, Justice, in the present case.

The highest courts of the two States immediately or more directly interested in the case under consideration hold the same rule on this subject. The plaintiff in error does not bear in his person the alleged sovereignty of the State of New York, from which he was remanded (Dow's Case, 18 Penn. St. 37); but if he did, that State properly recognizes the jurisdiction of the State of Georgia to try and punish him for any and all crimes committed within its territory. But aside from this, it would be a useless and idle procedure to require the State having custody of the alleged criminal to return him to the State by which he was rendered up in order to go through the formality of again demanding his extradition for the new or additional offences on which it desired to prosecute him. The Constitution and laws of the United States impose no such condition or requirement upon the State. Our conclusion is that, upon a fugitive's surrender to the State demanding his return in pursuance of national law, he may be tried in the State to which he is returned for any other offence than that specified in the requisition for his rendition, and that in so trying him against his objection no right, privilege, or immunity secured to him by the Constitution and laws of the United States is thereby denied.

It follows, therefore, that the judgment in the present case should be

*Affirmed.*

## CHAPTER XI.

### THE GUARANTY OF REPUBLICAN GOVERNMENT TO THE STATES.

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LUTHER *v.* BORDEN.

7 Howard, 1; 17 Curtis, 1. 1848.

[See *supra*, p. 595.]

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TEXAS *v.* WHITE.

7 Wallace, 700. 1868.

[See *supra*, p. 838.]

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## CHAPTER XII.

### THE AMENDMENTS TO THE CONSTITUTION.

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[See in general the cases under Chapter I.]

# CHAPTER XIII.

## CIVIL RIGHTS AND THEIR GUARANTIES.

### SECTION I. — RELIGIOUS LIBERTY.

### PFEIFFER *v.* BOARD OF EDUCATION OF THE CITY OF DETROIT.

— Michigan, —; 77 Northwestern Reporter, 250. 1898.

MONTGOMERY, J. The relator applied to the Circuit Court of Wayne County to compel the respondent to discontinue the use of a certain book, known as "Readings from the Bible," in the public schools of Detroit.

[The application for a writ of *mandamus* having been granted by the lower court, the respondent brings the case to this court by *certiorari*. The answer of respondent in the lower court shows that the teachers in the schools in question were not required to give instruction from the Bible, except such as was absolutely necessary for use of the same as a supplemental text-book of reading, and were not allowed to make note or comment upon anything contained in said book. It was also averred that the board did not require the pupils of such schools to listen to the readings from the Bible, but that such readings took place at the close of the sessions of said schools, and that pupils were, by the order of the board, excused therefrom upon the application of their parents or guardians.]

The contention of relator is that the action of the board is forbidden by the constitution of the State. The provisions touching this question are as follows (article 4): —

"Sect. 39. The legislature shall pass no law to prevent any person from worshipping Almighty God according to the dictates of his own conscience, or compel any person to attend, erect, or support any place of religious worship, or to pay tithes, taxes, or other rates for the support of any minister of the gospel or teacher of religion.

"Sect. 40. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological

or religious seminary, nor shall property belonging to the State be appropriated for any such purposes.

"Sect. 41. The legislature shall not diminish or enlarge the civil or political rights, privileges, and capacities of any person on account of his opinion or belief concerning matters of religion."

The precise question is not whether the pupil can be compelled to attend religious exercises, nor, necessarily, whether the reading of the Bible, or an extract from it, constitutes religious worship, but whether such reading of extracts from the Bible, at which reading pupils whose faith or scruples are shocked by hearing the passages read are not required to attend, constitutes the teacher a teacher of religion, or amounts to a restriction of civil or political rights or privileges of such students as do not attend upon the exercises. Is the reading of extracts taken from the Bible a violation of the provision of the constitution which inhibits the diminishing or enlargement of the civil or political rights, privileges, and capacities of the individual on account of his opinion or belief concerning matters of religion? We do not think it can be maintained that this section has any application to this subject. The primary purpose of this provision was to exclude religious tests, and to place all citizens on an equality before the law as to the exercise of the franchise of voting or holding office. The language is inapt to be applied as restricting the use of school rooms or school funds. It might be said that many of the students in our schools are not in position to avail themselves of the opportunity to study the dead languages. Is it, therefore, an unjust discrimination to provide for instruction in Latin and Greek for such pupils as are able to devote their time to those studies? Does it harm one who does not, for conscientious reasons, care to listen to readings from the Bible, that others are given the opportunity to do so? Is it not intolerant for one not required to attend to object to such readings? It may be said, of course, that the services of the teacher while engaged in these exercises are paid out of the fund in which all are entitled to share; but the same is true of the time which the teacher devotes to the languages, or instruction in higher mathematics. Does it follow that the civil rights or privileges of the students who do not accept teaching in those branches, or those who do, have been, on the one hand, diminished, or, on the other, enlarged? I do not think it should be so held. Nor has section 40 any more appropriate application. This section has a very plain meaning, which is that the public money may not be turned over to a religious sect to maintain churches or seminaries; and unless the readings from the Bible, or selections from the Bible, constitute the public school a religious or theological seminary, this section has not, in my judgment, any application. As is stated in the opinion of the learned circuit judge, the most significant provision is section 39; and the meritorious question is whether any student or any taxpayer has been

compelled to attend, erect, or support a place of religious worship, or to pay tithes, taxes, or other rates for the support of any minister of the gospel or teacher of religion. In determining this question, we should endeavor to place ourselves in the position of the framers of the constitution, and ascertain what was meant at the time; for, if we are successful in doing this, we have solved the question of its meaning for all time. It could not mean one thing at the time of its adoption, and another thing to-day, when public sentiments have undergone a change. McPherson *v.* Secretary of State, 92 Mich. 377. It is therefore essential that we determine the intent of this provision by reference to the state of the law or custom previously existing, and by the contemporaneous construction, rather than attempt to test its meaning by the so-called advanced or liberal views obtaining among a large class of the community at the present day.

A similar provision was introduced into the convention of 1835. The provision was as follows: "Every person has a right to worship Almighty God according to the dictates of his own conscience, and no person can of right be compelled to attend, erect, or support against his will any place of religious worship, or pay tithes, taxes, or other rates for the support of any minister of the gospel or teacher of religion." As is pointed out in the brief of the learned counsel for the respondent (to whom we are much indebted for a most laborious and careful research into the historical origin of this provision), the provision was doubtless taken from the Virginia constitution of 1830. It is clearly shown by that research that the inhabitants of that Commonwealth were by statute compelled to attend upon divine service; ministers were, in public statutes, referred to as "teachers of religion." In 1784 a statute making provision for the support of ministers of the established church was introduced, under the title of "A Bill to establish a provision for teachers of the Christian religion." This statute was repealed by a general statute adopted in 1786, entitled "An Act for establishing religious freedom," the preamble of which clearly shows that the term "teacher of religion" was used as synonymous with "minister." The constitution of 1830 was but an embodiment of this enactment in the organic law of the State. Can it be said that the adoption of this provision into our constitution of 1835 was intended to have a wider scope? I think not. It is significant that this constitution was adopted in pursuance to authority conferred by article 5 of the articles of compact contained in the ordinance of 1787 (Scott *v.* Society, 1 Doug. 122), which gave to the people of the Territory a right to form a constitution in conformity with the principles contained in the articles. The ordinance of 1787 declared that religion, morality, and knowledge were necessary to good government and the happiness of mankind, and provided that, for these purposes, schools and the means of education shall ever be

encouraged. It is not to be inferred that, in forming a constitution under the authority of this ordinance, the convention intended to prohibit in the public schools all mention of a subject which the ordinance, in effect, declared that schools were to be established to foster, — particularly as the provision, when traced to its historic origin, is shown to have been aimed at quite another evil. In my opinion, this provision, when incorporated into our organic law, meant simply that the inhabitants of the State should not be required to attend upon those church services which the people of Virginia had been by this same enactment relieved from, and that no one should be compelled to pay tithes or other rates for the support of ministers. If this meaning attached at that time, it has not been changed since.

. . . . . .

In my opinion, the reading of the extracts from the Bible in the manner indicated by the return, without comment, is not in violation of any constitutional provision. I am not able to see why extracts from the Bible should be proscribed, when the youth are taught no better authenticated truths of profane history. The order of the Circuit Court should be reversed.[1]

[1] MOORE, J., delivered a dissenting opinion.

In STATE EX REL. WEISS *v.* DISTRICT BOARD, 76 Wis. 177 (1890), the question was whether *mandamus* would lie to compel the teachers in a public school to discontinue the practice of reading in the school selections from the Bible. The court considers that the adoption of the Protestant or King James's version of the Bible in the public schools as a text-book and the reading of selections therefrom is sectarian instruction, within the meaning of sect. 3, art. 10, of the State Constitution, prohibiting sectarian instruction in the public schools of the State. LYON, J., uses the following language: —

"For the reasons above stated, we cannot doubt that the use of the Bible as a text-book in the public schools, and the stated reading thereof in such schools, without restriction, 'has a tendency to inculcate sectarian ideas,' and is sectarian instruction, within the meaning and intention of the constitution and the statute.

"7. The answer of the respondent states that the relators' children are not compelled to remain in the school-room while the Bible is being read, but are at liberty to withdraw therefrom during the reading of the same. For this reason it is claimed that the relators have no good cause for complaint, even though such reading be sectarian instruction. We cannot give our sanction to this position. When, as in this case, a small minority of the pupils in the public school is excluded, for any cause, from a stated school-exercise, particularly when such cause is apparent hostility to the Bible which a majority of the pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion and subjected to reproach and insult. But it is a sufficient refutation of the argument that the practice in question tends to destroy the equality of the pupils which the constitution seeks to establish and protect, and puts a portion of them to serious disadvantage in many ways with respect to the others."

On the question whether the acts of the teachers are infringement of privileges guaranteed in the Constitution with reference to the right of every man to worship Almighty God according to the dictates of his own conscience and that no control of or interference with the rights of conscience shall be permitted or any preference given by law to any religious establishments or modes of worship, CASSODAY, J., delivering the opinion of the court, uses this language: —

"In considering the two clauses quoted from our constitution, we are to bear in mind the general proposition conceded by all, that our state constitution is not a grant, but a limitation, of powers. State *ex rel.* Graef *v.* Forrest Co., 74 Wis. 615. Viewed in this light, and it will readily be perceived that these clauses operate as a perpetual bar to the State, and each of the three departments of the State government, and every agency thereof, from the infringement, control, or interference with the individual rights of every person, as indicated therein, or the giving of any preference by law to any religious sect or mode of worship. They presuppose the voluntary exercise of such rights by any person or body of persons who may desire, and by implication guarantee protection in the freedom of such exercise. We neither have nor can have in this State under our present constitution any statutes of toleration, nor of union, directly or indirectly, between church and state — for the simple reason that the constitution forbids all such preferences and guarantees all such rights. Bnt the exercise of such rights by one person, or any given number of persons, cannot be so extended as to interfere with the exercise of similar rights by other persons, nor so far as to prevent the legitimate exercise of the police powers of the State in preserving order, securing good citizenship, the administration of law, and the Sabbath as a day of rest. Stansbury *v.* Marks, 2 Dall. 213; Com. *v.* Wolf, 3 Serg. & R. 48; Com. *v.* Lesher, 17 Serg. & R. 155; McGatrick *v.* Wason, 4 Ohio St. 566; Simon's Ex'rs *v.* Gratz, 23 Am. Dec. 33; Shover *v.* State, 10 Ark. 259; Ferriter *v.* Tyler, 48 Vt. 469; State *ex rel.* Walker *v.* Judge, 39 La. Ann. 132. Such statutes come within no constitntional prohibition, and are founded upon an impregnable basis.

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"We must hold that the stated reading of the Bible in the public schools as a text-book may be 'worship' within the meaning of the clause of the constitution under consideration. If, then, such reading of the Bible is worship, can there be any doubt but what the school-room in which it is so statedly read is a 'place of worship,' within the meaning of the same clause of the constitution?

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"The thing that is prohibited is the drawing of any money from the State treasury for the benefit of any religious school. If the stated reading of the Bible in the school as a text-book is not only, in a limited sense, worship, but also instruction, as it manifestly is, then there is no escape from the conclusion that it is religious instruction; and hence the money so drawn from the State treasury was for the benefit of a religious school, within the meaning of this clause of the Constitution."

In REYNOLDS *v.* UNITED STATES, 98 U. S. 145 (1878), which was a prosecution in a territorial court of Utah for polygamy in violation of a Federal statute, defendant interposed the objection that the polygamous marriage was contracted in pursuance of a supposed religious duty. With reference to this question MR. CHIEF JUSTICE WAITE, delivering the opinion of the court, used this language:—

"Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The first amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is, whether the law now under consideration comes within this prohibition.

"The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guaranteed.

"Before the adoption of the Constitntion, attempts were made in some of the colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining

heretical opinions. The controversy upon this general subject was animated in many of the States, but seemed at last to culminate in Virginia. In 1784, the House of Delegates of that State having under consideration 'a bill establishing provision for teachers of the Christian religion,' postponed it until the next session, and directed that the bill should be published and distributed, and that the people be requested 'to signify their opinion respecting the adoption of such a bill at the next session of assembly.'

"This brought out a determined opposition. Amongst others, Mr. Madison prepared a 'Memorial and Remonstrance,' which was widely circulated and signed, and in which he demonstrated 'that religion, or the duty we owe the Creator,' was not within the cognizance of civil government. Semple's Virginia Baptists, Appendix. At the next session the proposed bill was not only defeated, but another, 'for establishing religious freedom,' drafted by Mr. Jefferson, was passed. 1 Jeff. Works, 45; 2 Howison, Hist. of Va. 298. In the preamble of this act (12 Hening's Stat. 84) religious freedom is defined; and after a recital 'that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty,' it is declared 'that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.' In these two sentences is found the true distinction between what properly belongs to the church and what to the state.

"In a little more than a year after the passage of this statute the convention met which prepared the Constitution of the United States. Of this convention Mr. Jefferson was not a member, he being then absent as minister to France. As soon as he saw the draft of the Constitution proposed for adoption, he, in a letter to a friend, expressed his disappointment at the absence of an express declaration insuring the freedom of religion (2 Jeff. Works, 355), but was willing to accept it as it was, trusting that the good sense and honest intentions of the people would bring about the necessary alterations. 1 Jeff. Works, 79. Five of the States, while adopting the Constitution, proposed amendments. Three — New Hampshire, New York, and Virginia — included in one form or another a declaration of religious freedom in the changes they desired to have made, as did also North Carolina, where the convention at first declined to ratify the Constitution until the proposed amendments were acted upon. Accordingly, at the first session of the first Congress the amendment now under consideration was proposed with others by Mr. Madison. It met the views of the advocates of religious freedom, and was adopted. Mr. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association (8 id. 113), took occasion to say: 'Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions, — I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion or prohibiting the free exercise thereof," thus building a wall of separation between church and state. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.' Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."

It is therefore held that the lower court did not err in charging the jury that if defendant, under the influence of a religious belief that it was right, deliberately married a second time having a first wife living, the want of consciousness of evil intent did not excuse him, but that criminal intent would be implied.

## SECTION II. — SECURITY OF THE DWELLING, AND OF PERSONS AND PAPERS.

### BOYD v. UNITED STATES.

116 United States, 616. 1886.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This was an information filed by the District Attorney of the United States in the District Court for the Southern District of New York, in July, 1884, in a cause of seizure and forfeiture of property, against thirty-five cases of plate glass, seized by the collector as forfeited to the United States, under section 12 of the "Act to amend the customs revenue laws," etc., passed June 22, 1874, 18 Stat. 186.

It is declared by that section that any owner, importer, consignee, &c., who shall, with intent to defraud the revenue, make, or attempt to make, any entry of imported merchandise, by means of any fraudulent or false invoice, affidavit, letter, or paper, or by means of any false statement, written or verbal, or who shall be guilty of any wilful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, shall for each offence be fined in any sum not exceeding $5,000 nor less than $50, or be imprisoned for any time not exceeding two years, or both; and, in addition to such fine, such merchandise shall be forfeited.

The charge was that the goods in question were imported into the United States to the port of New York, subject to the payment of duties; and that the owners or agents of said merchandise, or other person unknown, committed the alleged fraud which was described in the words of the statute. The plaintiffs in error entered a claim for the goods, and pleaded that they did not become forfeited in manner and form as alleged. On the trial of the cause it became important to show the quantity and value of the glass contained in twenty-nine cases previously imported. To do this the district attorney offered in evidence an order made by the district judge under section 5 of the same act of June 22, 1874, directing notice under seal of the court to be given to the claimants, requiring them to produce the invoice of the twenty-nine cases. The claimants, in obedience to the notice, but objecting to its validity and to the constitutionality of the law, produced the invoice; and when it was

offered in evidence by the district attorney they objected to its reception on the ground that, in a suit for forfeiture, no evidence can be compelled from the claimants themselves, and also that the statute, so far as it compels production of evidence to be used against the claimants, is unconstitutional and void.

The evidence being received, and the trial closed, the jury found a verdict for the United States, condemning the thirty-five cases of glass which were seized, and judgment of forfeiture was given. This judgment was affirmed by the Circuit Court, and the decision of that court is now here for review.

[The section referred to provides that "in all suits and proceedings other than criminal arising under any of the revenue laws of the United States, the attorney representing the government, whenever in his belief any business book, invoice, or paper belonging to or under the control of the defendant or claimant will tend to prove any allegation made by the United States, may make a written motion particularly describing such book, invoice, or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is pending may at its discretion issue a notice to the defendant or claimant to produce such book, invoice, or paper in court at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant by the United States marshal; . . . and if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper in obedience to such notice the allegations stated in the said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And if produced the said attorney shall be permitted, under the direction of the court, to make examination . . . of such entries in said book, invoice, or paper as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence in behalf of the United States. . . ."]

The clauses of the Constitution, to which it is contended that these laws are repugnant, are the Fourth and Fifth Amendments. The Fourth declares, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The fifth article, amongst other things, declares that no person "shall be compelled in any criminal case to be a witness against himself."

But, in regard to the Fourth Amendment, it is contended that, whatever might have been alleged against the constitutionality of the acts of 1863 and 1867, that of 1874, under which the order in the present case was made, is free from constitutional objection, because it does not authorize the search and seizure of books and papers,

but only requires the defendant or claimant to produce them. That is so; but it declares that if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production; for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of. It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting, and to this extent the proceeding under the act of 1874 is a mitigation of that which was authorized by the former acts; but it accomplishes the substantial object of those acts in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure.

The principal question, however, remains to be considered. Is a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws — is such a proceeding for such a purpose an "*unreasonable* search and seizure" within the meaning of the Fourth Amendment of the Constitution? or, is it a legitimate proceeding?

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In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms "unreasonable searches and seizures," it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book;" since they placed "the liberty of every man in the hands of every petty officer."[1] This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother

[1] *Note by the Court.* — Cooley's Constitutional Limitations, 301–303. A very full and interesting account of this discussion will be found in the works of John Adams, Vol. II., Appendix A, pp. 523–525; Vol. X., pp. 183, 233, 244, 256, &c., and in Quincy's Reports, pp. 469–482; and see Paxton's Case, id. 51–57, which was argued in November of the same year (1761). An elaborate history of the writs of assistance is given in the Appendix to Quincy's Reports, above referred to, written by Horace Gray, Jr., Esq., now a member of this court.

country. "Then and there," said John Adams, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."

These things, and the events which took place in England immediately following the argument about writs of assistance in Boston, were fresh in the memories of those who achieved our independence and established our form of government. In the period from 1762, when the "North Briton" was started by John Wilkes, to April, 1766, when the House of Commons passed resolutions condemnatory of general warrants, whether for the seizure of persons or papers, occurred the bitter controversy between the English government and Wilkes, in which the latter appeared as the champion of popular rights, and was, indeed, the pioneer in the contest which resulted in the abolition of some grievous abuses which had gradually crept into the administration of public affairs. Prominent and principal among these was the practice of issuing general warrants by the Secretary of State, for searching private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel. Certain numbers of the "North Briton," particularly No. 45, had been very bold in denunciation of the government, and were esteemed heinously libellous. By authority of the Secretary's warrant Wilkes's house was searched, and his papers were indiscriminately seized. For this outrage he sued the perpetrators and obtained a verdict of £1,000 against Wood, one of the party who made the search, and £4,000 against Lord Halifax, the Secretary of State, who issued the warrant. The case, however, which will always be celebrated as being the occasion of Lord Camden's memorable discussion of the subject, was that of Entick *v.* Carrington and Three Other King's Messengers, reported at length in 19 Howell's State Trials, 1029. The action was trespass for entering the plaintiff's dwelling-house in November, 1762, and breaking open his desks, boxes, &c., and searching and examining his papers. The jury rendered a special verdict, and the case was twice solemnly argued at the bar. Lord Camden pronounced the judgment of the court in Michaelmas Term, 1765, and the law as expounded by him has been regarded as settled from that time to this, and his great judgment on that occasion is considered as one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country. It is regarded as one of the permanent monuments of the British Constitution, and is quoted as such by the English authorities on that subject down to the present time.[1]

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[1] *Note by the Court.* — See 3 May's Constitutional History of England, Chap. XI.; Broom's Constitutional Law, 558; Cox's Institutions of the English Government, 437.

The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offence, — it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.

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Reverting then to the peculiar phraseology of this act, and to the information in the present case, which is founded on it, we have to deal with an act which expressly excludes criminal proceedings from its operation (though embracing civil suits for penalties and forfeitures), and with an information not technically a criminal proceeding, and neither, therefore, within the literal terms of the Fifth Amendment to the Constitution any more than it is within the literal terms of the Fourth. Does this relieve the proceedings or the law from being obnoxious to the prohibitions of either? We think not; we think they are within the spirit of both.

We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms. We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal. In this very case, the ground of forfeiture as declared in the 12th section of the act of

1874, on which the information is based, consists of certain acts of fraud committed against the public revenue in relation to imported merchandise, which are made criminal by the statute; and it is declared that the offender shall be fined not exceeding $5,000 nor less than $50, or be imprisoned not exceeding two years, or both; and, in addition to such fine, such merchandise shall be forfeited. These are the penalties affixed to the criminal acts; the forfeiture sought by this suit being one of them. If an indictment had been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants, — that is, civil in form, — can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one. As showing the close relation between the civil and criminal proceedings on the same statute in such cases, we may refer to the recent case of Coffey *v.* The United States, [116 U. S.] 427, in which we decided that an acquittal on a criminal information was a good plea in bar to a civil information for the forfeiture of goods, arising upon the same acts. As, therefore, suits for penalties and forfeitures incurred by the commission of offences against the law are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure — and an unreasonable search and seizure — within the meaning of the Fourth Amendment.

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We think that the notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void, and that the inspection by the district attorney of said invoice, when produced in obedience to said notice, and its admission in evidence by the court, were erroneous and unconstitutional proceedings. We are of opinion, therefore, that

*The judgment of the Circuit Court should be reversed, and the cause remanded, with directions to award a new trial.*[1]

[1] Mr. Justice Miller delivered a dissenting opinion, in which Mr. Chief Justice Waite concurred. After quoting the Fourth Amendment, he says: —

## SECTION III. — PROHIBITION OF SLAVERY.

### ROBERTSON *v.* BALDWIN.

165 United States, 275. 1897.

[THIS is an appeal from the judgment of the District Court for the Northern District of California dismissing a writ of *habeas corpus* issued upon the petition of Robertson and others for release from imprisonment by the United States marshal under commitment by a United States commissioner for trial upon a charge for disobedience of the lawful orders of the master of the American barkantine "Arago." Robertson and the other petitioners were sailors on board the "Arago," and having deserted the vessel in violation of their contract as seamen they had been returned to said vessel against their will and by force, under the provisions of Rev. Stat. §§ 4596–4599; and it is claimed that subdivision 1 of said section 4596, which provides a punishment of imprisonment for desertion by any seaman, is unconstitutional under the Thirteenth Amendment to the Federal Constitution, as involving involuntary servitude. Other facts in the case and a portion of the opinion of

"The things here forbidden are two, — search and seizure. And not all searches nor all seizures are forbidden, but only those that are unreasonable. Reasonable searches, therefore, may be allowed, and if the thing sought be found, it may be seized.

"But what search does this statute authorize? If the mere service of a notice to produce a paper to be used as evidence, which the party can obey or not as he chooses, is a search, then a change has taken place in the meaning of words, which has not come within my reading, and which I think was unknown at the time the Constitution was made. The searches meant by the Constitution were such as led to seizure when the search was successful. But the statute in this case uses langnage carefully framed to forbid any seizure under it, as I have already pointed out.

"While the framers of the Constitution had their attention drawn, no doubt, to the abuses of this power of searching private houses and seizing private papers, as practised in England, it is obvious that they only intended to restrain the abuse, while they did not abolish the power. Hence it is only *unreasonable* searches and seizures that are forbidden, and the means of securing this protection was by abolishing searches under warrants, which were called general warrants, because they authorized searches in any place, for any thing.

"This was forbidden, while searches founded on affidavits, and made under warrants which described the thing to be searched for, the person and place to be searched, are still permitted.

"I cannot conceive how a statute aptly framed to require the production of evidence in a suit by mere service of notice on the party, who has that evidence in his possession, can be held to authorize an unreasonable search or seizure, when no seizure is authorized or permitted by the statute."

the court on another question have already been given; see *supra*, p. 782.]

Mr. Justice Brown delivered the opinion of the court.

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2. The question whether sections 4598 and 4599 conflict with the Thirteenth Amendment, forbidding slavery and involuntary servitude, depends upon the construction to be given to the term "involuntary servitude." Does the epithet "involuntary" attach to the word "servitude" continuously, and make illegal any service which becomes involuntary at any time during its existence; or does it attach only at the inception of the servitude, and characterize it as unlawful because unlawfully entered into? If the former be the true construction, then no one, not even a soldier, sailor, or apprentice, can surrender his liberty, even for a day; and the soldier may desert his regiment upon the eve of battle, or the sailor abandon his ship at any intermediate port or landing, or even in a storm at sea, provided only he can find means of escaping to another vessel. If the latter, then an individual may, for a valuable consideration, contract for the surrender of his personal liberty for a definite time and for a recognized purpose, and subordinate his going and coming to the will of another during the continuance of the contract; — not that all such contracts would be lawful, but that a servitude which was knowingly and willingly entered into could not be termed "involuntary." Thus, if one should agree, for a yearly wage, to serve another in a particular capacity during his life, and never to leave his estate without his consent, the contract might not be enforceable for the want of a legal remedy, or might be void upon grounds of public policy, but the servitude could not be properly termed "involuntary." Such agreements for a limited personal servitude at one time were very common in England, and by statute of June 17, 1823, 4 Geo. IV. c. 34, § 3, it was enacted that if any servant in husbandry, or any artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, laborer, or other person, should contract to serve another for a definite time, and should desert such service during the term of the contract, be was made liable to a criminal punishment. The breach of a contract for personal service has not, however, been recognized in this country as involving a liability to criminal punishment, except in the cases of soldiers, sailors, and possibly some others, nor would public opinion tolerate a statute to that effect.

But we are also of opinion that, even if the contract of a seaman could be considered within the letter of the Thirteenth Amendment, it is not, within its spirit, a case of involuntary servitude. The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had

inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (art. 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy (art. 5) does not prevent a second trial, if upon the first trial the jury failed to agree, or if the verdict was set aside upon the defendant's motion (United States *v.* Ball, 163 U. S. 662, 672); nor does the provision of the same article that no one shall be a witness against himself impair his obligation to testify, if a prosecution against him be barred by the lapse of time, a pardon, or by statutory enactment (Brown *v.* Walker, 161 U. S. 591, and cases cited); nor does the provision that an accused person shall be confronted with the witnesses against him prevent the admission of dying declarations, or the depositions of witnesses who have died since the former trial.

The prohibition of slavery, in the Thirteenth Amendment, is well known to have been adopted with reference to a state of affairs which had existed in certain States of the Union since the foundation of the government, while the addition of the words "involuntary servitude" were said in the Slaughter-house Cases, 16 Wall. 36, to have been intended to cover the system of Mexican peonage and the Chinese coolie trade, the practical operation of which might have been a revival of the institution of slavery under a different and less offensive name. It is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional, such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards. The amendment, however, makes no distinction between a public and a private service. To say that persons engaged in a public service are not within the amendment is to admit that there are exceptions to its general language, and the further question is at once presented, where shall the line be drawn? We know of no better answer to make than to say that services which have from time immemorial been treated as exceptional shall not be regarded as within its purview.

From the earliest historical period the contract of the sailor has been treated as an exceptional one, and involving, to a certain extent, the surrender of his personal liberty during the life of the contract. Indeed, the business of navigation could scarcely be

carried on without some guaranty, beyond the ordinary civil remedies upon contract, that the sailor will not desert the ship at a critical moment, or leave her at some place where seamen are impossible to be obtained — as Molloy forcibly expresses it, "to rot in her neglected brine." Such desertion might involve a long delay of the vessel while the master is seeking another crew, an abandonment of the voyage, and, in some cases, the safety of the ship itself. Hence the laws of nearly all maritime nations have made provision for securing the personal attendance of the crew on board, and for their criminal punishment for desertion, or absence without leave during the life of the shipping articles.

[Provisions of early maritime codes for punishment of deserting seamen are set out.]

The provision of Rev. Stat. § 4598, under which these proceedings were taken, was first enacted by Congress in 1790, 1 Stat. 131, § 7. This act provided for the apprehension of deserters and their delivery on board the vessel, but apparently made no provision for imprisonment as a punishment for desertion; but by the Shipping Commissioners' Act of 1872, c. 322, § 51, 17 Stat. 273, now incorporated into the Revised Statutes as section 4596, the court is authorized to add to forfeiture of wages for desertion imprisonment for a period of not more than three months, and for absence without leave imprisonment for not more than one month. In this act and the amendments thereto very careful provisions are made for the protection of seamen against the frauds and cruelty of masters, the devices of boarding-house keepers, and, as far as possible, against the consequences of their own ignorance and improvidence. At the same time discipline is more stringently enforced by additional punishments for desertion, absence without leave, disobedience, insubordination, and barratry. Indeed, seamen are treated by Congress, as well as by the Parliament of Great Britain, as deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults, and as needing the protection of the law in the same sense in which minors and wards are entitled to the protection of their parents and guardians: "*quemadmodum pater in filios, magister in discipulos, dominus in servos vel familiares.*" The ancient characterization of seamen as "wards of admiralty" is even more accurate now than it was formerly.

In the face of this legislation upon the subject of desertion and absence without leave, which was in force in this country for more than sixty years before the Thirteenth Amendment was adopted, and similar legislation abroad from time immemorial, it cannot be open to doubt that the provision against involuntary servitude was never intended to apply to their contracts.

The judgment of the court below is, therefore,

*Affirmed.*[1]

[1] Mr. Justice Harlan delivered a dissenting opinion.

## SECTION IV. — THE GUARANTIES OF LIFE, LIBERTY, AND EQUALITY.

### a. *Due Process of Law.*

### MURRAY'S LESSEE *v.* THE HOBOKEN LAND AND IMPROVEMENT COMPANY.

18 Howard, 272. 1855.

MR. JUSTICE CURTIS delivered the opinion of the court.

This case comes before us on a certificate of division of opinion of the Judges of the Circuit Court of the United States for the district of New Jersey. It is an action of ejectment, in which both parties claim title under Samuel Swartwout, — the plaintiffs, under the levy of an execution on the 10th day of April, 1839, and the defendants, under a sale made by the marshal of the United States for the district of New Jersey, on the 1st day of June, 1839, — by virtue of what is denominated a distress warrant, issued by the solicitor of the treasury under the act of Congress of May 15, 1820, entitled "An Act providing for the better organization of the Treasury Department." This act having provided, by its first section, that a lien for the amount due should exist on the lands of the debtor from the time of the levy and record thereof in the office of the District Court of the United States for the proper district, and the date of that levy in this case being prior to the date of the judgment under which the plaintiffs' title was made, the question occurred in the Circuit Court "whether the said warrant of distress in the special verdict mentioned, and the proceedings thereon and anterior thereto, under which the defendants claim title, are sufficient, under the Constitution of the United States and the law of the land, to pass and transfer the title and estate of the said Swartwout in and to the premises in question, as against the lessors of the plaintiff." Upon this question, the judges being of opposite opinions, it was certified to this court, and has been argued by counsel.

No objection has been taken to the warrant on account of any defect or irregularity in the proceedings which preceded its issue. It is not denied that they were in conformity with the requirements of the act of Congress. The special verdict finds that Swartwout was collector of the customs for the port of New York for eight years before the 29th of March, 1838: that on the 10th of November, 1838, his account, as such collector, was audited by

the first auditor, and certified by the first comptroller of the treasury; and for the balance thus found, amounting to the sum of $1,374,119.65, the warrant in question was issued by the solicitor of the treasury. Its validity is denied by the plaintiffs, upon the ground that so much of the act of Congress as authorized it is in conflict with the Constitution of the United States.

In support of this position, the plaintiff relies on that part of the first section of the third article of the Constitution which requires the judicial power of the United States to be vested in one Supreme Court and in such inferior courts as Congress may, from time to time, ordain and establish; the judges whereof shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office. Also, on the second section of the same article, which declares that the judicial power shall extend to controversies to which the United States shall be a party.

It must be admitted that if the auditing of this account, and the ascertainment of its balance, and the issuing of this process, was an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power. They neither constituted a court of the United States, nor were they, or either of them, so connected with any such court as to perform even any of the ministerial duties which arise out of judicial proceedings.

The question, whether these acts were an exercise of the judicial power of the United States, can best be considered under another inquiry, raised by the further objection of the plaintiff, that the effect of the proceedings authorized by the act in question is to deprive the party, against whom the warrant issues, of his liberty and property, "without due process of law;" and, therefore, is in conflict with the fifth article of the amendments of the Constitution.

Taking these two objections together, they raise the questions, whether, under the Constitution of the United States, a collector of the customs, from whom a balance of account has been found to be due by accounting officers of the treasury, designated for that purpose by law, can be deprived of his liberty, or property, in order to enforce payment of that balance, without the exercise of the judicial power of the United States, and yet by due process of law, within the meaning of those terms in the Constitution; and if so, then, secondly, whether the warrant in question was such due process of law?

The words, "due process of law," were undoubtedly intended to convey the same meaning as the words, "by the law of the land," in Magna Charta. Lord Coke, in his commentary on those words (2 Inst. 50), says they mean due process of law. The constitutions which had been adopted by the several States before the formation of the Federal Constitution, following the language of the great

charter more closely, generally contained the words, "but by the judgment of his peers, or the law of the land." The ordinance of Congress of July 13, 1787, for the government of the territory of the United States northwest of the river Ohio, used the same words.

The Constitution of the United States, as adopted, contained the provision, that "the trial of all crimes, except in cases of impeachment, shall be by jury." When the fifth article of amendment containing the words now in question was made, the trial by jury in criminal cases had thus already been provided for. By the sixth and seventh articles of amendment, further special provisions were separately made for that mode of trial in civil and criminal cases. To have followed, as in the State constitutions, and in the ordinance of 1787, the words of Magna Charta, and declared that no person shall be deprived of his life, liberty, or property but by the judgment of his peers or the law of the land, would have been in part superfluous and inappropriate. To have taken the clause, "law of the land," without its immediate context, might possibly have given rise to doubts, which would be effectually dispelled by using those words which the great commentator on Magna Charta had declared to be the true meaning of the phrase, "law of the land," in that instrument, and which were undoubtedly then received as their true meaning.

That the warrant now in question is legal process, is not denied. It was issued in conformity with an act of Congress. But is it "due process of law"? The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process "due process of law," by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. We apprehend there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown, and especially those due from receivers of the revenues. It is difficult, at this day, to trace

with precision all the proceedings had for these purposes in the earliest ages in the common law. That they were summary and severe, and had been used for purposes of oppression, is inferable from the fact that one chapter of Magna Charta treats of their restraint. It declares: "We or our bailiffs shall not seize any land or rent for any debt as long as the present goods and chattels of the debtor do suffice to pay the debt, and the debtor himself be ready to satisfy therefor. Neither shall the pledges of the debtor be distrained, as long as the principal debtor is sufficient for the payment of the debt; and if the principal debtor fail in payment of the debt, having nothing wherewith to pay, or will not pay where he is able, the pledges shall answer for the debt. And if they will, they shall have the lands and rents of the debtor until they be satisfied of the debt which they before paid for him, except that the principal debtor can show himself to be acquitted against the said sureties."

By the common law, the body, lands, and goods of the king's debtor were liable to be levied on to obtain payment. In conformity with the above provision of Magna Charta a conditional writ was framed, commanding the sheriff to inquire of the goods and chattels of the debtor, and, if they were insufficient, then to extend on the lands. 3 Co. 12 *b;* Com. Dig., Debt, G. 2; 2 Inst. 19. But it is said that since the statute 33 Hen. VIII. c. 39, the practice has been to issue the writ in an absolute form, without requiring any previous inquisition as to the goods. Gilbert's Exch. 127.

To authorize a writ of extent, however, the debt must be matter of record in the king's exchequer. The 33 Hen. VIII. c. 39, § 50, made all specialty debts due to the king of the same force and effect as debts by statute staple, thus giving to such debts the effect of debts of record. In regard to debts due upon simple contract, other than those due from collectors of the revenue and other accountants of the crown, the practice, from very ancient times, has been to issue a commission to inquire as to the existence of the debt.

This commission being returned, the debt found was thereby evidenced by a record, and an extent could issue thereon. No notice was required to be given to the alleged debtor of the execution of this commission (2 Tidd's Pr. 1047), though it seems that, in some cases, an order for notice might be obtained. 1 Ves. 269. Formerly, no witnesses were examined by the commission (Chitty's Prerog. 267; West, 22); the affidavit prepared to obtain an order for an immediate extent being the only evidence introduced. But this practice has been recently changed. 11 Price, 29. By the statute 13 Eliz. c. 4, balances due from receivers of the revenue and all other accountants of the crown were placed on the same footing as debts acknowledged to be due by statute staple. These balances were found by auditors, the particular officers acting thereon having been from time to time varied by legislation and usage.

The different methods of accounting in ancient and modern times are described in Mr. Price's Treatise on the Law and Practice of the Exchequer, ch. 9. Such balances, when found, were certified to what was called the pipe office, to be given in charge to the sheriffs for their levy. Price, 231.

If an accountant failed to render his accounts, a process was issued, termed a *capias nomine districtionis*, against the body, goods, and lands of the accountant. Price, 162, 233, note 3.

This brief sketch of the modes of proceeding to ascertain and enforce payment of balances due from receivers of the revenue in England is sufficient to show that the methods of ascertaining the existence and amount of such debts, and compelling their payment, have varied widely from the usual course of the common law on other subjects; and that, as respects such debts due from such officers, "the law of the land" authorized the employment of auditors, and an inquisition without notice, and a species of execution bearing a very close resemblance to what is termed a warrant of distress in the act of 1820, now in question.

It is certain that this diversity in "the law of the land" between public defaulters and ordinary debtors was understood in this country, and entered into the legislation of the colonies and provinces, and more especially of the States, after the declaration of independence and before the formation of the Constitution of the United States. Not only was the process of distress in nearly or quite universal use for the collection of taxes, but what was generally termed a warrant of distress, running against the body, goods, and chattels of defaulting receivers of public money, was issued to some public officer, to whom was committed the power to ascertain the amount of the default, and by such warrant proceed to collect it. Without a wearisome repetition of details, it will be sufficient to give one section from the Massachusetts act of 1786: "That if any constable or collector, to whom any tax or assessment shall be committed to collect, shall be remiss and negligent of his duty, in not levying and paying unto the treasurer and receiver-general such sum or sums of money as he shall from time to time have received, and as ought by him to have been paid within the respective time set and limited by the assessor's warrant, pursuant to law, the treasurer and receiver-general is hereby empowered, after the expiration of the time so set, by warrant under his hand and seal, directed to the sheriff or his deputy, to cause such sum and sums of money to be levied by distress and sale of such deficient constable or collector's estate, real and personal, returning the overplus, if any there be; and, for want of such estate, to take the body of such constable or collector, and imprison him until he shall pay the same; which warrant the sheriff or his deputy is hereby empowered and required to execute accordingly." Then follows another provision, that if the deficient sum shall not be made by the first warrant,

another shall issue against the town; and if its proper authorities shall fail to take the prescribed means to raise and pay the same, a like warrant of distress shall go against the estates and bodies of the assessors of such town. Laws of Massachusetts, Vol. I. p. 266. Provisions not distinguishable from these in principle may be found in the acts of Connecticut (Revision of 1784, p. 198); of Pennsylvania, 1782 (2 Laws of Penn. 13); of South Carolina, 1788 (5 Stats. of S. C. 55); New York, 1788 (1 Jones & Varick's Laws, 34); see also 1 Henning's Stats. of Virginia, 319, 343; 12 ib. 562; Laws of Vermont (1797, 1800), 340. Since the formation of the Constitution of the United States, other States have passed similar laws. See 7 La. Ann. 192. Congress, from an early period, and in repeated instances, has legislated in a similar manner. By the fifteenth section of the "Act to lay and collect a direct tax within the United States," of July 14, 1798, the supervisor of each district was authorized and required to issue a warrant of distress against any delinquent collector and his sureties, to be levied upon the goods and chattels, and for want thereof upon the body, of such collector; and, failing of satisfaction thereby, upon the goods and chattels of the sureties. 1 Stats. at Large, 602. And again, in 1813 (3 Stats. at Large, 33, § 28) and 1815 (3 Stats. at Large, 177 § 33), the comptroller of the treasury was empowered to issue a similar warrant against collectors of the customs and their sureties. This legislative construction of the Constitution, commencing so early in the government, when the first occasion for this manner of proceeding arose, continued throughout its existence, and repeatedly acted on by the judiciary and the executive, is entitled to no inconsiderable weight upon the question whether the proceeding adopted by it was "due process of law." Prigg *v.* Pennsylvania, 16 Pet. 621; United States *v.* Nourse, 9 Pet. 8; Randolph's Case, 2 Brock. 447; Nourse's Case, 4 Cranch C. C. R. 151; Bullock's Case (cited 6 Pet. 485, note).

Tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the States at the time of the adoption of this amendment, the proceedings authorized by the act of 1820 cannot be denied to be due process of law, when applied to the ascertainment and recovery of balances due to the government from a collector of customs, unless there exists in the Constitution some other provision which restrains Congress from authorizing such proceedings. For, though "due process of law" generally implies and includes *actor*, *reus*, *judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings (2 Inst. 47, 50; Hoke *v.* Henderson, 4 Dev. N. C. Rep. 15; Taylor *v.* Porter, 4 Hill, 146; Van Zandt *v.* Waddel, 2 Yerg. 260; State Bank *v.* Cooper, ib. 599; Jones's Heirs *v.* Perry, 10 ib. 59; Greene *v.* Briggs, 1 Curtis, 311), yet this is not universally true. There may be, and we

have seen that there are, cases under the law of England after Magna Charta, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands, and goods of certain public debtors without any such trial; and this brings us to the question, whether those provisions of the Constitution which relate to the judicial power are incompatible with these proceedings?

That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense the act of the President in calling out the militia under the act of 1795, 12 Wheat. 19, or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial. But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. United States *v.* Ferreira, 13 How. 40. It is necessary to go further, and show not only that the adjustment of the balances due from accounting officers may be, but from their nature must be, controversies to which the United States is a party, within the meaning of the second section of the third article of the Constitution. We do not doubt the power of Congress to provide by law that such a question shall form the subject-matter of a suit in which the judicial power can be exerted. The act of 1820 makes such a provision for reviewing the decision of the accounting officers of the treasury. But, until reviewed, it is final and binding; and the question is, whether its subject-matter is necessarily, and without regard to the consent of Congress, a judicial controversy. And we are of opinion it is not.

Among the legislative powers of Congress are the powers "to lay and collect taxes, duties, imposts, and excises; to pay the debts and provide for the common defence and welfare of the United States; to raise and support armies; to provide and maintain a navy; and to make all laws which may be necessary and proper for carrying into execution those powers." What officers should be appointed to collect the revenue thus authorized to be raised, and to disburse it in payment of the debts of the United States; what duties should be required of them; when and how, and to whom they should account, and what security they should furnish; and to what remedies they should be subjected to enforce the proper discharge of their duties, Congress was to determine. In the exercise of their powers, they have required collectors of customs to be appointed; made it incumbent on them to account, from time to time, with certain officers of the Treasury Department, and to furnish sureties, by bond, for the payment of all balances of the public money which may become due from them. And by the act of 1820, now in question, they have undertaken to provide summary means to compel

these officers — and in case of their default, their sureties — to pay such balances of the public money as may be in their hands.

The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such mean. should be forbidden in some other part of the Constitution. The power has not been exhausted by the receipt of the money by the collector. Its purpose is to raise money and use it in payment of the debts of the government; and, whoever may have possession of the public money, until it is actually disbursed, the power to use those known and appropriate means to secure its due application continues.

As we have already shown, the means provided by the act of 1820 do not differ in principle from those employed in England from remote antiquity — and in many of the States, so far as we know without objection — for this purpose, at the time the Constitution was formed. It may be added, that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties, but always in some way observed and yielded to.

It is true that in England all these proceedings were had in what is denominated the Court of Exchequer, in which Lord Coke says, 4 Inst. 115, the barons are the sovereign auditors of the kingdom. But the barons exercise in person no judicial power in auditing accounts, and it is necessary to remember that the exchequer includes two distinct organizations, one of which has charge of the revenues of the crown, and the other has long been in fact, and now is for all purposes, one of the judicial courts of the kingdom, whose proceedings are and have been as distinct, in most respects, from those of the revenue side of the exchequer, as the proceedings of the Circuit Court of this district are from those of the treasury; and it would be an unwarrantable assumption to conclude that, because the accounts of receivers of revenue were settled in what was denominated the Court of Exchequer, they were judicial controversies between the king and his subjects, according to the ordinary course of the common law or equity. The fact, as we have already seen, was otherwise.

. . . . . .

To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admi-

ralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. Equitable claims to land by the inhabitants of ceded territories form a striking instance of such a class of cases; and as it depends upon the will of Congress whether a remedy in the courts shall be allowed at all, in such cases, they may regulate it and prescribe such rules of determination as they may think just and needful. Thus it has been repeatedly decided in this class of cases that upon their trial the acts of executive officers, done under the authority of Congress, were conclusive, either upon particular facts involved in the inquiry or upon the whole title. Foley *v.* Harrison, 15 How. 433; Burgess *v.* Gray, 16 How. 48; —— *v.* The Minnesota Mining Company, at the present term.[1]

[Other points suggested in argument are considered. The question certified by the judges and set out in the first paragraph of the opinion is answered in the affirmative.]

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## Ex parte WALL.

107 United States, 265. 1883.

Mr. Justice Bradley delivered the opinion of the court.

[On a petition in this court for an alternate writ of *mandamus* to the district judge of the United States for the Southern District of Florida to show cause why a peremptory writ should not issue to compel him to vacate an order made by him as such district judge prohibiting said Wall from practising at the bar of said court and restore said Wall to the rights, privileges, and immunities of an attorney and proctor thereof, it appears that Wall was disbarred in a summary proceeding in the Circuit Court of the United States held by said district judge. This court, after finding that the disbarment was on account of unlawful acts of the attorney not in the discharge of his duties but in the presence of the court, held that such acts constituted a proper ground for disbarment, although said Wall had not been tried therefor or convicted thereof in any criminal proceeding.]

It is contended, indeed, that a summary proceeding against an attorney to exclude him from the practice of his profession on ac-

[1] The case here referred to is probably Cooper *v.* Roberts, 18 How. 173. See Minnesota Co. *v.* National Co., 3 Wall. 332. — [Ed.]

count of acts for which he may be indicted and tried by a jury is in violation of the Fifth Amendment of the Constitution, which forbids the depriving of any person of life, liberty, or property without due process of law. But the action of the court in cases within its jurisdiction is due process of law. It is a regular and lawful method of proceeding, practised from time immemorial. Conceding that an attorney's calling or profession is his property, within the true sense and meaning of the Constitution, it is certain that in many cases, at least, he may be excluded from the pursuit of it by the summary action of the court of which he is an attorney. The extent of the jurisdiction is a subject of fair judicial consideration. That it embraces many cases in which the offence is indictable is established by an overwhelming weight of authority. This being so, the question whether a particular class of cases of misconduct is within its scope, cannot involve any constitutional principle.

It is a mistaken idea that due process of law requires a plenary suit and a trial by jury, in all cases where property or personal rights are involved. The important right of personal liberty is generally determined by a single judge, on a writ of *habeas corpus*, using affidavits or depositions for proofs, where facts are to be established. Assessments for damages and benefits occasioned by public improvements are usually made by commissioners in a summary way. Conflicting claims of creditors, amounting to thousands of dollars, are often settled by the courts on affidavits or depositions alone. And the courts of chancery, bankruptcy, probate, and admiralty administer immense fields of jurisdiction without trial by jury. In all cases that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts. "Perhaps no definition," says Judge Cooley, "is more often quoted than that given by Mr. Webster in the Dartmouth College case: 'By the law of the land is most clearly intended the general law — a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society.'" Cooley's Const. Lim. 353.

The question, what constitutes due process of law within the meaning of the Constitution, was much considered by this court in Davidson *v.* New Orleans, 96 U. S. 97; and Mr. Justice Miller, speaking for the court, said: "It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." And, referring to Murray's Lessee *v.* Hoboken Land and Improvement Co., 18 How. 272, he said: "An exhaustive judicial inquiry into the meaning of the words 'due process of law,' as found in the Fifth Amendment, resulted in the unanimous deci-

sion of this court, that they do not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts."

We have seen that, in the present case, due notice was given to the petitioner, and a trial and hearing was had before the court, in the manner in which proceedings against attorneys, when the question is whether they should be struck off the roll, are always conducted.

We think that the court below did not exceed its powers in taking cognizance of the case in a summary way, and that no such irregularity occurred in the proceeding as to require this court to interpose by the writ of *mandamus*. The writ of *mandamus* is, therefore,

*Refused.*[1]

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## HURTADO *v.* PEOPLE OF CALIFORNIA.

110 United States, 516. 1884.

[UNDER the constitution and laws of California a prisoner may be tried on a criminal charge presented by information; indictment not being required in any case, although provision is made for summoning a grand jury at least once a year in each county. An examination before a committing magistrate is provided for, and the reduction of the testimony of the witnesses on such examination to writing in the form of depositions. Hurtado, having been put on trial in a court of that State for murder on an information without previous investigation by a grand jury, was convicted, and on appeal to the Supreme Court of the State the conviction was affirmed. Defendant brought the case to this court by writ of error.]

MR. JUSTICE MATTHEWS delivered the opinion of the court.

It is claimed on behalf of the prisoner that the conviction and sentence are void, on the ground that they are repugnant to that clause of the Fourteenth Article of Amendment of the Constitution of the United States which is in these words: "Nor shall any State deprive any person of life, liberty, or property without due process of law."

The proposition of law we are asked to affirm is that an indictment or presentment by a grand jury, as known to the common law of England, is essential to that "due process of law," when applied to prosecutions for felonies, which is secured and guaranteed by this provision of the Constitution of the United States, and which accordingly it is forbidden to the States respectively to dispense with in the administration of criminal law.

[1] MR. JUSTICE FIELD delivered a dissenting opinion.

The question is one of grave and serious import, affecting both private and public rights and interests of great magnitude, and involves a consideration of what additional restrictions upon the legislative policy of the States has been imposed by the Fourteenth Amendment to the Constitution of the United States.

[Cases in the State courts are cited holding that the provision as to due process of law in the Fourteenth Amendment does not require an indictment by a grand jury in a criminal case in the State courts.]

On the other hand, it is maintained on behalf of the plaintiff in error that the phrase "due process of law" is equivalent to "law of the land," as found in the 29th chapter of Magna Charta; that by immemorial usage it has acquired a fixed, definite, and technical meaning; that it refers to and includes, not only the general principles of public liberty and private right, which lie at the foundation of all free government, but the very institutions which, venerable by time and custom, have been tried by experience and found fit and necessary for the preservation of those principles, and which, having been the birthright and inheritance of every English subject, crossed the Atlantic with the colonists and were transplanted and established in the fundamental laws of the State; that, having been originally introduced into the Constitution of the United States as a limitation upon the powers of the government, brought into being by that instrument, it has now been added as an additional security to the individual against oppression by the States themselves; that one of these institutions is that of the grand jury, an indictment of presentment by which against the accused in cases of alleged felonies is an essential part of due process of law, in order that he may not be harassed or destroyed by prosecutions founded only upon private malice or popular fury.

This view is certainly supported by the authority of the great name of Chief Justice Shaw and of the court in which he presided, which, in Jones *v.* Robbins, 8 Gray, 329, decided that the 12th article of the Bill of Rights of Massachusetts, a transcript of Magna Charta in this respect, made an indictment or presentment of a grand jury essential to the validity of a conviction in cases of prosecutions for felonies. In delivering the opinion of the court in that case, Merrick, J., alone dissenting, the Chief Justice said: —

"The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense, and anxiety of a public trial before a probable cause is established by the presentment and indictment of a grand jury, in case of high offences, is justly regarded as one of of the securities to the innocent against hasty, malicious, and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty." . . . "It having been stated," he continued, "by Lord Coke, that by the 'law of the land' was intended a due course of proceeding according to the established rules and practice of the courts of com-

mon law, it may, perhaps, be suggested that this might include other modes of proceeding sanctioned by the common law, the most familiar of which are, by informations of various kinds, by the officers of the crown in the name of the King. But, in reply to this, it may be said that Lord Coke himself explains his own meaning by saying 'the law of the land,' as expressed in Magna Charta, was intended due process of law, that is, by indictment or presentment of good and lawful men. And further, it is stated, on the authority of Blackstone, that informations of every kind are confined by the constitutional law to misdemeanors only. 4 Bl. Com. 310."

Referring again to the passage from Lord Coke, he says, p. 343: "This may not be conclusive, but, being a construction adopted by a writer of high authority before the emigration of our ancestors, it has a tendency to show how it was then understood."

This passage from Coke seems to be the chief foundation of the opinion for which it is cited; but a critical examination and comparison of the text and context will show that it has been misunderstood; that it was not intended to assert that an indictment or presentment of a grand jury was essential to the idea of due process of law in the prosecution and punishment of crimes, but was only mentioned as an example and illustration of due process of law as it actually existed in cases in which it was customarily used. In beginning his commentary on this chapter of Magna Charta, 2 Inst. 46, Coke says: —

"This chapter containeth nine several branches: —

"1. That no man be taken or imprisoned but *per legem terræ*, that is, by the *common law, statute law, or custom of England;* for the words *per legem terræ*, being towards the end of this chapter, doe referre to all the precedent matters in the chapter, &c.

"2. No man shall be disseised, &c., unless it be by the lawful judgment, that is, verdict of his equals (that is, of men of his own condition), *or by the law of the land (that is, to speak it once for all), by the due course and process of law.*"

He then proceeds to state that, 3, no man shall be outlawed, unless according to the law of the land; 4, no man shall be exiled, unless according to the law of the land; 5, no man shall be in any sort destroyed, "unlesse it be by the verdict of his equals, or according to the law of the land;" 6, "no man shall be condemned at the King's suite, either before the King in his bench, where the pleas are *coram rege* (and so are the words *nec super eum ibimus* to be understood), nor before any other commissioner or judge whatsoever, and so are the words *nec super eum mittemus* to be understood, but by the judgment of his peers, that is, equals, or according to the law of the land."

Recurring to the first clause of the chapter, he continues: —

"1. No man shall be taken (that is) restrained of liberty by petition or suggestion to the King or to his councill, unless it be by

indictment or presentment of good and lawfull men, where such deeds be done. This branch and divers other parts of this act have been notably explained by divers acts of Parliament, &c., quoted in the margent."

The reference is to various acts during the reign of Edward III. And reaching again the words "*nisi per legem terræ*," he continues: —

"But by the law of the land. For the true sense and exposition of these words see the statute of 37 E. 3, cap. 8, where the words, 'by the law of the land,' are rendered, without due proces of the law, for there it is said, though it be contained in the Great Charter, that no man be taken, imprisoned, or put out of his freehold without proces of the law, that is, by indictment of good and lawfull men, where such deeds be done in due manner, or by writ originall of the common law. Without being brought in to answere but by due proces of the common law. No man be put to answer without presentment before justices, or thing of record, or by due proces, or by writ originall, according to the old law of the land. Wherein it is to be observed that this chapter is but declaratory of the old law of England."

It is quite apparent from these extracts that the interpretation usually put upon Lord Coke's statement is too large, because if an indictment or presentment by a grand jury is essential to due process of law in all cases of imprisonment for crime, it applies not only to felonies but to misdemeanors and petty offences, and the conclusion would be inevitable that informations as a substitute for indictments would be illegal in all cases. It was indeed so argued by Sir Francis Winninton in Prynn's Case, 5 Mod. 459, from this very language of Magna Charta, that all suits of the King must be by presentment or indictment, and he cited Lord Coke as authority to that effect. He attempted to show that informations had their origin in the act of 11 Hen. VII. c. 3, enacted in 1494, known as the infamous Empson and Dudley act, which was repealed by that of 1 Hen. VIII. c. 6, in 1509. But the argument was overruled, Lord Holt saying that to hold otherwise "would be a reflection on the whole bar." Sir Bartholomew Shower, who was prevented from arguing in support of the information, prints his intended argument in his report of the case under the name of The King *v.* Berchet, 1 Show. 106, in which, with great thoroughness, he arrays all the learning of the time on the subject. He undertakes to "evince that this method of prosecution is noways contrariant to any fundamental rule of law, but agreeable to it." He answers the objection that it is inconvenient and vexatious to the subject by saying (p. 117): —

"Here is no inconvenience to the people. Here is a trial *per pais*, fair notice, liberty of pleading *dilatories* as well as *bars*. Here is *subpœna* and *attachment*, as much time for defence, charge, &c., for the prosecutor makes up the record, &c.; then, in case of malicious

prosecution, the person who prosecutes is known by the note to the coroner, according to the practice of the court."

He answers the argument drawn from Magna Charta, and says "that this method of prosecution no way contradicts that law, for we say this is *per legem terræ et per communem legem terræ*, for otherwise there never had been so universal a practice of it in all ages."

And referring to Coke's comment, that "no man shall be taken," *i. e.*, restrained of liberty by petition or suggestion to the King or his Council unless it be by indictment or presentment, he says (p. 122): "By petition or suggestion can never be meant of the King's Bench, for he himself had preferred several here; that is meant only of the King alone, or in Council, or in the Star Chamber. In the King's Bench the information is not a suggestion to *the King*, but to the *court* upon record."

And he quotes 3 Inst. 136, where Coke modifies the statement by saying, "The King cannot put any to answer, but his court must be apprized of the crime by indictment, presentment, or *other matter of record*," which, Shower says, includes an information.

So it has been recently held that upon a coroner's inquisition taken concerning the death of a man, and a verdict of guilty of murder or manslaughter is returned, the offender may be prosecuted and tried without the intervention of a grand jury. Reg. *v.* Ingham, 5 B. & S. 257. And it was said by Buller, J., in Rex *v.* Joliffe, 4 T. R. 285–293, that if to an action for slander in charging the plaintiff with felony a justification is pleaded which is found by the jury, that of itself amounts to an indictment, as if it had been found by the grand jury, and is sufficient to put the party thus accused on his trial.

The language of Lord Coke applies only to forfeitures of life and liberty at the suit of the King, and hence appeals of murder, which were prosecutions by private persons, were never regarded as contrary to Magna Charta. On the contrary, the appeal of death was by Lord Holt "esteemed a noble remedy and a badge of the rights and liberties of an Englishman." Rex *v.* Toler, 1 Ld. Raym. 557; 12 Mod. 375; Holt, 483. We are told that in the early part of the last century, in England, persons who had been acquitted on indictments for murder were often tried, convicted, and executed on appeals. Kendall on Trial by Battel (3d ed.), 44–47. An appeal of murder was brought in England as lately as 1817, but defeated by the appellant's declining to accept the wager of battel. Ashford *v.* Thornton, 1 B. & Ald. 405. The English statutes concerning appeals of murder were in force in the provinces of Pennsylvania and Maryland. Report of Judges, 3 Binn. 599–604; Kitty, Maryl. Stat. 141, 143, 158. It is said that no such appeal was ever brought in Pennsylvania; but in Maryland, in 1765, a negro was convicted and executed upon such an appeal. Soper *v.* Tom,

1 Har. & McHen. 227. See note to Paxton's Case, Quincy's Mass. Rep. 53, by Mr. Justice Gray.

This view of the meaning of Lord Coke is the one taken by Merrick, J., in his dissenting opinion in Jones *v.* Robbins, 8 Gray, 329, who states his conclusions in these words: —

"It is the forensic trial, under a broad and general law, operating equally upon every member of our community, which the words, 'by the law of the land,' in Magna Charta, and in every subsequent declaration of rights which has borrowed its phraseology, make essential to the safety of the citizen, securing thereby both his liberty and his property, by preventing the unlawful arrest of his person or any unlawful interference with his estate." See also State *v.* Starling, 15 Rich. (S. C.) Law, 120.

Mr. Reeve, in 2 History of Eng. Law, 43, translates the phrase, *nisi per legale judicium parium suorum vel per legem terræ*, "But by the judgment of his peers, or by some other legal process or proceeding adapted by law to the nature of the case."

Chancellor Kent, 2 Com. 13, adopts this mode of construing the phrase. Quoting the language of Magna Charta, and referring to Lord Coke's comment upon it, he says: "The better and larger definition of *due process of law* is that it means law in its regular course of administration through courts of justice."

This accords with what is said in Westervelt *v.* Gregg, 12 N. Y. 202, by Denio, J., p. 212: "The provision was designed to protect the citizen against all mere acts of power, whether flowing from the legislative or executive branches of the government."

The principal and true meaning of the phrase has never been more tersely or accurately stated than by Mr. Justice Johnson, in Bank of Columbia *v.* Okely, 4 Wheat. 235–244: "As to the words from Magna Charta, incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

And the conclusion rightly deduced is, as stated by Mr. Cooley, Constitutional Limitations, 356: "The principles, then, upon which the process is based, are to determine whether it is 'due process' or not, and not any considerations of mere form. Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen."

It is urged upon us, however, in argument, that the claim made in behalf of the plaintiff in error is supported by the decision of this court in Murray's Lessee *v.* Hoboken Land & Improvement Company, 18 How. 272. There Mr. Justice Curtis, delivering the opinion of the court, after showing, p. 276, that due process of law

must mean something more than the actual existing law of the land, for otherwise it would be no restraint upon legislative power, proceeds as follows: —

"To what principle, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

This, it is argued, furnishes an indispensable test of what constitutes "due process of law;" that any proceeding otherwise authorized by law, which is not thus sanctioned by usage, or which supersedes and displaces one that is, cannot be regarded as due process of law.

But this inference is unwarranted. The real syllabus of the passage quoted is, that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law. The point in the case cited arose in reference to a summary proceeding, questioned on that account, as not due process of law. The answer was: however exceptional it may be, as tested by definitions and principles of ordinary procedure, nevertheless, this, in substance, has been immemorially the actual law of the land, and, therefore, is due process of law. But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.

This would be all the more singular and surprising, in this quick and active age, when we consider that, owing to the progressive development of legal ideas and institutions in England, the words of Magna Charta stood for very different things at the time of the separation of the American colonies from what they represented originally. For at first the words *nisi per legale judicium parium* had no reference to a jury; they applied only to the *pares regni*, who were the constitutional judges in the Court of Exchequer and *coram rege*. Bac. Abr. Juries, 7th ed., Lond., note Reeve, H. L. 41. And as to the grand jury itself, we learn of its constitution and functions from the Assize of Clarendon, A. D. 1164, and that of Northampton, A. D. 1176, Stubbs' Charters, 143–150. By the latter of these, which was a republication of the former, it was provided, that "if any one is accused before the justices of our Lord the King of murder, or theft,

or robbery, or of harboring persons committing those crimes, or of forgery or arson, by the oath of twelve knights of the hundred, or, if there are no knights, by the oath of twelve free and lawful men, and by the oath of four men from each township of the hundred, let him go to the ordeal of water, and, if he fails, let him lose one foot. And at Northampton it was added, for greater strictness of justice (*pro rigore justitiæ*), that he shall lose his right hand at the same time with his foot, and abjure the realm and exile himself from the realm within forty days. And if he is acquitted by the ordeal, let him find pledges and remain in the kingdom, unless he is accused of murder or other base felony by the body of the country and the lawful knights of the country; but if he is so accused as aforesaid, although he is acquitted by the ordeal of water, nevertheless he must leave the kingdom in forty days and take his chattels with him, subject to the rights of his lords, and he must abjure the kingdom at the mercy of our Lord the King."

"The system thus established," says Mr. Justice Stephen, 1 Hist. Crim. Law of England, 252, "is simple. The body of the country are the accusers. Their accusation is practically equivalent to a conviction, subject to the chance of a favorable termination of the ordeal by water. If the ordeal fails, the accused person loses his foot and his hand. If it succeeds, he is nevertheless to be banished. Accusation, therefore, was equivalent to banishment, at least."

When we add to this that the primitive grand jury heard no witnesses in support of the truth of the charges to be preferred, but presented upon their own knowledge, or indicted upon common fame and general suspicion, we shall be ready to acknowledge that it is better not to go too far back into antiquity for the best securities for our "ancient liberties." It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government.

This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law. Sir James Mackintosh ascribes this principle of development to Magna Charta itself. To use his own language: —

"It was a peculiar advantage that the consequences of its principles were, if we may so speak, only discovered slowly and gradually. It gave out on each occasion only so much of the spirit of liberty and reformation as the circumstances of succeeding generations required and as their character would safely bear. For almost five centuries it was appealed to as the decisive authority on behalf of the people, though commonly so far only as the necessities of each case demanded." 1 Hist. of England, 221.

The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice, — *suum cuique tribuere.* There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.

The concessions of Magna Charta were wrung from the King as guaranties against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land; for notwithstanding what was attributed to Lord Coke in Bonham's Case, 8 Rep. 115, 118 *a*, the omnipotence of Parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons.

In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.

It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and

restrict them by the ancient customary English law, they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.

Restraints that could be fastened upon executive authority with precision and detail, might prove obstructive and injurious when imposed on the just and necessary discretion of legislative power; and, while in every instance, laws that violated express and specific injunctions and prohibitions, might, without embarrassment, be judicially declared to be void, yet, any general principle or maxim, founded on the essential nature of law, as a just and reasonable expression of the public will and of government, as instituted by popular consent and for the general good, can only be applied to cases coming clearly within the scope of its spirit and purpose, and not to legislative provisions merely establishing forms and modes of attainment. Such regulations, to adopt a sentence of Burke's, "may alter the mode and application but have no power over the substance of original justice." Tract on the Popery Laws, 6 Burke's Works, ed. Little & Brown, 323.

Such is the often-repeated doctrine of this court. In Munn *v.* Illinois, 94 U. S. 113–134, the Chief Justice, delivering the opinion of the court, said: —

"A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will or even at the whim of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."

And in Walker *v.* Savinet, 92 U. S. 90, the court said: —

"A trial by jury in suits at common law pending in State courts is not, therefore, a privilege or immunity of national citizenship which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process according to the law of the land. This process in the States is regulated by the law of State."

In Kennard *v.* Louisiana *ex rel.* Morgan, 92 U. S. 480, the question was whether a mode of trying the title to an office, in which was no provision for a jury, was due process of law. Its validity was affirmed. The Chief Justice, after reciting the various steps in the proceeding, said: —

"From this it appears that ample provision has been made for the

trial of the contestation before a court of competent jurisdiction; for bringing the party against whom the proceeding is had before the court and notifying him of the case he is required to meet; for giving him an opportunity to be heard in his defence; for the deliberation and judgment of the court; for an appeal from this judgment to the highest court of the State, and for hearing and judgment there. A mere statement of the facts carries with it a complete answer to all the constitutional objections urged against the validity of the act."

And Mr. Justice Miller, in Davidson *v.* New Orleans, 96 U. S. 97–105, after showing the difficulty, if not the impossibility of framing a definition of this constitutional phrase, which should be "at once perspicuous, comprehensive, and satisfactory," and thence deducing the wisdom "in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require," says, however, that "It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has by the laws of the State a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." See also Missouri *v.* Lewis, 101 U. S. 22–31; *Ex parte* Wall, 107 U. S. 288–290.

We are to construe this phrase in the Fourteenth Amendment by the *usus loquendi* of the Constitution itself. The same words are contained in the Fifth Amendment. That article makes specific and express provision for perpetuating the institution of the grand jury, so far as relates to prosecutions for the more aggravated crimes under the laws of the United States. It declares that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be witness against himself." It then immediately adds: "Nor be deprived of life, liberty, or property, without due process of law."

According to a recognized canon of interpretation, especially application to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious inference is, that in the sense of the Constitution "due process of law" was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the States, it was used in the same sense and with no greater extent; and that if in the adoption of that amendment it had

been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the Fifth Amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure.

"The Fourteenth Amendment," as was said by Mr. Justice Bradley in Missouri *v.* Lewis, 101 U. S. 22–31, "does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding."

But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, "the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial," so "that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society," and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well

against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government.

. . . . . .

For these reasons, finding no error therein, the judgment of the Supreme Court of California is *Affirmed.*[1]

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## b. *Equal Protection of the Laws.*

### YICK WO *v.* HOPKINS.

118 United States, 356. 1886.

[PLAINTIFF in error petitioned the Supreme Court of California for a writ of *habeas corpus*, alleging that he was illegally deprived of his personal liberty by defendant as sheriff of the city and county of San Francisco by reason of imprisonment for non-payment of a fine for violation of a city ordinance prescribing the kind of buildings in which laundries might be conducted, and making it unlawful for any person to establish, maintain, or carry on a laundry within the corporate limits without having obtained first the consent of the board of supervisors, unless the same shall be located in a building constructed either of brick or stone. It appeared that petitioner was a native of China and remained a subject of that empire; that he had been engaged in the laundry business for many years prior to the enactment of the ordinance, and that his premises were unobjectionable with reference to danger from fire or danger to the health of the neighborhood. It also appeared that his application for license to continue his laundry had been refused by the board of supervisors, and that he and all other Chinese subjects who were conducting their business in wooden houses were denied such license, while white persons conducting laundries under similar conditions were left unmolested and free to enjoy the enhanced trade and profit arising from this hurtful and unfair discrimination. The Supreme Court refused the writ, and the case was brought to this court by writ of error. Another case involving the same questions was brought by writ of error from the United States Circuit Court for the District of California, and was considered at the same time.]

MR. JUSTICE MATTHEWS delivered the opinion of the court.

. . . . . .

We are consequently constrained, at the outset, to differ from the Supreme Court of California upon the real meaning of the ordinances in question. That court considered these ordinances as vest-

[1] MR. JUSTICE HARLAN delivered a dissenting opinion.

ing in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, with a view to the protection of the public against the dangers of fire. We are not able to concur in that interpretation of the power conferred upon the supervisors. There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of *mandamus*, to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint.

This erroneous view of the ordinances in question led the Supreme Court of California into the further error of holding that they were justified by the decisions of this court in the cases of Barbier *v.* Connolly, 113 U. S. 27, and Soon Hing *v.* Crowley, 113 U. S. 703. In both of these cases the ordinance involved was simply a prohibition to carry on the washing and ironing of clothes in public laundries and washhouses, within certain prescribed limits of the city and county of San Francisco, from ten o'clock at night until six o'clock in the morning of the following day. This provision was held to be purely a police regulation, within the competency of any municipality possessed of the ordinary powers belonging to such bodies — a necessary measure of precaution in a city composed largely of wooden buildings like San Francisco, in the application of which there was no invidious discrimination against any one within the prescribed limits, all persons engaged in the same business being treated alike, and subject to the same restrictions, and entitled to the same privileges, under similar conditions.

. . . . . .

The ordinance drawn in question in the present case is of a very different character. It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, it

divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this, that they are tenants at will under the supervisors, of their means of living. The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature.

The rights of the petitioners, as affected by the proceedings of which they complain, are not less, because they are aliens and subjects of the Emperor of China. By the third article of the treaty between this government and that of China, concluded November 17, 1880, 22 Stat. 827, it is stipulated: "If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the government of the United States will exert all its powers to devise measures for their protection, and to secure to them the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty."

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: "Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by section 1977 of the Revised Statutes that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of

the strangers and aliens who now invoke the jurisdiction of the court.

It is contended on the part of the petitioners that the ordinances for violations of which they are severally sentenced to imprisonment are void on their face, as being within the prohibitions of the Fourteenth Amendment; and, in the alternative, if not so, that they are void by reason of their administration, operating unequally, so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances — an unjust and illegal discrimination, it is claimed, which, though not made expressly by the ordinances, is made possible by them.

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth "may be a government of laws and not of men." For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

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In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordi-

nances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in Henderson *v.* Mayor of New York, 92 U. S. 259; Chy Lung *v.* Freeman, 92 U. S. 275; *Ex parte* Virginia, 100 U. S. 339; Neal *v.* Delaware, 103 U. S. 370; and Soon Hing *v.* Crowley, 113 U. S. 703.

The present cases, as shown by the facts disclosed in the record, are within this class. It appears that both petitioners have complied with every requisite, deemed by the law or by the public officers charged with its administration, necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is, therefore, illegal, and they must be discharged. To this end,

*The judgment of the Supreme Court of California in the case of Yick Wo, and that of the Circuit Court of the United States for the District of California in the case of Wo Lee, are severally reversed, and the cases remanded, each to the proper court, with directions to discharge the petitioners from custody and imprisonment.*[1]

[1] As to the validity of regulations of the laundry business, see Barbier *v.* Connolly, 113 U. S. 27, *infra*, p. 925.

In Soon Hing *v.* Crowley, 113 U. S. 703 (1885), the validity of certain lanndry

ordinances of San Francisco was also involved, and MR. JUSTICE FIELD, delivering the opinion of the court, used the following language: —

"There is no force in the objection that an unwarrantable discrimination is made against persons engaged in the laundry business, because persons in other kinds of business are not required to cease from their labors during the same hours at night. There may be no risks attending the business of others, certainly not as great as where fires are constantly required to carry them on. The specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws.

"But counsel in the court below not only objected to the fourth section of the ordinance as discriminating between those engaged in the laundry business, and those engaged in other business, but also as discriminating between different classes engaged in the laundry business itself. This latter ground of objection becomes intelligible only by reference to his brief, in which we are informed that the laundry business, besides the washing and ironing of clothes, involves the fluting, polishing, blueing, and wringing of them; and that these are all different branches, requiring separate and skilled workmen, who are not prohibited from working during the hours of night. This fluting, polishing, blueing, and wringing of clothes, it seems to us, are incidents of the general business, and are embraced within its prohibition. But if not incidents, and they are outside of the prohibition, it is because there is not the danger from them that would arise from the continuous fires required in washing; and it is not discriminating legislation in any invidious sense that branches of the same business from which danger is apprehended are prohibited during certain hours of the night, whilst other branches involving no such danger are permitted."

In GULF, COLORADO, & SANTA FE RAILWAY COMPANY *v.* ELLIS, 165 U. S. 150 (1897), the constitutionality of a statute of Texas authorizing the recovery of attorneys' fees in addition to damages in actions against railway companies for the killing of stock was questioned, on the ground that it operated to deprive the railway companies of property without due process of law, and denied to them the equal protection of the law in that it singled them out of all citizens and corporations, and required them to pay in certain cases attorneys' fees to the parties successfully suing them, while it gave to them no like or corresponding benefit. The constitutionality of the statute being sustained in the State courts, the case was brought to this court on writ of error. MR. JUSTICE BREWER, delivering the opinion of the court (MR. JUSTICE GRAY, MR. CHIEF JUSTICE FULLER, and MR. JUSTICE WHITE dissenting), held that the provision was not a legitimate police regulation for the purpose of inducing the railway companies to fence their tracks, and thus prevent injuries to stock, for there was no requirement in the State that tracks of railways should be fenced. Continuing, he used this language: —

"But a mere statute to compel the payment of indebtedness does not come within the scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors, and while in certain cases there may be a peculiar obligation which may be enforced by penalties, yet nothing of that kind springs from the mere work of railroad transportation. Statutes have been sustained giving special protection to the claims of laborers and mechanics, but no such idea underlies this legislation. It does not aim to protect the laborer or the mechanic alone, for its benefits are conferred upon every individual in the State, rich or poor, high or low, who has a claim of the character described. It is not a statute for the protection of particular classes of individuals supposed to need protection, but for the punishment of certain corporations on account of their delinquency.

"Neither can it be sustained as a proper means of enforcing the payment of small debts and preventing any unnecessary litigation in respect to them, because it does

not impose the penalty in all cases where the amount in controversy is within the limit named in the statute. Indeed, the statute arbitrarily singles out one class of debtors and punishes it for a failure to perform certain duties — duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the State. Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained.

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this."

The decision of the Supreme Court of Texas is therefore reversed.

In HAYES *v.* MISSOURI, 120 U. S. 68 (1887), the validity of a State statute was called in question, which provided that in capital cases in cities having a population of over one hundred thousand inhabitants, the State shall be allowed fifteen peremptory challenges to jurors, while elsewhere in the same State the prosecution is allowed in such cases only eight peremptory challenges, the claim being that by virtue of such statute, the accused, who was being prosecuted for murder in a city of over one hundred thousand inhabitants, was denied the equal protection of the laws. MR. JUSTICE FIELD, delivering the opinion of the court, used this language: —

"The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. As we said in Barbier *v.* Connolly, speaking of the Fourteenth Amendment: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.' 113 U. S. 27, 32.

"In Missouri *v.* Lewis, 101 U. S. 22, it was held, that the last clause of the amendment as to the equal protection of the laws, was not violated by any diversity in the jurisdiction of the several courts which the State might establish, as to subject-matter, amount, or finality of their decisions, if all persons within the territorial limits of their respective jurisdictions have an equal right in like cases, and under like circumstances, to resort to them for redress; that the State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government; and that, as respects the administration of justice, it may establish one system of courts for cities and another for rural districts. And we may add, that the systems of procedure in them may be different without violating any provision of the Fourteenth Amendment.

"Allowing the State fifteen peremptory challenges in capital cases, tried in cities containing a population of over one hundred thousand inhabitants, is simply providing against the difficulty of securing, in such cases, an impartial jury in cities of that size which does not exist in other portions of the State. So far from defeating, it may furnish the necessary means of giving that equal protection of its laws to all persons, which that amendment declares shall not be denied to any one within its jurisdiction.

"We see nothing in the legislation of Missouri which is repugnant to that amendment."

In PEMBINA MINING COMPANY *v.* PENNSYLVANIA, 125 U. S. 181 (1888), a State statute imposing a licensee fee on corporations organized under the laws of another State, which should have an office within the limits of the State, was held not to be invalid as denying to such foreign corporations the equal protection of the laws. MR. JUSTICE FIELD, delivering the opinion of the court, used this language: —

"The application of the Fourteenth Amendment of the Constitution to the statute imposing the license tax in question is not more apparent than the application of the clause of the Constitution to the rights of citizens of one State to the privileges and

immunities of citizens in other States. The inhibition of the amendment that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Under the designation of 'person' there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution. As said by Chief Justice Marshall, 'The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men.' Providence Bank *v.* Billings, 4 Pet. 514, 562. The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the State. The plaintiff in error is not a corporation within the jurisdiction of Pennsylvania. The office it hires is within such jurisdiction, and on condition that it pays the required license tax, it can claim the same protection in the use of the office that any other corporation having a similar office may claim. It would then have the equal protection of the law so far as it had anything within the jurisdiction of the State, and the constitutional amendment requires nothing more. The State is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, provided always such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce. It is not every corporation, lawful in the State of its creation, that other States may be willing to admit within their jurisdiction or consent that it have offices in them; such, for example, as a corporation for lotteries. And even where the business of a foreign corporation is not unlawful in other States the latter may wish to limit the number of such corporations, or to subject their business to such control as would be in accordance with the policy governing domestic corporations of a similar character. The States may, therefore, require for the admission within their limits of the corporations of other States, or of any number of them, such conditions as they may choose, without acting in conflict with the concluding provision of the first section of the Fourteenth Amendment. As to the meaning and extent of that section of the amendment, see Barbier *v.* Connolly, 113 U. S. 27; Soon Hing *v.* Crowley, 113 U. S. 703; Missouri *v.* Lewis, 101 U. S. 22, 30; Missouri Pacific Railway Co. *v.* Humes, 115 U. S. 512; Yick Wo *v.* Hopkins, 118 U. S. 356; Hayes *v.* Missouri, 120 U. S. 68.

"The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the Federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the Federal government, is not to be restricted by State authority."

In Home Insurance Company *v.* New York, 134 U. S. 194 (1890), it was held that a State tax upon the corporate franchise or business, alike of domestic corporations and foreign corporations doing business in the State, was not invalid as denying to such corporations the equal protection of the laws because applicable only to corporations. Mr. Justice Field, in delivering the opinion of the court (Mr. Justice Miller and Mr. Justice Harlan dissenting), used this language: —

"Nor is the objection tenable that the statute, in imposing such tax, conflicts with the last clause of the first section of the Fourteenth Amendment of the Constitution of the United States, declaring that no State shall deprive any person within its jurisdiction of the equal protection of the laws. It is conceded that corporations are 'persons' within the meaning of this amendment. It has been so decided by this court. Pembina Cons. Silver, &c. Co. *v.* Pennsylvania, 125 U. S. 181. But the amendment does not prevent the classification of property for taxation — subjecting one kind of property to one rate of taxation, and another kind of property to a different rate — distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property. Nor does the amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be obtained by it. And when such legis-

## c. *The Police Power.*

### BARBIER v. CONNOLLY.

113 United States, 27. 1885.

On the 8th of April, 1884, the board of supervisors of the city and county of San Francisco, the legislative authority of that municipality, passed an ordinance reciting that the indiscriminate establishment of public laundries and wash-houses, where clothes and other articles were cleansed for hire, endangered the public health and the public safety, prejudiced the well-being and comfort of the community, and depreciated the value of property in their neighborhood; and then ordaining, pursuant to authority alleged to be vested in the board under provisions of the State constitution, and of the act of April 19, 1856, consolidating the government of the city and county, that after its passage it should be unlawful for any person to establish, maintain, or carry on the business of a public laundry or of a public wash-house within certain designated limits of the city and county, without first having obtained a certificate, signed by the health officer of the municipality, that the premises were properly and sufficiently drained, and that all proper arrangements were made to carry on the business without injury to the sanitary condition of the neighborhood; also a certificate signed by the board of fire wardens of the municipality, that the stoves, washing and drying apparatus, and the appliances for heating smoothing-irons, were in good condition, and that their use was not dangerous to the surrounding property from fire, and that all proper precautions were taken to comply with the provisions of the ordinance defining the fire limits of the city and county, and making regulations concerning the erection and use of buildings therein.

The ordinance requires the health officer and board of fire wardens, upon application of any one to open or conduct the business of a public laundry, to inspect the premises in which it was proposed to carry on the business, in order to ascertain whether they are provided with proper drainage and sanitary appliances, and whether the provisions of the fire ordinance have been complied with; and, if found satisfactory in all respects, to issue to the

lation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the statute of New York, all corporations, joint-stock companies, and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another of the same class. See Barbier *v.* Connolly, 113 U. S. 29, 32; Soon Hing *v.* Crowley, 113 U. S. 703, 709; Missouri Pacific Railway *v.* Humes, 115 U. S. 512, 523; Missouri Pacific Railway *v.* Mackey, 127 U. S. 205, 209; Minneapolis Railway Co. *v.* Beckwith, 129 U. S. 26, 32."

applicant the required certificates without charge for the services rendered. Its fourth section declares that no person owning or employed in a public laundry or a public wash-house within the prescribed limits shall wash or iron clothes between the hours of ten in the evening and six in the morning or upon any portion of Sunday; and its fifth section, that no person engaged in the laundry business within those limits shall permit any one suffering from an infectious or contagious disease to lodge, sleep, or remain upon the premises. The violation of any of these several provisions is declared to be a misdemeanor, and penalties are prescribed differing in degree according to the nature of the offence. The establishing, maintaining, or carrying on the business, without obtaining the certificates, is punishable by fine of not more than $1,000, or by imprisonment of not more than six months, or by both. Carrying on the business outside of the hours prescribed, or permitting persons with contagious diseases on the premises, is punishable by fine of not less than $5 or more than $50, or by imprisonment of not more than one month, or by both such fine and imprisonment.

The petitioner in the court below, the plaintiff in error here, was convicted in the Police Judge's Court of the City and County of San Francisco, under the fourth section of the ordinance, of washing and ironing clothes in a public laundry, within the prescribed limits, between the hours of ten o'clock in the evening of May 1, 1884, and six o'clock in the morning of the following day, and was sentenced to imprisonment in the county jail for five days, and was accordingly committed, in execution of the sentence, to the custody of the sheriff of the city and county, who was keeper of the county jail. That court had jurisdiction to try him for the alleged offence, if the ordinance was valid and binding. But, alleging that his arrest and imprisonment were illegal, he obtained from the Superior Court of the city and county a writ of *habeas corpus*, in obedience to which his body was brought before the court by the sheriff, who returned that he was held under the commitment of the police judge upon a conviction of a misdemeanor, the commitment and sentence being produced.

The petitioner thereupon moved for his discharge on the ground that the fourth section of the ordinance violates the Fourteenth Amendment to the Constitution of the United States, and certain sections of the constitution of the State. The particulars stated in which such alleged violations consist were substantially these, — omitting the repetition of the same position, — that the section discriminates between the class of laborers engaged in the laundry business and those engaged in other kinds of business; that it discriminates between laborers beyond the designated limits and those within them; that it deprives the petitioner of the right to labor, and, as a necessary consequence, of the right to acquire property; that it is not within the power of the board of supervisors of the

city and county of San Francisco; and that it is unreasonable in its requirements. The Superior Court overruled the positions and dismissed the writ, and the petitioner brought this writ of error.

Mr. Justice Field delivered the opinion of the court. After reciting the facts as above stated, he continued: —

In this case we can only consider whether the fourth section of the ordinance of the city and county of San Francisco is in conflict with the Constitution or laws of the United States. We cannot pass upon the conformity of that section with the requirements of the constitution of the State. Our jurisdiction is confined to a consideration of the Federal question involved, which arises upon an alleged conflict of the fourth section in question with the first section of the Fourteenth Amendment of the Constitution of the United States. No other part of the amendment has any possible application.

That fourth section, so far as it is involved in the case before the police judge, was simply a prohibition to carry on the washing and ironing of clothes in public laundries and wash-houses, within certain prescribed limits of the city and county, from ten o'clock at night until six o'clock on the morning of the following day. The prohibition against labor on Sunday is not involved. The provision is purely a police regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies. And it would be an extraordinary usurpation of the authority of a municipality, if a Federal tribunal should undertake to supervise such regulations. It may be a necessary measure of precaution in a city composed largely of wooden buildings like San Francisco, that occupations in which fires are constantly required should cease after certain hours at night until the following morning; and of the necessity of such regulations the municipal bodies are the exclusive judges; at least any correction of their action in such matters can come only from State legislation or State tribunals. The same municipal authority which directs the cessation of labor must necessarily prescribe the limits within which it shall be enforced, as it does the limits in a city within which wooden buildings cannot be constructed. There is no invidious discrimination against any one within the prescribed limits by such regulations. There is none in the regulation under consideration. The specification of the limits within which the business cannot be carried on without the certificates of the health officer and board of fire wardens is merely a designation of the portion of the city in which the precautionary measures against fire and to secure proper drainage must be taken for the public health and safety. It is not legislation discriminating against any one. All persons engaged in the same business within it are treated alike; are subject to the same restrictions and are entitled to the same privileges under similar conditions.

The Fourteenth Amendment, in declaring that no State "shall

deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences. But neither the amendment — broad and comprehensive as it is — nor any other amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits, — for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others. is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.

In the execution of admitted powers unnecessary proceedings are often required which are cumbersome, dilatory, and expensive, yet, if no discrimination against any one be made and no substantial right be impaired by them, they are not obnoxious to any constitutional objection. The inconveniences arising in the administration of the laws from this cause are matters entirely for the consideration of

the State; they can be remedied only by the State. In the case before us the provisions requiring certificates from the health officer and the board of fire wardens may, in some instances, be unnecessary, and the changes to be made to meet the conditions prescribed may be burdensome; but, as we have said, this is a matter for the determination of the municipality in the execution of its police powers, and not a violation of any substantial right of the individual. *Judgment affirmed.*

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## HOLDEN *v.* HARDY.

169 United States, 366. 1898.

[PLAINTIFF in error applied to the Supreme Court of the State of Utah to be discharged by *habeas corpus* from the custody of defendant as sheriff under conviction for violating a State statute, making it a misdemeanor for any employer to employ working men in underground mines or in smelters, or other institutions for the reduction or refining of ores or metals, for more than eight hours per day except in cases of emergency where life or property is in imminent danger. The validity of the statute was challenged upon the ground of alleged violation of the Fourteenth Amendment to the Constitution of the United States, in that it abridges the privileges or immunities of citizens of the United States, deprives both the employer and the laborer of property without due process of law, and denies to them the equal protection of the laws. The application of the petitioner was denied and he was remanded to the custody of the sheriff, whereupon he sued out this writ of error assigning the unconstitutionality of the law. The opinion discusses the general interpretation of the Fourteenth Amendment in the light of the cases of Barbier *v.* Connolly, Soon Hing *v.* Crowley, Yick Wo *v.* Hopkins, *Ex parte* Wall, Hurtado *v.* California, Hayes *v.* Missouri, which have already been given, and other cases of the same character, and then continues.]

MR. JUSTICE BROWN delivered the opinion of the court.

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The latest utterance of this court upon this subject is contained in the case of Allgeyer *v.* Louisiana, 165 U. S. 578, 591, in which it was held that an act of Louisiana which prohibited individuals within the State from making contracts of insurance with corporations doing business in New York, was a violation of the Fourteenth Amendment. In delivering the opinion of the court, Mr. Justice Peckham remarked: "In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, must be embraced the right to make all proper contracts in relation thereto, and, although it may be conceded that this right to contract in relation to persons

or property, or to do business within the jurisdiction of the State, may be regulated and sometimes prohibited, when the contracts or business conflict with the policy of the State as contained in its statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the State, and which are also to be performed outside of such jurisdiction."

This right of contract, however, is itself subject to certain limitations which the State may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employees as to demand special precautions for their well-being and protection, or the safety of adjacent property. While this court has held, notably in the cases Davidson *v.* New Orleans, 96 U. S. 97, and Yick Wo *v.* Hopkins, 118 U. S. 356, that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances, and a large discretion "is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests." Lawton *v.* Steele, 152 U. S. 133, 136.

The extent and limitations upon this power are admirably stated by Chief Justice Shaw in the following extract from his opinion in Commonwealth *v.* Alger, 7 Cush. 53, 84: —

"We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that its use may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this Commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient."

This power legitimately exercised, can neither be limited by contract nor bartered away by legislation.

While this power is necessarily inherent in every form of government, it was, prior to the adoption of the Constitution, but sparingly

used in this country. As we were then almost purely an agricultural people, the occasion for any special protection of a particular class did not exist. Certain profitable employments, such as lotteries and the sale of intoxicating liquors, which were then considered to be legitimate, have since fallen under the ban of public opinion, and are now either altogether prohibited, or made subject to stringent police regulations. The power to do this has been repeatedly affirmed by this court. Stone *v.* Mississippi, 101 U. S. 814; Douglas *v.* Kentucky, 168 U. S. 488; Giozza *v.* Tiernan, 148 U. S. 657; Kidd *v.* Pearson, 128 U. S. 1; Crowley *v.* Christensen, 137 U. S. 86.

[Various State statutes relating to the regulation of the business of mining, and decisions thereunder, are referred to.]

But if it be within the power of a legislature to adopt such means for the protection of the lives of its citizens, it is difficult to see why precautions may not also be adopted for the protection of their health and morals. It is as much for the interest of the State that the public health should be preserved as that life should be made secure. With this end in view quarantine laws have been enacted in most if not all of the States; insane asylums, public hospitals, and institutions for the care and education of the blind established, and special measures taken for the exclusion of infected cattle, rags, and decayed fruit. In other States laws have been enacted limiting the hours during which women and children shall be employed in factories; and while their constitutionality, at least as applied to women, has been doubted in some of the States, they have been generally upheld. Thus, in the case of Commonwealth *v.* Hamilton Manufacturing Co., 120 Mass. 383, it was held that a statute prohibiting the employment of all persons under the age of eighteen, and of all women laboring in any manufacturing establishment more than sixty hours per week, violates no contract of the Commonwealth implied in the granting of a charter to a manufacturing company nor any right reserved under the Constitution to any individual citizen, and may be maintained as a health or police regulation.

Upon the principles above stated, we think the act in question may be sustained as a valid exercise of the police power of the State. The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction, or refining of ores or metals. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employees, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts.

While the general experience of mankind may justify us in believing that men may engage in ordinary employments more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of

fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases, generated by the processes of refining or smelting.

. . . . . .

We are of opinion that the act in question was a valid exercise of the police power of the State, and the judgments of the Supreme Court of Utah are, therefore, *Affirmed.*[1]

[1] MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissented.

In PEOPLE *v.* HAVNOR, 149 N. Y. 195 (1896), the validity of a statute regulating barbering on Sunday, and providing that any person who engages in that business on that day shall be guilty of a misdemeanor, with the exception that in the city of New York and the village of Saratoga Springs barber shops may be kept open, and the work of a barber may be performed therein, until one o'clock of the afternoon of Sunday, was questioned on the ground that it was in violation of the provisions of the State constitution of New York, that "No person shall be deprived of life, liberty, or property without due process of law," and also the provisions of the Fourteenth Amendment of the Constitution of the United States, and the court held the statute to be constitutional. VANN, J., delivering the opinion of the court (GRAY, BARTLETT, and HAIGHT, JJ., dissenting), used this language: —

"It is to the interest of the State to have strong, robust, healthy citizens, capable of self-support, of bearing arms, and of adding to the resources of the country. Laws to effect this purpose, by protecting the citizen from overwork and requiring a general day of rest to restore his strength and preserve his health, have an obvious connection with the public welfare. Independent of any question relating to morals or religion, the physical welfare of the citizen is a subject of such primary importance to the State, and has such a direct relation to the general good, as to make laws tending to promote that object proper under the police power, and hence valid under the Constitution, which 'presupposes its existence, and is to be construed with reference to that fact.' Village of Carthage *v.* Frederick, 122 N. Y. 268, 273.

"The statute under discussion tends to effect this result, because it requires persons engaged in a kind of business that takes many hours each day, to refrain from carrying it on during one day in seven. This affords an opportunity, recurring at regular intervals, for rest, needed both by the employer and the employed, and the latter, at least, may not have the power to observe a day of rest without the aid of legislation. As Mr. Tiedeman says in his work on Police Powers: 'If the law did not interfere, the feverish, intense desire to acquire wealth, . . . inciting a relentless rivalry and competition, would ultimately prevent not only the wage-earners, but likewise the capitalists and employers themselves, from yielding to the warnings of Nature and obeying the instinct of self-preservation by resting periodically from labor.' Tiedeman's Lim. Police Powers, 181. As barbers generally work more hours each day than most men, the legislature may well have concluded that legislation was necessary for the protection of their health.

"We think that this statute was intended and is adapted to promote the public health, and thereby to serve a public purpose of the utmost importance by promoting the observance of Sunday as a day of rest. It follows, therefore, that it does not go beyond the limits of legislative power by depriving any one of liberty or property within the meaning of the Constitution.

"The learned counsel for the defendant, however, criticises the act in question as class legislation, and claims that it is invalid under the Fourteenth Amendment to the Constitution of the United States, because it denies to barbers who do not reside in New York or Saratoga the equal protection of the laws. That amendment does not relate to territorial arrangements made for different portions of a State, nor to legislation which, in carrying out a public purpose, is limited in its operation, but within the sphere of its operation affects alike all persons similarly situated. Missouri *v.* Lewis, 101 U. S. 22, 30; Barbier *v.* Connolly, 113 U. S. 27, 31. It was not

designed to interfere with the exercise of the police power by the State for the protection of health, or the preservation of morals. Powell v. Pennsylvania, 127 U. S. 678, 683. The statute treats all barbers alike within the same localities, for none can work on Sunday outside of New York and Saratoga, but all may work in those places until a certain hour. All are, therefore, treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. Hayes v. Missouri, 120 U. S. 68. As was said by the learned Appellate Division in deciding this case: 'If the legislature has power to regulate the observance and prevent the desecration of the Sabbath, it has the power to say what acts in the different localities of the State it is necessary to prohibit to accomplish this purpose. It is quite conceivable that an act in one locality, thickly settled, should be prohibited, which in sparsely settled districts of the State could be allowed, and for this reason an act might be objectionable in one district, but not in another. All of these regulations have in view the proper observance of the day, and are within the discretion of the legislature.'

"We think that the statute violates no provision of either the Federal or State constitution, and that the judgment appealed from should, therefore, be affirmed."

In Ex parte Jentzsch, 112 Cal. 468 (1896), a statute containing special regulations as to the business of barbering, was held unconstitutional under the State constitution of California, which contains provisions against granting special privileges and immunities, and passing local or special laws. Henshaw, J., delivering the opinion of the court, used this language: —

"A man's constitutional liberty means more than his personal freedom. It means, with many other rights, his right freely to labor, and to own the fruits of his toil. It is a curious law for the protection of labor which punishes the laborer for working. Yet that is precisely what this law does. The laboring barber, engaged in a most respectable, useful, and cleanly pursuit, is singled out from the thousands of his fellows in other employments, and told that, willy nilly, he shall not work upon holidays and Sundays after twelve o'clock, noon. His wishes, tastes, or necessities are not consulted. If he labors, he is a criminal. Such protection to labor carried a little further would send him from the jail to the poorhouse.

"How comes it that the legislative eye was so keen to discern the needs of the oppressed barber, and yet was blind to his toiling brethren in other vocations? Steam-car and street-car operatives labor through long and weary Sunday hours; so do mill and factory hands. There is no Sunday period of rest and no protection for the overworked employees of our daily papers. Do these not need rest and protection? The bare suggestion of these considerations shows the injustice and inequality of this law.

"In brief, whether or not a general law to promote rest from labor in all business vocations may be upheld as within the due exercise of the police power, as imposing for its welfare a needed period of repose upon the whole community, a law such as this certainly cannot. A law is not always general because it operates upon all within a class. There must be back of that a substantial reason why it is made to operate only upon a class, and not generally upon all."

In Ritchie v. State, 155 Ill. 98 (1895), a State statute was considered which regulated the manufacture of clothing, and made it a crime to employ a female in any factory or workshop in that business more than eight hours in any one day, or forty-eight hours in any one week. It was contended that the statute was a violation of the provisions in the State constitution and in the Fourteenth Amendment to the Federal Constitution, that no person shall be deprived of life, liberty, or property without due process of law, in that it infringed the right to contract. Mr. Justice Magruder, delivering the opinion of the court, used this language: —

"A number of cases have arisen within recent years in which the courts have had occasion to consider this provision, or one similar to it, and its meaning has been quite clearly defined. The privilege of contracting is both a liberty and property right. Frorer v. The People, 141 Ill. 171. Liberty includes the right to acquire property, and that means and includes the right to make and enforce contracts. The State v. Loomis, 115 Mo. 307. The right to use, buy, and sell property, and contract in respect thereto, is protected by the Constitution. Labor is property, and the laborer has the same right to sell his labor, and to contract with reference thereto, as has any

## DENT *v.* WEST VIRGINIA.

129 United States, 114. 1889.

[PLAINTIFF in error was convicted in a West Virginia court for violation of a statute requiring every practitioner of medicine in the State to obtain a certificate from the State board of health that he is a graduate of a reputable medical college in the school of medicine to which he belongs, or that he has practised medicine in the

other property owner. In this country the legislature has no power to prevent persons who are *sui juris* from making their own contracts, nor can it interfere with the freedom of contract between the workman and the employer. The right to labor or employ labor, and make contracts in respect thereto, upon such terms as may be agreed between the parties, is included in the constitutional guaranty above quoted. State *v.* Goodwill, 33 W. Va. 179; Godcharles *v.* Wigeman, 113 Pa. St. 431; Braceville Coal Co. *v.* The People, 147 Ill. 66. The protection of property is one of the objects for which free governments are instituted among men. Const. of Ill. art. 2, sec. 1. The right to acquire, possess, and protect property includes the right to make reasonable contracts. Commonwealth *v.* Perry, 155 Mass. 117. And when an owner is deprived of one of the attributes of property, like the right to make contracts, he is deprived of his property within the meaning of the Constitution. Matter of Application of Jacobs, 98 N. Y. 98. The fundamental rights of Englishmen, brought to this country by its original settlers, and wrested from time to time in the progress of history from the sovereigns of the English nation, have been reduced by Blackstone to three principal or primary articles: 'the right of personal security, the right of personal liberty, and the right of private property.' 1 Black. Com., marg. page 129. The right to contract is the only way by which a person can rightfully acquire property by his own labor. 'Of all the rights of persons, it is the most essential to human happiness.' Leep *v.* St. L., I. M. & S. Ry. Co., 58 Ark. 407.

"This right to contract, which is thus included in the fundamental rights of liberty and property, cannot be taken away 'without due process of law.' The words, 'due process of law,' have been held to be synonymous with the words, 'law of the land.' The State *v.* Loomis, *supra;* Frorer *v.* The People, *supra.* Blackstone says: 'The third absolute right, inherent in every Englishman, is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land.' 1 Black. Com., p. 138; *Ex parte* Jacobs, 98 N. Y. 98. The 'law of the land' is 'general public law binding upon all the members of the community, under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals.' Millett *v.* The People, 117 Ill. 294. The 'law of the land' is the opposite of 'arbitrary, unequal, and partial legislation.' The State *v.* Loomis, *supra.* The legislature has no right to deprive one class of persons of privileges allowed to other persons under like conditions. The man who is forbidden to acquire and enjoy property in the same manner in which the rest of the community is permitted to acquire and enjoy it, is deprived of liberty in particulars of primary importance to his pursuit of happiness. If one man is denied the right to contract as he has hitherto done under the law, and as others are still allowed to do by the law, he is deprived of both liberty and property to the extent to which he is thus deprived of such right. In line with these principles, it has been held that it is not competent, under the Constitution, for the legislature to single out owners and employers of a particular class, and provide that they shall bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which other owners or employers are permitted to make. Millett *v.* The People, *supra;* Frorer *v.* The People, *supra;* Ramsey *v.* The People, 142 Ill. 380."

State continuously for a period of ten years prior to the 8th day of March, 1881, or that he has been found upon examination by the board to be qualified to practise medicine in all its departments. It appeared that defendant had been practising medicine prior to the passage of the statute, but not for the period of ten years, which under the statute would have entitled him to a license to practise, and he claimed that the statute was as to him unconstitutional and void as interfering with his vested right to practise medicine. On appeal to the Supreme Court of Appeals of the State the judgment was affirmed, and the case is brought here by writ of error.]

MR. JUSTICE FIELD, after stating the facts, delivered the opinion of the court.

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It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the "estate" acquired in them,— that is, the right to continue their prosecution, — is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the State for the protection of society. The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.

Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetable and mineral sustances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications. Due consideration, therefore, for the protection of society may well induce the State to exclude from practice those who have not such a license, or who are found upon examination not to be fully qualified. The same reasons which control in imposing conditions, upon compliance with which the physician is allowed to practise in the first instance, may call for further conditions as new modes of treating disease are discovered, or a more thorough acquaintance is obtained of the remedial properties of vegetable and mineral substances, or a more accurate knowledge is acquired of the human system and of the agencies by which it is affected. It would not be deemed a matter for serious discussion that a knowledge of the new acquisitions of the profession, as it from time to time advances in its attainments for the relief of the sick and suffering, should be required for continuance in its practice, but for the earnestness with which the plaintiff in error insists that, by being compelled to obtain the certificate required, and prevented from continuing in his practice without it, he is deprived of his right and estate in his profession without due process of law. We perceive nothing in the statute which indicates an intention of the legislature to deprive one of any of his rights. No one has a right to practise medicine without having the necessary qualifications of learning and skill; and the statute only requires that whoever assumes, by offering to the community his services as a physician, that he possesses such learning and skill, shall present evidence of it by a certificate or license from a body designated by the State as competent to judge of his qualifications.

As we have said on more than one occasion, it may be difficult, if not impossible, to give to the terms "due process of law" a definition which will embrace every permissible exertion of power affecting private rights and exclude such as are forbidden. They com· to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the subject against the arbitrary action of the crown and place him under the protection of the law. They were deemed

to be equivalent to "the law of the land." In this country, the requirement is intended to have a similar effect against legislative power, that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property. Legislation must necessarily vary with the different objects upon which it is designed to operate. It is sufficient, for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters: that is by process or proceedings adapted to the nature of the case. The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen. As said by this court in Yick Wo *v.* Hopkins, speaking by Mr. Justice Matthews: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." 118 U. S. 356, 369. See, also, Pennoyer *v.* Neff, 95 U. S. 714, 733; Davidson *v.* New Orleans, 96 U. S. 97, 104, 107; Hurtado *v.* California, 110 U. S. 516; Missouri Pacific Railway Co. *v.* Humes, 115 U. S. 512, 519.

There is nothing of an arbitrary character in the provisions of the statute in question; it applies to all physicians, except those who may be called for a special case from another State; it imposes no conditions which cannot be readily met; and it is made enforceable in the mode usual in kindred matters, that is, by regular proceedings adapted to the case. It authorizes an examination of the applicant by the board of health as to his qualifications when he has no evidence of them in the diploma of a reputable medical college in the school of medicine to which he belongs, or has not practised in the State a designated period before March, 1881. If, in the proceedings under the statute, there should be any unfair or unjust action on the part of the board in refusing him a certificate, we doubt not that a remedy would be found in the courts of the State. But no such imputation can be made, for the plaintiff in error did not submit himself to the examination of the board after it had decided that the diploma he presented was insufficient.

[The court discusses at length the case of *Ex parte* Garland, *supra*, p. 576, for the purpose of distinguishing this case. The judgment is affirmed.]

## MUGLER *v.* KANSAS.

123 United States, 623. 1887.

[PLAINTIFF in error was prosecuted under a statute of Kansas passed in 1881 to carry into effect the section of the constitution of the State adopted in 1880 prohibiting the manufacture and sale of intoxicating liquors except for medicinal, scientific, and mechanical purposes. By the statute the manufacture or sale, except for the specified purposes, was made a misdemeanor, and it was further provided that no one should sell for either of the excepted purposes without having procured a druggist's permit therefor, the conditions upon which such permit might be granted being prescribed. Mugler was charged with manufacturing and also selling without such permit, and being convicted, he appealed to the Supreme Court of Kansas, where the conviction was affirmed, and thereupon sued out this writ of error.]

MR. JUSTICE HARLAN delivered the opinion of the court.

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The facts necessary to a clear understanding of the questions, common to these cases, are the following: Mugler and Ziebold & Hagelin were engaged in manufacturing beer at their respective establishments (constructed specially for that purpose) for several years prior to the adoption of the constitutional amendment of 1880. They continued in such business in defiance of the statute of 1881, and without having the required permit. Nor did Mugler have a license or permit to sell beer. The single sale of which he was found guilty occurred in the State, and after May 1, 1881, that is, after the act of February 19, 1881, took effect, and was of beer manufactured before its passage.

The buildings and machinery constituting these breweries are of little value if not used for the purpose of manufacturing beer; that is to say, if the statutes are enforced against the defendants the value of their property will be very materially diminished.

The general question in each case is, whether the foregoing statutes of Kansas are in conflict with that clause of the Fourteenth Amendment which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

That legislation by a State prohibiting the manufacture within her limits of intoxicating liquors, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the Constitution of the United States, is made clear by the decisions of this court, rendered before and since the adoption of the Fourteenth Amendment; to some of

which, in view of questions to be presently considered, it will be well to refer.

In the License Cases, 5 How. 504, the question was, whether certain statutes of Massachusetts, Rhode Island, and New Hampshire, relating to the sale of spirituous liquors, were repugnant to the Constitution of the United States. In determining that question, it became necessary to inquire whether there was any conflict between the exercise by Congress of its power to regulate commerce with foreign countries, or among the several States, and the exercise by a State of what are called police powers. Although the members of the court did not fully agree as to the grounds upon which the decision should be placed, they were unanimous in holding that the statutes then under examination were not inconsistent with the Constitution of the United States, or with any act of Congress. Chief Justice Taney said: "If any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper." (p. 577.) Mr. Justice McLean, among other things, said: "A State regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon all internal matters which relate to its moral and political welfare. Over these subjects the Federal government has no power. . . . The acknowledged police power of a State extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed." (pp. 588, 589.) Mr. Justice Woodbury observed: "How can they [the States] be sovereign within their respective spheres, without power to regulate all their internal commerce, as well as police, and direct how, when, and where it shall be conducted in articles intimately connected either with public morals, or public safety, or the public prosperity?" (p. 628.) Mr. Justice Grier, in still more emphatic language, said: "The true question presented by these cases, and one which I am not disposed to evade, is whether the States have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects, and the cause of disease, pauperism, and crime. . . . Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed that every law for the restraint and punishment of crime, for the preservation of the public peace, health, and morals, must come within this category. . . . It is not necessary, for the sake of justifying the State legislation now under consideration, to array the appalling statistics of misery, pauperism, and crime, which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the States, is alone competent to the correction of these great evils, and all measures of restraint

or prohibition necessary to effect the purpose are within the scope of that authority." (pp. 631, 632.)

In Bartemeyer *v.* Iowa, 18 Wall. 129, it was said that prior to the adoption of the Fourteenth Amendment State enactments regulating or prohibiting the traffic in intoxicating liquors raised no question under the Constitution of the United States; and that such legislation was left to the discretion of the respective States, subject to no other limitations than those imposed by their own constitutions, or by the general principles supposed to limit all legislative power. Referring to the contention that the right to sell intoxicating liquors was secured by the Fourteenth Amendment, the court said that "so far as such a right exists, it is not one of the rights growing out of citizenship of the United States." In Beer Co. *v.* Massachusetts, 97 U. S. 25, 33, it was said that, "as a measure of police regulation, looking to the preservation of public morals, a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States." Finally, in Foster *v.* Kansas, 112 U. S. 201, 206, the court said that the question as to the constitutional power of a State to prohibit the manufacture and sale of intoxicating liquors was no longer an open one in this court. These cases rest upon the acknowledged right of the States of the Union to control their purely internal affairs, and, in so doing, to protect the health, morals, and safety of their people by regulations that do not interfere with the execution of the powers of the general government, or violate rights secured by the Constitution of the United States. The power to establish such regulations, as was said in Gibbons *v.* Ogden, 9 Wheat. 1, 203, reaches everything within the territory of a State not surrendered to the national government.

It is, however, contended, that although the State may prohibit the manufacture of intoxicating liquors for sale or barter within her limits, for general use as a beverage, "no convention or legislature has the right, under our form of government, to prohibit any citizen from manufacturing for his own use, or for export, or storage, any article of food or drink not endangering or affecting the rights of others." The argument made in support of the first branch of this proposition, briefly stated, is, that in the implied compact between the State and the citizen certain rights are reserved by the latter, which are guaranteed by the constitutional provision protecting persons against being deprived of life, liberty, or property, without due process of law, and with which the State cannot interfere; that among those rights is that of manufacturing for one's use either food or drink; and that while, according to the doctrines of the Commune, the State may control the tastes, appetites, habits, dress, food, and drink of the people, our system of government, based upon the individuality and intelligence of the citizen, does not claim to control him, except as to his conduct to others, leaving him the sole judge as to all that only affects himself.

It will be observed that the proposition, and the argument made in support of it, equally concede that the right to manufacture drink for one's personal use is subject to the condition that such manufacture does not endanger or affect the rights of others. If such manufacture does prejudicially affect the rights and interests of the community, it follows, from the very premises stated, that society has the power to protect itself, by legislation, against the injurious consequences of that business. As was said in Munn *v.* Illinois, 94 U. S. 113, 124, while powér does not exist with the whole people to control rights that are purely and exclusively private, government may require "each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another."

But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.

It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute (Sinking Fund Cases, 99 U. S. 700, 718), the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. "To what purpose," it was said in Marbury *v.* Madison, 1 Cranch, 137, 176, "are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation." The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty — indeed, are under a solemn duty — to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been

enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Keeping in view these principles, as governing the relations of the judicial and legislative departments of government with each other, it is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of the manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. There is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil. If, therefore, a State deems the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors for other than medical, scientific, and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation. Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the Constitution to another department. And so, if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the efforts to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far from such a regulation having no relation to the general end sought to be accomplished, the entire scheme of prohibition, as embodied in the constitution and laws of Kansas, might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore,

a business in which no one may lawfully engage. Those rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare.

This conclusion is unavoidable, unless the Fourteenth Amendment of the Constitution takes from the States of the Union those powers of police that were reserved at the time the original Constitution was adopted. But this court has declared, upon full consideration, in Barbier *v.* Connolly, 113 U. S. 27, 31, that the Fourteenth Amendment had no such effect. After observing, amoug other things, that that amendment forbade the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property, and secured equal protection to all under like circumstances, in respect as well to their personal and civil rights as to their acquisition and enjoyment of property, the court said: "But neither the amendment, — broad and comprehensive as it is, — nor any other amendment, was designed to interfere with the power of the State, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

Undoubtedly the State, when providing, by legislation, for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the general government. Henderson *v.* Mayor of New York, 92 U. S. 259; Railroad Co. *v.* Husen, 95 U. S. 465; New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650; Walling *v.* Michigan, 116 U. S. 446; Yick Wo *v.* Hopkins, 118 U. S. 356; Morgan's Steamship Co. *v.* Louisiana Board of Health, 118 U. S. 455.

Upon this ground — if we do not misapprehend the position of defendants — it is contended that, as the primary and principal use of beer is as a beverage; as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; as such establishments will become of no value as property, or, at least, will be materially diminished in value, if not employed in the manufacture of beer for every purpose; the prohibition upon their being so employed is, in effect, a taking of property for public use without compensation, and depriving the citizen of his property without due process of law. In other words, although the State, in the exercise of her police powers, may lawfully prohibit the manufacture and sale, within her limits, of intoxicating liquors to be used as a beverage, legislation having that object in view cannot be

enforced against those who, at the time, happen to own property, the chief value of which consists in its fitness for such manufacturing purposes, unless compensation is first made for the diminution in the value of their property, resulting from such prohibitory enactments.

This interpretation of the Fourteenth Amendment is inadmissible. It cannot be supposed that the States intended, by adopting that amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community. In respect to contracts, the obligations of which are protected against hostile State legislation, this court in Butchers' Union Co. *v.* Crescent City Co., 111 U. S. 746, 751, said that the State could not, by any contract, limit the exercise of her power to the prejudice of the public health and the public morals. So, in Stone *v.* Mississippi, 101 U. S. 814, 816, where the Constitution was invoked against the repeal by the State of a charter, granted to a private corporation, to conduct a lottery, and for which that corporation paid to the State a valuable consideration in money, the court said: "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. . . . Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them." Again, in New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 672: "The constitutional prohibition upon State laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations."

The principle, that no person shall be deprived of life, liberty, or property, without due process of law, was embodied, in substance, in the constitutions of nearly all, if not all, of the States at the time of the adoption of the Fourteenth Amendment; and it has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. Beer Co. *v.* Massachusetts, 97 U. S. 25, 32; Commonwealth *v.* Alger, 7 Cush. 53.

[The court refers to Patterson *v.* Kentucky, 97 U. S. 501, *supra*, p. 489, and other cases.]

As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without

compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not — and, consistently with the existence and safety of organized society, cannot be — burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

It is true, that, when the defendants in these cases purchased or erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. Indeed, as was said in Stone *v.* Mississippi, 101 U. S. 814, the supervision of the public health and the public morals is a governmental power, "continuing in its nature," and "to be dealt with as the special exigencies of the moment may require;" and that, "for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself." So in Beer Co. *v.* Massachusetts, 97 U. S. 32: "If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer."

[Another question arising under a distinct provision of the Kansas statute is considered, but the judgment of the court is affirmed.]

## MUNN *v.* ILLINOIS.

94 United States, 113. 1876.

[This was a prosecution in the Criminal Court of Cook County, Illinois, against plaintiff in error for operating a grain warehouse and elevator within the city of Chicago without obtaining a permit, as required by a State statute passed in conformity with article 13 of the Constitution of Illinois, adopted in 1870, which declares that all elevators or warehouses wherein grain or other property is stored for a compensation are public warehouses. The statute requires that any person operating such warehouses and elevators within any city of more than one hundred thousand population shall procure a license from the Circuit Court of the county permitting him to transact business as a public warehouseman, and provides a maximum charge for the storage and handling of grain received into such warehouse or elevator. Defendant, being found guilty and fined under the provisions of the statute, appealed to the Supreme Court of the State, where the judgment of the lower court was affirmed, and thereupon sued out this writ of error.]

Mr. Chief Justice Waite delivered the opinion of the court.

The question to be determined in this case is whether the general assembly of Illinois can, under the limitations upon the legislative power of the States imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the State having not less than one hundred thousand inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved."

[The objection to the statute which the court considers is based upon that portion of the Fourteenth Amendment to the Constitution of the United States which provides that no State shall "deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."]

The Constitution contains no definition of the word "deprive," as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection.

While this provision of the amendment is new in the Constitution of the United States, as a limitation upon the powers of the States, it is old as a principle of civilized government. It is found in Magna Charta and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several States of the Union. By the Fifth Amendment it was

introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the Fourteenth, as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the States.

When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions.

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private (Thorpe *v.* R. & B. Railroad Co., 27 Vt. 143); but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non lædas.* From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the License Cases, 5 How. 583, "are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things." Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be

made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in force, Congress, in 1820, conferred power upon the city of Washington "to regulate . . . the rates of wharfage at private wharves, . . . the sweeping of chimneys, and to fix the rates of fees therefor, . . . and the weight and quality of bread" (3 Stat. 587, sect. 7); and, in 1848, "to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen, and draymen, and the rates of commission of auctioneers" (9 Stat. 224, sect. 2).

From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular; it simply prevents the States from doing that which will operate as such a deprivation.

This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise De Portibus Maris, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

[The writings of Lord Hale are referred to, and also some English cases, tending to show that property used for ferries, wharves, warehouses, and the like, though belonging to private individuals, was clothed with a public right, and was therefore subject to legislative regulation.]

From the same source comes the power to regulate the charges of common carriers, which was done in England as long ago as the

third year of the reign of William and Mary, and continued until within a comparatively recent period. And in the first statute we find the following suggestive preamble, to wit: —

"And whereas divers wagoners and other carriers, by combination amongst themselves, have raised the prices of carriage of goods in many places to excessive rates, to the great injury of the trade: Be it, therefore, enacted," &c. 3 W. & M. c. 12, § 24; 3 Stat. at Large (Great Britain), 481.

Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. New Jersey Nav. Co. *v.* Merchants' Bank, 6 How. 382. Their business is, therefore, "affected with a public interest," within the meaning of the doctrine which Lord Hale has so forcibly stated.

But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle.

[The nature of the legislation of Illinois with reference to grain elevators is discussed.]

It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney-carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriage and established his business before the statute or the ordinance was adopted.

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is be-

cause the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts.

After what has already been said, it is unnecessary to refer at length to the effect of the other provision of the Fourteenth Amendment which is relied upon, viz., that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Certainly, it cannot be claimed that this prevents the State from regulating the fares of hackmen or the charges of draymen in Chicago, unless it does the same thing in every other place within its jurisdiction. But, as has been seen, the power to regulate the business of warehouses depends upon the same principle as the power to regulate hackmen and draymen, and what cannot be done in the one case in this particular cannot be done in the other.

[The validity of the Illinois legislation as affecting interstate commerce and as tending to give a preference to the ports of one State over those of another is briefly considered, but the judgment of the Supreme Court of Illinois is affirmed.[1]]

[1] Mr. Justice Field delivered a dissenting opinion, in which Mr. Justice Strong concurred. In the course of this opinion the following language is used: —

"The power of the State over the property of the citizen under the constitutional guaranty is well defined. The State may take his property for public uses, upon just

compensation being made therefor. It may take a portion of his property by way of taxation for the support of the government. It may control the use and possession of his property, so far as may be necessary for the protection of the rights of others, and to secure to them the equal use and enjoyment of their property. The doctrine that each one must so use his own as not to injure his neighbor — *sic utere tuo ut alienum non lædas* — is the rule by which every member of society must possess and enjoy his property; and all legislation essential to secure this common and equal enjoyment is a legitimate exercise of State authority. Except in cases where property may be destroyed to arrest a conflagration or the ravages of pestilence, or be taken under the pressure of an immediate and overwhelming necessity to prevent a public calamity, the power of the State over the property of the citizen does not extend beyond such limits.

"It is true that the legislation which secures to all protection in their rights, and the equal use and enjoyment of their property, embraces an almost infinite variety of subjects. Whatever affects the peace, good order, morals, and health of the community, comes within its scope; and every one must use and enjoy his property subject to the restrictions which such legislation imposes. What is termed the police power of the State, which, from the language often used respecting it, one would suppose to be an undefined and irresponsible element in government, can only interfere with the conduct of individuals in their intercourse with each other, and in the use of their property, so far as may be required to secure these objects. The compensation which the owners of property, not having any special rights or privileges from the government in connection with it, may demand for its use, or for their own services in union with it, forms no element of consideration in prescribing regulations for that purpose. If one construct a building in a city, the State, or the municipality exercising a delegated power from the State, may require its walls to be of sufficient thickness for the uses intended; it may forbid the employment of inflammable materials in its construction, so as not to endanger the safety of his neighbors; if designed as a theatre, church, or public hall, it may prescribe ample means of egress, so as to afford facility for escape in case of accident; it may forbid the storage in it of powder, nitro-glycerine, or other explosive material; it may require its occupants daily to remove decayed vegetable and animal matter, which would otherwise accumulate and engender disease; it may exclude from it all occupations and business calculated to disturb the neighborhood or infect the air. Indeed, there is no end of regulations with respect to the use of property which may not be legitimately prescribed, having for their object the peace, good order, safety, and health of the community, thus securing to all the equal enjoyment of their property; but in establishing these regulations it is evident that compensation to the owner for the use of his property, or for his services in union with it, is not a matter of any importance: whether it be one sum or another does not affect the regulation, either in respect to its utility or mode of enforcement. One may go, in like manner, through the whole round of regulations authorized by legislation, State or municipal, under what is termed the police power, and in no instance will he find that the compensation of the owner for the use of his property has any influence in establishing them. It is only where some right or privilege is conferred by the government or municipality upon the owner, which he can use in connection with his property, or by means of which the use of his property is rendered more valuable to him, or he thereby enjoys an advantage over others, that the compensation to be received by him becomes a legitimate matter of regulation. Submission to the regulation of compensation in such cases is an implied condition of the grant, and the State, in exercising its power of prescribing the compensation, only determines the conditions upon which its concession shall be enjoyed. When the privilege ends, the power of regulation ceases."

In BUDD *v.* NEW YORK, 143 U. S. 517 (1892), the court again considered the same question, and adhered to the decision in Munn *v.* Illinois. MR. JUSTICE BREWER (with whom concurred MR. JUSTICE FIELD and MR. JUSTICE BROWN) delivered a dissenting opinion, in which the following language is used: —

"I dissent from the opinion and judgment in these cases. The main proposition upon which they rest is, in my judgment, radically unsound. It is the doctrine of

Munn *v.* Illinois, 94 U. S. 113, reaffirmed. That is, as declared in the syllabus and stated in the opinion in that case: 'When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.' The elaborate discussions of the question in the dissenting opinions in that case, and the present cases when under consideration in the Court of Appeals of the State of New York, seem to forbid anything more than a general declaration of dissent. The vice of the doctrine is, that it places a public interest in the use of property upon the same basis as a public use of property. Property is devoted to a public use when, and only when, the use is one which the public in its organized capacity, to wit, the State, has a right to create and maintain, and, therefore, one which all the public have a right to demand and share in. The use is public, because the public may create it, and the individual creating it is doing thereby and *pro tanto* the work of the State. The creation of all highways is a public duty. Railroads are highways. The State may build them. If an individual does that work, he is *pro tanto* doing the work of the State. He devotes his property to a public use. The State doing the work fixes the price for the use. It does not lose the right to fix the price, because an individual voluntarily undertakes to do the work. But this public use is very different from a public interest in the use. There is scarcely any property in whose use the public has no interest. No man liveth unto himself alone, and no man's property is beyond the touch of another's welfare. Everything, the manner and extent of whose use affects the well-being of others, is property in whose use the public has an interest. Take, for instance, the only store in a little village. All the public of that village are interested in it; interested in the quantity and quality of the goods on its shelves, and their prices, in the time at which it opens and closes, and, generally, in the way in which it is managed; in short, interested in the use. Does it follow that that village public has a right to control these matters? That which is true of the single small store in the village, is also true of the largest mercantile establishment in the great city. The magnitude of the business does not change the principle. There may be more individuals interested, a larger public, but still the public. The country merchant who has a small warehouse in which the neighboring farmers are wont to store their potatoes and grain preparatory to shipment occupies the same position as the proprietor of the largest elevator in New York. The public has in each case an interest in the use, and the same interest, no more and no less. I cannot bring myself to believe that when the owner of property has by his industry, skill, and money made a certain piece of his property of large value to many, he has thereby deprived himself of the full dominion over it which he had when it was of comparatively little value; nor can I believe that the control of the public over one's property or business is at all dependent upon the extent to which the public is benefited by it.

"Surely the matters in which the public has the most interest are the supplies of food and clothing; yet can it be that by reason of this interest the State may fix the price at which the butcher must sell his meat, or the vendor of boots and shoes his goods? Men are endowed by their Creator with certain unalienable rights, 'life, liberty, and the pursuit of happiness;' and to 'secure,' not grant or create, these rights, governments are instituted. That property which a man has honestly acquired he retains full control of, subject to these limitations: First, that he shall not use it to his neighbor's injury, and that does not mean that he must use it for his neighbor's benefit; second, that if he devotes it to a public use, he gives to the public a right to control that use; and, third, that whenever the public needs require, the public may take it upon payment of due compensation.

"It is suggested that there is a monopoly, and that that justifies legislative interference. There are two kinds of monopoly: one of law, the other of fact. The one exists when exclusive privileges are granted. Such a monopoly, the law which creates alone can break; and being the creation of law justifies legislative control. A monopoly of fact any one can break, and there is no necessity for legislative interference. It exists where any one by his money and labor furnishes facilities for business which no one else has. A man puts up in a city the only building suitable for offices. He

has therefore a monopoly of that business; but it is a monopoly of fact, which any one can break who, with like business courage, puts his means into a similar building. Because of the monopoly feature, subject thus easily to be broken, may the legislature regulate the price at which he will lease his offices? So, here, there are no exclusive privileges given to these elevators. They are not upon public ground. If the business is profitable, any one can build another; the field is open for all the elevators, and all the competition that may be desired. If there be a monopoly, it is one of fact and not of law, and one which any individual can break.

"The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government. If it may regulate the price of one service, which is not a public service, or the compensation for the use of one kind of property which is not devoted to a public use, why may it not with equal reason regulate the price of all service, and the compensation to be paid for the use of all property? And if so, 'Looking Backward' is nearer than a dream.

"I dissent especially in these cases, because the statute in effect compels service without any compensation. It provides that the parties seeking the service of the elevator 'shall only be required to pay the actual cost of trimming or shovelling to the leg of the elevator when unloading, and trimming cargo when loading.' This work of trimming or shovelling is fully explained in the briefs of counsel. It is work performed by longshoremen with hand-scoops or shovels, on the vessel unloading or receiving the grain. They are not in the regular employ of the elevator; but engaged in an independent service, and yet one whose careful and skilful performance is essential to the successful transfer of grain into and through the elevator. The full service required of the elevator compels its proprietor to employ and superintend the work of these longshoremen. For this work of employment, and superintendence, and for the responsibility for the proper performance of their work, the act says that the proprietor of the elevator shall receive no compensation; he can charge only that which he pays out, the actual cost. I had supposed that no man could be required to render any service to another individual without some compensation."

In BRASS *v.* STOESER, 153 U. S. 391 (1894), the same question was again considered, and Munn *v.* Illinois was reaffirmed. MR. JUSTICE BREWER (with whom concurred MR. JUSTICE FIELD, MR. JUSTICE JACKSON, and MR. JUSTICE WHITE), delivered a dissenting opinion, reaffirming the dissent in Munn *v.* Illinois and Budd *v.* New York.

In SPRING VALLEY WATER WORKS *v.* SCHOTTLER, 110 U. S. 347 (1884), the validity of a statute of California requiring corporations formed for the purpose of supplying cities with water to do so at reasonable rates and without discrimination, such rates to be determined by a board of commissioners, was questioned as in violation of the Fourteenth Amendment. MR. CHIEF JUSTICE WAITE, delivering the opinion of the court (MR. JUSTICE FIELD dissenting), used this language: —

"That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt. That question is settled by what was decided on full consideration in Munn *v.* Illinois, 94 U. S. 113. As was said in that case, such regulations do not deprive a person of his property without due process of law. What may be done if the municipal authorities do not exercise an honest judgment, or if they fix upon a price which is manifestly unreasonable, need not now be considered, for that proposition is not presented by this record. The objection here is not to any improper prices fixed by the officers, but to their power to fix prices at all. By the Constitution and the legislation under it, the municipal authorities have been created a special tribunal to determine what, as between the public and the company, shall be deemed a reasonable price during a certain limited period. Like every other tribunal established by the legislature for such a purpose, their duties are judicial in their nature, and they are bound in morals and in law to exercise an honest judgment as to all matters submitted for their official determination. It is not to be presumed that they will act otherwise than according to this rule. And here again it is to be kept in mind that the question before us is not as to the penalties to be inflicted on the company for a failure to sell at the prices fixed,

## SMYTH *v.* AMES.

169 United States, 466. 1898.

Mr. Justice Harlan delivered the opinion of the court.

[The plaintiffs in error in this and other similar cases considered with it, were defendants in the Circuit Court of the United States for the district of Nebraska in suits brought against them as members and officers of the State board of transportation of that State by certain railroad corporations and certain individuals, stockholders in such companies, all being citizens of other States or aliens, in which it was sought to enjoin the members and officers of such State board of transportation from enforcing a statute of Nebraska passed in 1893, in which it was attempted to regulate railroads, classify freights, and fix reasonable maximum rates to be charged for the transportation of freight upon the railroads in that State. The constitutionality of the State statute was assailed on the ground that it violated the provisions of the Fourteenth Amendment. From decrees in favor of plaintiffs rendered in the lower court, the defendants appeal. Prior decisions of the court relating to the power of the legislature to directly regulate railroad rates or authorize their regulation by railroad commissions are considered, especially Railroad Commission Cases, 116 U. S. 307, and Reagan *v.* Farmers' Loan and Trust Co., 154 U. S. 364.]

In view of the adjudications these principles must be regarded as settled: —

1. A railroad corporation is a person within the meaning of the Fourteenth Amendment declaring that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. A State enactment, or regulations made under the authority of a State enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would therefore be repugnant to the Fourteenth Amendment of the Constitution of the United States.

3. While rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the car-

but as to the power to fix the price; not whether the company shall forfeit its property and franchises to the city and county if it fails to meet the requirements of the Constitution, but whether the prices it shall charge may be established in the way provided for in that instrument. It will be time enough to consider the consequences of the omissions of the company when a case involving such questions shall be presented."

rier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the State or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry.

The cases before us directly present the important question last stated.

. . . . . .

What are the considerations to which weight must be given when we seek to ascertain the compensation that a railroad company is entitled to receive, and a prohibition upon the receiving of which may be fairly deemed a deprivation by legislative decree of property without due process of law? Undoubtedly that question could be more easily determined by a commission composed of persons whose special skill, observation, and experience qualifies them to so handle great problems of transportation as to do justice both to the public and to those whose money has been used to construct and maintain highways for the convenience and benefit of the people. But despite the difficulties that confessedly attend the proper solution of such questions, the court cannot shrink from the duty to determine whether it be true, as alleged, that the Nebraska statute invades or destroys rights secured by the supreme law of the land. No one, we take it, will contend that a State enactment is in harmony with that law simply because the legislature of the State has declared such to be the case; for that would make the State legislature the final judge of the validity of its enactment, although the Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding. Art. VI. The idea that any legislature, State or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land.

[The court then considers at length the evidence bearing on the question whether the rates fixed by the State statute furnish an adequate compensation for the use of the property of the railroads.]

We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the

property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth. But even upon this basis, and determining the probable effect of the act of 1893 by ascertaining what could have been its effect if it had been in operation during the three years immediately preceding its passage, we perceive no ground on the record for reversing the decree of the Circuit Court. On the contrary, we are of opinion that as to most of the companies in question there would have been, under such rates as were established by the act of 1893, an actual loss in each of the years ending June 30, 1891, 1892, and 1893; and that, in the exceptional cases above stated, when two of the companies would have earned something above operating expenses in particular years, the receipts or gains, above operating expenses, would have been too small to affect the general conclusion that the act, if enforced, would have deprived each of the railroad companies involved in these suits of the just compensation secured to them by the Constitution. Under the evidence there is no ground for saying that the operating expenses of any of the companies were greater than necessary.

[The decree of the lower court in each case is affirmed.]

[For other cases relating to due process of law, equal protection of the laws, and the police power, see cases in Appendix C, p. 1260.]

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## SECTION V. — JURY TRIAL IN CIVIL CASES.

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### CAPITAL TRACTION COMPANY *v.* HOF.

174 United States, 1. 1899.

MR. JUSTICE GRAY delivered the opinion of the court.

[Plaintiff in error, a street railway corporation in the District of Columbia, presented to the Supreme Court of the District a petition for a writ of *certiorari* to a justice of the peace, to prevent a

civil action to recover damages in the sum of $300 from being tried by jury before him. It appeared that defendant in that proceeding had previously caused a summons to be issued by one of the justices of the peace in and for the District of Columbia, summoning the Traction Company to appear before such justice to answer the complaint of said Hof in a plea of damage in $300, and on the demand of the attorney of said Hof for a jury trial before such justice, the latter issued a writ for the summoning of a jury, whereupon the Traction Company filed its petition as above, contending that in such proceeding it was intended to subject the petitioner without appeal to trial before a justice of the peace, and that if the action before the justice was not thus prevented, the petitioner would be deprived of his constitutional right to a trial by jury, and would be in danger of being deprived of his property without due process of law, and would be denied the equal protection of the law; and petitioner prayed a writ of *certiorari* to remove Hof's claim into the Supreme Court of the District for trial according to the course of the common law, &c. The Supreme Court of the District having overruled Hof's motion to quash the writ and enter an order quashing all proceedings before the justice of the peace, Hof appealed to the Court of Appeals of the District, where the order of the Supreme Court was reversed and the case was remanded with directions to quash the writ. The Traction Company thereupon brings the case to this court by writ of error.]

I. The Congress of the United States, being empowered by the Constitution "to exercise exclusive legislation in all cases whatsoever" over the seat of the national government, has the entire control over the District of Columbia for every purpose of government, national or local. It may exercise within the District all legislative powers that the legislature of a State might exercise within the State; and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, so long as it does not contravene any provision of the Constitution of the United States. Kendall *v.* United States, (1838) 12 Pet. 524, 619; Mattingly *v.* District of Columbia, (1878) 97 U. S. 687, 690; Gibbons *v.* District of Columbia, (1886) 116 U. S. 404, 407.

It is beyond doubt, at the present day, that the provisions of the Constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia. Webster *v.* Reid, (1850) 11 How. 437, 460; Callan *v.* Wilson, (1888) 127 U. S. 540, 550; Thompson *v.* Utah, (1898) 170 U. S. 343.

The decision of this case mainly turns upon the scope and effect of the Seventh Amendment of the Constitution of the United States. It may therefore be convenient, before particularly examining the acts of Congress now in question, to refer to the circumstances

preceding and attending the adoption of this amendment, to the contemporaneous understanding of its terms, and to the subsequent judicial interpretation thereof, as aids in ascertaining its true meaning, and its application to the case at bar.

II. The first Continental Congress, in the Declaration of Rights adopted October 14, 1774, unanimously resolved that "the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." 1 Journals of Congress, 28.

The Ordinance of 1787 declared that the inhabitants of the Northwest Territory should "always be entitled to the benefits of the writ of *habeas corpus*, and of the trial by jury," "and of judicial proceedings according to the course of the common law." 1 Charters and Constitutions, 431.

The Constitution of the United States, as originally adopted, merely provided in article 3, section 3, that "the trial of all crimes, except in cases of impeachment, shall be by jury." In the convention which framed the Constitution, a motion to add this clause, "and a trial by jury shall be preserved as usual in civil cases," was opposed by Mr. Gorham of Massachusetts, on the ground that "the constitution of juries is different in different States, and the trial itself is usual in different cases, in different States;" and was unanimously rejected. 5 Elliott's Debates, 550.

Mr. Hamilton, in number 81 of the Federalist, when discussing the clause of the Constitution which confers upon this court "appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make," and again, in more detail, in number 83, when answering the objection to the want of any provision securing trial by jury in civil actions, stated the diversity then existing in the laws of the different States regarding appeals and jury trials; and especially pointed out that in the New England States, and in those alone, appeals were allowed, as of course, from one jury to another until there had been two verdicts on one side, and in no other State but Georgia was there any appeal from one to another jury. The diversity in the laws of the several States, he insisted, "shows the impropriety of a technical definition derived from the jurisprudence of any particular State," and "that no general rule could have been fixed upon by the convention which would have corresponded with the circumstances of all the States." And he suggested that "the legislature of the United States would certainly have full power to provide that in appeals to the Supreme Court there should be no re-examination of facts where they had been tried in the original causes by juries;" but if this "should be thought too extensive, it might be qualified with a limitation to such causes only as are determinable at common law in that mode of trial." 2 Federalist, (ed. 1788) pp. 319–321, 335, 336.

At the first session of the first Congress under the Constitution, Mr. Madison in the House of Representatives, on June 8, 1789, submitted propositions to amend the Constitution by adding, to the clause concerning the appellate jurisdiction of this court, the words "nor shall any fact, triable by a jury, according to the course of the common law, be otherwise re-examinable than according to the principles of the common law;" and, to the clause concerning trial by jury, these words: "In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate." 1 Annals of Congress, 424, 435. And those propositions, somewhat altered in form, were embodied in a single article, which was proposed by Congress on September 25, 1789, to the legislatures of the several States, and upon being duly ratified by them, became the Seventh Amendment to the Constitution, in these words: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law."

A comparison of the language of the Seventh Amendment, as finally made part of the Constitution of the United States, with the Declaration of Rights of 1774, with the Ordinance of 1787, with the essays of Mr. Hamilton in 1788, and with the amendments introduced by Mr. Madison in Congress in 1789, strongly tends to the conclusion that the Seventh Amendment, in declaring that "no fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law," had in view the rules of the common law of England, and not the rules of that law as modified by local statute or usage in any of the States.

This conclusion has been established, and "the rules of the common law" in this respect clearly stated and defined, by judicial decisions.

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It must therefore be taken as established, by virtue of the Seventh Amendment of the Constitution, that either party to an action at law (as distinguished from suits in equity or in admiralty) in a court of the United States, where the value in controversy exceeds twenty dollars, has the right to a trial by jury; that, when a trial by jury has been had in an action at law, in a court either of the United States or of a State, the facts there tried and decided cannot be re-examined in any court of the United States, otherwise than according to the rules of the common law of England; that by the rules of that law, no other mode of re-examination is allowed than upon a new trial, either granted by the court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law; and therefore that, unless a new

trial has been granted in one of those two ways, facts once tried by a jury cannot be tried anew, by a jury or otherwise, in any court of the United States.

. . . . . .

III. "Trial by jury," in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion. Yet there are unequivocal statements of it to be found in the books.

Lord Hale, in his History of the Common Law, c. 12, "touching trial by jury," says: "Another excellency of this trial is this, that the judge is always present at the time of the evidence given in it. Herein he is able in matters of law, emerging upon the evidence, to direct them, and also, in matters of fact, to give them great light and assistance by his weighing the evidence before them, and observing where the question and knot of the business lies, and by showing them his opinion even in matter of fact, which is a great advantage and light to laymen. And thus as the jury assists the judge in determining the matter of fact, so the judge assists the jury in determining points of law, and also very much in investigating and enlightening the matter of fact, whereof the jury are the judges." And again, in summing up the advantages of trial by jury, he says: "It has the advantage of the judge's observation, attention, and assistance, in point of law by way of decision, and in point of fact by way of direction to the jury." 2 Hale, Com. Law (5th ed.), 147, 156. See also 1 Hale P. C. 33.

[Various cases in the State courts relating to what constitutes a common-law jury are stated.]

V. Another question having an important bearing on the validity and the interpretation of the successive acts of Congress, concerning trial by jury in civil actions begun before justices of the peace in the District of Columbia, is whether the right of trial by jury, secured by the Seventh Amendment to the Constitution, is preserved by allowing a common-law trial by jury in a court of record, upon appeal from a judgment of a justice of the peace and upon giving bond with surety to prosecute the appeal and to abide the judgment of the appellate court.

. . . . . .

While, as has been seen, the Seventh Amendment to the Constitution of the United States requires that "the right of trial by jury shall be preserved" in the courts of the United States in every action at law in which the value in controversy exceeds twenty dollars, and forbids any fact once tried by a jury to "be otherwise re-examined, in any court of the United States, than according to the rules of the common law," meaning thereby the common law of England, and not the law of any one or more of the States of the Union, yet it is to be remembered that, as observed by Justice Johnson, speaking for this court, in Bank of Columbia *v.* Okely, 4 Wheat. 235, it is not "trial by jury," but "the right of trial by jury," which the amendment declares "shall be preserved." It does not prescribe at what stage of an action a trial by jury must, if demanded, be had; or what conditions may be imposed upon the demand of such a trial, consistently with preserving the right to it. In passing upon these questions, the judicial decisions and the settled practice in the several States are entitled to great weight, inasmuch as the constitutions of all of them had secured the right of trial by jury in civil actions, by the words "shall be preserved," or "shall be as heretofore," or "shall remain inviolate," or "shall be held sacred," or by some equivalent expression.

A long line of judicial decisions in the several States, beginning early in this century, maintains the position that the constitutional right of trial by jury in civil actions is not infringed by a statute which sets the pecuniary limit of the jurisdiction of justices of the peace in actions at law higher than it was when the particular constitution was adopted, allows a trial by jury for the first time upon appeal from the judgment of the justice of the peace, and requires of the appellant a bond with surety to prosecute the appeal and to pay the judgment of the appellate court. The full extent and weight of those precedents cannot be justly appreciated without referring to the texts of the statutes which they upheld, and which have not always been fully set forth in the reports.

. . . . . .

The trial by jury, allowed by the seventh section of the act, in a court of record, in the presence of a judge having the usual powers of superintending the course of the trial, instructing the jury on the law and advising them on the facts, and setting aside their verdict if in his opinion against the law or the evidence, was undoubtedly a trial by jury, in the sense of the common law and of the Seventh Amendment to the Constitution.

But a trial by a jury before a justice of the peace, pursuant to sections 15 and 16 of the act, was of quite a different character. Congress, in regulating this matter, might doubtless allow cases within the original jurisdiction of a justice of the peace to be tried and decided in the first instance by any specified number of persons in his presence. But such persons, even if required to be twelve

in number, and called a jury, were rather in the nature of special commissioners or referees. A justice of the peace, having no other powers than those conferred by Congress on such an officer in the District of Columbia, was not, properly speaking, a judge, or his tribunal a court; least of all, a court of record. The proceedings before him were not according to the course of the common law; his authority was created and defined by, and rested upon, the acts of Congress only. The act of 1823, in permitting cases before him to be tried by jury, did not require him to superintend the course of the trial or to instruct the jury in matter of law; nor did it authorize him, upon the return of their verdict, to arrest judgment upon it, or to set it aside, for any cause whatever; but made it his duty to enter judgment upon it forthwith, as a thing of course. A body of men, so free from judicial control, was not a common-law jury; nor was a trial by them a trial by jury, within the meaning of the Seventh Amendment to the Constitution. It was no more a jury, in the constitutional sense, than it would have been, if it had consisted, as has been more usual in statutes authorizing trials by a jury before a justice of the peace, of less than twelve men.

There was nothing, therefore, either in the Constitution of the United States, or in the act of Congress, to prevent facts once tried by such a jury before the justice of the peace from being tried anew by a constitutional jury in the appellate court.

[The court refers to acts of Congress by which the jurisdiction of justices of the peace was extended to claims not exceeding $300, with provision for trial by jury before the justice if the claim exceeded $20, and trial by jury in a court of record on appeal from the justice, with a further provision that no appeal shall be allowed unless the appellant enters into an undertaking with sufficient sureties to satisfy whatever final judgment may be recovered in the appellate court.]

X. Upon the whole matter, our conclusion is, that Congress, in the exercise of its general and exclusive power of legislation over the District of Columbia, may provide for the trial of civil causes of moderate amount by a justice of the peace, or, in his presence, by a jury of twelve, or of any less number, allowing to either party, where the value in controversy exceeds twenty dollars, the right to appeal from the judgment of the justice of the peace to a court of record, and to have a trial by jury in that court; that Congress, in every case where the value in controversy exceeds five dollars, has authorized either party to appeal from the judgment of the justice of the peace, although entered upon the verdict of a jury, to the Supreme Court of the District of Columbia, and to have a trial by jury in that court; that the trial by a jury of twelve, as permitted by Congress to be had before a justice of the peace, is not, and the trial by jury in the appellate court is, a trial by jury, within the meaning of the common law, and of the Seventh Amendment to

the Constitution; that therefore the trial of facts by a jury before the justice of the peace does not prevent those facts from being re-examined by a jury in the appellate court; that the right of trial by jury in the appellate court is not unduly obstructed by the provisions enlarging the civil jurisdiction of justices of the peace to three hundred dollars, and requiring every appellant to give security to pay and satisfy the judgment of the appellate court; that the legislation of Congress upon the subject is in all respects consistent with the Constitution of the United States; and that upon these grounds (which are substantially those taken by Chief Justice Alvey below) the judgment of the Court of Appeals, quashing the writ of *certiorari* to the justice of the peace, must be affirmed.

The effect of so affirming that judgment will be to leave the claim of Hof against the Capital Traction Company open to be tried by a jury before the justice of the peace, and, after his judgment upon their verdict, to be taken by appeal to the Supreme Court of the District of Columbia, and to be there tried by jury on the demand of either party. *Judgment affirmed.*

MR. JUSTICE BREWER concurred in the judgment of affirmance, but dissented from so much of the opinion as upheld the validity of the provision of the act of Congress requiring every appellant from the judgment of a justice of the peace to give bond with surety for the payment of the judgment of the appellate court.[1]

[1] In VICKSBURG AND MERIDIAN RAILROAD COMPANY *v.* PUTNAM, 118 U. S. 545 (1886), exception was taken to the action of the judge of the Circuit Court of the United States in which the case was tried, in giving instructions to the jury with reference to the facts. MR. JUSTICE GRAY, delivering the opinion of the court, used this language: —

"In the courts of the United States, as in those of England from which our practice was derived, the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error. Carver *v.* Jackson, 4 Pet. 1, 80; Magniac *v.* Thompson, 7 Pet. 348, 390; Mitchell *v.* Harmony, 13 How. 115, 131; Transportation Line *v.* Hope, 95 U. S. 297, 302; Taylor on Evidence (8th ed.), sec. 25. The powers of the courts of the United States in this respect are not controlled by the statutes of the State forbidding judges to express any opinion upon the facts. Nudd *v.* Burrows, 91 U. S. 426."

# CHAPTER XIV.

## POLITICAL PRIVILEGES.

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### SECTION I. — CITIZENSHIP.

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#### a. *Who are Citizens of the United States.*

#### UNITED STATES *v.* WONG KIM ARK.

169 United States, 649. 1898.

[PROCEEDINGS were instituted by defendant in error in the District Court of the United States for the Northern District of California, to secure his release by *habeas corpus* from arrest for attempting to enter the United States in alleged violation of the Chinese Exclusion Acts. The United States intervened in the action, and from a judgment granting the writ appealed to this court.]

MR. JUSTICE GRAY, after stating the facts, delivered the opinion of the court.

The facts of this case, as agreed by the parties, are as follows: Wong Kim Ark was born in 1873, in the city of San Francisco, in the State of California and United States of America, and was and is a laborer. His father and mother were persons of Chinese descent, and subjects of the Emperor of China; they were at the time of his birth domiciled residents of the United States, having previously established and still enjoying a permanent domicile and residence therein at San Francisco; they continued to reside and remain in the United States until 1890, when they departed for China; and during all the time of their residence in the United States they were engaged in business, and were never employed in any diplomatic or official capacity under the Emperor of China. Wong Kim Ark, ever since his birth, has had but one residence, to wit, in California, within the United States, and has there resided, claiming to be a citizen of the United States, and has never lost or changed that residence, or gained or acquired another residence; and neither he, nor his parents acting for him, ever renounced his allegiance to the United States, or did or committed

any act or thing to exclude him therefrom. In 1890 (when he must have been about seventeen years of age) he departed for China on a temporary visit and with the intention of returning to the United States, and did return thereto by sea in the same year, and was permitted by the collector of customs to enter the United States, upon the sole ground that he was a native-born citizen of the United States. After such return, he remained in the United States, claiming to be a citizen thereof, until 1894, when he (being about twenty-one years of age, but whether a little above or a little under that age does not appear) again departed for China on a temporary visit and with the intention of returning to the United States; and he did return thereto by sea in August, 1895, and applied to the collector of customs for permission to land; and was denied such permission, upon the sole ground that he was not a citizen of the United States.

It is conceded that, if he is a citizen of the United States, the acts of Congress, known as the Chinese Exclusion Acts, prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, do not and cannot apply to him.

The question presented by the record is whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution, "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

I. In construing any act of legislation, whether a statute enacted by the legislature, or a constitution established by the people as the supreme law of the land, regard is to be had, not only to all parts of the act itself, and of any former act of the same law-making power, of which the act in question is an amendment; but also to the condition, and to the history, of the law as previously existing, and in the light of which the new act must be read and interpreted.

The Constitution of the United States, as originally adopted, uses the words "citizen of the United States," and "natural-born citizen of the United States." By the original Constitution, every representative in Congress is required to have been "seven years a citizen of the United States," and every senator to have been "nine years a citizen of the United States" [Art. I. §§ 2, 3]; and "no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President." Art. II. § 1. The Fourteenth

Article of Amendment, besides declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," also declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." And the Fifteenth Article of Amendment declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude."

The Constitution nowhere defines the meaning of these words, either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." Amend. Art. XIV. In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. Minor *v.* Happersett, 21 Wall. 162; *Ex parte* Wilson, 114 U. S. 417, 422; Boyd *v.* United States, 116 U. S. 616, 624, 625; Smith *v.* Alabama, 124 U. S. 465. The language of the Constitution, as has been well said, could not be understood without reference to the common law. 1 Kent, Com. 336; Bradley, J., in Moore *v.* United States, 91 U. S. 270, 274.

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II. The fundamental principle of the common law with regard to English nationality was birth within the allegiance, also called "ligealty," "obedience," "faith," or "power," of the King. The principle embraced all persons born within the King's allegiance and subject to his protection. Such allegiance and protection were mutual — as expressed in the maxim, *protectio trahit subjectionem, et subjectio protectionem* — and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, so long as they were within the kingdom. Children, born in England, of such aliens, were therefore natural-born subjects. But the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the King's dominions, were not natural-born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction of the King.

This fundamental principle, with these qualifications or explanations of it, was clearly, though quaintly, stated in the leading case, known as Calvin's Case, or the Case of the Postnati, decided

in 1608, after a hearing in the Exchequer Chamber before the Lord Chancellor and all the judges of England, and reported by Lord Coke and by Lord Ellesmere. Calvin's Case, 7 Coke, 1, 4 *b*–6 *a*, 18 *a*, 18 *b*; Ellesmere, Postnati, 62–64; s. c. 2 Howell's State Trials, 559, 607, 613–617, 639, 640, 659, 679.

The English authorities ever since are to the like effect. Co. Lit. 8 *a*, 128 *b*; Lord Hale, in Hargrave's Law Tracts, 210, and in 1 Hale P. C. 61, 62; 1 Bl. Com. 366, 369, 370, 374; 4 Bl. Com. 74, 92; Lord Kenyon, in Doe *v.* Jones, 4 T. R. 300, 308; Cockburn on Nationality, 7; Dicey, Conflict of Laws, pp. 173–177, 741.

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It thus clearly appears that by the law of England for the last three centuries, beginning before the settlement of this country, and continuing to the present day, aliens, while residing in the dominions possessed by the crown of England, were within the allegiance, the obedience, the faith or loyalty, the protection, the power, and the jurisdiction, of the English sovereign; and therefore every child born in England of alien parents was a natural-born subject, unless the child of an ambassador or other diplomatic agent of a foreign State, or of an alien enemy in hostile occupation of the place where the child was born.

III. The same rule was in force in all the English colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the Constitution as originally established.

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IV. It was contended by one of the learned counsel for the United States that the rule of the Roman law, by which the citizenship of the child followed that of the parent, was the true rule of international law, as now recognized in most civilized countries, and had superseded the rule of the common law, depending on birth within the realm, originally founded on feudal considerations.

But at the time of the adoption of the Constitution of the United States in 1789, and long before, it would seem to have been the rule in Europe generally, as it certainly was in France, that, as said by Pothier, "citizens, true and native-born citizens, are those who are born within the extent of the dominion of France," and "mere birth within the realm gives the rights of a native-born citizen, independently of the origin of the father or mother, and of their domicile;" and children born in a foreign country, of a French father who had not established his domicile there nor given up the intention of returning, were also deemed Frenchmen, as Laurent says, by "a favor, a sort of fiction," and Calvo, "by a sort of fiction of exterritoriality, considered as born in France, and therefore invested with French nationality." Pothier, Traité des Personnes, pt. 1, tit. 2, sect. 1, nos. 43, 45; Walsh-Serrant *v.* Walsh-Serrant (1802), 3 Journal du Palais, 384; s. c. 8 Merlin, Jurisprudence

(5th ed.), Domicile, § 13; Préfet du Nord *v.* Lebeau (1862), Journal du Palais, 1863, 312 and note; 1 Laurent, Droit Civil, no. 321; 2 Calvo, Droit International (5th ed.), § 542; Cockburn on Nationality, 13, 14; Hall's International Law (4th ed.), § 68. The general principle of citizenship by birth within French territory prevailed until after the French Revolution, and was affirmed in successive constitutions, from the one adopted by the Constituent Assembly in 1791 to that of the French Republic in 1799. Constitutions et Chartes (ed. 1830), pp. 100, 136, 148, 186. The Code Napoleon of 1807 changed the law of France, and adopted, instead of the rule of country of birth, *jus soli*, the rule of descent or blood, *jus sanguinis*, as the leading principle; but an eminent commentator has observed that the framers of that code "appear not to have wholly freed themselves from the ancient rule of France, or rather, indeed, ancient rule of Europe, — *de la vieille règle française, ou plutôt même de la vieille règle européenne*, — according to which nationality had always been, in former times, determined by the place of birth." 1 Demolombe, Cours de Code Napoleon (4th ed.), no. 146.

The later modifications of the rule in Europe rest upon the constitutions, laws, or ordinances of the various countries, and have no important bearing upon the interpretation and effect of the Constitution of the United States. The English Naturalization Act of 33 Vict. (1870), c. 14, and the Commissioners' Report of 1869 out of which it grew, both bear date since the adoption of the Fourteenth Amendment of the Constitution; and, as observed by Mr. Dicey, that act has not affected the principle by which any person who, whatever the nationality of his parents, is born within the British dominions, acquires British nationality at birth, and is a natural-born British subject. Dicey, Conflict of Laws, 741. At the time of the passage of that act, although the tendency on the continent of Europe was to make parentage, rather than birthplace, the criterion of nationality, and citizenship was denied to the native-born children of foreign parents in Germany, Switzerland, Sweden, and Norway, yet it appears still to have been conferred upon such children in Holland, Denmark, and Portugal, and, when claimed under certain specified conditions, in France, Belgium, Spain, Italy, Greece, and Russia. Cockburn on Nationality, 14–21.

There is, therefore, little ground for the theory that, at the time of the adoption of the Fourteenth Amendment of the Constitution of the United States, there was any settled and definite rule of international law, generally recognized by civilized nations, inconsistent with the ancient rule of citizenship by birth within the dominion.

Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship.

Both in England and in the United States, indeed, statutes have been passed, at various times, enacting that certain issue born abroad of English subjects, or of American citizens, respectively, should inherit, to some extent at least, the rights of their parents. But those statutes applied only to cases coming within their purport; and they have never been considered, in either country, as affecting the citizenship of persons born within its dominion.

[English statutes are discussed at considerable length, as are also the statutes of the United States relating to naturalization and the Civil Rights Act. It is suggested that the first clause of the Fourteenth Amendment was not intended to impose any new restrictions upon citizenship, but is declaratory only of the existing law, and in support of this view the language used in Slaughter-House Cases, 16 Wall. 36 (*supra*, p. 18), is quoted at length.]

The only adjudication that has been made by this court upon the meaning of the clause, "and subject to the jurisdiction thereof," in the leading provision of the Fourteenth Amendment, is Elk *v.* Wilkins, 112 U. S. 94, in which it was decided that an Indian born a member of one of the Indian tribes within the United States, which still existed and was recognized as an Indian tribe by the United States, who had voluntarily separated himself from his tribe, and taken up his residence among the white citizens of a State, but who did not appear to have been naturalized, or taxed, or in any way recognized or treated as a citizen, either by the United States or by the State, was not a citizen of the United States, as a person born in the United States, "and subject to the jurisdiction thereof," within the meaning of the clause in question.[1]

That decision was placed upon the grounds, that the meaning of those words was, "not merely subject in some respect or degree to the jursidiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance;" that by the Constitution, as originally established, "Indians not taxed" were excluded from the persons according to whose numbers representatives in Congress and direct taxes were apportioned among the several States, and Congress was empowered to regulate commerce, not only "with foreign nations," and among the several States, but "with the Indian tribes;" that the Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign States, but were alien nations, distinct political communities, the members of which owed immediate allegiance to their several tribes, and were not part of the people of the United States; that the alien and dependent condition of the members of one of those tribes could not be put off at their own will, without the action or assent of the United States; and that they were never deemed citizens, except when naturalized,

[1] [But now see provisions of act of 1887, 24 Stat. 388, by which Indians may become citizens.]

collectively or individually, under explicit provisions of a treaty, or of an act of Congress; and, therefore, that "Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more 'born in the United States, and subject to the jurisdiction thereof,' within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States of ambassadors or other public ministers of foreign nations." And it was observed that the language used, in defining citizenship, in the first section of the Civil Rights Act of 1866, by the very Congress which framed the Fourteenth Amendment, was "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed." 112 U. S. 99–103.

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The decision in Elk *v.* Wilkins concerned only members of the Indian tribes within the United States, and had no tendency to deny citizenship to children born in the United States of foreign parents of Caucasian, African, or Mongolian descent, not in the diplomatic service of a foreign country.

The real object of the Fourteenth Amendment of the Constitution in qualifying the words, "All persons born in the United States," by the addition, "and subject to the jurisdiction thereof," would appear to have been to exclude, by the fewest and fittest words (besides children of members of the Indian tribes, standing in a peculiar relation to the national government, unknown to the common law), the two classes of cases, — children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State, — both of which as has already been shown, by the law of England, and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country. Calvin's Case, 7 Coke, 1, 18 *b;* Cockburn on Nationality, 7; Dicey, Conflict of Laws, 177; Inglis *v.* Sailors' Snug Harbor, 3 Pet. 99, 155; 2 Kent Com. 39, 42.

[The case of The Exchange, 7 Cranch, 116, and opinions of Secretaries of State and Attorneys-General are quoted from at length.]

The foregoing considerations and authorities irresistibly lead us to these conclusions: The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or

of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The amendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. His allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory, is yet, in the words of Lord Coke, in Calvin's Case, 7 Coke, 6 *a*, "strong enough to make a natural subject, for if he hath issue here, that issue is a natural-born subject;" and his child, as said by Mr. Binney in his essay before quoted, "if born in the country, is as much a citizen as the natural-born child of a citizen, and by operation of the same principle." It can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides — seeing that, as said by Mr. Webster, when Secretary of State, in his Report to the President on Thrasher's case in 1851, and since repeated by this court, "independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance or of renouncing any former allegiance, it is well known that, by the public law, an alien, or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason, or other crimes, as a native-born subject might be, unless his case is varied by some treaty stipulations." Ex. Doc. H. R. No. 10, 1st sess. 32d Congress, p. 4; 6 Webster's Works, 526; United States *v.* Carlisle, 16 Wall. 147, 155; Calvin's Case, 7 Coke, 6 *a*; Ellesmere, Postnati, 63; 1 Hale P. C. 62; 4 Bl. Com. 74, 92.

To hold that the Fourteenth Amendment of the Constitution excludes from citizenship the children, born in the United States of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States.

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The acts of Congress, known as the Chinese Exclusion Acts, the earliest of which was passed some fourteen years after the adoption of the constitutional amendment, cannot control its meaning, or impair its effect, but must be construed and executed in subordination to its provisions. And the right of the United States, as exercised by and under those acts, to exclude or to expel from the country persons of the Chinese race, born in China, and continuing

to be subjects of the Emperor of China, though having acquired a commercial domicile in the United States, has been upheld by this court, for reasons applicable to all aliens alike, and inapplicable to citizens, of whatever race or color. Chae Chan Ping *v.* United States, 130 U. S. 581; Nishimura Ekiu *v.* United States, 142 U. S. 651; Fong Yue Ting *v.* United States, 149 U. S. 698; Lem Moon Sing *v.* United States, 158 U. S. 538; Wong Wing *v.* United States, 163 U. S. 228.

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It is true that Chinese persons born in China cannot be naturalized, like other aliens, by proceedings under the naturalization laws. But this is for want of any statute or treaty authorizing or permitting such naturalization, as will appear by tracing the history of the statutes, treaties, and decisions upon that subject — always bearing in mind that statutes enacted by Congress, as well as treaties made by the President and Senate, must yield to the paramount and supreme law of the Constitution.

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The fact, therefore, that acts of Congress or treaties have not permitted Chinese persons born out of this country to become citizens by naturalization, cannot exclude Chinese persons born in this country from the operation of the broad and clear words of the Constitution, "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States."

VII. Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth. No doubt he might himself, after coming of age, renounce this citizenship, and become a citizen of the country of his parents, or of any other country; for by our law, as solemnly declared by Congress, "the right of expatriation is a natural and inherent right of all people," and "any declaration, instruction, opinion, order, or direction of any officer of the United States, which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic." Rev. Stat. § 1999, re-enacting act of July 27, 1868, c. 249, § 1; 15 Stat. 223, 224. Whether any act of himself, or of his parents, during his minority, could have the same effect, is at least doubtful. But it would be out of place to pursue that inquiry; inasmuch as it is expressly agreed that his residence has always been in the United States, and not elsewhere; that each of his temporary visits to China, the one for some months when he was about seventeen years old, and the other for something like a year about the time of his coming of age, was made with the intention of returning, and was followed by his actual return, to the United States; and "that said Wong Kim Ark has not, either by himself or his parents acting for him, ever renounced his allegiance to the

United States, and that he has never done or committed any act or thing to exclude him therefrom."

The evident intention, and the necessary effect, of the submission of this case to the decision of the court upon the facts agreed by the parties, were to present for determination the single question, stated at the beginning of this opinion, namely, whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States. For the reasons above stated, this court is of opinion that the question must be answered in the affirmative. *Order affirmed.*[1]

[1] MR. CHIEF JUSTICE FULLER delivered a dissenting opinion (MR. JUSTICE HARLAN concurring), in which the following language was used: —

"I think it follows that the children of Chinese born in this country do not, *ipso facto*, become citizens of the United States unless the Fourteenth Amendment overrides both treaty and statute. Does it bear that construction; or rather is it not the proper construction that all persons born in the United States of parents permanently residing here and susceptible of becoming citizens, and not prevented therefrom by treaty or statute, are citizens, and not otherwise?

"But the Chinese under their form of government, the treaties and statutes, cannot become citizens nor acquire a permanent home here, no matter what the length of their stay may be. Wharton, Confl. Laws, § 12.

"In Fong Yue Ting *v.* United States, 149 U. S. 698, 717, it was said in respect of the treaty of 1868: 'After some years' experience under that treaty, the government of the United States was brought to the opinion that the presence within our territory of large numbers of Chinese laborers, of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests; and therefore requested and obtained from China a modification of the treaty.'

"It is not to be admitted that the children of persons so situated become citizens by the accident of birth. On the contrary, I am of opinion that the President and Senate by treaty, and the Congress by naturalization, have the power, notwithstanding the Fourteenth Amendment, to prescribe that all persons of a particular race, or their children, cannot become citizens, and that it results that the consent to allow such persons to come into and reside within our geographical limits does not carry with it the imposition of citizenship upon children born to them while in this country under such consent, in spite of treaty and statute.

"In other words, the Fourteenth Amendment does not exclude from citizenship by birth children born in the United States of parents permanently located therein, and who might themselves become citizens; nor, on the other hand, does it arbitrarily make citizens of children born in the United States of parents who, according to the will of their native government and of this government, are and must remain aliens."

[As to citizenship of inhabitants of territory annexed to the United States, see cases in Appendix B, p. 1119. As to the administration of alien exclusion laws see the case of United States *v.* Ju Toy, 198 U. S. 253, Appendix D, p. 1281.]

b. *Privileges and Immunities of Citizens.*

TWINING *v.* NEW JERSEY.

211 U. S. 78; 29 Sup. Ct. Rep. 14. 1908.

[See *supra*, p. 17.]

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SLAUGHTER-HOUSE CASES.

16 Wallace, 36. 1872.

[See *supra*, p. 18.]

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UNITED STATES *v.* CRUIKSHANK.

92 United States, 542. 1875.

[See *supra*, p. 31.]

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CIVIL RIGHTS CASES.

109 United States, 3. 1883.

[See *supra*, p. 37, in note.]

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## SECTION II. — SUFFRAGE AND ELECTIONS.

MINOR *v.* HAPPERSETT.

21 Wallace, 162. 1874.

[THIS action was brought in the State courts of Missouri by plaintiff, a person who would have been entitled to vote under the constitution and laws of Missouri save for the fact that she was a woman, to recover damages against the defendant, a registrar of voters in the State of Missouri, for refusing to register her as a duly qualified elector. The decision of the Supreme Court of Missouri sustaining the lower court was that the provisions of the constitution and laws of Missouri, restricting the elective franchise

to males, was not in violation of the Federal Constitution, and plaintiff brought the cause to this court by writ of error.]

Mr. Chief Justice Waite delivered the opinion of the court.

The question is presented in this case, whether, since the adoption of the Fourteenth Amendment, a woman, who is a citizen of the United States and of the State of Missouri, is a voter in that State, notwithstanding the provision of the constitution and laws of the State, which confine the right of suffrage to men alone. We might, perhaps, decide the case upon other grounds, but this question is fairly made. From the opinion we find that it was the only one decided in the court below, and it is the only one which has been argued here. The case was undoubtedly brought to this court for the sole purpose of having that question decided by us, and in view of the evident propriety there is of having it settled, so far as it can be by such a decision, we have concluded to waive all other considerations and proceed at once to its determination.

It is contended that the provisions of the constitution and laws of the State of Missouri, which confine the right of suffrage and registration therefor to men, are in violation of the Constitution of the United States, and therefore void. The argument is, that as a woman, born or naturalized in the United States and subject to the jurisdiction thereof, is a citizen of the United States and of the State in which she resides, she has the right of suffrage as one of the privileges and immunities of her citizenship, which the State cannot by its laws or constitution abridge.

There is no doubt that women may be citizens. They are persons, and by the Fourteenth Amendment "all persons born or naturalized in the United States and subject to the jurisdiction thereof" are expressly declared to be "citizens of the United States and of the State wherein they reside." But, in our opinion, it did not need this amendment to give them that position. Before its adoption the Constitution of the United States did not in terms prescribe who should be citizens of the United States or of the several States, yet there were necessarily such citizens without such provision. There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.

For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words "subject," "inhabitant," and "citizen" have been used, and the choice between them is sometimes made to depend upon the

form of the government. Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the States upon their separation from Great Britain, and was afterwards adopted in the Articles of Confederation and in the Constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation, and nothing more.

To determine, then, who were citizens of the United States before the adoption of the amendment it is necessary to ascertain what persons originally associated themselves together to form the nation, and what were afterwards admitted to membership.

Looking at the Constitution itself we find that it was ordained and established by "the people of the United States" (Preamble, 1 Stat. 10), and then going further back, we find that these were the people of the several States that had before dissolved the political bands which connected them with Great Britain, and assumed a separate and equal station among the powers of the earth (Declaration of Independence, 1 Stat. 1), and that had by Articles of Confederation and Perpetual Union, in which they took the name of "the United States of America," entered into a firm league of friendship with each other for their common defence, the security of their liberties and their mutual and general welfare, binding themselves to assist each other against all force offered to or attack made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever (Articles of Confederation, § 3, 1 Stat. 4).

Whoever, then, was one of the people of either of these States when the Constitution of the United States was adopted, became *ipso facto* a citizen — a member of the nation created by its adoption. He was one of the persons associating together to form the nation, and was, consequently, one of its original citizens. As to this there has never been a doubt. Disputes have arisen as to whether or not certain persons or certain classes of persons were part of the people at the time, but never as to their citizenship if they were.

Additions might always be made to the citizenship of the United States in two ways: first, by birth, and second, by naturalization. This is apparent from the Constitution itself, for it provides (Article 2, § 1) that "no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of the Constitution, shall be eligible to the office of President" (Article 1, § 8), and that Congress shall have power "to establish a uniform rule of naturalization." Thus new citizens may be born or they may be created by naturalization.

[Legislation as to naturalization is referred to, indicating that alien women and alien minors may become citizens by naturaliza-

tion. Other Federal legislation is referred to, the character of which indicates that women are citizens and entitled to all the privileges and immunities of citizenship.]

If the right of suffrage is one of the necessary privileges of a citizen of the United States, then the constitution and laws of Missouri confining it to men are in violation of the Constitution of the United States, as amended, and consequently void. The direct question is, therefore, presented whether all citizens are necessarily voters.

The Constitution does not define the privileges and immunities of citizens. For that definition we must look elsewhere. In this case we need not determine what they are, but only whether suffrage is necessarily one of them.

. . . . . .

The [Fourteenth] Amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it. Indirectly it may have had that effect, because it may have increased the number of citizens entitled to suffrage under the constitution and laws of the States, but it operates for this purpose, if at all, through the States and the State laws, and not directly upon the citizen.

It is clear, therefore, we think, that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted. This makes it proper to inquire whether suffrage was co-extensive with the citizenship of the States at the time of its adoption. If it was, then it may with force be argued that suffrage was one of the rights which belonged to citizenship, and in the enjoyment of which every citizen must be protected. But if it was not, the contrary may with propriety be assumed.

[The early constitutions of the State are referred to as indicating that in all the States at the time the Federal Constitution was adopted the right to vote was not conferred upon all citizens. Article 4, § 2, and the Fourteenth and Fifteenth Amendments of the Federal Constitution are referred to as indicating that the privileges and immunities of the citizens in the several States do not include the right of suffrage.]

It is true that the United States guarantees to every State a republican form of government (Constitution, Article 4, § 4). It is also true that no State can pass a bill of attainder (Article 1, § 10), and that no person can be deprived of life, liberty, or property without due process of law (ib. Amendment 5). All these several provisions of the Constitution must be construed in connection with the other parts of the instrument, and in the light of the surrounding circumstances.

The guaranty is of a republican form of government. No par-

ticular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended.

The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. In all the people participated to some extent, through their representatives elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution.

As has been seen, all the citizens of the States were not invested with the right of suffrage. In all, save perhaps New Jersey, this right was only bestowed upon men and not upon all of them. Under these circumstances it is certainly now too late to contend that a government is not republican, within the meaning of this guaranty in the Constitution, because women are not made voters.

. . . . . .

Besides this, citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage. Thus, in Missouri, persons of foreign birth, who have declared their intention to become citizens of the United States, may under certain circumstances vote. The same provision is to be found in the constitutions of Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Minnesota, and Texas.

Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be.

We have given this case the careful consideration its importance demands. If the law is wrong, it ought to be changed; but the power for that is not with us. The arguments addressed to us bearing upon such a view of the subject may perhaps be sufficient to induce those having the power, to make the alteration, but they ought not to be permitted to influence our judgment in determining the present rights of the parties now litigating before us. No argument as to woman's need of suffrage can be considered. We can only act upon her rights as they exist. It is not for us to look at the hardship of withholding. Our duty is at an end if we find it is within the power of a State to withhold.

Being unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one, and that the constitutions and laws of the several States which commit that important trust to men alone are not necessarily void, we

*Affirm the judgment.*[1]

[1] In the case of WILEY *v.* SINKLER, 179 U. S. 58, 21 Sup. Ct. Rep. 17 (1900), it is held that the right to vote for members of Congress has its foundation in the Constitution of the United States. "This is clearly and amply set forth in *Ex parte* Yarbrough, 110 U. S. 651, in which this court, speaking by Mr. Justice Miller, upheld a conviction in a Circuit Court of the United States under sections 5508 and 5520 of the Revised Statutes for a conspiracy to intimidate a citizen of the United States in the exercise of his right to vote for a member of Congress; and answered the proposition 'that the right to vote for a member of Congress is not dependent upon the Constitution or laws of the United States, but is governed by the law of each State respectively,' as follows: 'But it is not correct to say that the right to vote for a member of Congress does not depend on the Constitution of the United States. The office, if it be properly called an office, is created by that Constitution and by that alone. It also declares how it shall be filled, namely, by election. Its language is "The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the state legislature." Art. 1, sec. 2. The States, in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualification for voters for those *eo nomine*. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress. It is not true, therefore, that electors for members of Congress owe their right to vote to the State law in any sense which makes the exercise of the right to depend exclusively on the law of the State.' 110 U. S. 663."

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EX PARTE SIEBOLD.

100 United States, 371. 1879.

[See *supra*, p. 56.]

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## SECTION III. — RIGHTS TO ASSEMBLE AND TO BEAR ARMS.

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UNITED STATES *v.* CRUIKSHANK.

92 United States, 542. 1875.

[See *supra*, p. 31.]

# CHAPTER XV.

## PROTECTION TO PERSONS ACCUSED OF CRIME.

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### CALDER *v.* BULL.

3 Dallas, 386; 1 Curtis, 269. 1798.

CHASE, J. 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 second Thursday of May, 1795, passed a resolution or law, which, for the reasons assigned, set aside a decree of the Court of Probate for Hartford, on the 21st of March, 1793, which decree disapproved of the will of Normand Morrison, the grandson, made the 21st of 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, who, on the 27th of 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, who, at February term, 1796, affirmed the decree of the Court of Probate. Appeal was had to the Supreme Court of Errors of Connecticut, who, in June, 1796, adjudged that there were no errors. More than eighteen months elapsed from the decree of the Court of Probate, on the 1st of March, 1793, and thereby Caleb Bull and wife were barred of all right 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.

[The question whether the legislature of a State can revise and correct by law a decision of a court of justice is also considered. On this question see Taylor *v.* Place, 4 R. I. 324, *supra*, p. 79.]

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 their 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;[1] 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;[2] at other times they inflicted punishments where the party was not by law liable to any punishment;[3] and in other cases they inflicted greater punishment than the law annexed to the offence.[4] 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 Constitution of the United States, art. 1, s. 9, prohibits the Legislature of the United States from passing any *ex post facto* law; and in sec. 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.

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

[1] The case of the Earl of Strafford, in 1640.

[2] The case of Sir John Fenwick, in 1696.

[3] The banishment of Lord Clarendon, 1667, 19 Car. II. c. 10; and of Bishop Atterbury, in 1723, 9 Geo. I. c. 17.

[4] The Conventry Act, in 1670, 22 & 23 Car. II. c. 1.

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, — 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. 3d. 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 offence, in order to convict the offender. 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, whom I esteem superior to both, for his extensive and accurate knowledge of the true principles of government.

[The other judges of the court delivered opinions and the decree of the Supreme Court of Errors of Connecticut was affirmed, all concurring.] [1]

[1] In KRING *v.* MISSOURI, 107 U. S. 221 (1882), it appeared that plaintiff in error had been put on trial under an indictment charging him with murder in the first degree, but had pleaded guilty of murder in the second degree, and had thereupon been sentenced for that offence. Subsequently, on appeal, he secured a reversal of this sentence, and the case was remanded to the lower court for further proceedings. Thereupon he refused to withdraw his plea of murder in the second degree, and refused to plead not guilty to the indictment for murder in the first degree; but the court set aside his plea of guilty, interposed for him a plea of not guilty, and he was tried and convicted for murder in the first degree. It appeared that by the law recognized in Missouri at the time the crime was committed, a conviction for the second degree under a charge of the first degree of the offence, amounted to an acquittal of so much of the crime charged as would constitute murder in the first degree, but subsequently, and before the last trial, it had been provided by an amendment to the constitution of the State that after the reversal of a conviction for a lower degree defendant could be again put on trial for the original charge. Kring insisted that, as to the offence charged as committed before this change in the constitution, such change was *ex post facto*. MR. JUSTICE MILLER, delivering the opinion of the court, quoted from the opinion in Calder *v.* Bull, which is given above, and continued as follows:—

"But it is not to be supposed that the opinion in that case undertook to define, by way of exclusion, all the cases to which the constitutional provision would be applicable.

"Accordingly, in a subsequent case tried before Mr. Justice Washington, he said, in his charge to the jury, that 'an *ex post facto* law is one which, in its operation, makes that criminal which was not so at the time the action was performed; or which

increases the punishment, *or, in short, which, in relation to the offence or its consequences, alters the situation of a party to his disadvantage.*' United States *v.* Hall, 2 Wash. 366.

"He adds, by way of application to that case, which was for a violation of the embargo laws: 'If the enforcing law applies to this case, there can be no doubt that, so far as it *takes away or impairs the defence* which the law had provided the defendant at the time when the condition of this bond became forfeited, it is *ex post facto* and inoperative.'

"This case was carried to the Supreme Court and the judgment affirmed. 6 Cranch, 171.

"The new constitution of Missouri does take away what, by the law of the State when the crime was committed, was a good defence to the charge of murder in the first degree.

"In the subsequent cases of Cummings *v.* The State of Missouri and *Ex parte* Garland, 4 Wall. 277, 333, this court held that a law which excluded a minister of the gospel from the exercise of his clerical function, and a lawyer from practice in the courts, unless each would take an oath that they had not engaged in or encouraged armed hostilities against the government of the United States, was an *ex post facto* law, because it punished, in a manner not before punished by law, offences committed before its passage, and because it instituted a new rule of evidence in aid of conviction. This court was divided in that case, the minority being of opinion that the act in question was not a crimes act, and inflicted no punishment, in the judicial sense, for any past crime, but they did not controvert the proposition that if the act had that effect it was an *ex post facto* law.

"In these cases we have illustrations of the liberal construction which this court, and Mr. Justice Washington in the Circuit Court, gave to the words *ex post facto* law, — a construction in manifest accord with the purpose of the constitutional convention to protect the individual rights of life and liberty against hostile retrospective legislation.

"Nearly all the States of the Union have similar provisions in their constitutions, and whether they have or not, they all recognize the obligatory force of this clause of the Federal Constitution on their legislation."

The opinion of the Supreme Court of Missouri, from which the case was brought to this court by writ of error, is considered at length, and to the position taken in that court that the change made in the constitution of Missouri related to procedure only, and therefore did not constitute an *ex post facto* law within the prohibition of the Federal Constitution, it was decided that a change in procedure might alter the situation of the party to his disadvantage, and might therefore be an *ex post facto* law, and unconstitutional. The decision of the Supreme Court of Missouri was therefore reversed.

MR. JUSTICE MATHEWS delivered a dissenting opinion, in which MR. CHIEF JUSTICE WAITE, MR. JUSTICE BRADLEY, and MR. JUSTICE GRAY concurred.

In THOMPSON *v.* UTAH, 170 U. S. 343 (1898), which, on another point, is given *supra*, on p. 831, MR. JUSTICE HARLAN, delivering the opinion of the court, discusses the question as to what is an *ex post facto* law, and uses the following language, which is not included in the portion of the opinion already given: —

"It is not necessary to review the numerous cases in which the courts have determined whether particular statutes come within the constitutional prohibition of *ex post facto* laws. It is sufficient now to say that a statute belongs to that class which by its necessary operation and 'in its relation to the offence, or its consequences, alters the situation of the accused to his disadvantage.' United States *v.* Hall, 2 Wash. C. C. 366; Kring *v.* Missouri, 107 U. S. 221, 228; Medley, petitioner, 134 U. S. 160, 171. Of course, a statute is not of that class unless it materially impairs the right of the accused to have the question of his guilt determined according to the law as it was when the offence was committed. And, therefore, it is well settled that the accused is not entitled of right to be tried in the exact mode, in all respects, that may be prescribed for the trial of criminal cases at the time of the commission of the offence charged against him. Cooley in his Treatise on Constitutional Limitations, c. 9, 6th ed. p. 326, after referring to some of the adjudged cases relating to *ex post facto* laws,

## MACKIN *v.* UNITED STATES.

117 United States, 417. 1885.

[PLAINTIFF in error was prosecuted by information in the District Court of the United States for the Northern District of Illinois under section 5440 of the Revised Statutes for conspiring to commit offences against the United States, defined by sections 5403, 5511, and 5512 of the Revised Statutes relating to election of representatives in Congress. Being convicted and sentenced to pay a fine of $5,000 and to be imprisoned for two years in the penitentiary of the State of Illinois (which sentence was within the penalty authorized by R. S. sec. 5440), the defendant took the case by writ of error to the Circuit Court, where the two judges were divided in opinion on the question whether the crime charged against defendant was an infamous crime for which he could not be prosecuted except by indictment; and on certificate of division on this question, the case came to this court.]

MR. JUSTICE GRAY delivered the opinion of the court.

In *Ex parte* Wilson, 114 U. S. 417, it was adjudged by this court, upon full consideration, that a crime punishable by imprisonment for a term of years at hard labor was an infamous crime, within the meaning of the Fifth Amendment of the Constitution of the United States, which declares that "No person shall be held to answer for a

says: 'But so far as mere modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime.' And this view was substantially approved by this court in Kring *v.* Missouri, above cited. So, in Hopt *v.* Utah, 110 U. S. 574, 590, it was said that no one had a vested right in mere modes of procedure, and that it was for the State, upon grounds of public policy, to regulate procedure at its pleasure. This court, in Duncan *v.* Missouri, 152 U. S. 377, 382, said that statutes regulating procedure, if they leave untouched all the substantial protections with which existing law surrounds the person accused of crime, are not within the constitutional inhibition of *ex post facto* laws. But it was held in Hopt *v.* Utah, above cited, that a statute that takes from the accused a substantial right given to him by the law in force at the time to which his guilt relates would be *ex post facto* in its nature and operation, and that legislation of that kind cannot be sustained simply because, in a general sense, it may be said to regulate procedure. The difficulty is not so much as to the soundness of the general rule that an accused has no vested right in particular modes of procedure, as in determining whether particular statutes by their operation take from an accused any right that was regarded, at the time of the adoption of the Constitution, as vital for the protection of life and liberty, and which he enjoyed at the time of the commission of the offence charged against him."

capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury;" and therefore could not be prosecuted by information in any court of the United States.

The reasons for that judgment, without undertaking to recapitulate them in detail, or to restate the authorities cited in their support, may be summed up as follows: The Fifth Amendment had in view the rule of the common law, governing the mode of prosecuting those accused of crime, by which an information by the Attorney General, without the intervention of a grand jury, was not allowed for a capital crime, nor for any felony; rather than the rule of evidence, by which those convicted of crimes of a certain character were disqualified to testify as witnesses. In other words, of the two kinds of infamy known to the law of England before the Declaration of Independence, the Constitutional amendment looked to the one founded on the opinions of the people respecting the mode of punishment, rather than to that founded on the construction of law respecting the future credibility of the delinquent. The leading word "capital" describing the crime by its punishment only, the associated words "or otherwise infamous crime," must, by an elementary rule of construction, be held to include any crime subject to an infamous punishment, even if they should be held to include also crimes infamous in their nature, independently of the punishment affixed to them. Having regard to the object and terms of the amendment, as well as to the history of its proposal and adoption, and to the early understanding and practice under it, no person can be held to answer, without presentment or indictment by a grand jury, for any crime for which an infamous punishment may lawfully be imposed by the court. The test is whether the crime is one for which the statutes authorize the court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one; when the accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be put upon his trial, except on the accusation of a grand jury. The Constitution protecting every one from being prosecuted in a court of the United States, without the intervention of a grand jury, for any crime which is subject by law to an infamous punishment, no declaration of Congress is needed to secure, or competent to defeat, the constitutional safeguard. What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another; and for more than a century, imprisonment at hard labor in the State prison or penitentiary has been considered an infamous punishment in England and America.

. . . . . .

How far a convict sentenced by a court of the United States to imprisonment in a State prison or penitentiary, and not in terms sentenced to hard labor, can be put to work, either as part of his punishment, or as part of the discipline and treatment of the prison,

was much discussed at the bar, but we have not found it necessary to dwell upon it, because we cannot doubt that at the present day imprisonment in a State prison or penitentiary, with or without hard labor, is an infamous punishment. It is not only so considered in the general opinion of the people, but it has been recognized as such in the legislation of the States and Territories, as well as of Congress.

. . . . . .

But the most conclusive evidence of the opinion of Congress upon this subject is to be found in the act conferring on the Police Court of the District of Columbia "original and exclusive jurisdiction of all offences against the United States, committed in the District, not deemed capital or otherwise infamous crimes, that is to say, of all simple assaults and batteries, and all other misdemeanors not punishable by imprisonment in the penitentiary." Act of June 17, 1870, ch. 133, § 1, 16 Stat. 153; Rev. Stat. D. C. § 1049. "Infamous crimes" are thus in the most explicit words defined to be those "punishable by imprisonment in the penitentiary."

The result is, that all the crimes charged against the defendants in this information are infamous crimes, within the meaning of the Fifth Amendment of the Constitution, and that the defendants cannot be held to answer in the courts of the United States for any of those crimes, otherwise than on a presentment or indictment of a grand jury; and therefore the first question certified must be answered in the affirmative, and the second question in the negative, and the other questions certified become immaterial.

*Ordered accordingly.*

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## HALLINGER v. DAVIS.

146 United States, 314. 1892.

[HALLINGER made application to the Circuit Court of the United States for the District of New Jersey for a writ of *habeas corpus* to relieve him from imprisonment under sentence in a State court for murder. In the State court he had plead guilty, and in accordance with the statutes of the State the court without a jury had by examination of witnesses determined the degree of the crime and adjudged him guilty of murder in the first degree, and condemned him to be hanged.]

MR. JUSTICE SHIRAS delivered the opinion of the court.

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It is contended on behalf of the appellant that the judgment and sentence of the Court of Oyer and Terminer of Hudson County, New Jersey, whereby he is deprived of his liberty and condemned to be

hanged, are void, because the Act of Criminal Procedure of the State of New Jersey, in pursuance of the provisions of which such judgment and sentence were rendered, is repugnant to the Fourteenth Amendment of the Constitution of the United States, which is in these words: "Nor shall any State deprive any person of life, liberty, or property without due process of law." Such repugnancy is supposed to be found in the proposition that a verdict by a jury is an essential part in prosecutions for felonies, without which the accused cannot be said to have been condemned by "due process of law;" and that any act of a State legislature providing for the trial of felonies otherwise than by a common law jury, composed of twelve men, would be unconstitutional and void.

Upon the question of the right of one charged with crime to waive a trial by jury, and elect to be tried by the court, when there is a positive legislative enactment, giving the right so to do, and conferring power on the court to try the accused in such a case, there are numerous decisions by State courts, upholding the validity of such proceeding. Dailey *v.* State, 4 Ohio St. 57; Dillingham *v.* State, 5 Ohio St. 280; People *v.* Noll, 20 Cal. 164; State *v.* Worden, 46 Conn. 349; State *v.* Albee, 61 N. H. 423, 428.

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The decisions already cited sufficiently show that the State courts hold that trials had under the provisions of statutes authorizing persons accused of felonies to waive a jury trial, and to submit the degree of their guilt to the determination of the courts, are "due process of law." While these decisions are not conclusive upon this court, yet they are entitled to our respectful consideration.

[Several cases relating to the question whether due process of law necessitates a trial by jury are considered, among them, *Ex parte* Wall, 107 U. S. 265, *supra*, p. 903, and Hurtado *v.* California, 110 U. S. 516, *supra*, p. 905.]

Applying the principles of these decisions to the case before us, we are readily brought to the conclusion that the appellant, in voluntarily availing himself of the provisions of the statute and electing to plead guilty, was deprived of no right or privilege within the protection of the Fourteenth Amendment. The trial seems to have been conducted in strict accordance with the forms prescribed by the constitution and laws of the State, and with special regard to the rights of the accused thereunder. The court refrained from at once accepting his plea of guilty, assigned him counsel, and twice adjourned, for a period of several days, in order that he might be fully advised of the truth, force, and effect of his plea of guilty. Whatever might be thought of the wisdom in departing, in capital cases, from time-honored procedure, there is certainly nothing in the present record to enable this court to perceive that the rights of the appellant, so far as the laws and Constitution of the United States are concerned, have been in anywise infringed.

Other propositions are discussed in the brief of the appellant's counsel, but they are either without legal foundation or suggest questions that are not subject to our revision.

The judgment of the Circuit Court is *Affirmed.*

MR. JUSTICE HARLAN assents to the conclusion, but does not agree in all the reasoning of the opinion.[1]

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## BOYD *v.* UNITED STATES.

116 United States, 616. 1886.

[See *supra*, p. 885.]

[1] In HARRIS *v.* PEOPLE, 128 Ill. 585 (1889), the question was raised whether a conviction in a criminal prosecution in which defendant had waived a jury trial, and the trial was by the court without a jury, was valid. MR. JUSTICE BAILEY, delivering the opinion of the court, cites the provisions of the constitution and statutes of the State expressly guaranteeing and preserving the right of jury trial in criminal cases, and then proceeds as follows: —

"A jury of twelve men being the only legally constituted tribunal for the trial of an indictment for a felony, it necessarily follows that the court or judge is not such tribunal, and that in the absence of a jury he has by law no jurisdiction. There is no law which authorizes him to sit as a substitute for a jury and perform their functions in such cases, and if he attempts to do so, his act must be regarded as nugatory. Especially must this be true where the jury are not only the judges of the facts as at common law, but are also the judges of the law as provided by our statute.

"But it is said that the right to a trial by a jury is a right which the defendant may waive. This may be admitted, since every plea of guilty is, in legal effect, a waiver of the right to a trial by the legally constituted tribunal. But while a defendant may waive his right to a jury trial, he cannot, by such waiver, confer jurisdiction to try him upon a tribunal which has no such jurisdiction by law. Jurisdiction of the subject-matter must always be derived from the law and not from the consent of the parties, but in the present case jurisdiction is sought to be based, not upon any law conferring it, but upon the defendant's consent and agreement to waive a jury and submit her cause to the court for trial. 'It is a maxim in the law that consent can never confer jurisdiction; by which is meant that the consent of the parties cannot empower a court to act upon subjects which are not submitted to its determination and judgment by the law. The law creates courts, and upon considerations of general public policy defines and limits their jurisdiction; and this can neither be enlarged nor restricted by the act of the parties.' Cooley's Const. Lim. 398.

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"We are of the opinion, then, both upon principle and authority, that the criminal court had no legal power to try the defendant without a jury, notwithstanding her consent and agreement in that behalf, and that the trial and conviction are therefore erroneous. The judgment will be reversed and the cause remanded."

## BROWN *v.* WALKER.

161 United States, 591. 1896.

[PETITIONER Brown applied to the Circuit Court of the United States to be relieved from imprisonment under commitment for contempt in refusing to answer as a witness before a grand jury of the District Court of the United States for the Western District of Pennsylvania in relation to a charge under investigation by that body against certain officers and agents of a railway company, of which Brown was also an officer, for alleged violation of the Interstate Commerce Act. His petition was refused and he was remanded to custody (70 Fed. Rep. 46). He thereupon appealed to this court.]

MR. JUSTICE BROWN, after stating the facts, delivered the opinion of the court.

This case involves an alleged incompatibility between that clause of the Fifth Amendment to the Constitution, which declares that no person "shall be compelled in any criminal case to be a witness against himself," and the act of Congress of February 11, 1893, c. 83, 27 Stat. 443, which enacts that "no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission or in obedience to the subpœna of the commission, . . . on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpœna or the subpœna of either of them, or in any such case or proceeding."

The act is supposed to have been passed in view of the opinion of this court in Counselman *v.* Hitchcock, 142 U. S. 547, to the effect that section 860 of the Revised Statutes, providing that no evidence given by a witness shall be used against him, his property or estate, in any manner, in any court of the United States, in any criminal proceeding, did not afford that complete protection to the witness which the amendment was intended to guarantee. The gist of that decision is contained in the following extracts from the opinion of Mr. Justice Blatchford, referring to section 860: "It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and

if he had refused to answer, he could not possibly have been convicted." And again: "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution, after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecutions for the offence to which the question relates."

The inference from this language is that, if the statute does afford such immunity against future prosecution, the witness will be compellable to testify. . . . To meet this construction of the constitutional provision, the act in question was passed, exempting the witness from any prosecution on account of any transaction to which he may testify. The case before us is whether this sufficiently satisfies the constitutional guaranty of protection.

The clause of the Constitution in question is obviously susceptible of two interpretations. If it be construed literally, as authorizing the witness to refuse to disclose any fact which might tend to incriminate, disgrace, or expose him to unfavorable comments, then as he must necessarily to a large extent determine upon his own conscience and responsibility whether his answer to the proposed question will have that tendency (1 Burr's Trial, 244; Fisher *v.* Ronalds, 12 C. B. 762; Reynell *v.* Sprye, 1 De Gex, McN. & G. 656; Adams *v.* Lloyd, 3 H. & N. 351; Merluzzi *v.* Gleeson, 59 Md. 214; Bunn *v.* Bunn, 4 De Gex, J. & S. 316; *Ex parte* Reynolds, 20 Ch. Div. 294; *Ex parte* Schofield, 6 Ch. Div. 230), the practical result would be, that no one could be compelled to testify to a material fact in a criminal case, unless he chose to do so, or unless it was entirely clear that the privilege was not set up in good faith. If, upon the other hand, the object of the provision be to secure the witness against a criminal prosecution, which might be aided directly or indirectly by his disclosure then, if no such prosecution be possible, — in other words, if his testimony operate as a complete pardon for the offence to which it relates, — a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the clause in question.

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The maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which have long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions

of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier State trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.

Stringent as the general rule is, however, certain classes of cases have always been treated as not falling within the reason of the rule, and, therefore, constituting apparent exceptions. When examined, these cases will all be found to be based upon the idea that, if the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness, the rule ceases to apply, its object being to protect the witness himself and no one else — much less that it shall be made use of as a pretext for securing immunity to others.

[The exceptions referred to and sustained at some length by citations of authorities are the following: Waiver of the privilege by disclosing criminal connection with the offence, after which a full disclosure may be required; waiver of the privilege under the statutes allowing defendant to testify, after which he may be subjected to full cross-examination; cases where the prosecution is barred by the statute of limitations; cases where the evidence might tend to bring the witness into disrepute without fixing criminal culpability; cases where the witness has been pardoned for the crime.]

All of the cases above cited proceed upon the idea that the prohibition against his being compelled to testify against himself pre supposes a legal detriment to the witness arising from the exposure. As the object of the first eight amendments to the Constitution was to incorporate into the fundamental law of the land certain principles of natural justice which had become permanently fixed in the jurisprudence of the mother country, the construction given to those principles by the English courts is cogent evidence of what they

were designed to secure and of the limitations that should be put upon them. This is but another application of the familar rule that where one State adopts the laws of another, it is also presumed to adopt the known and settled construction of those laws by the courts of the State from which they are taken. Cathcart *v.* Robinson, 5 Pet. 264, 280; McDonald *v.* Hovey, 110 U. S. 619.

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The act of Congress in question securing to witnesses immunity from prosecution is virtually an act of general amnesty, and belongs to a class of legislation which is not uncommon either in England (2 Taylor, Evidence, § 1455, where a large number of similar acts are collated) or in this country. Although the Constitution vests in the President "power to grant reprieves and pardons for offences against the United States, except in cases of impeachment," this power has never been held to take from Congress the power to pass acts of general amnesty, and is ordinarily exercised only in cases of individuals after conviction, although as was said by this court in *Ex parte* Garland, 4 Wall. 333, 380, "it extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment."

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It is argued in this connection that, while the witness is granted immunity from prosecution by the Federal government, he does not obtain such immunity against prosecution in the state courts. We are unable to appreciate the force of this suggestion. It is true that the Constitution does not operate upon a witness testifying in the State courts, since we have held that the first eight amendments are limitations only upon the powers of Congress and the Federal courts, and are not applicable to the several States, except so far as the Fourteenth Amendment may have made them applicable. Barron *v.* Baltimore, 7 Pet. 243; Fox *v.* Ohio, 5 How. 410; Withers *v.* Buckley, 20 How. 84; Twitchell *v.* Commonwealth, 7 Wall. 321; Presser *v.* Illinois, 116 U. S. 252.

There is no such restriction, however, upon the applicability of Federal statutes. The sixth article of the Constitution declares that "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

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The act in question contains no suggestion that it is to be applied only to the Federal courts. It declares broadly that "no person shall be excused from attending and testifying . . . before the Interstate Commerce Commission . . . on the ground . . . that the testi-

mony . . . required of him may tend to criminate him," etc. "But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify," etc. It is not that he shall not be prosecuted for or on account of any *crime* concerning which he may testify, which might possibly be urged to apply only to crimes under the Federal law and not to crimes, such as the passing of counterfeit money, etc., which are also cognizable under State laws; but the immunity extends to any *transaction, matter, or thing* concerning which he may testify, which clearly indicates that the immunity is intended to be general, and to be applicable whenever and in whatever court such prosecution may be had.

But even granting that there were still a bare possibility that by his disclosure he might be subjected to the criminal laws of some other sovereignty, that, as Chief Justice Cockburn said in Queen *v.* Boyes, 1 B. & S. 311, in reply to the argument that the witness was not protected by his pardon against an impeachment by the House of Commons, is not a real and probable danger, with reference to the ordinary operations of the law in the ordinary courts, but "a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct." Such dangers it was never the object of the provision to obviate.

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If, as was justly observed in the opinion of the court below, witnesses standing in Brown's position were at liberty to set up an immunity from testifying, the enforcement of the Interstate Commerce Law or other analogous acts, wherein it is for the interest of both parties to conceal their misdoings, would become impossible, since it is only from the mouths of those having knowledge of the inhibited contracts that the facts can be ascertained. While the constitutional provision in question is justly regarded as one of the most valuable prerogatives of the citizen, its object is fully accomplished by the statutory immunity, and we are, therefore, of opinion that the witness was compellable to answer, and that the judgment of the court below must be *Affirmed.*[1]

[1] MR. JUSTICE SHIRAS delivered a dissenting opinion, in which MR. JUSTICE GRAY and MR. JUSTICE WHITE concurred. MR. JUSTICE FIELD also delivered a dissenting opinion

## MATTOX *v.* UNITED STATES.

**156 United States, 237. 1895.**

[This is an appeal from a conviction in the District Court of the United States for the District of Kansas for murder alleged to have been committed within the Indian Territory. Questions of jurisdiction were raised and considered which are not here material. But it appears that during the trial a transcript of the evidence given in favor of the prosecution on a former trial of the same cause by witnesses since deceased, was admitted in evidence against the objection that the right of the accused by the Sixth Amendment to be confronted with the witnesses against him was violated. On this point the decision is as follows.]

Mr. Justice Brown delivered the opinion of the court.

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3. Upon the trial it was shown by the government that two of its witnesses on the former trial, namely, Thomas Whitman and George Thornton, had since died, whereupon a transcribed copy of the reporter's stenographic notes of their testimony upon such trial, supported by his testimony that it was correct, was admitted to be read in evidence, and constituted the strongest proof against the accused. Both these witnesses were present and were fully examined and cross-examined on the former trial. It is claimed, however, that the constitutional provision that the accused shall "be confronted with the witnesses against him" was infringed, by permitting the testimony of witnesses sworn upon the former trial to be read against him. No question is made that this may not be done in a civil case, but it is insisted that the reasons of convenience and necessity which excuse a departure from the ordinary course of procedure in civil cases cannot override the constitutional provision in question.

[Many decisions on the question in the courts of England and of the United States are referred to, and it is indicated that there is a conflict in the authorities.]

The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by

the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.

We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject — such as his ancestors had inherited and defended since the days of Magna Charta. Many of its provisions in the nature of a Bill of Rights are subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected. A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant. For instance, there could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations. They are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination; nor is the witness brought face to face with the jury; yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility. They are admitted not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice. As was said by the Chief Justice when this case was here upon the first writ of error (146 U. S. 140, 152), the sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath. If such declarations are admitted, because made by a person then dead, under circumstances which give his statements the same weight as if made under oath, there is equal if not greater reason for admitting testimony of his statements which were made under oath.

The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face

to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of, and many of the very cases which hold testimony such as this to be admissible also hold that not the substance of his testimony only, but the very words of the witness, shall be proven. We do not wish to be understood as expressing an opinion upon this point, but all the authorities hold that a copy of the stenographic report of his entire former testimony, supported by the oath of the stenographer that it is a correct transcript of his notes and of the testimony of the deceased witness, such as was produced in this case, is competent evidence of what he said.

[Other questions are considered. The judgment is affirmed.[1]]

[1] MR. JUSTICE SHIRAS delivered a dissenting opinion in which MR. JUSTICE GRAY and MR. JUSTICE WHITE concurred.

# CHAPTER XVI.

## PROTECTION TO CONTRACTS AND PROPERTY.

### SECTION I. — LAWS IMPAIRING THE OBLIGATION OF CONTRACTS.

### WOODRUFF *v.* TRAPNALL.

10 Howard, 190 ; 18 Curtis, 358. 1850.

M'LEAN, J., delivered the opinion of the court.

This case is before us on a writ of error to the Supreme Court of Arkansas.

An action was brought by the State of Arkansas, in the Pulaski Circuit Court, against the plaintiff in error, and his sureties, Chester Ashley and others, upon his official bond as late treasurer of State, for the recovery of a certain sum of money alleged to have been received by him, as treasurer, between the 27th day of October, 1836, and the 26th day of December, 1838. And a judgment was recovered against him and his securities, on the 13th of June, 1845, for $3,359.22 and costs. An execution having been issued on the judgment, on the 24th of February, 1847, the plaintiff tendered to the defendant in error, who prosecuted the suit as attorney-general, the full amount of the judgment, interest, and costs, in the notes of the Bank of the State of Arkansas, which were refused.

The above facts being stated in a petition to the Supreme Court of Arkansas on the 25th of February, 1847, an alternative *mandamus* was issued to Trapnall, the defendant in error, to receive the bank-notes in satisfaction of the judgment, or show cause why he shall refuse to do so.

On the return of the *mandamus*, the defendant admitted the judgment and tender of the notes ; but alleged that he was not authorized to receive them in satisfaction of the judgment, because the twenty-eighth section of the bank charter, under which alone the plaintiff could claim a right so to satisfy the judgment, was repealed by an act of the legislature, approved January 10, 1845.

It was agreed by the parties, that the record of the judgment should be made a part of the proceeding; that the defendant was the proper officer by law to receive satisfaction of the judgment; that the notes tendered were issued by the bank prior to the year 1840, and that down to the year 1845 the notes of the bank were received and paid out by the State, in discharge of all public dues; that the bank continues to exist with all its corporate functions.

The court were of opinion that the return of the defendant showed a sufficient cause for a refusal to obey the mandate of the writ, and gave judgment accordingly.

The twenty-eighth section of the bank charter, which was repealed by the act of 1845, provided "that the bills and notes of said institution shall be received in all payments of debts due to the State of Arkansas." And the question raised for consideration and decision is, whether the repeal of this section brings the case within the Constitution of the United States, which prohibits a State from impairing the obligations of a contract.

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The entire stock of the bank is owned by the State. It furnishes the capital and receives the profits. And, in addition to the credit given to the notes of the bank by the capital provided, the State declares in the charter, they shall be received in all payments of debts due to it. Is this a contract? A contract is defined to be an agreement between competent persons, to do or not to do a certain thing. The undertaking on the part of the State is, to receive the notes of the bank in payment from its debtors. This comes within the definition of a contract. It is a contract founded upon a good and valuable consideration; a consideration beneficial to the State, as its profits are increased by sustaining the credit, and consequently extending the circulation, of the paper of the bank.

With whom was this contract made? We answer, with the holders of the paper of the bank. The notes are made payable to bearer; consequently, every *bona fide* holder has a right, under the twenty-eighth section, to pay to the State any debt he may owe it, in the paper of the bank. It is a continuing guarantee by the State, that the notes shall be so received. Such a contract would be binding on an individual, and it is not less so on a State.

That the State had the right to repeal the above section may be admitted. And the emissions of the bank subsequently are without the guarantee. But the notes in circulation at the time of the repeal are not affected by it. The holder may still claim the right, by the force of the contract, to discharge any debt he may owe to the State in the notes thus issued.

It is argued that there could have been violated or impaired no contract with the plaintiff in error, as it does not appear he had the notes tendered by him in his possession at the time the twenty-eighth section was repealed.

It is admitted that he had the notes in his possession at the time he made the tender, and that they were issued by the bank before the repeal of the section; and nothing more than this could be required.

The guarantee of the State, that the notes of the bank should be received in discharge of public dues, embraced all the bills issued by it; the repeal of the guarantee was intended, no doubt, to exclude all the notes of the bank then in circulation. Until the repeal of the twenty-eighth section, the State continued to receive and pay out these notes. Up to that time, no one doubted the obligation of the State to receive them. The law was absolute and imperative on the officers of the State. The holder of the paper claimed the benefit of this obligation, and it is supposed his right could never have been questioned. The notes were payable to bearer, and the bearer was the only person who had a right to demand payment of the bank, or to pay them into the state treasury in discharge of a debt. The guarantee included all the notes of the bank in circulation as clearly as if on the face of every note the words had been engraved: "This note shall be received by the State in payment of debts." And that the legislature could not withdraw this obligation from the notes in circulation at the time the guarantee was repealed, is a position which can require no argument. Any one had a right to receive them, and to test the constitutionality of the repeal.

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A State can no more impair, by legislation, the obligation of its own contracts, than it can impair the obligation of the contracts of individuals. We naturally look to the action of a sovereign state to be characterized by a more scrupulous regard to justice, and a higher morality, than belong to the ordinary transactions of individuals. The obligation of the State of Arkansas to receive the notes of the bank, in payment of its debts, is much stronger than in the above case of individual guarantee.

The bank belonged to the State, and it realized the profits of its operations. It was conducted by the agents of the State, under the supervision of the legislature. By the guarantee, the notes of the bank, for the payment of debts to the State, were equal to gold and silver. This, to some extent, sustained their credit, and gave them currency. Loans were made by the bank on satisfactory security. The debts of the bank, or a large portion of them, may fairly be presumed to have been collected. But the means of the bank, thus under the control of the State, became exhausted. Whether this was the result of withdrawing the capital from the bank, by the State, does not appear upon the record. We only know the fact, that its funds have disappeared, leaving, it is said, a large amount of its paper, issued before the repeal of the guarantee, worthless, in the hands of the citizens of the State.

The obligation of the State to receive these notes is denied, on the ground that the twenty-eighth section was a general provision, liable

to be repealed at any time by the legislature. And it is compared to a general provision to receive, for public dues, the paper of banks generally, unconnected with the State. There is no analogy in the two cases. One is a question of public policy, influenced by considerations of general convenience, which every one knows may be changed at the discretion of the legislature. But the other arises out of a contract incorporated into the charter, imposing an obligation on the State to receive, in payment of all debts due to it, the paper of a bank owned by the State, and whose notes are circulated for its benefit. The power of the legislature to repeal the section, the stock of the bank being owned by the State, is not controverted; but that act cannot affect the notes in circulation at the time of the repeal.

It is objected, that this view trenches upon the sovereignty of the State, in the exercise of its taxing power and in the regulation of its currency. We are not aware that a State has power over the currency further than the right to establish banks, to regulate or prohibit the circulation, within the State, of foreign notes, and to determine in what the public dues shall be paid.

It is a principle controverted by no one, that, on general questions of policy, one legislature cannot bind those which shall succeed it; but it is equally true and undoubted, that a legislature may make a contract which shall bind those that shall come after it.

. . . . . .

In sustaining the application for a *mandamus*, the Supreme Court of the State exercised jurisdiction in the case. To that court exclusively belongs the question of its own jurisdiction. For the reasons stated, the judgment of the Supreme Court is reversed, and the cause is remanded for further proceedings to that court, as it may have jurisdiction, in conformity to the opinion of this court.[1]

[1] MR. JUSTICE GREER delivered a dissenting opinion in which MR. JUSTICE CATRON and MR. JUSTICE DANIEL concurred. MR. JUSTICE NELSON also dissented.

Several cases have been decided in the Supreme Court of the United States arising under provisions in a refunding act in Virginia by which the coupons of the refunding bonds were made receivable in payment of taxes. In the last of these cases, McGAHEY *v.* VIRGINIA, 135 U. S. 662 (1890), MR. JUSTICE BRADLEY, delivering the opinion of the court, uses this language: —

"It has always been contended on the part of the bondholders that this statute created a contract between them and the State, firm and inviolable, which the legislature had no constitutional right to violate or impair; and such was, for several years, the uniform holding of the Supreme Court of Appeals of Virginia. See Antoni *v.* Wright, 22 Grattan, 833, November term, 1872; Wise *v.* Rogers, 24 Grattan, 169; Clarke *v.* Tyler, 30 Grattan, 134. A different view, however, has since been taken by the Court of Appeals, which now holds that the act of 1871 was unconstitutional from its inception, being repugnant to certain provisions of the Constitution of the State adopted in 1869. An elaborate argument to this effect is contained in the opinion of the court rendered in one of the cases now before us, Vashon *v.* Greenhow, decided January 14, 1886. In ordinary cases the decision of the highest court of a State with regard to the validity of one of its statutes would be binding upon this court; but where the question raised is whether a contract has or has not been made, the obligation of which is alleged to have been impaired by legislative action, it is the prerogative of this court, under the Constitution of the United States and the acts of

Congress relating to writs of error to the judgments of state courts, to inquire, and judge for itself, with regard to the making of such contract, whatever may be the views or decisions of the state courts in relation thereto.

"The decisions of this court, therefore, in reference to the question whether a valid contract was made by the statute in question between the State of Virginia and the holders of the bonds authorized by said act, are to be considered as binding upon us, although a contrary view may have been taken by the courts of Virginia; and in view of this principle of constitutional law, and of the decisions made by this court, we have no hesitation in saying that the act of 1871 was a valid act, and that it did and does constitute a contract between the State and the holders of the bonds issued under it, and that the holders of the coupons of said bonds, whether still attached thereto or separated therefrom, are entitled, by a solemn engagement of the State, to use them in payment of State taxes and public dues. This was determined in Hartman *v.* Greenhow, 102 U. S. 672, decided in January, 1881; in Antoni *v.* Greenhow, 107 U. S. 769, decided in March, 1883; in the Virginia Coupon Cases, 114 U. S. 269, decided in April, 1885; and in all the cases on the subject that have come before this court for adjudication. This question, therefore, may be considered as foreclosed and no longer open for consideration. It may be laid down as undoubted law that the lawful owner of any such coupons has the right to tender the same after maturity in absolute payment of all taxes, debts, dues, and demands due from him to the State. The only question of difficulty which can arise in any case is as to the mode of relief which the owner of such coupons is entitled to in case they are refused when properly tendered in making his payment, or as to the cases which may be excepted from the operation of his right."

In MURRAY *v.* CHARLESTON, 96 U. S. 432 (1877), was involved the validity of the action of the city of Charleston in South Carolina in levying a tax upon bonds of the city held by non-resident owners. MR. JUSTICE STRONG, delivering the opinion of the court, uses this language: —

"We come, then, to the question whether the ordinances decided by the court to be valid did impair the obligation of the city's contract with the plaintiff. The solution of this question depends upon a correct understanding of what that obligation was. By the certificates of stock, or city loan, held by the plaintiff, the city assumed to pay to him the sum mentioned in them, and to pay six per cent interest in quarterly payments. The obligation undertaken, therefore, was both to pay the interest at the rate specified, and to pay it to the plaintiff. Such was the contract, and such was the whole contract. It contained no reservation or restriction of the duty described. But the city ordinances, if they can have any force, change both the form and effect of the undertaking. They are the language of the promisor. In substance, they say to the creditor: 'True, our assumption was to pay to you quarterly a sum of money equal to six per cent per annum on the debt we owe you. Such was our express engagement. But we now lessen our obligation. Instead of paying all the interest to you, we retain a part for ourselves, and substitute the part retained for a part of what we expressly promised you.' Thus applying the ordinances to the contract, it becomes a very different thing from what it was when it was made; and the change is effected by legislation, by ordinances of the city, enacted under the asserted authority of laws passed by the legislature. That by such legislation the obligation of the contract is impaired is manifest enough, unless it can be held there was some implied reservation of a right in the creditor to change its terms, a right reserved when the contract was made, — unless some power was withheld, not expressed or disclosed, but which entered into and limited the express undertaking. But how that can be, — how an express contract can contain an implication, or consist with a reservation directly contrary to the words of the instrument, has never yet been discovered.

"It has been strenuously argued on behalf of the defendant that the State of South Carolina and the city council of Charleston possessed the power of taxation when the contracts were made, that by the contracts the city did not surrender this power; that, therefore, the contracts were subject to its possible exercise, and that the city ordinances were only an exertion of it. We are told the power of a State to impose taxes upon subjects within its jurisdiction is unlimited (with some few exceptions), and

## SALT COMPANY *v.* EAST SAGINAW.

13 Wallace, 373. 1871.

[In 1859 the legislature of Michigan passed an act for encouraging the manufacture of salt, which provided that all corporations formed or which might be formed for the purpose of boring for and manufacturing salt from salt water in the State, and all individuals engaged or to be engaged in such boring and manufacture, should hold all their property, real and personal, used for the purpose exempt from taxation of any kind, and that a bounty of ten cents per bushel should be paid to each such corporation or individual for salt manufactured from water obtained by boring in the State. It appeared that the East Saginaw Salt Manufacturing Company had, after the passage of this act, been organized and operated as a corporation for the purpose of manufacturing salt from salt water to be obtained in the State. In 1861 the statute was amended by greatly limiting its benefits, and the plaintiff brought action to restrain the collection of taxes which were within the exemption of the original act but not within the provisions of the act as amended, alleging that it had, after the passage of the original act, spent large sums of money in erecting works for the manufacture of salt and in manufacturing the same. A demurrer to the bill was overruled in the lower court, but on appeal to the Supreme Court of the State this ruling was reversed and the bill was dismissed, which decision was by the Salt Company brought to this court for review on error.]

Mr. Justice Bradley delivered the opinion of the court.

It is unnecessary at this time to discuss the question of power on the part of a State legislature to make a contract exempting certain

that it extends to every thing that exists by its authority or is introduced by its permission. Hence it is inferred that the contracts of the city of Charleston were made with reference to this power, and in subordination of it.

"All this may be admitted, but it does not meet the case of the defendant. We do not question the existence of a State power to levy taxes as claimed, nor the subordination of contracts to it, so far as it is unrestrained by constitutional limitation. But the power is not without limits, and one of its limitations is found in the clause of the Federal Constitution, that no State shall pass a law impairing the obligation of contracts. A change of the expressed stipulations of a contract, or a relief of a debtor from strict and literal compliance with its requirements, can no more be effected by an exertion of the taxing power than it can be by the exertion of any other power of a State legislatnre. The constitutional provision against impairing contract obligations is a limitation upon the taxing power, as well as upon all legislation, whatever form it may assume. Indeed, attempted State taxation is the mode most frequently adopted to affect contracts contrary to the constitutional inhibition. It most frequently calls for the exercise of our supervisory power. It may, then, safely be affirmed that no State, by virtue of its taxing power, can say to a debtor, 'You need not pay to your creditor all of what you have promised to him. Yon may satisfy your dnty to him by retaining a part for yourself, or for some municipality, or for the State treasury.' Much less can a city say, 'We will tax our debt to you, and in virtue of the tax withhold a part for our own use.'"

property from taxation. Such a power has been frequently asserted and sustained by the decisions of this court.

The question in this case is, whether any contract was made at all; and, if there was, whether it was a contract determinable at will, or of perpetual obligation?

Had the plaintiff in error been incorporated by a special charter, and had that charter contained the provision that all its lands and property used in the manufacture of salt should forever, or during the continuance of its charter, be exempt from taxation, and had that charter been accepted and acted on, it would have constituted a contract. But the case before us is not of that kind. It declares, in purport and effect, that *all* corporations and individuals who shall manufacture salt in Michigan from water obtained by boring in that State, shall be exempt from taxation as to all property used for that purpose, and, after they shall have manufactured five thousand bushels of salt, they shall receive a bounty of ten cents per bushel. That is the whole of it. As the Supreme Court of Michigan says, it is a bounty law, and nothing more; a law dictated by public policy and the general good, like a law offering a bounty of fifty cents for the killing of every wolf or other destructive animal. Such a law is not a contract, except to bestow the promised bounty upon those who earn it, so long as the law remains unrepealed. There is no pledge that it shall not be repealed at any time. As long as it remains a law every inhabitant of the State, every corporation having the requisite power, is at liberty to avail himself, or itself, of its advantages, at will, by complying with its terms, and doing the things which it promises to reward, but is also at liberty, at any time, to abandon such a course. There is no obligation on any person to comply with the conditions of the law. It is a matter purely voluntary; and, as it is purely voluntary on the one part, so it is purely voluntary on the other part; that is, on the part of the legislature, to continue, or not to continue, the law. The law in question says to all: You shall have a bounty of ten cents per bushel for all salt manufactured, and the property used shall be free from taxes. But it does not say how long this shall continue; nor do the parties who enter upon the business promise how long they will continue the manufacture. It is an arrangement determinable at the will of either of the parties, as much so as the hiring of a laboring man by the day.

If it be objected that such a view of the case exposes parties to hardship and injustice, the answer is ready at hand, and is this: It will not be presumed that the legislature of a sovereign State will do acts that inflict hardship and injustice.

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In short, the law does not, in our judgment, belong to that class of laws which can be denominated contracts, except so far as they have been actually executed and complied with. There is no stipulation,

express or implied, that it shall not be repealed. General encouragements, held out to all persons indiscriminately, to engage in a particular trade or manufacture, whether such encouragement be in the shape of bounties or drawbacks, or other advantage, are always under the legislative control, and may be discontinued at any time.

*Judgment affirmed.*

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## FISK *v.* JEFFERSON POLICE JURY.

116 United States, 131. 1885.

Mr. Justice Miller delivered the opinion of the court.

[This case involves the question whether plaintiff in error, who was an attorney at law, could recover of the Parish of Jefferson for salary and fees due him from the parish as district attorney. He obtained judgment in the State court against the police jury, which is the governing body of the parish, and being unable to obtain the payment of his judgment, he applied for a writ of mandamus to compel the assessment and collection of a tax, which right was denied in the Supreme Court of the State, and the case was brought to this court by writ of error.]

We do not assert the proposition that a person elected to an office for a definite term has any such contract with the government or with the appointing body as to prevent the legislature or other proper authority from abolishing the office or diminishing its duration or removing him from office. So, though when appointed the law has provided a fixed compensation for his services, there is no contract which forbids the legislature or other proper authority to change the rate of compensation for salary or services after the change is made, though this may include a part of the term of the office then unexpired. Butler *v.* Pennsylvania, 10 How. 402.

But, after the services have been rendered, under a law, resolution, or ordinance which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate. This contract is a completed contract. Its obligation is perfect, and rests on the remedies which the law then gives for its enforcement. The vice of the argument of the Supreme Court of Louisiana is in limiting the protecting power of the constitutional provision against impairing the obligation of contracts to express contracts, to specific agreements, and in rejecting that much larger class in which one party having delivered property, paid money, rendered service, or suffered loss at the request of or for the use of another, the law completes the contract by implying an obligation on the part of the latter to make compensation. This obligation can no more be impaired by a law of the State than that arising on a promissory note.

The case of Fisk was of this character. His appointment as district attorney was lawful, and was a request made to him by the proper authority to render the services demanded of that office. He did render these services for the parish, and the obligation of the police jury to pay for them was complete. Not only were the services requested and rendered, and the obligation to pay for them perfect, but the measure of compensation was also fixed by the previous order of the police jury. There was here wanting no element of a contract. The judgment in the court for the recovery of this compensation concluded all these questions. Hall *v.* Wisconsin, 103 U. S. 5, 10; Newton *v.* Commissioners, 100 U. S. 548, 559.

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*The judgments of the Supreme Court of Louisiana are therefore reversed, and the cases are remanded to that court for further proceedings not inconsistent with this opinion.*

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## TRUSTEES OF DARTMOUTH COLLEGE *v.* WOODWARD.

4 Wheaton, 518; 4 Curtis, 463. 1819.

[This was an action of trover brought in the State court of New Hampshire by plaintiff in error for the record books and other documents of the corporation detained by defendant Woodward. Plaintiffs were, by letters patent of King George III. issued in 1769 through the then governor of the province of New Hampshire, created a corporation, and continued to claim as such by succession in accordance with the provisions of the original letters patent. Subsequently, in 1816, certain statutes were passed by the State providing for the reorganization of the corporation and continuance of the same, under the title of "The Trustees of Dartmouth University," and defendant, who had been the secretary and the treasurer of the plaintiff corporation, having been deposed from such offices by that corporation and elected to the same position by the body claiming to act under the State laws, retained possession of the records of the college, refusing to deliver them to plaintiffs, who asserted their right thereto under the original charter. The jury in the State court returned a special verdict to the effect that if the State statutes were valid, defendant was entitled to possession of the records; otherwise the verdict should be entered for plaintiff for twenty thousand dollars damages. It appears that the judgment of the State court was for defendant, although the statement in the case is to the effect that it was for plaintiff in the lower court. Plaintiffs bring the case to this court by writ of error. The court discusses at length the nature of the organization provided for by the letters patent, and finds that such organization became by the letters patent a private

eleemosynary corporation. The portion of the opinion relating to the question whether the statutes of New Hampshire were invalid as impairing the obligation of the contract involved in the original charter is as follows.]

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the court.

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From this review of the charter, it appears that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors to the specified objects of that bounty; that its trustees or governors were originally named by the founder, and invested with the power of perpetuating themselves; that they are not public officers, nor is it a civil institution, participating in the administration of government; but a charity school, or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation.

Yet a question remains to be considered, of more real difficulty, on which more doubt has been entertained than on all that have been discussed. The founders of the college, at least those whose contributions were in money, have parted with the property bestowed upon it, and their representatives have no interest in that property. The donors of land are equally without interest, so long as the corporation shall exist. Could they be found, they are unaffected by any alteration in its constitution, and probably regardless of its form, or even of its existence. The students are fluctuating, and no individual among our youth has a vested interest in the institution which can be asserted in a court of justice. Neither the founders of the college, nor the youth for whose benefit it was founded, complain of the alteration made in its charter, or think themselves injured by it. The trustees alone complain, and the trustees have no beneficial interest to be protected. Can this be such a contract as the Constitution intended to withdraw from the power of State legislation? Contracts the parties to which have a vested beneficial interest, and those only, it has been said, are the objects about which the Constitution is solicitous, and to which its protection is extended.

The court has bestowed on this argument the most deliberate consideration, and the result will be stated. Dr. Wheelock, acting for himself, and for those who at his solicitation had made contributions to his school, applied for this charter, as the instrument which should enable him and them to perpetuate their beneficent intention. It was granted. An artificial, immortal being was created by the crown, capable of receiving and distributing forever, according to the will of the donors, the donations which should be made to it. On this being, the contributions which had been collected were immediately bestowed. These gifts were made, not indeed to make a profit for the donors or their posterity, but for something in their opinion of inestimable value; for something which they deemed a full equivalent for

the money with which it was purchased. The consideration for which they stipulated, is the perpetual application of the fund to its object, in the mode prescribed by themselves. Their descendants may take no interest in the preservation of this consideration. But in this respect their descendants are not their representatives. They are represented by the corporation. The corporation is the assignee of their rights, stands in their place, and distributes their bounty, as they would themselves have distributed it, had they been immortal. So with respect to the students who are to derive learning from this source. The corporation is a trustee for them also. Their potential rights, which, taken distributively, are imperceptible, amount, collectively, to a most important interest. These are, in the aggregate, to be exercised, asserted, and protected by the corporation. They were as completely out of the donors, at the instant of their being vested in the corporation, and as incapable of being asserted by the students, as at present.

According to the theory of the British Constitution, their parliament is omnipotent. To annul corporate rights might give a shock to public opinion, which that government has chosen to avoid; but its power is not questioned. Had parliament, immediately after the emanation of this charter, and the execution of those conveyances which followed it, annulled the instrument, so that the living donors would have witnessed the disappointment of their hopes, the perfidy of the transaction would have been universally acknowledged. Yet then, as now, the donors would have had no interest in the property; then, as now, those who might be students would have had no rights to be violated; then, as now, it might be said, that the trustees, in whom the rights of all were combined, possessed no private, individual, beneficial interest in the property confided to their protection. Yet the contract would at that time have been deemed sacred by all. What has since occurred to strip it of its inviolability? Circumstances have not changed it. In reason, in justice, and in law, it is now what it was in 1769.

This is plainly a contract to which the donors, the trustees, and the crown (to whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract on the faith of which real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the Constitution, and within its spirit also, unless the fact that the property is invested by the donors in trustees, for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the Constitution.

It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the

Constitution, when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent recurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the State legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say, that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception.

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The opinion of the court, after mature deliberation, is, that this is a contract the obligation of which cannot be impaired without violating the Constitution of the United States. This opinion appears to us to be equally supported by reason, and by the former decisions of this court.

2. We next proceed to the inquiry, whether its obligation has been impaired by those acts of the legislature of New Hampshire to which the special verdict refers.

From the review of this charter which has been taken, it appears that the whole power of governing the college, of appointing and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the students, and of filling up vacancies created in their own body, was vested in the trustees. On the part of the crown, it was expressly stipulated that this corporation, thus constituted, should continue forever; and that the number of trustees should forever consist of twelve, and no more. By this contract the crown was bound, and could have made no violent alteration in its essential terms without impairing its obligation.

By the Revolution, the duties as well as the powers of government devolved on the people of New Hampshire. It is admitted, that among the latter was comprehended the transcendent power of parliament, as well as that of the executive department. It is too clear to require the support of argument, that all contracts and rights respecting property remained unchanged by the Revolution. The obligations, then, which were created by the charter to Dartmouth College, were the same in the new that they had been in the old government. The power of the government was also the same. A repeal of this charter at any time prior to the adoption of the present

Constitution of the United States would have been an extraordinary and unprecedented act of power, but one which could have been contested only by the restrictions upon the legislature to be found in the constitution of the State. But the Constitution of the United States has imposed this additional limitation, that the legislature of a State shall pass no act "impairing the obligation of contracts."

It has been already stated, that the act "to amend the charter, and enlarge and improve the corporation of Dartmouth College," increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the State, and creates a board of overseers, to consist of twenty-five persons, of whom twenty-one are also appointed by the executive of New Hampshire, who have power to inspect and control the most important acts of the trustees.

On the effect of this law, two opinions cannot be entertained. Between acting directly, and acting through the agency of trustees and overseers, no essential difference is perceived. The whole power of governing the college is transferred from trustees, appointed according to the will of the founder, expressed in the charter, to the executive of New Hampshire. The management and application of the funds of this eleemosynary institution, which are placed by the donors in the hands of trustees named in the charter, and empowered to perpetuate themselves, are placed by this act under the control of the government of the State. The will of the State is substituted for the will of the donors, in every essential operation of the college. This is not an immaterial change. The founders of the college contracted not merely for the perpetual application of the funds which they gave to the objects for which those funds were given; they contracted, also, to secure that application by the constitution of the corporation. They contracted for a system which should, as far as human foresight can provide, retain forever the government of the literary institution they had formed, in the hands of persons approved by themselves. This system is totally changed. The charter of 1769 exists no longer. It is reorganized; and reorganized in such a manner as to convert a literary institution, moulded according to the will of its founders, and placed under the control of private literary men, into a machine entirely subservient to the will of government. This may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of that contract on the faith of which their property was given.

In the view which has been taken of this interesting case, the court has confined itself to the rights possessed by the trustees, as the assignees and representatives of the donors and founders, for the benefit of religion and literature. Yet it is not clear that the trustees ought to be considered as destitute of such beneficial interest in themselves as the law may respect. In addition to their being the legal

owners of the property, and to their having a freehold right in the powers confided to them, the charter itself countenances the idea that trustees may also be tutors, with salaries. The first president was one of the original trustees; and the charter provides, that in case of vacancy in that office, "the senior professor or tutor, being one of the trustees, shall exercise the office of president until the trustees shall make choice of, and appoint a president." According to the tenor of the charter, then, the trustees might, without impropriety, appoint a president and other professors from their own body. This is a power not entirely unconnected with an interest. Even if the proposition of the counsel for the defendant were sustained; if it were admitted that those contracts only are protected by the Constitution, a beneficial interest in which is vested in the party who appears in court to assert that interest; yet it is by no means clear that the trustees of Dartmouth College have no beneficial interest in themselves.

But the court has deemed it unnecessary to investigate this particular point, being of opinion, on general principles, that in these private eleemosynary institutions the body corporate, as possessing the whole legal and equitable interest, and completely representing the donors for the purpose of executing the trust, has rights which are protected by the Constitution.

It results, from this opinion, that the acts of the legislature of New Hampshire, which are stated in the special verdict found in this cause, are repugnant to the Constitution of the United States; and that the judgment on this special verdict ought to have been for the plaintiffs. The judgment of the State Court must, therefore, be reversed.[1]

[1] Other justices of the court delivered opinions concurring in the reversal of the case, and substantially as to the grounds assigned therefor in the opinion of the chief justice. MR. JUSTICE DUVALL dissented.

In the case of THE BINGHAMPTON BRIDGE, 3 Wall. 51 (1865), the question arose as to the rights of a corporation under a charter authorizing it to erect a toll bridge, and making it unlawful for any person to erect any other bridge or establish any ferry across the same stream within two miles either above or below the bridge erected by the corporation, and it was contended that a subsequent act of the legislature authorizing another toll bridge within the specified limits was a violation of the contract involved in the previous charter. MR. JUSTICE DAVIS, delivering the opinion of the court (MR. CHIEF JUSTICE CHASE, MR. JUSTICE FIELD, and MR. JUSTICE GREER dissenting), used this language:—

"The constitutional right of one legislature to grant corporate privileges and franchises, so as to bind and conclude a succeeding one, has been denied. We have supposed, if anything was settled by an unbroken course of decisions in the Federal and State courts, it was that an act of incorporation was a contract between the State and the stockholders. All courts at this day are estopped from questioning the doctrine. The security of property rests upon it, and every successful enterprise is undertaken in the unshaken belief that it will never be forsaken.

"A departure from it *now* would involve dangers to society that cannot be foreseen, would shock the sense of justice of the country, unhinge its business interests, and weaken, if not destroy, that respect which has always been felt for the judicial department of the government. An attempt even to reaffirm it could only tend to

lessen its force and obligation. It received its ablest exposition in the case of Dartmouth College *v.* Woodward, 4 Wheat. 418, which case has ever since been considered a landmark by the profession, and no court has since disregarded the doctrine, that the charters of private corporations are contracts, protected from invasion by the Constitution of the United States. And it has since so often received the solemn sanction of this court, that it would unnecessarily lengthen this opinion to refer to the cases, or even enumerate them.

"The principle is supported by reason as well as authority. It was well remarked by the chief justice in the Dartmouth College case, 'that the objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country, and this benefit constitutes the consideration, and in most cases the sole consideration for the grant.' The purposes to be attained are generally beyond the ability of individual enterprise, and can only be accomplished through the aid of associated wealth. This will not be risked unless privileges are given and securities furnished in an act of incorporation. The wants of the public are often so imperative, that a duty is imposed on government to provide for them; and as experience has proved that a State should not directly attempt to do this, it is necessary to confer on others the faculty of doing what the sovereign power is unwilling to undertake. The legislature, therefore, says to public-spirited citizens: 'If you will embark, with your time, money, and skill, in an enterprise which will accommodate the public necessities, we will grant to you, for a limited period, or in perpetuity, privileges that will justify the expenditure of your money, and the employment of your time and skill.' Such a grant is a contract, with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it.

"It is argued, as a reason why courts should not be rigid in enforcing the contracts made by States, that legislative bodies are often overreached by designing men, and dispose of franchises with great recklessness.

"If the knowledge that a contract made by a State with individuals is equally protected from invasion as a contract made between natural persons, does not awaken watchfulness and care on the part of law-makers, it is difficult to perceive what would. The corrective to improvident legislation is not in the courts, but is to be found elsewhere."

The decree of the Court of Appeals of New York against the corporation claiming an exclusive privilege under the earlier charter was therefore reversed.

The dissent in this case was based on the view that, to be effectual in conferring an exclusive privilege of this nature, the intention must be clearly expressed in the letter of the statute, and that the charter in question did not contain a sufficiently explicit statement of such intention.

In the case of The Delaware Railroad Tax, 18 Wall. 206 (1873), it was contended that a stipulation in a charter consolidating two railroad companies, as to the rate of tax to be paid annually into the treasury of the State by the new company, was a contract limiting the power of the State in the matter of taxing property of such company. Mr. Justice Field, delivering the opinion of the court, uses this language: —

"That the charter of a private corporation is a contract between the State and the corporators, and within the provision of the Constitution prohibiting legislation impairing the obligation of contracts, has been the settled law of this court since the decision in the Dartmouth College Case, 4 Wheat. 518. Nor does it make any difference that the uses of the corporation are public, if the corporation itself be private. The contract is equally protected from legislative interference, whether the public be interested in the exercise of its franchise or the charter be granted for the sole benefit of its corporators. This doctrine is not controverted by any one; it is the established law; and the question in all cases, when it becomes necessary to apply it, is whether the particular legislative interference alleged does in fact impair the obligation of the contract; for it is not every kind of legislative interference with the powers, action, and property of the corporation which will have that result.

"It has also been repeatedly held by this court that the legislature of a State may exempt particular parcels of property or the property of particular persons or corpo-

rations from taxation, either for a specified period or perpetually, or may limit the amount or rate of taxation to which such property shall be subjected. And when such immunity is conferred, or such limitation is prescribed by the charter of a corporation, it becomes a part of the contract, and is equally inviolate with its other stipulations. But before any such exemption or limitation can be admitted, the intent of the legislature to confer the immunity or prescribe the limitation must be clear beyond a reasonable doubt. All public grants are strictly construed. Nothing can be taken against the State by presumption or inference. The established rule of construction in such cases is that rights, privileges, and immunities not expressly granted are reserved. There is no safety to the public interests in any other rule. And with special force does the principle upon which the rule rests apply when the right, privilege, or immunity claimed calls for any abridgment of the powers of the government, or any restraint upon their exercise. The power of taxation is an attribute of sovereignty, and is essential to every independent government. As this court has said, the whole community is interested in retaining it undiminished, and has 'a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear.' Providence Bank *v.* Billings, 4 Pet. 561. If the point were not already adjudged it would admit of grave consideration, whether the legislature of a State can surrender this power, and make its action in this respect binding upon its successors any more than it can surrender its police power or its right of eminent domain. But the point being adjudged, the surrender when claimed must be shown by clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power. If a doubt arise as to the inteut of the legislature, that doubt must be solved in favor of the State."

In PENNSYLVANIA COLLEGE CASES, 13 Wall. 190 (1871), it appeared that a charter was granted by the State of Pennsylvania to the trustees of Jefferson College, in which there was a provision that the constitution of the college "shall not be altered or alterable by any ordinance or law of the said trustees, nor in any other manner than by an act of the legislature of the Commonwealth." Subsequently, a State statute was passed, uniting this college with another under the name of the Washington and Jefferson College, and the question was made as to the validity of the act of union. MR. JUSTICE CLIFFORD, delivering the opinion of the court, used this language: —

"Corporate franchises granted to private corporations, if duly accepted by the corporators, partake of the nature of legal estates, as the grant under such circumstances becomes a contract within the protection of that clause of the Constitution which ordains that no State shall pass any law impairing the obligation of contracts. Dartmouth College *v.* Woodward, 4 Wheat. 700. Charters of private corporations are regarded as executed contracts between the government and the corporators, and the rule is well settled that the legislature cannot repeal, impair, or alter such a charter against the consent or without the default of the corporation judicially ascertained and declared. Fletcher *v.* Peck, 6 Cranch, 136; Terrett *v.* Taylor, 9 id. 51. Of course these remarks apply only to acts of incorporation which do not contain any reservations or provisions annexing conditions to the charter modifying and limiting the nature of the contract. Cases often arise where the legislature, in granting an act of incorporation for a private purpose, either make the duration of the charter conditional or reserve to the State the power to alter, modify, or repeal the same at pleasure. Where such a provision is incorporated in the charter it is clear that it qualifies the grant, and that the subsequent exercise of that reserved power cannot be regarded as an act within the prohibition of the Constitution. Such a power also, that is, the power to alter, modify, or repeal an act of incorporation, is frequently reserved to the State by a general law applicable to all acts of incorporation, or to certain classes of the same, as the case may be, in which case it is equally clear that the power may be exercised whenever it appears that the act of incorporation is one which falls within the reservation, and that the charter was granted subsequent to the passage of the general law, even though the charter contains no such condition nor any allusion to such a reservation. Dartmouth College *v.* Woodward, 4 Wheat. 708;

## BEER COMPANY *v.* MASSACHUSETTS.

97 United States, 25. 1877.

[This proceeding was commenced in the State Court of Massachusetts for a forfeiture of certain malt liquors belonging to the Boston Beer Company for violation of the provisions of the prohibitory liquor law. The decision of the lower State court was that the liquors were subject to forfeiture, and this decision was affirmed by the Supreme Judicial Court. The company brings the case to this court on writ of error.]

Mr. Justice Bradley delivered the opinion of the court.

The question raised in this case is, whether the charter of the plaintiff, which was granted in 1828, contains any contract the obligation of which was impaired by the prohibitory liquor law of Massachusetts, passed in 1869, as applied to the liquor in question in this suit.

[The question whether the legislature had not, in granting the charter to the Beer Company, reserved the right to amend or repeal the same at its discretion, is considered, but the point is not of importance in this connection.]

The plaintiff in error was incorporated "for the purpose of manufacturing malt liquors in all their varieties," it is true; and the right to manufacture, undoubtedly, as the plaintiff's counsel contends, included the incidental right to dispose of the liquors manufactured. But although this right or capacity was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture

General Hospital *v.* Insurance Co., 4 Gray, 227; Suydam *v.* Moore, 8 Barb. 358; Angel & Ames on Corporations (9th ed.), § 767, p. 787. Reservations in such a charter, it is admitted, may be made, and it is also conceded that where they exist the exercise of the power reserved by a subsequent legislature does not impair the obligation of the contract created by the original act of incorporation. Subsequent legislation altering or modifying the provisions of such a charter, where there is no such reservation, is certainly unauthorized if it is prejudicial to the rights of the corporators, and was passed without their assent; but the converse of the proposition is also true, that if the new provisions altering and modifying the charter were passed with the assent of the corporation and they were duly accepted by a corporate vote as amendments to the original charter, they cannot be regarded as impairing the obligation of the contract created by the original charter. Private charters or such as are granted for the private benefit of the corporators are held to be contracts because they are based for their consideration on the liabilities and duties which the corporators assume by accepting the terms therein specified, and the grant of the franchise on that account can no more be resumed by the legislature or its benefits diminished or impaired without the assent of the corporators than any other grant of property or legal estate, unless the right to do so is reserved in the act of incorporation or in some general law of the State which was in operation at the time the charter was granted."

malt liquor; nor as exempting the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State.

We do not mean to say that property actually in existence, and in which the right of the owner has become vested, may be taken for the public good without due compensation. But we infer that the liquor in this case, as in the case of Bartemeyer *v.* Iowa (18 Wall. 129), was not in existence when the liquor law of Massachusetts was passed. Had the plaintiff in error relied on the existence of the property prior to the law, it behooved it to show that fact. But no such fact is shown, and no such point is taken. The plaintiff in error boldly takes the ground that, being a corporation, it has a right, by contract, to manufacture and sell beer forever, notwithstanding and in spite of any exigencies which may occur in the morals or the health of the community requiring such manufacture to cease. We do not so understand the rights of the plaintiff. The legislature had no power to confer any such rights.

Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. Boyd *v.* Alabama, 94 U. S. 645.

Since we have already held, in the case of Bartemeyer *v.* Iowa, that as a measure of police regulation, looking to the preservation of public morals, a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States, we see nothing in the present case that can afford any sufficient ground for disturbing the decision of the Supreme Court of Massachusetts.

Of course, we do not mean to lay down any rule at variance with what this court has decided with regard to the paramount authority of the Constitution and laws of the United States, relating to the regulation of commerce with foreign nations and among the several States, or otherwise. Brown *v.* Maryland, 12 Wheat. 419; License Cases, 5 How. 504; Passenger Cases, 7 id. 283; Henderson *v.* Mayor

of New York, 92 U. S. 259; Chy Lung *v.* Freeman, id. 275; Railroad Company *v.* Husen, 95 id. 465. That question does not arise in this case. *Judgment affirmed.*[1]

[1] In DOUGLAS *v.* KENTUCKY, 168 U. S. 488 (1897), the question arose whether a provision in the Constitution of Kentucky, adopted in 1891, prohibiting lotteries, was applicable to a lottery enterprise carried on under a franchise previously granted to operate a lottery in the State. This franchise had been acquired by one Stewart, and after his death passed to the plaintiff in error, who was defendant in the lower court. The action was brought in the State court to prevent the exercise by said defendant of such lottery franchise. From a decision of the State Court of Appeals against defendant, the case was brought to this court by writ of error. MR. JUSTICE HARLAN, delivering the opinion of the court, used this language: —

"The Federal question presented for our determination arises upon the claim of the plaintiff in error — which was denied by the final judgment of the highest court of Kentucky — that the agreement between the city of Frankfort and E. S. Stewart, by which the latter became the owner of the lottery scheme devised by that city, under the authority of law, was a contract the obligation of which the State was forbidden by the Constitution of the United States to impair either by legislative enactment or by constitutional provision.

"If this interpretation of the Federal Constitution be correct, it will follow that any provision in the constitution or in the statutes of Kentucky forbidding lotteries and gift enterprises in that Commonwealth, and revoking the lottery privileges or charters theretofore granted, is null and void as to the defendant Douglas, who succeeded to the rights acquired by Stewart under the agreement of 1875 with the city of Frankfort. This necessarily results from the declaration that the Constitution of the United States is the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding.

"This court had occasion many years ago to say that the common forms of gambling were comparatively innocuous when placed in contrast with the widespread pestilence of lotteries; that the former were confined to a few persons and places, while the latter infested the whole community, entered every dwelling, reached every class, preyed upon the hard earnings of the poor, and plundered the ignorant and simple. Phalen *v.* Virginia, 8 How. 163.

"Is a State forbidden by the supreme law of the land from protecting its people at all times from practices which it conceives to be attended by such ruinous results? Can the legislature of a State contract away its power to establish such regulations as are reasonably necessary from time to time to protect the public morals against the evils of lottery?

"These questions arose and were determined, upon much consideration, in Stone *v.* Mississippi, 101 U. S. 814, 819, 821.

"It will be seen from the report of that case that the legislature of Mississippi chartered the Mississippi Agricultural, Educational, and Manufacturing Aid Society, with authority to raise money by way of lottery; and in consideration thereof the society paid $5000 into the treasury of the State, and agreed to pay, and did pay, an annual tax of $1000, together with one-half of one per cent, on the amount of receipts derived from the sale of certificates. While the society's charter was in force, the State adopted a new constitution, declaring that the legislature should never authorize a lottery, nor should the sale of lottery tickets be allowed, nor any lottery theretofore authorized be permitted to be drawn or tickets therein be sold. This was followed by the passage of an act prohibiting lotteries, and making it unlawful to conduct one in the State. The question was then raised by an information in the nature of *quo warranto*, whether the lottery privilege given by the society's charter could be withdrawn or impaired by the State legislation — that society having, as was conceded, complied with all the conditions upon which its charter was granted. The Supreme Court of Mississippi held that the State could withdraw the lottery privilege which it had granted. And that conclusion was questioned upon writ of error sued out from this court.

"Chief Justice Waite, who delivered the unanimous judgment of the court in that case, said: 'The question is therefore directly presented, whether, in view of these facts, the legislature of a State can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.' Again, referring to lotteries: 'They disturb the checks and balances of a well-ordered community. Society built on such a foundation would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what, "by the casting of lots, or by lot, chance, or otherwise," might be "awarded" to them from the accumulation of others. Certainly the right to suppress them is governmental, to be exercised at all times by those in power, at their discretion. Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has in legal effect nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the State. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal.'"

Defendant further contended that he acquired the lottery franchise after it had been held by the court of last resort in Kentucky that such a franchise was irrevocable, and therefore that he had a vested right under the decisions of the State court; but on this point the following language is used: —

"The doctrine that this court possesses paramount authority when reviewing the final judgment of a State court upholding a State enactment alleged to be in violation of the contract clause of the Constitution, to determine for itself the existence or non-existence of the contract set up, and whether its obligation has been impaired by the State enactment, has been affirmed in numerous other cases. Ohio Life Ins. Co. *v.* Debolt, 16 How. 416, 452; Wright *v.* Nagle, 101 U. S. 791, 794; Louisville Gas Co. *v.* Citizens' Gas Co., 115 U. S. 683, 697; Vicksburg, Shreveport, etc. Railroad *v.* Dennis, 116 U. S. 665, 667; N. O. Waterworks Co. *v.* Louisiana Sugar Co., 125 U. S. 18, 36; Bryan *v.* Board of Education, 151 U. S. 639, 650; Mobile & Ohio Railroad *v.* Tennessee, 153 U. S. 486, 493; Bacon *v.* Texas, 163 U. S. 207, 219.

"In view of these adjudications it is clear that we are not required to accept as authoritative in this case the decision of the Court of Appeals of Kentucky in Gregory *v.* Shelby College Lottery Trustees [2 Met. (Ky.) 589], above cited, to the effect that a legislative revocation of a lottery grant is a violation of the Constitution of the United States so far as such revocation affects rights acquired on the faith of the privilege conferred by the grant, and the exercise of which involves the continuance of that privilege for such time as may be necessary for the full enjoyment of those rights."

In NEW ORLEANS GAS CO. *v.* LOUISIANA LIGHT CO., 115 U. S. 650 (1885), the contention was as to whether the plaintiff in error who brought action in the Circuit Court of the United States for the Eastern District of Louisiana was entitled to protection under a grant of the exclusive privilege of manufacturing and distributing gas in the city of New Orleans as against the defendant claiming under a subsequent grant of a similar privilege. The action of the lower court dismissing plaintiff's bill was reversed on appeal to this court, and MR. JUSTICE HARLAN, delivering the opinion of the court, used this language: —

"The principle upon which the decisions in Beer Co. *v.* Massachusetts [97 U. S. 25],

Fertilizing Co. *v.* Hyde Park [97 U. S. 659], Stone *v.* Mississippi [101 U. S. 814], and Butchers' Union Co. *v.* Crescent City Live-Stock Landing Co. [111 U. S. 746], rest, is, that one legislature cannot so limit the discretion of its successors, that they may not enact such laws as are necessary to protect the public health, or the public morals. That principle, it may be observed, was announced with reference to particular kinds of private business which, in whatever manner conducted, were detrimental to the public health or the public morals. It is fairly the result of those cases, that statutory authority given by the State to corporations or individuals to engage in a particular private business attended by such results, while it protects them for the time against public prosecution, does not constitute a contract preventing the withdrawal of such authority, or the granting of it to others.

"The present case involves no such considerations. We have seen, the manufacture of gas, and its distribution for public and private use by means of pipes laid, under legislative authority, in the streets and ways of a city, is not an ordinary business in which every one may engage, but is a franchise belonging to the government, to be granted, for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases. It is a business of a public nature, and meets a public necessity for which the State may make provision. It is one which, so far from affecting the public injuriously, has become one of the most important agencies of civilization, for the promotion of the public convenience and the public safety.

"It is to be presumed that the legislature of Louisiana, when granting the exclusive privileges in question, deemed it unwise to burden the public with the cost of erecting and maintaining gas-works sufficient to meet the necessities of the municipal government and the people of New Orleans, and that the public would be best protected, as well as best served, through a single corporation invested with the power, and charged with the duty, of supplying gas of the requisite quality and in such quantity as the public needs demanded. In order to accomplish what, in its judgment, the public welfare required, the legislature deemed it necessary that some inducement be offered to private capitalists to undertake, at their own cost, this work. That inducement was furnished in the grant of an exclusive privilege of manufacturing and distributing gas by means of pipes laid in the streets of New Orleans for a fixed period, during which the company would be protected against competition from corporations or companies engaged in like business. Without that grant it was inevitable either that the cost of supplying the city and its people would have been made, in some form, a charge upon the public, or the public would have been deprived of the security in person, property, and business which comes from well-lighted streets.

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"With reference to the contract in this case, it may be said that it is not, in any legal sense, to the prejudice of the public health or the public safety. It is none the less a contract because the manufacture and distribution of gas, when not subjected to proper supervision, may possibly work injury to the public; for the grant of exclusive privileges to the plaintiff does not restrict the power of the State, or of the municipal government of New Orleans acting under authority for that purpose, to establish and enforce regulations which are not inconsistent with the essential rights granted by plaintiff's charter, which may be necessary for the protection of the public against injury, whether arising from the want of due care in the conduct of its business, or from an improper use of the streets in laying gas pipes, or from the failure of the grantee to furnish gas of the required quality and amount. The constitutional prohibition upon State laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations.

"Whatever therefore in the manufacture or distribution of gas in the city of New Orleans proves to be injurious to the public health, the public comfort, or the public

## GEORGIA RAILROAD & BANKING COMPANY v. SMITH.

128 United States, 174. 1888.

[PLAINTIFF in error brought an action in the State court of Georgia to restrain the State Board of Railroad Commissioners from regulating the rates of freight and passenger tariff on its road, contending that in its charter granted in 1835 it was provided that the charges of transportation or conveyance should not exceed fifty cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement for every one hundred miles, and five cents per mile for passengers; and that this stipulation constituted a contract which would be violated by the enforcement against the company of regulations fixing a lower rate. A demurrer to the bill having

safety, may, notwithstanding the exclusive grant to plaintiff, be prohibited by legislation, or by municipal ordinance passed under legislative authority. It cannot be said with propriety, that to sustain that grant is to obstruct the State in the exercise of her power to provide for the public protection, health, and safety. The article in the State constitution of 1879 in relation to monopolies is not in any legal sense an exercise of the police power for the preservation of the public health, or the promotion of the public safety; for the exclusiveness of a grant has no relation whatever to the public health or to the public safety. These considerations depend upon the nature of the business or duty to which the grant relates, and not at all upon the inquiry whether a franchise is exercised by one rather than by many. The monopoly clause only evinces a purpose to reverse the policy, previously pursued, of granting to private corporations franchises accompanied by exclusive privileges, as a means of accomplishing public objects. That change of policy, although manifested by constitutional enactment, cannot affect contracts which, when entered into, were within the power of the State to make, and which, consequently, were protected against impairment, in respect of their obligation, by the Constitution of the United States. A State can no more impair the obligation of a contract by her organic law than by legislative enactment; for her constitution is a law within the meaning of the contract clause of the National Constitution. Railroad Co. *v.* McClure, 10 Wall. 511; Ohio Life Ins. & T. Co. *v.* Debolt, 16 How. 416, 429; Sedgwick's Stat. & Const. Law, 637. And the obligation of her contracts is as fully protected by that instrument against impairment by legislation as are contracts between individuals exclusively. New Jersey *v.* Wilson, 7 Cranch, 164; Providence Bank *v.* Billings, 4 Pet. 514; Green *v.* Biddle, 8 Wheat. 1; Woodruff *v.* Trapnall, 10 How. 190; Wolff *v.* New Orleans, 103 U. S. 358.

"If, in the judgment of the State, the public interests will be best subserved by an abandonment of the policy of granting exclusive privileges to corporations, other than railroad companies, in consideration of services to be performed by them for the public, the way is open for the accomplishment of that result, with respect to corporations whose contracts with the State are unaffected by that change in her organic law. The rights and franchises which have become vested upon the faith of such contracts can be taken by the public, upon just compensation to the company, under the State's power of eminent domain. West River Bridge Co. *v.* Dix [6 How. 507]; Richmond, etc. Railroad Co. *v.* Louisa Railroad Co., 13 How. 71, 83; Boston Water-Power Co. *v.* Boston & Worcester Railroad, 23 Pick. 360, 393; Boston & Lowell Railroad Co. *v.* Salem & Lowell Railroad Co., 2 Gray, 1, 35. In that way the plighted faith of the public will be kept with those who have made large investments upon the assurance by the State that the contract with them will be performed."

been sustained, the decree was affirmed in the Supreme Court of the State, and the case was brought to this court by writ of error.]

Mr. Justice Field delivered the opinion of the court.

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It has been adjudged by this court in numerous instances that the legislature of a State has the power to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits, in the absence of any provision in the charter of the company constituting a contract vesting in it authority over those matters, subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation; and that what is done does not amount to a regulation of foreign or interstate commerce. Stone *v.* Farmers' Loan and Trust Co., 116 U. S. 307, 325, 331; Dow *v.* Beidelman, 125 U. S. 680. The incorporation of the company, by which numerous parties are permitted to act as a single body for the purposes of its creation, or as Chief Justice Marshall expresses it, by which "the character and properties of individuality" are bestowed "on a collective and changing body of men," Providence Bank *v.* Billings, 4 Pet. 514, 562; the grant to it of special privileges to carry out the object of its incorporation, particularly the authority to exercise the State's right of eminent domain that it may appropriate needed property, — a right which can be exercised only for public purposes; and the obligation, assumed by the acceptance of its charter, to transport all persons and merchandise, upon like conditions and upon reasonable rates, affect the property and employment with a public use; and where property is thus affected, the business in which it is used is subject to legislative control. So long as the use continues, the power of regulation remains, and the regulation may extend not merely to provisions for the security of passengers and freight against accidents, and for the convenience of the public, but also to prevent extortion by unreasonable charges, and favoritism by unjust discriminations. This is not a new doctrine but an old doctrine, always asserted whenever property or business is, by reason of special privileges received from the government, the better to secure the purposes to which the property is dedicated or devoted, affected with a public use. There have been differences of opinion among the judges of this court in some cases as to the circumstances or conditions under which some kinds of property or business may be properly held to be thus affected, as in Munn *v.* Illinois, 94 U. S. 113, 126, 139, 146; but none as to the doctrine that when such use exists the business becomes subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression. In almost every case which has been before this court, where the power of the State to regulate the rates of charges of railroad companies for the transportation of persons and freight within its jurisdiction has been under consideration, the question discussed

has not been the original power of the State over the subject, but whether that power had not been, by stipulations of the charter, or other legislation, amounting to a contract, surrendered to the company, or been in some manner qualified. It is only upon the latter point that there have been differences of opinion.

The question then arises whether there is in the 12th section of the charter of the plaintiff in error a contract that it may make any charges within the limits there designated.

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It is conceded that a railroad corporation is a private corporation, though its uses are public, and that a contract embodied in terms in its provisions, or necessarily implied by them, is within the constitutional clause prohibiting legislation impairing the obligation of contracts. If the charter in this way provides that the charges, which the company may make for its services in the transportation of persons and property, shall be subject only to its own control up to the limit designated, exemption from legislative interference within that limit will be maintained. But to effect this result, the exemption must appear by such clear and unmistakable language that it cannot be reasonably construed consistently with the reservation of the power by the State. There is no such language in the present case. The contention of the plaintiff in error therefore fails, and the judgment must be *Affirmed.*

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## EAST HARTFORD *v.* HARTFORD BRIDGE COMPANY.

10 Howard, 511; 18 Curtis, 483. 1850.

[The Hartford Bridge Company prosecuted this action in the courts of Connecticut to enjoin the town of East Hartford from reopening a ferry. The town claimed the right to operate the ferry by virtue of an old colonial grant, but the legislature in 1808 chartered the Bridge Company and gave it a franchise to erect a bridge which superseded the ferry. Subsequently the legislature formally discontinued the ferry. Plaintiff claimed in the State court that the attempt of the town to reopen the ferry was a violation of contract rights involved in the legislation in behalf of the Bridge Company. The judgment in the Supreme Court of Connecticut being adverse to the town, it brings the case to this court by writ of error.]

Mr. Justice Woodbury delivered the opinion of the court.

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But it is not found necessary for us to decide finally on this first and more doubtful question, as our opinion is clearly in favor of the defendant in error on the other question; namely, that the parties

to this grant did not by their charter stand in the attitude towards each other of making a contract by it, such as is contemplated in the constitution, and as could not be modified by subsequent legislation. The legislature was acting here on the one part, and public municipal and political corporations on the other. They were acting, too, in relation to a public object, being virtually a highway across the river, over another highway up and down the river. From this standing and relation of these parties, and from the subject-matter of their action, we think that the doings of the legislature as to this ferry must be considered rather as public laws than as contracts. They related to public interests. They changed as those interests demanded. The grantees likewise, the towns being mere organizations for public purposes, were liable to have their public powers, rights, and duties modified or abolished at any moment by the legislature.

They are incorporated for public, and not private objects. They are allowed to hold privileges or property only for public purposes. The members are not shareholders, nor joint partners in any corporate estate, which they can sell or devise to others, or which can be attached and levied on for their debts.

Hence, generally, the doings between them and the legislature are in the nature of legislation rather than compact, and subject to all the legislative conditions just named, and therefore to be considered as not violated by subsequent legislative changes.

It is hardly possible to conceive the grounds on which a different result could be vindicated, without destroying all legislative sovereignty, and checking most legislative improvements and amendments, as well as supervision over its subordinate public bodies.

Thus, to go a little into details, one of the highest attributes and duties of the legislature is to regulate public matters with all public bodies, no less than the community, from time to time, in the manner which the public welfare may appear to demand.

It can neither devolve these duties permanently on other public bodies, nor permanently suspend or abandon them itself, without being usually regarded as unfaithful, and, indeed, attempting what is wholly beyond its constitutional competency.

It is bound, also, to continue to regulate such public matters and bodies, as much as to organize them at first. Where not restrained by some constitutional provision, this power is inherent in its nature, design, and attitude; and the community possess as deep and permanent an interest in such power remaining in and being exercised by the legislature, when the public progress and welfare demand it, as individuals or corporations can, in any instance, possess in restraining it. See Taney, C. J., in 11 Pet. 547, 548.

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Looking to the subject, when, as here, the grantees as well as the grantors are public bodies, and created solely for municipal and

political objects, the continued right of the legislature to make regulations and changes is still clearer. Perhaps a stronger illustration of this principle than any yet cited exists in another of our own decisions.

In the State of Maryland *v.* Baltimore and Ohio Railroad, 3 How. 551, this court held, that a grant by the legislature to a county, of a sum forfeited, could be dispensed with by the legislature afterwards, as it was made for public, not private purposes, and to a public body.

[The court further considers the nature of the grant to the town of East Hartford, and finds that it is in the nature of a public grant, and holds therefore that the subsequent repeal by the legislature did not violate any contract rights of the town, and the judgment of the State court is affirmed.]

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## MORLEY *v.* LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY.

146 United States, 162. 1892.

[In a proceeding in the State courts of New York a judgment was rendered against a railroad company, to which the defendant in error is successor, and the latter company being brought into court as defendant for the purpose of having the judgment enforced against it, sought to have the court declare the judgment satisfied by the payment of a less sum than the sum claimed to be due thereon, the difference in the claims of the contending parties being based upon a reduction of the rate of interest payable on judgments, which was made by a statute of New York passed after the original decree was rendered and long after the making of the contract under which the claim accrued. It was contended that the New York statute reducing the rate of interest on the judgment was unconstitutional as impairing the obligation of the contract on which the judgment was based. It was also contended there was a saving clause in the New York statutes which prevented the provision in question as to the reduction of the rate of interest having application to contracts already made, but it was held in the State courts that the saving clause applied only to contracts and not to judgments. The decision of the Court of Appeals of New York was to the effect that the statute reducing the rate of interest on judgments was applicable to the judgment in question, and was not unconstitutional as impairing any contract right; and this decision was brought to this court by writ of error for review.]

MR. JUSTICE SHIRAS delivered the opinion of the court.

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Assuming, then, that the statute in question was correctly construed by the New York court, our only inquiry must be as to the validity of the statute itself, as construed by the State court. Did, then, the law that changed the rate of interest thereafter to accrue on a subsisting judgment, infringe a contract within the meaning of the Constitution of the United States?

Before we state the conclusions reached by this court, the contention on behalf of the plaintiff in error may be briefly stated, as follows:

The judgment was based on a contract which, as soon as it became a cause of action by the failure of the defendant to comply with its terms, began, under the then existing law of the State, to draw interest at the rate of seven per cent per annum, and, when merged into judgment, was entitled to draw interest at that rate until paid; that such judgment was itself a contract in the constitutional sense; and that the interest accruing and to accrue was as much a part of the contract as the principal itself, and equally within the protection of the Constitution.

Interest on a principal sum may be stipulated for in the contract itself, either to run from the date of the contract until it matures, or until payment is made; and its payment in such a case is as much a part of the obligation of contract as the principal, and equally within the protection of the Constitution. But if the contract itself does not provide for interest, then, of course, interest does not accrue during the running of the contract, and whether, after maturity and a failure to pay, interest shall accrue, depends wholly on the law of the State, as declared by its statutes. If the State declares that, in case of the breach of a contract, interest shall accrue, such interest is in the nature of damages, and, as between the parties to the contract, such interest will continue to run until payment, or until the owner of the cause of action elects to merge it into judgment.

After the cause of action, whether a tort or a broken contract, not itself prescribing interest till payment, shall have been merged into a judgment, whether interest shall accrue upon the judgment is a matter not of contract between the parties, but of legislative discretion, which is free, so far as the Constitution of the United States is concerned, to provide for interest as a penalty or liquidated damages for the non-payment of the judgment, or not to do so. When such provision is made by statute, the owner of the judgment is, of course, entitled to the interest so prescribed until payment is received, or until the State shall, in the exercise of its discretion, declare that such interest shall be changed or cease to accrue. Should the statutory damages for non-payment of a judgment be determined by a State, either in whole or in part, the owner of a judgment will be entitled to receive and have a vested right in the damages which

shall have accrued up to the date of the legislative change; but after that time his rights as to interest as damages are, as when he first obtained his judgment, just what the legislature chooses to declare. He has no contract whatever on the subject with the defendant in the judgment, and his right is to receive, and the defendant's obligation is to pay, as damages, just what the State chooses to prescribe.

It is contended on behalf of the plaintiff in error, as stated above, that the judgment is itself a contract, and includes within the scope of its obligation the duty to pay interest thereon. As we have seen, it is doubtless the duty of the defendant to pay the interest that shall accrue on the judgment, if such interest be prescribed by statute, but such duty is created by the statute, and not by the agreement of the parties, and the judgment is not itself a contract within the meaning of the constitutional provision invoked by the plaintiff in error. The most important elements of a contract are wanting. There is no *aggregatio mentium*. The defendant has not voluntarily assented or promised to pay. "A judgment is, in no sense, a contract or agreement between the parties." Wyman *v.* Mitchell, 1 Cowen, 316, 321. In McCoun *v.* New York Central, etc. R. R. Co., 50 N. Y. 176, 180, it was said that "a statute liability wants all the elements of a contract, consideration and mutuality, as well as the assent of the party. Even a judgment founded upon a contract is no contract." In Bidleson *v.* Whytel, 3 Burrow, 1545, it was held by Lord Mansfield, after great deliberation, and after consultation with all the judges, that "a judgment is no contract, nor can be considered in the light of a contract: for *judicium redditur in invitum*." To a *scire facias* on a judgment, entered in 13 Car. II., the defendant for plea alleged that the contract upon which recovery was had was usurious, to which plea the plaintiff demurred, saying that judgments cannot be void upon such a ground, since by the judgment the original contract which is supposed to be usurious is determined, and cited the case of Middleton *v.* Hall (Gouldsb. 128, and Cro. Eliz. 588). And according to this the plea was ruled bad, and judgment given for the plaintiff. Rowe *v.* Bellaseys, 1 Siderfin, 182. "To a *scire facias* on a judgment by confession, the defendant pleaded that the warrant of attorney was given on an usurious contract. And upon demurrer it was held that this was not within the statute 12 Anue [of usury], or to be got at this way, for this is no contract or assurance, a judgment being *redditum in invitum*." Bush *v.* Gower, 2 Strange, 1043. In Louisiana *v.* New Orleans, 109 U. S. 285, 288, in which it was contended on behalf of an owner of a judgment that it was a contract, and within the protection of the Federal Constitution as such, it was said that "the term 'contract' is used in the Constitution in its ordinary sense, as signifying the agreement of two or more minds, for considerations proceeding from one to the other, to do, or not to do, certain acts. Mutual assent to its terms is of its very essence." Where the transaction is not based upon any assent of parties it can-

not be said that any faith is pledged with respect to it, and no case arises for the operation of the constitutional prohibition. Garrison *v.* City of New York, 21 Wall. 196, 203. It is true that in Louisiana *v.* New Orleans, and in Garrison *v.* City of New York, the causes of action merged in the judgments were not contract obligations; but in both these cases, as in this, the court was dealing with the contention that the judgments themselves were contracts *proprio vigore.*

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The further contention of the plaintiff in error, that he has been deprived of his property without due process of law, can be more readily disposed of. If, as we have seen, the plaintiff has actually received on account of his judgment all that he is entitled to receive, he cannot be said to have been deprived of his property; and whether or not a statutory change in the rate of interest thereafter to accrue on the judgment can be regarded as a deprivation of property, the adjudication of the plaintiff's claims by the courts of his own State must be admitted to be due process of law. Nor are we authorized by the judiciary act to review this judgment of the State court, because this judgment refuses to give effect to a valid contract or because such judgment in its effect impairs the obligation of a contract. If we did, every case decided in the State courts could be brought here, when the party setting up a contract alleged that the court took a different view of its obligation from that which he held. Knox *v.* Exchange Bank, 12 Wall. 379, 383.

The result of these views is, that we find no error in the record, and that the judgment of the New York Court of Appeals is accordingly *Affirmed.*[1]

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## McCRACKIN *v.* HAYWARD.

2 Howard, 608; 15 Curtis, 228. 1844.

[SUIT was brought in the Circuit Court of the United States for the District of Illinois to foreclose a mortgage. It appeared that after the execution of the mortgage in Illinois a State statute was passed requiring that in sales of real or personal property under foreclosure of mortgage an appraisement should be made of the value of the property and the sale should be for not less than two-thirds of such appraised value. This statutory provision having been adopted by rule of the Circuit Court as applicable to foreclosure of mortgages in that court, it was contended that the statute and rule were not applicable to a mortgage executed before the passage of the statute. On

[1] MR. JUSTICE HARLAN delivered a dissenting opinion, in which MR. JUSTICE FIELD and MR. JUSTICE BREWER concurred.

certificate of division of opinion of the judges of the court, the case was brought to this court.]

Mr. Justice Baldwin delivered the opinion of the court.

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In placing the obligation of contracts under the protection of the Constitution, its framers looked to the essentials of the contract more than to the forms and modes of proceeding by which it was to be carried into execution; annulling all State legislation which impaired the obligation, it was left to the States to prescribe and shape the remedy to enforce it. The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution.

This principle is so clearly stated and fully settled in the case of Bronson *v.* Kinzie, decided at the last term, 1 How. 311, that nothing remains to be added to the reasoning of the court, or requires a reference to any other authority than what is therein referred to; it is, however, not to be understood that by that, or any former decision of this court, all State legislation on existing contracts is repugnant to the Constitution.

"It is within the undoubted power of State legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time, and the power is the same whether the deed is dated before or after the passage of the recording act. Though the effect of such a law is to render the prior deed fraudulent and void as against a subsequent purchaser, it is not a law impairing the obligation of contracts; such, too, is the power to pass acts of limitation, and their effect. Reasons of sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned. The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to

their enactment. Cases may occur where the provisions of a law may be so unreasonable as to amount to the denial of a right, and call for the interposition of the court." 3 Pet. 290.

The obligation of the contract between the parties, in this case, was to perform the promises and undertakings contained therein; the right of the plaintiff was to damages for the breach thereof, to bring suit and obtain a judgment, to take out and prosecute an execution against the defendant till the judgment was satisfied, pursuant to the existing laws of Illinois. These laws giving these rights were as perfectly binding on the defendant, and as much a part of the contract, as if they had been set forth in its stipulations in the very words of the law relating to judgments and executions. If the defendant had made such an agreement as to authorize a sale of his property, which should be levied on by the sheriff, for such price as should be bid for it at a fair public sale on reasonable notice, it would have conferred a right on the plaintiff, which the Constitution made inviolable; and it can make no difference whether such right is conferred by the terms or law of the contract. Any subsequent law which denies, obstructs, or impairs this right, by superadding a condition that there shall be no sale for any sum less than the value of the property levied on, to be ascertained by appraisement, or any other mode of valuation than a public sale, affects the obligation of the contract as much in the one case as the other, for it can be enforced only by a sale of the defendant's property, and the prevention of such sale is the denial of a right. The same power in a State legislature may be carried to any extent, if it exists at all; it may prohibit a sale for less than the whole appraised value, or for three-fourths, or nine-tenths, as well as for two-thirds; for if the power can be exercised to any extent, its exercise must be a matter of uncontrollable discretion, in passing laws relating to the remedy which are regardless of the effect on the right of the plaintiff. This was the ruling principle of the case of Bronson *v.* Kinzie, 1 How. 311, which arose on a mortgage containing a covenant, that, in default of payment, the mortgagee might enter upon, sell, and convey the mortgaged premises, as the attorney of the mortgagor; yet the case was not decided on the effect and obligation of that covenant, but on the broad and general principle, that a State law, which professedly provided a remedy for enforcing the contract of mortgage, effectually impaired the rights incident to, and attached to it by the laws in force at its date, was void. No agreement or contract can create more binding obligations than those fastened by the law, which the law creates and attaches to contracts; the express power which a mortgagor confers on the mortgagee to sell as his agent is not more potent than that which the law delegates to the marshal, to sell and convey the property levied on, under an execution. He is the constituted agent of the defendant, invested with all his powers for these purposes. The marshal can do under the authority of the

law whatever he could do under the fullest power of attorney from the execution debtor; and no State law can prohibit it. It follows that the law of Illinois now under consideration, so far as it prohibits a sale for less than two-thirds of the appraised value of the property levied on, is unconstitutional and void.[1]

[1] In GUNN v. BARRY, 15 Wall. 610 (1872), the validity of a State statute increasing the exemption to a debtor, as applied to indebtedness under a contract already existing, was brought in question. MR. JUSTICE SWAYNE, delivering the opinion of the court, uses this language: —

"The legal remedies for the enforcement of a contract, which belong to it at the time and place where it is made, are a part of its obligation. A State may change them, provided the change involve no impairment of a substantial right. If the provision of the Constitution, or the legislative act of a State, fall within the category last mentioned, they are to that extent utterly void. They are, for all the purposes of the contract which they impair, as if they had never existed. The constitutional provision and statute here in question are clearly within that category, and are, therefore, void. The jurisdictional prohibition which they contain with respect to the courts of the State can, therefore, form no impediment to the plaintiff in error in the enforcement of his rights touching this judgment, as those rights are recognized by this court. White v. Hart, 13 Wall. 646; Von Hoffman v. The City of Quincy, 4 id. 535.

In TERRY v. ANDERSON, 95 U. S. 628 (1877), the validity of a State statute of Georgia passed in 1869 providing that causes of action which had accrued prior to 1865, and which were not brought by the first of January, 1870, should be barred after the latter date, was called in question. It appearing that under the statute of limitation in force when the contract was made the right of action thereunder would not be barred, it was contended that the subsequent statute impaired the obligation of the prior contract. MR. CHIEF JUSTICE WAITE, delivering the opinion of the court, uses this language: —

"This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. Hawkins v. Barney, 5 Pet. 451; Jackson v. Lamphire, 3 id. 280; Sohn v. Waterson, 17 Wall. 596; Christmas v. Russell, 5 id. 290; Sturges v. Crowninshield, 4 Wheat. 122. It is difficult to see why, if the legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed, than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remain.

"In all such cases, the question is one of reasonableness, and we have therefore only to consider whether the time allowed in this statute is, under all the circumstances, reasonable. Of that the legislature is primarily the judge; and we cannot overrule the decision of that department of the government, unless a palpable error has been committed. In judging of that, we must place ourselves in the position of the legislators, and must measure the time of limitation in the midst of the circumstances which surrounded them, as nearly as possible; for what is reasonable in a particular case depends upon its particular facts."

In MITCHELL v. CLARK, 110 U. S. 633 (1884), it appeared that in a State court of Missouri the validity of a statute of the United States was brought in question which prescribed a limit to actions on account of any arrest or imprisonment made or trespass committed during the rebellion by virtue or under color of any authority derived from or exercised by or under the President of the United States or by or under any

## SECTION II. — PROTECTION TO PROPERTY.

### MISSOURI PACIFIC RAILWAY *v.* NEBRASKA.

164 United States, 403. 1896.

[AN action for a mandamus was brought in the Supreme Court of the State of Nebraska to compel the plaintiff in error to comply with an order of the Nebraska State Board of Transportation which directed the company to grant to certain persons the right to erect an elevator upon the grounds of the railway company at one of its stations in accordance with the provision of the constitution of Nebraska which declares that railways are "public highways and shall be free to all persons for the transportation of their persons or property thereon under such regulations as may be prescribed by law," and statutory provisions thereunder providing for a board of transportation and authorizing it to investigate cases of discrimination, etc. It appeared that permission had been given to two private firms to erect elevators upon the right of way at this station, and complainants who were refused permission to erect a third elevator under the same terms and conditions as those granted in the other cases asked relief on the ground that such refusal was an unjust discrimination. A mandamus having been awarded in the trial court and sustained in the State Supreme Court, the case is brought to this court by writ of error.]

MR. JUSTICE GRAY delivered the opinion of the court.

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The order in question was not, and was not claimed to be, either in the opinion of the court below, or in the argument for the defendant in error in this court, a taking of private property for a public use under the right of eminent domain. The petitioners were merely private individuals, voluntarily associated together for their own

act of Congress, etc. The Supreme Court of that State having held this legislation to be invalid, the case was brought by writ of error to this court. MR. JUSTICE MILLER, delivering the opinion of the court, uses this language: —

"It is no answer to this to say that [such legislation] interferes with the validity of contracts, for no provision of the Constitution prohibits Congress from doing this, as it does the States; and where the question of the power of Congress arises, as in the legal tender cases and in bankruptcy cases, it does not depend upon the incidental effect of its exercise on contracts, but on the existence of the power itself.

"In regard to the States, which are expressly forbidden to impair by legislation the obligation of contracts, it has been repeatedly held that a statute of limitation which reduces materially the time within which suit may be commenced, though passed after the contract was made, is not void if a reasonable time is left for the enforcement of the contract by suit before the statute bars that right."

benefit. They do not appear to have been incorporated by the State for any public purpose whatever; or to have themselves intended to establish an elevator for the use of the public. On the contrary, their own application to the railroad company, as recited in their complaint to the board of transportation, was only "for a location, on the right of way at Elmwood station aforesaid, for the erection of an elevator of sufficient capacity to store from time to time the cereal products of the farms and leaseholds of complainants aforesaid, as well as the products of other neighboring farms."

To require the railroad company to grant to the petitioners a location on its right of way, for the erection of an elevator for the specified purpose of storing from time to time the grain of the petitioners and of neighboring farmers, is to compel the railroad company, against its will, to transfer an estate in part of the land which it owns and holds, under its charter, as its private property and for a public use, to an association of private individuals, for the purpose of erecting and maintaining a building thereon for storing grain for their own benefit, without reserving any control of the use of such land, or of the building to be erected thereon, to the railroad company for the accommodation of its own business, or for the convenience of the public.

This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion, that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation, for the private use of the petitioners. The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States. Wilkinson *v.* Leland, 2 Pet. 627, 658; Murray *v.* Hoboken Co., 18 How. 272, 276; Loan Association *v.* Topeka, 20 Wall. 655; Davidson *v.* New Orleans, 96 U. S. 97, 102; Cole *v.* La Grange, 113 U. S. 1; Fallbrook District *v.* Bradley [164 U. S.], 112, 158, 161; State *v.* Chicago, Milwaukee, & St. Paul Railway, 36 Minn. 402.

*Judgment reversed, and case remanded to the Supreme Court of the State of Nebraska, for further proceedings not inconsistent with this opinion.*

## PENNOYER *v.* NEFF.

95 United States, 714. 1877.

Mr. Justice Field delivered the opinion of the court.

This is an action to recover the possession of a tract of land, of the alleged value of $15,000, situated in the State of Oregon. The plaintiff asserts title to the premises by a patent of the United States issued to him in 1866, under the act of Congress of Sept. 27, 1850, usually known as the Donation Law of Oregon. The defendant claims to have acquired the premises under a sheriff's deed, made upon a sale of the property on execution issued upon a judgment recovered against the plaintiff in one of the Circuit Courts of the State. The case turns upon the validity of this judgment.

It appears from the record that the judgment was rendered in February, 1866, in favor of J. H. Mitchell, for less than $300, including costs, in an action brought by him upon a demand for services as an attorney; that, at the time the action was commenced and the judgment rendered, the defendant therein, the plaintiff here, was a non-resident of the State; that he was not personally served with process, and did not appear therein; and that the judgment was entered upon his default in not answering the complaint, upon a constructive service of summons by publication.

The Code of Oregon provides for such service when an action is brought against a non-resident and absent defendant, who has property within the State. It also provides, where the action is for the recovery of money or damages, for the attachment of the property of the non-resident. And it also declares that no natural person is subject to the jurisdiction of a court of the State, "unless he appear in the court, or be found within the State, or be a resident thereof, or have property therein; and, in the last case, only to the extent of such property at the time the jurisdiction attached." Construing this latter provision to mean, that, in an action for money or damages where a defendant does not appear in the court, and is not found within the State, and is not a resident thereof, but has property therein, the jurisdiction of the court extends only over such property, the declaration expresses a principle of general, if not universal, law. The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse. D'Arcy *v.* Ketchum *et al.*, 11 How. 165. In the case against the plaintiff, the property here in controversy sold under the judgment rendered was not attached, nor in any way brought under the jurisdiction of the court. Its first connection with the case was

caused by a levy of the execution. It was not, therefore, disposed of pursuant to any adjudication, but only in enforcement of a personal judgment, having no relation to the property, rendered against a non-resident without service of process upon him in the action, or his appearance therein. The court below did not consider that an attachment of the property was essential to its jurisdiction or to the validity of the sale, but held that the judgment was invalid from defects in the affidavit upon which the order of publication was obtained, and in the affidavit by which the publication was proved.

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But it was also contended in that court, and is insisted upon here, that the judgment in the State court against the plaintiff was void for want of personal service of process on him, or of his appearance in the action in which it was rendered, and that the premises in controversy could not be subjected to the payment of the demand of a resident creditor except by a proceeding *in rem;* that is, by a direct proceeding against the property for that purpose. If these positions are sound, the ruling of the Circuit Court as to the invalidity of that judgment must be sustained, notwithstanding our dissent from the reasons upon which it was made. And that they are sound would seem to follow from two well-established principles of public law respecting the jurisdiction of an independent State over persons and property. The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred. The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. Story, Confl. Laws, c. 2; Wheat. Int. Law, pt. 2, c. 2. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and

that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. "Any exertion of authority of this sort beyond this limit," says Story, "is a mere nullity, and incapable of binding such persons or property in any other tribunals." Story, Confl. Laws, sect. 539.

But as contracts made in one State may be enforceable only in another State, and property may be held by non-residents, the exercise of the jurisdiction which every State is admitted to possess over persons and property within its own territory will often affect persons and property without it. To any influence exerted in this way by a State affecting persons resident or property situated elsewhere, no objection can be justly taken; whilst any direct exertion of authority upon them, in an attempt to give ex-territorial operation to its laws, or to enforce an ex-territorial jurisdiction by its tribunals, would be deemed an encroachment upon the independence of the State in which the persons are domiciled or the property is situated, and be resisted as usurpation.

Thus the State, through its tribunals, may compel persons domiciled within its limits to execute, in pursuance of their contracts respecting property elsewhere situated, instruments in such form and with such solemnities as to transfer the title, so far as such formalities can be complied with; and the exercise of this jurisdiction in no manner interferes with the supreme control over the property by the State within which it is situated. Penn *v.* Lord Baltimore, 1 Ves. 444; Massie *v.* Watts, 6 Cranch, 148; Watkins *v.* Holman, 16 Pet. 25; Corbett *v.* Nutt, 10 Wall. 464.

So the State, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled. Every State owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-resident have no property in the State, there is nothing upon which the tribunals can adjudicate.

[The nature of proceedings *in rem* as illustrated by various cases is then considered at length, the case of Thompson *v.* Whitman, 18 Wall. 457, *supra*, p. 844, being specially referred to.]

Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground

that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution — that is, by the law of its creation — to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.

Except in cases affecting the personal status of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance, as hereinafter mentioned, the substituted service of process by publication, allowed by the law of Oregon and by similar laws in other States, where actions are brought against non-residents, is effectual only where, in connection with process against the person for commencing the action, property in the State is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding *in rem*. As stated by Cooley in his Treatise on Constitutional Limitations, 405, for any other purpose than to subject the property of a non-resident to valid claims against him in the State, "due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered."

It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the State, they are substantially proceedings *in rem* in the broader sense which we have mentioned.

It is hardly necessary to observe, that in all we have said we have had reference to proceedings in courts of first instance, and to their jurisdiction, and not to proceedings in an appellate tribunal to

review the action of such courts. The latter may be taken upon such notice, personal or constructive, as the State creating the tribunal may provide. They are considered as rather a continuation of the original litigation than the commencement of a new action. Nations *et al. v.* Johnson *et al.*, 24 How. 195.

It follows from the views expressed that the personal judgment recovered in the State court of Oregon against the plaintiff herein, then a non-resident of the State, was without any validity, and did not authorize a sale of the property in controversy.

To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a State may not authorize proceedings to determine the status of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident. The jurisdiction which every State possesses to determine the civil status and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties guilty of acts for which, by the law of the State, a dissolution may be granted, may have removed to a State where no dissolution is permitted. The complaining party would, therefore, fail if a divorce were sought in the State of the defendant; and if application could not be made to the tribunals of the complainant's domicile in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress. Bish. Marr. and Div., sect. 156.

Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-residents both within and without the State. As was said by the Court of Exchequer in Vallee *v.* Dumergue, 4 Exch. 290, "It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them." See also The Lafayette

Insurance Co. *v.* French *et al.*, 18 How. 404, and Gillespie *v.* Commercial Mutual Marine Insurance Co., 12 Gray (Mass.), 201. Nor do we doubt that a State, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions would hold their interest subject to the conditions prescribed by law. Copin *v.* Adamson, Law Rep. 9 Ex. 345.

In the present case there is no feature of this kind, and, consequently, no consideration of what would be the effect of such legislation in enforcing the contract of a non-resident can arise. The question here respects only the validity of a money judgment rendered in one State, in an action upon a simple contract against the resident of another, without service of process upon him, or his appearance therein. *Judgment affirmed.*[1]

[1] MR. JUSTICE HUNT delivered a dissenting opinion.

In ARNDT *v.* GRIGGS, 134 U. S. 316 (1890), the question was considered whether a State has the power to provide by statute that the title to real estate within its limits may be settled and determined by a suit in which the defendant, being a non-resident, is brought into court only by publication. MR. JUSTICE BREWER, delivering the opinion of the court, uses this language: —

"If a State has no power to bring a non-resident into its courts for any purposes by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a non-resident will remain for all time a cloud, unless such non-resident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the State. It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a non-resident within its limits — its process goes not out beyond its borders — but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice. The well-being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the State; and as this duty is one of the State, the manner of discharging it must be determined by the State, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution, or against natural justice. So it has been held repeatedly that the procedure established by the State, in this respect, is binding upon the Federal courts.

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"These various decisions of this court establish that, in its judgment, a State has power by statute to provide for the adjudication of titles to real estate within its limits as against non-residents who are brought into court only by publication; and that is all that is necessary to sustain the validity of the decree in question in this case."

## CUNNIUS *v.* READING SCHOOL DISTRICT.

198 U. S. 458, 25 Sup. Ct. Rep. 721. 1905.

[This was an appeal from a judgment of the Supreme Court of Pennsylvania, sustaining the validity of a state statute providing for administration upon the estates of persons presumed to be dead by reason of long absence.]

MR. JUSTICE WHITE delivered the opinion of the court.

In their ultimate aspect the assignments of error and the propositions based on them all rest on the assumption that the State of Pennsylvania had no jurisdiction over the person or property of the absentee, and therefore the proceedings for the appointment of the administrator and all acts done by him were void and subject to collateral attack. But to uphold this contention, in a broad sense, would be to deny the possession by the various States of powers which they obviously have the right to exert.

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It will be observed that the propositions challenge the authority of the State to enact the statute which formed the basis of the proceedings, not only because it is insisted that there was a complete want of power to do so, but also because, even if the State had power, the method of procedure which the statute authorized was so wanting in notice as not to constitute due process of law. We shall consider these objections separately:

1st. Was the State statute providing for the administration of the property of an absentee under the circumstances contemplated by the statute so beyond the scope of the State's authority as to constitute a want of due process of law within the intendment of the Fourteenth Amendment? That the Amendment does not deprive the States of their police power over subjects within their jurisdiction is elementary. The question then is, not the wisdom of the statute, but whether it was so beyond the scope of municipal government as to amount to a want of due process of law. The solution of this inquiry leads us therefore to consider the general power of government to provide for the administration of the estates of absentees under the conditions enumerated in the Pennsylvania law. We do not pause to demonstrate, by original reasoning, that the right to regulate concerning the estate or property of absentees is an attribute, which, in its very essence, must belong to all governments, to the end that they may be able to perform the purposes for which government exists. This is not done, because we propose rather to test the question by ascertaining how far such authority has been deemed a proper governmental attribute in all times and under all conditions. If it be found that an authority of that character has ever been treated as belonging to government and embraced in the right to protect and

foster the well-being and order of society, it must follow that that which has at all times been conceded to be within the power of government, cannot, in reason, be said to be so beyond the scope of governmental authority that the exertion of such a power must be held to be a want of due process of law, even although there is no constitutional limitation affecting the exercise of the power. Whilst it may be that under the Roman Law there was no complete and coherent system provided for the administration of the estate of an absentee, Toullier, title 1, No. 379; Duranton, title 1, No. 384, it is nevertheless certain that absence, without being heard from for a given length of time, authorized the appointment of a curator to protect and administer an estate. See the references to the Roman Law on that subject in Domat, liv. 2, tit. 2, sect. 1, No. 13. That in the ancient law of France, under varying conditions, the same governmental right was recognized is also undoubted. Journal du Palais Rep. Verbo Absence, p. 20, from No. 9 to 25. In the Code Napoleon the subject is especially provided for under a title treating of absence, in which ample provision is made for the administration of the property of the absentee, the law providing for, first, the provisional and ultimately the final distribution of such property in accordance with the restrictions and regulations which the title provides. Code Nap., title 4, article 112 *et seq.* Demolombe, in generally treating upon the subject, thus expounds the fundamental conceptions from which the power of government on the subject is derived:

"Three characters of interest invoke a necessity for legislation concerning this difficult and important subject. First. The interest of the person himself who has disappeared. If it is true that generally speaking every person is held at his own peril to watch over his own property, nevertheless the law owes a duty to protect those who from incapacity are unable to direct their affairs. It is upon this principle of public order that the appointment of tutors to minors or curators to the insane rests. It is indeed natural to presume that a person who has disappeared, if he continues to exist, is prevented from returning by some obstacle stronger than his own will, and which, therefore, places him in the category of an incapable person, whose interest it is the duty of the law to protect. And it is for this reason that the provisions as to absence in the code are placed in the chapter treating of the status of persons because the absentee, in the legal sense, is a person occupying a peculiar legal status. Second. The duty of the lawmaker to consider the rights of third parties against the absentee, especially those who have rights which would depend upon the death of the absentee. Third. Finally, the general interest of society which may require that property does not remain abandoned without some one representing it and without an owner. . . . "

Provisions similar in character to those of the Code Napoleon were incorporated in the Civil Code of Louisiana of 1808 under the head

of absentees in book 1 of that code, defining the status of persons, and such provisions have been in force from that day to the present time. Louisiana Civil Code, article 47 *et seq.* The provisions of that code on the subject were referred to by this court in Scott *v.* McNeal, 154 U. S. 34, 41. Under the law of England, as stated in that case, a presumption of death arose from an absence of seven years without being heard from; and whilst it is true, as we shall hereafter have occasion to say, that such presumption was not conclusive and was rebuttable, nevertheless the very fact of the presumption occasioned by absence, irrespective of the force of the presumption, was a manifestation of the power to give legal effect to the status arising from absence.

As the preceding statement shows that the right to regulate the estates of absentees, both in the common and civil law, has ever been recognized as being within the scope of governmental authority, it must follow that the proposition that the State of Pennsylvania was wholly without power to legislate concerning the property of an absentee, is without merit, unless it be that the authority of a State over the subject is restrained by some constitutional limitation. That the constitution of Pennsylvania does not put such a restriction is foreclosed by the decision of the Supreme Court of Pennsylvania in this case. But it is insisted, conceding that the State of Pennsylvania had power to provide for the administration of the property of an absentee, yet that authority could not be exerted without violating the due process clause of the Fourteenth Amendment if the administrative proceeding, brought into play under the exercise of the authority, is made binding upon the absentee if it should subsequently develop that he was alive when the administration was initiated. To sustain this proposition numerous decisions of State courts of last resort are relied upon, which are enumerated in the margin, and special reliance is placed upon the decision of this court in Scott *v.* McNeal, *supra.*

In that case a probate court in the State of Washington had issued letters of administration upon the estate of a person who had disappeared, and proceeded to admiuister his estate as that of a dead person upon the presumption of death, which the court assumed had arisen from his absence. There was no statute of the State of Washington providing for an administration of the estate of an absentee as such, and creating rights and safeguards applicable to that situation, as distinct from the general law of the State, conferring upon courts of probate power to administer the estates of deceased persons. Referring to the presumption under the law of England of death arising from absence, it was held that such presumption was not conclusive, and was absolutely rebutted by proof that the person who was presumed from the fact of absence to be dead was, in fact, alive. Having established this proposition, it was then held, as death was essential to confer jurisdiction on a probate court to administer an estate as such, the fact of life at the time the administration was initiated con-

clusively rebutted the presumption and caused the court to be wholly without jurisdiction to administer the estate of a person who was alive. This conclusion was abundantly sustained by a citation of the English and American adjudications, in none of which was the doctrine upon which the case proceeded more cogently stated than in the opinion of this court, speaking through Chief Justice Marshall, in Griffith *v.* Frazier, 8 Cr. 9, 23. That the opinion, however, in Scott *v.* McNeal was not intended to and did not imply that the States were wholly devoid of power to endow their courts with jurisdiction under proper conditions to administer upon the estates of absentees, even though they might be alive, by special and appropriate proceedings applicable to that condition as distinct from the general power to administer the estates of deceased persons, is conclusively shown by the opinion in Scott *v.* McNeal.

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True it is that there are some general expressions found in the opinion (p. 50), which, if separated from the context of the opinion, might lead to the conclusion that it was held that a State was absolutely without power to provide by a special proceeding for the administration and care of the property of an absentee, and to confer jurisdiction on its courts to do so, irrespective of the fact of death. But these general expressions are necessarily controlled by the case which was before the court, and by the context of the opinion, which makes it clear that it was alone decided that under a law giving jurisdiction to probate courts to administer the estates of deceased persons, even although a rebuttable presumption existed as to death after a certain time, that if such presumption was subsequently rebutted by the proof of the fact of life that the court, whose authority depended upon death, was devoid of jurisdiction.

[The decision of the Pennsylvania court was therefore affirmed.]

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## GOSHORN *v.* PURCELL.

11 Ohio State, 641. 1860.

[PLAINTIFF in the lower court, who is defendant in error in this court, brought action to have a deed corrected which was executed by defendant and his wife for the conveyance to plaintiff of property, the fee simple title of which was in defendant's wife. It appeared that the deed did not contain in the granting clause thereof the name of defendant's wife as grantor, which was essential by the law of Ohio to the validity of the deed as to the wife's title. The wife, however, joined in the execution of the deed. Subsequently a statute was passed authorizing the correction of

conveyances of any husband and wife executed and intended to convey the lands of the wife, although not executed as required by law. The lower court granted the relief asked, and on appeal to the Supreme Court it was contended that the State statute was invalid because in violation of a provision in the constitution of the State prohibiting the passing of retroactive laws "except for the purpose of authorizing the courts to carry into effect the manifest intention of parties and officers by curing omissions, defects," etc.]

GHOLSON, J. . . .

The argument against the validity of the law assumes that, as applied to this case, it interferes with vested rights; that the married woman being bound by no contract, and her act being, as the law then stood, void and inoperative, her right to the property was left untouched, and that to take it away by subsequent legislation would operate as a mere arbitrary divestiture of title. This, it is said, even a provision of the constitution could not do. Upon so grave an inquiry as our right, in any case, to disregard a provision of the constitution, we do not think we are required to enter. For we think that the case which the argument assumes is not presented. The act of the married woman may, under the law, have been void and inoperative; but, in justice and equity, it did not leave her right to the property untouched. She had capacity to do the act, in a form prescribed by law for her protection. She intended to do the act in the prescribed form. She attempted to do it, and her attempt was received and acted on in good faith. A mistake, subsequently discovered, invalidates the act; justice and equity require that she should not take advantage of that mistake; and she has, therefore, no just right to the property. She has no right to complain if the law, which prescribed forms for her protection, shall interfere to prevent her reliance upon them to resist the demands of justice. She has no vested right to do wrong. Foster *v.* Essex Bank, 16 Mass. 245, 273. As said in a recent case, "laws curing defects, which would otherwise operate to frustrate what must be presumed to be the desire of the party affected, cannot be considered as taking away vested rights. Courts do not regard rights as vested contrary to the equity and justice of the case." State *v.* Newark, 3 Dutcher, 185, 197. "Retrospective laws that violated no principle of natural justice, but that, on the contrary, were in furtherance of equity and good morals," have been repeatedly sustained in this State. Trustees of Cuyahoga Falls, R. E. A. *v.* McCaughy, 2 Ohio St. 152, 155; Butler *v.* The City of Toledo, 5 Ohio St. 225, 231; Lewis *v.* McElwain, 16 Ohio, 347, 355; Johnson *v.* Bentley, id. 97, 103.

[The judgment of the lower court is therefore affirmed.[1]]

[1] In BRINTON *v.* SEEVERS, 12 Iowa, 389, the validity of a State statute curing defects in acknowledgments of deeds previously recorded was in question, and WRIGHT, J., delivering the opinion of the court, uses this language: —

"Our conclusion is, that the act is not repugnant to the Constitution upon the ground that it impairs the obligation of contracts. It validates, rather than otherwise, the contracts in question. Satterlee v. Matthewson, 2 Pet. 380; Watson v. Mercer, 8 Ib. 88. But it is invalid upon the ground that, as applied to this case, it interferes with vested rights. It appears from the bill and exhibits that respondent purchased the property, paid his money, and received the sheriff's certificate, before the passage of the curative act of 1858; but procured the sheriff's deed afterwards. If the purchase had been subsequent to the taking effect of this act, then he would be affected by its curative terms, and could not in any sense claim that it interfered with vested rights. By such voluntary purchase, with knowledge of the law, he would stand in no better position than the parties to the deed. When he purchases and parts with his money, however, before, the legislature cannot, by afterwards declaring the title of a third person valid, make it paramount and deprive such purchaser of all rights acquired under the sheriff's sale."

In MATTINGLY v. DISTRICT OF COLUMBIA, 97 U. S. 687 (1878), it was urged in a bill filed in the Supreme Court for the District of Columbia, that the board of public works of the district were proceeding without authority to assess property for improvements on the abutting street. MR. JUSTICE STRONG, delivering the opinion of the court on appeal from that court, uses the following language: —

"We do not propose to inquire whether the charges of the bill are well founded. Such an inquiry can have no bearing upon the case as it now stands; for were it conceded that the board of public works had no authority to do the work that was done at the time when it was done, and consequently no authority to make an assessment of a part of its cost upon the complainants' property, or to assess in the manner in which the assessment was made, the concession would not dispose of the case, or establish that the complainants have a right to the equitable relief for which they pray. There has been congressional legislation since 1872, the effect of which upon the assessments is controlling. There were also acts of the legislative assembly of the District, which very forcibly imply a confirmation of the acts and assessments of the board of which the bill complains. If Congress or the legislative assembly had the power to commit to the board the duty of making the improvements, and to prescribe that the assessments should be made in the manner in which they were made, it had power to ratify the acts which it might have authorized. And the ratification, if made, was equivalent to an original authority, according to the maxim, *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.* Under the Constitution, Congress had power to exercise exclusive legislation in all cases whatsoever over the District, and this includes the power of taxation. Cohen v. Virginia, 6 Wheat. 264. Congress may legislate within the District, respecting the people and property therein, as may the legislature of any State over any of its subordinate municipalities. It may therefore cure irregularities, and confirm proceedings which without the confirmation would be void, because unauthorized, provided such confirmation does not interfere with intervening rights. Judge Cooley, in view of the authorities, asserts the following rule: 'If the thing wanting, or which failed to be done, and which constitutes the defect in the proceeding, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law.' Cooley, Const. Lim. 371. This rule, we think, is accurately stated."

## CAMPBELL *v.* HOLT.

115 United States, 620. 1885.

Mr. Justice Miller delivered the opinion of the court.

[This action was brought in a district court of Texas, by defendant in error to recover of plaintiffs in error as administrators, a sum of money claimed to be due for conversion of property by testator. By way of defence to the claim the State statute of limitations was set up, but it appeared that after the cause of action became barred the State adopted a new constitution in which it was declared that the statutes of limitations of civil suits were suspended by the so-called act of secession, and should be considered as suspended until the adoption of this constitution. The bar of the statute of limitations which the defendant relied on accrued during the Rebellion and before the restoration of the State to the Union. Judgment was rendered for plaintiff in the lower court, and affirmed on appeal to the commissioners of appeal. By writ of error the case is brought to this court.]

The action is based on contract. It is for hire of the negroes used by the father, and for the money received for the land of his daughter, sold by him. The allegation is of indebtedness on this account, and the plea is that the action is barred by the statute of limitations. It is not a suit to recover possession of real or personal property, but to recover for the violation of an implied contract to pay money. The distinction is clear, and, in the view we take of the case, important.

By the long and undisturbed possession of tangible property, real or personal, one may acquire a title to it, or ownership, superior in law to that of another, who may be able to prove an antecedent and, at one time, paramount title. This superior or antecedent title has been lost by the laches of the person holding it, in failing within a reasonable time to assert it effectively; as, by resuming the possession to which he was entitled, or asserting his right by suit in the proper court. What the primary owner has lost by his laches, the other party has gained by continued possession, without question of his right. This is the foundation of the doctrine of *prescription*, a doctrine which, in the English law, is mainly applied to incorporeal hereditaments, but which, in the Roman law, and the codes founded on it, is applied to property of all kinds.

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Possession has always been a means of acquiring title to property. It was the earliest mode recognized by mankind of the *appropriation* of anything tangible by one person to his own use, to the exclusion of others, and legislators and publicists have always acknowledged its efficacy in confirming or creating title.

The English and American statutes of limitation have in many cases the same effect, and, if there is any conflict of decisions on the subject, the weight of authority is in favor of the proposition that, where one has had the peaceable, undisturbed, open possession of real or personal property, with an assertion of his ownership, for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title — a title superior to that of the latter, whose neglect to avail himself of his legal rights has lost him his title. This doctrine has been repeatedly asserted in this court. Leffingwell *v.* Warren, 2 Black, 599; Croxall *v.* Shererd, 5 Wall. 268, 289; Dickerson *v.* Colgrove, 100 U. S. 578, 583; Bicknell *v.* Comstock, 113 U. S. 149, 152. It is the doctrine of the English courts, and has been often asserted in the highest courts of the States of the Union.

It may, therefore, very well be held that, in an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, such act deprives the party of his property without due process of law. The reason is, that, by the law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this title to plaintiff, would be to deprive him of his property without due process of law.

But we are of opinion that to remove the bar which the statute of limitations enables a debtor to interpose to prevent the payment of his debt stands on very different ground.

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In all this class of cases the ground taken is, that there exists a contract, but, by reason of no remedy having been provided for its enforcement, or the remedy ordinarily applicable to that class having, for reasons of public policy, been forbidden or withheld, the legislature, by providing a remedy where none exists, or removing the statutory obstruction to the use of the remedy, enables the party to enforce the contract, otherwise unobjectionable.

Such is the precise case before us. The implied obligation of defendant's intestate to pay his child for the use of her property remains. It was a valid contract, implied by the law before the statute began to run in 1866. Its nature and character were not changed by the lapse of two years, though the statute made that a valid defence to a suit on it. But this defence, a purely arbitrary creation of the law, fell with the repeal of the law on which it depended.

It is much insisted that this right to defence is a vested right, and a right of property which is protected by the provisions of the Fourteenth Amendment.

It is to be observed that the words "vested right" are nowhere used in the Constitution, neither in the original instrument nor in any of the amendments to it.

We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. But when we get beyond this, although vested rights may exist, they are better described by some more exact term, as the phrase itself is not one found in the language of the Constitution.

We certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right, so as to be beyond legislative power in a proper case. The statutes of limitation, as often asserted and especially by this court, are founded in public needs and public policy — are arbitrary enactments by the law-making power. Tioga R. R. Co. *v.* Blossburg & Corning R. R. Co., 20 Wall. 137, 150. And other statutes, shortening the period or making it longer, which is necessary to its operation, have always been held to be within the legislative power until the bar is complete. The right does not enter into or become a part of the contract. No man promises to pay money with any view to being released from that obligation by lapse of time. It violates no right of his, therefore, when the legislature says, time shall be no bar, though such was the law when the contract was made. The authorities we have cited, especially in this court, show that no right is destroyed when the law restores a remedy which had been lost.

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We are unable to see how a man can be said to have *property* in the bar of the statute as a defence to his promise to pay. In the most liberal extension of the use of the word "property," to choses in action, to incorporeal rights, it is new to call the defence of lapse of time to the obligation to pay money, property. It is no natural right. It is the creation of conventional law.

We can understand a right to enforce the payment of a lawful debt. The Constitution says that no State shall pass any law impairing this obligation. But we do not understand the right to satisfy that obligation by a protracted failure to pay. We can see no right which the promisor has in the law which permits him to plead lapse of time instead of payment, which shall prevent the legislature from repealing that law, because its effect is to make him fulfil his honest obligations.

[The court follows the Texas decisions in sustaining the validity of the constitutional provision repealing all statutes of limitation formerly in existence; and the judgment of the lower court is affirmed.[1]]

[1] Mr. Justice Bradley delivered a dissenting opinion, in which Mr. Justice Harlan concurred.

## LOUISIANA ex rel. FOLSOM v. MAYOR OF NEW ORLEANS.

109 United States, 285. 1883.

Mr. Justice Field delivered the opinion of the court.

The relators are the holders of two judgments against the city of New Orleans, one for $26,850, the other for $2,000. Both were recovered in the courts of Louisiana — the first in June, 1877, by the relators; the second in June, 1874, by parties who assigned it to them. Both judgments were for damages done to the property of the plaintiffs therein by a mob or riotous assemblage of people in the year 1873. A statute of the State made municipal corporations liable for damages thus caused within their limits. Rev. Stats. of La., 1870, sect. 2453.

The judgments were duly registered in the office of the comptroller of the city, pursuant to the provisions of the act known as No. 5 of the extra session of 1870, and the present proceeding was taken by the relators to compel the authorities of the city to provide for their payment. At the time the injuries complained of were committed, and one of the judgments was recovered, the city of New Orleans was authorized to levy and collect a tax upon property within its limits of one dollar and seventy-five cents upon every one hundred dollars of its assessed value. At the time the other judgment was recovered this limit of taxation was reduced to one dollar and fifty cents on every one hundred dollars of the assessed value of the property. By the constitution of the State, adopted in 1879, the power of the city to impose taxes on property within its limits was further restricted to ten mills on the dollar of the valuation.

The effect of this last limitation is to prevent the relators, who are not allowed to issue executions against the city, from collecting their judgments, as the funds receivable from the tax thus authorized to be levied are exhausted by the current expenses of the city, which must first be met.

The relators sought in the State courts to compel a levy by the city of taxes to meet their judgments at the rate permitted when the damages were done for which the judgments were obtained. They contended that the subsequent limitation imposed upon its powers violated that clause of the Federal Constitution which prohibits a State from passing a law impairing the obligation of contracts, and also that clause of the Fourteenth Amendment which forbids a State to deprive any person of life, liberty, or property without due process of law. The Supreme Court of the State, reversing the lower court, decided against the relators, and the same contention is renewed here.

The right to reimbursement for damages caused by a mob or riotous assemblage of people is not founded upon any contract between the city and the sufferers. Its liability for the damages is created by a law of the legislature, and can be withdrawn or limited at its pleasure. Municipal corporations are instrumentalities of the State for the convenient administration of government within their limits. They are invested with authority to establish a police to guard against disturbance; and it is their duty to exercise their authority so as to prevent violence from any cause, and particularly from mobs and riotous assemblages. It has, therefore, been generally considered as a just burden cast upon them to require them to make good any loss sustained from the acts of such assemblages which they should have repressed. The imposition has been supposed to create, in the holders of property liable to taxation within their limits, an interest to discourage and prevent any movements tending to such violent proceedings. But, however considered, the imposition is simply a measure of legislative policy, in no respect resting upon contract, and subject, like all other measures of policy, to any change the legislature may see fit to make, either in the extent of the liability or in the means of its enforcement. And its character is not at all changed by the fact that the amount of loss, in pecuniary estimation, has been ascertained and established by the judgments rendered. The obligation to make indemnity created by the statute has no more element of contract in it because merged in the judgments than it had previously. The term "contract" is used in the Constitution in its ordinary sense, as signifying the agreement of two or more minds, for considerations proceeding from one to the other, to do, or not to do, certain acts. Mutual assent to its terms is of its very essence.

A judgment for damages, estimated in money, is sometimes called by text-writers a specialty or contract of record, because it establishes a legal obligation to pay the amount recovered; and, by a fiction of law, a promise to pay is implied where such legal obligation exists. It is on this principle that an action *ex contractu* will lie upon a judgment. Chitty on Contracts, Perkins' ed., 87. But this fiction cannot convert a transaction wanting the assent of parties into one which necessarily implies it. Judgments for torts are usually the result of violent contests, and, as observed by the court below, are imposed upon the losing party by a higher authority against his will and protest. The prohibition of the Federal Constitution was intended to secure the observance of good faith in the stipulation of parties against any State action. Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it; and no case arises for the operation of the prohibition. Garrison *v.* City of New York, 21 Wall. 203. There is, therefore, nothing in the liabilities of the city by reason of which the relators recovered their judgments, that precluded the

State from changing the taxing power of the city, even though the taxation be so limited as to postpone the payment of the judgments.

The clause of the Fourteenth Amendment cited is equally inoperative to restrain the action of the State. Conceding that the judgments, though founded upon claims to indemnity for unlawful acts of mobs or riotous assemblages, are property in the sense that are capable of ownership, and may have a pecuniary value, the relators cannot be said to be deprived of them so long as they continue an existing liability against the city. Although the present limitation of the taxing power of the city may prevent the receipt of sufficient funds to pay the judgments, the legislature of the State may, upon proper appeal, make other provision for their satisfaction. The judgments may also, perhaps, be used by the relators or their assigns as offsets to demands of the city; at least it is possible that they may be available in various ways. Be this as it may, the relators have no such vested right in the taxing power of the city as to render its diminution by the State to a degree affecting the present collection of their judgments a deprivation of their property in the sense of the constitutional prohibition. A party cannot be said to be deprived of his property in a judgment because at the time he is unable to collect it.

The cases in which we have held that the taxing power of a municipality continues, notwithstanding a legislative act of limitation or repeal, are founded upon contracts; and decisions in them do not rest upon the principle that the party affected in the enforcement of his contract rights has been thereby deprived of any property, but upon the principle that the remedies for the enforcement of his contracts existing when they were made have been by such legislation impaired. The usual mode in which municipal bodies meet their pecuniary contracts is by taxation. And when, upon the faith that such taxation will be levied, contracts have been made, the constitutional inhibition has been held to restrain the State from repealing or diminishing the power of the corporation so as to deprive the holder of the contract of all adequate and efficacious remedy. As we have often said, the power of taxation belongs exclusively to the legislative department of the government, and the extent to which it shall be delegated to a municipal body is a matter of discretion, and may be limited or revoked at the pleasure of the legislature. But, as we held in Wolff *v.* New Orleans, 103 U. S. 358, and repeated in Louisiana *v.* Pilsbury, 105 U. S. 278, in both cases by the unanimous judgment of the court, the legislation in that respect is subject to this qualification, which attends all State legislation, that it "shall not conflict with the prohibitions of the Constitution of the United States, and, among other things, shall not operate directly upon contracts of the corporation, so as to impair their obligation by abrogating or lessening the means of their enforcement. Legislation producing this latter result, not indirectly as a consequence

of legitimate measures taken, as will sometimes happen, but directly by operating upon those means, is prohibited by the Constitution, and must be disregarded — treated as if never enacted — by all courts recognizing the Constitution as the paramount law of the land. This doctrine has been repeatedly asserted by this court when attempts have been made to limit the power of taxation of a municipal body, upon the faith of which contracts have been made, and by means of which alone they could be performed. . . . However great the control of the legislature over the corporation while it is in existence, it must be exercised in subordination to the principle which secures the inviolability of contracts."

This doctrine can have no application to claims against municipal corporations, founded upon torts of the character mentioned. Whether or not the State, in so limiting the power of the city to raise funds by taxation that it cannot satisfy all claims against it recognized by law, though not resting upon contract, does a wrong to the relators, which a wise policy and a just sense of public honor should not sanction, is not a question upon which this court can pass. If the action of the State does not fall within any prohibition of the Federal Constitution, it lies beyond the reach of our authority.

The question of the effect of legislation upon the means of enforcing an ordinary judgment of damages for a tort, rendered against the person committing it, in favor of the person injured, may involve other considerations, and is not presented by the case before us.

*Judgment affirmed.*[1]

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## SECTION III. — EMINENT DOMAIN.

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### MUGLER *v.* KANSAS.

123 United States, 623. 1887.

[See *supra*, p. 938.]

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### PUMPELLY *v.* GREEN BAY COMPANY.

13 Wallace, 166. 1871.

[ACTION was brought in the Circuit Court of the United States to recover damages against defendant company for overflowing

[1] MR. JUSTICE BRADLEY delivered a dissenting opinion.

plaintiff's land by means of a dam erected across Fox River in Wisconsin. Defendant attempted to justify under authority from the legislature of Wisconsin authorizing the construction of such a dam; and this defence being held good on demurrer, plaintiff brought the case to this court by writ of error.]

MR. JUSTICE MILLER delivered the opinion of the court.

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Counsel for the defendant, with becoming candor, argue that the damages of which the plaintiff complains are such as the State had a right to inflict in improving the navigation of the Fox River, without making any compensation for them.

This requires a construction of the constitution of Wisconsin; for though the Constitution of the United States provides that private property shall not be taken for public use without just compensation, it is well settled that this is a limitation on the power of the Federal government, and not on the States. The constitution of Wisconsin, however, has a provision almost identical in language, viz.: that "the property of no person shall be taken for public use without just compensation therefor." Sec. 13, Article 1. Indeed this limitation on the exercise of the right of eminent domain is so essentially a part of American constitutional law that it is believed that no State is now without it, and the only question that we are to consider is whether the injury to plaintiff's property, as set forth in his declaration, is within its protection.

The declaration states that, by reason of the dam, the water of the lake was so raised as to cause it to overflow all his land, and that the overflow remained continuously from the completion of the dam, in the year 1861, to the commencement of the suit in the year 1867, and the nature of the injuries set out in the declaration are such as show that it worked an almost complete destruction of the value of the land.

The argument of the defendant is that there is no *taking* of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation.

It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent,

can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.

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We are not unaware of the numerous cases in the State courts in which the doctrine has been successfully invoked that for a consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers, and other highways, for the public good, there is no redress; and we do not deny that the principle is a sound one, in its proper application, to many injuries to property so originating. And when, in the exercise of our duties here, we shall be called upon to construe other State constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those States. But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle. Beyond this we do not go, and this case calls us to go no further.

We are, therefore, of opinion that the second plea set up no valid defence, and that the demurrer to it should have been sustained.

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## CENTRAL BRIDGE CORPORATION *v.* CITY OF LOWELL.

4 Gray, 474. 1855.

[The plaintiff corporation sought to enjoin the defendant city from proceeding under the authority of a statute of Massachusetts to enter upon, take, and lay out as a public highway a bridge already constructed by the plaintiff under a charter granted by the State authorizing the corporation to construct such bridge and receive toll and income therefrom.]

BIGELOW, J., delivered the opinion of the court.

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The whole controversy in the present case turns upon the validity of the acts of the defendants, by which they proceeded in July, 1855, to take, lay out, and appropriate the bridge constructed and owned by the plaintiffs, as and for a town way. This was done in pursuance of a power expressly granted to the defendants by St. 1853, c. 356, § 3; and it is clear that if this act was originally valid and still continues in force, and the defendants have done nothing by which they have surrendered or lost the power and authority conferred upon them by it, their doings have been legal, and there is no ground for maintaining this suit.

1. The plaintiffs rely upon various objections to defeat and annul these proceedings, the first and most important of which is, that the section of the statute above cited, which gives to the defendants the right to enter upon and take the bridge of the plaintiffs, and lay it out as a town way, is unconstitutional and void. This position is based on the familiar principle, that the act incorporating the plaintiffs is a contract with the government, which it cannot legitimately impair or destroy. Starting with this, the plaintiffs then contend that the effect and necessary consequence of the power given to the defendants by the act in question is to infringe on the obligation of this contract, because it takes away their franchise and deprives them of the rights and privileges conferred upon them by their original act of incorporation.

It is true that the plaintiffs, by accepting and acting under the act by which they were created, and by advancing their money and building the bridge upon the faith of it, are entitled to insist that the legislature shall not invalidate or disregard the power granted to them or the right created and vested by their charter. But it is also true that their powers and privileges, including everything which constitutes their franchise, are held and enjoyed in the same manner and by the like tenure as all other property and every species of valuable right and interest are possessed and owned under our Constitution and laws. They can claim no special exemption or privilege for their franchise. It is subject to the same sovereign right of eminent domain, by which the property and rights of all subjects and individuals are liable to be taken and appropriated to a public use, in the manner provided in the Constitution, whenever the legislature shall deem that the public exigencies require it. This principle is too well settled by the highest authority to be now open to question. West River Bridge *v.* Dix, 6 How. 507; Richmond, Fredericksburg, & Potomac Railroad *v.* Louisa Railroad, 13 How. 83; Boston & Lowell Railroad *v.* Salem & Lowell Railroad, 2 Gray, 35; Springfield *v.* Connecticut River Railroad, 4 Cush. 63. In the case first cited, it was fully recognized and applied to facts very similar to those in the case at

bar. It was there held, that a franchise to build and maintain a bridge might be taken and appropriated to a public use, and that the right of a corporation, under a charter from a State legislature, to erect and keep up a bridge and take tolls thereon, might be taken for a highway in the due exercise of the right of eminent domain.

Nor is the principle thus recognized any violation of justice or sound policy, nor does it in any degree tend to impair the obligation or infringe upon the sanctity of contracts. It rests on the basis that public convenience and necessity are of paramount importance and obligation, to which, when duly ascertained and declared by the sovereign authority, all minor considerations and private rights and interests must be held, in a measure and to a certain extent, subordinate. By the grant of a franchise to individuals for one public purpose, the legislature do not forever debar themselves from giving to others new and paramount rights and privileges when required by public exigencies, although it may be necessary in the exercise of such rights and privileges to take and appropriate a franchise previously granted. If such were the rule, great public improvements, rendered necessary by the increasing wants of society in the development of civilization and the progress of the arts, might be prevented by legislative grants which were wise and expedient in their time, but which the public necessities have outgrown and rendered obsolete. The only true rule of policy, as well as of law, is that a grant for one public purpose must yield to another more urgent and important, and this can be effected without any infringement on the constitutional rights of the subject. If in such cases suitable and adequate provision is made by the legislature for the compensation of those whose property or franchise is injured or taken away, there is no violation of public faith or private right. The obligation of the contract created by the original charter is thereby recognized. The property of individuals in it, and the rights acquired by them under it, like other property appropriated for public uses, form proper subjects for indemnity in damages under the provision in the tenth article of our Declaration of Rights.

These well-established principles leave no room for doubt as to the validity and binding force of the provision contained in St. 1853, c. 356, § 3, under which the acts set forth in the bill have been done by the defendants. The intent of the legislature to empower them to enter upon and take the bridge of the plaintiffs for a public use is unequivocally expressed; and adequate provision is made, by which the plaintiffs can seek and obtain compensation for all injuries and damage which they may sustain by reason of such appropriation.

[Other questions are considered, and the bill of the plaintiff is dismissed.]

## PIERCE *v.* DREW.

136 Massachusetts, 75. 1883.

DEVENS, J. The facts admitted by the demurrer may be thus stated: The plaintiffs own land on a certain street or public highway in Brookline; they also own a fee in the half of the street which is next to their abutting land.

The defendants are the selectmen of Brookline, and, on the application of the American Rapid Telegraph Company, a corporation organized under the St. of 1874, c. 165 (Pub. Sts. c. 106, § 14), for the transmission of intelligence by electricity, are about to grant to that company, under the Pub. Sts. c. 109, a location along said highway for their posts, wires, &c. The bill seeks to restrain the defendants, upon the ground that the last-named statute is unconstitutional.

[The substance of Pub. Sts. c. 109, relating to the erection of telegraph poles in highways is summarized. The essential provisions involved in the opinion are sufficiently stated hereafter.]

That it was the intent of the statute to grant to those corporations, formed under the general incorporation laws, for the purpose of transmitting intelligence by electricity, the right to construct lines of telegraph upon and along highways and public roads upon the locations assigned them by the officers of the municipality wherein such ways are situate, cannot be doubted. The use of the words "every company" permit no other interpretation. Nor are we able to conceive why, if this authority might be given to corporations specially chartered, it may not equally be given to those organized under the general law.

If this use of property already appropriated to certain public uses is to be deemed of itself an exercise of the right of eminent domain, the determination of the legislature that the purpose for which it now directs it to be taken is a public use, is not necessarily conclusive; but, if the use be public, it is conclusive that the necessity exists which requires it to be taken. Talbot *v.* Hudson, 16 Gray, 417. While in some cases there may be difficulty in deciding whether an appropriation of property is for a public or private use, such difficulty does not seem to exist in the present case. The transmission of intelligence by electricity is a business of public character, to be exercised under public control, in the same manner as transportation of goods or passengers by railroads. The St. of 1849, c. 93, of which, with additions, the Pub. Sts. c. 109, is a reenactment, recognized its public nature; and in Young *v.* Yarmouth, 9 Gray, 386, which was an action for injuries sustained by a traveller on the highway by reason of the telegraph poles erected there

under the location granted by the selectmen by authority of the St. of 1849, the town was held not liable because the poles were lawfully within the limits of the highway, and thus not such an obstruction or defect as to render it responsible. See also Commonwealth *v.* Boston, 97 Mass. 555; Bay State Brick Co. *v.* Foster, 115 Mass. 431. The public nature of this business has been recognized by the legislation of Congress, the decisions of the United States courts, and of many of the States of the Union. So far as known to us, it has not been held otherwise anywhere. U. S. Sts. of July 1, 1862; March 3, 1863; July 2, 1864; July 24, 1866. Pensacola Telegraph *v.* Western Union Telegraph, 96 U. S. 1.

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As the chapter does not, in our opinion, provide for damages to the owner of the fee in the highway by reason of the erection of the telegraphic posts and apparatus, it is to be determined whether such a use of the highway creates a separate and additional burden, requiring an independent assessment of damages, for which the owner of the land was not compensated when the highway was laid out, and thus whether the omission of the act to provide for this compensation renders it unconstitutional.

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No right to take the private property of the owner of the fee in the highway is conferred by this act; all that is given is the right to use land, by permission of the municipal authorities, the whole beneficial use of which had been previously taken from the owner and appropriated to the public. It is a temporary privilege only which is conferred; no right is acquired as against the owner of the fee by its enjoyment, nor is any legal right acquired to the continued enjoyment of the privilege, or any presumption of a grant raised thereby. Pub. Sts. c. 109, § 15. The discontinuance of a highway would annul any permit granted under the statute, and no encumbrance would remain upon the land.

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When land has been taken or granted for highways, it is so taken or granted for the passing and repassing of travellers thereon, whether on foot or horseback, or with carriages and teams for the transportation and conveyance of passengers and property, and for the transmission of intelligence between the points connected thereby. As every such grant has for its object the procurement of an easement for the public, the incidental powers granted must be so construed as most effectually to secure to the public the full enjoyment of such easement. Commonwealth *v.* Temple, 14 Gray, 69, 77.

It has never been doubted that, by authority of the legislature, highways might be used for gas or water pipes, intended for the convenience of the citizens, although the gas or water was conducted thereunder by companies formed for the purpose; or for

sewers, whose object was not merely the incidental one of cleansing the streets, but also the drainage of private estates, the rights of which to enter therein were subject to public regulations. Commonwealth *v.* Lowell Gas Light Co., 12 Allen, 75; Attorney-General *v.* Metropolitan Railroad, 125 Mass. 515, 517; Boston *v.* Richardson [13 Allen, 146].

Nor can we perceive that these are to be treated as incidental uses, as suggested by the plaintiff, because the pipes are conducted under the surface of the travelled way, rather than above it. The rights of the owner of the fee must be the same in either case, and the use of the land under the way for gas-pipes or sewers would effectually prevent his own use of it for cellarage or similar purposes.

When the land was taken for a highway, that which was taken was not merely the privilege of travelling over it in the then known vehicles, or of using it in the then known methods, for either the conveyance of property or transmission of intelligence. Although the horse railroad was deemed a new invention, it was held that a portion of the road might be set aside for it, and the rights of other travellers, to some extent, limited by those privileges necessary for its use. Commonwealth *v.* Temple, *ubi supra.* Attorney-General *v.* Metropolitan Railroad, *ubi supra.* The discovery of the telegraph developed a new and valuable mode of communicating intelligence. Its use is certainly similar to, if not identical with, that public use of transmitting information for which the highway was originally taken, even if the means adopted are quite different from the post-boy or the mail-coach. It is a newly discovered method of exercising the old public easement, and all appropriate methods must have been deemed to have been paid for when the road was laid out. Under the clause to regulate commerce among the States, conferred on Congress by the Constitution of the United States, although telegraphic communication was unknown when it was adopted, it has been held that it is the right of Congress to prevent the obstruction of telegraphic communication by hostile State legislation, as it has become an indispensable means of intercommunication. Pensacola Telegraph *v.* Western Union Telegraph, *ubi supra.*

No question arises as to any interference with the old methods of communication, as the statute we are considering, by § 8, guards carefully against this by providing that the telegraphic structures are not to be permitted to incommode the public use of highways or public roads. We are therefore of opinion that the use of a portion of a highway for the public use of companies organized under the laws of the State for the transmission of intelligence by electricity, and subject to the supervision of the local municipal authorities, which has been permitted by the legislature, is a public use similar to that for which the highway was originally taken, or to which it was originally devoted, and that the owner of the fee is entitled to no further compensation.

There remains the inquiry, whether there is any objection to the statute because it does not provide a sufficient remedy for the owners of property near to or adjoining the way, who may be incidentally injured by the structures which the telegraph companies may have been permitted to erect along the line of the highway and within its limits. Such remedy is given by § 4 as the legislature deemed sufficient. We should not be willing to believe that the landowner thus injured would be without remedy, if the company failed to pay the damages lawfully assessed under this section, while it still endeavored to maintain its structures; but the only compensation to which such owner is entitled is that which the legislature deems just, when it permits the erection of these structures. The legislature may provide for compensation to the adjoining owners, but without such provision there can be no legal claim to it, as the use of the highway is a lawful one. Attorney-General *v.* Metropolitan Railroad, *ubi supra.*

The clause in the Declaration of Rights which provides that, "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor," is confined in its application to property actually taken and appropriated by the government. No construction can be given to it which can extend the benefit of it to the case of one who suffers an indirect or consequential damage or expense by means of the rightful use of property already belonging to the public. Callender *v.* Marsh, 1 Pick. 418, 430.

The majority of the court is therefore satisfied that the demurrer to this bill was properly sustained, and the entry will be,

*Decree affirmed.*[1]

[1] Mr. Justice C. Allen delivered a dissenting opinion in which Mr. Justice William Allen concurred.

In Zehren *v.* Milwaukee Electric Railway & Light Company, 99 Wis. 83 (1898), the question was whether an electric passenger railway can he constructed on a conntry highway without payment of additional compensation to abutting landowners. Winslow, J., delivering the opinion of the court, used the following language: —

"That there are many and marked differences between the uses to which a city street is put and the uses to which a country highway is put cannot be denied; nor can it he denied that the uses contemplated when the land is taken vary widely, except that both are intended for purposes of travel. The street railway in its inception is a purely urban institution. It is intended to facilitate travel in and about the city, from one part of the municipality to another, and thus relieve the sidewalks of foot passengers and the roadway of vehicles. It is thus an aid to the exercise of the easement of passage; strictly, a city convenience, for use in the city, by people living or stopping therein, and fully under the control of municipal authorities, who have been endowed with ample power for that purpose. This strictly urhan character of the street railways remained practically nnchanged for many years, and during these years the long line of decisions grew up recognizing the street railway as merely an improved method of using the street, and rather as a help to the street than as a burden thereon. Time, however, has made changes in conditions. New motive power has been discovered, and it is found that hy its use an enlarged city street car may profitably run long distances, and compete to some extent with the steam railway. It is proposed to convert the city railways into lines of passenger transportation,

## BAUMAN *v.* ROSS.

167 United States, 548. 1897.

[From a decision of the Court of Appeals of the District of Columbia in certain proceedings for the condemnation of a right of way for a highway over lands situated in the District of Columbia outside the limits of the cities of Washington and Georgetown, brought under act of March 2, 1893, c. 197, 27 Stat. 532, an appeal was taken to this court. The decision of the lower court involved the constitutionality of provisions in the act of Congress directing that in the assessment of compensation to the owners of property in such cases, the tribunal making the assessment should take into consideration, by way of lessening the damages due to such owners, any special or direct benefits, capable of present estimate and reasonable computation, caused by the establishment of the highway to the part not taken.]

Mr. Justice Gray delivered the opinion of the court.

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covering long distances, and connecting widely separated cities and villages, by using the country highways, and operating long and heavy coaches, sometimes made up into trains of several cars. Thus the urban railway has developed into the interurban railway, and threatens soon to develop into the interstate railway. The small car which took up passengers at one corner, and dropped them at another, has become a large coach, approximating the ordinary railway coach in size, and has become a part, perhaps, of a train which sweeps across the country from one city to another, bearing its load of passengers ticketed through, with an occasional local passenger picked up on the highway. The purely city purpose which the urban railway subserved has developed into or been supplanted by an entirely different purpose; namely, the transportation of passengers from city to city over long stretches of intervening country. When this train or car, with its load of through passengers, is passing through a country town, it is clearly serving no township purpose, save in the most limited sense. It is very difficult to say that this use of a country highway is not an additional burden. It is built and operated mainly to obtain the through travel from city to city, and only incidentally to take up a passenger in the country town. This through travel is unquestionably composed of people who otherwise would travel on the ordinary steam railroad, and would not use the highway at all. Thus, the operation of this newly-developed street railway (so called) upon the country road is precisely opposite to the operation of the urban railway upon the city street. It burdens the road with travel which would otherwise not be there, instead of relieving it by the substitution of one vehicle for many. However we regard this development of the urban into the interurban railway, it seems utterly impossible and illogical to say that it is essentially the same in its purpose or effects as the mere street railway, which was held in the Hobart Case not to be an additional burden on the fee. The reasons given for that holding in that case either do not apply at all, or only in a very limited degree, to the interurban railway. The difference is not so much in the change of motive power, but in the entirely different character of the use. Suppose a steam-railway corporation were organized to carry passengers only from city to city, and should attempt to lay its track upon the country roads without compensation; is there any doubt but that it would be held that it could not do so? We think not. Our conclusion is that an interurban electric railway, running upon the highways through country towns, is an additional burden upon the highway. Pennsylvania R. Co. *v.* Montgomery Co. Pass. Ry. Co., 167 Pa. St. 62."

In the Fifth Article of the earliest amendments to the Constitution of the United States, in the nature of a Bill of Rights, the inherent and necessary power of the government to appropriate private property to the public use is recognized, and the rights of private owners are secured, by the declaration, "nor shall private property be taken for public use without just compensation."

The right of eminent domain, as was said by this court, speaking through the Chief Justice, in a recent case, "is the offspring of political necessity, and is inseparable from sovereignty unless denied to it by its fundamental law. It cannot be exercised, except upon condition that just compensation shall be made to the owner; and it is the duty of the State, in the conduct of the inquest by which the compensation is ascertained, to see that it is just, not merely to the individual whose property is taken, but to the public which is to pay for it." Searl *v.* School District, 133 U. S. 553, 562. The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.

Consequently, when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account. When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened. If, for example, by the widening of a street, the part which lies next the street, being the most valuable part of the land, is taken for the public use, and what was before in the rear becomes the front part, and upon a wider street, and thereby of greater value than the whole was before, it is neither just in itself, nor required by the Constitution, that the owner should be entitled both to receive the full value of the part taken, considered as front land, and to retain the increase in value of the back land, which has been made front land by the same taking.

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The careful collection and classification of the cases upon this subject in Lewis on Eminent Domain, §§ 465–471, shows that in the greater number of the States, unless expressly forbidden by constitution or statute, special benefits are allowed to be set off, both against the value of the part taken, and against damages to the remainder; that in some of those States general benefits also are allowed to be thus set off; that in comparatively few States both kinds of benefits, or at least special benefits, are allowed to be set off

against damages to the remainder, but not against the value of the part taken; and that in Mississippi alone benefits are not allowed to be considered at all. See also Cooley, Const. Lim. (6th ed.) 697–702; 2 Dillon, Mun. Corp. (4th ed.) §§ 624, 625; Randolph on Eminent Domain, §§ 254–273.

The Constitution of the United States contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use; and, for the reasons and upon the authorities above stated, no such prohibition can be implied; and it is therefore within the authority of Congress, in the exercise of the right of eminent domain, to direct that, when part of a parcel of land is appropriated to the public use for a highway in the District of Columbia, the tribunal vested by law with the duty of assessing the compensation or damages due to the owner, whether for the value of the part taken, or for any injury to the rest, shall take into consideration, by way of lessening the whole or either part of the sum due him, any special and direct benefits, capable of present estimate and reasonable computation, caused by the establishment of the highway to the part not taken.

[Other objections to the statute are considered, but the act is held to be constitutional, and the judgment of the lower court is reversed.]

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## KOHL *v.* UNITED STATES.

91 United States, 367. 1875.

[Proceedings were instituted in the Circuit Court of the United States for the Southern District of Ohio to appropriate certain property for the use of the United States in the erection thereon of a Federal building; and from rulings in the lower court in favor of the United States as to certain questions involved, an appeal was taken to this court.]

Mr. Justice Strong delivered the opinion of the court.

It has not been seriously contended during the argument that the United States government is without power to appropriate lands or other property within the States for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-

houses, post-offices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be. No one doubts the existence in the State governments of the right of eminent domain, — a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. Vattel, c. 20, 34; Bynk., lib. 2, c. 15; Kent's Com. 338–340; Cooley on Const. Lim. 584 *et seq.* But it is no more necessary for the exercise of the powers of a State government than it is for the exercise of the conceded powers of the Federal government. That government is as sovereign within its sphere as the States are within theirs. True, its sphere is limited. Certain subjects only are committed to it; but its power over those subjects is as full and complete as is the power of the States over the subjects to which their sovereignty extends. The power is not changed by its transfer to another holder.

But, if the right of eminent domain exists in the Federal government, it is a right which may be exercised within the States, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution. In Ableman *v.* Booth, 21 How. 523, Chief Justice Taney described in plain language the complex nature of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the Constitution of the United States, independent of the other. Neither is under the necessity of applying to the other for permission to exercise its lawful powers. Within its own sphere, it may employ all the agencies for exerting them which are appropriate or necessary, and which are not forbidden by the law of its being. When the power to establish post-offices and to create courts within the States was conferred upon the Federal government, included in it was authority to obtain sites for such offices and for court-houses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power, ought not to be questioned. The Constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants.

The Fifth Amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken?

. . . . . .

It is true, this power of the Federal government has not heretofore been exercised adversely; but the non-user of a power does not disprove its existence. In some instances, the States, by virtue of their own right of eminent domain, have condemned lands for the use of the general government, and such condemnations have been sustained by their courts, without, however, denying the right of the United States to act independently of the States. Such was the ruling in Gilmer *v.* Line Point, 18 Cal. 229, where lands were condemned by a proceeding in a State court and under a State law for a United States fortification. A similar decision was made in Burt *v.* The Merchants' Ins. Co., 106 Mass. 356, where land was taken under a State law as a site for a post-office and sub-treasury building. Neither of these cases denies the right of the Federal government to have lands in the States condemned for its uses under its own power and by its own action. The question was, whether the State could take lands for any other public use than that of the State. In Tromhley *v.* Humphrey, 23 Mich. 471, a different doctrine was asserted, founded, we think, upon better reason. The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond that, there exists no necessity; which alone is the foundation of the right. If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired.

[Other questions involved in the appeal are considered, and the judgment of the lower court is affirmed.[1]]

[1] Mr. Justice Field delivered a dissenting opinion.

In Cherokee Nation *v.* Kansas Railway Company, 135 U. S. 641 (1890), which was an appeal from the District Court of the United States for the Western District of Kansas, the question involved was the right of the railway company to condemn a right of way under authority of Congress through the territory of the Cherokee Nation. It was contended that the Cherokee Nation was an independent power, and that Congress could not authorize such proceedings. Mr. Justice Harlan, delivering the opinion of the court, uses the following language: —

"In view of these authorities, the contention that the lands through which the defendant was authorized by Congress to construct its railway, are held by the Cherokees as a sovereign nation, without dependence on any other, and that the right of eminent domain within its territory can only be exercised by it, and not by the United States, except with the consent of the Cherokee Nation, cannot be sustained. The fact that the Cherokee Nation holds these lands in fee simple under patents from the United

States, is of no consequence in the present discussion; for the United States may exercise the right of eminent domain, even within the limits of the several States, for purposes necessary to the execution of the powers granted to the general government by the Constitution. Such an authority, as was said in Kohl *v.* United States, 91 U. S. 367, is essential to the independent existence and perpetuity of the United States, and is not dependent upon the consent of the States. United States *v.* Fox, 94 U. S. 315, 320; United States *v.* Jones, 109 U. S. 513; United States *v.* Great Falls Manufacturing Co., 112 U. S. 645; Van Brocklin *v.* State of Tennessee, 117 U. S. 151, 154. As was said by Mr. Justice Bradley in Stockton *v.* Baltimore, &c. Railroad, 35 Fed. Rep. 9, 19: 'The argument based upon the doctrine that the States have the eminent domain or highest dominion in the lands comprised within their limits, and that the United States have no dominion in such lands, cannot avail to frustrate the supremacy given by the Constitution to the government of the United States in all matters within the scope of its sovereignty. This is not a matter of words, but of things. If it is necessary that the United States government should have an eminent domain still higher than that of the State, in order that it may fully carry out the objects and purposes of the Constitution, then it has it. Whatever may be the necessities or conclusions of theoretical law as to eminent domain or anything else, it must be received as a postulate of the Constitution that the government of the United States is invested with full and complete power to execute and carry out its purposes.' It would be very strange if the national government, in the execution of its rightful authority, could exercise the power of eminent domain in the several States, and could not exercise the same power in a Territory occupied by an Indian nation or tribe, the members of which were wards of the United States, and directly subject to its political control. The lands in the Cherokee Territory, like the lands held by private owners everywhere within the geographical limits of the United States, are held subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it; provided only, that they are not taken without just compensation being made to the owner.

"But it is said that the objects for which the act of 1884 was passed are not such as admit of the exercise of the right of eminent domain. This contention is without merit. Congress has power to regulate commerce, not only with foreign nations and among the several States, but with the Indian tribes. It is not necessary that an act of Congress should express, in words, the purpose for which it was passed. The court will determine for itself whether the means employed by Congress have any relation to the powers granted by the Constitution. The railroad which the defendant was authorized to construct and maintain will have, if constructed and put into operation, direct relation to commerce with the Indian tribes, as well as with commerce among the States, especially with the States immediately north and south of the Indian Territory. It is true that the company authorized to construct and maintain it is a corporation created by the laws of a State, but it is none the less a fit instrumentality to accomplish the public objects contemplated by the act of 1884. Other means might have been employed, but those designated in that act, although not indispensably necessary to accomplish the end in view, are appropriate and conducive to that end, and, therefore, within the power of Congress to adopt. The question is no longer an open one, as to whether a railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends, and, therefore, subject to governmental control and regulation. It is because it is a public highway, and subject to such control, that the corporation by which it is constructed, and by which it is to be maintained, may be permitted, under legislative sanction, to appropriate private property for the purposes of a right of way, upon making just compensation to the owner, in the mode prescribed by law. It is well said by Mr. Cooley, in his Treatise on Constitutional Limitations, section 537, that 'while there are unquestionably some objections to compelling a citizen to surrender his property to a corporation, whose corporators, in receiving it, are influenced by motives of private gain and emolument, so that *to them* the purpose of the appropriation is altogether private, yet conceding it to be settled that these facilities for travel and commerce are a public necessity, if the legislature, reflecting the public sentiment, decide that this general benefit is better promoted

## UNITED STATES *v.* GETTYSBURG ELECTRIC RAILWAY COMPANY.

160 United States, 668. 1896.

[A WRIT of error is brought to this court from the decision of the Circuit Court of the United States for the Eastern District of Pennsylvania, in a proceeding under act of Congress to acquire land including the right of way of a railroad, for the purpose of establishing a public park on the site of the battlefield of Gettysburg.]

MR. JUSTICE PECKHAM, after stating the facts, delivered the opinion of the court.

The really important question to be determined in these proceedings is, whether the use to which the petitioner desires to put the land described in the petitions is of that kind of public use for

by their construction through individuals or corporations than by the State itself, it would clearly be pressing a constitutional maxim to an absurd extreme if it were to be held that the public necessity should only be provided for in the way which is least consistent with the public interest.' But this precise question was determined upon full consideration in California *v.* Pacific Railroad Company, 127 U. S. 1, 39, where this court said: 'The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. . . . Of course the authority of Congress over the Territories of the United States and its power to grant franchises exercisable therein are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories, and employing the agency of State as well as Federal corporations.' Upon this point nothing more need be said.

"It is further suggested that the act of Congress violates the Constitution in that it does not provide for compensation to be made to the plaintiff before the defendant entered upon these lands for the purpose of constructing its road over them. This objection to the act cannot be sustained. The Constitution declares that private property shall not be taken 'for public use without just compensation.' It does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain, and adequate provision for obtaining compensation before his occupancy is disturbed. Whether a particular provision be sufficient to secure the compensation to which, under the Constitution, he is entitled, is sometimes a question of difficulty. In the present case, the requirements of the Constitution have, in our judgment, been fully met. The third section provides that before the railway shall be constructed through any lands proposed to be taken, full compensation shall be made to the owner for all property to be taken or damage done by reason of the construction of the road. In the event of an appeal from the finding of the referees, the company is required to pay into court double the amount of the award, to abide its judgment; and, that being done, the company may enter upon the property sought to be condemned, and proceed with the construction of its road. We are of the opinion that this provision is sufficiently reasonable, certain, and adequate to secure the just compensation to which the owner is entitled."

which the government of the United States is authorized to condemn land.

It has authority to do so whenever it is necessary or appropriate to use the land in the execution of any of the powers granted to it by the Constitution. Kohl *v.* United States, 91 U. S. 367; Cherokee Nation *v.* Kansas Railway Co., 135 U. S. 641, 656; Chappell *v.* United States, 160 U. S. 499.

Is the proposed use, to which this land is to be put, a public use within this limitation?

The purpose of the use is stated in the first act of Congress, passed on the 3d day of March, 1893 (the Appropriation Act of 1893), and is quoted in the above statement of facts. The appropriation act of August 18, 1894, also contained the following: "For continuing the work of surveying, locating, and preserving the lines of battle at Gettysburg, Pennsylvania, and for purchasing, opening, constructing, and improving avenues along the portions occupied by the various commands of the armies of the Potomac and Northern Virginia on that field, and for fencing the same; and for the purchase, at private sale or by condemnation, of such parcels of land as the Secretary of War may deem necessary for the sites of tablets, and for the construction of the said avenues; for determining the leading tactical positions and properly marking the same with tablets of batteries, regiments, brigades, divisions, corps, and other organizations with reference to the study and correct understanding of the battle, each tablet bearing a brief historical legend, compiled without praise and without censure; fifty thousand dollars, to be expended under the direction of the Secretary of War."

In these acts of Congress and in the joint resolution the intended use of this land is plainly set forth. It is stated in the second volume of Judge Dillon's work on Municipal Corporations (4th ed. § 600), that when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation. Many authorities are cited in the note, and, indeed, the rule commends itself as a rational and proper one.

As just compensation, which is the full value of the property taken, is to be paid, and the amount must be raised by taxation where the land is taken by the government itself, there is not much ground to fear any abuse of the power. The responsibility of Congress to the people will generally, if not always, result in a most conservative exercise of the right. It is quite a different view of the question which courts will take when this power is delegated to a private corporation. In that case the presumption that the intended use for which the corporation proposes to take the land is public, is not so strong as where the government intends to use the land itself.

In examining an act of Congress it has been frequently said that

every intendment is in favor of its constitutionality. Such act is presumed to be valid unless its invalidity is plain and apparent; no presumption of invalidity can be indulged in; it must be shown clearly and unmistakably. This rule has been stated and followed by this court from the foundation of the government.

Upon the question whether the proposed use of this land is a public one, we think there can be no well-founded doubt. And also, in our judgment, the government has the constitutional power to condemn the land for the proposed use. It is, of course, not necessary that the power of condemnation for such purpose be expressly given by the Constitution. The right to condemn at all is not so given. It results from the powers that are given, and it is implied because of its necessity, or because it is appropriate in exercising those powers. Congress has power to declare war and to create and equip armies and navies. It has the great power of taxation to be exercised for the common defence and general welfare. Having such powers, it has such other and implied ones as are necessary and appropriate for the purpose of carrying the powers expressly given into effect. Any act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some one or all of the powers granted by Congress must be valid. This proposed use comes within such description. The provision comes within the rule laid down by Chief Justice Marshall, in McCulloch *v.* Maryland, 4 Wheat. 316, 421, in these words: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adequate to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional."

The end to be attained by this proposed use as provided for by the act of Congress, is legitimate, and lies within the scope of the Constitution. The battle of Gettysburg was one of the great battles of the world. The numbers contained in the opposing armies were great; the sacrifice of life was dreadful; while the bravery and, indeed, heroism displayed by both the contending forces rank with the highest exhibition of those qualities ever made by man. The importance of the issue involved in the contest of which this great battle was a part cannot be overestimated. The existence of the government itself and the perpetuity of our institutions depended upon the result. Valuable lessons in the art of war can now be learned from an examination of this great battlefield in connection with the history of the events which there took place. Can it be that the government is without power to preserve the land, and properly mark out the various sites upon which this struggle took place? Can it not erect the monuments provided for

by these acts of Congress, or even take possession of the field of battle in the name and for the benefit of all the citizens of the country for the present and for the future? Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country. It would be a great object lesson to all who looked upon the land thus cared for, and it would show a proper recognition of the great things that were done there on those momentous days. By this use the government manifests for the benefit of all its citizens the value put upon the services and exertions of the citizen soldiers of that period. Their successful effort to preserve the integrity and solidarity of the great republic of modern times is forcibly impressed upon every one who looks over the field. The value of the sacrifices then freely made is rendered plainer and more durable by the fact that the government of the United States, through its representatives in Congress assembled, appreciates and endeavors to perpetuate it by this most suitable recognition. Such action on the part of Congress touches the heart, and comes home to the imagination of every citizen, and greatly tends to enhance his love and respect for those institutions for which these heroic sacrifices were made. The greater the love of the citizen for the institutions of his country the greater is the dependence properly to be placed upon him for their defence in time of necessity, and it is to such men that the country must look for its safety. The institutions of our country which were saved at this enormous expenditure of life and property ought to and will be regarded with proportionate affection. Here upon this battlefield is one of the proofs of that expenditure, and the sacrifices are rendered more obvious and more easily appreciated when such a battlefield is preserved by the government at the public expense. The right to take land for cemeteries for the burial of the deceased soldiers of the country rests on the same footing and is connected with and springs from the same powers of the Constitution. It seems very clear that the government has the right to bury its own soldiers and to see to it that their graves shall not remain unknown or unhonored.

No narrow view of the character of this proposed use should be taken. Its national character and importance, we think, are plain. The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred.

It is needless to enlarge upon the subject, and the determination is arrived at without hesitation that the use intended as set forth in the petition in this proceeding is of that public nature which comes

within the constitutional power of Congress to provide for by the condemnation of land.

[Other objections to the validity of the statute are considered; but for the reasons pointed out in the portion of the opinion which is given, the decision of the lower court, which was to the effect that the intended use of the land was not that kind of a public use for which the United States had the constitutional power to condemn land, was reversed.]

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## BEDFORD *v.* UNITED STATES.

192 U. S. 217; 24 Sup. Ct. Rep. 238. 1904.

[The plaintiffs sued in the Court of Claims to recover damages to land by flooding as the result of revetments erected by the United States along the banks of the Mississippi River to prevent erosion from natural causes. The claim was disallowed and plaintiffs appeal.]

MR. JUSTICE MCKENNA delivered the opinion of the court.

There is no dispute about the power of the government to construct the works which, it is claimed, caused the damage to appellants' land. It was alleged by appellants that they were constructed by the "United States in the execution of its rights and powers, in and over said river and in pursuance of its lawful control over the navigation of said river and for the betterment and improvement thereof." And also that the works were not constructed upon appellants' land, and their immediate object was to prevent further erosion at De Soto Point. In other words, the object of the works was to preserve the conditions made by natural causes. By constructing works to secure that object appellants contend there was given to them a right to compensation. The contention asserts a right in a riparian proprietor to the unrestrained operation of natural causes, and that works of the government which resist or disturb those causes, if injury result to riparian owners, have the effect of taking private property for public uses within the meaning of the Fifth Amendment of the Constitution of the United States. The consequences of the contention immediately challenge its soundness. . . . Conceding the power of the government over navigable rivers, it would make that power impossible of exercise, or would prevent its exercise by the dread of an immeasurable responsibility.

There is another principle by which the rights of riparian property and the power of the government over navigable rivers are better accommodated. It is illustrated in many cases.

The Constitution provides that private property shall not be taken without just compensation, but a distinction has been made between

damage and taking, and that distinction must be observed in applying the constitutional provision. An excellent illustration is found in Gibson *v.* United States, 166 U. S. 269. The distinction is there instructively explained, and other cases need not be cited. It is, however, necessary to refer to United States *v.* Lynah, 188 U. S. 445, as it is especially relied upon by appellants. The facts are stated in the following excerpt from the opinion:

"It appears from the finding, as amended, that a large portion of the land flooded was in its natural condition between high-water mark and low-water mark, and was subject to overflow as the water passed from one stage to the other; that this natural overflow was stopped by an embankment, and in lieu thereof, by means of flood gates, the land was flooded and drained at the will of the owner. From this it is contended that the only result of the raising of the level of the river by the government works was to take away the possibility of drainage. But findings nine and ten show that, both by seepage and percolation through the embankment and an actual flowing upon the plantation above the obstruction, the water has been raised in the plantation about eighteen inches, that it is impossible to remove this overflow of water, and, as a consequence, the property has become an irreclaimable bog, unfit for the purpose of rice culture or any other known agriculture, and deprived of all value. It is clear from these findings that what was a valuable rice plantation has been permanently flooded, wholly destroyed in value, and turned into an irreclaimable bog; and this as the necessary result of the work which the government has undertaken."

The question was asked: "Does this amount to a taking?" To which it was replied: "The case of Pumpelly *v.* Green Bay Co., 13 Wall. 166 [**1050**], answers this question in the affirmative." And further: "The Green Bay Company, as authorized by statute, constructed a dam across Fox River, by means of which the land of Pumpelly was overflowed and rendered practically useless to him. There, as here, no proceedings had been taken to formally condemn the land." In both cases, therefore, it was said that there was an actual invasion and appropriation of land as distinguished from consequential damage. In the case at bar the damage was strictly consequential. It was the result of the action of the river through a course of years. The case at bar, therefore, is distinguishable from the Lynah case in the cause and manner of the injury. In the Lynah case the works were constructed in the bed of the river, obstructed the natural flow of its water, and were held to have caused, as a direct consequence, the overflow of Lynah's plantation. In the case at bar the works were constructed along the banks of the river and their effect was to resist erosion of the banks by the waters of the river. There was no other interference with natural conditions. Therefore, the damage to appellants' land, if it can be assigned to the works at all, was but an incidental consequence of them. *Judgment affirmed.*

# APPENDIX A.

## ADDITIONAL CASES RELATING TO REGULATION OF COMMERCE.

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### 1. The Extent of Federal Power.

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### LOTTERY CASE.

(CHAMPION *v.* AMES.)

188 U. S. 321; 23 Sup. Ct. Rep. 321. 1903.

[The plaintiff was held under arrest on a charge of conspiring to commit the offense against the United States of causing to be carried from one State to another in the United States certain lottery tickets for the purpose of disposing of the same to purchasers thereof, in violation of the first section of the Act of Congress of March 2, 1895, c. 191, entitled, "An act for the suppression of lottery traffic through national and interstate commerce and the postal service subject to the jurisdiction and laws of the United States." 28 Stat. 963. It was charged that this transportation was attempted to be effected by depositing lottery tickets with the Wells-Fargo Express Company in Texas to be transported by said corporation, engaged in carrying freight and packages through several States and having the same transported to the State of California for the purpose of disposing of the same. Plaintiff instituted proceedings in the Circuit Court of the United States for the Northern District of Illinois to secure his release from arrest by means of a writ of *habeas corpus*, claiming that he was restrained of his liberty by the marshal of the United States in violation of the Constitution and laws of the United States. The application for the writ having been denied, plaintiff appeals.]

Mr. Justice Harlan delivered the opinion of the court.

The appellant insists that the carrying of lottery tickets from one State to another State by an express company engaged in carrying freight and packages from State to State, although such tickets may be contained in a box or package, does not constitute, and cannot by any act of Congress be legally made to constitute, *commerce* among

the States within the meaning of the clause of the Constitution of the United States, providing that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes;" consequently, that Congress cannot make it an offense to cause such tickets to be carried from one State to another.

The government insists that express companies, when engaged for hire in the business of transportation from one State to another, are instrumentalities of commerce among the States; that the carrying of lottery tickets from one State to another is commerce which Congress may regulate; and that as a means of executing the power to regulate interstate commerce Congress may make it an offense against the United States to cause lottery tickets to be carried from one State to another.

The questions presented by these opposing contentions are of great moment, and are entitled to receive, as they have received, the most careful consideration.

What is the import of the word "commerce" as used in the Constitution? It is not defined by that instrument. Undoubtedly, the carrying from one State to another by independent carriers of things or commodities that are ordinary subjects of traffic, and which have in themselves a recognized value in money, constitutes interstate commerce. But does not commerce among the several States include something more? Does not the carrying from one State to another, by independent carriers, of lottery tickets that entitle the holder to the payment of a certain amount of money therein specified, also constitute commerce among the States?

It is contended by the parties that these questions are answered in the former decisions of this court, the government insisting that the principles heretofore announced support its position, while the contrary is confidently asserted by the appellant. This makes it necessary to ascertain the import of such decisions. Upon that inquiry we now enter, premising that some propositions were advanced in argument that need not be considered. In the examination of former judgments it will be best to look at them somewhat in the order in which they were rendered. When prior adjudications have been thus collated the particular grounds upon which the judgment in the present case must necessarily rest can be readily determined. We may here remark that some of the cases referred to may not bear directly upon the questions necessary to be decided, but attention will be directed to them as throwing light upon the general inquiry as to the meaning and scope of the commerce clause of the Constitution.

[After quoting at some length from the opinions in Gibbons *v.* Odgen, *supra*, p. 235; Brown *v.* Maryland, *supra*, p. 303; Almy *v.* California, *supra*, p. 404; Henderson *v.* Mayor, *supra*, p. 244; and Pensacola Tel. Co. *v.* Western Union Tel. Co., *supra*, p. 282; and citing many other cases, the court continues.]

This reference to prior adjudications could be extended if it were necessary to do so. The cases cited, however, sufficiently indicate the grounds upon which this court has proceeded when determining the meaning and scope of the commerce clause. They show that commerce among the States embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph. They also show that the power to regulate commerce 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; that such power is plenary, complete in itself, and may be exerted by Congress to its utmost extent, subject *only* to such limitations as the Constitution imposes upon the exercise of the powers granted by it; and that in determining the character of the regulations to be adopted Congress has a large discretion which is not to be controlled by the courts, simply because, in their opinion, such regulations may not be the best or most effective that could be employed.

We come, then, to inquire whether there is any solid foundation upon which to rest the contention that Congress may not regulate the carrying of lottery tickets from one State to another, at least by corporations or companies whose business it is, for hire, to carry tangible property from one State to another.

It was said in argument that lottery tickets are not of any real or substantial value in themselves, and therefore are not subjects of commerce. If that were conceded to be the only legal test as to what are to be deemed subjects of the commerce that may be regulated by Congress, we cannot accept as accurate the broad statement that such tickets are of no value. Upon their face they showed that the lottery company offered a large capital prize, to be paid to the holder of the ticket winning the prize at the drawing, advertised to be held at Asuncion, Paraguay. Money was placed on deposit in different banks in the United States to be applied by the agents representing the lottery company to the prompt payment of prizes. These tickets were the subject of traffic; they could have been sold; and the holder was assured that the company would pay to him the amount of the prize drawn. That the holder might not have been able to enforce his claim in the courts of any country making the drawing of lotteries illegal, and forbidding the circulation of lottery tickets, did not change the fact that the tickets issued by the foreign company represented so much money payable to the person holding them and who might draw the prizes affixed to them. Even if a holder did not draw a prize, the tickets, before the drawing, had a money value in the market among those who chose to sell or buy lottery tickets. In short, a lottery ticket is a subject of traffic, and is so designated in the act of 1895. 28 Stat. 963. That fact is not without significance in view of what this court has said. That act, counsel for

the accused well remarks, "was intended to supplement the provisions of prior acts, excluding lottery tickets from the mails, and prohibiting the importation of lottery matter from abroad, and to prohibit the causing lottery tickets to be carried, and lottery tickets and lottery advertisements to be transferred from one State to another by any means or method." 15 Stat. 196; 17 Stat. 302; 19 Stat. 90; Rev. Stat. § 3894; 26 Stat. 465; 28 Stat. 963.

We are of opinion that lottery tickets are subjects of traffic, and therefore are subjects of commerce, and the regulation of the carriage of such tickets from State to State, at least by independent carriers, is a regulation of commerce among the several States.

But it is said that the statute in question does not regulate the carrying of lottery tickets from State to State, but by punishing those who cause them to be so carried Congress in effect prohibits such carrying; that in respect of the carrying from one State to another of articles or things that are, in fact, or according to usage in business, the subjects of commerce, the authority given Congress was not to *prohibit*, but only to *regulate*. This view was earnestly pressed at the bar by learned counsel, and must be examined.

It is to be remarked that the Constitution does not define what is to be deemed a legitimate regulation of interstate commerce. In Gibbons *v.* Ogden it was said that the power to regulate such commerce is the power to prescribe the rule by which it is to be governed. But this general observation leaves it to be determined, when the question comes before the court, whether Congress, in prescribing a particular rule, has exceeded its power under the Constitution. While our government must be acknowledged by all to be one of enumerated powers (M'Cullough *v.* Maryland, 4 Wheat. 316, 405, 407) [1], the Constitution does not attempt to set forth all the means by which such powers may be carried into execution. It leaves to Congress a large discretion as to the means that may be employed in executing a given power. The sound construction of the Constitution, this court has said, "must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." 4 Wheat. 421.

We have said that the carrying from State to State of lottery tickets constitutes interstate commerce, and that the regulation of such commerce is within the power of Congress under the Constitution. Are we prepared to say that a provision which is, in effect, a *prohibition* of the carriage of such articles from State to State is not a fit or appropriate mode for the *regulation* of that particular kind of commerce? If lottery traffic, *carried on through interstate commerce*, is a matter of

which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on? Or may not Congress, for the protection of the people of all the States, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution and not prohibited by it, as will drive that traffic out of commerce among the States?

In determining whether regulation may not under some circumstances properly take the form or have the effect of prohibition, the nature of the interstate traffic which it was sought by the act of May 2, 1895, to suppress, cannot be overlooked. When enacting that statute Congress no doubt shared the views upon the subject of lotteries heretofore expressed by this court. In Phalen *v.* Virginia, 8 How. 163, 168, after observing that the suppression of nuisances injurious to public health or morality is among the most important duties of government, this court said: "Experience has shown that the common forms of gambling are comparatively inocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple." In other cases we have adjudged that authority given by legislative enactment to carry on a lottery, although based upon a consideration in money, was not protected by the contract clause of the Constitution; this, for the reason that no State may bargain away its power to protect the public morals, nor excuse its failure to perform a public duty by saying that it had agreed, by legislative enactment, not to do so. Stone *v.* Mississippi, 101 U. S. 814 [**1016** *n*]; Douglas *v.* Kentucky, 168 U. 8. 488 [**1016** *n*].

If a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another? In this connection it must not be forgotten that the power of Congress to regulate commerce among the States is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution. What provision in that instrument can be regarded as limiting the exercise of the power granted? What clause can be cited which, in any degree, countenances the suggestion that one may, of right, carry or cause to be carried from one State to another that which will harm the public morals? We cannot think of any clause of that instrument that could possibly be invoked by those who assert their right to send lottery tickets from State to State except the one providing that no person shall be deprived of his liberty without due process of law. We have said that the liberty protected by the Con-

stitution embraces the right to be free in the enjoyment of one's faculties; "to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper." Allgeyer *v.* Louisiana, 165 U. S. 578, 589. But surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the States an element that will be confessedly injurious to the public morals.

If it be said that the act of 1895 is inconsistent with the Tenth Amendment, reserving to the States respectively, or to the people, the powers not delegated to the United States, the answer is that the power to regulate commerce among the States has been expressly delegated to Congress.

Besides, Congress, by that act, does not assume to interfere with traffic or commerce in lottery tickets carried on exclusively within the limits of any State, but has in view only commerce of that kind among the several States. It has not assumed to interfere with the completely internal affairs of any State, and has only legislated in respect of a matter which concerns the people of the United States. As a State may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the "widespread pestilence of lotteries" and to protect the commerce which concerns all the States, may prohibit the carrying of lottery tickets from one State to another. In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States — perhaps all of them — which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce. What was said by this court upon a former occasion may well be here repeated: "The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject-matter specifically committed to its charge." *In re* Rahrer, 140 U. S. 545, 562. If the carrying of lottery tickets from one State to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offense to cause lottery tickets to

be carried from one State to another, we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat favored in both national and State legislation in the early history of the country, has grown into disrepute, and has become offensive to the entire people of the Nation. It is a kind of traffic which no one can be entitled to pursue as of right.

That regulation may sometimes appropriately assume the form of prohibition is also illustrated by the case of diseased cattle, transported from one State to another. Such cattle may have, notwithstanding their condition, a value in money for some purposes, and yet it cannot be doubted that Congress, under its power to regulate commerce, may either provide for their being inspected before transportation begins or, in its discretion, may prohibit their being transported from one State to another. Indeed, by the act of May 29, 1884, chap. 60 (23 Stat. at L. 32, § 6), Congress has provided: "That no railroad company within the United States, or the owners or masters of any steam or sailing, or other vessel or boat, shall receive for transportation or transport, from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia; nor shall any person, company, or corporation deliver for such transportation to any railroad company or master or owner of any boat or vessel, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease; nor shall any person, company, or corporation drive on foot or transport in private conveyance from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia." Reid *v.* Colorado, 187 U. S. 137.

The act of July 2, 1890 (26 Stat. 209, chap. 647), known as the Sherman Anti-Trust Act, and which is based upon the power of Congress to regulate commerce among the States, is an illustration of the proposition that regulation may take the form of prohibition. The object of that act was to protect trade and commerce against unlawful restraints and monopolies. To accomplish that object Congress declared certain contracts to be illegal. That act, in effect, prohibited the doing of certain things, and its prohibitory clauses have been sustained in several cases as valid under the power of Congress to regulate interstate commerce. United States *v.* Trans-Mission Freight Asso., 166 U. S. 290; United States *v.* Joint Traffic Asso., 171 U. S. 505; Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211. In the case last named the court, referring to the

power of Congress to regulate commerce among the States, said: "In Gibbons *v.* Ogden, 9 Wheat. 1 [**235**], the power was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. Under this grant of power to Congress that body, in our judgment, may enact such legislation as shall declare void and *prohibit* the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce. (And when we speak of interstate we also include in our meaning foreign commerce.) We do not assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts of the class mentioned. The power to regulate interstate commerce is, as stated by Chief Justice Marshall, full and complete in Congress, and there is no limitation in the grant of the power which excludes private contracts of the nature in question from the jurisdiction of that body. Nor is any such limitation contained in that other clause of the Constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law." Again: "The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the States. On the contrary, we think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law *prohibiting* the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally, and collaterally, regulate to a greater or less degree commerce among the States."

That regulation may sometimes take the form or have the effect of prohibition is also illustrated in the case of *In re* Rahrer, 140 U. S. 545. In Mugler *v.* Kansas, 123 U. S. 623 [**938**], it was adjudged that State legislation prohibiting the manufacture of spirituous, malt, vinous, fermented, or other intoxicating liquors within the limits of the State, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the Constitution of the United States or by the amendments thereto. Subsequently in Bowman *v.* Chicago & N. W. R. Co., 125 U. S. 465, this court held that ardent spirits, distilled liquors, ale, and beer were subjects of exchange, barter, and traffic, and were so recognized by the usages of the commercial world, as well as by the laws of Congress and the decisions of the courts. In Leisy *v.* Hardin, 135 U. S. 100 [**378**], the court again held that spirituous liquors were recognized articles of commerce, and declared a statute of Iowa

prohibiting the sale within its limits of any intoxicating liquors, except for pharmaceutical, medicinal, chemical, or sacramental purposes, under a State license, to be repugnant to the commerce clause of the Constitution, if applied to the sale within the State by the importer, in the original, unbroken packages of such liquors manufactured in and brought from another State. And in determining whether a State could prohibit the sale within its limits in original, unbroken packages, of ardent spirits, distilled liquors, ale, and beer, imported from another State, this court said that they were recognized by the laws of Congress as well as by the commercial world as "subjects of exchange, barter, and traffic," and that "whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognized as subjects of commerce are not such." Leisy *v.* Hardin, 135 U. S., 100, 110, 125 [**378**].

Then followed the passage by Congress of the act of August 8, 1890 (26 Stat. 313, chap. 728), providing "that all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." That act was sustained in the Rahrer case as a valid exercise of the power of Congress to regulate commerce among the States.

In Rhodes *v.* Iowa, 170 U. S. 412, 426 [**390**], that statute — all of its provisions being regarded — was held as not causing the power of the State to attach to an interstate commerce shipment of intoxicating liquors "whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee."

Thus, under its power to regulate interstate commerce, as involved in the transportation, in original packages, of ardent spirits from one State to another, Congress, by the necessary effect of the act of 1890, made it impossible to transport such packages to places within a prohibitory State and there dispose of their contents by sale; although it had been previously held that ardent spirits were recognized articles of commerce and, until Congress otherwise provided, could be imported into a State, and sold in the original packages, despite the will of the State. If at the time of the passage of the act of 1890 all the States had enacted liquor laws prohibiting the sale of intoxicating liquors within their respective limits, then the act would necessarily have had the effect to exclude ardent spirits altogether from commerce among the States; for no one would ship, for purposes of sale, packages containing such spirits to points within any State that for-

bade their sale at any time or place, even in unbroken packages, and, in addition, provided for the seizure and forfeiture of such packages. So that we have in the Rahrer case a recognition of the principle that the power of Congress to regulate interstate commerce may sometimes be exerted with the effect of excluding particular articles from such commerce.

It is said, however, that if, in order to suppress lotteries carried on through interstate commerce, Congress may exclude lottery tickets from such commerce, that principle leads necessarily to the conclusion that Congress may arbitrarily exclude from commerce among the States any article, commodity, or thing, of whatever kind or nature, or however useful or valuable, which it may choose, no matter with what motive, to declare shall not be carried from one State to another. It will be time enough to consider the constitutionality of such legislation when we must do so. The present case does not require the court to declare the full extent of the power that Congress may exercise in the regulation of commerce among the States. We may, however, repeat, in this connection, what the court has heretofore said, that the power of Congress to regulate commerce among the States, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Constitution. This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument. It would not be difficult to imagine legislation that would be justly liable to such an objection as that stated, and be hostile to the objects for the accomplishment of which Congress was invested with the general power to regulate commerce among the several States. But, as often said, the possible abuse of a power is not an argument against its existence. There is probably no governmental power that may not be exerted to the injury of the public. If what is done by Congress is manifestly in excess of the powers granted to it, then upon the courts will rest the duty of adjudging that its action is neither legal nor binding upon the people. But if what Congress does is within the limits of its power, and is simply unwise or injurious, the remedy is that suggested by Chief Justice Marshall in Gibbons *v.* Ogden, when he said: "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 rely solely, in all representative governments."

The whole subject is too important, and the questions suggested by its consideration are too difficult of solution to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be enacted under the commerce clause. We decide nothing more in the present case than that lottery tickets are sub-

jects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one State to another is therefore interstate commerce; that under its power to regulate commerce among the several States Congress — subject to the limitations imposed by the Constitution upon the exercise of the powers granted — has plenary authority over such commerce, and may prohibit the carriage of such tickets from State to State; and that legislation to that end, and of that character, is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to congress.

*Judgment affirmed.*[1]

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## NORTHERN SECURITIES COMPANY *v.* UNITED STATES.

193 U. S. 197; 24 Sup. Ct. Rep. 436. 1904.

[Appeal from a decree of the Circuit Court of the United States for the District of Minnesota in favor of the United States in a suit instituted by it against the Northern Securities Company and other defendants.]

Mr. Justice Harlan announced the affirmance of the decree of the Circuit Court, and delivered the following opinion:

This suit was brought by the United States against the Northern Securities Company, a corporation of New Jersey; the Great Northern Railway Company, a corporation of Minnesota; the Northern Pacific Railway Company, a corporation of Wisconsin; James J. Hill, a citizen of Minnesota; and William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker, and Daniel S. Lamont, citizens of New York.

Its general object was to enforce, as against the defendants, the provisions of the statute of July 2, 1890, commonly known as the Anti-Trust Act, and entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies." 26 Stat. 209. By the decree below the United States was given substantially the relief asked for in the bill.

As the act is not very long, and as the determination of the particular questions arising in this case may require a consideration of the scope and meaning of most of its provisions, it is here given in full:

[1] Mr. Chief Justice Fuller, with whom concurred Mr. Justice Brewer, Mr. Justice Shiras, and Mr. Justice Peckham, dissented on the ground that lottery tickets are not articles of commerce, and on the further ground that the power to regulate interstate commerce does not carry with it the absolute power to prohibit the transportation of articles of commerce.

"SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court.

"SEC. 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and, pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

"SEC. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they

reside in the district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

"SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

"SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

"SEC. 8. That the word 'person,' or 'persons,' wherever used in this act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the law of any foreign country."

Is the case as presented by the pleadings and the evidence one of a combination or a conspiracy in restraint of trade or commerce among the States, or with foreign states? Is it one in which the defendants are properly chargeable with monopolizing or attempting to monopolize any part of such trade or commerce? Let us see what are the facts disclosed by the record.

The Great Northern Railway Company and the Northern Pacific Railway Company owned, controlled, and operated separate lines of railway — the former road extending from Superior, and from Duluth and St. Paul, to Everett, Seattle, and Portland, with a branch line to Helena; the latter extending from Ashland, and from Duluth and St. Paul, to Helena, Spokane, Seattle, Tacoma, and Portland. The two lines, main and branches, about 9000 miles in length, were and are parallel and competing lines across the continent through the northern tier of States between the Great Lakes and the Pacific, and the two companies were engaged in active competition for freight and passenger traffic, each road connecting at its respective terminals with lines of railway, or with lake and river steamers, or with sea-going vessels.

Prior to 1893 the Northern Pacific system was owned or controlled and operated by the Northern Pacific Railroad Company, a corporation organized under certain acts and resolutions of Congress. That company becoming insolvent, its road and property passed into the hands of receivers appointed by courts of the United States. In

advance of foreclosure and sale a majority of its bondholders made an arrangement with the Great Northern Railway Company for a virtual consolidation of the two systems, and for giving the practical control of the Northern Pacific to the Great Northern. That was the arrangement declared in Pearsall *v.* Great Northern R. Co., 161 U. S. 646, to be illegal under the statutes of Minnesota, which forbade any railroad corporation, or the purchasers or managers of any corporation, to consolidate the stock, property, or franchises of such corporation, or to lease or purchase the works or franchises of, or in any way control, other railroad corporations owning or having under their control parallel or competing lines. Gen. Laws, Minn. 1874, chap. 29, 1881, chap. 109.

Early in 1901 the Great Northern and Northern Pacific Railway Companies, having in view the ultimate placing of their two systems under a common control, united in the purchase of the capital stock of the Chicago, Burlington and Quincy Railway Company, giving in payment, upon an agreed basis of exchange, the joint bonds of the Great Northern and Northern Pacific Railway Companies, payable in twenty years from date, with interest at 4 per cent per annum. In this manner the two purchasing companies became the owners of $107,000,000 of the $112,000,000 total capital stock of the Chicago, Burlington and Quincy Railway Company, whose lines aggregated about 8,000 miles, and extended from St. Paul to Chicago, and from St. Paul and Chicago to Quincy, Burlington, Des Moines, St. Louis, Kansas City, St. Joseph, Omaha, Lincoln, Denver, Cheyenne, and Billings, where it connected with the Northern Pacific Railroad. By this purchase of stock the Great Northern and Northern Pacific acquired full control of the Chicago, Burlington and Quincy main line and branches.

Prior to November 13, 1901, defendant Hill and associate stockholders of the Great Northern Railway Company, and defendant Morgan and associate stockholders of the Northern Pacific Railway Company, entered into a combination to form, under the laws of New Jersey, a *holding* corporation, to be called the Northern Securities Company, with a capital stock of $400,000,000, and to which company, in exchange for its own capital stock upon a certain basis and at a certain rate, was to be turned over the capital stock, or a controlling interest in the capital stock, of each of the constituent railway companies, with power in the holding corporation to vote such stock and in all respects to act as the owner thereof, and to do whatever it might deem necessary in aid of such railway companies, or to enhance the value of their stocks. In this manner the interests of individual stockholders in the property and franchises of the two independent and competing railway companies were to be converted into an interest in the property and franchises of the holding corporation. Thus, as stated in Article VI, of the bill, "by making the stockholders of each system jointly interested in both systems and by practi-

cally pooling the earnings of both for the benefit of the former stockholders of each, and by vesting the selection of the directors and officers of each system in a common body, to wit, the holding corporation, with not only the power, but the duty, to pursue a policy which would promote the interests, not of one system at the expense of the other, but of both at the expense of the public, all inducement for competition between the two systems was to be removed, a virtual consolidation effected, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established."

In pursuance of this combination, and to effect its objects, the defendant, the Northern Securities Company, was organized November 13, 1901, under the laws of New Jersey.

Its certificate of incorporation stated that the objects for which the company was formed were: "1. To acquire by purchase, subscription, or otherwise, and to hold as investment any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, territory, or country. 2. To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory, or country, and while owner thereof to exercise all the rights, powers, and privileges of ownership. 3. To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory, or country, and while owner of such stock to exercise all the rights, powers, and privileges of ownership, including the right to vote thereon. 4. To aid in any manner any corporation or association of which any bonds or other securities or evidences of indebtedness or stock are held by the corporation, and to do any acts or things designed to protect, preserve, improve, or enhance the value of any such bonds or other securities or evidences of indebtedness or stock. 5. To acquire, own, and hold such real and personal property as may be necessary or convenient for the transaction of its business."

It was declared in the certificate that the business or purpose of the corporation was from time to time to do any one or more of such acts and things, and that the corporation should have power to conduct its business in other States and in foreign countries, and to have one or more offices, and hold, purchase, mortgage, and convey real and personal property, out of New Jersey.

The total authorized capital stock of the corporation was fixed at $400,000,000, divided into 4,000,000 shares of the par value of $100 each. The amount of the capital stock with which the corporation

should commence business was fixed at $30,000. The duration of the corporation was to be perpetual.

This charter having been obtained, Hill and his associate stockholders of the Great Northern Railway Company, and Morgan and associate stockholders of the Northern Pacific Railway Company, assigned to the Securities Company a controlling amount of the capital stock of the respective constituent companies upon an agreed basis of exchange of the capital stock of the Securities Company for each share of the capital stock of the other companies.

In further pursuance of the combination, the Securities Company acquired additional stock of the defendant railway companies, issuing in lieu thereof its own stock upon the above basis, and, at the time of the bringing of this suit, held, as owner and proprietor, substantially all the capital stock of the Northern Pacific Railway Company, and, it is alleged, a controlling interest in the stock of the Great Northern Railway Company, "and is voting the same and is collecting the dividends thereon, and in all respects is acting as the owner thereof, in the organization, management, and operation of said railway companies and in the receipt and control of their earnings."

No consideration whatever, the bill alleges, has existed or will exist, for the transfer of the stock of the defendant railway companies to the Northern Securities Company, other than the issue of the stock of the latter company for the purpose, after the manner, and upon the basis stated.

The Securities Company, the bill also alleges, was not organized in good faith to purchase and pay for the stocks of the Great Northern and Northern Pacific Railway Companies, but solely "to incorporate the pooling of the stocks of said companies," and carry into effect the above combination; that it is a mere depositary, custodian, holder, or trustee of the stocks of the Great Northern and Northern Pacific Railway Companies; that its shares of stock are but beneficial certificates against said railroad stocks to designate the interest of the holders in the pool; that it does not have and never had any capital to warrant such an operation; that its subscribed capital was but $30,000, and its authorized capital stock of $400,000,000 was just sufficient, when all issued, to represent and cover the exchange value of substantially the entire stock of the Great Northern and Northern Pacific Railway Companies, upon the basis and at the rate agreed upon, which was about $122,000,000 in excess of the combined capital stock of the two railway companies taken at par; and that, unless prevented, the Securities Company would acquire, as owner and proprietor, substantially all the capital stock of the Great Northern and Northern Pacific Railway Companies, issuing in lieu thereof its own capital stock to the full extent of its authorized issue, of which, upon the agreed basis of exchange, the former stockholders of the Great Northern Railway Company have received or would receive and

hold about 55 per cent, the balance going to the former stockholders of the Northern Pacific Railway Company.

The government charges that if the combination was held not to be in violation of the act of Congress, then all efforts of the national government to preserve to the people the benefits of free competition among carriers engaged in interstate commerce will be wholly unavailing, and all transcontinental lines, indeed, the entire railway systems of the country, may be absorbed, merged, and consolidated, thus placing the public at the absolute mercy of the holding corporation.

The several defendants denied all the allegations of the bill imputing to them a purpose to evade the provisions of the act of Congress, or to form a combination or conspiracy having for its object either to restrain or to monopolize commerce or trade among the States or with foreign nations. They denied that any combination or conspiracy was formed in violation of the act.

In our judgment, the evidence fully sustains the material allegations of the bill, and shows a violation of the act of Congress, in so far as it declares illegal every combination or conspiracy in restraint of commerce among the several States and with foreign nations, and forbids attempts to monopolize such commerce or any part of it.

Summarizing the principal facts, it is indisputable upon this record that under the leadership of the defendants Hill and Morgan, the stockholders of the Great Northern and Northern Pacific Railway corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound, combined and conceived the scheme of organizing a corporation under the laws of New Jersey which should *hold* the shares of the stock of the constituent companies; such shareholders, in lieu of their shares in those companies, to receive, upon an agreed basis of value, shares in the holding corporation; that pursuant to such combination the Northern Securities Company was organized as the holding corporation through which the scheme should be executed; and under that scheme such holding corporation has become the holder — more properly speaking, the custodian — of more than nine tenths of the stock of the Northern Pacific, and more than three fourths of the stock of the Great Northern, the stockholders of the companies who delivered their stock receiving upon the agreed basis shares of stock in the holding corporation. The stockholders of these two competing companies disappeared, as such, for the moment, but immediately reappeared as stockholders of the holding company, which was thereafter to guard the interests of both sets of stockholders as a unit, and to manage, or cause to be managed, both lines of railroad as if held *in one ownership*. Necessarily by this combination or arrangement the holding company in the fullest sense dominates the situation in the interest of those who were stockholders of the constituent companies; as much so, for every practical purpose, as if it had been

itself a railroad corporation which had built, owned, and operated both lines for the exclusive benefit of its stockholders. Necessarily, also, the constituent companies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines, and have become, practically, one powerful consolidated corporation by the name of a holding corporation, the principal, if not the sole, object for the formation of which was to carry out the purpose of the original combination, under which competition between the constituent companies would cease. Those who were stockholders of the Great Northern and Northern Pacific and became stockholders in the holding company are now interested in preventing all competition between the two lines, and, as owners of stock or of certificates of stock in the holding company, they will see to it that no competition is tolerated. They will take care that no persons are chosen directors of the holding company who will permit competition between the constituent companies. The result of the combination is that all the earnings of the constituent companies make a common fund in the hands of the Northern Securities Company, to be distributed, not upon the basis of the earnings of the respective constituent companies, each acting exclusively in its own interests, but upon the basis of the certificates of stock issued by the holding company. No scheme or device could more certainly come within the words of the act, — "combination in the form of a trust or otherwise . . . in restraint of commerce among the several States or with foreign nations," — or could more effectively and certainly suppress free competition between the constituent companies. This combination is, within the meaning of the act, a "trust;" but if not, it is a *combination in restraint of interstate and international commerce;* and that is enough to bring it under the condemnation of the act. The mere existence of such a combination, and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected. If such combination be not destroyed, all the advantages that would naturally come to the public under the operation of the general laws of competition, as between the Great Northern and Northern Pacific Railway Companies, will be lost, and the entire commerce of the immense territory in the northern part of the United States between the Great Lakes and the Pacific at Puget Sound will be at the mercy of a single holding corporation, organized in a State distant from the people of that territory.

The Circuit Court was undoubtedly right when it said — all the judges of that court concurring — that the combination referred to "led inevitably to the following results: First, it placed the control of the two roads in the hands of a single person, to wit, the Securities Company, by virtue of its ownership of a large majority of the stock of both companies; second, it destroys every motive for competition

between two roads engaged in interstate traffic, which were natural competitors for business, by pooling the earnings of the two roads for the common benefit of the stockholders of both companies." 120 Fed. Rep. 721, 724.

Such being the case made by the record, what are the principles that must control the decision of the present case? Do former adjudications determine the controlling questions raised by the pleadings and proofs?

The contention of the government is that, if regard be had to former adjudications, the present case must be determined in its favor. That view is contested and the defendants insist that a decision in their favor will not be inconsistent with anything heretofore decided and would be in harmony with the act of Congress.

Is the act to be construed as forbidding every combination or conspiracy in restraint of trade or commerce among the States or with foreign nations? Or does it embrace only such restraints as are unreasonable in their nature? Is the motive with which a forbidden combination or conspiracy was formed at all material when it appears that the necessary tendency of the particular combination or conspiracy in question is to restrict or suppress free competition between competing railroads engaged in commerce among the States? Does the act of Congress prescribe, as a *rule* for *interstate* or *international* commerce, that the operation of the natural laws of competition between those engaged in *such* commerce shall not be restricted or interfered with by any contract, combination, or conspiracy? How far may Congress go in regulating the affairs or conduct of state corporations engaged as carriers in commerce among the States or of state corporations which, although not directly engaged themselves in *such* commerce, yet have control of the business of interstate carriers? If state corporations or their stockholders are found to be parties to a combination in the form of a trust or otherwise, which restrains interstate or international commerce, may they not be compelled to respect any rule for such commerce that may be lawfully prescribed by Congress?

These questions were earnestly discussed at the bar by able counsel, and have received the full consideration which their importance demands.

The first case in this court arising under the Anti-Trust Act was United States *v.* E. C. Knight Co., 156 U. S. 1 [**263**]. The next case was that of United States *v.* Trans-Missouri Freight Association, 166 U. S. 290. That was followed by United States *v.* Joint Traffic Association, 171 U. S. 505; Hopkins *v.* United States, 171 U. S. 578; Anderson *v.* United States, 171 U. S. 604; Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211, and Montague & Co. *v.* Lowry, 193 U. S. 38. To these may be added Pearsall *v.* Great Northern Railway, 161 U. S. 646, which, although not arising under the Anti-Trust Act, involved an agreement under which the Great

Northern and Northern Pacific Railway companies should be consolidated and by which competition between those companies was to cease. In United States *v.* E. C. Knight Co., it was held that the agreement or arrangement there involved had reference only to the *manufacture* or *production* of sugar by those engaged in the alleged combination, but if it had directly embraced interstate or international commerce, it would then have been covered by the Anti-Trust Act and would have been illegal; in United States *v.* Trans-Missouri Freight Association, that an agreement between certain railroad companies providing for establishing and maintaining, for their mutual protection, reasonable rates, rules, and regulations in respect of freight traffic, through and local, and by which free competition among those companies was restricted, was, by reason of such restriction, illegal under the Anti-Trust Act; in United States *v.* Joint Traffic Association, that an arrangement between certain railroad companies in reference to railroad traffic among the States, by which the railroads involved were not subjected to competition among themselves, was also forbidden by the act; in Hopkins *v.* United States and Anderson *v.* United States, that the act embraced only agreements that had direct connection with interstate commerce, and that such commerce comprehended intercourse for all the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between citizens of different States, and the power to regulate it embraced all the instrumentalities by which such commerce is conducted; in Addyston Pipe & Steel Co. *v.* United States, all the members of the court concurring, that the act of Congress made illegal an agreement between certain private companies or corporations engaged in different States in the manufacture, sale, and transportation of iron pipe, whereby competition among them was avoided, was covered by the Anti-Trust Act; and in Montague *v.* Lowry, all the members of the court again concurring, that a combination created by an agreement between certain private manufacturers and dealers in tiles, grates, and mantels, in different States, whereby they controlled or sought to control the price of such articles in those States, was condemned by the act of Congress. In Pearsall *v.* Great Northern Railway which, as already stated, involved the consolidation of the Great Northern and Northern Pacific Railway companies, the court said: "The consolidation of these two great corporations will unavoidably result in giving to the defendant [the Great Northern] a monopoly of all traffic in the northern half of the State of Minnesota, as well as of all transcontinental traffic north of the line of the Union Pacific, against which public regulations will be but a feeble protection. The acts of the Minnesota legislature of 1874 and 1881 undoubtedly reflected the general sentiment of the public, that their best security is in competition."

We will not encumber this opinion by extended extracts from the former opinions of this court. It is sufficient to say that from the

decisions in the above cases certain propositions are plainly deducible and embrace the present case. Those propositions are:

That although the act of Congress known as the Anti-Trust Act has no reference to the mere manufacture of or production of articles or commodities within the limits of the several States, it does embrace and declare to be illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates *in restraint* of trade or commerce *among the several States or with foreign nations;*

That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces *all* direct *restraints* imposed by any combination, conspiracy, or monopoly upon such trade or commerce;

That railroad carriers engaged in interstate or international trade or commerce are embraced by the act;

That combinations, even among *private* manufacturers or dealers, whereby *interstate or international commerce* is restrained, are equally embraced by the act;

That Congress has the power to establish *rules* by which *interstate and international* commerce shall be governed, and, by the Anti-Trust Act, has prescribed the rule of free competition among those engaged in such commerce;

That *every* combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in *interstate trade or commerce*, and which would *in that way* restrain *such* trade or commerce, is made illegal by the act;

That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promotes trade and commerce;

That to vitiate a combination such as the act of Congress condemns, it need not be shown that the combination, in fact, results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that, by its necessary operation, it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition;

That the constitutional guaranty of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in *interstate and international* commerce; and,

That under its power to regulate commerce among the several States and with foreign nations, Congress had authority to enact the statute in question.

No one, we assume, will deny that these propositions were distinctly announced in the former decisions of this court. They cannot be ignored or their effect avoided by the intimation that the court indulged in *obiter dicta*. What was said in those cases was within the limits of the issues made by the parties. In our opinion,

the recognition of the principles announced in former cases must, under the conceded facts, lead to an affirmance of the decree below, unless the special objections, or some of them, which have been made to the application of the act of Congress to the present case, are of a substantial character. We will now consider those objections.

Underlying the argument in behalf of the defendants is the idea that, as the Northern Securities Company is a state corporation, and as its acquisition of the stock of the Great Northern and Northern Pacific Railway companies is not inconsistent with the powers conferred by its charter, the enforcement of the act of Congress, as against those corporations, will be an unauthorized interference by the national government with the internal commerce of the States creating those corporations. This suggestion does not at all impress us. There is no reason to suppose that Congress had any purpose to interfere with the internal affairs of the States, nor, in our opinion, is there any ground whatever for the contention that the Anti-Trust Act regulates their domestic commerce. By its very terms the act regulates only commerce among the States and with foreign States. Viewed in that light, the act, if within the powers of Congress, must be respected; for, by the explicit words of the Constitution, that instrument and the laws enacted by Congress in pursuance of its provisions are the supreme law of the land, "anything in the Constitution or laws of any State to the contrary notwithstanding" — supreme over the States, over the courts, and even over the people of the United States, the source of all power under our governmental system in respect of the objects for which the national government was ordained. An act of Congress constitutionally passed under its power to regulate commerce among the States and with foreign nations is binding upon all; as much so as if it were embodied, in terms, in the Constitution itself. Every judicial officer, whether of a national or a state court, is under the obligation of an oath so to regard a lawful enactment of Congress. Not even a State, still less one of its artificial creatures, can stand in the way of its enforcement. If it were otherwise, the government and its laws might be prostrated at the feet of local authority. Cohens *v.* Virginia, 6 Wheat. 264, 385, 414. These views have been often expressed by this court.

It is said that whatever may be the power of a State over such subjects, Congress cannot forbid single individuals from disposing of their stock in a state corporation, even if such corporation be engaged in interstate and international commerce; that the holding or purchase by a state corporation, or the purchase by individuals, of the stock of another corporation, for whatever purpose, are matters in respect of which Congress has no authority under the Constitution; that, so far as the power of Congress is concerned, citizens, or State corporations, may dispose of their property and invest their money in any way they choose; and that in regard to all such matters, citizens and state corporations are subject, if to any authority, only to

the lawful authority of the State in which such citizens reside or under whose laws such corporations are organized. It is unnecessary in this case to consider such abstract, general questions. The court need not now concern itself with them. They are not here to be examined and determined, and may well be left for consideration in some case necessarily involving their determination.

In this connection, it is suggested that the contention of the government is that the acquisition and *ownership* of stock in a State railroad corporation is itself interstate commerce, if that corporation be engaged in interstate commerce. This suggestion is made in different ways; sometimes in express words, at other times by implication. For instance, it is said that the questian here is whether the power of Congress over interstate commerce extends to the regulation of the ownership of the stock in state railroad companies, by reason of their being engaged in such commerce. Again, it is said that the only issue in this case is whether the Northern Securities Company can acquire and hold stock in other state corporations. Still further, is it asked, generally, whether the organization or ownership of railroads is not under the control of the States under whose laws they came into existence? Such statements as to the issues in this case are, we think, wholly unwarranted, and are very wide of the mark; it is the setting up of mere men of straw to be easily stricken down. We do not understand that the government makes any such contentions or takes any such positions as those statements imply. It does not contend that Congress may control the mere acquisition or the mere ownership of stock in a state corporation engaged in interstate commerce. Nor does it contend that Congress can control the organization of state corporations authorized by their charters to engage in interstate and international commerce. But it does not contend that Congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful, and not prohibited by the Constitution. It does contend that no state corporation can stand in the way of the enforcement of the national will, legally expressed. What the government particularly complains of, indeed, all that it complains of here, is the existence of a combination among the stockholders of competing railroad companies which, in violation of the act of Congress, restrains interstate and international commerce through the agency of a common corporate trustee, designated to act for both companies in repressing free competition between them. Independently of any question of the mere ownership of stock or of the organization of a state corporation, can it in reason be said that such a combination is not embraced by the very terms of the Anti-Trust Act? May not Congress declare that *combination* to be illegal? If Congress legislates for the protection of the public, may it not proceed on the ground that wrongs, when effected by a powerful combination, are more dangerous and require more stringent supervision than when they are to be effected by a single per-

son? Callan *v.* Wilson, 127 U. S. 540, 556. How far may the courts go in order to give effect to the act of Congress, and remedy the evils it was designed by that act to suppress? These are confessedly questions of great moment, and they will now be considered.

By the express words of the Constitution, Congress has power to "regulate commerce with foreign nations and among the several States, and with the Indian tribes." In view of the numerous decisions of this court there ought not, at this day, to be any doubt as to the general scope of such power. In some circumstances regulation may properly take the form and have the effect of prohibition. *In re* Rahrer, 140 U. S. 545; Lottery Case, 188 U. S. 321, 355 [**1071**], and authorities there cited. Again and again this court has reaffirmed the doctrine announced in the great judgment rendered by Chief Justice Marshall for the court in Gibbons *v.* Ogden, 9 Wheat. 1, 196, 197 [**235**], that the power of Congress to regulate commerce among the States and with foreign nations is the power "to prescribe the *rule* by which commerce *is to be governed;*" that such power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution;" that "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;*" that a sound construction of the Constitution allows to Congress a large discretion "with respect to the means by which the powers it confers are to be carried into execution, which enable that body to perform the high duties assigned to it, in the manner most beneficial to the people;" and that if the end to be accomplished is within the scope of the Constitution, "all means which are appropriate, which are plainly adapted to that end, and which are not prohibited, are constitutional." Brown *v.* Maryland, 12 Wheat. 419 [**303**]; Sinnot *v.* Davenport, 22 How. 227, 238; Henderson *v.* The Mayor, 92 U. S. 259; Railroad Company *v.* Husen, 95 U. S. 465, 472; County of Mobile *v.* Kimball, 102 U. S. 691; Missouri, K. & T. R. Co. *v.* Haber, 169 U. S. 613, 626; The Lottery Case, 188 U. S. 321, 348 [**1071**]. In Cohens *v.* Virginia, 6 Wheat. 264, 413, this court said that the United States were, for many important purposes, "a single nation," and that, "in all commercial regulations we are one and the same people;" and it has since frequently declared that commerce among the several States was a *unit*, and subject to national control. Previously, in M'Culloch *v.* Maryland, 4 Wheat. 316, 405 [**1**], the court had said that the government ordained and established by the Constitution was, within the limits of the powers granted to it, "the government of all; its powers are delegated by all; it represents all, and acts for all," and was "supreme within its sphere of action." As late as the case of

*In re* Debs, 158 U. S. 564, 582, this court, every member of it concurring, said: "The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights intrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are at the service of the nation to compel obedience to its laws."

The means employed in respect of the combinations forbidden by the Anti-Trust Act, and which Congress deemed germane to the end to be accomplished, was to prescribe as *a rule* for *interstate and international* commerce (not for domestic commerce) that it should not be vexed by combinations, conspiracies, or monopolies which restrain commerce by destroying or restricting competition. We say that Congress has prescribed such a rule, because, in all the prior cases in this court, the Anti-Trust Act has been construed as forbidding any combination which, by its necessary operation, destroys or restricts free competition among those engaged in interstate commerce; in other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce. Now, can this court say that such a rule is prohibited by the Constitution or is not one that Congress could appropriately prescribe when exerting its power under the commerce clause of the Constitution? Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. Undoubtedly, there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied. But there are others who believe that such a rule is more necessary in these days of enormous wealth than it ever was in any former period of our history. Be all this as it may, Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As, in the judgment of Congress, the public convenience and the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be, for all, the end of the matter, if this is to remain a government of laws, and not of men.

It is said that railroad corporations created under the laws of a State can only be consolidated with the authority of the State. Why that suggestion is made in this case we cannot understand, for there is no pretense that the combination here in question was under the authority of the States under whose laws these railroad corporations were created. But even if the State allowed consolidation, it would not follow that the stockholders of two or more state railroad corpo-

rations, having *competing lines and engaged in interstate commerce,* could lawfully combine and form a distinct corporation to hold the stock of the constituent corporations, and, by destroying competition between them, in violation of the act of Congress, restrain commerce among the States and with foreign nations.

The rule of competition, prescribed by Congress, was not at all new in trade and commerce. And we cannot be in any doubt as to the reason that moved Congress to the incorporation of that rule into a statute. That reason was thus stated in United States *v.* Joint Traffic Association: "Has not Congress, with regard to interstate commerce, and in the course of regulating it, in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition? We think it has. . . . It is the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting *as one body* in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, *so far as the combination operates upon and restrains interstate commerce,* Congress has power to legislate and to prohibit" (pp. 569, 571). That such a rule was applied to interstate commerce should not have surprised anyone. Indeed, when Congress declared contracts, combinations, and conspiracies in restraint of trade or commerce to be illegal, it did nothing more than apply to interstate commerce a rule that had been long applied by the several States when dealing with combinations that were in restraint of their domestic commerce. The decisions in state courts upon this general subject are not only numerous and instructive, but they show the circumstances under which the anti-trust act was passed. It may well be assumed that Congress, when enacting that statute, shared the general apprehension that a few powerful corporations or combinations sought to obtain, and, unless restrained, would obtain, such absolute control of the entire trade and commerce of the country as would be detrimental to the general welfare.

In Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173, 186, the Supreme Court of Pennsylvania dealt with a combination of coal companies seeking the control, within a large territory, of the entire market for bituminous coal. The court, observing that the combination was wide in its scope, general in its influence, and injurious in its effects, said: "When competition is left free, individual error or folly will generally find a correction in the conduct of others. But here is a combination of all the companies operating in the Blossburg and Barclay mining regions, and controlling their entire productions. They have combined together to govern the supply and the price of coal in all markets from the Hudson to the Mississippi rivers, and from Pennsylvania to the Lakes. This combination has a power in its confederated form which no individual action can confer. The

public interest must succumb to it, for it has left no competition free to correct its baleful influence. When the supply of coal is suspended the demand for it becomes importunate, and prices must rise. Or if the supply goes forward, the prices fixed by the confederates must accompany it. The domestic hearth, the furnaces of the iron master, and the fires of the manufacturer, all feel the restraint, while many dependent hands are paralyzed and hungry mouths are stinted. The influence of a lack of supply or a rise in the price of an article of such prime necessity cannot be measured. It permeates the entire mass of the community and leaves few of its members untouched by its withering blight. Such a combination is more than a contract; it is an offense. . . . In all such combinations, where the purpose is injurious or unlawful, the gist of the offense is the conspiracy. Men can often do by the *combination* of many what, severally, no one could accomplish, and even what, when done by one, would be innocent. . . . *There is a potency in numbers when combined* which the law cannot overlook, where injury is the consequence." The same principles were applied in Arnot *v.* Pittston & Elmira Coal Co., 68 N. Y. 558, 565, which was the case of a combination of two coal companies in order to give one of them a monopoly of coal in a particular region, the Court of Appeals of New York holding that "a combination to effect such a purpose is inimical to the interests of the public, and that all contracts designed to effect such an end are contrary to public policy, and therefore illegal." They were also applied by the Supreme Court of Ohio in Central Ohio Salt Co. *v.* Guthrie, 35 Ohio St. 666, 672, which was the case of a combination among manufacturers of salt in a large salt-producing territory, the court saying: "It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. *Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public.*"

So, in Craft *v.* McConoughy, 79 Ill. 346, 350, which was the case of a combination among grain dealers by which competition was stifled, the court saying: "So long as competition was free, the interest of the public was safe. The laws of trade, in connection with the rigor of competition, was all the guarantee the public required; but the secret combination created by the contract destroyed all competition, and created a monopoly against which the public interest had no protection." Again, in People *v.* Chicago Gas Trust Co., 130 Ill. 269, 297, which involved the validity of the organization of a gas corporation which obtained a monopoly in the business of furnishing illuminating gas in the city of Chicago by buying the stock of four other gas companies, it was said: "Of what avail is it that any number of gas companies may be formed under the general incorporation law, if a giant trust company can be clothed with the power of buying up and holding the stock and property of such

companies, and, through the control thereby attained, can direct all their operations and weld them into one huge combination?" To the same effect are cases almost too numerous to be cited. But among them we refer to Richardson *v.* Buhl, 77 Mich. 632, which was the case of the organization of a corporation in Connecticut to unite in one corporation all the match manufacturers in the United States, and thus to obtain control of the business of manufacturing matches; Santa Clara Mill & Lumber Co. *v.* Hayes, 76 Cal. 387, 390, which was the case of a combination among manufacturers of lumber, by which it could control the business in certain localities; and India Bagging Association *v.* Kock, 14 La. Ann. 168, which was the case of a combination among various commercial firms to control the prices of bagging used by cotton planters.

The cases just cited, it is true, relate to the domestic commerce of the States. But they serve to show the authority which the States possess to guard the public against *combinations* that repress individual enterprise and interfere with the operation of the natural laws of competition among those engaged in trade within its limits. They serve also to give point to the declaration of this court in Gibbons *v.* Ogden, 9 Wheat. 197 [**235**] — a principle never modified by any subsequent decision — that, subject to the limitations imposed by the Constitution upon the exercise of the powers granted by that instrument, "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 power as are found in the Constitution of the United States." Is there then any escape from the conclusion that, subject only to such restrictions, power of Congress over interstate and international commerce is as full and complete as is the power of any State over its domestic commerce? If a State may strike down combinations that restrain its domestic commerce by destroying free competition among those engaged in such commerce, what power, except that of Congress, is competent to protect the freedom of interstate and international commerce when assailed by a combination that restrains such commerce by stifling competition among those engaged in it?

Now the court is asked to adjudge that, if held to embrace the case before us, the Anti-Trust Act is repugnant to the Constitution of the United States. In this view we are unable to concur. The contention of the defendants could not be sustained without, in effect, overruling the prior decisions of this court as to the scope and validity of the Anti-Trust Act. If, as the court has held, Congress can strike down a combination between private persons or private corporations that restrains trade among the States in iron pipe (as in Addyston Pipe & Steel Co. *v.* United States), or in tiles, grates, and mantels (as in Montague *v.* Lowry), surely it ought not to be doubted that Congress has power to declare illegal a combination that restrains

commerce among the States and with foreign nations, as carried on over the lines of competing railroad companies exercising public franchises, and engaged in such commerce. We cannot agree that Congress may strike down combinations among manufacturers and dealers in iron pipe, tiles, grates, and mantels that restrain commerce among the States in such articles, but may not strike down combinations among stockholders of competing railroad carriers, which restrain commerce as involved in the transportation of passengers and property among the several States. If private parties may not, by combination among themselves, restrain interstate and international commerce in violation of an act of Congress, much less can such restraint be tolerated when imposed or attempted to be imposed upon commerce as carried on over public highways. Indeed, if the contentions of the defendants are sound, why may not *all* the railway companies in the United States that are engaged under State charters, in interstate and international commerce, enter into a combination such as the one here in question, and, by the device of a holding corporation, obtain the absolute control throughout the entire country of rates for passengers and freight beyond the power of Congress to protect the public against their exactions? The argument in behalf of the defendants necessarily leads to such results, and places Congress, although invested by the people of the United States with full authority to regulate interstate and international commerce, in a condition of utter helplessness, so far as the protection of the public against such combinations is concerned.

Will it be said that Congress can meet such emergencies by prescribing the rates by which interstate carriers shall be governed in the transportation of freight and passengers? If Congress has the power to fix such rates — and upon that question we express no opinion — it does not choose to exercise its power in that way or to that extent. It has, all will agree, a large discretion as to the means to be employed in the exercise of any power granted to it. For the present, it has determined to go no farther than to protect the freedom of commerce among the States and with foreign states by declaring illegal all contracts, combinations, conspiracies, or monopolies in restraint of such commerce, and make it a public offense to violate the rule thus prescribed. How much further it may go we do not now say. We need only at this time consider whether it has exceeded its powers in enacting the statute here in question.

Assuming, without further discussion, that the case before us is within the terms of the act, and that the act is not in excess of the powers of Congress, we recur to the question: How far may the courts go in reaching and suppressing the combination described in the bill? All will agree that if the anti-trust act be constitutional, and if the combination in question be in violation of its provisions, the courts may enforce the provisions of the statute by such orders and decrees as are necessary or appropriate to that end and as may be

consistent with the fundamental rules of legal procedure. And all, we take it, will agree, as established firmly by the decisions of this court, that the power of Congress over commerce extends to all the instrumentalities of such commerce, and to every device that may be employed to interfere with the freedom of commerce among the States and with foreign nations. Equally, we assume, all will agree that the Constitution and the legal enactments of Congress are, by express words of the Constitution, the supreme law of the land, anything in the constitution and laws of any State to the contrary notwithstanding. Nevertheless, the defendants, strangely enough, invoke in their behalf the Tenth Amendment of the Constitution, which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people;" and we are confronted with the suggestion that any order or decree of the Federal court which will prevent the Northern Securities company from exercising the power it acquired in becoming the holder of the stocks of the Great Northern and Northern Pacific Railway companies will be an invasion of the rights of the State under which the Securities Company was chartered, as well as of the rights of the States creating the other companies. In other words, if the State of New Jersey gives a charter to a corporation, and even if the obtaining of such a charter is in fact pursuant to a *combination* under which it becomes the holder of the stocks of shareholders in two competing, parallel railroad companies engaged in interstate commerce in other States, whereby competition between the respective roads of those companies is to be destroyed, and the enormous commerce carried on over them restrained by suppressing competition, Congress must stay its hands and allow such restraint to continue, to the detriment of the public, because, forsooth, the corporations concerned or some of them are State corporations. We cannot conceive how it is possible for anyone to seriously contend for such a proposition. It means nothing less than that Congress, in regulating interstate commerce, must act in subordination to the will of the States when exerting their power to create corporations. No such view can be entertained for a moment.

It is proper to say in passing that nothing in the record tends to show that the State of New Jersey had any reason to suspect that those who took advantage of its liberal incorporation laws had in view, when organizing the Securities Company, to destroy competition between two great railway carriers engaged in interstate commerce in distant States of the Union. The purpose of the combination was concealed under very general words that gave no clue whatever to the real purposes of those who brought about the organization of the Securities Company. If the certificate of incorporation of that company had expressly stated that the object of the company was to destroy competition between competing, parallel lines of interstate carriers, all would have seen, at the outset, that the scheme was in

hostility to the national authority, and that there was a purpose to violate or evade the act of Congress.

We reject any such view of the relations of the national government and the States composing the Union as that for which the defendants contend. Such a view cannot be maintained without destroying the just authority of the United States. It is inconsistent with all the decisions of this court as to the powers of the national government over matters committed to it. No State can, by merely creating a corporation, or in any other mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce. It cannot be said that any State may give a corporation, created under its laws, authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress. Every corporation created by a State is necessarily subject to the supreme law of the land. And yet the suggestion is made that to restrain a State corporation from interfering with the free course of trade and commerce among the States, in violation of an act of Congress, is hostile to the reserved rights of the States. The Federal court may not have power to forfeit the charter of the Securities Company; it may not declare how its shares of stock may be transferred on its books, nor prohibit it from acquiring real estate, nor diminish or increase its capital stock. All these and like matters are to be regulated by the State which created the company. But to the end that effect be given to the national will, lawfully expressed, Congress may prevent that company, in its capacity as a holding corporation and trustee, from carrying out the purposes of a combination formed in restraint of interstate commerce. The Securities Company is itself a part of the present combination; its head and front; its trustee. It would be extraordinary if the court, in executing the act of Congress, could not lay hands upon that company and prevent it from doing that which, if done, will defeat the act of Congress. Upon like grounds the court can, by appropriate orders, prevent the two competing railroad companies here involved from co-operating with the Securities Company in restraining commerce among the States. In short, the court may make any order necessary to bring about the dissolution or suppression of an illegal combination that restrains interstate commerce. All this can be done without infringing in any degree upon the just authority of the States. The affirmance of the judgment below will only mean that no combination, however powerful, is stronger than the law, or will be permitted to avail itself of the pretext that to prevent it doing that which, if done, would defeat a legal enactment of Congress, is to attack the reserved rights of the States. It would mean that the government which represents all, can, when acting within the

limits of its powers, compel obedience to its authority. It would mean that no device in evasion of its provisions, however skilfully such device may have been contrived, and no combination, by whomsoever formed, is beyond the reach of the supreme law of the land, if such device or combination, by its operation, directly restrains commerce among the States or with foreign nations in violation of the act of Congress.

The defendants rely, with some confidence, upon the case of the Railroad Company *v.* Maryland, 21 Wall. 456, 473; 22 L. ed. 678, 684. But nothing we have said is inconsistent with any principle announced in that case. The court there recognized the principle that a State has plenary powers "over its own territory, its highways, its franchises, and its corporations," and observed that "we are bound to sustain the constitutional powers and prerogatives of the States, as well as those of the United States, whenever they are brought before us for adjudication, no matter what may be the consequences." Of course, every State has, in a general sense, plenary power over its corporations. But is it conceivable that a State, when exerting power over a corporation of its creation, may prevent or embarrass the exercise by Congress of any power with which it is invested by the Constitution? In the case just referred to the court does not say, and it is not to be supposed that it will ever say, that any power exists in a State to prevent the enforcement of a lawful enactment of Congress, or to invest any of its corporations, in whatever business engaged, with authority to disregard such enactment or defeat its legitimate operation. On the contrary, the court has steadily held to the doctrine, vital to the United States as well as to the States, that a State enactment, even if passed in the exercise of its acknowledged powers, must yield, in case of conflict, to the supremacy of the Constitution of the United States and the acts of Congress enacted in pursuance of its provisions. This results, the court has said, as well from the nature of the government as from the words of the Constitution. Gibbons *v.* Ogden, 9 Wheat. 1, 210 [**235**]; Sinnot *v.* Davenport, 22 How. 227, 243; *In re* Debs, 158 U. S. 564; Missouri, K. & T. R. Co. *v.* Haber, 169 U. S. 613, 626, 627. In Texas *v.* White, 7 Wall. 700, 725 [**838**], the court remarked "that 'the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union, there could be no such political body as the United States.' County of Lane *v.* Oregon, 7 Wall. 76 [**40**]. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government." These doctrines are at the basis of our constitutional government, and cannot be disregarded with safety.

The defendants also rely on Louisville & N. R. Co. *v.* Kentucky, 161 U. S. 677, 702. In that case it was contended by the railroad company that the assumption of the State to forbid the consolidation of parallel and competing lines was an interference with the power of Congress over interstate commerce. The court observed that but little need be said in answer to such a proposition, for "it has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers." But that case distinctly recognized that there was a division of power between Congress and the States in respect to interstate railways, and that Congress had the superior right to control that commerce and forbid interference therewith, while to the States remained the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests. If there is anything in that case which even intimates that a State or a State corporation may in any way directly restrain interstate commerce, over which Congress has, by the Constitution, complete control, we have been unable to find it.

The question of the relations of the General Government with the States is again presented by the specific contention of each defendant that Congress did not intend "to limit the power of the several States to create corporations, define their purposes, fix the amount of their capital, and determine who may buy, own, and sell their stock." All that is true, generally speaking, but the contention falls far short of meeting the controlling questions in this case. To meet this contention we must repeat some things already said in this opinion. But if what we have said be sound, repetition will do no harm. So far as the Constitution of the United States is concerned, a State may, indeed, create a corporation, define its powers, prescribe the amount of its stock and the mode in which it may be transferred. It may even authorize one of its corporations to engage in commerce of every kind: domestic, interstate, and international. The regulation or control of purely domestic commerce of a State is, of course, with the State, and Congress has no direct power over it so long as what is done by the State does not interfere with the operations of the General Government, or any legal enactment of Congress. A State, if it chooses so to do, may even submit to the existence of combinations within its limits that restrain its internal trade. But neither a state corporation nor its stockholders can, by reason of the nonaction of the State or by means of any combination among such stockholders, interfere with the complete enforcement of any rule lawfully devised by Congress for the conduct of commerce among the States or with foreign nations; for, as we have seen, interstate and international commerce is, by the Constitution, under the control of Congress, and it belongs to the legislative department of the government to prescribe

rules for the conduct of that commerce. If it were otherwise, the declaration in the Constitution of its supremacy, and of the supremacy as well of the laws made in pursuance of its provisions, was a waste of words. Whilst every instrumentality of domestic commerce is subject to State control, every instrumentality of interstate commerce may be reached and controlled by national authority, *so far as to compel it to respect the rules for such commerce lawfully established by Congress*. No corporate person can excuse a departure from or violation of that rule under the plea that that which it has done or omitted to do is permitted, or not forbidden, by the State under whose authority it came into existence. We repeat that no State can endow any of its corporations, or any combination of its citizens, with authority to restrain interstate or international commerce, or to disobey the national will as manifested in legal enactments of Congress. So long as Congress keeps within the limits of its authority as defined by the Constitution, infringing no rights recognized or secured by that instrument, its regulations of interstate and international commerce, whether founded in wisdom or not, must be submitted to by all. Harm, and only harm, can come from the failure of the courts to recognize this fundamental principle of constitutional construction. To depart from it because of the circumstances of special cases, or because the rule, in its operation, may possibly affect the interests of business, is to endanger the safety and integrity of our institutions and make the Constitution mean not what it says, but what interested parties wish it to mean at a particular time and under particular circumstances. The supremacy of the law is the foundation rock upon which our institutions rest. The law, this court said in United States *v.* Lee, 106 U. S. 196, 220 [**720**], is the only supreme power in our system of government. And no higher duty rests upon this court than to enforce, by its decrees, the will of the legislative department of the government, as expressed in a statute, unless such statute be plainly and unmistakably in violation of the Constitution. If the statute is beyond the constitutional power of Congress, the court would fail in the performance of a solemn duty if it did not so declare. But if nothing more can be said than that Congress has erred — and the court must not be understood as saying that it has or has not erred — the remedy for the error and the attendant mischief is the selection of new senators and representatives, who, by legislation, will make such changes in existing statutes, or adopt such new statutes, as may be demanded by their constituents, and be consistent with law.

Many suggestions were made in argument based upon the thought that the Anti-Trust Act would, in the end, prove to be mischievous in its consequences. Disaster to business and widespread financial ruin, it has been intimated, will follow the execution of its provisions. Such predictions were made in all the cases heretofore arising under that act. But they have not been verified. It is the history of

monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions. In this, as in former cases, they seek shelter behind the reserved rights of the States and even behind the constitutional guaranty of liberty of contract. But this court has heretofore adjudged that the act of Congress did not touch the rights of the States, and that liberty of contract did not involve a right to deprive the public of the advantages of free competition in trade and commerce. Liberty of contract does not imply liberty in a corporation or individuals to defy the national will, when legally expressed. Nor does the enforcement of a legal enactment of Congress infringe, in any proper sense, the general inherent right of everyone to acquire and hold property. That right, like all other rights, must be exercised in subordination to the law.

But even if the court shared the gloomy forebodings in which the defendants indulge, it could not refuse to respect the action of the legislative branch of the government if what it has done is within the limits of its constitutional power. The suggestions of disaster to business have, we apprehend, their origin in the zeal of parties who are opposed to the policy underlying the act of Congress or are interested in the result of this particular case; at any rate, the suggestions imply that the court may and ought to refuse the enforcement of the provisions of the act if, in its judgment, Congress was not wise in prescribing as a rule by which the conduct of interstate and international commerce is to be governed, that every combination, whatever its form, in restraint of such commerce and the monopolizing or attempting to monopolize such commerce, shall be illegal. These, plainly, are questions as to the policy of legislation which belong to another department, and this court has no function to supervise such legislation from the standpoint of wisdom or policy. We need only say that Congress has authority to declare, and by the language of its act, as interpreted in prior cases, has, in effect, declared, that the freedom of interstate and international commerce shall not be obstructed or disturbed by any combination, conspiracy, or monopoly that will restrain such commerce, by preventing the free operation of competition among interstate carriers engaged in the transportation of passengers and freight. This court cannot disregard that declaration unless Congress, in passing the statute in question, be held to have transgressed the limits prescribed for its action by the Constitution. But, as already indicated, it cannot be so held consistently with the provisions of that instrument.

The combination here in question may have been for the pecuniary benefit of those who formed or cause it to be formed. But the interests of private persons and corporations cannot be made paramount to the interests of the general public. Under the Articles of Confederation commerce among the original States was subject to vexatious

and local regulations that took no account of the general welfare. But it was for the protection of the general interests, as involved in interstate and international commerce, that Congress, representing the whole country, was given by the Constitution full power to regulate commerce among the States and with foreign nations. In Brown *v.* Maryland, 12 Wheat. 419, 446 [**303**], it was said: "Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress." Railroad companies, we said in the Trans-Missouri Freight Association case, "are instruments of commerce, and their business is commerce itself." And such companies, it must be remembered, operate "public highways, established primarily for the convenience of the people, and therefore are subject to governmental control and regulation." Cherokee Nation *v.* Kansas Railway Co., 135 U. S. 641, 657; Chicago, Eh. R. R. Co. *v.* Pullman Southern Car Co., 139 U. S. 79, 90; Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 475; United States *v.* Trans-Missouri Freight Association, 166 U. S. 290, 332; Smyth *v.* Ames, 169 U. S. 466, 544 [**954**]; Lake Shore, etc., Ry. Co. *v.* Ohio, 173 U. S. 285, 301 [**357**]. When such carriers, in the exercise of public franchises, engage in the transportation of passengers and freight among the States, they become — even if they be State corporations — subject to such rules as Congress may lawfully establish for the conduct of interstate commerce.

It was said in argument that the circumstances under which the Northern Securities Company obtained the stock of the constituent companies imported simply an investment in the stock of other corporations, a purchase of that stock; which investment or purchase, it is contended, was not forbidden by the charter of the company, and could not be made illegal by any act of Congress. This view is wholly fallacious, and does not comport with the actual transaction. There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a transaction, it was not, in fact, one of that kind. However that company may have acquired for itself any stock in the Great Northern and Northern Pacific Railway companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose. If anyone had full knowledge of what was designed to be accomplished, and as to what was actually accomplished, by the combination in question, it was the

defendant Morgan. In his testimony he was asked, "Why put the stocks of *both* these [constituent companies] into one holding company?" He frankly answered: "In the first place, this holding company was simply a question of *custodian*, because it had no other alliances." That disclosed the actual nature of the transaction, which was only to organize the Northern Securities Company as a *holding* company, in whose hands, not as a real purchaser or absolute owner, but simply as custodian, were to be placed the stocks of the constituent companies — such custodian to represent the combination formed between the shareholders of the constituent companies, the direct and necessary effect of such combination being, as already indicated, to restrain and monopolize interstate commerce by suppressing, or (to use the words of this court in United States *v.* Joint Traffic Association) "smothering" competition between the lines of two railway carriers.

We will now inquire as to the nature and extent of the relief granted to the government by the decree below.

By the decree in the Circuit Court it was found and adjudged that the defendants had entered into a combination or conspiracy in restraint of trade or commerce among the several States, such as the act of Congress denounced as illegal; and that all of the stocks of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, claimed to be owned and held by the Northern Securities Company, was acquired, and is by it held, in virtue of such combination or conspiracy, in restraint of trade and commerce among the several States. It was therefore decreed as follows: "That the Northern Securities Company, its officers, agents, servants, and employees, be and they are hereby enjoined from acquiring, or attempting to acquire, further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision, or influence whatsoever over the acts and doings of said railway companies, or either of them, by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants, and agents, be and they are hereby respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies; that they, together with their officers, directors, servants, and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies, which it now claims to own and hold; and that the aforesaid railway companies,

their officers, directors, servants, and agents, be enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said The Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

Subsequently, and before the appeal to this court was perfected, an order was made in the Circuit Court to this effect: "That upon the giving of an approved bond to the United States by or on behalf of the defendants in the sum of $50,000, conditioned to prosecute their appeal with effect and to pay all damages which may result to the United States from this order, that portion of the injunction contained in the final decree herein which forbids the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants, and agents, from paying dividends to the Northern Securities Company on account of stock in either of the railway companies which the Securities Company claims to own and hold, is suspended during the pendency of the appeal allowed herein this day. All other portions of the decree and of the injunction it contains remain in force and are unaffected by this order."

No valid objection can be made to the decree below, in form or in substance. If there was a combination or conspiracy in violation of the act of Congress, between the stockholders of the Great Northern and the Northern Pacific Railway companies, whereby the Northern Securities Company was formed as a holding corporation, and whereby interstate commerce over the lines of the constituent companies was restrained, it must follow that the court, in execution of that act, and to defeat the efforts to evade it, could prohibit the parties to the combination from doing the specific things which, being done, would affect the result denounced by the act. To say that the court could not go so far is to say that it is powerless to enforce the act or to suppress the illegal combination, and powerless to protect the rights of the public as against that combination.

It is here suggested that the alleged combination had accomplished its object before the commencement of this suit, in that the Securities Company had then organized, and had actually received a majority

of the stock of the two constituent companies; *therefore*, it is argued, no effective relief can now be granted by the government. This same view was pressed upon the Circuit Court and was rejected. It was completely answered by that court when it said: "Concerning the second contention, we observe that it would be a novel, not to say absurd, interpretation of the anti-trust act to hold that after an unlawful combination is formed and has acquired the power which it had no right to acquire, — namely, to restrain commerce by suppressing competition, — and is proceeding to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it. Obviously, the act, when fairly interpreted, will bear no such construction. Congress aimed to destroy the power to place any direct restraint on interstate trade or commerce, when, by any combination or conspiracy, formed by either natural or artificial persons, such a power had been acquired; and the government may intervene and demand relief as well after the combination is fully organized as while it is in process of formation. In this instance, as we have already said, the Securities Company made itself a party to a combination in restraint of interstate commerce that antedated its organization, as soon as it came into existence, doing so, of course, under the direction of the very individuals who promoted it." The Circuit Court has done only what the actual situation demanded. Its decree has done nothing more than to meet the requirements of the statute. It could not have done less without declaring its impotency in dealing with those who have violated the law. The decree, if executed, will destroy not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose.

It is said that this statute contains criminal provisions and must therefore be strictly construed. The rule upon that subject is a very ancient and salutary one. It means only that we must not bring cases within the provisions of such a statute that are not clearly embraced by it, nor by narrow, technical, or forced construction of words, exclude cases from it that are obviously within its provisions. What must be sought for always is the intention of the legislature, and the duty of the court is to give effect to that intention as disclosed by the words used.

As early as the case of King *v.* Hodnett, 1 T. R. 96, 101, Mr. Justice Buller said: "It is not true that the courts, in the exposition of penal statutes, are to narrow the construction." In United States *v.* Wiltberger, 5 Wheat. 76, 95, Chief Justice Marshall, delivering the judgment of this court and referring to the rule that penal statutes

are to be construed strictly, said: "It is a modification of the ancient maxim, and amounts to this; that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction." In United States *v.* Morris, 14 Pet. 464, 475, this court, speaking by Chief Justice Taney, said: "In expounding a penal statute the court certainly will not extend it beyond the plain meaning of its words; for it has been long and well settled that such statutes must be construed strictly. Yet the evident intention of the legislature ought not to be defeated by a forced and overstrict construction. 5 Wheat. 95." So, in The Schooner Industry, 1 Gall. 114, 117, Mr. Justice Story said: "We are undoubtedly bound to construe penal statutes strictly, and not to extend them beyond their obvious meaning by strained inferences. On the other hand, we are bound to interpret them according to the manifest import of the words, and to hold all cases which are within the words and the mischiefs to be within the remedial influence of the statute." In another case the same eminent jurist said: "I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication or extended to cases not obviously within their words and purport. . . . In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature." United States *v.* Winn 3, Sumn. 209, 211, 212. In People *v.* Bartow, 6 Cowen, 290, the highest court of New York said: "Although a penal statute is to be construed strictly, the court are not to disregard the plain intent of the legislature. It is well settled that a statute which is made for the good of the public ought, although it be penal, to receive an equitable construction." So, in Commonwealth *v.* Martin, 17 Mass. 359, 362, the highest court of Massachusetts said: "If a statute creating or increasing a penalty be capable of two constructions, undoubtedly that construction which operates in favor of life or liberty is to be adopted; but it is not justifiable in this any more than in any other case, to imagine ambiguities merely that a lenient construction may be adopted. If such were the privilege of a court, it would be easy to obstruct the public will in almost every statute enacted; for it rarely happens that one is so precise and exact in its terms as to preclude the exercise of ingenuity in raising doubts about its construction." There are cases almost without number in this country and in England to the same effect.

Guided by these long-established rules of construction, it is manifest that if the Anti-Trust Act is held not to embrace a case such as is now before us, the plain intention of the legislative branch of the government will be defeated. If Congress has not, by the words used in the act, described this and like cases, it would, we apprehend, be impossible to find words that would describe them. This, it must be remembered, is a suit in equity, instituted by authority of Congress, "to prevent and restrain violations of the act," section 4; and the court, in virtue of a well-settled rule governing proceedings in equity, may mould its decree so as to accomplish practical results — such results as law and justice demand. The defendants have no just cause to complain of the decree, in matter of law, and it should be affirmed.

The judgment of the court is that the decree below be and hereby is affirmed, with liberty to the Circuit Court to proceed in the execution of its decree as the circumstances may require.

*Affirmed.*

MR. JUSTICE BREWER, concurring.

I cannot assent to all that is said in the opinion just announced, and believe that the importance of the case and the questions involved justify a brief statement of my views.

First, let me say that while I was with the majority of the court in the decision in United States *v.* Freight Association, 166 U. S. 290, followed by the cases of United States *v.* Joint Traffic Association, 171 U. S. 505; Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211; and Montague & Co. *v.* Lowry, 193 U. S. 38, decided at the present term, and while a further examination (which had been induced by the able and exhaustive arguments of counsel in the present case) has not disturbed the conviction that those cases were rightly decided, I think that in some respects the reasons given for the judgments cannot be sustained. Instead of holding that the Anti-Trust act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the act. That act, as appears from its title, was leveled at only "unlawful restraints and monopolies." Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition, with prescribed penalties and remedies, upon those contracts which were in direct restraint of trade, unreasonable, and against public policy. Whenever a departure from common-law rules and definitions is claimed, the purpose to make the departure should be clearly shown. Such a purpose does not appear, and such a departure was not intended.

Further, the general language of the act is also limited by the

power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen. If, applying this thought to the present case, it appeared that Mr. Hill was the owner of a majority of the stock in the Great Northern Railway Company, he could not, by any act of Congress, be deprived of the right of investing his surplus means in the purchase of stock of the Northern Pacific Railway Company, although such purchase might tend to vest in him through that ownership a control over both companies. In other words, the right which all other citizens had of purchasing Northern Pacific stock could not be denied to him by Congress because of his ownership of stock in the Great Northern Company. Such was the ruling in Pearsall *v.* Great Northern Railway, 161 U. S. 646, in which this court said, in reference to the right of the stockholders of the Great Northern Company to purchase the stock of the Northern Pacific Railway Company: "Doubtless these stockholders could lawfully acquire, by individual purchases, a majority or even the whole of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations, with no interests, as such, in common."

But no such investment by a single individual of his means is here presented. There was a combination by several individuals, separately owning stock in two competing railroad companies, to place the control of both in a single corporation. The purpose to combine, and by combination destroy competition, existed before the organization of the corporation, the Securities Company. That corporation, though nominally having a capital stock of $400,000,000, had no means of its own; $30,000 in cash was put into its treasury, but simply for the expenses of organization. The organizers might just as well have made the nominal stock a thousand millions as four hundred, and the corporation would have been no richer or poorer. A corporation, while by fiction of law recognized for some purposes as a person, and, for purposes of jurisdiction, as a citizen, is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business. In this case it was a mere instrumentality by which separate railroad properties were combined under one control. That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock. The transfer of stock to the Securities Company was a mere incident, the manner in which the combination to destroy competition, and thus unlawfully restrain trade, was carried out.

If the parties interested in these two railroad companies can, through the instrumentality of a holding corporation, place both

under one control, then in like manner, as was conceded on the argument by one of the counsel for the appellants, could the control of all the railroad companies in the country be placed in a single corporation. Nor need this arrangement for control stop with what has already been done. The holders of $201,000,000 of stock in the Northern Securities Company might organize another corporation to hold their stock in that company, and the new corporation, holding the majority of the stock in the Northern Securities Company, and acting in obedience to the wishes of a majority of its stockholders, would control the action of the Securities Company and through it the action of the two railroad companies; and this process might be extended until a single corporation whose stock was owned by three or four parties would be in practical control of both roads; or, having before us the possibilities of combination, the control of the whole transportation system of the country. I cannot believe that to be a reasonable or lawful restraint of trade.

Again, there is by this suit no interference with State control. It is a recognition rather than a disregard of its action. This merging of control and destruction of competition was not authorized, but specifically prohibited by the State which created one of the railroad companies, and within whose boundaries the lines of both were largely located and much of their business transacted. The purpose and policy of the State are therefore enforced by the decree. So far as the work of the two railroad companies was interstate commerce, it was subject to the control of Congress, and its purpose and policy were expressed in the act under which this suit was brought.

It must also be remembered that under present conditions a single railroad is, if not a legal, largely a practical monopoly; and the arrangement by which the control of these two competing roads was merged in a single corporation broadens and extends such monopoly. I cannot look upon it as other than an unreasonable combination in restraint of interstate commerce — one in conflict with State law, and within the letter and spirit of the statute and the power of Congress. Therefore I concur in the judgment of affirmance.

I have felt constrained to make these observations for fear that the broad and sweeping language of the opinion of the court might tend to unsettle legitimate business enterprises, stifle or retard wholesome business activities, encourage improper disregard of reasonable contracts, and invite unnecessary litigation.[1]

[1] MR. JUSTICE WHITE, with whom concurred MR. CHIEF JUSTICE FULLER, MR. JUSTICE PECKHAM, and MR. JUSTICE HOLMES, dissented. There was also a dissenting opinion by MR. JUSTICE HOLMES, in which the other dissenting justices concurred.

## 2. State Taxation.

### ALLEN *v.* PULLMAN PALACE CAR COMPANY.

191 U. S. 171; 24 Sup. Ct. Rep. 39. 1903.

[The Palace Car Company brought suit in the Circuit Court of the United States for the middle district of Tennessee to recover from the State moneys paid under protest for taxes levied and collected. There was a judgment for the company, and the officer of the State against whom the action was brought appeals.]

Mr. Justice Day delivered the opinion of the court.

The taxes in controversy were levied under certain revenue laws of the State of Tennessee. Those for the years 1887 and 1888 provided: "That the rate of taxation on the following privileges shall be as follows: Sleeping cars: Each company doing business in the State, on each car, per annum, $500." Section eight of the act provided: "That any and all parties, firms, or corporations exercising any of the foregoing privileges must pay this tax, as set forth in this act, for the exercise of such privilege, whether they make a business of it or not."

The Tennessee act of 1877, imposing a tax upon the running of sleeping cars, was before this court for consideration in the case of Pickard *v.* Pullman Southern Car Co., 117 U. S. 34. That act provided: "That the running or using of sleeping cars or coaches on railroads in Tennessee, not owned by the railroads upon which they are run or used, is declared to be a privilege, and the companies shall be required to pay to the comptroller by the first day of July following fifty dollars for each and every said cars or coaches used or run over said roads; and if the said privilege tax herein assessed be not paid as aforesaid, the comptroller shall enforce the payment of the same by distress warrant."

It was held that the tax was a burden upon interstate commerce, and void because of the exclusive power of Congress to regulate commerce between the States. Unless the statute now under consideration can be distinguished from the one then construed, the Pickard case is decisive of the present case. Both taxes were imposed under the power granted by the Constitution of Tennessee to lay a privilege tax. This power is held by the Supreme Court of the State to give a wide range of legislative discretion. Any occupation, business, employment, or the like, affecting the public, may be classed and taxed as a privilege. Knoxville & O. R. Co. *v.* Harris, 99 Tenn. 684. In the act of 1877 the running and using of sleeping cars on railroads

in the State, when the cars are not owned by the railroads upon which they are run, is declared to be a privilege. Under the act of 1887, the tax is specifically imposed upon a privilege. Under the act of 1877, the tax imposed was $50 for each car or coach used or run over the road. Under the act of 1887, each company doing business in the State is required to pay $500 per annum for the same privilege. The distinction, except in the amount of annual tax exacted, is without substantial difference. Under the earlier act the tax is required for the privilege of running and using sleeping cars on railroads not owning the cars. In the later act it is exacted for the privilege of doing business in the State. This business consists of running sleeping cars upon railroads not owning the cars, and is precisely the privilege to be paid for under the first act, neither more nor less. In neither act is any distinction attempted between local or through cars or carriers of passengers. The railroads upon which the cars are run are lines traversing the State, but not confined to its limits. The cars of the Pullman Company run into and beyond the State as well as between points within the State. The act in its terms applies to cars running through the State as well as those whose operation is wholly *intra-state*. It applies to all alike, and requires payment for the privilege of running the cars of the company, regardless of the fact whether used in interstate traffic or in that which is wholly within the borders of the State. There is no decision of the Supreme Court of Tennessee limiting the act in its operation to *intra-state* traffic. It is true that the comptroller has sought to restrain the operation of the law by imposing the tax for two years upon cars running between Nashville and Memphis and between Nashville and Chattanooga for two years, and fixing one car in each year as the proportion of local business done on interstate cars for two years. But this action does not conclude the State in taxing for other years, and the action taken by the comptroller does not limit the terms of the law affecting interstate commerce.

In Leloup *v.* Mobile, 127 U. S. 640, 647 [**341** *n*], it was sought to recover a penalty imposed upon an agent of the Western Union Telegraph Company for failure to pay an annual license tax as required by an ordinance of Mobile. In the course of the opinion denying the right to exact the license fee, Mr. Justice Bradley said: "But it is urged that a portion of the telegraph company's business is internal to the State of Alabama, and therefore taxable by the State. But that fact does not remove the difficulty. The tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subject to taxation, without the imposition of a tax which covers the entire operations of the company."

In Osborne *v.* Florida, 164 U. S. 650, a license tax upon express companies was sustained, in view of the decision of the Supreme Court of that State that it affected only business of the company

within the State. The statute now under consideration requires payment of the sum exacted for the privilege of doing any business, when the principal thing to be done is interstate traffic. We are not at liberty to read into the statute terms not found therein or necessarily implied, with a view to limiting the tax to local business, which the legislature, in the terms of the act, impose upon the entire business of the company. We are of opinion that taxes exacted under the act of 1887 are void as an attempt by the State to impose a burden upon interstate commerce.

Other considerations apply in the construction of the act of 1889, under which, or acts identical in terms, taxes were collected from 1889 to 1893, inclusive. It provides, p. 247, 266, c. 130, April 8, 1889: "Sec. 4. The rate of taxation on the following privileges shall be as follows, per annum: . . . Sleeping car companies (in lieu of all other taxes except *ad valorem* tax). Each company doing business in this State, for one or more passengers taken up at one point in this State and delivered at another point in this State, and transported wholly within the State, per annum, $3,000." Its terms apply strictly to business done in the transportation of passengers taken up at one point in the State and transported wholly within the State to another point therein. It is not necessary to review the numerous cases in this court in which attempts by the States to control or regulate interstate commerce have been the subject of consideration. While they show a zealous care to preserve the exclusive right of Congress to regulate interstate traffic, the corresponding right of the State to tax and control the internal business of the State, although thereby foreign or interstate commerce may be indirectly affected, has been recognized with equal clearness. In the late case of Osborne *v.* Florida, *supra*, Mr. Justice Peckham, speaking for the court, said: "It has never been held, however, that when the business of the company, which is wholly within the State, is but a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the State of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to, and is not imposed upon, the business of the company which is interstate, there is no interference with that commerce by the State statute."

Granting that the right exists whereby a State may impose privilege or license fees upon business carried on wholly within the State, it is argued that the tax of $3,000 per annum, collected for carrying one or more local passengers on cars operating within the State, is assessed upon traffic which bears such small proportion to the entire business of the company within the State that it could not have been levied in good faith upon purely local business, and is but a thinly disguised attempt to tax the privilege of interstate traffic. If the payment of this tax was compulsory upon the company before it could do a carrying business within the State, and the burden of

its payment, because of the minor character of the domestic traffic, rested mainly upon the receipts from interstate traffic, there would be much force in this objection. Upon this proposition we are unable to distinguish this case from Pullman Co. *v.* Adams, 189 U. S. 420, decided at the last term, wherein it was held that the privilege tax imposed by the State of Mississippi upon each car carrying passengers from one point in the State to another therein was a valid tax, notwithstanding the fact that the company offered to show that its receipts from the carrying of the passengers named did not equal the expenses chargeable against such receipts. This conclusion was based upon the right of the company to abandon the business if it saw fit. It was urged that under the Constitution of Mississippi the Pullman Company was a common carrier, required to carry passengers, and therefore could not be taxed for the privilege of doing that which it was compelled to do; but in view of a decision of the Supreme Court of Mississippi, sustaining the tax, it was assumed that no such objection existed under the State Constitution. Speaking upon this subject, Mr. Justice Holmes, delivering the opinion of the court, said: "If the clause of the State Constitution referred to were held to impose the obligation supposed, and to be valid, we assume, without discussion, that the tax would be invalid. For then it would seem to be true that the State Constitution and the statute combined would impose a burden on commerce between the States analogous to that which was held bad in Crutcher *v.* Kentucky, 141 U. S. 47 [**328**]. On the other hand, if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another in the State, the case is governed by Osborne *v.* Florida, 164 U. S. 650. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce. Both parties agree that the tax is a privilege tax."

There is additional reason for holding that the Pullman Company may transact its business in Tennessee without paying this privilege tax, and continue its interstate business, declining local business, thereby escaping the attempt to tax it upon business wholly within the State. The statute of Tennessee, enacted in 1875, provides: "The rule of the common law giving a right of action to any person excluded from any hotel or public means of transportation or place of amusement is hereby abrogated; and hereafter no keeper of any hotel or public house, or carrier of passengers for hire, or conductors, drivers, or employees of such carrier or keeper, shall be bound or under any obligation to entertain, carry, or admit any person whom he shall, for any reason whatever, choose not to entertain, carry, or admit to his house, hotel, carriage, or means of transportation, or place of amusement, nor shall any right exist in favor of any such person so refused admission, but the right of such keepers of hotels and public houses, carriers of passengers, and keepers of

places of amusement, and their employees, to control the access and admission or exclusion of persons to or from their public houses, means of transportation, and places of amusement, shall be as perfect and complete as that of any private person over his private house, carriage, or private theatre or place of amusement for his family." (Shannon's Code, § 3046.)

Under this act, no carrier is required to admit any passenger to his car or means of transportation. While the Pullman Company may not be technically a common carrier, still we think it comes within the scope and meaning of this act. A sleeping car is obviously a public means of transportation. Under this act, the carrier is not obliged to afford its privileges to those making application therefor. Mr. Justice Blatchford, speaking of the character of the service afforded by sleeping cars, in Pickard *v.* Pullman Southern Car Co., 117 U. S. 34, said: "The car was equally a vehicle of transit as if it had been a car owned by the railroad company, and the special conveniences or comforts furnished to the passenger had been furnished by the railroad company itself."

It follows that a tax imposed upon domestic business, under the circumstances shown, cannot be a burden upon interstate commerce in such sense as will invalidate it.

Under the judgment of the court below, the Pullman Company was permitted to recover for license taxes levied under both acts. In so far as it permitted a recovery for taxes under the act of 1889 and identical laws of other years, *the judgment should be modified.* For that purpose, and for further proceedings in accordance with this opinion, the case is remanded to the Circuit Court.

# APPENDIX B.

## ADDITIONAL CASES RELATING TO ANNEXATION OF TERRITORY.

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### DOWNES *v.* BIDWELL.

182 U. S. 244; 21 Sup. Ct. Rep. 770. 1901.

This was an action begun in the Circuit Court by Downes, doing business under the first name of S. B. Downes & Co., against the collector of the port of New York, to recover back duties to the amount of $659.35 exacted and paid under protest upon certain oranges consigned to the plaintiff at New York, and brought thither from the port of San Juan in the island of Porto Rico during the month of November, 1900, after the passage of the act temporarily providing a civil government and revenues for the island of Porto Rico, known as the Foraker act.

The district attorney demurred to the complaint for the want of jurisdiction in the court, and for insufficiency in its averments. The demurrer was sustained, and the complaint dismissed. Whereupon plaintiff sued out this writ of error.

MR. JUSTICE BROWN announced the conclusion and judgment of the court.

This case involves the question whether merchandise brought into the port of New York from Porto Rico since the passage of the Foraker act is exempt from duty, notwithstanding the third section of that act, which requires the payment of "fifteen per centum of the duties which are required to be levied, collected, and paid upon like articles of merchandise imported from foreign countries."

1. The exception to the jurisdiction of the court is not well taken. By Rev. Stat., Sec. 629, subd. 4, the Circuit Courts are vested with jurisdiction "of all suits at law or in equity arising under any act providing for revenue from imports or tonnage," irrespective of the amount involved. This section should be construed in connection with sec. 643, which provides for the removal from state courts to Circuit Courts of the United States of suits against revenue officers "on account of any act done under color of his office, or of any such [revenue] law, or on account of any right, title, or authority claimed by such officer or other person under any such law." Both these sections are taken from the act of March 2, 1833, c. 57, 4 Stat. 632, commonly known as the Force Bill, and are evidently intended to

include all actions against customs officers acting under color of their office. While, as we have held in De Lima *v.* Bidwell, [181 U. S. 1], actions against the collector to recover back duties assessed upon non-importable property are not "customs cases" in the sense of the Administrative Act, they are, nevertheless, actions arising under an act to provide for a revenue from imports, in the sense of section 629, since they are for acts done by a collector under color of his office. This subdivision of sec. 629 was not repealed by the jurisdictional act of 1875, or the subsequent act of August 13, 1888, since these acts were "not intended to interfere with the prior statutes conferring jurisdiction upon the Circuit or District Courts in special cases and over particular subjects. United States *v.* Mooney, 116 U. S. 104, 107. See also Insurance Co. *v.* Ritchie, 5 Wall. 541; Philadelphia *v.* The Collector, 5 Wall. 720; Hornthall *v.* The Collector, 9 Wall. 560. As the case "involves the construction or application of the Constitution," as well as the constitutionality of a law of the United States, the writ of error was properly sued out from this court.

2. In the case of De Lima *v.* Bidwell just decided, we held that, upon the ratification of the treaty of peace with Spain, Porto Rico ceased to be a foreign country, and became a territory of the United States, and that duties were no longer collectible upon merchandise brought from that island. We are now asked to hold that it became a part of the *United States* within that provision of the Constitution which declares that "all duties, imposts, and excises shall be uniform throughout the United States." Art. I, Sec. 8. If Porto Rico be a part of the United States, the Foraker act imposing duties upon its products is unconstitutional, not only by reason of a violation of the uniformity clause, but because by section 9 "vessels bound to or from one State" cannot "be obliged to enter, clear, or pay duties in another."

The case also involves the broader question whether the revenue clauses of the Constitution extend of their own force to our newly acquired territories. The Constitution itself does not answer the question. Its solution must be found in the nature of the government created by that instrument, in the opinion of its contemporaries, in the practical construction put upon it by Congress, and in the decisions of this court.

The Federal government was created in 1777 by the union of thirteen colonies of Great Britain in "certain articles of confederation and perpetual union," the first one of which declared that "the stile of this confederacy shall be the United States of America." Each member of the confederacy was denominated a *State.* Provision was made for the representation of each State by not less than two or more than seven delegates; but no mention was made of territories or other lands, except in art. XI, which authorized the admission of Canada, upon its "acceding to this confederation," and

of other colonies, if such admission were agreed to by nine States. At this time several States made claims to large tracts of land in the unsettled west, which they were at first indisposed to relinquish. Disputes over these lands became so acrid as nearly to defeat the confederacy before it was fairly put in operation. Several of the States refused to ratify the articles, because the convention had taken no steps to settle the titles to these lands upon principles of equity and sound policy; but all of them, through fear of being accused of disloyalty, finally yielded their claims, though Maryland held out until 1781. Most of these States in the meantime having ceded their interests in these lands, the confederate Congress, in 1787, created the first territorial government northwest of the Ohio River, provided for local self-government, a bill of rights, a representation in Congress by a delegate, who should have a seat "with a right of debating, but not of voting," and for the ultimate formation of States therefrom, and their admission into the Union on an equal footing with the original States.

The confederacy, owing to well-known historical reasons, having proven a failure, a new Constitution was formed in 1787 by "the people of the United States" "for the United States of America," as its preamble declares. All legislative powers were vested in a Congress consisting of representatives from the several States, but no provision was made for the admission of delegates from the territories, and no mention was made of territories as separate portions of the Union, except that Congress was empowered "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." At this time all of the States had ceded their unappropriated lands except North Carolina and Georgia. It was thought by Chief Justice Taney in the Dred Scott case, 19 How. 393, 436, that the sole object of the territorial clause was "to transfer to the new government the property then held in common by the States, and to give to that government power to apply it to the objects for which it had been destined by mutual agreement among the States before their league was dissolved;" that the power "to make needful rules and regulations" was not intended to give the powers of sovereignty, or to authorize the establishment of territorial governments, — in short, that these words were used in a proprietary, and not in a political sense. But, as we observed in De Lima *v.* Bidwell, the power to establish territorial governments has been too long exercised by Congress and acquiesced in by this court to be deemed an unsettled question. Indeed, in the Dred Scott case it was admitted to be the inevitable consequence of the right to acquire territory.

It is sufficient to observe in relation to these three fundamental instruments, that it can nowhere be inferred that the territories were considered a part of the United States. The Constitution was created by the people of the *United States*, as a union of *States*, to be

governed solely by representatives of the *States;* and even the provision relied upon here, that all duties, imposts, and excises shall be uniform "throughout the United States," is explained by subsequent provisions of the Constitution, that "no tax or duty shall be laid on articles exported from any *State,*" and "no preference shall be given by any regulation of commerce or revenue to the ports of one *State* over those of another; nor shall vessels bound to or from one *State* be obliged to enter, clear, or pay duties in another." In short, the Constitution deals with *States*, their people, and their representatives.

The Thirteenth Amendment to the Constitution, prohibiting slavery and involuntary servitude "within the United States, or in any place subject to their jurisdiction," is also significant as showing that there may be places within the jurisdiction of the United States that are no part of the Union. To say that the phraseology of this amendment was due to the fact that it was intended to prohibit slavery in the seceded States, under a possible interpretation that those States were no longer a part of the Union, is to confess the very point in issue, since it involves an admission that, if these States were not a part of the Union, they were still subject to the jurisdiction of the United States.

Upon the other hand, the Fourteenth Amendment, upon the subject of citizenship, declares only that "all persons born or naturalized *in the United States,* and subject to the jurisdiction thereof, are citizens of the United States, and of the *State* wherein they reside." Here there is a limitation to persons born or naturalized in the United States, which is not extended to persons born in any place "subject to their jurisdiction."

The question of the legal relations between the States and the newly acquired territories first became the subject of public discussion in connection with the purchase of Louisiana in 1803. This purchase arose primarily from the fixed policy of Spain to exclude all foreign commerce from the Mississippi. This restriction became intolerable to the large number of immigrants who were leaving the eastern States to settle in the fertile valley of that river and its tributaries. After several futile attempts to secure the free navigation of that river by treaty, advantage was taken of the exhaustion of Spain in her war with France, and a provision inserted in the treaty of October 27, 1795, by which the Mississippi river was opened to the commerce of the United States. 8 Stat. 138, 140, art. IV. In October, 1800, by the secret treaty of San Ildefonso, Spain retroceded to France the territory of Louisiana. This treaty created such a ferment in this country that James Monroe was sent as minister extraordinary with discretionary powers to coöperate with Livingston, then minister to France, in the purchase of New Orleans, for which Congress appropriated $2,000,000. To the surprise of the negotiators, Bonaparte invited them to make an offer for the whole of Louisiana at a price finally fixed at $15,000,000. It is well known that Mr. Jefferson

entertained grave doubts as to his power to make the purchase, or, rather, as to his right to annex the territory and make it part of the United States, and had instructed Mr. Livingston to make no agreement to that effect in the treaty, as he believed it could not be legally done. Owing to a new war between England and France being upon the point of breaking out, there was need for haste in the negotiations, and Mr. Livingston took the responsibility of disobeying his instructions, and, probably owing to the insistence of Bonaparte, consented to the third article of the treaty, which provided that "the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess." This evidently committed the government to the ultimate, but not to the immediate admission of Louisiana as a State, and postponed its incorporation into the Union to the pleasure of Congress. In regard to this, Mr. Jefferson, in a letter to Senator Breckinridge of Kentucky, of August 12, 1803, used the following language: "This treaty must, of course, be laid before both Houses, because both have important functions to exercise respecting it. They, I presume, will see their duty to their country in ratifying and paying for it, so as to secure a good which would otherwise probably be never again in their power. But I suppose they must then appeal to the nation for an additional article to the Constitution approving and confirming an act which the nation had not previously authorized. The Constitution has made no provision for holding foreign territory, still less for incorporating foreign nations into our Union. The Executive, in seizing the fugitive occurrence which so much advances the good of their country, has done an act beyond the Constitution."

To cover the questions raised by this purchase Mr. Jefferson prepared two amendments to the Constitution, the first of which declared that "the province of Louisiana is incorporated with the United States and made part thereof;" and the second of which was couched in a little different language, *viz.*: "Louisiana, as ceded by France to the United States, is made a part of the United States. Its white inhabitants shall be citizens, and stand, as to their rights and obligations, on the same footing as other citizens in analogous situations." But by the time Congress assembled, October 17, 1803, either the argument of his friends or the pressing necessity of the situation seems to have dispelled his doubts regarding his power under the Constitution, since in his message to Congress he referred the whole matter to that body, saying that "with the wisdom of Congress it will rest to take those ulterior measures which may be necessary for the immediate occupation and temporary government of the country; for

its incorporation into the Union." Jefferson's Writings, vol. 8, p. 269.

The raising of money to provide for the purchase of this territory, and the act providing a civil government, gave rise to an animated debate in Congress in which two questions were prominently presented: First, whether the provision for the ultimate incorporation of Louisiana into the Union was constitutional; and, second, whether the seventh article of the treaty admitting the ships of Spain and France for the next twelve years "into the ports of New Orleans, and in all other legal ports of entry within the ceded territory, in the same manner as the ships of the United States coming directly from France or Spain, or any of their colonies, without being subject to any other or greater duty on merchandise or other or greater tonnage than that paid by the citizens of the United States" [8 Stat. 204], was an unlawful discrimination in favor of those ports and an infringement upon Art. I, sec. 9, of the Constitution, that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another." This article of the treaty contained the further stipulation that. "during the space of time above mentioned no other nation shall have a right to the same privileges in the ports of the ceded territory; . . . and it is well understood that the object of the above article is to favor the manufactures, commerce, freight, and navigation of France and Spain."

It is unnecessary to enter into the details of this debate. The arguments of individual legislators are no proper subject for judicial comment. They are so often influenced by personal or political considerations, or by the assumed necessities of the situation, that they can hardly be considered even as the deliberate views of the persons who make them, much less as dictating the construction to be put upon the Constitution by the courts. United States *v.* Union P. R. Co., 91 U. S. 72, 79. Suffice it to say that the administration partly took the ground that, under the constitutional power to make treaties, there was ample power to acquire territory, and to hold and govern it under laws to be passed by Congress; and that as Louisiana was incorporated into the Union as a territory, and not as a State, a stipulation for citizenship became necessary; that as a State they would not have needed a stipulation for the safety of their liberty, property, and religion, but as territory this stipulation would govern and restrain the undefined powers of Congress to "make rules and regulations" for territories. The Federalists admitted the power of Congress to acquire and hold territory, but denied its power to incorporate it into the Union under the Constitution as it then stood.

They also attacked the seventh article of the treaty, discriminating in favor of French and Spanish ships, as a distinct violation of the Constitution against preference being given to the ports of one State over those of another. The administration party, through Mr. Elliott of Vermont, replied to this that "the States, as such, were equal and

intended to preserve that equality; and the provision of the Constitution alluded to was calculated to prevent Congress from making any odious discrimination or distinctions between particular States. It was not contemplated that this provision would have application to colonial or territorial acquisitions." Said Mr. Nicholson of Maryland, speaking for the administration: "It [Louisiana] is in the nature of a colony whose commerce may be regulated without any reference to the Constitution. Had it been the island of Cuba which was ceded to us, under a similar condition of admitting French and Spanish vessels for a limited time into Havana, could it possibly have been contended that this would be giving a preference to the ports of one State over those of another, or that the uniformity of duties, imposts, and excises throughout the United States would have been destroyed? And because Louisiana lies adjacent to our own territory is it to be viewed in a different light?"

As a sequence to this debate two bills were passed, one October 31, 1803 (2 Stat. 245, chap. 1), authorizing the President to take possession of the territory and to continue the existing government; and the other November 10, 1803 (2 Stat. 245, chap. 2), making provision for the payment of the purchase price. These acts continued in force until March 26, 1804, when a new act was passed providing for a temporary government (2 Stat. 283, chap. 38), and vesting all legislative powers in a governor and legislative council, to be appointed by the President. These statutes may be taken as expressing the views of Congress, first, that territory may be lawfully acquired by treaty, with a provision for its ultimate incorporation into the Union; and, second, that a discrimination in favor of certain foreign vessels trading with the ports of a newly acquired territory is no violation of that clause of the Constitution (Art. I, sec. 9) that declares that no preference shall be given to the ports of one State over those of another. It is evident that the constitutionality of this discrimination can only be supported upon the theory that ports of territories are not ports of States within the meaning of the Constitution.

The same construction was adhered to in the treaty with Spain for the purchase of Florida (8 Stat. 252) the sixth article of which provided that the inhabitants should "be incorporated into the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution;" and the fifteenth article of which agreed that Spanish vessels coming directly from Spanish ports and laden with productions of Spanish growth or manufacture should be admitted, for the term of twelve years, to the ports of Pensacola and St. Augustine "without paying other or higher duties on their cargoes, or of tonnage, than will be paid by the vessels of the United States," and that "during the said term no other nation shall enjoy the same privileges within the ceded territories."

So, too, in the act annexing the Republic of Hawaii, there was a

provision continuing in effect the customs relations of the Hawaiian Islands with the United States and other countries, the effect of which was to compel the collection in those islands of a duty upon certain articles, whether coming from the United States or other countries, much greater than the duty provided by the general tariff law then in force. This was a discrimination against the Hawaiian ports wholly inconsistent with the revenue clauses of the Constitution, if such clauses were there operative.

The very treaty with Spain under discussion in this case contains similar discriminative provisions, which are apparently irreconcilable with the Constitution, if that instrument be held to extend to these islands immediately upon their cession to the United States. By Art. IV the United States agree, "for the term of ten years from the date of the exchange of the ratifications of the present treaty, to admit Spanish ships and merchandise to the ports of the Philippine Islands on the same terms as ships and merchandise of the United States" — a privilege not extending to any other ports. It was a clear breach of the uniformity clause in question, and a manifest excess of authority on the part of the commissioners, if ports of the Philippine Islands be ports of the United States."

So, too, by Art. XIII, "Spanish scientific, literary, and artistic works . . . shall be continued to be admitted free of duty in such territories for the period of ten years, to be reckoned from the date of the exchange of the ratifications of this treaty." This is also a clear discrimination in favor of Spanish literary productions into particular ports.

Notwithstanding these provisions for the incorporation of territories into the Union, Congress, not only in organizing the territory of Louisiana by act of March 26, 1804, but all other territories carved out of this vast inheritance, has assumed that the Constitution did not extend to them of its own force, and has in each case made special provision, either that their legislatures shall pass no law inconsistent with the Constitution of the United States, or that the Constitution or laws of the United States shall be the supreme law of such territories. Finally, in Rev. Stat., § 1891, a general provision was enacted that "the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized territories, and in every territory hereafter organized, as elsewhere within the United States."

So, too, on March 6, 1820 (3 Stat. 545, chap. 22), in an act authorizing the people of Missouri to form a State government, after a heated debate, Congress declared that in the territory of Louisiana north of 36° 30′, slavery should be forever prohibited. It is true that, for reasons which have become historical, this act was declared to be unconstitutional in Scott *v.* Sandford, 19 How. 393, but it is none the less a distinct annunciation by Congress of power over property in the territories, which it obviously did not possess in the several States.

The researches of counsel have collated a large number of other instances in which Congress has in its enactments recognized the fact that provisions intended for the States did not embrace the territories, unless specially mentioned. These are found in the laws prohibiting the slave trade with "the United States or territories thereof;" or equipping ships "in any port or place within the *jurisdiction* of the United States;" in the internal revenue laws, in the early ones of which no provision was made for the collection of taxes in the territory not included within the boundaries of the existing States, and others of which extended them expressly to the territories, or "within the exterior boundaries of the United States;" and in the acts extending the internal revenue laws to the territories of Alaska and Oklahoma. It would prolong this opinion unnecessarily to set forth the provisions of these acts in detail. It is sufficient to say that Congress has or has not applied the revenue laws to the territories, as the circumstances of each case seemed to require, and has specifically legislated for the territories whenever it was its intention to execute laws beyond the limits of the states. Indeed, whatever may have been the fluctuations of opinion in other bodies (and even this court has not been exempt from them), Congress has been consistent in recognizing the difference between the States and territories under the Constitution.

The decisions of this court upon this subject have not been altogether harmonious. Some of them are based upon the theory that the Constitution does not apply to the territories without legislation. Other cases, arising from territories where such legislation has been had, contain language which would justify the inference that such legislation was unnecessary, and that the Constitution took effect immediately upon the cession of the territory to the United States. It may be remarked, upon the threshold of an analysis of these cases, that too much weight must not be given to general expressions found in several opinions that the power of Congress over territories is complete and supreme, because these words may be interpreted as meaning only supreme under the Constitution; nor, upon the other hand, to general statements that the Constitution covers the territories as well as the States, since in such cases it will be found that acts of Congress had already extended the Constitution to such territories, and that thereby it subordinated, not only its own acts, but those of the territorial legislatures, to what had become the supreme law of the land. "It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their re-

lation to the case decided, but their possible bearing on all other cases is seldom completely investigated." Cohens *v.* Virginia, 6 Wheat. 264, 399.

The earliest case is that of Hepburn *v.* Ellzey, 2 Cranch, 445, in which this court held that, under that clause of the Constitution limiting the jurisdiction of the courts of the United States to controversies between citizens of different *States*, a citizen of the District of Columbia could not maintain an action in the Circuit Court of the United States. It was argued that the word "State," in that connection, was used simply to denote a distinct political society. "But," said the Chief Justice, "as the act of Congress obviously used the word 'State' in reference to that term as used in the Constitution, it becomes necessary to inquire whether Columbia is a State in the sense of that instrument. The result of that examination is a conviction that the members of the American confederacy only are the States contemplated in the Constitution, . . . and excludes from the term the signification attached to it by writers on the law of nations." This case was followed in Barney *v.* Baltimore, 6 Wall. 280, and quite recently in Hooe *v.* Jamieson, 166 U. S. 395 [**734**]. The same rule was applied to citizens of territories in New Orleans *v.* Winter, 1 Wheat. 91, in which an attempt was made to distinguish a territory from the District of Columbia. But it was said that "neither of them is a *State* in the sense in which that term is used in the Constitution." In Scott *v.* Jones, 5 How. 343, and in Miners' Bank v. Iowa, 12 How. 1, it was held that under the Judiciary Act, permitting writs of error to the Supreme Court of a State in cases where the validity of a *State statute* is drawn in question, an act of a territorial legislature was not within the contemplation of Congress.

Loughborough *v.* Blake, 5 Wheat. 317, was an action of trespass (or, as appears by the original record, *replevin*), brought in the Circuit Court for the District of Columbia to try the right of Congress to impose a direct tax for general purposes on that District. 3 Stat. 216, chap. 60. It was insisted that Congress could act in a double capacity: in one as legislating for the states; in the other as a local legislature for the District of Columbia. In the latter character, it was admitted that the power of levying direct taxes might be exercised, but for District purposes only, as a State legislature might tax for State purposes; but that it could not legislate for the District under Art. I, sec. 8, giving to Congress the power "to lay and collect taxes, imposts, and excises," which "shall be uniform throughout the United States," inasmuch as the District was no part of the United States. It was held that the grant of this power was a general one without limitation as to place, and consequently extended to all places over which the government extends; and that it extended to the District of Columbia as a constituent part of the United States. The fact that Art. I, sec. 20, declares that "representatives and direct taxes shall be apportioned among the several States . . . according to their

respective numbers" furnished a standard by which taxes were apportioned, but not to exempt any part of the country from their operation. "The words used do not mean that direct taxes shall be imposed on States only which are represented, or shall be apportioned to representatives; but that direct taxation, in its application to States, shall be apportioned to numbers." That Art. I, sec. 9, ¶ 4, declaring that direct taxes shall be laid in proportion to the census, was applicable to the District of Columbia, "and will enable Congress to apportion on it its just and equal share of the burden, with the same accuracy as on the respective States. If the tax be laid in this proportion, it is within the very words of the restriction. It is a tax in proportion to the census or enumeration referred to." It was further held that the words of the ninth section did not "in terms require that the system of direct taxation, when resorted to, shall be extended to the territories, as the words of the second section require that it shall be extended to all the States. They therefore may, without violence, be understood to give a rule when the territories shall be taxed, without imposing the necessity of taxing them."

There could be no doubt as to the correctness of this conclusion, so far, at least, as it applied to the District of Columbia. This District had been a part of the States of Maryland and Virginia. It had been subject to the Constitution, and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can never be taken backward. The tie that bound the States of Maryland and Virginia to the Constitution could not be dissolved, without at least the consent of the Federal and state governments to a formal separation. The mere cession of the District of Columbia to the Federal government relinquished the authority of the States, but it did not take it out of the United States or from under the ægis of the Constitution. Neither party had ever consented to that construction of the cession. If, before the District was set off, Congress had passed an unconstitutional act affecting its inhabitants, it would have been void. If done after the District was created, it would have been equally void; in other words, Congress could not do indirectly, by carving out the District, what it could not do directly. The District still remained a part of the United States, protected by the Constitution. Indeed, it would have been a fanciful construction to hold that territory which had once been a part of the United States ceased to be such by being ceded directly to the Federal government.

In delivering the opinion, however, the Chief Justice made certain observations which have occasioned some embarrassment in other cases. "The power," said he, "to lay and collect duties, imposts, and excises may be exercised, and must be exercised, throughout the United States. Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit but of one answer. It is the name given to our great republic which is composed of States and territories. The District of Columbia, or

the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania; and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises should be observed in the one than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously coextensive with the power to lay and collect duties, imposts, and excises, and since the latter extends throughout the United States, it follows that the power to impose direct taxes also extends throughout the United States." So far as applicable to the District of Columbia, these observations are entirely sound. So far as they apply to the territories, they were not called for by the exigencies of the case.

In line with Loughborough *v.* Blake is the case of Callan *v.* Wilson, 127 U. S. 540 [**834**], in which the provisions of the Constitution relating to trial by jury were held to be in force in the District of Columbia. Upon the other hand, in Geofroy *v.* Riggs, 133 U. S. 258, [**586** *n*], the District of Columbia, as a political community, was held to be one of "the States of the Union" within the meaning of that term as used in a consular convention of February 23, 1853, with France. The seventh article of that convention provided that in all the States of the Union whose existing laws permitted it Frenchmen should enjoy the right of holding, disposing of, and inheriting property in the same manner as citizens of the United States; and as to the States of the Union by whose existing laws aliens were not permitted to hold real estate the President engaged to recommend to them the passage of such laws as might be necessary for the purpose of conferring this right. The court was of opinion that if these terms, "States of the Union," were held to exclude the District of Columbia and the territories, our government would be placed in the inconsistent position of stipulating that French citizens should enjoy the right of holding, disposing of, and inheriting property in like manner as citizens of the United States, in States whose laws permitted it, and engaging that the President should recommend the passage of laws conferring that right in States whose laws did not permit aliens to hold real estate, while at the same time refusing to citizens of France holding property in the District of Columbia and in some of the territories, where the power of the United States is in that respect unlimited, a like release from the disabilities of alienage, "thus discriminating against them in favor of citizens of France holding property in States having similar legislation. No plausible motive can be assigned for such discrimination. A right which the government of the United States apparently desires that citizens of France should enjoy in all the States, it would hardly refuse to them in the district embracing its capital, or in any of its own territorial dependencies."

This case may be considered as establishing the principle that, in dealing with foreign sovereignties, the term "United States" has a

broader meaning than when used in the Constitution, and includes all territories subject to the jurisdiction of the Federal government, wherever located. In its treaties and conventions with foreign nations this government is a unit. This is so, not because the territories comprised a part of the government established by the people of the States in their Constitution, but because the Federal government is the only authorized organ of the territories, as well as of the States, in their foreign relations. By Art. I, sec. 10, of the Constitution, "no State shall enter into any treaty, alliance, or confederation, . . . or enter into any agreement or compact with another State, or with a foreign power." It would be absurd to hold that the territories, which are much less independent than the States, and are under the direct control and tutelage of the general government, possess a power in this particular which is thus expressly forbidden to the States.

It may be added in this connection, that to put at rest all doubts regarding the applicability of the Constitution to the District of Columbia, Congress by the act of February 21, 1871, c. 62, 16 Stat. 419, 426, § 34, specifically extended the Constitution and laws of the United States to this District.

The case of American Ins. Co. *v.* Canter, 1 Pet. 511 [**827**], originated in a libel filed in the district court for South Carolina, for the possession of 356 bales of cotton which had been wrecked on the coast of Florida, abandoned to the insurance companies, and subsequently brought to Charleston. Canter claimed the cotton as *bona fide* purchaser at a marshal's sale at Key West, by virtue of a decree of a territorial court consisting of a notary and five jurors, proceeding under an act of the governor and legislative council of Florida. The case turned upon the question whether the sale by that court was effectual to devest the interest of the underwriters. The District Judge pronounced the proceedings a nullity, and rendered a decree from which both parties appealed to the Circuit Court. The Circuit Court reversed the decree of the District Court upon the ground that the proceedings of the court at Key West were legal, and transferred the property to Canter, the alleged purchaser.

The opinion of the Circuit Court was delivered by Mr. Justice Johnson, of the Supreme Court, and is published in full in a note in Peters' Reports. It was argued that the Constitution vested the admiralty jurisdiction exclusively in the general government; that the legislature of Florida had exercised an illegal power in organizing this court, and that its decrees were void. On the other hand, it was insisted that this was a court of separate and distinct jurisdiction from the courts of the United States, and as such its acts were not to be reviewed in a foreign tribunal, such as was the court of South Carolina; "that the District of Florida was not part of the United States, but only an acquisition or dependency, and as such the Constitution *per se* had no binding effect in or over it." "It becomes," said the court, "indispensable to the solution of these difficulties that

we should conceive a just idea of the relation in which Florida stands to the United States. . . . And, first, it is obvious that there is a material distinction between the territory now under consideration and that which is acquired from the aborigines (whether by purchase or conquest) *within* the acknowledged limits of the United States, as also that which is acquired by the establishment of a disputed line. As to both these there can be no question that the sovereignty of the State or territory within which it lies, and of the United States, immediately attached, producing a complete subjection to all the laws and institutions of the two governments, local and general, unless modified by treaty. The question now to be considered relates to territories previously subject to the acknowledged jurisdiction of another sovereign, such as was Florida to the crown of Spain. And on this subject we have the most explicit proof that the understanding of our public functionaries is that the government and laws of the United States do not extend to such territory by the mere act of cession. For in the act of Congress of March 30, 1822, sec. 9, we have an enumeration of the acts of Congress which are to be held in force in the territory; and in the tenth section an enumeration, in the nature of a bill of rights, of privileges and immunities which could not be denied to the inhabitants of the territory if they came under the Constitution by the mere act of cession. . . . These States, this territory, and future *States* to be admitted into the Union are the sole objects of the Constitution; there is no express provision whatever made in the Constitution for the acquisition or government of territories beyond those limits." He further held that the right of acquiring territory was altogether incidental to the treaty-making power; that their government was left to Congress; that the territory of Florida did "not stand in the relation of a State to the United States;" that the acts establishing a territorial government were the constitution of Florida; that while, under these acts, the territorial legislature could enact nothing inconsistent with what Congress had made inherent and permanent in the territorial government, it had not done so in organizing the court at Key West.

From the decree of the Circuit Court the underwriters appealed to this court, and the question was argued whether the Circuit Court was correct in drawing a distinction between territories existing at the date of the Constitution and territories subsequently acquired. The main contention of the appellants was that the Superior Courts of Florida had been vested by Congress with exclusive jurisdiction in all admiralty and maritime cases; that salvage was such a case, and therefore any law of Florida giving jurisdiction in salvage cases to any other court was unconstitutional. On behalf of the purchaser it was argued that the Constitution and laws of the United States were not *per se* in force in Florida, nor the inhabitants citizens of the United States; that the Constitution was established by the people of the United States *for* the United States; that if the Constitution were

in force in Florida it was unnecessary to pass an act extending the laws of the United States to Florida. "What is Florida?" said Mr. Webster. "It is no part of the United States. How can it be? How is it represented? Do the laws of the United States reach Florida? Not unless by particular provisions."

The opinion of Mr. Chief Justice Marshall in this case should be read in connection with Art. III, secs. 1 and 2, of the Constitution, vesting "the judicial power of the United States" in "one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judges both of the Supreme Court and the inferior courts shall hold their offices during good behavior," etc. He held that the court "should take into view the relation in which Florida stands to the United States;" that territory ceded by treaty "becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose." That Florida, upon the conclusion of the treaty, became a territory of the United States and subject to the power of Congress under the territorial clause of the Constitution. The acts providing a territorial government for Florida were examined in detail. He held that the judicial clause of the Constitution, above quoted, did not apply to Florida; that the judges of the Superior Courts of Florida held their office for four years; that "these courts are not constitutional courts in which the judicial power conferred by the Constitution on the general government can be deposited;" that "they are legislative courts, created in virtue of the general right of sovereignty which exists in the government," or in virtue of the territorial clause of the Constitution; that the jurisdiction with which they are invested is not a part of judicial power of the Constitution, but is conferred by Congress in the exercise of those general powers which that body possesses over the territories of the United States; and that in legislating for them Congress exercises the combined powers of the general and of a State government. The act of the territorial legislature creating the court in question was held not to be "inconsistent with the laws and Constitution of the United States," and the decree of the Circuit Court was affirmed.

As the only judicial power vested in Congress is to create courts whose judges shall hold their offices during good behavior, it necessarily follows that, if Congress authorizes the creation of courts and the appointment of judges for a limited time, it must act independently of the Constitution and upon territory which is not part of the United States within the meaning of the Constitution. In delivering his opinion in this case Mr. Chief Justice Marshall made no reference whatever to the prior case of Loughborough *v.* Blake, 5 Wheat. 317, in which he had intimated that the territories were part of the United States. But if they be a part of the United States, it is difficult to see how Congress could create courts in such territories, except under the judicial clause of the Constitution. The power to make needful

rules and regulations would certainly not authorize anything inconsistent with the Constitution if it applied to the territories. Certainly no such court could be created within a State, except under the restrictions of the judicial clause. It is sufficient to say that this case has ever since been accepted as authority for the proposition that the judicial clause of the Constitution has no application to courts created in the territories, and that with respect to them Congress has a power wholly unrestricted by it. We must assume as a logical inference from this case that the other powers vested in Congress by the Constitution have no application to these territories, or that the judicial clause is exceptional in that particular.

This case was followed in Benner *v.* Porter, 9 How. 235, in which it was held that the jurisdiction of these territorial courts ceased upon the admission of Florida into the Union, Mr. Justice Nelson remarking of them (p. 242), that "they are not organized under the Constitution, nor subject to its complex distribution of the powers of government, as the organic law; but are the creations, exclusively, of the legislative department, and subject to its supervision and control. Whether or not there are provisions in that instrument which extend to and act upon these territorial governments, it is not now material to examine. We are speaking here of those provisions that refer particularly to the distinction between Federal and State jurisdiction. . . . (p. 244). Neither were they organized by Congress under the Constitution, as they were invested with powers and jurisdiction which that body were incapable of conferring upon a court within the limits of a State." To the same effect are Clinton *v.* Englebrecht, 13 Wall. 434; Good *v.* Martin, 95 U. S. 90, 98; and McAllister *v.* United States, 141 U. S. 174.

That the power over the territories is vested in Congress without limitation, and that this power has been considered the foundation upon which the territorial governments rest, was also asserted by Chief Justice Marshall in M'Culloch *v.* Maryland, 4 Wheat. 316, 422 [**1**], and in United States *v.* Gratiot, 14 Pet. 526. So, too, in Mormon Church *v.* United States, 136 U. S. 1 [**835**], in holding that Congress had power to repeal the charter of the church, Mr. Justice Bradley used the following forceful language: "The power of Congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. The power to acquire territory, other than the territory northwest of the Ohio River (which belonged to the United States at the adoption of the Constitution), is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty and belong to

all independent governments. The power to make acquisitions of territory by conquest, by treaty, and by cession is an incident of national sovereignty. The Territory of Louisiana, when acquired from France, and the territories west of the Rocky mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those territories. Having rightfully acquired said territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete. . . . Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments, but these limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than by any express and direct application of its provisions." See also, to the same effect, National Bank *v.* County of Yankton, 101 U. S. 129; Murphy *v.* Ramsey, 114 U. S. 15.

In Webster *v.* Reid, 11 How. 437, it was held that a law of the Territory of Iowa, which prohibited the trial by jury of certain actions at law founded on contract to recover payment for services, was void; but the case is of little value as bearing upon the question of the extension of the Constitution to that Territory, inasmuch as the organic law of the Territory of Iowa, by express provision and by reference, extended the laws of the United States, including the ordinance of 1787 (which provided expressly for jury trials), so far as they were applicable; and the case was put upon this ground. 5 Stat. 235, 239, chap. 96, sec. 12.

In Reynolds *v.* Uuited States, 98 U. S. 145 [**883** *n*], a law of the Territory of Utah, providing for grand juries of fifteen persons, was held to be constitutional, though Rev. Stat. sec. 808, required that a grand jury impaneled before any Circuit or District Court of the United States shall consist of not less than sixteen nor more than twenty-three persons. Section 808 was held to apply only to the Circuit and District Courts. The territorial courts were free to act in obedience to their own laws.

In Ross's Case, 140 U. S. 453, petitioner had been convicted by the American consular tribunal in Japan, of a murder committed upon an American vessel in the harbor of Yokohama, and sentenced to death. There was no indictment by a grand jury, and no trial by a petit jury. This court affirmed the conviction, holding that the Constitution had no application, since it was ordained and established "for the United States of America," and not for countries outside of their limits. "The guaranties it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are

brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad."

In Springville *v.* Thomas, 166 U. S. 707, it was held that a verdict returned by less than the whole number of jurors was invalid because in contravention of the Seventh Amendment to the Constitution and the act of Congress of April 7, 1874 (18 Stat. 27, chap. 80), which provide "that no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law." It was also intimated that Congress "could not impart the power to change the constitutional rule," which was obviously true with respect to Utah, since the organic act of that Territory [9 Stat. 458, chap. 51, sec. 17] had expressly extended to it the Constitution and laws of the United States. As we have already held, that provision, once made, could not be withdrawn. If the Constitution could be withdrawn directly, it could be nullified indirectly by acts passed inconsistent with it. The Constitution would thus cease to exist as such, and become of no greater authority than an ordinary act of Congress. In American Pub. Co. *v.* Fisher, 166 U. S. 464, a similar law providing for majority verdicts was put upon the express ground above stated, that the organic act of Utah extended the Constitution over that Territory. These rulings were repeated in Thompson *v.* Utah, 170 U. S. 343 [**831**], and applied to felonies committed before the Territory became a State, although the state Constitution continued the same provision.

Eliminating, then, from the opinions of this court all expressions unnecessary to the disposition of the particular case, and gleaning therefrom the exact point decided in each, the following propositions may be considered as established:

1. That the District of Columbia and the territories are not States within the judicial clause of the Constitution giving jurisdiction in cases between citizens of different States;

2. That territories are not States within the meaning of Rev. Stat., sec. 709, permitting writs of error from this court in cases where the validity of a *state* statute is drawn in question;

3. That the District of Columbia and the territories are States as that word is used in treaties with foreign powers, with respect to the ownership, disposition, and inheritance of property;

4. That the territories are not within the clause of the Constitution providing for the creation of a Supreme Court and such inferior courts as Congress may see fit to establish;

5. That the Constitution does not apply to foreign countries or to trials therein conducted, and that Congress may lawfully provide for such trials before consular tribunals, without the intervention of a grand or petit jury;

6. That where the Constitution has been once formally extended by Congress to territories, neither Congress nor the territorial legislature can enact laws inconsistent therewith.

The case of Dred Scott *v.* Sandford, 19 How. 393, remains to be considered. This was an action of trespass *vi et armis* brought in the Circuit Court for the district of Missouri by Scott, alleging himself to be a citizen of Missouri, against Sandford, a citizen of New York. Defendant pleaded to the jurisdiction that Scott was not a citizen of the State of Missouri, because a negro of African descent, whose ancestors were imported as negro slaves. Plaintiff demurred to this plea and the demurrer was sustained; whereupon, by stipulation of counsel and with leave of the court, defendant pleaded in bar the general issue, and specially that the plaintiff was a slave and the lawful property of defendant, and, as such, he had a right to restrain him. The wife and children of the plaintiff were also involved in the suit.

The facts in brief were that plaintiff had been a slave belonging to Dr. Emerson, a surgeon in the army; that in 1834 Emerson took the plaintiff from the State of Missouri to Rock Island, Illinois, and subsequently to Fort Snelling, Minnesota (then known as Upper Louisiana), and held him there until 1838.. Scott married his wife there, of whom the children were subsequently born. In 1838 they returned to Missouri.

Two questions were presented by the record: First, whether the Circuit Court had jurisdiction; and, second, if it had jurisdiction, was the judgment erroneous or not? With regard to the first question, the court stated that it was its duty "to decide whether the facts stated in the plea are or are not sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States," and that the question was whether "a negro whose ancestors were imported into this country and sold as slaves became a member of the political community formed and brought into existence by the Constitution of the United States, and as such entitled to all the rights and privileges and immunities guaranteed by that instrument to the citizen, one of which rights is the privilege of suing in a court of the United States." It was held that he was not, and was not included under the word "citizens" in the Constitution, and therefore could claim "none of the rights and privileges which that instrument provides for and secures to citizens of the United States;" that it did not follow, because he had all the rights and privileges of a citizen of a State, he must be a citizen of the United States; that no State could by any law of its own "introduce a new member into the political community created by the Constitution"; that the African race was not intended to be included, and formed no part of the people who framed and adopted the Declaration of Independence. The question of the *status* of negroes in England and the several States was considered at great length by the Chief Justice, and the conclusion reached that Scott was not a citizen of Missouri, and that the Circuit Court had no jurisdiction of the case.

This was sufficient to dispose of the case without reference to the question of slavery; but, as the plaintiff insisted upon his title to

freedom and citizenship by the fact that he and his wife, though born slaves, were taken by their owner and kept four years in Illinois and Minnesota, they thereby became free, and upon their return to Missouri became citizens of that State, the Chief Justice proceeded to discuss the question whether Scott was still a slave. As the court had decided against his citizenship upon the plea in abatement, it was insisted that further decision upon the question of his freedom or slavery was extra judicial and mere *obiter dicta.* But the Chief Justice held that the correction of one error in the court below did not deprive the appellate court of the power of examining further into the record and correcting any other material error which may have been committed; that the error of an inferior court in actually pronouncing judgment for one of the parties, in a case in which it had no jurisdiction, can be looked into or corrected by this court, even though it had decided a similar question presented in the pleadings.

Proceeding to decide the case upon the merits, he held that the territorial clause of the Constitution was confined to the territory which belonged to the United States at the time the Constitution was adopted, and did not apply to territory subsequently acquired from a foreign government.

In further examining the question as to what provision of the Constitution authorizes the Federal government to acquire territory outside of the original limits of the United States, and what powers it may exercise therein over the person or property of a citizen of the United States, he made use of the following expressions, upon which great reliance is placed by the plaintiff in this case (p. 446): "There is certainly no power given by the Constitution to the Federal government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; . . . and if a new State is admitted, it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers and duties of the State, and the citizens of the State, and the Federal government. But no power is given to acquire a territory to be held and governed permanently in that character."

He further held that citizens who migrate to a territory cannot be ruled as mere colonists, and that, while Congress had the power of legislating over territories until states were formed from them, it could not deprive a citizen of his property merely because he brought it into a particular territory of the United States, and that this doctrine applied to slaves as well as to other property. Hence, it followed that the act of Congress which prohibited a citizen from holding and owning slaves in territories north of 36° 30′ (known as the Missouri Compromise) was unconstitutional and void, and the fact that Scott was carried into such territory, referring to what is now known as Minnesota, did not entitle him to his freedom.

He further held that whether he was made free by being taken into the free State of Illinois and being kept there two years depended

upon the laws of Missouri, and not those of Illinois, and that by the decisions of the highest court of that State his status as a slave continued, notwithstandiug his residence of two years in Illinois.

It must be admitted that this case is a strong authority in favor of the plaintiff, and if the opinion of the Chief Justice be taken at its full value it is decisive in his favor. We are not, however, bound to overlook the fact, that, before the Chief Justice gave utterance to his opinion upon the merits, he had already disposed of the case adversely to the plaintiff upon the question of jurisdiction, and that, in view of the excited political condition of the country at the time, it is unfortunate that he felt compelled to discuss the question upon the merits, particularly so in view of the fact that it involved a ruling that an act of Congress which had been acquiesced in for thirty years was declared unconstitutional. It would appear from the opinion of Mr. Justice Wayne that the real reason for discussing these constitutional questions was that "there had become such a difference of opinion" about them "that the peace and harmony of the country required the settlement of them by judicial decision" (p. 455). The attempt was not successful. It is sufficient to say that the country did not acquiesce in the opinion, and that the Civil War, which shortly thereafter followed, produced such changes in judicial, as well as public, sentiment as to seriously impair the authority of this case.

While there is much in the opinion of the Chief Justice which tends to prove that he thought all the provisions of the Constitution extended of their own force to the territories west of the Mississippi, the question actually decided is readily distinguishable from the one involved in the cause under consideration. The power to prohibit slavery in the territories is so different from the power to impose duties upon territorial products, and depends upon such different provisions of the Constitution, that they can scarcely be considered as analogous, unless we assume broadly that every clause of the Constitution attaches to the territories as well as to the States — a claim quite inconsistent with the position of the court in the Canter case. If the assumption be true that slaves are indistinguishable from other property, the inference from the Dred Scott case is irresistible that Congress had no power to prohibit their introduction into a territory. It would scarcely be insisted that Congress could with one hand invite settlers to locate in the territories of the United States, and with the other deny them the right to take their property and belongings with them. The two are so inseparable from each other that one could scarcely be granted and the other withheld without an exercise of arbitrary power inconsistent with the underlying principles of a free government. It might indeed be claimed with great plausibility that such a law would amount to a deprivation of property within the Fourteenth Amendment. The difficulty with the Dred Scott case was that the court refused to make a distinction between property in

general and a wholly exceptional class of property. Mr. Benton tersely stated the distinction by saying that the Virginian might carry his slave into the territories, but he could not carry with him the Virginian law which made him a slave.

In his history of the Dred Scott case, Mr. Benton states that the doctrine that the Constitution extended to territories as well as to States first made its appearance in the Senate in the session of 1848–1849, by an attempt to amend a bill giving territorial government to California, New Mexico, and Utah (itself "hitched on" to a general appropriation bill), by adding the words "that the Constitution of the United States and all and singular the several acts of Congress (describing them) be and the same hereby are extended and given full force and efficacy in said territories." Says Mr. Benton: "The novelty and strangeness of this proposition called up Mr. Webster, who repulsed as an absurdity and as an impossibility the scheme of extending the Constitution to the territories, declaring that instrument to have been made for States not territories; that Congress governed the territories independently of the Constitution and incompatibly with it; that no part of it went to a territory but what Congress chose to send; that it could not act of itself anywhere, not even in the States for which it was made, and that it required an act of Congress to put it in operation before it had effect anywhere. Mr. Clay was of the same opinion and added: 'Now, really, I must say the idea that *eo instanti* upon the consummation of the treaty, the Constitution of the United States spread itself over the acquired territory and carried along with it the institution of slavery is so irreconcilable with my comprehension, or any reason I possess, that I hardly know how to meet it.' Upon the other hand, Mr. Calhoun boldly avowed his intent to carry slavery into them under the wing of the Constitution, and denounced as enemies of the South all who opposed it."

The amendment was rejected by the House, and a contest brought on which threatened the loss of the general appropriation bill in which this amendment was incorporated, and the Senate finally receded from its amendment. "Such," said Mr. Benton, "were the portentous circumstances under which this new doctrine first revealed itself in the American Senate, and then as needing legislative sanction requiring an act of Congress to carry the Constitution into the territories and to give it force and efficacy there." Of the Dred Scott case he says: "I conclude this introductory note with recurring to the great fundamental error of the court (father of all the political errors), that of assuming the extension of the Constitution to the territories. I call it assuming, for it seems to be a naked assumption without a reason to support it, or a leg to stand upon, condemned by the Constitution itself and the whole history of its formation and administration. Who were the parties to it? The States alone. Their delegates framed it in the Federal convention; their citizens adopted it in the State conventions. The Northwest Territory was then in

existence and it had been for three years; yet it had no voice either in the framing or adopting of the instrument, no delegate at Philadelphia, no submission of it to their will for adoption. The preamble shows it made by States. Territories are not alluded to in it."

Finally, in summing up the results of the decisions holding the invalidity of the Missouri Compromise and the self-extension of the Constitution to the territories, he declares "that the decisions conflict with the uniform action of all the departments of the Federal government from its foundation to the present time, and cannot be received as rules governing Congress and the people without reversing that action, and admitting the political supremacy of the court, and accepting an altered Constitution from its hands, and taking a new and portentous point of departure in the working of the government."

To sustain the judgment in the case under consideration, it by no means becomes necessary to show that none of the articles of the Constitution apply to the island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only "throughout the United States" or among the several States.

Thus, when the Constitution declares that "no bill of attainder or *ex post facto* law shall be passed," and that "no title of nobility shall be granted by the United States," it goes to the competency of Congress to pass a bill *of that description.* Perhaps the same remark may apply to the First Amendment, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble and to petition the government for a redress of grievances." We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application.

Upon the other hand, when the Constitution declares that all duties shall be uniform "throughout the United States," it becomes necessary to inquire whether there be any territory over which Congress has jurisdiction which is not a part of the "United States," by which term we understand the *States* whose people *united* to form the Constitution, and such as have since been admitted to the Union upon an equality with them. Not only did the people in adopting the Thirteenth Amendment thus recognize a distinction between the United States and "any place subject to their jurisdiction," but Congress itself, in the act of March 27, 1804 (2 Stat. 298, chap. 56), providing for the proof of public records, applied the provisions of the act, not only to "every court and office within the United States," but to the "courts and offices of the respective territories of the United States and countries subject to the jurisdiction of the United States," as to the courts and offices of the several States. This classification,

adopted by the Eighth Congress, is carried into the Revised Statutes as follows:

"Sec. 905. The acts of the legislature of any State or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated," etc.

"Sec. 906. All records and exemplifications of books which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States," etc.

Unless these words are to be rejected as meaningless, we must treat them as a recognition by Congress of the fact that there may be territories subject to the jurisdiction of the United States, which are not *of* the United States.

In determining the meaning of the words of Art. I, sec. 8, "uniform throughout the United States," we are bound to consider, not only the provisions forbidding preference being given to the ports of one State over those of another (to which attention has already been called), but the other clauses declaring that no tax or duty shall be laid on articles exported from any State, and that no State shall, without the consent of Congress, lay any imposts or duties upon imports or exports, nor any duty on tonnage. The object of all of these was to protect the States which united in forming the Constitution from discriminations by Congress, which would operate unfairly or injuriously upon some States and not equally upon others. The opinion of Mr. Justice White in Knowlton *v.* Moore, 178 U. S. 41, contains an elaborate historical review of the proceedings in the convention, which resulted in the adoption of these different clauses and their arrangement, and he there comes to the conclusion (p. 105) that "although the provision as to preference between ports and that regarding uniformity of duties, imposts, and excises were one in purpose, one in their adoption," they were originally placed together, and "became separate only in arranging the Constitution for the purpose of style." Thus construed together, the purpose is irresistible that the words "throughout the United States" are indistinguishable from the words "among or between the several States," and that these prohibitions were intended to apply only to commerce between ports of the several States as they then existed or should thereafter be admitted to the Union.

Indeed, the practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect that the Constitution is applicable to territories acquired by purchase or conquest, only when and so far as Congress shall so direct. Notwithstanding its duty to "guarantee to every State in this Union a republican form of government" (Art. IV, sec. 4), by which we understand, according to the definition of Webster, "a government in which the supreme power resides in the whole body of the people, and is exercised by representatives elected by them," Congress did not hesitate, in the original organization of the territories of Louisi-

ana, Florida, the Northwest Territory, and its subdivisions of Ohio, Indiana, Michigan, Illinois, and Wisconsin and still more recently in the case of Alaska, to establish a form of goverument bearing a much greater analogy to a British crown colony than a republican State of America, and to vest the legislative power either in a governor and council, or a governor and judges, to be appointed by the President. It was not until they had attained a certain population that power was given them to organize a legislature by vote of the people. In all these cases, as well as in territories subsequently organized west of the Mississippi, Congress thought it necessary either to extend the Constitution and laws of the United States over them, or to declare that the inhabitants should be entitled to enjoy the right of trial by jury, of bail, and of the privilege of the writ of *habeas corpus,* as well as other privileges of the bill of rights.

We are also of opinion that the power to acquire territory by treaty implies, not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the "American empire." There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges, and immunities of citizens. If such be their status, the consequences will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions, and modes of life, shall become at once citizens of the United States. In all its treaties hitherto the treaty-making power has made special provision for this subject; in the cases of Louisiana and Florida, by stipulating that "the inhabitants shall be incorporated into the Union of the United States and admitted as soon as possible . . . to the enjoyment of all the rights, advantages, and immunities of citizens of the United States;" in the case of Mexico, that they should "be incorporated into the Union, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States;" in the case of Alaska, that the inhabitants who remained three years, "with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights," etc.; and in the case of Porto Rico and the Philippines, "that the civil rights and political status of the native inhabitants . . . shall be determined by Congress." In all these cases there is an implied denial of the right of the inhabitants to American citizenship until Congress by further action shall signify its assent thereto.

Grave apprehensions of danger are felt by many eminent men — a fear lest an unrestrained possession of power on the part of Congress may lead to unjust and oppressive legislation in which the

natural rights of territories, or their inhabitants, may be engulfed in a centralized despotism. These fears, however, find no justification in the action of Congress in the past century, nor in the conduct of the British Parliament towards its outlying possessions since the American Revolution. Indeed, in the only instance in which this court has declared an act of Congress unconstitutional as trespassing upon the rights of territories (the Missouri Compromise), such action was dictated by motives of humanity and justice, and so far commanded popular approval as to be embodied in the Thirteenth Amendment to the Constitution. There are certain principles of natural justice inherent in the Anglo-Saxon character, which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests. Even in the Foraker act itself, the constitutionality of which is so vigorously assailed, power was given to the legislative assembly of Porto Rico to repeal the very tariff in question in this case, a power it has not seen fit to exercise. The words of Chief Justice Marshall in Gibbons *v.* Ogden, 9 Wheat. 1 [**235**], with respect to the power of Congress to regulate commerce, are pertinent in this connection: "This power," said he, "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. . . . The wisdom and 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 rely solely in all representative governments."

So too, in Johnson *v.* M'Intosh, 8 Wheat. 543, 589, it was said by him:

"The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wontingly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually they are incorporated with the victorious nation and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old; and that confidence in their security should gradually banish the painful sense of being separated from their ancient connections and united by force to strangers.

"When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, *or safely governed as a distinct*

*people*, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame and hazard to his power."

The following remarks of Mr. Justice White in the case of Knowlton *v.* Moore, 178 U. S. 41, 109, in which the court upheld the progressive features of the legacy tax, are also pertinent:

"The grave consequences which it is asserted must arise in the future if the right to levy a progressive tax be recognized, involves in its ultimate aspect the mere assertion that free and representative government is a failure, and that the grossest abuses of power are foreshadowed unless the courts usurp a purely legislative function. If a case should ever arise where an arbitrary and confiscatory exaction is imposed, bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so."

It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws, and customs of the people, and from differences of soil, climate, and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians.

We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage (Minor *v.* Happersett, 21 Wall. 162 [**974**]), and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals.

Whatever may be finally decided by the American people as to the status of these islands and their inhabitants — whether they shall be introduced into the sisterhood of States or be permitted to form independent governments — it does not follow that in the meantime, awaiting that decision, the people are in the matter of personal rights

unprotected by the provisions of our Constitution and subject to the merely arbitrary control of Congress. Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty, and property. This has been frequently held by this court in respect to the Chinese, even when aliens, not possessed of the political rights of citizens of the United States. Yick Wo *v.* Hopkins, 118 U. S. 356 [**917**]; Fong Yue Ting *v.* United States, 149 U. S. 698 [**567** *n*]; Lem Moon Sing, 158 U. S. 538, 547; Wong Wing *v.* United States, 163 U. S. 228. We do not desire, however, to anticipate the difficulties which would naturally arise in this connection, but merely to disclaim any intention to hold that the inhabitants of these territories are subject to an unrestrained power on the part of Congress to deal with them upon the theory that they have no rights which it is bound to respect.

Large powers must necessarily be intrusted to Congress in dealing with these problems, and we are bound to assume that they will be judiciously exercised. That these powers may be abused is possible. But the same may be said of its powers under the Constitution as well as outside of it. Human wisdom has never devised a form of government so perfect that it may not be perverted to bad purposes. It is never conclusive to argue against the possession of certain powers from possible abuses of them. It is safe to say that if Congress should venture upon legislation manifestly dictated by selfish interests, it would receive quick rebuke at the hands of the people. Indeed, it is scarcely possible that Congress could do a greater injustice to these islands than would be involved in holding that it could not impose upon the States taxes and excises without extending the same taxes to them. Such requirement would bring them at once within our internal revenue system, including stamps, licenses, excises, and all the paraphernalia of that system, and apply it to territories which have had no experience of this kind, and where it would prove an intolerable burden.

This subject was carefully considered by the Senate committee in charge of the Foraker bill, which found, after an examination of the facts, that property in Porto Rico was already burdened with a private debt amounting probably to $30,000,000; that no system of property taxation was or ever had been in force in the island, and that it probably would require two years to inaugurate one and secure returns from it; that the revenues had always been chiefly raised by duties on imports and exports, and that our internal revenue laws, if applied in that island, would prove oppressive and ruinous to many people and interests; that to undertake to collect our heavy internal revenue tax, far heavier than Spain ever imposed upon their products and vocations, would be to invite violations of the law so innumerable as to make prosecutions impossible, and to almost certainly alienate and destroy the friendship and good will of that people for the United States.

In passing upon the questions involved in this case and kindred cases, we ought not to overlook the fact that, while the Constitution was intended to establish a permanent form of government for the States which should elect to take advantage of its conditions, and continue for an indefinite future, the vast possibilities of that future could never have entered the minds of its framers. The States had but recently emerged from a war with one of the most powerful nations of Europe, were disheartened by the failure of the confederacy, and were doubtful as to the feasibility of a stronger union. Their territory was confined to a narrow strip of land on the Atlantic coast from Canada to Florida, with a somewhat indefinite claim to territory beyond the Alleghanies, where their sovereignty was disputed by tribes of hostile Indians supported, as was popularly believed, by the British, who had never formally delivered possession under the treaty of peace. The vast territory beyond the Mississippi, which formerly had been claimed by France, since 1762 had belonged to Spain, still a powerful nation and the owner of a great part of the Western Hemisphere. Under these circumstances it is little wonder that the question of annexing these territories was not made a subject of debate. The difficulties of bringing about a union of the States were so great, the objections to it seemed so formidable, that the whole thought of the convention centered upon surmounting these obstacles. The question of territories was dismissed with a single clause, apparently applicable only to the territories then existing, giving Congress the power to govern and dispose of them.

Had the acquisition of other territories been contemplated as a possibility, could it have been foreseen that, within little more than one hundred years, we were destined to acquire, not only the whole vast region between the Atlantic and Pacific Oceans, but the Russian possessions in America and distant islands in the Pacific, it is incredible that no provision should have been made for them, and the question whether the Constitution should or should not extend to them have been definitely settled. If it be once conceded that we are at liberty to acquire foreign territory, a presumption arises that our power with respect to such territories is the same power which other nations have been accustomed to exercise with respect to territories acquired by them. If, in limiting the power which Congress was to exercise within the United States, it was also intended to limit it with regard to such territories as the people of the United States should thereafter acquire, such limitations should have been expressed. Instead of that, we find the Constitution speaking only to States, except in the territorial clause, which is absolute in its terms, and suggestive of no limitations upon the power of Congress in dealing with them. The States could only delegate to Congress such powers as they themselves possessed, and as they had no power to acquire new territory they had none to delegate in that connection. The logical inference from this is that if Congress had power to

acquire new territory, which is conceded, that power was not hampered by the constitutional provisions. If, upon the other hand, we assume that the territorial clause of the Constitution was not intended to be restricted to such territory as the United States then possessed, there is nothing in the Constitution to indicate that the power of Congress in dealing with them was intended to be restricted by any of the other provisions.

There is a provision that "new States may be admitted by the Congress into this Union." These words, of course, carry the Constitution with them, but nothing is said regarding the acquisition of new territories or the extension of the Constitution over them. The liberality of Congress in legislating the Constitution into all our contiguous territories has undoubtedly fostered the impression that it went there by its own force, but there is nothing in the Constitution itself, and little in the interpretation put upon it, to confirm that impression. There is not even an analogy to the provisions of an ordinary mortgage, for its attachment to after-acquired property, without which it covers only property existing at the date of the mortgage. In short, there is absolute silence upon the subject. The executive and legislative departments of the government have for more than a century interpreted this silence as precluding the idea that the Constitution attached to these territories as soon as acquired, and unless such interpretation be manifestly contrary to the letter or spirit of the Constitution, it should be followed by the judicial department. Cooley, Const. Lim. §§ 81–85. Burrow-Giles Lithographic Co. *v.* Sarony, 111 U. S. 53, 57; Field *v.* Clark, 143 U. S. 649, 691 [**95**].

Patriotic and intelligent men may differ widely as to the desirableness of this or that acquisition, but this is solely a political question. We can only consider this aspect of the case so far as to say that no construction of the Constitution should be adopted which would prevent Congress from considering each case upon its merits, unless the language of the instrument imperatively demand it. A false step at this time might be fatal to the development of what Chief Justice Marshall called the American empire. Choice in some cases, the natural gravitation of small bodies towards large ones in others, the result of a successful war in still others, may bring about conditions which would render the annexation of distant possessions desirable. If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.

We are therefore of opinion that the island of Porto Rico is a

territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker act is constitutional, so far as it imposes duties upon imports from such island, and that the plaintiff cannot recover back the duties exacted in this case.

The judgment of the Circuit Court is therefore affirmed.

MR. JUSTICE WHITE, with whom concurred MR. JUSTICE SHIRAS and MR. JUSTICE MCKENNA, uniting in the judgment of affirmance:

Mr. Justice Brown, in announcing the judgment of affirmance, has in his opinion stated his reasons for his concurrence in such judgment. In the result I likewise concur. As, however, the reasons which cause me to do so are different from, if not in conflict with, those expressed in that opinion, if its meaning is by me not misconceived, it becomes my duty to state the convictions which control me.

The recovery sought is the amount of duty paid on merchandise which came into the United States from Porto Rico after July 1, 1900. The exaction was made in virtue of the act of Congress approved April 12, 1900, entitled "An Act Temporarily to Provide Revenue and a Civil Government for Porto Rico, and for Other Purposes." 31 Stat. 77, c. 191. The right to recover is predicated on the assumption that Porto Rico, by the ratification of the treaty with Spain, became incorporated into the United States, and therefore the act of Congress which imposed the duty in question is repugnant to Art. I, sec. 8, clause 1, of the Constitution providing that "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States." Subsidiarily, it is contended that the duty collected was also repugnant to the export and preference clauses of the Constitution. But as the case concerns no duty on goods going from the United States to Porto Rico, this proposition must depend also on the hypothesis that the provisions of the Constitution referred to apply to Porto Rico because that island has been incorporated into the United States. It is hence manifest that this latter contention is involved in the previous one, and need not be separately considered.

The arguments at bar embrace many propositions which seem to me to be irrelevant, or, if relevant, to be so contrary to reason and so in conflict with previous decisions of this court as to cause them to require but a passing notice. To eliminate all controversies of this character, and thus to come to the pivotal contentions which the case involves, let me state and concede the soundness of some principles, referring, in doing so, in the margin to the authorities by which they are sustained, and making such comment on some of them as may to me appear necessary.

First. The government of the United States was born of the Constitution, and all powers which it enjoys or may exercise must be

either derived expressly or by implication from that instrument. Even then, when an act of any department is challenged because not warranted by the Constitution, the existence of the authority is to be ascertained by determining whether the power has been conferred by the Constitution, either in express terms or by lawful implication, to be drawn from the express authority conferred, or deduced as an attribute which legitimately inheres in the nature of the powers given, and which flows from the character of the government established by the Constitution. In other words, while confined to its constitutional orbit, the government of the United States is supreme within its lawful sphere.[1]

Second. Every function of the government being thus derived from the Constitution, it follows that that instrument is everywhere and at all times potential in so far as its provisions are applicable.[2]

Third. Hence it is that wherever a power is given by the Constitution, and there is a limitation imposed on the authority, such restriction operates upon and confines every action on the subject within its constitutional limits.[3]

Fourth. Consequently it is impossible to conceive that, where conditions are brought about to which any particular provision of the Constitution applies, its controlling influence may be frustrated by the action of any or all of the departments of the government. Those departments, when discharging, within the limits of their constitutional power, the duties which rest on them, may, of course, deal with the subjects committed to them in such a way as to cause the matter dealt with to come under the control of provisions of the Constitution which may not have been previously applicable. But this does not conflict with the doctrine just stated, or presuppose that the Constitution may or may not be applicable at the election of any agency of the government.

Fifth. The Constitution has undoubtedly conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States, whether they have been incorporated or not, to give to the inhabitants, as respects the local governments, such degree of representation as may be conducive to the public well-being, to deprive such territory of representative government if it is considered just to do so, and to change such local governments at discretion.[4]

[1] Marbury *v.* Madison, 1 Cranch, 137, 176 *et seq;* Martin *v.* Hunther, 1 Wheat. 304, 326; New Orleans *v.* United States, 10 Pet. 662, 736; Geofroy *v.* Riggs, 133 U. S. 258, 266; United States *v.* Gettysburg Electric R. Co., 160 U. S. 668, 679, and cases cited.

[2] The City of Panama, 101 U. S. 453, 460; Fong Yue Ting *v.* United States, 149 U. S. 698, 716, 738.

[3] Monongahela Nav. Co. *v.* United States, 148 U. S. 312, 336; Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 479; United States *v.* Joint Traffic Asso., 171 U. S. 505, 571.

[4] United States *v.* Kagama, 118 U. S. 375, 378; Shively *v.* Bowlby, 152 U. S. 1, 48.

The plenitude of the power of Congress, as just stated, is conceded by both sides to this controversy. It has been manifest from the earliest days, and so many examples are afforded of it, that to refer to them seems superfluous. However, there is an instance which exemplifies the exercise of the power substantially in all its forms, in such an apt way that reference is made to it. The instance referred to is the District of Columbia, which has had from the beginning different forms of government conferred upon it by Congress, some largely representative, others only partially so, until, at the present time, the people of the District live under a local government totally devoid of local representation, in the elective sense, administered solely by officers appointed by the President, Congress, in which the District has no representative in effect, acting as the local legislature.

In some adjudged cases the power to locally govern at discretion has been declared to arise as an incident to the right to acquire territory. In others it has been rested upon the clause of section 3, Article IV, of the Constitution, which vests Congress with the power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States.[1] But this divergence, if not conflict of opinion, does not imply that the authority of Congress to govern the territories is outside of the Constitution, since in either case the right is founded on the Constitution, although referred to different provisions of that instrument.

While, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended.[2] But this does not suggest that every express limitation of the Constitution which is applicable has not force, but only signifies that even in cases where there is no direct command of the Constitution which applies, there may, nevertheless, be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution.

Sixth. As Congress in governing the territories is subject to the Constitution, it results that all the limitations of the Constitution which are applicable to Congress in exercising this authority necessarily limit its power on this subject. It follows, also, that every provision of the Constitution which is applicable to the territories is

[1] Sere *v.* Pitot, 6 Cranch, 332, 336; McCulloch *v.* Maryland, 4 Wheat. 316, 421; American Ins. Co. *v.* Canter, 1 Pet. 511, 542; United States *v.* Gratiot, 14 Pet. 526, 537; Dred Scott *v.* Sandford, 19 How. 393, 448; Clinton *v.* Englebrecht, 13 Wall. 434, 447; Hamilton *v.* Dillin, 21 Wall. 73, 93; National Bank *v.* County of Yankton, 101 U. S. 129, 132; The City of Panama, 101 U. S. 453, 457; Murphy *v.* Ramsey, 114 U. S. 15, 44; United States *v.* Kagama, 118 U. S. 375, 380; Mormon Church *v.* United States, 136 U. S. 1, 42; Boyd *v.* Thayer, 143 U. S. 135, 169.

[2] Mormon Church *v.* United States, 136 U. S. 1, 44.

also controlling therein. To justify a departure from this elementary principle by a criticism of the opinion of Mr. Chief Justice Taney in Scott *v.* Sandford, 19 How. 393, appears to me to be unwarranted. Whatever may be the view entertained of the correctness of the opinion of the court in that case, in so far as it interpreted a particular provision of the Constitution concerning slavery, and decided that as so construed it was in force in the territories, this in no way affects the principle which that decision announced, that the applicable provisions of the Constitution were operative. That doctrine was concurred in by the dissenting judges, as the following excerpts demonstrate. Thus, Mr. Justice McLean, in the course of his dissenting opinion, said (19 How. 542):

"In organizing the government of a territory, Congress is limited to means appropriate to the attainment of the constitutional object. No powers can be exercised which are prohibited by the Constitution, or which are contrary to its spirit."

Mr. Justice Curtis, also, in the dissent expressed by him, said (p. 614):

"If, then, this clause does contain a power to legislate respecting the territory, what are the limits of that power?

"To this I answer that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that, in the exercise of the legislative power, Congress cannot pass an *ex post facto* law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution."

Seventh. In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable.

Eighth. As Congress derives its authority to levy local taxes for local purposes within the territories, not from the general grant of power to tax as expressed in the Constitution, it follows that its right to locally tax is not to be measured by the provision empowering Congress "to lay and collect taxes, duties, imposts, and excises," and is not restrained by the requirement of uniformity throughout the United States. But the power just referred to, as well as the qualification of uniformity, restrains Congress from imposing an impost duty on goods coming into the United States from a territory which has been incorporated into and forms a part of the United States. This results because the clause of the Constitution in question does not confer upon Congress power to impose such an impost duty on goods coming from one part of the United States to another part thereof, and such duty, besides, would be repugnant to the requirement of uniformity throughout the United States.[1]

[1] Loughborough *v.* Blake, 5 Wheat. 317, 322; Woodruff *v.* Parham, 8 Wall. 123, 133; Brown *v.* Houston, 114 U. S. 622, 628; Fairbank *v.* United States, 181 U. S. 283.

To question the principle above stated on the assumption that the rulings on this subject of Mr. Chief Justice Marshall in Loughborough *v.* Blake were mere *dicta* seems to me to be entirely inadmissible. And, besides, if such view was justified, the principle would still find support in the decision in Woodruff *v.* Parham, and that decision, in this regard, was affirmed by this court in Brown *v.* Houston, 114 U. S. 622 [**333**], and Fairbank *v.* United States, 181 U. S. 283.

From these conceded propositions it follows that Congress in legislating for Porto Rico was only empowered to act within the Constitution and subject to its applicable limitations, and that every provision of the Constitution which applied to a country situated as was that island was potential in Porto Rico.

And the determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States. This is well illustrated by some of the decisions of this court which are cited in the margin.[1] Some of these decisions hold on the one hand that, growing out of the presumably ephemeral nature of a territorial government, the provisions of the Constitution relating to the life tenure of judges is inapplicable to courts created by Congress even in territories which are incorporated into the United States, and some, on the other hand, decide that the provisions as to common-law juries found in the Constitution are applicable under like conditions; that is to say, although the judge presiding over a jury need not have the constitutional tenure, yet the jury must be in accordance with the Constitution. And the application of the provision of the Constitution relating to juries has been also considered in a different aspect, the case being noted in the margin.[2]

The question involved was the constitutionality of the statutes of the United States conferring power on ministers and consuls to try American citizens for crimes committed in certain foreign countries. Rev. Stat., secs. 4083–4086. The court held the provisions in question not to be repugnant to the Constitution, and that a conviction for a felony without a previous indictment by a grand jury, or the summoning of a petty jury, was valid.

It was decided that the provisions of the Constitution relating to grand and petty juries were inapplicable to consular courts exercising their jurisdiction in certain countries foreign to the United States. But this did not import that the government of the United States in creating and conferring jurisdiction on consuls and ministers acted

[1] American Ins. Co. *v.* Canter, 1 Pet. 511; Benner *v.* Porter, 9 How. 235; Webster *v.* Reid, 11 How. 437, 460; Clinton *v.* Englebrecht, 13 Wall. 434; Reynolde *v.* United States, 98 U. S. 145; Callan *v.* Wilson, 127 U. S. 540; McAllister *v.* United States, 141 U. S. 174; Springville *v.* Thomas, 166 U. S. 707; Banman *v.* Ross, 167 U. S. 548; Thompson *v.* Utah, 170 U. S. 343; Capital Traction Co. *v.* Hof, 174 U. S. 1; Black *v.* Jackson, 177 U. S. 349, 363.

[2] *In re* Ross, 140 U. S. 453, 461, 462, 463.

outside of the Constitution, since it was expressly held that the power to call such courts into being and to confer upon them the right to try, in the foreign countries in question, American citizens, was deducible from the treaty-making power as conferred by the Constitution. The court said (p. 463):

"The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein."

In other words, the case concerned, not the question of a power outside the Constitution, but simply whether certain provisions of the Constitution were applicable to the authority exercised under the circumstances which the case presented.

Albeit, as a general rule, the status of a particular territory has to be taken in view when the applicability of any provision of the Constitution is questioned, it does not follow, when the Constitution has absolutely withheld from the government all power on a given subject, that such an inquiry is necessary. Undoubtedly there are general prohibitions in the Constitution in favor of the liberty and property of the citizen, which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts. In the nature of things, limitations of this character cannot be under any circumstances transcended, because of the complete absence of power.

The distinction which exists between the two characters of restrictions — those which regulate a granted power and those which withdraw all authority on a particular subject — has in effect been always conceded, even by those who most strenuously insisted on the erroneous principle that the Constitution did not apply to Congress in legislating for the territories, and was not operative in such districts of country. No one had more broadly asserted this principle than Mr. Webster. Indeed, the support which that proposition receives from expressions of that illustrious man have been mainly relied upon to sustain it, and yet there can be no doubt that, even while insisting upon such principle, it was conceded by Mr. Webster that those positive prohibitions of the Constitution which withhold all power on a particular subject were always applicable. His views of the principal proposition and his concession as to the existence of the qualification are clearly shown by a debate which took place in the Senate on February 24, 1849, on an amendment offered by Mr. Walker extending the Constitution and certain laws of the United States over California and New Mexico. Mr. Webster, in support of his conception that the Constitution did not, generally speaking, control Congress in legislating for the territories or operate in such districts, said as follows (20 Cong. Globe, App. p. 272):

"Mr. President, it is of importance that we should seek to have clear ideas and correct notions of the question which this amendment of the member from Wisconsin has presented to us; and especially that we should seek to get some conception of what is meant by the proposition, in a law, to 'extend the Constitution of the United States to the territories.' Why, sir, the thing is utterly impossible. All the legislation in the world, in this general form, could not accomplish it. There is no cause for the operation of the legislative power in such a matter as that. The Constitution, what is it — we extend the Constitution of the United States by law to a territory? What is the Constitution of the United States? Is not its very first principle that all within its influence and comprehension shall be represented in the legislature which it establishes with not only the right of debate and the right to vote in both Houses of Congress, but a right to partake in the choice of the President and Vice-President? And can we by law extend these rights, or any of them, to a territory of the United States? Everybody will see that it is altogether impracticable."

Thereupon, the following colloquy ensued between Mr. Underwood and Mr. Webster (*Ibid.* 281–282):

"Mr. Underwood: 'The learned Senator from Massachusetts says, and says most appropriately and forcibly, that the principles of the Constitution are obligatory upon us even while legislating for the territories. That is true, I admit, in its fullest force, but if it is obligatory upon us while legislating for the territories, is it possible that it will not be equally obligatory upon the officers who are appointed to administer the laws in these territories?'

"Mr. Webster: 'I never said it was not obligatory upon them. What I said was, that in making laws for these territories it was the high duty of Congress to regard those great principles in the Constitution intended for the security of personal liberty and for the security of property.'

"Mr. Underwood: '. . . Suppose we provide by our legislation that nobody shall be appointed to an office there who professes the Catholic religion. What do we do by an act of this sort?'

"Mr. Webster: 'We violate the Constitution, which says that no religious test shall be required as qualification for office.'"

And this was the state of opinion generally prevailing in the Free Soil and Republican parties, since the resistance of those parties, to the extension of slavery into the territories, while in a broad sense predicated on the proposition that the Constitution was not generally controlling in the territories, was sustained by express reliance upon the Fifth Amendment to the Constitution forbidding Congress from depriving any person of life, liberty, or property without due process of law. Every platform adopted by those parties down to and including 1860, while propounding the general doctrine, also in effect declared the rule just stated. I append in

the margin an excerpt from the platform of the Free Soil party adopted in 1842.[1]

The conceptions embodied in these resolutions were in almost identical language reiterated in the platform of the Liberty party in 1843, in that of the Free Soil party in 1852, and in the platform of the Republican party in 1856. Stanwood, Hist. of Presidency, pp. 218, 253, 254, and 271. In effect, the same thought was repeated in the declaration of principles made by the Republican party convention in 1860, when Mr. Lincoln was nominated, as will be seen from an excerpt therefrom set out in the margin.[2]

The doctrine that those absolute withdrawals of power which the Constitution has made in favor of human liberty are applicable to every condition or status has been clearly pointed out by this court in Chicago, R. I. & P. R. Co. *v.* McGlinn, (1885) 114 U. S. 542, where, speaking through Mr. Justice Field, the court said (p. 546):

"It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another the municipal laws of the country — that is, laws which are intended for the protection of private rights — continue in force until abrogated or changed by the new government or sovereign. By the cession, public property passes from one government to the

[1] Extract from the Free Soil Party Platform of 1842 (Stanwood, Hist. of Presidency, p. 240):

"*Resolved*, That our fathers ordained the Constitution of the United States in order, among other great national objects, to establish justice, promote the general welfare, and secure the blessings of liberty, but expressly denied to the Federal government which they created, all constitutional power to deprive any person of life, liberty, or property without due legal process.

"*Resolved*, That, in the judgment of this convention, Congress has no more power to make a slave than to make a king; no more power to institute or establish slavery than to institute or establish a monarchy. No such power can be found among those specifically conferred by the Constitution, or derived by any just implication from them.

"*Resolved*, That it is the duty of the Federal government to relieve itself from all responsibility for the existence or continuance of slavery wherever the government possesses constitutional authority to legislate on that subject, and is thus responsible for its existence.

"*Resolved*, That the true, and in the judgment of this convention the only safe, means of preventing the extension of slavery into territory now free, is to prohibit its existence in all such territory by an act of Congress."

[2] Excerpt from declarations made in the platform of the Republican Party in 1860 (Stanwood, Hist. of Presidency, p. 293):

"8. That the normal condition of all the territory of the United States is that of freedom; that as our republican fathers, when they had abolished slavery in all our national territory, ordained that no person should be deprived of life, liberty, or property without due process of law, it becomes our duty, by legislation, whenever such legislation is necessary, to maintain this provision of the Constitution against all attempts to violate it; and we deny the authority of Congress, of a territorial legislature, or of any individual, to give legal existence to slavery in any territory of the United States."

other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power — and the latter is involved in the former — to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force, without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed. American Ins. Co. *v.* Canter, 1 Pet. 542 [**827**]; Halleck, International Law, chap. 34, § 14."

There is in reason then, no room in this case to contend that Congress can destroy the liberties of the people of Porto Rico by exercising in their regard powers against freedom and justice which the Constitution has absolutely denied. There can also be no controversy as to the right of Congress to locally govern the island of Porto Rico as its wisdom may decide, and in so doing to accord only such degree of representative government as may be determined on by that body. There can also be no contention as to the authority of Congress to levy such local taxes in Porto Rico as it may choose, even although the amount of the local burden so levied be manifold more onerous than is the duty with which this case is concerned. But as the duty in question was not a local tax, since it was levied in the United States on goods coming from Porto Rico, it follows that, if that island was a part of the United States, the duty was repugnant to the Constitution, since the authority to levy an impost duty conferred by the Constitution on Congress does not, as I have conceded, include the right to lay such a burden on goods coming from one to another part of the United States. And, besides, if Porto Rico was a part of the United States the exaction was repugnant to the uniformity clause.

The sole and only issue, then, is not whether Congress has taxed Porto Rico without representation — for, whether the tax was local or national, it could have been imposed although Porto Rico had no representative local government and was not represented in Congress — but is whether the particular tax in question was levied in such form as to cause it to be repugnant to the Constitution. This is to be resolved by answering the inquiry, Had Porto Rico, at the

time of the passage of the act in question, been incorporated into and become an integral part of the United States?

On the one hand, it is affirmed that, although Porto Rico had been ceded by the treaty with Spain to the United States, the cession was accompanied by such conditions as prevented that island from becoming an integral part of the United States, at least temporarily and until Congress had so determined. On the other hand, it is insisted that by the fact of cession to the United States alone, irrespective of any conditions found in the treaty, Porto Rico became a part of the United States and was incorporated into it. It is incompatible with the Constitution, it is argued, for the government of the United States to accept a cession of territory from a foreign country without complete incorporation following as an immediate result, and therefore it is contended that it is immaterial to inquire what were the conditions of the cession, since if there were any which were intended to prevent incorporation they were repugnant to the Constitution and void. The result of the argument is that the government of the United States is absolutely without power to acquire and hold territory as property or as appurtenant to the United States. These conflicting contentions are asserted to be sanctioned by many adjudications of this court and by various acts of the executive and legislative branches of the government; both sides, in many instances, referring to the same decisions and to the like acts, but deducing contrary conclusions from them. From this it comes to pass that it will be impossible to weigh the authorities relied upon without ascertaining the subject-matter to which they refer, in order to determine their proper influence. For this reason, in the orderly discussion of the controversy, I propose to consider the subject from the Constitution itself, as a matter of first impression, from that instrument as illustrated by the history of the government, and as construed by the previous decisions of this court. By this process, if accurately carried out, it will follow that the true solution of the question will be ascertained, both deductively and inductively, and the result, besides, will be adequately proven.

It may not be doubted that by the general principles of the law of nations every government which is sovereign within its sphere of action possesses as an inherent attribute the power to acquire territory by discovery, by agreement or treaty, and by conquest. It cannot also be gainsaid that, as a general rule, wherever a government acquires territory as a result of any of the modes above stated, the relation of the territory to the new government is to be determined by the acquiring power in the absence of stipulations upon the subject. These general principles of the law of nations are thus stated by Halleck in his treatise on International Law, page 126:

"A State may acquire property or domain in various ways; its title may be acquired originally by mere occupancy, and confirmed by the presumption arising from the lapse of time; or by discov-

ery and lawful possession; or by conquest, confirmed by treaty or tacit consent; or by grant, cession, purchase or exchange; in fine, by any of the recognized modes by which private property is acquired by individuals. It is not our object to enter into any general discussion of these several modes of acquisition, any further than may be necessary to distinguish the character of certain rights of property which are the peculiar objects of international jurisprudence. Wheaton, International Law, pt. 2, chap. 4, §§ 1, 4, 5; 1 Phillimore, International Law, §§ 221–277; Grotius, de Jur. Bel. ac Pac., lib. 2, chap. 4; Vattel, Droit des Gens, liv. 2, chaps. 7 and 11; Rutherford, Inst. b. 1, chap. 3, b. 2, chap. 9; Puffendorf, de Jur. Nat. et Gent., lib. 4, chaps. 4–6; Moser, Versuch, etc., b. 5, chap. 9; Martens Precis du Droit des Gens, §§ 35 *et seq.*; Schmaltz, Droit des Gens, liv. 4, chap. 1; Kluber, Droit des Gens, §§ 125, 126; Heffter, Droit International, § 76; Ortolan, Domaine International, §§ 53 *et seq.*; Bowyer, Universal Public Law, chap. 28; Bello, Derecho Internacional, pt. 1, chap. 4; Riquelme, Derecho, Pub. Int., lib. 1, title 1, chap. 2; Burlamaqui, Droit de la Nat. et des Gens, tome 4, pt. 3, chap. 5."

Speaking of a change of sovereignty, Halleck says (pp. 76, 418):

"Chap. III, § 23. The sovereignty of a State may be lost in various ways. It may be vanquished by a foreign power, and become incorporated into the conquering State *as a province* or as one of its component parts; or it may voluntarily unite itself with another in such a way that its independent existence as a State will entirely cease.

. . . . . .

"Chap. XXX, § 3. If the hostile nation be subdued and the entire State conquered, a question arises as to the manner in which the conqueror may treat it without transgressing the just bounds established by the rights of conquest. If he simply replaces the former sovereign, and, on the submission of the people, governs them according to the laws of the State, they can have no cause of complaint. Again, if he incorporate them with his former states, giving to them the rights, privileges, and immunities of his own subjects, he does for them all that is due from a humane and equitable conqueror to his vanquished foes. But if the conquered are a fierce, savage, and restless people, he may, according to the degree of their indocility, govern them with a tighter rein, so as to curb their 'impetuosity, and to keep them under subjection.' Moreover, the rights of conquest may, in certain cases, justify him in imposing a tribute or other burthen, either a compensation for the expenses of the war or as a punishment for the injustice he has suffered from them. . . . Vattel, Droit des Gens, liv. 3, ch. 13, § 201; Curtis, History, etc., liv. 7, cap. 8; Grotius, de Jur. Bel. ac Pac. lib. 3, caps. 8, 15; Puffendorf, de Jur. Nat. et Gent., lib. 8, cap. 6, § 24; Real, Science du Gouvernement, tome 5, ch. 2, § 5; Heffter, Droit International, § 124; Abegg, Untersuchungen, etc., p. 86."

In American Ins. Co. *v.* Canter, 1 Pet. 511 [**827**], the general doctrine was thus summarized in the opinion delivered by Mr. Chief Justice Marshall (p. 542):

"If it [conquered territory] be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession or *on such as its new master shall impose.*"

When our forefathers threw off their allegiance to Great Britain and established a republican government, assuredly they deemed that the nation which they called into being was endowed with those general powers to acquire territory which all independent governments in virtue of their sovereignty enjoyed. This is demonstrated by the concluding paragraph of the Declaration of Independence, which reads as follows:

"As free and independent States, they [the United States of America] have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do."

That under the Confederation it was considered that the government of the United States had authority to acquire territory like any other sovereiguty is clearly established by the eleventh of the Articles of Confederation.

The decisions of this court leave no room for question that, under the Constitution, the government of the United States, in virtue of its sovereignty, supreme within the sphere of its delegated power, has the full right to acquire territory enjoyed by every other sovereign nation.

In American Ins. Co. *v.* Canter, 1 Pet. 511 [**827**], the court, by Mr. Chief Justice Marshall, said (p. 542):

"The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty."

In United States *v.* Huckabee, (1872) 16 Wall. 414, the court, speaking through Mr. Justice Clifford, said (p. 434):

"Power to acquire territory either by conquest or treaty is vested by the Constitution in the United States. Conquered territory, however, is usually held as a mere military occupation until the fate of the nation from which it is conquered is determined; but if the nation is entirely subdued, or in case it be destroyed and ceases to exist, the right of occupation becomes permanent, and the title vests absolutely in the conqueror. American Ins. Co. *v.* Canter, 1 Pet. 511 [**827**]; Hogsheads of Sugar *v.* Boyle, 9 Cranch, 195; Shanks *v.* Dupont, 3 Pet. 246; United States *v.* Rice, 4 Wheat. 254; The Amy Warwick, 2 Sprague, 143; Johnson *v.* M'Intosh, 8 Wheat. 588. Complete conquest, by whatever mode it may be perfected, carries with it all the rights of the former government; or, in other words,

the conqueror, by the completion of his conquest, becomes the absolute owner of the property conquered from the enemy nation or State. His rights are no longer limited to mere occupation of what he has taken into his actual possession, but they extend to all the property and rights of the conquered State, including even debts as well as personal and real property. Halleck, International Law, 839; Elphinstone v. Bedreechund, 1 Knapp's Privy Council Cases, 329; Vattel, 365; 3 Phillimore, International Law, 505."

In Mormon Church v. United States, (1889) 136 U. S. 1 [**835**], Mr. Justice Bradley, announcing the opinion of the court, declared (p. 42):

"The power to acquire territory, other than the territory northwest of the Ohio River (which belonged to the United States at the adoption of the Constitution), is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty, and by cession is an incident of national sovereignty. The Territory of Louisiana, when acquired from France, and the territories west of the Rocky Mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those territories."

Indeed, it is superfluous to cite authorities establishing the right of the government of the United States to acquire territory, in view of the possession of the Northwest Territory when the Constitution was framed and the cessions to the general government by various States subsequent to the adoption of the Constitution, and in view also of the vast extension of the territory of the United States brought about since the existence of the Constitution by substantially every form of acquisition known to the law of nations. Thus, in part at least, "the title of the United States to Oregon was founded upon original discovery and actual settlement by citizens of the United States, authorized or approved by the government of the United States." Shively v. Bowlby, 152 U. S. 50. The Province of Louisiana was ceded by France in 1803; the Floridas were transferred by Spain in 1819; Texas was admitted into the Union by compact with Congress in 1845; California and New Mexico were acquired by the treaty with Mexico of 1848, and other western territory from Mexico by the treaty of 1853; numerous islands have been brought within the dominion of the United States under the authority of the act of August 18, 1856, chap. 164, usually designated as the Guano Islands act, re-enacted in Revised Statutes, §§ 5570–5578; Alaska was ceded by Russia in 1867; Medway island, the western end of the Hawaiian group, 1,200 miles from Honolulu, was acquired in 1867, and $50,000 was expended in efforts to make it a naval station; on the renewal

of a treaty with Hawaii, November 9, 1887, Pearl harbor was leased for a permanent naval station; by joint resolution of Congress the Hawaiian Islands came under the sovereignty of the United States in 1898; and on April 30, 1900, an act for the government of Hawaii was approved, by which the Hawaiian Islands were given the status of an incorporated territory; on May 21, 1890, there was proclaimed by the President an agreement, concluded and signed with Germany and Great Britain, for the joint administration of the Samoan Islands (26 Stat. 1497); and on February 16, 1900 (31 Stat. 69) there was proclaimed a convention between the United States, Germany, and Great Britain, by which Germany and Great Britain renounced in favor of the United States all their rights and claims over and in respect to the island of Tutuilla and all other islands of the Samoan group east of longitude 171° west of Greenwich. And finally the treaty with Spain which terminated the recent war was ratified.

It is worthy of remark that, beginning in the administration of President Jefferson, the acquisition of foreign territory above referred to were largely made whilst that political party was in power which announced as its fundamental tenet the duty of strictly construing the Constitution, and it is true to say that all shades of political opinion have admitted the power to acquire, and lent their aid to its accomplishment. And the power has been asserted in instances where it has not been exercised. Thus, during the administration of President Pierce, in 1854, a draft of a treaty for the annexation of Hawaii was agreed upon, but, owing to the death of the King of the Hawaiian Islands, was not executed. The second article of the proposed treaty provided as follows (Ex. Doc. Senate, 55th Congress, 2d sess., Report No. 681, Calendar No. 747, p. 91):

"ARTICLE II.

"The Kingdom of the Hawaiian Islands shall be incorporated into the American Union as a State, enjoying the same degree of sovereignty as other states, and admitted as such as soon as it can be done in consistency with the principles and requirements of the Federal Constitution, to all the rights, privileges, and immunities of a State as aforesaid, on a perfect equality with the other States of the Union."

It is insisted, however, that, conceding the right of the government of the United States to acquire territory, as all such territory when acquired becomes absolutely incorporated into the United States, every provision of the Constitution which would apply under that situation is controlling in such acquired territory. This, however, is but to admit the power to acquire, and immediately to deny its beneficial existence.

The general principle of the law of nations, already stated, is that acquired territory, in the absence of agreement to the contrary, will bear such relation to the acquiring government as may be by it deter-

mined. To concede to the government of the United States the right to acquire, and to strip it of all power to protect the birthright of its own citizens and to provide for the well being of the acquired territory by such enactments as may in view of its condition be essential, is, in effect, to say that the United States is helpless in the family of nations and does not possess that authority which has at all times been treated as an incident of the right to acquire. Let me illustrate the accuracy of this statement. Take a case of discovery. Citizens of the United States discover an unknown island, peopled with an uncivilized race, yet rich in soil, and valuable to the United States for commercial and strategic reasons. Clearly, by the law of nations, the right to ratify such acquisition and thus to acquire the territory would pertain to the government of the United States. Johnson *v.* M'Intosh, 8 Wheat. 543, 595; Martin *v.* Waddell, 16 Pet. 367, 409; Jones *v.* United States, 137 U. S. 202 [**590**], 212; Shively *v.* Bowlby, 152 U. S. 1, 50. Can it be denied that such right could not be practically exercised if the result would be to endow the inhabitants with citizenship of the United States and to subject them, not only to local, but also to an equal proportion of national taxes, even although the consequence would be to entail ruin on the discovered territory, and to inflict grave detriment on the United States, to arise both from the dislocation of its fiscal system and the immediate bestowal of citizenship on those absolutely unfit to receive it?

The practice of the government has been otherwise. As early as 1856 Congress enacted the Guano Islands act, heretofore referred to, which by section 1 provided that when any citizen of the United States shall "discover a deposit of guano on any island, rock, or key not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and shall take peaceable possession thereof, and occupy the same, said island, rock, or key may, at the discretion of the President of the United States, be considered *as appertaining* to the United States." 11 Stat. 119, chap. 164; Rev. Stat. § 5570. Under the act referred to, it was stated in argument, that the government now holds and protects American citizens in the occupation of some seventy islands. The statute came under consideration in Jones *v.* United States, 137 U. S. 202 [**590**], where the question was whether or not the act was valid, and it was decided that the act was a lawful exercise of power, and that islands thus acquired were "appurtenant" to the United States. The court, in the course of the opinion, speaking through Mr. Justice Gray, said (p. 212):

"By the law of nations, recognized by all civilized states, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens or subjects of one nation, in its name and by its authority or with its assent, take and hold actual, continuous, and useful possession (although only for the purpose of carrying on a particular business, such as catching and

curing fish or working mines) of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired. This principle affords ample warrant for the legislation of Congress concerning guano islands. Vattel, lib. 1, chap. 18; Wheaton, International Law, 8th ed. §§ 161, 165, 176, note 104; Halleck, International Law, chap. 6, §§ 7, 15; 1 Phillimore, International Law, 3d ed. §§ 227, 229, 230, 242; 1 Calvo, Droit International, 4th ed. §§ 266, 277, 300; Whiton *v.* Albany County Ins. Co., 109 Mass. 24, 31."

And these considerations concerning discovery are equally applicable to ownership resulting from conquest. A just war is declared, and in its prosecution the territory of the enemy is invaded and occupied. Would not the war, even if waged successfully, be fraught with danger if the effect of occupation was to necessarily incorporate an alien and hostile people into the United States? Take another illustration. Suppose at the termination of a war the hostile government had been overthrown, and the entire territory or a portion thereof was occupied by the United States, and there was no government to treat with or none willing to cede by treaty, and thus it became necessary for the United States to hold the conquered country for an indefinite period, or at least until such time as Congress deemed that it should be either released or retained because it was apt for incorporation into the United States. If holding was to have the effect which is now claimed for it, would not the exercise of judgment respecting the retention be so fraught with danger to the American people that it could not be safely exercised?

Yet again. Suppose the United States, in consequence of outrages perpetrated upon its citizens, was obliged to move its armies or send its fleets to obtain redress, and it came to pass that an expensive war resulted and culminated in the occupation of a portion of the territory of the enemy, and that the retention of such territory — an event illustrated by examples in history — could alone enable the United States to recover the pecuniary loss it had suffered. And suppose, further, that to do so would require occupation for an indefinite period, dependent upon whether or not payment was made of the required indemnity. It being true that incorporation must necessarily follow the retention of the territory, it would result that the United States must abandon all hope of recouping itself for the loss suffered by the unjust war, and hence the whole burden would be entailed upon the people of the United States. This would be a necessary consequence, because if the United States did not hold the territory as security for the needed indemnity it could not collect such indemnity, and, on the other hand, if incorporation must follow from holding the territory the uniformity provision of the Constitution would prevent the assessment of the cost of the war solely upon the newly acquired country. In this, as in the case of discovery, the

traditions and practices of the government demonstrate the unsoundness of the contention. Congress, on May 13, 1846, declared that war existed with Mexico. In the summer of that year New Mexico and California were subdued by the American arms, and the military occupation which followed continued until after the treaty of peace was ratified, in May, 1848. Tampico, a Mexican port, was occupied by our forces on November 15, 1846, and possession was not surrendered until after the ratification. In the spring of 1847 President Polk, through the Secretary of the Treasury, prepared a tariff of duties on imports and tonnage which was put in force in the conquered country. 1 Senate Documents, First Session, 30th Congress, pp. 562, 569. By this tariff, *duties were laid as well on merchandise, exported from the United States* as from other countries, except as to supplies for our army, and on May 10, 1847, an exemption from tonnage duties was accorded to "all vessels chartered by the United States to convey supplies of any and all descriptions to our army and navy, and actually laden with supplies." *Ibid.* 583. An interesting debate respecting the constitutionality of this action of the President is contained in 18 Cong. Globe, First Session, 30th Congress, at pp. 478, 479, 484–489, 495, 498, etc.

In Fleming *v.* Page, 9 How. 603, it was held that the revenue officials properly treated Tampico as a port of a foreign country during the occupation by the military forces of the United States, and that duties on imports into the United States from Tampico were lawfully levied under the general tariff act of 1846. Thus, although Tampico was in the possession of the United States, and the court expressly held that in an international sense the port was a part of the territory of the United States, yet it was decided that in the sense of the revenue laws Tampico was a foreign country. The special tariff act promulgated by President Polk was in force in New Mexico and California until after notice was received of the ratification of the treaty of peace. In Cross *v.* Harrison, 16 How. 164, certain collections of impost duties on goods brought from foreign countries into California prior to the time when official notification had been received in California that the treaty of cession had been ratified, as well as impost duties levied after the receipt of such notice, were called in question. The duties collected prior to the receipt of notice were laid at the rate fixed by the tariff promulgated by the President; those laid after the notification conformed to the general tariff laws of the United States. The court decided that all the duties collected were valid. The court undoubtedly in the course of its opinion said that immediately upon the ratification of the treaty California became a part of the United States and subject to its revenue laws. However, the opinion pointedly referred to a letter of the Secretary of the Treasury directing the enforcement of the tariff laws of the United States, upon the express ground that Congress had enacted laws which recognized the treaty of cession. Besides,

the decision was expressly placed upon the conditions of the treaty, and it was stated, in so many words, that a different rule would have been applied had the stipulations in the treaty been of a different character.

But, it is argued, all the instances previously referred to may be conceded, for they but illustrate the rule *inter arma sitent leges.* Hence they do not apply to acts done after the cessation of hostilities when a treaty of peace has been concluded. This not only begs the question, but also embodies a fallacy. A case has been supposed in which it was impossible to make a treaty because of the unwillingness or disappearance of the hostile government, and therefore the occupation necessarily continued, although actual war had ceased. The fallacy lies in admitting the right to exercise the power, if only it is exerted by the military arm of the government, but denying it wherever the civil power comes in to regulate and make the conditions more in accord with the spirit of our free institutions. Why it can be thought, although under the Constitution the military arm of the government is in effect the creature of Congress, that such arm may exercise a power without violating the Constitution, and yet Congress — the creator — may not regulate, I fail to comprehend.

This further argument, however, is advanced. Granting that Congress may regulate without incorporating, where the military arm has taken possession of foreign territory, and where there has been or can be no treaty, this does not concern the decision of this case, since there is here involved no regulation, but an actual cession to the United States of territory by treaty. The general rule of the law of nations, by which the acquiring government fixes the status of acquired territory, it is urged, does not apply to the government of the United States, because it is incompatible with the Constitution that that government should hold territory under a cession and administer it as a dependency without its becoming incorporated. This claim, I have previously said, rests on the erroneous assumption that the United States under the Constitution is stripped of those powers which are absolutely inherent in and essential to national existence. The certainty of this is illustrated by the examples already made use of in the supposed cases of discovery and conquest.

If the authority by treaty is limited as suggested, then it will be impossible to terminate a successful war by acquiring territory through a treaty, without immediately incorporating such territory into the United States. Let me, however, eliminate the case of war, and consider the treaty-making power as subserving the purposes of the peaceful evolution of national life. Suppose the necessity of acquiring a naval station or a coaling station on an island inhabited with people utterly unfit for American citizenship and totally incapable of bearing their proportionate burden of the national expense. Could such island, under the rule which is now insisted upon, be taken? Suppose, again, the acquisition of territory for an inter-

oceanic canal, where an inhabited strip of land on either side is essential to the United States for the preservation of the work. Can it be denied that, if the requirements of the Constitution as to taxation are to immediately control, it might be impossible by treaty to accomplish the desired result?

Whilst no particular provision of the Constitution is referred to, to sustain the argument that it is impossible to acquire territory by treaty without immediate and absolute incorporation, it is said that the spirit of the Constitution excludes the conception of property or dependencies possessed by the United States, and which are not so completely incorporated as to be in all respects a part of the United States ; that the theory upon which the Constitution proceeds is that of confederated and independent States, and that no territory, therefore, can be acquired which does not contemplate statehood, and excludes the acquisition of any territory which is not in a position to be treated as an integral part of the United States. But this reasoning is based on political, and not judicial considerations. Conceding that the conception upon which the Constitution proceeds is that no territory, as a general rule, should be acquired unless the territory may reasonably be expected to be worthy of statehood, the determination of when such blessing is to be bestowed is wholly a political question, and the aid of the judiciary cannot be invoked to usurp political discretion in order to save the Constitution from imaginary or even real dangers. The Constitution may not be saved by destroying its fundamental limitations.

Let me come, however, to a consideration of the express powers which are conferred by the Constitution, to show how unwarranted is the principle of immediate incorporation, which is here so strenuously insisted on. In doing so it is conceded at once that the true rule of construction is not to consider one provision of the Constitution alone, but to contemplate all, and therefore to limit one conceded attribute by those qualifications which naturally result from the other powers granted by that instrument, so that the whole may be interpreted by the spirit which vivifies, and not by the letter which killeth. Undoubtedly, the power to carry on war and to make treaties implies also the exercise of those incidents which ordinarily inhere in them. Indeed, in view of the rule of construction which I have just conceded — that all powers conferred by the Constitution must be interpreted with reference to the nature of the government and be construed in harmony with related provisions of the Constitution — it seems to me impossible to conceive that the treaty-making power by a mere cession can incorporate an alien people into the United States without the express or implied approval of Congress. And from this it must follow that there can be no foundation for the assertion that, where the treaty-making power has inserted conditions which preclude incorporation until Congress has acted in respect thereto, such conditions are void and incorporation results in spite

thereof. If the treaty-making power can absolutely, without the consent of Congress, incorporate territory, and if that power may not insert conditions against incorporation, it must follow that the treaty-making power is endowed by the Constitution with the most unlimited right, susceptible of destroying every other provision of the Constitution; that is, it may wreck our institutions. If the proposition be true, then millions of inhabitants of alien territory if acquired by treaty, can, without the desire or consent of the people of the United States speaking through Congress, be immediately and irrevocably incorporated into the United States, and the whole structure of the government be overthrown. While thus aggrandizing the treaty-making power on the one hand, the construction at the same time minimizes it on the other, in that it strips that authority of any right to acquire territory upon any condition which would guard the people of the United States from the evil of immediate incorporation. The treaty-making power, then, under this contention, instead of having the symmetrical functions which belong to it from its very nature, becomes distorted — vested with the right to destroy upon the one hand, and deprived of all power to protect the government on the other.

And, looked at from another point of view, the effect of the principle asserted is equally antagonistic, not only to the express provisions, but to the spirit of the Constitution in other respects. Thus, if it be true that the treaty-making power has the authority which is asserted, what becomes of that branch of Congress which is peculiarly the representative of the people of the United States, and what is left of the functions of that body under the Constitution? For, although the House of Representatives might be unwilling to agree to the incorporation of alien races, it would be impotent to prevent its accomplishment, and the express provisions conferring upon Congress the power to regulate commerce, the right to raise revenue — bills for which, by the Constitution, must originate in the House of Representatives — and the authority to prescribe uniform naturalization laws, would be in effect set at naught by the treaty-making power. And the consequent result — incorporation — would be beyond all future control of or remedy by the American people, since, at once and without hope of redress or power of change, incorporation by the treaty would have been brought about. The inconsistency of the position is at once manifest. The basis of the argument is that the treaty must be considered to have been incorporated, because acquisition presupposes the exercise of judgment as to fitness for immediate incorporation. But the deduction drawn is, although the judgment exercised is against immediate incorporation, and this result is plainly expressed, the conditions are void because no judgment against incorporation can be called into play.

All the confusion and dangers above indicated, however, it is argued, are more imaginary than real, since, although it be conceded

that the treaty-making power has the right by cession to incorporate without the consent of Congress, that body may correct the evil by availing itself of the provision of the Constitution giving to Congress the right to dispose of the territory and other property of the United States. This assumes that there has been absolute incorporation by the treaty-making power on the one hand, and yet asserts that Congress may deal with the territory as if it had not been incorporated into the United States. In other words, the argument adopts conflicting theories of the Constitution, and applies them both at the same time. I am not unmindful that there has been some contrariety of decision on the subject of the meaning of the clause empowering Congress to dispose of the territories and other property of the United States, some adjudged cases treating that article as referring to property as such, and others deriving from it the general grant of power to govern territories. In view, however, of the relations of the territories to the government of the United States at the time of the adoption of the Constitution, and the solemn pledge then existing that they should forever "remain a part of the Confederacy of the United States of America," I cannot resist the belief that the theory that the disposing clause relates as well to a relinquishment or cession of sovereignty as to a mere transfer of rights of property is altogether erroneous.

Observe, again, the inconsistency of this argument. It considers, on the one hand, that so vital is the question of incorporation that no alien territory may be acquired by a cession without absolutely endowing the territory with incorporation and the inhabitants with resulting citizenship, because, under our system of government, the assumption that a territory and its inhabitants may be held by any other title than one incorporating is impossible to be thought of. And yet, to avoid the evil consequences which must follow from accepting this proposition, the argument is that all citizenship of the United States is precarious and fleeting, subject to be sold at any moment, like any other property. That is to say, to protect a newly acquired people in their presumed rights, it is essential to degrade the whole body of American citizenship.

The reasoning which has sometimes been indulged in by those who asserted that the Constitution was not at all operative in the territories is that, as they were acquired by purchase, the right to buy included the right to sell. This has been met by the proposition that if the country purchased and its inhabitants became incorporated into the United States, it came under the shelter of the Constitution, and no power existed to sell American citizens. In conformity to the principles which I have admitted it is impossible for me to say at one and the same time that territory is an integral part of the United States protected by the Constitution, and yet the safeguards, privileges, rights, and immunities which arise from this situation are so ephemeral in their character that by a mere act of sale they may be

destroyed. And applying this reasoning to the provisions of the treaty under consideration, to me it seems indubitable that if the treaty with Spain incorporated all the territory ceded into the United States, it resulted that the millions of people to whom that treaty related were, without the consent of the American people as expressed by Congress, and without any hope of relief, indissolubly made a part of our common country.

Undoubtedly, the thought that under the Constitution power to dispose of people and territory, and thus to annihilate the rights of American citizens, was contrary to the conceptions of the Constitution entertained by Washington and Jefferson. In the written suggestions of Mr. Jefferson, when Secretary of State, reported to President Washington in March, 1792, on the subject of proposed negotiations between the United States and Spain, which were intended to be communicated by way of instruction to the commissioners of the United States appointed to manage such negotiations, it was observed, in discussing the possibility as to compensation being demanded by Spain "for the ascertainment of our right" to navigate the lower part of the Mississippi, as follows:

"We have nothing else" (than a relinquishment of certain claims on Spain) "to give in exchange. For as to territory, we have neither the right nor the disposition to alienate an inch of what belongs to any member of our Union. Such a proposition therefore is totally inadmissible, and not to be treated for a moment." Ford's Writings of Jefferson, vol. v, p. 476.

The rough draft of these observations was submitted to Mr. Hamilton, then Secretary of the Treasury, for suggestions, previously to sending it to the President, some time before March 5, and Hamilton made the following (among other) notes upon it:

"Page 25. Is it true that the United States have no right to *alienate an inch* of the territory in question, except in the case of necessity intimated in another place? Or will it be useful to avow the denial of such a right? It is apprehended that the doctrine which restricts the alienation of territory to cases of *extreme necessity* is applicable rather to *peopled* territory than to waste and uninhabited districts. Positions restraining the right of the United States to accommodate to exigencies which may arise ought ever to be advanced with great caution." Ford's Writings of Jefferson, vol. v, p. 443.

Respecting this note, Mr. Jefferson commented as follows:

"The power to alienate the *unpeopled* territories of any State is not among the enumerated powers given by the Constitution to the general government, and if we may go out of that instrument and *accommodate to exigencies which may arise* by alienating the *unpeopled* territory of a State, we may accommodate ourselves a little more by alienating that which is *peopled*, and still a little more by selling the *people* themselves. A shade or two more in the degree of exigency is all that will be requisite, and of that degree we shall ourselves be the

judges. However, may it not be hoped that these questions are forever laid to rest by the Twelfth Amendment once made a part of the Constitution, declaring expressly that the 'powers not delegated to the United States by the Constitution are reserved to the States respectively?' And if the general government has no power to alienate the territory of a State, it is too irresistible an argument to deny ourselves the use of it on the present occasion." *Ibid.*

The opinions of Mr. Jefferson, however, met the approval of President Washington. On March 18, 1792, in inclosing to the commissioners to Spain their commission, he said, among other things:

"You will herewith receive your commission; as also observations on these several subjects reported to the President and approved by him, which will therefore serve as instructions for you. These expressing minutely the sense of our government, and what they wish to have done, it is unnecessary for me to do more here than desire you to pursue these objects unremittingly," etc. Ford's Writings of Jefferson, vol. v, p. 456.

When the subject matter to which the negotiations related is considered, it becomes evident that the word "State" as above used related merely to territory which was either claimed by some of the States, as Mississippi territory was by Georgia, or to the Northwest Territory, embraced within the ordinance of 1787, or the territory south of the Ohio (Tennessee), which had also been endowed with all the rights and privileges conferred by that ordinance, and all which territory had originally been ceded by States to the United States under express stipulations that such ceded territory should be ultimately formed into States of the Union. And this meaning of the word "State" is absolutely in accord with what I shall hereafter have occasion to demonstrate was the conception entertained by Mr. Jefferson of what constituted the United States.

True, from the exigency of a calamitous war or the necessity of a settlement of boundaries, it may be that citizens of the United States may be expatriated by the action of the treaty-making power, impliedly or expressly ratified by Congress.

But the arising of these particular conditions cannot justify the general proposition that territory which is an integral part of the United States may, as a mere act of sale, be disposed of. If, however, the right to dispose of an incorporated American territory and citizens by the mere exertion of the power to sell be conceded, *arguendo*, it would not relieve the dilemma. It is ever true that, where a malign principle is adopted, as long as the error is adhered to it must continue to produce its baleful results. Certainly, if there be no power to acquire subject to a condition, it must follow that there is no authority to dispose of subject to conditions, since it cannot be that the mere change of form of the transaction could bestow a power which the Constitution has not conferred. It would follow, then, that any conditions annexed to a disposition which looked to the pro-

tection of the people of the United States, or to enable them to safeguard the disposal of territory, would be void; and thus it would be that either the United States must hold on absolutely, or must dispose of unconditionally.

A practical illustration will at once make the consequences clear. Suppose Congress should determine that the millions of inhabitants of the Philippine Islands should not continue appurtenant to the United States, but that they should be allowed to establish an autonomous government, outside of the Constitution of the United States, coupled, however, with such conditions providing for control as far only as essential to the guaranty of life and property and to protect against foreign encroachment. If the proposition of incorporation be well founded, at once the question would arise whether the ability to impose these conditions existed, since no power was conferred by the Constitution to annex conditions which would limit the disposition. And if it be that the question of whether territory is immediately fit for incorporation when it is acquired is a judicial, and not a legislative one, it would follow that the validity of the conditions would also come within the scope of judicial authority, and thus the entire political policy of the government be alone controlled by the judiciary.

The theory as to the treaty-making power upon which the argument which has just been commented upon rests, it is now proposed to be shown, is refuted by the history of the government from the beginning. There has not been a single cession made from the time of the Confederation up to the present day, excluding the recent treaty with Spain, which has not contained stipulations to the effect that the United States through Congress would either not disincorporate or would incorporate the ceded territory into the United States. There were such conditions in the deed of cession by Virginia when it conveyed the Northwest Territory to the United States. Like conditions were attached by North Carolina to the cession whereby the territory south of the Ohio, now Tennessee, was transferred. Similar provisions were contained in the cession by Georgia of the Mississippi territory, now the States of Alabama and Mississippi. Such agreements were also expressed in the treaty of 1803, ceding Louisiana; that of 1819, ceding the Floridas, and in the treaties of 1848 and 1853, by which a large extent of territory was ceded to this country, as also in the Alaska treaty of 1867. To adopt the limitations on the treaty-making power now insisted upon would presuppose that every one of these conditions thus sedulously provided for were superfluous, since the guaranties which they afforded would have obtained, although they were not expressly provided for.

When the various treaties by which foreign territory has been acquired are considered in the light of the circumstances which surrounded them, it becomes to my mind clearly established that the treaty-making power was always deemed to be devoid of authority to

incorporate territory into the United States without the assent, express or implied, of Congress, and that no question to the contrary has ever been even mooted. To appreciate this it is essential to bear in mind what the words "United States" signified at the time of the adoption of the Constitution. When by the treaty of peace with Great Britain the independence of the United States was acknowledged, it is unquestioned that all the territory within the boundaries defined in that treaty, whatever may have been the disputes as to title, substantially belonged to particular States. The entire territory was part of the United States, and all the native white inhabitants were citizens of the United States and endowed with the rights and privileges arising from that relation. When, as has already been said, the Northwest Territory was ceded by Virginia, it was expressly stipulated that the rights of the inhabitants in this regard should be respected. The ordinance of 1787, providing for the government of the Northwest Territory, fulfilled this promise on behalf of the Confederation. Without undertaking to reproduce the text of the ordinance, it suffices to say that it contained a bill of rights, a promise of ultimate statehood, and it provided (italics mine) that "the said territory and the States which may be formed therein *shall ever remain a part of this Confederacy of the United States of America,* subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made, and to all the acts and ordinances of the United States in Congress assembled, comformably thereto." It submitted the inhabitants to a liability for a tax to pay their proportional part of the public debt and the expenses of the government, to be assessed by the rule of apportionment which governed the States of the Confederation. It forbade slavery within the territory, and contained a stipulation that the provisions of the ordinance should ever remain unalterable unless by common consent.

Thus it was that, at the adoption of the Constitution, the United States, as a geographical unit and as a governmental conception both in the international and domestic sense, consisted not only of States, but also of territories, all the native white inhabitants being endowed with citizenship, protected by pledges of a common union, and, except as to political advantages, all enjoying equal rights and freedom, and safeguarded by substantially similar guaranties, all being under the obligation to contribute their proportionate share for the liquidation of the debt and future expenses of the general government.

The opinion has been expressed that the ordinance of 1787 became inoperative and a nullity on the adoption of the Constitution (Taney, C. J., in Scott *v.* Sandford, 19 How. 393, 438), while on the other hand, it has been said that the ordinance of 1787 was "the most solemn of all engagements," and became a part of the Constitution of the United States by reason of the Sixth article, which provided that "all debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this

Constitution as under the Confederation." Per Baldwin, J., concurring opinion in Pollard *v.* Kibbe, 14 Pet. 353, 417, and per Catron, J., in dissenting opinion in Strader *v.* Graham, 10 How. 82, 98. Whatever view may be taken of this difference of legal opinion, my mind refuses to assent to the conclusion that under the Constitution the provision of the Northwest Territory ordinance making such territory forever a part of the Confederation was not binding on the government of the United States when the Constitution was formed. When it is borne in mind that large tracts of this territory were reserved for distribution among the Continental soldiers, it is impossible for me to believe that it was ever considered that the result of the cession was to take the Northwest Territory out of the Union, the necessary effect of which would have been to expatriate the very men who by their suffering and valor had secured the liberty of their united country. Can it be conceived that North Carolina, after the adoption of the Constitution, would cede to the general government the territory south of the Ohio River, intending thereby to expatriate those dauntless mountaineers of North Carolina who had shed lustre upon the Revolutionary arms by the victory of King's Mountain? And the rights bestowed by Congress after the adoption of the Constitution, as I shall proceed to demonstrate, were utterly incompatible with such a theory.

Beyond question, in one of the early laws enacted at the first session of the First Congress, the binding force of the ordinance was recognized, and certain of its provisions concerning the appointment of officers in the territory were amended to conform the ordinance to the new Constitution. Chap. 8, Aug. 7, 1789, 1 Stat.

In view of this it cannot, it seems to me, be doubted that the United States continued to be composed of States and territories, all forming an integral part thereof and incorporated therein, as was the case prior to the adoption of the Constitution. Subsequently, the territory now embraced in the State of Tennessee was ceded to the United States by the State of North Carolina. In order to insure the rights of the native inhabitants, it was expressly stipulated that the inhabitants of the ceded territory should enjoy all the rights, privileges, benefits, and advantages set forth in the ordinance "of the late Congress for the government of the western territory of the United States." A condition was, however, inserted in the cession, that no regulation should be made by Congress tending to emancipate slaves. By act of April 2, 1790 (1 Stat. 106, chap. 6) this cession was accepted. And at the same session, on May 26, 1790, an act was passed for the government of this territory, under the designation of "the territory of the United States south of the Ohio River." 1 Stat. 123, chap. 14. This act, except as to the prohibition which was found in the Northwest Territory ordinance as to slavery, in express terms declared that the inhabitants of the territory should enjoy all the rights conferred by that ordinance.

A government of the Mississippi territory was organized on April 7, 1798. 1 Stat. 549, chap. 28. The land embraced was claimed by the State of Georgia, and her rights were saved by the act. The sixth section thereof provided as follows:

"Sec. 6. *And be it further enacted,* That from and after the establishment of the said government, the people of the aforesaid territory shall be entitled to and enjoy, all and singular, the rights, privileges, and advantages granted to the people of the territory of the United States northwest of the river Ohio, in and by the aforesaid ordinance of the thirteenth day of July, in the year one thousand seven hundred and eighty-seven, in as full and ample a manner as the same are possessed and enjoyed by the people of the said last-mentioned territory."

Thus clearly defined by boundaries, by common citizenship, by like guaranties, stood the United States when the plan of acquiring by purchase from France the province of Louisiana was conceived by President Jefferson. Naturally, the suggestion which arose was the power on the part of the government of the United States, under the Constitution, to incorporate into the United States — a Union then composed, as I have stated, of States and Territories — a foreign province inhabited by an alien people, and thus make them partakers in the American commonwealth. Mr. Jefferson, not doubting the power of the United States to acquire, consulted Attorney General Lincoln as to the right by treaty to stipulate for incorporation. By that officer Mr. Jefferson was, in effect, advised that the power to incorporate, that is, to share the privileges and immunities of the people of the United States with a foreign population, required the consent of the people of the United States, and it was suggested, therefore, that if a treaty of cession were made containing such agreements it should be put in the form of a change of boundaries instead of a cession, so as thereby to bring the territory within the United States. The letter of Mr. Lincoln was sent by President Jefferson to Mr. Gallatin, the Secretary of the Treasury. Mr. Gallatin did not agree as to the propriety of the expedient suggested by Mr. Lincoln. In a letter to President Jefferson, in effect so stating, he said:

"But does any constitutional objection really exist? To me it would appear (1) that the United States as a nation have an inherent right to acquire territory; (2) that whenever that acquisition is by treaty, the same constituted authorities in which the treaty-making power is vested have a constitutional right to sanction the acquisition; (3) that whenever the territory has been acquired Congress have the power either of admitting into the Union as a new State, or of annexing to a State, with the consent of that State, or of making regulations for the government of such territory." Gallatin's Writings, vol. 1, p. 11, etc.

To this letter President Jefferson replied in January, 1803, clearly showing that he thought there was no question whatever of the right

of the United States to acquire, but that he did not believe incorporation could be stipulated for and carried into effect without the consent of the people of the United States. He said (italics mine):

"You are right, in my opinion, as to Mr. L's proposition: *There is no constitutional difficulty as to the acquisition of territory, and whether when acquired it may be taken into the Union by the Constitution as it now stands* will become a question of expediency. I think that it will be safer not to permit the enlargement of the Union but by amendment of the Constitution." Gallatin's Writings, vol. 1, p. 115.

And the views of Mr. Madison, then Secretary of State, exactly conformed to those of President Jefferson, for, on March 2, 1803, in a letter to the commissioners who were negotiating the treaty, he said:

"To incorporate the inhabitants of the hereby ceded territory with the citizens of the United States, being a provision which cannot now be made, it is to be expected from the character and policy of the United States that such incorporation will take place without unnecessary delay." State Papers, II, 540.

Let us pause a moment to accentuate the irreconcilable conflict which exists between the interpretation given to the Constitution at the time of the Louisiana treaty by Jefferson and Madison, and the import of that instrument as now insisted upon. You are to negotiate, said Madison to the commissioners, to obtain a cession of the territory, but you must not under any circumstances agree "*to incorporate the inhabitants of the hereby ceded territory with the citizens of the United States, being a provision which cannot now be made.*" Under the theory now urged, Mr. Madison should have said: You are to negotiate for the cession of the territory of Louisiana to the United States, and if deemed by you expedient in accomplishing this purpose, you may provide for the immediate incorporation of the inhabitants of the acquired territory into the United States. This you can freely do because the Constitution of the United States has conferred upon the treaty-making power the absolute right to bring all the alien people residing in acquired territory into the United States, and thus divide with them the rights which peculiarly belong to the citizens of the United States. Indeed, it is immaterial whether you make such agreements, since by the effect of the Constitution, without reference to any agreements which you may make for that purpose, all the alien territory and its inhabitants will instantly become incorporated into the United States if the territory is acquired.

Without going into details, it suffices to say that a compliance with the instructions given them would have prevented the negotiators on behalf of the United States from inserting in the treaty any provision looking even to the ultimate incorporation of the required territory into the United States. In view of the emergency and exigencies of the negotiations, however, the commissioners were constrained to make such a stipulation, and the treaty provided as follows:

"Art III. The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess." 8 Stat. 202.

Weighing the provisions just quoted, it is evident they refute the theory of incorporation arising at once from the mere force of a treaty, even although such result be directly contrary to any provisions which a treaty may contain. Mark the language. It expresses a promise: "The inhabitants of the ceded territory *shall be incorporated into the Union of the United States.* . . ." Observe how guardedly the fulfilment of this pledge is postponed until its accomplishment is made possible by the will of the American people, since it is to be executed only "*as soon as possible according to the principles of the Federal Constitution.*" If the view now urged be true, this wise circumspection was unnecessary, and, indeed, as I have previously said, the entire proviso was superfluous, since everything which it assured for the future was immediately and unalterably to arise.

It is said, however, that the treaty for the purchase of Louisiana took for granted that the territory ceded would be immediately incorporated into the United States, and hence the guaranties contained in the treaty related, not to such incorporation, but was a pledge that the ceded territory was to be made a part of the Union as a State. The minutest analysis, however, of the clauses of the treaty, fails to disclose any reference to a promise of statehood, and hence it can only be that the pledges made referred to incorporation into the United States. This will further appear when the opinions of Jefferson and Madison and their acts on the subject are reviewed. The argument proceeds upon the theory that the words of the treaty, "shall be incorporated into the Union of the United States," could only have referred to a promise of statehood, since the then existing and incorporated Territories were not a part of the Union of the United States, as that Union consisted only of the States. But this has been shown to be unfounded, since the "Union of the United States" was composed of States and Territories, both having been embraced within the boundaries fixed by the treaty of peace between Great Britain and the United States which terminated the Revolutionary War, the latter, the Territories, embracing districts of country which were ceded by the States to the United States under the express pledge that they should forever remain a part thereof. That this conception of the Union composing the United States was the understanding of Jefferson and Madison, and indeed of all those who participated in the events which preceded and led up to the Louisiana treaty, results from what I have already said, and will be additionally demonstrated by statements to be hereafter made. Again, the incon-

sistency of the argument is evident. Thus, whilst the premise upon which it proceeds is that foreign territory, when acquired, becomes at once a part of the United States, despite conditions in the treaty expressly excluding such consequence, it yet endeavors to escape the refutation of such theory which arises from the history of the government by the contention that the territories which were a part of the United States were not component constituents of the Union which composed the United States. I do not understand how foreign territory which has been acquired by treaty can be asserted to have been absolutely incorporated into the United States as a part thereof despite conditions to the contrary inserted in the treaty, and yet the assertion be made that the territories which as I have said, were in the United States originally as a part of the States, and which were ceded by them upon express condition that they should forever so remain a part of the United States, were not a part of the Union composing the United States. The argument, indeed, reduces itself to this, that for the purpose of incorporating foreign territory into the United States domestic territory must be disincorporated. In other words, that the Union must be, at least in theory, dismembered for the purpose of maintaining the doctrine of the immediate incorporation of alien territory.

That Mr. Jefferson deemed the provision of the treaty relating to incorporation to be repugnant to the Constitution is unquestioned. Whilst he conceded, as has been seen, the right to acquire, he doubted the power to incorporate the territory into the United States without the consent of the people by a constitutional amendment. In July, 1803, he proposed two drafts of a proposed amendment, which he thought ought to be submitted to the people of the United States to enable them to ratify the terms of the treaty. The first of these, which is dated July, 1803, is printed in the margin.[1]

The second and revised amendment was as follows:

"Louisiana, as ceded by France to the United States, is made a part of the United States. Its white inhabitants shall be citizens, and stand, as to their rights and obligations, on the same footing with other citizens of the United States in analogous situations. Save only that, as to the portion thereof lying north of the latitude of the mouth of Arcana River, no new State shall be established nor

[1] First draft of Mr. Jefferson's proposed amendment to the Constitution: "The province of Louisiana is incorporated with the United States and made part thereof. The rights of occupancy in the soil and of self-government are confirmed to Indian inhabitants as they now exist." It then proceeded with other provisions relative to Indian rights and possessions and exchange of lands, and forbidding Congress to dispose of the lands otherwise than is therein provided without further amendment to the Constitution. This draft closes thus: "Except as to that portion thereof which lies south of the latitude of 31°, which, whenever they deem expedient, they may enact into a territorial government, either separate or as making part with one on the eastern side of the river, vesting the inhabitants thereof with all rights possessed by other territorial citizens of the United States." Writings of Jefferson, edited by Ford, vol. 8, p. 241.

any grants of land made therein other than to Indians in exchange for equivalent portions of lands occupied by them until an amendment of the Constitution shall be made for those purposes.

"Florida, also, whensoever it may be rightfully obtained, shall become a part of the United States. Its white inhabitants shall thereupon become citizens, and shall stand, as to their rights and obligations, on the same footing with other citizens of the United States in analogous situations." Ford's Writings of Jefferson, vol. 8, p. 241.

It is strenuously insisted that Mr. Jefferson's conviction on the subject of the repugnancy of the treaty to the Constitution was based alone upon the fact that he thought the treaty exceeded the limits of the Constitution, because he deemed that it provided for the admission, according to the Constitution, of the acquired territory as a new State or States into the Union, and hence, for the purpose of conferring this power, he drafted the amendment. The contention is refuted by two considerations: The first, because the two forms of amendment which Mr. Jefferson prepared did not purport to confer any power upon Congress to admit new States; and, second, they absolutely forbade Congress from admitting a new State out of a described part of the territory without a further amendment to the Constitution. It cannot be conceived that Mr. Jefferson would have drafted an amendment to cure a defect which he thought existed, and yet say nothing in the amendment on the subject of such defect. And, moreover, it cannot be conceived that he drafted an amendment to confer a power he supposed to be wanting under the Constitution, and thus ratify the treaty, and yet in the very amendment withhold in express terms, as to a part of the ceded territory, the authority which it was the purpose of the amendment to confer.

I excerpt in the margin [1] two letters from Mr. Jefferson, one written

[1] Letter to William Dunbar of July 7, 1803:

"Before you receive this you will have heard through the channel of the public papers of the cession of Louisiana by France to the United States. The terms as stated in the National Intelligencer are accurate. That the treaty may be ratified in time, I have found it necessary to convene Congress on the 17th of October, and it is very important for the happiness of the country that they should possess all information which can be obtained respecting it, that they make the best arrangements practicable for its good government. It is most necessary because they will be obliged to ask from the people an amendment of the Constitution authorizing their receiving the province into the Union and providing for its government, and limitations of power which shall be given by that amendment will be unalterable but by the same authority." Jefferson's Writings, vol. 8, p. 254.

Letter to Wilson Cary Nicholas of September 7, 1803:

"I am aware of the force of the observations you make on the power given by the Constitution to Congress to admit new Ststes into the Union without restraining the subject to the territory then constituting the United States. But when I consider that the limits of the United States are precisely fixed by the treaty of 1783, that the Constitution expressly declares itself to be made for the United States, I cannot help believing that the intention was to permit Congress to admit into the Union new States which should be formed out of the territory for which and under whose author-

under date of July 7, 1803, to William Dunbar, and the other dated September 7, 1803, to Wilson Cary Nicholas, which show clearly the difficulties which were in the mind of Mr. Jefferson, and which remove all doubt concerning the meaning of the amendment which he wrote and the adoption of which he deemed necessary to cure any supposed want of power concerning the treaty would be provided for.

These letters show that Mr. Jefferson bore in mind the fact that the Constitution in express terms delegated to Congress the power to admit new States, and therefore no further authority on this subject was required. But he thought this power in Congress was confined to the area embraced within the limits of the United States, as existing at the adoption of the Constitution. To fulfil the stipulations of the treaty so as to cause the ceded territory to become a part of the United States, Mr. Jefferson deemed an amendment to the Constitution to be essential. For this reason the amendment which he formulated declared that the territory ceded was to be "*a part of the United States,* and its white inhabitants shall be citizens, and stand, as to their rights and obligations, on the same footing with other citizens of the United States *in analogous situations.*" What these words meant is not open to doubt when it is observed that they were but the paraphrase of the following words, which were contained in the first proposed amendment which Mr. Jefferson wrote: "Vesting the inhabitants thereof with all rights possessed *by other territorial citizens of the United States,*" — which clearly show that it was the want of power to incorporate the ceded country into the United States as a territory which was in Mr. Jefferson's mind, and to accomplish which result he thought an amendment to the Constitution was required. This provision of the amendment applied to all of the territory ceded, and therefore brought it all into the United States, and hence placed it in a position where the power of Congress to admit new States would have attached to it. As Mr. Jefferson deemed that every requirement of the treaty would be fulfilled by incorporation, and that it would be unwise to form a new State out of the upper part of the new territory, after thus providing for the complete execution of the treaty by incorporation of all the territory into the United States, he inserted a provision *forbidding Congress from admitting a new State out of a part of the territory.*

With the debates which took place on the subject of the treaty I need not particularly concern myself. Some shared Mr. Jefferson's doubts as to the right of the treaty-making power to incorporate the

ity alone they were then acting. I do not believe it was meant that they might receive England, Ireland, Holland, etc., into it, which would be the case under your construction. When an instrument admits two constructions, the one safe, the other dangerous, the one precise, the other indefinite, I prefer that which is safe and precise. I had rather ask an enlargement of power from the nation where it is found necessary, than to assume it by a construction which would make our powers boundless." Writings of Jefferson, vol. 8, p. 247.

territory into the United States without an amendment of the Constitution; others deemed that the provision of the treaty was but a promise that Congress would ultimately incorporate as a territory, and, until by the action of Congress this latter result was brought about, full power of legislation to govern as deemed best was vested in Congress. This latter view prevailed. Mr. Jefferson's proposed amendment to the Constitution, therefore, was never adopted by Congress, and hence was never submitted to the people.

An act was approved on October 31, 1803 (2 Stat. 245), "to enable the President of the United States to take possession of the territories ceded by France to the United States by the treaty concluded at Paris on the 30th of April last, and for the temporary government thereof." The provisions of this act were absolutely incompatible with the conception that the territory had been incorporated into the United States by virtue of the cession. On November 10, 1803 (2 Stat. 245 ), an act was passed providing for the issue of stock to raise the funds to pay for the territory. On February 24, 1804 (2 Stat. 251), an act was approved which expressly extended certain revenue and other laws over the ceded country. On March 26, 1804 (2 Stat. 283), an act was passed dividing the "Province of Louisiana" into Orleans Territory on the south and the District of Louisiana to the north. This act extended over the Territory of Orleans a large number of the general laws of the United States, and provided a form of government. For the purposes of government the District of Louisiana was attached to the Territory of Indiana, which had been carved out of the Northwest Territory. Although the area described as Orleans Territory was thus under the authority of a territorial government, and many laws of the United States had been extended by act of Congress to it, it was manifest that Mr. Jefferson thought that the requirement of the treaty that it should be incorporated into the United States had not been complied with.

In a letter written to Mr. Madison on July 14, 1804, Mr. Jefferson, speaking of the treaty of cession, said (Ford's Writings of Jefferson, vol. 8, p. 313):

"The inclosed reclamations of Girod & Chote against the claims of Bapstroop to a monopoly of the Indian commerce supposed to be under the protection of the third article of the Louisiana convention, as well as some other claims to abusive grants, will probably force us to meet that question. The article has been worded with remarkable caution on the part of our negotiators. It is that the inhabitants shall be admitted as soon as possible, according to the principles of our Constitution, to the enjoyment of all the rights of citizens, and, in the meantime, *en attendant*, shall be maintained in their liberty, property, and religion. That is, that they shall continue under the protection of the treaty until the principles of our Constitution can be extended to them, when the protection of the treaty is to cease, and that of our own principles to take its place. But as this could

not be done at once, it has been provided to be as soon as our rules will admit. Accordingly, Congress has begun by extending about twenty particular laws by their titles, to Louisiana. Among these is the act concerning intercourse with the Indians, which establishes a system of commerce with them admitting no monopoly. That class of rights, therefore, are now taken from under the treaty and placed under the principles of our laws. I imagine it will be necessary to express an opinion to Governor Claiborne on this subject, after you shall have made up one."

In another letter to Mr. Madison, under date of August 15, 1804, Mr. Jefferson said (*Ibid.* p. 315):

"I am so much impressed with the expediency of putting a termination to the right of France to patronize the rights of Louisiana, which will cease with their complete adoption as citizens of the United States, that I hope to see that take place on the meeting of Congress."

At the following session of Congress, on March 2, 1805 (2 Stat. 322, chap. 23), an act was approved, which, among other purposes, doubtless was intended to fulfil the hope expressed by Mr. Jefferson in the letter just quoted. That act, in the first section, provided that the inhabitants of the Territory of Orleans "*shall be entitled to and enjoy all the rights, privileges, and advantages secured by the said ordinance*" (that is, the ordinance of 1787) "*and now enjoyed by the people of the Mississippi Territory.*" As will be remembered, the ordinance of 1787 had been extended to that territory. 1 Stat. 550, chap. 28. Thus, strictly in accord with the thought embodied in the amendments contemplated by Mr. Jefferson, citizenship was conferred, and the Territory of Orleans was incorporated into the United States to fulfil the requirements of the treaty, by placing it exactly in the position which it would have occupied had it been within the boundaries of the United States as a territory at the time the Constitution was framed. It is pertinent to recall that the treaty contained stipulations giving certain preferences and commercial privileges for a stated period to the vessels of French and Spanish subjects, and that, even after the action of Congress above stated, this condition of the treaty continued to be enforced, thus demonstrating that even after the incorporation of the territory the express provisions conferring a temporary right which the treaty had stipulated for and which Congress had recognized were not destroyed, the effect being that incorporation as to such matter was for the time being in abeyance.

The upper part of the Province of Louisiana, designated by the act of March 26, 1804 (2 Stat. 283, chap. 38), as the District of Louisiana, and by the act of March 3, 1805 (2 Stat. 331, chap. 31), as the Territory of Louisiana, was created the Territory of Missouri on June 4, 1812. 2 Stat. 743, chap. 95. By this latter act, though the ordinance of 1787 was not in express terms extended over the territory — probably owing to the slavery agitation — the inhabitants of the terri-

tory were accorded substantially all the rights of the inhabitants of the Northwest Territory. Citizenship was in effect recognized in the ninth section, while the fourteenth section contained an elaborate declaration of the rights secured to the people of the territory.

Pausing to analyze the practical construction which resulted from the acquisition of the vast domain covered by the Louisiana purchase, it indubitably results, first, that it was conceded by every shade of opinion that the government of the United States had the undoubted right to acquire, hold, and govern the territory as a possession, and that incorporation into the United States could under no circumstances arise solely from a treaty of cession, even although it contained provisions for the accomplishment of such result; second, it was strenuously denied by many eminent men that, in acquiring territory, citizenship could be conferred upon the inhabitants within the acquired territory; in other words, that the territory could be incorporated into the United States without an amendment to the Constitution; and, third, that the opinion which prevailed was that, although the treaty might stipulate for incorporation and citizenship under the Constitution, such agreements by the treaty-making power were but promises depending for their fulfilment on the future action of Congress. In accordance with this view the territory acquired by the Louisiana purchase was governed as a mere dependency until, conformably to the suggestion of Mr. Jefferson, it was by the action of Congress incorporated as a Territory into the United States, and the same rights were conferred in the same mode by which other Territories had previously been incorporated, that is, by bestowing the privileges of citizenship and the rights and immunities which pertained to the Northwest Territory.

Florida was ceded by treaty signed on February 2, 1819. 8 Stat. 252. While drafted in accordance with the precedent afforded by the treaty ceding Louisiana, the Florida treaty was slightly modified in its phraseology, probably to meet the view that under the Constitution Congress had the right to determine the time when incorporation was to arise. Acting under the precedent afforded by the Louisiana case, Congress adopted a plan of government which was wholly inconsistent with the theory that the territory had been incorporated. General Jackson was appointed governor under this act, and exercised a degree of authority entirely in conflict with the conception that the territory was a part of the United States, in the sense of incorporation, and that those provisions of the Constitution which would have been applicable under that hypothesis were then in force. It will serve no useful purpose to go through the gradations of legislation adopted as to Florida. Suffice it to say that in 1822 (3 Stat. 654, chap. 13), an act was passed as in the case of Missouri, and presumably for the same reason, which, whilst not referring to the Northwest Territory ordinance, *in effect endowed the inhabitants of that territory with the rights granted by such ordinance.*

This treaty also, it is to be remarked, contained discriminatory commercial provisions incompatible with the conception of immediate incorporation arising from the treaty, and they were enforced by the executive officers of the government.

The intensity of the political differences which existed at the outbreak of hostilities with Mexico and at the termination of the war with that country, and the subject around which such conflicts of opinion centered, probably explains why the treaty of peace with Mexico departed from the form adopted in the previous treaties concerning Florida and Louisiana. That treaty, instead of expressing a cession in the form previously adopted, whether intentionally or not I am unable, of course, to say, resorted to the expedient suggested by Attorney General Lincoln to President Jefferson, and accomplished the cession *by changing the boundaries of the two countries;* in other words, *by bringing the acquired territory within the described boundaries of the United States.* The treaty, besides, contained a stipulation for rights of citizenship; in other words, a provision equivalent in terms to those used in the previous treaties to which I have referred. The controversy which was then flagrant on the subject of slavery prevented the passage of a bill giving California a territorial form of government, and California, after considerable delay, was therefore directly admitted into the Union as a State. After the ratification of the treaty various laws were enacted by Congress, which in effect treated the territory as acquired by the United States; and the executive officers of the government, conceiving that these acts were an implied or express ratification of the provisions of the treaty by Congress, acted upon the assumption that the provisions of the treaty were thus made operative, and hence incorporation had thus become efficacious.

Ascertaining the general rule from the provisions of this latter treaty and the practical execution which it received, it will be seen that the precedents established in the cases of Louisiana and Florida were departed from to a certain extent; that is, the rule was considered to be that where the treaty, in express terms, brought the territory within the boundaries of the United States and provided for incorporation, and the treaty was expressly or impliedly recognized by Congress, the provisions of the treaty ought to be given immediate effect. But this did not conflict with the general principles of the law of nations which I have at the outset stated, but enforced it, since the action taken assumed, not that incorporation was brought about by the treaty-making power wholly without the consent of Congress, but only that, as the treaty provided for incorporation in express terms, and Congress had acted without repudiating it, its provisions should be at once enforced.

Without referring in detail to the acquisition from Russia of Alaska, it suffices to say that that treaty also contained provisions for incorporation, and was acted upon exactly in accord with the

practical construction applied in the case of the acquisitions from Mexico, as just stated. However, the treaty ceding Alaska contained an express provision excluding from citizenship the uncivilized native tribes, and it has been nowhere contended that this condition of exclusion was inoperative because of the want of power under the Constitution in the treaty-making authority to so provide, which must be the case if the limitation on the treaty-making power, which is here asserted, be well founded. The treaty concerning Alaska, therefore, adds cogency to the conception established by every act of the government from the foundation — that the condition of a treaty, when expressly or impliedly ratified by Congress, becomes the measure by which the rights arising from the treaty are to be adjusted.

The demonstration which it seems to me is afforded by the review which has preceded is, besides, sustained by various other acts of the government which to me are wholly inexplicable except upon the theory that it was admitted that the government of the United States had the power to acquire and hold territory without immediately incorporating it. Take, for instance, the simultaneous acquisition and admission of Texas, which was admitted into the Union as a State by joint resolution of Congress, instead of by treaty. To what grant of power under the Constitution can this action be referred, unless it be admitted that Congress is vested with the right to determine when incorporation arises? It cannot be traced to the authority conferred on Congress to admit new States, for to adopt that theory would be to presuppose that this power gave the prerogative of conferring statehood on wholly foreign territory. But this I have incidentally shown is a mistaken conception. Hence, it must be that the action of Congress at one and the same time fulfilled the function of incorporation; and, this being so, the privilege of statehood was added. But I shall not prolong this opinion by occupying time in referring to the many other acts of the government which further refute the correctness of the propositions which are here insisted on and which I have previously shown to be without merit. In concluding my appreciation of the history of the government, attention is called to the Thirteenth Amendment to the Constitution, which to my mind seems to be conclusive. The first section of the amendment, the italics being mine, reads as follows: "Sec. 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, *or any place subject to their jurisdiction.*" Obviously this provision recognized that there may be places subject to the jurisdiction of the United States, but which are not incorporated into it, and hence are not within the United States in the completest sense of those words.

Let me now proceed to show that the decisions of this court, without a single exception, are absolutely in accord with the true rule as

evolved from a correct construction of the Constitution as a matter of first impression, and as shown by the history of the government which has been previously epitomized. As it is appropriate here, I repeat the quotation which has heretofore been made from the opinion, delivered by Mr. Chief Justice Marshall, in American Ins. Co. *v.* Canter, 1 Pet. 511 [**827**] where, considering the Florida treaty, the court said (p. 542):

"The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession or on such as its new master shall impose."

In Fleming *v.* Page the court, speaking through Mr. Chief Justice Taney, discussing the acts of the military forces of the United States while holding possession of Mexican territory, said (9 How. 614):

"The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace in order to idemnify its citizens for the injuries they have suffered, or to reimburse the government for the expenses of the war. But this can be done only by the treaty-making power or the legislative authority."

In Cross *v.* Harrison, 16 How. 164, the question for decision, as I have previously observed, was as to the legality of certain duties collected both before and after the ratification of the treaty of peace, on foreign merchandise imported into California. Part of the duties collected were assessed upon importations made by local officials before notice had been received of the ratification of the treaty of peace, and when duties were laid under a tariff which had been promulgated by the President. Other duties were imposed subsequent to the receipt of notification of the ratification, and these latter duties were laid according to the tariff as provided in the laws of the United States. All the exactions were upheld. The court decided that, prior to and up to the receipt of notice of the ratification of the treaty, the local government lawfully imposed the tariff then in force in California, although it differed from that provided by Congress, and that subsequent to the receipt of notice of the ratification of the treaty the duty prescribed by the act of Congress, which the President had ordered the local officials to enforce, could be lawfully collected. The opinion undoubtedly expressed the thought that by the ratification of the treaty in question, which, as I have shown, not only included the ceded territory within the boundaries of the United States, but also expressly provided for incorporation, the territory had become a part of the United States, and the body of the opinion quoted the letter of the Secretary of the Treasury, which referred to the enactment of laws of Congress by which the treaty had been

impliedly ratified. The decision of the court as to duties imposed subsequent to the receipt of notice of the ratification of the treaty of peace undoubtedly took the fact I have just stated into view, and, in addition, unmistakably proceeded upon the nature of the rights which the treaty conferred. No comment can obscure or do away with the patent fact, namely, that it was unequivocally decided that if different provisions had been found in the treaty a contrary result would have followed. Thus, speaking through Mr. Justice Wayne, the court said (16 How. 197):

"By the ratification of the treaty California became a part of the United States. And, *as there is nothing differently stipulated in the treaty with respect to commerce*, it became instantly bound and privileged by the laws which Congress had passed to raise a revenue from duties on imports and tonnage."

It is, then, as I think, indubitably settled by the principles of the law of nations, by the nature of the government created under the Constitution, by the express and implied powers conferred upon that government by the Constitution, by the mode in which those powers have been executed from the beginning, and by an unbroken line of decisions of this court, first announced by Marshall and followed and lucidly expounded by Taney, that the treaty-making power cannot incorporate territory into the United States without the express or implied assent of Congress, that it may insert in a treaty conditions against immediate incorporation, and that on the other hand, when it has expressed in the treaty the conditions favorable to incorporation they will, if the treaty be not repudiated by Congress, have the force of the law of the land, and therefore by the fulfilment of such conditions cause incorporation to result. It must follow, therefore, that where a treaty contains no conditions for incorporation, and, above all, where it not only has no such conditions, but expressly provides to the contrary, incorporation does not arise until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family.

Does, then, the treaty in question contain a provision for incorporation, or does it, on the contrary, stipulate that incorporation shall not take place from the mere effect of the treaty and until Congress has so determined? — is then the only question remaining for consideration.

The provisions of the treaty with respect to the status of Porto Rico and its inhabitants are as follows:

"ARTICLE II.

"Spain cedes to the United States the Island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam, in the Marianas or Ladrones."

"ARTICLE IX.

"Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce, and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain in the territory they may preserve their allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.

"The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."

"ARTICLE X.

"The inhabitants of the territories over which Spain relinquishes or cedes her sovereignty shall be secured in the free exercise of their religion."

It is to me obvious that the above-quoted provisions of the treaty do not stipulate for incorporation, but, on the contrary, expressly provide that the "civil rights and political status of the native inhabitants of the territories hereby ceded" shall be determined by Congress. When the rights to which this careful provision refers are put in juxtaposition with those which have been deemed essential from the foundation of the government to bring about incorporation, all of which have been previously referred to, I cannot doubt that the express purpose of the treaty was not only to leave the status of the territory to be determined by Cougress, but to prevent the treaty from operating to the contrary. Of course, it is evident that the express or implied acquiescence by Congress in a treaty so framed cannot import that a result was brought about which the treaty itself — giving effect to its provisions — could not produce. And, in addition, the provisions of the act by which the duty here in question was imposed, taken as a whole, seem to me plainly to manifest the intention of Congress that, for the present at least, Porto Rico is not to be incorporated into the United States.

The fact that the act directs the officers to swear to support the Constitution does not militate against this view, for, as I have

conceded, whether the island be incorporated or not, the applicable provisions of the Constitution are there in force. A further analysis of the provisions of the act seems to me not to be required in view of the fact that as the act was reported from the committee it contained a provision conferring citizenship upon the inhabitants of Porto Rico, and this was stricken out in the Senate. The argument, therefore, can only be that rights were conferred, which, after consideration, it was determined should not be granted. Moreover, I fail to see how it is possible, on the one hand, to declare that Congress in passing the act had exceeded its powers by treating Porto Rico as not incorporated into the United States, and at the same time, it be said that the provisions of the act itself amount to an incorporation of Porto Rico into the United States, although the treaty had not previously done so. It in reason cannot be that the act is void because it seeks to keep the island disincorporated, and, at the same time, that material provisions are not to be enforced because the act does incorporate. Two irreconcilable views of that act cannot be taken at the same time, the consequence being to cause it to be unconstitutional.

In what has preceded I have in effect considered every substantial proposition, and have either conceded or reviewed every authority referred to as establishing that immediate incorporation resulted from the treaty of cession which is under consideration. Indeed, the whole argument in favor of the view that immediate incorporation followed upon the ratification of the treaty in its last analysis necessarily comes to this: Since it has been decided that incorporation flows from a treaty which provides for that result, when its provisions have been expressly or impliedly approved by Congress, it must follow that the same effect flows from a treaty which expressly stipulates to the contrary, even although the condition to that end has been approved by Congress. That is to say, the argument is this: Because a provision for incorporation when ratified incorporates, therefore a provision against incorporation must also produce the very consequence which it expressly provides against.

The result of what has been said is that whilst in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession. As a necessary consequence, the impost in question assessed on merchandise coming from Porto Rico into the United States after the cession was within the power of Congress, and that body was not, moreover, as to such impost, controlled by the clause requiring that imposts should be uniform throughout the United States; in other words the provision of the Constitution just referred to was not applicable to Congress in legislating for Porto Rico.

Incidentally I have heretofore pointed out that the arguments of expediency pressed with so much earnestness and ability concern the legislative, and not the judicial, department of the government. But it may be observed that, even if the disastrous consequences which are foreshadowed as arising from conceding that the government of the United States may hold property without incorporation were to tempt me to depart from what seems to me to be the plain line of judicial duty, reason admonishes me that so doing would not serve to prevent the grave evils which it is insisted must come, but, on the contrary, would only render them more dangerous. This must be the result, since, as already said, it seems to me it is not open to serious dispute that the military arm of the government of the United States may hold and occupy conquered territory without incorporation for such length of time as may seem appropriate to Congress in the exercise of its discretion. The denial of the right of the civil power to do so would not, therefore, prevent the holding of territory by the United States if it was deemed best by the political department of the government, but would simply necessitate that it should be exercised by the military instead of by the civic power.

And to me it further seems apparent that another and more disastrous result than that just stated would follow as a consequence of an attempt to cause judicial judgment to invade the domain of legislative discretion. Quite recently one of the stipulations contained in the treaty with Spain which is now under consideration came under review by this court. By the provision in question Spain relinquished "all claim of sovereignty over and title to Cuba." It was further provided in the treaty as follows:

"And as the island is upon the evacuation by Spain to be occupied by the United States, the United States, will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, and for the protection of life and property."

It cannot, it is submitted, be questioned that, under this provision of the treaty, as long as the occupation of the United States lasts, the benign sovereignty of the United States extends over and dominates the Island of Cuba. Likewise, it is not, it seems to me, questionable that the period when that sovereignty is to cease is to be determined by the legislative department of the government of the United States in the exercise of the great duties imposed upon it, and with the sense of the responsibility which it owes to the people of the United States, and the high respect which it of course feels for all the moral obligations by which the government of the United States may, either expressly or impliedly, be bound. Considering the provisions of this treaty, and reviewing the pledges of this government extraneous to that instrument, by which the sovereignty of Cuba is to be held by the United States for the benefit of the people of Cuba and for their account, to be relinquished to them when the

conditions justify its accomplishment, this court unanimously held in Neely *v.* Henkel, 180 U. S. 109, that Cuba was not incorporated into the United States, and was a foreign country. It follows from this decision that it is lawful for the United States to take possession of and hold in the exercise of its sovereign power a particular territory, without incorporating it into the United States, if there be obligations of honor and good faith which, although not expressed in the treaty, nevertheless sacredly bind the United States to terminate the dominion and control when, in its political discretion, the situation is ripe to enable it to do so. Conceding, then, for the purpose of the argument, it to be true that it would be a violation of duty under the Constitution for the legislative department, in the exercise of its discretion, to accept a cession of and permanently hold territory which is not intended to be incorporated, the presumption necessarily must be that that department, which within its lawful sphere is but the expression of the political conscience of the people of the United States, will be faithful to its duty under the Constitution, and therefore, when the unfitness of particular territory for incorporation is demonstrated, the occupation will terminate. I cannot conceive how it can be held that pledges made to an alien people can be treated as more sacred than is that great pledge given by every member of every department of the government of the United States to support and defend the Constitution.

But if it can be supposed — which, of course, I do not think to be conceivable — that the judiciary would be authorized to draw to itself by an act of usurpation purely political functions upon the theory that if such wrong is not committed a greater harm will arise, because the other departments of the government will forget their duty to the Constitution and wantonly transcend its limitations, I am further admonished that any judicial action in this case which would be predicated upon such an unwarranted conception would be absolutely unavailing. It cannot be denied that under the rule clearly settled in Neely *v.* Henkel, 180 U. S. 109, *supra*, the sovereignty of the United States may be extended over foreign territory to remain paramount until, in the discretion of the political department of the government of the United States, it be relinquished. This method, then, of dealing with foreign territory, would in any event be available. Thus, the enthralling of the treaty-making power, which would result from holding that no territory could be acquired by treaty of cession without immediate incorporation, would only result in compelling a resort to the subterfuge of relinquishment of sovereignty, and thus indirection would take the place of directness of action — a course which would be incompatible with the dignity and honor of the government.

I am authorized to say that MR. JUSTICE SHIRAS and MR. JUSTICE MCKENNA concur in this opinion.

MR. JUSTICE GRAY, concurring:

Concurring in the judgment of affirmance in this case, and in substance agreeing with the opinion of MR. JUSTICE WHITE, I will sum up the reasons for my concurrence in a few propositions which may also indicate my position in other cases now standing for judgment.

The cases now before the court do not touch the authority of the United States over the Territories in the strict and technical sense, being those which lie within the United States, as bounded by the Atlantic and Pacific Oceans, the Dominion of Canada and the Republic of Mexico, and the Territories of Alaska and Hawaii; but they relate to territory in the broader sense, acquired by the United States by war with a foreign State.

As Chief Justice Marshall said: "The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty. The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose." American Ins. Co. *v.* Canter (1828), 1 Pet. 511, 542 [**827**].

The civil government of the United States cannot extend immediately, and of its own force, over territory acquired by war. Such territory must necessarily, in the first instance, be governed by the military power under the control of the President as Commander in Chief. Civil government cannot take effect at once, as soon as possession is acquired under military authority, or even as soon as that possession is confirmed by treaty. It can only be put in operation by the action of the appropriate political department of the government, at such time and in such degree as that department may determine. There must, of necessity, be a transition period.

In a conquered territory, civil government must take effect either by the action of the treaty-making power, or by that of the Congress of the United States. The office of a treaty of cession ordinarily is to put an end to all authority of the foreign government over the territory, and to subject the territory to the disposition of the government of the United States.

The government and disposition of territory so acquired belong to the government of the United States, consisting of the President, the Senate, elected by the States, and the House of Representatives, chosen by and immediately representing the people of the United States. Treaties by which territory is acquired from a foreign state usually recognize this.

It is clearly recognized in the recent treaty with Spain, especially

in the ninth article, by which "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."

By the fourth and thirteenth articles of the treaty, the United States agree that for ten years Spanish ships and merchandise shall be admitted to the ports of the Philippine Islands on the same terms as ships and merchandise of the United States, and Spanish scientific, literary, and artistic works not subversive of public order shall continue to be admitted free of duty into all the ceded territories. Neither of these provisions could be carried out if the Constitution required the customs regulations of the United States to apply in those territories.

In the absence of congressional legislation, the regulation of the revenue of the conquered territory, even after the treaty of session, remains with the executive and military authority.

So long as Congress has not incorporated the territory into the United States, neither military occupation nor cession by treaty makes the conquered territory domestic territory, in the sense of the revenue laws; but those laws concerning "foreign countries" remain applicable to the conquered territory until changed by Congress. Such was the unanimous opinion of this court, as declared by Chief Justice Taney in Fleming *v.* Page, 9 How. 603, 617.

If Congress is not ready to construct a complete government for the conquered territory, it may establish a temporary government, which is not subject to all the restrictions of the Constitution.

Such was the effect of the act of Congress of April 12, 1900, chap. 191, entitled "An Act Temporarily to Provide Revenues and a Civil Government for Porto Rico, and for Other Purposes." By the third section of that act, it was expressly declared that the duties thereby established on merchandise and articles going into Porto Rico from the United States, or coming into the United States from Porto Rico, should cease in any event on March 1, 1902, and sooner if the legislative assembly of Porto Rico should enact and put into operation a system of local taxation to meet the necessities of the government established by that act.

The system of duties temporarily established by that act during the transition period was within the authority of Congress under the Constitution of the United States.

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE HARLAN, MR. JUSTICE BREWER, and MR. JUSTICE PECKHAM, dissenting:

This is an action brought to recover moneys exacted by the collector of customs at the port of New York as import duties on two shipments of fruit from ports in the Island of Porto Rico to the port of New York in November, 1900.

The treaty ceding Porto Rico to the United States was ratified by

the Senate February 6, 1899; Congress passed an act to carry out its obligations March 3, 1899; and the ratifications were exchanged, and the treaty proclaimed April 11, 1899. Then followed the act approved April 12, 1900. 31 Stat. 77, chap. 191.

Mr. Justice Harlan, Mr. Justice Brewer, Mr. Justice Peckham, and myself are unable to concur in the opinions and judgment of the court, in this case. The majority widely differ in the reasoning by which the conclusion is reached, although there seems to be concurrence in the view that Porto Rico belongs to the United States, but nevertheless, and notwithstanding the act of Congress, is not a part of the United States subject to the provisions of the Constitution in respect of the levy of taxes, duties, imposts, and excises.

The inquiry is whether the act of April 12, 1900, so far as it requires the payment of import duties on merchandise brought from a port of Porto Rico as a condition of entry into other ports of the United States, is consistent with the Federal Constitution.

The act creates a civil government for Porto Rico, with a governor, secretary, attorney general, and other officers, appointed by the President, by and with the advice and consent of the Senate, who, together with five other persons, likewise so appointed and confirmed, are constituted an executive council; local legislative powers are vested in a legislative assembly consisting of the executive council and a house of delegates to be erected; courts are provided for, and, among other things, Porto Rico is constituted a judicial district, with a district judge, attorney, and marshal, to be appointed by the President for the term of four years. The District Court is to be called the District Court of the United States for Porto Rico, and to possess, in addition to the ordinary jurisdiction of District Courts of the United States, jurisdiction of all cases cognizant in the Circuit Courts of the United States. The act also provides that "Writs of error and appeals from the final decisions of the Supreme Court of Porto Rico and the District Court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the supreme courts of the Territories of the United States; and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an act of Congress is brought in question and the right claimed thereunder is denied."

It was also provided that the inhabitants continuing to reside in Porto Rico, who were Spanish subjects on April 11, 1899, and their children born subsequent thereto (except such as should elect to preserve their allegiance to the Crown of Spain), together with citizens of the United States residing in Porto Rico, should "constitute a body politic under the name of The People of Porto Rico, with governmental powers as hereinafter conferred, and with power to sue and be sued as such."

All officials authorized by the act are required to, "before entering

upon the duties of their respective offices, take an oath to support the Constitution of the United States and the laws of Porto Rico."

The second, third, fourth, fifth and thirty-eighth sections of the act are printed in the margin.[1]

[1] Sec. 2 That on and after the passage of this act the same tariffs, customs, and duties shall be levied, collected, and paid upon all articles imported into Porto Rico from ports other than those of the United States which are required by law to be collected upon articles imported into the United States from foreign countries: *Provided,* That on all coffee in the bean or ground imported into Porto Rico there shall be levied and collected a duty of five cents per pound, any law or part of law to the contrary notwithstanding: *And provided further,* That all Spanish scientific, literary, and artistic works, not subversive of public order in Porto Rico, shall be admitted free of duty into Porto Rico, for a period of ten years, reckoning from the eleventh day of April, eighteen hundred and ninety-nine, as provided in said treaty of peace between the United States and Spain: *And provided further,* That all books and pamphlets printed in the English language shall be admitted into Porto Rico free of duty when imported from the United States.

Sec. 3. That on and after the passage of this act all merchandise coming into the United States from Porto Rico and coming into Porto Rico from the United States shall be entered at the several ports of entry upon payment of fifteen per centum of the duties which are required to be levied, collected, and paid upon like articles of merchandise imported from foreign countries; and in addition thereto, upon articles of merchandise of Porto Rican manufacture coming into the United States and withdrawn for consumption or sale, upon payment of a tax equal to the internal revenue tax imposed in the United States upon the like articles of merchandise of domestic manufacture; such tax to be paid by internal revenue stamp or stamps to be purchased and provided by the Commissioner of Internal Revenue, and to be procured from the collector of internal revenue at or most convenient to the port of entry of said merchandise in the United States, and to be affixed under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and on all articles of merchandise of United States manufacture coming into Porto Rico, in addition to the duty above provided, upon payment of a tax equal in rate and amount to the internal revenue tax imposed in Porto Rico upon the like articles of Porto Rican manufacture: *Provided,* That on and after the date when this act shall take effect all merchandise and articles, except coffee, not dutiable under the tariff laws of the United States, and all merchandise and articles entered in Porto Rico free of duty under orders heretofore made by the Secretary of War, shall be admitted into the several ports thereof, when imported from the United States, free of duty, all laws or parts of laws to the contrary notwithstanding; and whenever the legislative assembly of Porto Rico shall have enacted and put into operation a system of local taxation to meet the necessities of the government of Porto Rico, by this act established, and shall by resolution duly passed so notify the President, he shall make proclamation thereof, and thereupon all tariff duties on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico shall cease, and from and after such date all such merchandise and articles shall be entered at the several ports of entry free of duty; and in no event shall any duties be collected after the first day of March, nineteen hundred and two, on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico.

Sec. 4. That the duties and taxes collected in Porto Rico in pursuance of this act, less the cost of collecting the same, and the gross amount of all collections of duties and taxes in the United States upon articles of merchandise coming from Porto Rico, shall not be covered into the general fund of the treasury, but shall be held as a separate fund, and shall be placed at the disposal of the President to be used for the government and benefit of Porto Rico until the government of Porto Rico herein pro-

It will be seen that duties are imposed upon "merchandise coming into Porto Rico from the United States;" "merchandise coming into the United States from Porto Rico;" taxes upon "articles of merchandise of Porto Rican manufacture coming into the United States and withdrawn from consumption or sale" "equal to the internal revenue tax imposed in the United States upon like articles of domestic manufacture;" and "on all articles of merchandise of United States manufacture coming into Porto Rico," "a tax equal in rate and amount to the internal revenue tax imposed in Porto Rico upon the like articles of Porto Rican manufacture."

And it is also provided that all duties collected in Porto Rico on imports from foreign countries and on "merchandise coming into Porto Rico from the United States," and "the gross amount of all collections of duties and taxes in the United States upon articles of merchandise coming from Porto Rico," shall be held as a separate fund and placed "at the disposal of the President to be used for the

vided for shall have been organized, when all moneys theretofore collected under the provisions hereof, then unexpended, shall be transferred to the local treasury of Porto Rico, and the Secretary of the Treasury shall designate the several ports and sub-ports of entry into Porto Rico, and shall make such rules and regulations and appoint such agents as may be necessary to collect the duties and taxes authorized to be levied, collected, and paid in Porto Rico by the provisions of this act, and he shall fix the compensation and provide for the payment thereof of all such officers, agents, and assistants as he may find it necessary to employ to carry out the provisions hereof: *Provided, however*, That as soon as a civil government for Porto Rico shall have been organized in accordance with the provisions of this act, and notice thereof shall have been given to the President, he shall make proclamation thereof, and thereafter all collections of duties and taxes in Porto Rico under the provisions of this act shall be paid into the treasury of Porto Rico, to be expended as required by law for the government and benefit thereof, instead of being paid into the treasury of the United States.

Sec. 5. That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported from Porto Rico, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to the duties imposed by this act, and to no other duty, upon the entry or the withdrawal thereof: *Provided*, That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse said duties shall be levied and collected upon the weight of such merchandise at the time of its entry.

. . . . . .

Sec. 38. That no export duties shall be levied or collected on exports from Porto Rico; but taxes and assessments on property, and license fees for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal governments, respectively, as may be provided and defined by the act of the legislative assembly; and where necessary to anticipate taxes and revenues, bonds and other obligations may be issued by Porto Rico or any municipal government therein as may be provided by law to provide for expenditures authorized by law, and to protect the public credit, and to reimburse the United States for any moneys which have been or may be expended out of the emergency fund of the War Department for the relief of the industrial conditions of Porto Rico caused by the hurricane of August eighth, eighteen hundred and ninety-nine: *Provided, however*, That no public indebtedness of Porto Rico or of any municipality thereof shall be authorized or allowed in excess of seven per centum of the aggregate tax valuation of its property.

government and benefit of Porto Rico" until the local government is organized, when "all collections of taxes and duties under this act shall be paid into the treasury of Porto Rico, instead of being paid into the treasury of the United States."

The first clause of section 8, Article I, of the Constitution provides:

"The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

Clauses four, five, and six of section nine are:

"No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

"No tax or duty shall be laid on articles exported from any State.

"No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another."

This act on its face does not comply with the rule of uniformity, and that fact is admitted.

The uniformity required by the Constitution is a geographical uniformity, and is only attained when the tax operates with the same force and effect in every place where the subject of it is found. Knowlton *v.* Moore, 178 U. S. 41; Head Money Cases, 112 U. S. 580, 594 [**252**]. But it was said that Congress, in attempting to levy these duties was not exercising power derived from the first clause of section 8, or restricted by it, because in dealing with the Territories Congress exercises unlimited powers of government, and, moreover, that these duties are merely local taxes.

This court, in 1820, when Marshall was chief justice, and Washington, William Johnson, Livingston, Todd, Duvall, and Story were his associates, took a different view of the power of Congress in the matter of laying and collecting taxes, duties, imposts, and excises in the Territories, and its ruling in Loughborough *v.* Blake, 5 Wheat. 317, has never been overruled.

It is said in one of the opinions of the majority that the chief justice "made certain observations which have occasioned some embarrassment in other cases." Manifestly this is so in this case, for it is necessary to overrule that decision in order to reach the result herein announced.

The question in Loughborough *v.* Blake was whether Congress had the right to impose a direct tax on the District of Columbia apart from the grant of exclusive legislation, which carried the power to levy local taxes. The court held that Congress had such power under the clause in question. The reasoning of Chief Justice Marshall was directed to show that the grant of the power to "lay and collect taxes, duties, imposts, and excises," because it was general and without limitation as to place, consequently extended "to all places over

which the government extends," and he declared that, if this could be doubted, the doubt was removed by the subsequent words, which modified the grant, "but all duties, imposts, and excises shall be uniform throughout the United States." He then said: "It will not be contended that the modification of the power extends to places to which the power itself does not extend. The power, then, to lay and collect duties, imposts, and excises may be exercised, and must be exercised, throughout the United States. Does this term designate the whole, or any portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of States and territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania; and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises should be observed in the one than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously coextensive with the power to lay and collect duties, imposts, and excises, and since the latter extends throughout the United States, it follows that the power to impose direct taxes also extends throughout the United States."

It is wholly inadmissible to reject the process of reasoning by which the chief justice reached and tested the soundness of his conclusion, as merely *obiter*.

Nor is there any imitation that the ruling turned on the theory that the Constitution irrevocably adhered to the soil of Maryland and Virginia, and therefore accompanied the parts which were ceded to form the District, or that "the tie" between those States and the Constitution "could not be dissolved without at least the consent of the Federal and state governments to a formal separation," and that this was not given by the cession and its acceptance in accordance with the constitutional provision itself, and hence that Congress was restricted in the exercise of its powers in the District, while not so in the territories.

So far from that, the Chief Justice held the territories as well as the District to be part of the United States for the purposes of national taxation, and repeated in effect what he had already said in M'Culloch *v.* Maryland, 4 Wheat. 408 [1]; "Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported."

Conceding that the power to tax for the purposes of territorial government is implied from the power to govern territory, whether the latter power is attributed to the power to acquire or the power to make needful rules and regulations, these particular duties are nevertheless not local in their nature, but are imposed as in the exercise of national powers. The levy is clearly a regulation of commerce, and

a regulation affecting the States and their people as well as this territory and its people. The power of Congress to act directly on the rights and interests of the people of the States can only exist if, and as, granted by the Constitution. And by the Constitution Congress is vested with power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The territories are indeed not mentioned by name, and yet commerce between territories and foreign nations is covered by the clause, which would seem to have been intended to embrace the entire internal as well as foreign commerce of the country.

It is evident that Congress cannot regulate commerce between a territory and the States and other territories in the exercise of the bare power to govern the particular territory, and as this act was framed to operate and does operate on the people of the States, the power to so legislate is apparently rested on the assumption that the right to regulate commerce between the States and territories comes within the commerce clause by necessary implication. Stoutenburgh *v.* Hennick, 129 U. S. 141.

Accordingly the act of Congress of August 8, 1890, entitled "An Act to Limit the Effect of the Regulations of Commerce between the Several States, and with Foreign Countries in Certain Cases," applied in terms to the territories as well as to the States. [26 Stat. 313, chap. 728.]

In any point of view, the imposition of duties on commerce operates to regulate commerce, and is not a matter of local legislation; and it follows that the levy of these duties was in the exercise of the national power to do so, and subject to the requirement of geographical uniformity.

The fact that the proceeds are devoted by the act to the use of the territory does not make national taxes local. Nobody disputes the source of the power to lay and collect duties geographically uniform, and apply the proceeds by a proper appropriation act to the relief of a particular territory, but the destination of the proceeds would not change the source of the power to lay and collect. And that suggestion is certainly not strengthened when based on the diversion of duties collected from all parts of the United States to a territorial treasury before reaching the Treasury of the United States. Clause 7 of sec. 9 of Article I provides that "no money shall be drawn from the treasury, but in consequence of appropriations made by law," and the proposition that this may be rendered inapplicable if the money is not permitted to be paid in so as to be susceptible of being drawn out is somewhat startling.

It is also urged that Chief Justice Marshall was entirely in fault because while the grant was general and without limitation as to place, the words, "throughout the United States," imposed a limitation as to place so far as the rule of uniformity was concerned, namely, a limitation to the States as such.

Undoubtedly the view of the Chief Justice was utterly inconsistent with that contention, and, in addition to what has been quoted, he further remarked: "If it be said that the principle of uniformity, established in the Constitution, secures the District from oppression in the imposition of indirect taxes, it is not less true that the principle of apportionment, also established in the Constitution, secures the District from any oppressive exercise of the power to lay and collect direct taxes." It must be borne in mind that the grant was of the absolute power of taxation for national purposes, wholly unlimited as to place, and subject to only one exception and two qualifications. The exception was that exports could not be taxed at all. The qualifications were that direct taxes must be imposed by the rule of apportionment, and direct taxes by the rule of uniformity. License Tax Cases, 5 Wall. 462. But as the power necessarily could be exercised throughout every part of the national domain, State, Territory, District, the exception and the qualifications attended its exercise. That is to say, the protection extended to the people of the States extended also to the people of the District and the Territories.

In Knowlton *v.* Moore, 178 U. S. 41, it is shown that the words, "throughout the United States," are but a qualification introduced for the purpose of rendering the uniformity prescribed, geographical, and not intrinsic, as would have resulted if they had not been used.

As the grant of the power to lay taxes and duties was unqualified as to place, and the words were added for the sole purpose of preventing the uniformity required from being intrinsic, the intention thereby to circumscribe the area within which the power could operate not only cannot be imputed, but the contrary presumption must prevail.

Taking the words in their natural meaning — in the sense in which they are frequently and commonly used — no reason is perceived for disagreeing with the Chief Justice in the view that they were used in this clause to designate the geographical unity known as "The United States," "our great republic, which is composed of States and territories."

Other parts of the Constitution furnish illustrations of the correctness of this view. Thus, the Constitution vests Congress with the power "to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcy throughout the United States."

This applies to the territories as well as the States, and has always been recognized in legislation as binding.

Aliens in the territories are made citizens of the United States, and bankrupts residing in the territories are discharged from debts owing citizens of the States, pursuant to uniform rules and laws enacted by Congress in the exercise of this power.

The Fourteenth Amendment provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside;" and this court naturally held, in the Slaughter-House

Cases, 16 Wall. 36 [**18**], that the United States included the District and the territories. Mr. Justice Miller observed: "It had been said by eminent judges that no man was a citizen of the United States, except as he was a citizen of one of the States composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens. Whether this proposition was sound or not had never been judicially decided." And he said the question was put at rest by the amendment, and the distinction between citizenship of the United States and citizenship of a State was clearly recognized and established. "Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union."

No person is eligible to the office of President unless he has "attained the age of thirty-five years, and been fourteen years a resident of the United States." Clause 5, sec. 1, Art. II.

Would a native-born citizen of Massachusetts be ineligible if he had taken up his residence and resided in one of the territories for so many years that he had not resided altogether fourteen years in the States? When voted for he must be a citizen of one of the States (clause 3, sec. 1, Art. II; Art. XII), but as to length of time must residence in the territories be counted against him?

The Fifteenth Amendment declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Where does that prohibition on the United States especially apply if not in the territories?

The Thirteenth Amendment says that neither slavery nor involuntary servitude "shall exist within the United States or any place subject to their jurisdiction." Clearly this prohibition would have operated in the territories if the concluding words had not been added. The history of the times shows that the addition was made in view of the then condition of the country — the amendment passed the House January 31, 1865 — and it is, moreover, otherwise applicable to the territories. Besides, generally speaking, when words are used simply out of abundant caution, the fact carries little weight.

Other illustrations might be adduced, but it is unnecessary to prolong this opinion by giving them.

I repeat that no satisfactory ground has been suggested for restricting the words "throughout the United States," as qualifying the power to impose duties, to the States, and that conclusion is the more to be avoided when we reflect that it rests, in the last analysis, on the assertion of the possession by Congress of unlimited power over the territories.

The government of the United States is the government ordained by the Constitution, and possesses the powers conferred by the Constitution. "This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" Marbury *v.* Madison, 1 Cranch, 137, 176 [**815**]. The opinion of the court, by Chief Justice Marshall, in that case, was delivered at the February term, 1803, and at the October term, 1805, the court, in Yick Wo *v.* Hopkins, 118 U. S. 356 [**917**], speaking through Mr. Justice Matthews, said: "When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power."

From Marbury *v.* Madison to the present day, no utterance of this court has intimated a doubt that in its operation on the people, by whom and for whom it was established, the national government is a government of enumerated powers, the exercise of which is restricted to the use of means appropriate and plainly adapted to constitutional ends, and which are "not prohibited, but consist with the letter and spirit of the Constitution."

The powers delegated by the people to their agents are not enlarged by the expansion of the domain within which they are exercised. When the restriction on the exercise of a particular power by a particular agent is ascertained, that is an end of the question.

To hold otherwise is to overthrow the basis of our constitutional law, and moreover, in effect, to reassert the proposition that the States, and not the people, created the government.

It is again to antagonize Chief Justice Marshall, when he said: "The government of the Union, then (whatever may be the influence of this fact on the case), is emphatically and truly a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them and for their benefit. This government is acknowledged by all to be one of enumerated powers." 4 Wheat. 404.

The prohibitory clauses of the Constitution are many, and they

have been repeatedly given effect by this court in respect of the Territories and the District of Columbia.

The underlying principle is indicated by Chief Justice Taney, in The Passenger Cases, 7 How. 283, 492 [**245**], where he maintained the right of the American citizen to free transit in these words: "Living, as we do, under a common government charged with the great concerns of the whole Union, every citizen of the United States, from the most remote States or territories, is entitled to free access, not only to the principal departments established at Washington, but also to its judicial tribunals and public offices in every State and territory of the Union. . . . For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

In Cross *v.* Harrison, 16 How. 164, 197, it was held that by the ratification of the treaty with Mexico "California became a part of the United States," and that "The right claimed to land foreign goods within the United States at any place out of a collection district, if allowed, would be a violation of that provision in the Constitution which enjoins that all duties, imposts, and excises shall be uniform throughout the United States."

In Dred Scott *v.* Sandford, 19 How. 393, the court was unanimous in holding that the power to legislate respecting a territory was limited by the restrictions of the Constitution, or, as Mr. Justice Curtis put it, by "the express prohibitions on Congress not to do certain things."

Mr. Justice McLean said: "No powers can be exercised which are prohibited by the Constitution, or which are contrary to its spirit."

Mr. Justice Campbell: "I look in vain, among the discussions of the time, for the assertion of a supreme sovereignty for Congress over the territory then belonging to the United States or that they might thereafter acquire. I seek in vain for an annunciation that a consolidated power had been inaugurated, whose subject comprehended an empire, and which had no restriction but the discretion of Congress."

Chief Justice Taney: "The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under territorial government, as well as that covered by States. It is a total absence of power everywhere within the dominion of the United States, and places the citizens of a territory, so far as these rights are concerned, on the same footing with citizens of the States, and guards them as firmly and plainly against any inroads which the

general government might attempt under the plea of implied or incidental powers."

Many of the later cases were brought from territories over which Congress had professed to "extend the Constitution," or from the District after similar provision, but the decisions did not rest upon the view that the restrictions on Congress were self-imposed, and might be withdrawn at the pleasure of that body.

Capital Traction Co. *v.* Hof, 174 U. S. 1 [**956**], is a fair illustration, for it was there ruled, citing Webster *v.* Reid, 11 How. 437, Callan *v.* Wilson, 127 U. S. 550 [**834**], Thompson *v.* Utah, 170 U. S. 343 [**831**], that "it is beyond doubt, at the present day, that the provisions of the Constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia."

No reference whatever was made to § 34 of the act of February 21, 1871 (16 Stat. 419, chap. 62), which, in providing for the election of a delegate for the District, closed with the words: "The person having the greatest number of legal votes shall be declared by the governor to be duly elected, and a certificate thereof shall be given accordingly; and the Constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said District of Columbia as elsewhere within the United States."

Nor did the court in Bauman *v.* Ross, 167 U. S. 548 [**1059**], attribute the application of the Fifth Amendment to the act of Congress, although it was cited to another point.

The truth is that, as Judge Edmunds wrote, "the instances in which Congress has declared, in statutes organizing territories, that the Constitution and laws should be in force there, are no evidence that they were not already there, for Congress and all legislative bodies have often made enactments that in effect merely declared existing law. In such cases they declare a pre-existing truth to ease the doubts of casuists." Cong. Rec. 56th Cong. 1st Sess., p. 3507.

In Callan *v.* Wilson, 127 U. S. 540 [**834**], which was a criminal prosecution in the District of Columbia, Mr. Justice Harlan, speaking for the court, said: "There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guaranties of life, liberty, and property — especially of the privilege of trial by jury in criminal cases." And further: "We cannot think that the people of this District have, in that regard, less rights than those accorded to the people of the territories of the United States."

In Thompson *v.* Utah, 170 U. S. 343 [**831**], it was held that a statute of the State of Utah providing for the trial of criminal cases other than capital, by a jury of eight, was invalid as applied on a trial for a crime committed before Utah was admitted; that it was

not "competent for the State of Utah, upon its admission into the Union, to do in respect of Thompson's crime what the United States could not have done while Utah was a Territory;" and that an act of Congress providing for a trial by a jury of eight persons in the Territory of Utah would have been in conflict with the Constitution.

Article 6 of the Constitution ordains: "This Constitution, and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

And, as Mr. Justice Curtis observed in United States *v.* Morris, 1 Curt. 23, 50, "nothing can be clearer than the intention to have the Constitution, laws, and treaties of the United States in equal force throughout every part of the territory of the United States, alike in all places, at all times."

But it is said that an opposite result will be reached if the opinion of Chief Justice Marshall in American Ins. Co. *v.* Canter, 1 Pet. 511 [**827**], be read "in connection with Art. III, §§ 1 and 2 of the Constitution, vesting 'the judicial power of the United States' in 'one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior,'" etc. And it is argued: "As the only judicial power vested in Congress is to create courts whose judges shall hold their offices during good behavior, it necessarily follows that, if Congress authorizes the creation of courts and the appointment of judges for a limited time, it must act independently of the Constitution, and upon territory which is not part of the United States within the meaning of the Constitution."

And further, that if the territories "be a part of the United States, it is difficult to see how Congress could create courts in such territories, except under the judicial clause of the Constitution."

By the ninth clause of section 8 of Article I, Congress is vested with power "to constitute tribunals inferior to the Supreme Court," while by section 1 of Article III the power is granted to it to establish inferior courts in which the judicial power of the government treated of in that article is vested.

That power was to be exerted over the controversies therein named, and did not relate to the general administration of justice in the territories, which was committed to courts established as part of the territorial government.

What the Chief Justice said was (p. 546): "These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all

needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the territories of the United States."

The Chief Justice was dealing with the subject in view of the nature of the judicial department of the government and the distinction between Federal and state jurisdiction, and the conclusion was, to use the language of Mr. Justice Harlan in McAllister *v.* United States, 141 U. S. 174, "that courts in the territories, created under the plenary municipal authority that Congress possesses over the territories of the United States, are not courts of the United States created under the authority conferred by that article."

But it did not therefore follow that the territories were not parts of the United States, and that the power of Congress in general over them was unlimited; nor was there in any of the discussions on this subject the least intimation to that effect.

And this may justly be said of expressions in some other cases supposed to give color to this doctrine of absolute dominion in dealing with civil rights.

In Murphy *v.* Ramsey, 114 U. S. 15, Mr. Justice Matthews said: "The personal and civil rights of the inhabitants of the territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, state and national. Their political rights are franchises, which they hold as privileges in the legislative discretion of the Congress of the United States."

In the Mormon Church *v.* United States, 136 U. S. 1, 44 [**835**], Mr. Justice Bradley observed: "Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than by any express and direct application of its provisions."

That able judge was referring to the fact that the Constitution does not expressly declare that its prohibitions operate on the power to govern the territories, but, because of the implication that an express provision to that effect might be essential, three members of the court were constrained to dissent, regarding it, as was said, "of vital consequence that absolute power should never be conceded as belonging under our system of government to any one of its departments."

What was ruled in Murphy *v.* Ramsey is that in places over which Congress has exclusive local jurisdiction its power over the political status is plenary.

Much discussion was had at the bar in respect of the citizenship of

the inhabitants of Porto Rico, but we are not required to consider that subject at large in these cases. It will be time enough to seek a ford when, if ever, we are brought to the stream.

Yet although we are confined to the question of the validity of certain duties imposed after the organization of Porto Rico as a territory of the United States, a few observations and some references to adjudged cases may well enough be added in view of the line of argument pursued in the concurring opinion.

In American Ins. Co. *v.* Canter, 1 Pet. 511, 541 [**827**] — in which, by the way, the court did not accept the views of Mr. Justice Johnson in the circuit Court or of Mr. Webster in argument — Chief Justice Marshall said: "The course which the argument has taken will require that in deciding this question the court should take into view the relation in which Florida stands to the United States. The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or by treaty. The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the State. On the 2d of February, 1819, Spain ceded Florida to the United States. The sixth article of the treaty of cession contains the following provision: 'The inhabitants of the territories which his Catholic Majesty cedes to the United States by this treaty shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States.' This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition independent of stipulation. They do not, however, participate in political power; they do not share in the government till Florida shall become a State. In the meantime, Florida continues to be a territory of the United States; governed

by virtue of that clause in the Constitution which empowers Congress 'to make all needful rules and regulations respecting the territory or other property belonging to the United States.' Perhaps the power of governing a Territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned."

General Halleck (International Law, 1st ed. chap. 33, § 14), after quoting from Chief Justice Marshall, observed:

"This is now a well-settled rule of the law of nations, and is universally admitted. Its provisions are clear and simple and easily understood; but it is not so easy to distinguish between what are *political* and what are *municipal* laws, and to determine *when* and *how far* the constitution and laws of the conqueror change or replace those of the conquered. And in case the government of the new state is a constitutional government, of limited and divided powers, questions necessarily arise respecting the authority, which, in the absence of legislative action, can be exercised in the conquered territory after the cessation of war and the conclusion of a treaty of peace. The determination of these questions depends upon the institutions and laws of the new sovereign, which, though conformable to the general rule of the law of nations, affect the construction and application of that rule to particular cases."

In United States *v.* Percheman, 7 Pet. 51, 87, the Chief Justice said:

"The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? . . . The cession of a territory by its name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property."

Again, the court in Pollard *v.* Hagan, 3 How. 212, 225, said:

"Every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it."

And in Chicago, R. I. & P. R. Co. *v.* McGlinn, 114 U. S. 546: "It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until

abrogated or changed by the new government or sovereign. By the cession, public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power — and the latter is involved in the former — to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use, and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed."

When a cession of territory to the United States is completed by the ratification of a treaty, it was stated in Cross *v.* Harrison, 16 How. 164, 198, that the land ceded becomes a part of the United States, and that, as soon as it becomes so, the territory is subject to the acts which were in force to regulate foreign commerce with the United States, after those had ceased which had been instituted for its regulation as a belligerent right; and the latter ceased after the ratification of the treaty. This statement was made by the Justice delivering the opinion, as the result of the discussion and argument which he had already set forth. It was his summing up of what he supposed was decided on that subject in the case in which he was writing.

The new master was, in the instance of Porto Rico, the United States, a constitutional government with limited powers, and the terms which the Constitution itself imposed, or which might be imposed in accordance with the Constitution, were the terms on which the new master took possession.

The power of the United States to acquire territory by conquest, by treaty, or by discovery and occupation, is not disputed, nor is the proposition that in all international relations, interests, and responsibilities the United States is a separate, independent, and sovereign nation; but it does not derive its powers from international law, which, though a part of our municipal law, is not a part of the organic law of the land. The source of national power in this country is the Constitution of the United States; and the government, as to our internal affairs, possesses no inherent sovereign power not derived from that instrument, and inconsistent with its letter and spirit.

Doubtless the subjects of the former sovereign are brought by the

transfer under the protection of the acquiring power, and are so far forth impressed with its nationality, but it does not follow that they necessarily acquire the full status of citizens. The ninth article of the treaty ceding Porto Rico to the United States provided that Spanish subjects, natives of the peninsula, residing in the ceded territory, might remain or remove, and in case they remained might preserve their allegiance to the Crown of Spain by making a declaration of their decision to do so, "in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they reside."

The same article also contained this paragraph: "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress." This was nothing more than a declaration of the accepted principles of international law applicable to the status of the Spanish subjects and of the native inhabitants. It did not assume that Congress could deprive the inhabitants of ceded territory of rights to which they might be entitled. The grant by Spain could not enlarge the powers of Congress, nor did it purport to secure from the United States a guaranty of civil or political privileges.

Indeed, a treaty which undertook to take away what the Constitution secured, or to enlarge the Federal jurisdiction, would be simply void.

"It need hardly be said that a treaty cannot change the Constitution, or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government." The Cherokee Tobacco, 11 Wall. 616, 620.

So, Mr. Justice Field in Geofroy *v.* Riggs, 133 U. S. 258, 267 [**586***n*]: "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent."

And it certainly cannot be admitted that the power of Congress to lay and collect taxes and duties can be curtailed by an arrangement made with a foreign nation by the President and two thirds of a quorum of the Senate. See 2 Tucker on the Constitution, §§ 354, 355, 356.

In the language of Judge Cooley: "The Constitution itself never yields to treaty or enactment; it neither changes with time nor does it in theory bend to the force of circumstances. It may be amended according to its own permission; but while it stands it is 'a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all

circumstances.' Its principles cannot, therefore, be set aside in order to meet the supposed necessities of great crises. 'No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.'"

I am not intimating in the least degree that any reason exists for regarding this article to be unconstitutional, but even if it were, the fact of the cession is a fact accomplished, and this court is concerned only with the question of the power of the government in laying duties in respect of commerce with the territory so ceded.

In the concurring opinion of Mr. Justice White, we find certain important propositions conceded, some of which are denied or not admitted in the other. These are to the effect that "when an act of any department is challenged because not warranted by the Constitution, the existence of the authority is to be ascertained by determining whether the power has been conferred by the Constitution, either in express terms or by lawful implication;" that, as every function of the government is derived from the Constitution, "that instrument is everywhere and at all times potential in so far as its provisions are applicable;" that "wherever a power is given by the Constitution, and there is a limitation imposed on the authority, such restriction operates upon and confines every action on the subject within its constitutional limits;" that where conditions are brought about to which any particular provision of the Constitution applies, its controlling influence cannot be frustrated by the action of any or all of the departments of the government; that the Constitution has conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States, but every applicable express limitation of the Constitution is in force, and even where there is no express command which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed though not expressed in so many words; that every provision of the Constitution which is applicable to the Territories is controlling therein, and all the limitations of the Constitution applicable to Congress in governing the territories necessarily limit its power; that in the case of the territories, when a provision of the Constitution is invoked, the question is whether the provision relied on is applicable; and that the power to lay and collect taxes, duties, imposts, and excises, as well as the qualification of uniformity, restrains Congress from imposing an impost duty on goods coming into the United States from a territory which has been incorporated into and forms a part of the United States.

And it is said that the determination of whether a particular provision is applicable involves an inquiry into the situation of the territory and its relations to the United States, although it does not follow, when the Constitution has withheld all power over a given subject, that such an inquiry is necessary.

The inquiry is stated to be: "Had Porto Rico, at the time of the passage of the act in question, been incorporated into and become an integral part of the United States?" And the answer being given that it had not, it is held that the rule of uniformity was not applicable.

I submit that that is not the question in this case. The question is whether, when Congress has created a civil government for Porto Rico, has constituted its inhabitants a body politic, has given it a governor and other officers, a legislative assembly, and courts, with right of appeal to this court, Congress can, in the same act and in the exercise of the power conferred by the first clause of section eight, impose duties on the commerce between Porto Rico and the States and other territories in contravention of the rule of uniformity qualifying the power. If this can be done, it is because the power of Congress over commerce between the States and any of the territories is not restricted by the Constitution. This was the position taken by the Attorney General, with a candor and ability that did him great credit.

But that position is rejected, and the contention seems to be that, if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period; and, more than that, that after it has been called from that limbo, commerce with it is absolutely subject to the will of Congress, irrespective of constitutional provisions.

The accuracy of this view is supposed to be sustained by the act of 1856 in relation to the protection of citizens of the United States removing guano from unoccupied islands; but I am unable to see why the discharge by the United States of its undoubted duty to protect its citizens on *terra nullius*, whether temporarily engaged in catching and curing fish, or working mines, or taking away manure, furnishes support to the proposition that the power of Congress over the Territories of the United States is unrestricted.

Great stress is thrown upon the word "incorporation," as if possessed of some occult meaning, but I take it that the act under consideration made Porto Rico, whatever its situation before, an organized territory of the United States. Being such, and the act undertaking to impose duties by virtue of clause 1 of sec. 8, how is it that the rule which qualifies the power does not apply to its exercise in respect of commerce with that territory? The power can only be exercised as prescribed, and even if the rule of uniformity could be treated as a mere regulation of the granted power — a suggestion to which I do not assent — the validity of these duties comes up directly, and it is idle to discuss the distinction between a total want of power and a defective exercise of it.

The concurring opinion recognizes the fact that Congress, in dealing with the people of new territories or possessions, is bound to respect the fundamental guaranties of life, liberty, and property,

but assumes that Congress is not bound, in those territories or possessions, to follow the rules of taxation prescribed by the Constitution. And yet the power to tax involves the power to destroy, and the levy of duties touches all our people in all places under the jurisdiction of the government.

The logical result is that Congress may prohibit commerce altogether between the States and territories, and may prescribe one rule of taxation in one territory, and a different rule in another.

That theory assumes that the Constitution created a government empowered to acquire countries throughout the world, to be governed by different rules than those obtaining in the original States and territories, and substitutes for the present system of republican government a system of domination over distant provinces in the exercise of unrestricted power.

In our judgment, so much of the Porto Rican act as authorized the imposition of these duties is invalid, and plaintiffs were entitled to recover.

Some argument was made as to general consequences apprehended to flow from this result, but the language of the Constitution is too plain and unambiguous to permit its meaning to be thus influenced. There is nothing "in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument as to justify those who expound the Constitution" in giving it a construction not warranted by its words.

Briefs have been presented at this bar, purporting to be on behalf of certain industries, and eloquently setting forth the desirability that our government should possess the power to impose a tariff on the products of newly acquired territories so as to diminish or remove competition. That, however, furnishes no basis for judicial judgment, and if the producers of staples in the existing States of this Union believe the Constitution should be amended so as to reach that result, the instrument itself provides how such amendment can be accomplished. The people of all the States are entitled to a voice in the settlement of that subject.

Again, it is objected on behalf of the government that the possession of absolute power is essential to the acquisition of vast and distant territories, and that we should regard the situation as it is to-day, rather than as it was a century ago. "We must look at the situation as comprehending a possibility — I do not say a probability, but a possibility — that the question might be as to the powers of this government in the acquisition of Egypt and the Soudan, or a section of Central Africa, or a spot in the Antarctic Circle, or a section of the Chinese Empire."

But it must be remembered that, as Marshall and Story declared, the Constitution was framed for ages to come, and that the sagacious men who framed it were well aware that a mighty future waited on their work. The rising sun to which Franklin referred at the close

of the convention, they well knew, was that star of empire whose course Berkeley had sung sixty years before.

They may not, indeed, have deliberately considered a triumphal progress of the nation, as such, around the earth, but as Marshall wrote: "It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception."

This cannot be said, and on the contrary, in order to the successful extension of our institutions, the reasonable presumption is that the limitations on the exertion of arbitrary power would have been made more rigorous.

After all, these arguments are merely political, and "political reasons have not the requisite certainty to afford rules of judicial interpretation."

Congress has power to make all laws which shall be necessary and proper for carrying into execution all the powers vested by the Constitution in the government of the United States or in any department or officer thereof. If the end be legitimate and within the scope of the Constitution, then, to accomplish it, Congress may use "all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution."

The grave duty of determining whether an act of Congress does or does not comply with these requirements is only to be discharged by applying the well-settled rules which govern the interpretation of fundamental law, unaffected by the theoretical opinions of individuals.

Tested by those rules our conviction is that the imposition of these duties cannot be sustained.

MR. JUSTICE HARLAN, dissenting:

I concur in the dissenting opinion of the Chief Justice. The grounds upon which he and Mr. Justice Brewer and Mr. Justice Peckham regard the Foraker act as unconstitutional in the particulars involved in this action meet my entire approval. Those grounds need not be restated, nor is it necessary to re-examine the authorities cited by the Chief Justice. I agree in holding that Porto Rico — at least after the ratification of the treaty with Spain — became a part of the United States within the meaning of the section of the Constitution enumerating the powers of Congress, and providing that "*all* duties, imposts, and excises shall be uniform *throughout the United States.*"

In view, however, of the importance of the questions in this case, and of the consequences that will follow any conclusion reached by the court, I deem it appropriate — without rediscussing the principal

questions presented — to add some observations suggested by certain passages in opinions just delivered in support of the judgment.

In one of those opinions it is said that "the Constitution was created by the people of the *United States*, as a union of *States*, to be governed solely by representatives of the *States*;" also, that "we find the Constitution speaking *only to States*, except in the territorial clause, which is absolute in its terms, and suggestive of no limitations upon the power of Congress in dealing with them." I am not sure that I correctly interpret these words. But if it is meant, as I assume it is meant, that, with the exception named, the Constitution was ordained by the States, and is addressed to and operates only on the States, I cannot accept that view.

In Martin *v.* Hunter, 1 Wheat. 304, 324, 326, 331 [**746**], this court, speaking by Mr. Justice Story, said that "the Constitution of the United States was ordained and established, not by the States in their sovereign capacities but emphatically, as the preamble of the Constitution declares, by the People of the United States."

In McCulloch *v.* Maryland, 4 Wheat. 316, 403–406 [**1**], Chief Justice Marshall, speaking for this court, said: "The government proceeds directly from the people; is 'ordained and established' in the name of the people; and is declared to be ordained 'in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and their posterity.' The assent of the States, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The Constitution, when thus adopted, was of complete obligation, and bound the State sovereignties. . . . The government of the union, then (whatever may be the influence of this fact on the case) is emphatically and truly a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them and for their benefit. This government is acknowledged by all to be one of enumerated powers. . . . It is the government of all; its powers are delegated by all; it represents all, and acts for all."

Although the States are constituent parts of the United States, the Government rests upon the authority of the people of the United States, and not on that of the States. Chief Justice Marshall, delivering the unanimous judgment of this court in Cohens *v.* Virginia, 6 Wheat. 264, 413 [**691**, **710**], said: "That the United States form, for many and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other repects, the American people are one; and the Government which is alone capable of controlling and manag-

ing their interests in all these respects is the Government of the Union. It is their Government, and in that character they have no other. America has chosen to be, in many respects and to many purposes, a nation; and for all these purposes her Government is complete; to all these objects it is competent. The people have declared that in the exercise of all powers given for those objects it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory."

In reference to the doctrine that the Constitution was established by and for the States as distinct political organizations, Mr. Webster said: "The Constitution itself in its very front refutes that. It declares that it is ordained and established by the People of the United States. So far from saying that it is established by the governments of the several States, it does not even say that it is established by the people of the several States. But it pronounces that it was established by the people of the United States in the aggregate. Doubtless, the people of the several States, taken collectively, constitute the people of the United States. But it is in this their collective capacity, it is as all the people of the United States, that they established the Constitution."

In view of the adjudications of this court I cannot assent to the proposition, whether it be announced in express words or by implication, that the National Government is a government of or by the States in union, and that the prohibitions and limitations of the Constitution are addressed only to the States. That is but another form of saying that, like the government created by the Articles of Confederation, the present government is a mere league of States, held together by compact between themselves; whereas, as this court has often declared, it is a Government created by the People of the United States, with enumerated powers, and supreme over States and individuals with respect to certain objects, throughout the entire territory over which its jurisdiction extends. If the National Government is in any sense a compact, it is a compact between the People of the United States among themselves as constituting in the aggregate the political community by whom the National Government was established. The Constitution speaks, not simply to the States in their organized capacities, but to all peoples, whether of States or territories, who are subject to the authority of the United States. Martin *v.* Hunter, 1 Wheat. 304, 327 [**746**].

In the opinion to which I am referring it is also said that the "practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect that the Constitution is applicable to territories acquired by purchase or conquest only when and so far as Congress shall so direct;" that while all power of government may be abused, the same may be said of the power of the government "under the Constitution as well as outside of it;" that "if it once be conceded that we are at liberty to acquire foreign terri-

tory, a presumption arises that our power with respect to such territories is the same power which other nations have been accustomed to exercise with respect to territories acquired by them;" that "the liberality of Congress in legislating the Constitution into all our contiguous territories has undoubtedly fostered the impression that it went there by its own force, but there is nothing in the Constitution itself and little in the interpretation put upon it, to confirm that impression;" that as the States could only delegate to Congress such powers as they themselves possessed, and as they had no power to acquire new territory, and therefore none to delegate in that connection, the logical inference is that "if Congress had power to acquire new territory, which is conceded, that power was not hampered by the constitutional provisions;" that if "we assume that the territorial clause of the Constitution was not intended to be restricted to such territory as the United States then possessed, there is nothing in the Constitution to indicate that the power of Congress in dealing with them was intended to be restricted by any of the other provisions;" and that "the executive and legislative departments of the government have for more than a century interpreted this silence as precluding the idea that the Constitution attached to these territories as soon as acquired."

These are words of weighty import. They involve consequences of the most momentous character. I take leave to say that if the principles thus announced should ever receive the sanction of a majority of this court, a radical and mischievous change in our system of government will be the result. We will, in that event, pass from the era of constitutional liberty guarded and protected by a written constitution into an era of legislative absolutism.

Although from the foundation of the Government this court has held steadily to the view that the Government of the United States was one of enumerated powers, and that no one of its branches, nor all of its branches combined, could constitutionally exercise powers not granted, or which were not necessarily implied from those expressly granted (Martin *v.* Hunter, 1 Wheat. 304, 326, 331 [**746**]), we are now informed that Congress possesses powers *outside of the Constitution*, and may deal with new territory acquired by treaty or conquest in the same manner *as other nations have been accustomed to act with respect to territories acquired by them.* In my opinion, Congress has no existence and can exercise no authority outside of the Constitution. Still less is it true that Congress can deal with new territories just as other nations have done or may do with their new territories. This nation is under the control of a written constitution, the supreme law of the land and the only source of the powers which our Government, or any branch or officer of it, may exert at any time or at any place. Monarchical and despotic governments, unrestrained by written constitutions, may do with newly acquired territories what this Government may not do consist-

ently with our fundamental law. To say otherwise is to concede that Congress may by action taken outside of the Constitution, engraft upon our republican institutions a colonial system such as exists under monarchical governments. Surely such a result was never contemplated by the fathers of the Constitution. If that instrument had contained a word suggesting the possibility of a result of that character it would never have been adopted by the People of the United States. The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces — the people inhabiting them to enjoy only such rights as Congress chooses to accord to them — is wholly inconsistent with the spirit and genius, as well as with the words of the Constitution.

The idea prevails with some — indeed, it found expression in arguments at the bar — that we have in this country substantially or practically two national governments; one to be maintained under the Constitution, with all its restrictions; the other to be maintained by Congress outside and independently of that instrument, by exercising such powers as other nations of the earth are accustomed to exercise. It is one thing to give such a latitudinarian construction to the Constitution as will bring the exercise of power by Congress, upon a particular occasion or upon a particular subject, within its provisions. It is quite a different thing to say that Congress may, if it so elects, proceed outside of the Constitution. The glory of our American system of government is that it was created by a written constitution which protects the people against the exercise of arbitrary, unlimited power, and the limits of which instrument may not be passed by the government it created, or by any branch of it, or even by the people who ordained it, except by amendment or change of its provisions. "To what purpose," Chief Justice Marshall said in Marbury *v.* Madison, 1 Cranch, 137, 176 [**815**], "are powers limited, and to what purpose is that limitation committed to writing if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation."

The wise men who framed the Constitution, and the patriotic people who adopted it, were unwilling to depend for their safety upon what, in the opinion referred to, is described as "certain principles of natural justice inherent in Anglo-Saxon character, which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests." They proceeded upon the theory — the wisdom of which experience has vindicated — that the only safe guaranty against governmental oppression was to withhold or restrict the power to oppress. They well remembered that Anglo-Saxons across the ocean had attempted, in defiance of law and justice, to trample upon the rights of

Anglo-Saxons on this continent, and had sought by military force to establish a government that could at will destroy the privileges that inhere in liberty. They believed that the establishment here of a government that could administer public affairs according to its will, unrestrained by any fundamental law and without regard to the inherent rights of freemen, would be ruinous to the liberties of the people, by exposing them to the oppressions of arbitrary power. Hence, the Constitution enumerates the powers which Congress and the other departments may exercise — leaving unimpaired, to the States or the People, the powers not delegated to the National Government nor prohibited to the States. That instrument so expressly declares in the Tenth Article of Amendment. It will be an evil day for American liberty if the theory of a government outside of the supreme law of the land finds lodgment in our constitutional jurisprudence. No higher duty rests upon this court than to exert its full authority to prevent all violation of the principles of the Constitution.

Again, it is said that Congress has assumed, in its past history, that the Constitution goes into territories acquired by purchase or conquest *only when and as it shall so direct*, and we are informed of the liberality of Congress in *legislating* the Constitution into all our contiguous territories. This is a view of the Constitution that may well cause surprise, if not alarm. Congress, as I have observed, has no existence except by virtue of the Constitution. It is the creature of the Constitution. It has no powers which that instrument has not granted, expressly or by necessary implication. I confess that I cannot grasp the thought that Congress, which lives and moves and has its being in the Constitution, and is consequently the mere creature of that instrument, can, at its pleasure, legislate or exclude its creator from territories which were acquired only by authority of the Constitution.

By the express words of the Constitution, every Senator and Representative is bound by oath or affirmation, to regard it as the supreme law of the land. When the Constitutional Convention was in session there was much discussion as to the phraseology of the clause defining the supremacy of the Constitution, laws, and treaties of the United States. At one stage of the proceedings, the Convention adopted the following clause: "This Constitution, and the laws of the United States made in pursuance thereof, and all the treaties made under the authority of the United States, shall be the supreme law of the several *States* and of *their* citizens and inhabitants, and the judges of the several States shall be bound thereby in their decisions, anything in the laws of the several States to the contrary notwithstanding." This clause was amended, on motion of Mr. Madison, by inserting after the words "all treaties made" the words "or which shall be made." If the clause so amended had been inserted in the Constitution as finally adopted, perhaps there would have been some justification for saying that the Constitution, laws, and treaties

of the United States constituted the supreme law only in the States, and that outside of the States the will of Congress was supreme. But the framers of the Constitution saw the danger of such a provision, and put into that instrument in place of the above clause the following: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be *the supreme law of the land:* and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding," Meigs's Growth of the Constitution, 284, 287. That the convention struck out the words, "the supreme law of the several States," and inserted "the supreme law of the land," is a fact of no little significance. The "land" referred to manifestly embraced all the peoples and all the territory, whether within or without the States, over which the United States could exercise jurisdiction or authority.

Further, it is admitted that *some* of the provisions of the Constitution do apply to Porto Rico, and may be invoked as limiting or restricting the authority of Congress, or for the protection of the people of that island. And it is said that there is a clear distinction between such prohibitions "as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only 'throughout the United States' or among the several States." In the enforcement of this suggestion it is said in one of the opinions just delivered: "Thus, when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' and that 'no title of nobility shall be granted by the United States,' it goes to the competency of Congress to pass a bill *of that description.*" I cannot accept this reasoning as consistent with the Constitution or with sound rules of interpretation. The express prohibition upon the passage by Congress of bills of attainder or of *ex post facto* laws, or the granting of titles of nobility, goes no more directly to the root of the power of Congress than does the express prohibition against the imposition by Congress of any duty, impost, or excise that is not uniform throughout the United States. The opposite theory, I take leave to say, is quite as extraordinary as that which assumes that Congress may exercise powers outside of the Constitution, and may, in its discretion, legislate that instrument into or out of a domestic territory of the United States.

In the opinion to which I have referred it is suggested that conditions may arise when the annexation of distant possessions may be desirable. "If," says that opinion, "those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large *concessions* ought not to be made for a time, that ultimately

our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action." In my judgment, the Constitution does not sustain any such theory of our governmental system. Whether a particular race will or will not assimilate with our people, and whether they can or cannot with safety to our institutions be brought within the operation of the Constitution, is a matter to be thought of when it is proposed to acquire their territory by treaty. A mistake in the acquisition of territory, although such acquisition seemed at the time to be necessary, cannot be made the ground for violating the Constitution or refusing to give full effect to its provisions. The Constitution is not to be obeyed or disobeyed as the circumstances of a particular crisis in our history may suggest the one or the other course to be pursued. The People have decreed that it shall be the supreme law of the land at all times. When the acquisition of territory becomes complete, by cession, the Constitution necessarily becomes the supreme law of such new territory, and no power exists in any department of the government to make "concessions" that are inconsistent with its provisions. The authority to make such concessions implies the existence in Congress of power to declare that constitutional provisions may be ignored under special or embarrassing circumstances. No such dispensing power exists in any branch of our Government. The Constitution is supreme over every foot of territory, wherever situated, under the jurisdiction of the United States, and its full operation cannot be stayed by any branch of the Government in order to meet what some may suppose to be extraordinary emergencies. If the Constitution is in force in any territory, it is in force there for every purpose embraced by the objects for which the Government was ordained. Its authority cannot be displaced by concessions, even if it be true, as asserted in argument in some of these cases, that if the tariff act took effect in the Philippines of its own force, the inhabitants of Mandanao, who live on imported rice, would starve, because the import duty is many fold more than the ordinary cost of the grain to them. The meaning of the Constitution cannot depend upon accidental circumstances arising out of the products of other countries or of this country. We cannot violate the Constitution in order to serve particular interests in our own or in foreign lands. Even this court, with its tremendous power, must heed the mandate of the Constitution. No one in official station, to whatever department of the Government he belongs, can disobey its commands without violating the obligation of the oath he has taken. By whomsoever and wherever power is exercised in the name and under the authority of the United States, or of any branch of its Government, the validity or invalidity of that which is done must be determined by the Constitution.

In De Lima *v.* Bidwell, just decided [181 U. S. 1], we have held, that, upon the ratification of the treaty with Spain, Porto Rico ceased

to be a foreign country and became a domestic territory of the United States. We have said in that case that from 1803 to the present time there was not a shred of authority, except a *dictum* in one case, "for holding that a district ceded to and in possession of the United States remains for any purpose a foreign territory;" that territory so acquired cannot be "domestic for one purpose and foreign for another;" and that any judgment to the contrary would be "pure judicial legislation," for which there was no warrant in the Constitution or in the powers conferred upon this court. Although, as we have just decided, Porto Rico ceased, after the ratification of the treaty with Spain, to be a foreign country within the meaning of the tariff act, and became a domestic country — "a territory of the United States" — it is said that if Congress so wills it may be controlled and governed outside of the Constitution and by the exertion of the powers which other nations have been accustomed to exercise with respect to territories acquired by them; in other words, we may solve the question of the power of Congress under the Constitution by referring to the powers that may be exercised by other nations. I cannot assent to this view. I reject altogether the theory that Congress, in its discretion, can exclude the Constitution from a domestic territory of the United States, acquired, and which could only have been acquired, in virtue of the Constitution. I cannot agree that it is a domestic territory of the United States for the purpose of preventing the application of the tariff act imposing duties upon imports from foreign countries, but not a part of the United States for the purpose of enforcing the constitutional requirement that *all* duties, imposts and excises imposed by Congress "shall be uniform throughout the United States." How Porto Rico can be a domestic territory of the United States, as distinctly held in De Lima *v.* Bidwell, and yet, as is now held, not embraced by the words "throughout the United States," is more than I can understand.

We heard much in argument about the "expanding future of our country." It was said that the United States is to become what is called a "world power"; and that if this government intends to keep abreast of the times and be equal to the great destiny that awaits the American people, it *must* be allowed to exert all the power that other nations are accustomed to exercise. My answer is, that the fathers never intended that the authority and influence of this nation should be exerted otherwise than in accordance with the Constitution. If our government needs more power than is conferred upon it by the Constitution, that instrument provides the mode in which it may be amended and additional power thereby obtained. The people of the United States who ordained the Constitution never supposed that a change could be made in our system of government by mere judicial interpretation. They never contemplated any such juggling with the words of the Constitution as would authorize the courts to hold that the words "throughout the United States," in the taxing

clause of the Constitution, do not embrace a domestic "territory of the United States" having a civil government established by the authority of the United States. This is a distinction which I am unable to make, and which I do not think ought to be made when we are endeavoring to ascertain the meaning of a great instrument of government.

There are other matters to which I desire to refer. In one of the opinions just delivered the case of Neely *v.* Henkel, 180 U. S. 119, is cited in support of the proposition that the provision of the Foraker act here involved was consistent with the Constitution. If the contrary had not been asserted I should have said that the judgment in that case did not have the slightest bearing on the question before us. The only inquiry there was whether Cuba was a foreign country or territory within the meaning, not of the tariff act, but of the act of June 6, 1900 (31 Stat. 656, chap. 793). We held that it was a foreign country. We could not have held otherwise, because the United States, when recognizing the existence of war between this country and Spain, disclaimed "any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof," and asserted "its determination, when that is accomplished, to leave the government and control of the island to its people." We said: "While by the act of April 25, 1898, declaring war between this country and Spain, the President was directed and empowered to use our entire land and naval forces, as well as the militia of the several States, to such an extent as was necessary to carry such act into effect, that authorization was not for the purpose of making Cuba an integral part of the United States, but only for the purpose of compelling the relinquishment by Spain of its authority and government in that island and the withdrawal of its forces from Cuba and Cuban waters. The legislative and executive branches of the Government, by the joint resolution of April 20, 1898, expressly disclaimed any purpose to exercise sovereignty, jurisdiction, or control over Cuba 'except for the pacification thereof,' and asserted the determination of the United States, that object being accomplished, to leave the government and control of Cuba to its own people. All that has been done in relation to Cuba has had that end in view, and, so far as this court is informed by the public history of the relations of this country with that island, nothing has been done inconsistent with the declared object of the war with Spain. Cuba is none the less foreign territory, within the meaning of the act of Congress, because it is under a military governor appointed by and representing the President in the work of assisting the inhabitants of that island to establish a government of their own, under which, as a free and independent people, they may control their own affairs without interference by other nations. The occupancy of the island by troops of the United States was the necessary result of the war. That result could not have been avoided by the United States consistently with

the principles of international law or with its obligations to the people of Cuba. It is true that as between Spain and the United States, — indeed, as between the United States and all foreign nations — Cuba, upon the cessation of hostilities with Spain and after the Treaty of Paris, was to be treated as if it were conquered territory. But as between the United States and Cuba, that island is territory held in trust for the inhabitants of Cuba to whom it rightfully belongs, and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action." In answer to the suggestion that, under the modes of trial there adopted, Neely, if taken to Cuba, would be denied the rights, privileges, and immunities accorded by our Constitution to persons charged with crime against the United States, we said that the constitutional provisions referred to "have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country." What use can be made of that case in order to prove that the Constitution is not in force in a territory of the United States acquired by treaty, except as Congress may provide, is more than I can perceive.

There is still another view taken of this case. Conceding that the National Government is one of enumerated powers, to be exerted only for the limited objects defined in the Constitution, and that Congress has no power, except as given by that instrument either expressly or by necessary implication, it is yet said that a new territory, acquired by treaty or conquest, cannot become *incorporated* into the United States without the consent of Congress. What is meant by such incorporation we are not fully informed nor are we isntructed as to the precise mode in which it is to be accomplished. Of course, no territory can become a State in virtue of a treaty or without the consent of the legislative branch of the Government; for only Congress is given power by the Constitution to admit new States. But it is an entirely different question whether a domestic "territory of the United States," having an organized civil government established by Congress, is not, for all purposes of government by the Nation, under the complete jurisdiction of the United States, and therefore a part of, and incorporated into, the United States, subject to all the authority which the National Government may exert over any territory or people. If Porto Rico, although a territory of the United States, may be treated as if it were not a part of the United States, then New Mexico and Arizona may be treated as not parts of the United States, and subject to such legislation as Congress may choose to enact without any reference to the restrictions imposed by the Constitution. The admission that no power can be exercised under and by authority of the United States except in accordance with the Constitution is of no practical value whatever to constitutional liberty, if, as soon as the admission is made — as quickly as the words expressing the thought can be uttered — the Constitution is so liberally interpreted as to

produce the same results as those which flow from the theory that Congress may go outside of the Constitution in dealing with newly acquired territories, and give them the benefit of that instrument only when and as it shall direct.

Can it for a moment be doubted that the addition of Porto Rico to the territory of the United States in virtue of the treaty with Spain has been recognized by direct action upon the part of Congress? Has it not legislated in recognition of that treaty, and appropriated the money which it required this country to pay?

If, by virtue of the ratification of the treaty with Spain, and the appropriation of the amount which that treaty required this country to pay, Porto Rico could not become a part of the United States so as to be embraced by the words "throughout the United States," did it not become "incorporated" into the United States when Congress passed the Foraker act? 31 Stat. 77, chap. 191. What did that act do? It provided a civil government for Porto Rico, with legislative, executive, and judicial departments; also, for the appointment by the President, by and with the advice and consent of the Senate of the United States, of a "governor, secretary, attorney general, treasurer, auditor, commissioner of the interior, and a commissioner of education." §§ 17–25. It provided for an executive council, the members of which should be appointed by the President, by and with the advice and consent of the Senate. § 18. The governor was required to report all transactions of the government in Porto Rico to the President of the United States. § 17. Provision was made for the coins of the United States to take the place of Porto Rican coins. § 11. All laws enacted by the Porto Rican legislative assembly were required to be reported to the Congress of the United States, which reserved the power and authority to amend the same. § 31. But that was not all. Except as otherwise provided, and except also the internal revenue laws, the statutory laws of the United States, not locally inapplicable, are to have the same force and effect in Porto Rico as in the United States. § 14. A judicial department was established in Porto Rico, with a judge to be appointed by the President, by and with the advice and consent of the Senate. § 33. The court so established was to be known as the District Court of the United States for Porto Rico, from which writs of error and appeals were to be allowed to this court. § 34. All judicial process, it was provided, "shall run in the name of the United States of America, and the President of the United States." § 16. And yet it is said that Porto Rico was not "incorporated" by the Foraker act into the United States so as to be part of the United States within the meaning of the constitutional requirement that all duties, imposts, and excises imposed by Congress shall be uniform "throughout the United States."

It would seem, according to the theories of some, that even if Porto Rico is in and of the United States for many important pur-

poses, it is yet not a part of this country with the privilege of protesting against a rule of taxation which Congress is expressly forbidden by the Constitution from adopting as to any part of the "United States." And this result comes from the failure of Congress to use the word "incorporate" in the Foraker act, although by the same act all power exercised by the civil government in Porto Rico is by authority of the United States, and although this court has been given jurisdiction by writ of error or appeal to re-examine the final judgments of the District Court of the United States established by Congress for that territory. Suppose Congress had passed this act: "*Be it enacted by the Senate and House of Representatives in Congress assembled,* That Porto Rico be and is hereby incorporated into the United States as a territory," would such a statute have enlarged the scope or effect of the Foraker act? Would such a statute have accomplished more than the Foraker act has done? Indeed, would not such legislation have been regarded as most extraordinary as well as unnecessary?

I am constrained to say that this idea of "incorporation" has some occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel.

In my opinion Porto Rico became, at least after the ratification of the treaty with Spain, a part of and subject to the jurisdiction of the United States in respect of all its territory and people, and that Congress could not thereafter impose any duty, impost, or excise with respect to that island and its inhabitants, which departed from the rule of uniformity established by the Constitution.

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## DOOLEY *v.* UNITED STATES.

183 U. S. 151, 22 Sup. Ct. Rep. 62. 1901.

This was an action begun in the Circuit Court as a Court of Claims by the firm of Dooley, Smith & Co., to recover duties exacted of them and paid under protest to the collector of the port of San Juan, Porto Rico, upon merchandise imported into that port from the port of New York after May 1, 1900, and since the Foraker act. This act requires all merchandise "coming into Porto Rico from the United States" to be "entered at the several ports of entry upon payment of fifteen per centum of the duties which are required to be levied, collected, and paid upon like articles of merchandise imported from foreign countries." [31 Stat. 77, chap. 191, sec. 3.]

A demurrer was interposed by the district attorney upon the ground that the court had no jurisdiction of the subject of the action, and also that the complaint did not state facts sufficient to constitute a cause of action. The demurrer to the complaint for insufficiency was sustained, and the petition dismissed.

MR. JUSTICE BROWN delivered the opinion of the court:

This case raises the question of the constitutionality of the Foraker act, so far as it fixes the duties to be paid upon merchandise imported into Porto Rico from the port of New York. The validity of this requirement is attacked upon the ground of its violation of that clause of the Constitution (Art. I, sec. 9) declaring that "no tax or duty shall be laid on articles exported from any State."

While the words "import" and "export" are sometimes used to denote goods passing from one State to another, the word "import," in connection with the provision of the Constitution that "no State shall levy any imposts or duties on imports or exports," was held in Woodruff *v.* Parham, 8 Wall. 123, to apply only to articles imported from foreign countries into the United States.

That was an action to recover a tax imposed by the city of Mobile for municipal purposes, upon sales at auction. Defendants, who were auctioneers, received in the course of their business for themselves, or as consignees or agents for others, large amounts of goods and merchandise the products of other States than Alabama, and sold the same in Mobile to purchasers in unbroken and original packages. The Supreme Court of Alabama decided the case in favor of the tax, and the case came here for review.

The question, as stated by Mr. Justice Miller, was "whether merchandise brought from other States and sold, under the circumstances stated, comes within the prohibition of the Federal Constitution that no State shall, without the consent of Congress, levy any imposts or duties on imports or exports." Defendants relied largely upon a *dictum* in Brown *v.* Maryland, 12 Wheat. 419, to the effect that the principles laid down in that case as to the non-taxability of imports from foreign countries might perhaps apply equally to importations from a sister State.

In discussing this question, and particularly of the power of Congress to levy and collect taxes, duties, imposts, and excises, Mr. Justice Miller observed: "Is the word 'impost,' here used, intended to confer upon Congress a distinct power to levy a tax upon all goods or merchandise carried from one State to another? Or is the power limited to duties on foreign imports? If the former be intended, then the power conferred is curiously rendered nugatory by the subsequent clause of the ninth section, which declares that no tax shall be laid on articles exported from any State, for no article can be imported from one State into another which is not at the same time exported from the former. But if we give to the word 'imposts' as used in the first-mentioned clause the definition of Chief Justice Marshall, and to the word 'export' the corresponding idea of something carried out of the United States, we have, in the power to lay duties on imports from abroad and the prohibition to lay such duties on exports to other countries, the power and its limitations concerning imposts."

"It is not too much to say that, so far as our research has extended, neither the word 'export,' 'import,' or 'impost,' is to be found in the discussion on this subject, as they have come down to us from that time, in reference to any other than foreign commerce, without some special form of words to show that foreign commerce is not meant. . . . Whether we look, then, to the terms of the clause of the Constitution in question, or to its relation to other parts of that instrument, or to the history of its formation and adoption, or to the comments of the eminent men who took part in those transactions, we are forced to the conclusion that no intention existed to prohibit by this clause" (that no State shall, without the consent of Congress, levy any impost or duty upon any export or import) "the right of one State to tax articles brought into it from another." This definition of the word "impost" was afterwards approved in Brown *v.* Houston, 114 U. S. 622 [**333**]. See also Fairbank *v.* United States, 181 U. S. 283.

It follows, and is the logical sequence of the case of Woodruff *v.* Parham, that the word "export" should be given a correlative meaning, and applied only to goods exported to a foreign country. Muller *v.* Baldwin, L. R. 9 Q. B. 457. If, then, Porto Rico be no longer a foreign country under the Dingley act, as was held by a majority of this court in De Lima *v.* Bidwell, 182 U. S. 1, and Dooley *v.* United States, 182 U. S. 222, we find it impossible to say that goods carried from New York to Porto Rico can be considered as "exported" from New York within the meaning of that clause of the Constitution. If they are neither exports nor imports, they are still liable to be taxed by Congress under the ample and comprehensive authority conferred by the Constitution "to lay and collect taxes, duties, imposts, and excises." Art. I, sec. 8.

In another view, however, the case presented by the record is whether a duty laid by Congress upon goods arriving at Porto Rico from New York is a duty upon an export from New York, or upon an import to Porto Rico. The fact that the duty is exacted upon the arrival of the goods at San Juan certainly creates a presumption in favor of the latter theory. At the same time it is possible that it may also be a duty upon an export. The mere fact that the duty is not laid at the port of departure is by no means decisive against its being such. It is too clear for argument that, if vessels bound for a foreign country were compelled to stop at an intermediate port and pay into the Treasury of the United States a duty upon their cargoes, such duty would be a tax upon an export, and the place of its exaction would be of little significance. The manner in which and the place at which the tax is levied are of minor consequence. Thus, in Brown *v.* Maryland, 12 Wheat. 419 [**303**], it was held that an act of a State legislature requiring importers of foreign goods to take out a license was a violation of the Constitution declaring that no State shall, without the consent of Congress, lay any impost or duty on

imports or exports; and in the recent case of Fairbank *v.* United States, 181 U. S. 283, we held that a discriminating stamp tax upon bills of lading covering goods to be carried to a foreign country was a tax upon exports within the same provision of the Constitution.

One thing, however, is entirely clear. The tax in question was imposed upon goods imported into Porto Rico, since it was exacted by the collector of the port of San Juan after the arrival of the goods within the limits of that port. From this moment the duties became payable as upon imported merchandise. United States *v.* Howell, 5 Cranch, 368; Arnold *v.* United States, 9 Cranch, 104; Meredith *v.* United States, 13 Pet. 486. Now, while an import into one port almost necessarily involves a prior export from another, still, in determining the character of the tax imposed, it is important to consider whether the duty be laid for the purpose of adding to the revenues of the country from which the export takes place, or for the benefit of the territory into which they are imported. By the third section of the Foraker act, imposing duties upon merchandise coming into Porto Rico from the United States, it is declared that "whenever the legislative assembly of Porto Rico shall have enacted and put into operation a system of local taxation to meet the necessities of the government of Porto Rico, by this act established, and shall by resolution duly passed so notify the President, he shall make proclamation thereof, and thereupon all tariff duties on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico shall cease, and from and after such date all such merchandise and articles shall be entered at the several ports of entry free of duty. And by section four, "the duties and taxes collected in Porto Rico in pursuance of this act, less the cost of collecting the same, and the gross amount of all collections of duties and taxes in the United States upon articles of merchandise coming from Porto Rico, shall not be covered into the general fund of the Treasury, but shall be held as a separate fund, and shall be placed at the disposal of the President to be used for the government and benefit of Porto Rico until the government of Porto Rico, herein provided for, shall have been organized, when all moneys theretofore collected under the provisions hereof, then unexpended, shall be transferred to the local treasury of Porto Rico."

Now, there can be no doubt whatever that if the legislative assembly of Porto Rico should, with the consent of Congress, lay a tax upon goods arriving from ports of the United States, such tax, if legally imposed, would be a duty upon imports to Porto Rico, and not upon exports from the United States; and we think the same result must follow if the duty be laid by Congress in the interest and for the benefit of Porto Rico. The truth is that, in imposing the duty as a temporary expedient, with a proviso that it may be abolished by the legislative assembly of Porto Rico at its will, Congress

thereby shows that it is undertaking to legislate for the island for the time being and only until the local government is put into operation. The mere fact that the duty passes through the hands of the revenue officers of the United States is immaterial, in view of the requirement that it shall not be covered into the general fund of the Treasury, but be held as a separate fund for the government and benefit of Porto Rico.

The action is really correlative to that of Downes *v.* Bidwell, 182 U. S. 244 [**1119**], in which we held that Congress could lawfully impose a duty upon imports from Porto Rico, notwithstanding the provision of the Constitution that all duties, imposts, and excises shall be uniform throughout the United States. It is true that this conclusion was reached by a majority of the court by different processes of reasoning, but it is none the less true that in the conclusion that certain provisions of the Constitution did apply to Porto Rico, and that certain others did not, there was no difference of opinion.

It is not intended by this opinion to intimate that Congress may lay an export tax upon merchandise carried from one State to another. While this does not seem to be forbidden by the express words of the Constitution, it would be extremely difficult, if not impossible, to lay such a tax without a violation of the first paragraph of Art. I, sec. 8, that "all duties, imposts and excises shall be uniform throughout the United States." There is a wide difference between the full and paramount power of Congress in legislating for a Territory in the condition of Porto Rico and its power with respect to the States, which is merely incidental to its right to regulate interstate commerce. The question, however, is not involved in this case, and we do not desire to express an opinion upon it.

These duties were properly collected, and *the action of the Circuit Court in sustaining the demurrer to the complaint was correct, and it is therefore affirmed.*

MR. JUSTICE WHITE concurring:

While agreeing to the judgment of affirmance and in substance concurring in the opinion of the court just announced, by which the affirmance is sustained, I propose to summarize in my own language the reasoning which the opinion embodies as it is by me understood.

In my judgment the opinion of the court in the cases of De Lima *v.* Bidwell, 182 U. S. 1, and Dooley *v.* United States, 182 U. S. 222, decided in the last term, and that just announced in the case of The Diamond Rings, 183 U. S. 176, as well as the opinions of the majority of the members of the court in Downes *v.* Bidwell, 182 U. S. 244 [**1119**], also decided at the last term, when considered in connection with the previous adjudications of this court, are conclusive in favor of the affirmance of the judgment in this cause. The question is whether a tax imposed by authority of the act of April 12, 1900 (31 St. 77, chap. 191), in Porto Rico, on merchandise coming into that island

from the United States, is repugnant to clause 5, sec. 9, of Art. I of the Constitution of the United States, which provides that "no tax or duty shall be laid on articles exported from any State." Is the tax here assailed an export tax within the meaning of the Constitution? If it is, the judgment sustaining it should be reversed; if it is not, affirmance is required.

In Woodruff *v.* Parham (1868), 8 Wall. 123, the validity of a tax on auction sales levied by the city of Mobile pursuant to authority conferred by the laws of the State of Alabama was called in question. One of the contentions was that, as the tax was on sales at auction of goods in the original packages brought into the State of Alabama from other States, it was repugnant to that clause of sec. 9 of Art. I of the Constitution, which forbids any State, without the consent of Congress, from laying imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws. In approaching the consideration of the question thus presented, the court, in its opinion, which was announced by Mr. Justice Miller, said (p. 131):

"The words 'imposts,' 'imports,' and 'exports' are frequently used in the Constitution. They have a necessary co-relation, and when we have a clear idea of what either word means in any particular connection in which it may be found, we have one of the most satisfactory tests of its definition in other parts of the same instrument. . . . Leaving, then, for a moment, the clause of the Constitution under consideration" (forbidding a State to lay an import or an export tax), "we find the first use of these co-relative terms in that clause of the eighth section of the first article, which begins the enumeration of the powers confided to Congress. 'The Congress shall have power to levy and collect taxes, duties, imposts, and excises. . . . But all duties, imposts, and excises shall be uniform throughout the United States.' Is the word 'impost,' here used, intended to confer upon Congress a distinct power to levy a tax upon all goods or merchandise carried from one State into another? or is the power limited to duties on foreign imports? If the former be intended, then the power conferred is curiously rendered nugatory by the subsequent clause of the ninth section, which declares that no tax shall be laid on articles exported from any State, for no article can be imported from one State into another, which is not, at the same time, exported from the former. But if we give to the word 'imposts,' as used in the first-mentioned clause, the definition of Chief Justice Marshall, and to the word 'export' the corresponding idea of something carried out of the United States, we have, in the power to lay duties on imports from abroad, and the prohibition to lay such duties on exports to other countries, the power and its limitations concerning imposts."

The opinion then proceeded to elaborately consider the meaning of the words "imports," "exports," and "imposts" in the Constitution,

with reference to the powers of Congress, and concluded that they related only to the bringing in of goods from a country foreign to the United States, or the taking out of goods from the United States to such a country. From this conclusion the deduction was drawn that the words "imports" and "exports," when used in the Constitution with reference to the power of the several States, had a similar meaning, and hence the tax levied by the city of Mobile was decided not to be repugnant to the clause of the Constitution heretofore referred to, prohibiting a State "from laying imposts or duties on imports or exports." In the course of the opinion an intimation of Mr. Chief Justice Marshall in Brown *v.* Maryland, that the words "imports" and "exports" might relate to the movement of goods between the States, was referred to, and it was expressly said that this was a mere suggestion on the part of the Chief Justice not involved in the cause, and not therefore decided. So, also, the attention of the court was directed to the case of Almy *v.* California (1860), 24 How. 169 [**404**]. That case involved the validity of a stamp tax imposed in California on all bills of lading for the shipment of gold from California to a point without the State. The particular bill of lading which was in question was for the shipment of gold from California to New York. It was held that this stamp tax was at least an indirect burden on exports, and hence was void, because an export tax within the meaning of the Constitution. In the opinion in Woodruff *v.* Parham it was expressly decided that although the conclusion in Almy *v.* California, that the tax was void, was sustained by the commerce clause of the Constitution, which had been referred to in the argument of that case, it had been erroneously held that "import" or "export," within the constitutional sense of the words, related to the movement of goods between the States, and not exclusively to foreign commerce. To the extent, therefore, that Almy *v.* California held or intimated that an export or import tax within the meaning of the Constitution embraced anything but foreign commerce, it was expressly overruled.

In Brown *v.* Houston, 114 U. S. 622 [**333**], decided in 1884, fourteen years after the decision in Woodruff *v.* Parham, the question which arose in the latter case was again presented. A tax levied by the State of Louisiana on certain coal which had come down the Ohio river was assailed on the ground that it amounted to both an export and import tax within the meaning of the Constitution. The court, speaking through Mr. Justice Bradley, said (p. 628):

"It was decided by this court, in the case of Woodruff *v.* Parham, 8 Wall. 123, that the term 'imports,' as used in that clause of the Constitution which declares that 'no State shall without the consent of Congress lay any imposts or duties on imports or exports,' does not refer to articles carried from one State into another, but only to articles imported from foreign countries into the United States."

The opinion, after stating the facts which were presented in Wood-

ruff *v.* Parham, and the contention which was in that case based upon them, said (pp. 628, 629):

"This court, however, after an elaborate examination of the question, held that the terms 'imports' and 'exports' in the clause under consideration had reference to goods brought from or carried to foreign countries alone, and not to goods transported from one State to another. It is unnecessary, therefore, to consider further the question raised by the plaintiffs in error under their third assignment of error, so far forth as it is based on the assumption that the tax complained of was an impost or duty on imports."

Thus treating the meaning of the words "imports" and "exports" as having been conclusively determined by Woodruff *v.* Parham, the court passed to the consideration of the contention that the tax levied in the State of Louisiana was an export tax within the meaning of the Constitution, because some of the coal was intended for export to a foreign country, or had been, as it was claimed, in part actually exported to such country.

Again, in Fairbank *v.* United States (1900), 181 U. S. 283, the court was called upon to determine whether the requirement in an act of Congress that a revenue stamp be affixed to every bill of lading for goods shipped to a foreign country was a tax on exports. In the course of the opinion, in considering the question, the court referred to Almy *v.* California, 24 How. 169 [**404**], as authority for the proposition that a tax on the bill of lading was a tax on the movement of the goods which the bill of lading evidenced. But in referring to the Almy case the court was careful to say (p. 294):

"It is true that thereafter, in Woodruff *v.* Parham, 8 Wall. 123, it was held that the words 'imports' and 'exports' as used in the Constitution were used to define the shipment of articles between this and a foreign country, and not that between the States, and while, therefore, that case is no longer an authority as to what is or what is not an export, the proposition that a stamp duty on a bill of lading is in effect a duty on the article transported remains unaffected."

A consideration of the opinions in Woodruff *v.* Parham and Brown *v.* Houston, so recently in effect approved by this court in the case of Fairbank *v.* United States, will make it clear that an adherence to the interpretation of the words "export" and "import," which was expounded in those cases, is essential to the preservation of the necessary powers of taxation of the several States, as well as of those of the government of the United States. And, by implication, in a number of cases decided by this court since the decision in Woodruff *v.* Parham, the doctrine of export and import there defined has been, if not expressly, at least tacitly, approved in many ways. Indeed, it may be safely assumed that many State statutes levying taxes and much legislation of Congress has been enacted upon the express or implied recognition of the settled construction of the Constitution

hitherto affixed to the import and export clauses by this Court in the cases referred to. And this will be made obvious when it is considered that if the words "export" and "import" as used in the Constitution be applied to the movement of goods between the States, then it amounts to not only an express prohibition on the States to impose any direct, but also any indirect, burden, and therefore, under the doctrine of Brown *v.* Maryland, any State tax law which would indirectly burden the coming of goods from one State to the other would be wholly void. So also as to the government of the United States, if the provision as to the laying and collection of imposts be not construed as a "distinct" provision relating to foreign commerce and co-related with the clause as to exports, it would follow, as was clearly pointed out in Woodruff *v.* Parham, that the Constitution had granted on the one hand a power and immediately denied it. Besides, it would follow that all the general powers of taxation conferred upon Congress would be limited by the export clause, and thus any domestic tax, although fulfilling the requirements of uniformity and not violating the prohibition against preferences which indirectly burdened the ultimate export, would be void — a doctrine which would manifestly cause to be invalid methods of taxation exercised by Congress from the beginning without question.

It being, then, beyond doubt that this court has, in a line of well-considered cases, determined that the words "export" and "import" when employed in the Constitution relate to the bringing in of goods from a country foreign to the United States and to the carrying out of goods from the United States to such a country, the only question remaining is, Is Porto Rico a country foreign to the United States? In answering this question it is manifest, from the entire reasoning of the court, in the cases in which it was decided that the terms "export" and "import" relate to a foreign country alone, that the words "foreign country," as used in those opinions, signified a country outside of the sovereignty of the United States and beyond its legislative authority, and that such meaning of those words was absolutely essential to the process of reasoning by which the conclusion in the cases referred to was reached.

Is Porto Rico a country foreign to the United States in the sense that it is not within the sovereignty and not subject to the legislative authority of the United States? — is, then, the issue. In De Lima *v.* Bidwell, 182 U. S. 1, and Dooley *v.* United States, 182 U. S. 222, it was held that, instantly upon the ratification of the treaty with Spain, Porto Rico ceased to be a foreign country within the meaning of the tariff laws of the United States. In the case of The Diamond Rings, 183 U. S. 176, it has just been held that the Philippine Islands immediately upon the ratification of the treaty ceased to be foreign country within the meaning of the tariff laws; and of course, as these islands were acquired by the same treaty by which Porto Rico was acquired, this ruling is predicated on the decisions in

De Lima and Dooley, above referred to. It is true that both in the De Lima and the Dooley cases, as well as in the case of The Diamond Rings, just decided, dissents were announced. None of the dissents rested, however, upon the theory that Porto Rico or the Philippine Islands had not come under the sovereignty and become subject to the legislative authority of the United States, but were based on the ground that legislation by Congress was necessary to bring the territory within the line of the tariff laws in force at the time of the acquisition; and especially was this the case where the new territory had not, as the result of the acquisition, been incorporated into the United States, as an integral part thereof, though coming under its sovereignty and subject, as a possession, to the legislative power of Congress.

In Downes *v.* Bidwell, 182 U. S. 244 [**1119**], the question was whether a tax imposed by Congress on goods coming into the United States from Porto Rico was repugnant to that clause of the Constitution requiring uniformity "throughout the United States" of all "duties, imposts, and excises." The contention on the one hand was that, as Porto Rico had by the treaty with Spain been acquired by the United States, Congress could not impose a burden on goods coming from Porto Rico, in disregard of the requirement of uniformity "throughout the United States." On the other hand, it was contended that, although Porto Rico had become territory of the United States and was subject to the legislative authority of Congress, it had not been so made a part of the United States as to cause Congress to be subject, in legislating with regard to that island, to the uniformity provision of the Constitution. The court maintained the latter view. While it is true the members of the court who agreed in this conclusion did so for different reasons, nevertheless, in all the opinions delivered by the justices who formed the majority of the court, it was declared that Porto Rico had come under the sovereignty and was subject to the legislative authority of the United States. Indeed, this was controverted by no one, since the members of the court who dissented did so because they deemed that Porto Rico had so entirely ceased to be foreign country, and had so completely been made a part of the United States, that Congress could not, in legislating for that island, disregard the provision of uniformity throughout the United States.

It having been thus affirmatively repeatedly determined that the export and import clauses of the Constitution refer only to commerce with foreign countries, — that is, to a country or countries without the sovereignty and entirely beyond the legislative authority of the United States — and it having been conclusively settled that Porto Rico is not such a country, it seems to me the claim here made that the tax imposed by Congress in Porto Rico is an export or an import within the meaning of the Constitution is untenable. But, it is said, if Porto Rico is not foreign, and therefore the tax laid on goods in

that island on their arrival from the United States is not within the purview of the import and the inhibition of the export clauses of the Constitution, then Porto Rico is domestic, and the tax is void because repugnant to the first clause of sec. 8 of Art. I of the Constitution, conferring upon Congress "the power to lay and collect taxes, duties, imposts, and excises, . . . but all duties, imposts, and excises shall be uniform throughout the United States." This contention, however, is but a restatement of the proposition which the court held to be unsound in Downes *v.* Bidwell; for in that case it was expressly decided that a provision of the statute now in question, which imposes a tax on goods coming to the United States from Porto Rico, was valid because that island occupied such a relation to the United States as empowered Congress to exact such a tax, since the requirement of uniformity throughout the United States was inapplicable. I do not propose to recapitulate the grounds of the conclusion so elaborately expressed by the opinions of the majority of the court in that case, since it suffices to say, for the purposes of the uniformity clause, that decision is controlling in this case. If the contention be that because the impost clause of the Constitution refers only to foreign commerce, therefore there was no power in Congress to impose the tax in question, or that such power is impliedly denied, the contention is unfounded and really but amounts to an indirect attack upon the doctrines announced in Woodruff *v.* Parham, Brown *v.* Houston, and Fairbank *v.* United States. As held in Woodruff *v.* Parham, the impost clause and the export clause are co-related and refer to a distinct subject, that is, foreign commerce. By what process of reasoning it can be said that because a special enumeration on a particular subject of taxation and a particular limitation as to that subject is expressed in the Constitution, therefore other and general powers of taxation not relating to the subject in question are taken away, is not by me perceived. Certainly the argument cannot be that because a power has been conferred on Congress by the Constitution to levy a tax on foreign commerce, therefore the Constitution has taken away from Congress power to tax even indirectly domestic commerce. Because the grant of power as to imposts contained in the first clause of sec. 8 of Art. I of the Constitution relates to foreign commerce, there arises no limitation on the general authority to tax as to all other subjects, which flows from the other provisions of the same clause. Referring to such power — the authority to levy and collect taxes, duties, imposts, and excises — the court said, in the License Tax Cases (1866), 5 Wall. 462, 471:

"The power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion."

Of course, the Constitution contemplates freedom of commerce between the States, but it also confers upon Congress the powers of taxation to which I have referred, and safe-guards the freedom of commerce and equality of taxation between the States by conferring upon Congress the power to regulate such commerce, by providing for the apportionment of direct taxes, by exacting uniformity throughout the United States in the laying of duties, imposts, and excises, and by prohibiting preferences between ports of different States. Indeed, when the argument which I am considering is properly analyzed, it amounts to a denial, as I have said, of the substantial powers of Congress with regard to domestic taxation, and, as I understand it, overthrows the settled interpretation of the Constitution, long since announced and consistently adhered to.

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE HARLAN, MR. JUSTICE BREWER, and MR. JUSTICE PECKHAM, dissenting:

This is an action brought to recover back duties levied and collected under the Porto Rican act of April 12, 1900 (31 Stat. 77, chap. 191), at San Juan, on articles shipped to that port by citizens of New York from the State of New York. Plaintiffs were engaged in the business of commission merchants, having their main office in the city of New York and a branch office at San Juan.

The second section of the act provides that, from the time of its passage, "the same tariffs, customs, and duties shall be levied, collected, and paid upon all articles imported into Porto Rico from ports other than those of the United States, which are required by law to be collected upon articles imported into the United States from foreign countries," with some exceptions not material here.

The third section, by which these duties are imposed, reads: "That on and after the passage of this act all merchandise coming into the United States from Porto Rico and coming into Porto Rico from the United States shall be entered at the several ports of entry upon payment of fifteen per centum of the duties which are required to be levied, collected, and paid upon like articles of merchandise imported from foreign countries; and, in addition thereto, upon articles of merchandise of Porto Rican manufacture coming into the United States and withdrawn for consumption or sale, upon payment of a tax equal to the internal revenue tax imposed in the United States upon the like articles of merchandise of domestic manufacture;" and it was further provided that articles of merchandise manufactured in the United States coming into Porto Rico should, after entry, be subject to whatever internal revenue taxes might be in force on the island. And also that whenever the legislative assembly of Porto Rico should have enacted and put into operation a system of local taxation, and proclamation thereof had been made, "all tariff duties on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico shall cease."

Assuming that "the United States" as referred to is the United States as constituted at the date of the proclamation of the treaty, the act, explicitly recognizing the distinction between tariff duties and internal taxes, is in respect of such duties an act to raise revenue by taxing the commerce of the people of every State and Territory.

The fact that the net proceeds of the duties are appropriated by the act for use in Porto Rico does not affect their character any more than if so appropriated by another and separate act. The taxation reaches the people of the States directly, and is national, and not local, even though the revenue derived therefrom is devoted to local purposes.

Customs duties are duties imposed on imports or exports, and, according to the terms of this act, these are customs duties, not levied according to the rule of uniformity, and laid on exports as well as imports.

By the first clause of sec. 8 of Art. I of the Constitution, Congress is empowered to lay and collect duties, imposts, and excises, subject to the rule of uniformity, but this court has held that customs duties are only leviable on foreign commerce (Woodruff *v.* Parham, 8 Wall. 123), and that the uniformity required is geographical merely (Knowlton *v.* Moore, 178 U. S. 41). By the third clause of the same section, Congress is empowered "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The power to tax and the power to regulate commerce are distinct powers, yet the power of taxation may be so exercised as to operate in regulation of commerce.

Clauses 5 and 6 of sec. 9 provide:

"No tax or duty shall be laid on any articles exported from any State.

"No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another."

These provisions were intended to prevent the application of the power to lay taxes or duties, or the power to regulate commerce, so as to discriminate between one part of the country and another. The regulation of commerce by a majority vote, and the exemption of exports from duties or taxes, were parts of one of the great compromises of the Constitution.

If, after the cession, Porto Rico remained a foreign country, the prohibition of clause 5 would be fatal to these duties; while if Porto Rico became domestic, then, as they are customs duties, they could not be sustained, according to Woodruff *v.* Parham, under the first clause of sec. 8; and were also prohibited by clause 5 of sec. 9, whether customs duties or not, if the application of that clause is not limited to foreign commerce.

The prohibition that "no tax or duty shall be laid on articles exported from any State" negatives the existence of any power in Congress to lay taxes or duties in any form on articles exported from a State, *irrespective of their destination*, and, this being so, the act in imposing the duties in question is invalid, whether Porto Rico after its passage was a foreign or reputed foreign territory, a domestic territory, or a territory subject to be dealt with at the will of Congress regardless of constitutional limitations.

Confessedly the prohibition applies to foreign commerce, and the question is whether it is confined to that; in other words, whether language which embraces all articles exported can be properly restricted to particular exports. On what ground can the insertion in this comprehensive denial of power of the words "to foreign countries," thereby depriving it of effect on commerce other than foreign, be justified?

If the words "exported from any State" apply only to articles exported from a State to a foreign country, it would seem to follow that the broad power granted to Congress "to lay and collect taxes," for the purposes specified in the Constitution, may be exerted in the way of taxation on articles exported from one State to another. The right to carry legitimate articles of commerce from one State to another State without interference by national or State authority was, it has always been supposed, firmly established and secured by the Constitution. But that right may be destroyed or greatly impaired if it be true that articles may be taxed by Congress by reason of their being carried from one State to another.

Undoubtedly the clause confines the power to lay customs duties or imposts to imports only. This was so stated by Mr. Hamilton in the thirty-second number of The Federalist: "The first clause of the same section [sec. 8] empowers Congress '*to lay and collect taxes, duties, imposts, and excises;*' and the second clause of the tenth section of the same article declares that '*no State shall, without the consent of Congress, lay any imposts or duties on imports or exports*, except for the purpose of executing its inspection laws.' Hence would result an exclusive power in the Union to lay duties on imports and exports, with the particular exception mentioned. But this power is abridged by another clause, which declares that no tax or duty shall be laid on articles exported from any State; in consequence of which qualification it now only extends to the *duties on imports*."

Nevertheless, because the clause secured that object, it is not to be assumed that it was not also intended to secure unrestrained intercourse between the different parts of a common country.

As was said in Gibbons *v.* Ogden, the right of intercourse between State and State was derived "from those laws whose authority is acknowledged by civilized man throughout the world. . . . The Constitution found it an existing right, and gave to Congress the power to regulate it." 9 Wheat. 211 [**235**]. From this grant, however, the

power to regulate by the levy of any tax or duty on articles exported from any State was expressly withheld.

In Woodruff *v.* Parham, 8 Wall. 132, Mr. Justice Miller, in support of the conclusion that clause 1 of sec. 8 was confined as to customs duties to foreign commerce, said: "Is the word 'impost,' here used, intended to confer upon Congress a distinct power to levy a tax upon all goods or merchandise carried from one State into another? Or is the power limited to duties on foreign imports? If the former be intended, then the power conferred is curiously rendered nugatory by the subsequent clause of the ninth section, which declares that no tax shall be laid on articles exported from any State, for no article can be imported from one State into another, which is not, at the same time, exported from the former."

In that case, clause 2 of sec. 10 was under consideration: "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

It was held that this referred to foreign commerce only, and "that no intention existed to prohibit, by *this clause*, the right of one State to tax articles brought into it from another." This was reaffirmed in Brown *v.* Houston, 114 U. S. 622, 630 [**333**], and Mr. Justice Bradley said: "But in holding, with the decision in Woodruff *v.* Parham, that goods carried from one State to another are not imports or exports within the meaning of the clause which prohibits a State from laying any impost or duty on imports or exports, we do not mean to be understood as holding that a State may levy import or export duties on goods imported from or exported to another State. We only mean to say that the clause in question does not prohibit it. Whether the laying of such duties by a State would not violate some other provision of the Constitution — that, for example, which gives to Congress the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes — is a different question."

The question has been repeatedly answered by this court to the effect "that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress." Lyng *v.* Michigan, 135 U. S. 166. But if that power of regulation is absolutely unrestricted as respects interstate commerce, then, the very unity the Constitution was framed to secure can be set at naught by a legislative body created by that instrument.

Such a conclusion is wholly inadmissible. The power to regulate interstate commerce was granted in order that trade between the States might be left free from discriminating legislation, and not to impart the power to create antagonistic commercial relations between them.

The prohibition of preference of ports was coupled with the prohibition of taxation on articles exported. The citizens of each State were declared "entitled to all privileges and immunities of citizens in the several States," and that included the right of ingress and egress, and the enjoyment of the privileges of trade and commerce. Slaughter-House Cases, 16 Wall. 36 [**18**].

And so the court, in Woodruff *v.* Parham, as the quotation from its opinion by Mr. Justice Miller demonstrates, did not put upon the absolute and general prohibition of power to lay any tax or duty on articles exported from any State that narrow construction which would limit it to exports to a foreign country, and would concede the power to Congress to impose duties on exports from one State to another in regulation of interstate commerce.

The power to lay duties in regulation of commerce with foreign nations is relied on as the source of power to pass laws for the protection and encouragement of domestic industries, and except for this clause the same effect would be attributed to the power to regulate commerce among the States. This, however, the clause, literally read, prevents, and to limit its application to foreign commerce, as the power to lay customs duties under the first clause of sec. 8 has been limited, would defeat the manifest purpose of the Constitution by enabling discriminating taxes and duties to be laid against one section of the country as distinguished from another.

And if the prohibition be not confined to foreign commerce, then it applies to all commerce not wholly internal to the respective States, and the destination of articles exported from a State cannot effect, or be laid hold of to affect, the result.

In short, clause 5 operates, and was intended to operate, to except the power to lay any tax or duty on articles exported from the general power to regulate commerce, whether interstate or foreign. And this is equally true in respect of commerce with the Territories, for the power to regulate commerce includes the power to regulate it, not only as between foreign countries and the Territories, but also by necessary implication as between the States and Territories. Stoutenburgh *v.* Hennick, 129 U. S. 141.

Nothing is better settled than that the States cannot interfere with interstate commerce, yet it is easy to see that if the exclusive delegation to Congress of the power to regulate commerce did not embrace commerce between the States and Territories, the interference by the States with such commerce might be justified.

Again, if in any view these duties could be treated as other than custom duties the result would be the same, inasmuch as the goods were

articles exported from New York, and there was a total lack of power to lay *any* tax or duty on such articles.

The prohibition on Congress is explicit, and noticeably different from the prohibition on the States. The State is forbidden to lay "any imposts or duties;" Congress is forbidden to lay "any tax or duty." The State is forbidden from laying imposts or duties "on imports and exports," that is, articles coming into or going out of the United States. Congress is forbidden to tax "articles exported *from any State.*"

The plain language of the Constitution should not be made "blank paper by construction," and its specific mandate ought to be obeyed.

As said in Marbury *v.* Madison, "It is declared that 'no tax or duty shall be laid on articles exported from any state.' Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the Constitution, and only see the law?" 1 Cranch, 137, 178 [**815**].

Nor is the result affected by the fact that the collection of these duties was at Porto Rico.

In Brown *v.* Maryland, 12 Wheat. 419, 437 [**303**], Chief Justice Marshall said: "An impost, or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before or on entering the port does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are 'imports?' The lexicons inform us they are 'things imported.' If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. 'A duty on imports,' then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country."

And so of exports. They are the things exported — the articles themselves. A duty on exports is not merely a duty on the act of exportation, but is a duty on the article exported, and the article exported remains such until it has reached its final destination. The place of collection is purely incidental, and immaterial on the question of power.

But we are told that these duties were laid, not on articles exported from the State of New York, but on articles imported into Porto Rico. The language used, however, precludes this contention, and there is

nothing in the act to indicate that at some particular point on a voyage articles exported were to cease to be such and to become imports, and nothing in the facts in this case to indicate a sea change of that sort as to these goods. The geographical origin of the shipment controls, and, as heretofore said, it is not material whether the duties were collectible at the place of exportation or at Porto Rico. They were imposed on articles exported from the State of New York, and before the articles had reached their ultimate destination and been mingled with the common mass of property on the island.

Chief Justice Marshall disposed of the suggested evasion thus: "Suppose revenue cutters were to be stationed off the coast for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries; would it be received as an excuse for this outrage were the government to say that exportation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or things imported, ceased the instant they were brought into the country, so the prohibition to tax articles exported ceased when they were carried out of the country?" 12 Wheat. 445.

There is no difference in principle between the case supposed and that before us. The course of transportation is arrested until the exaction is paid.

The proposition that because the proceeds of these duties were to be used for the benefit of Porto Rico they might be regarded as if laid by Porto Rico itself with the consent of Congress, and were therefore lawful, will not bear examination. No money can be drawn from the Treasury except in consequence of appropriations made by law. This act does not appropriate a fixed sum for the benefit of Porto Rico, but provides that the money collected, and collected from citizens of the United States, in every port of the United States, shall be placed in a separate fund or subsequently in the Treasury of Porto Rico, to be expended for the government and benefit thereof. And although the destination of the proceeds in this way were lawful, it would not convert duties on articles exported from the States into local taxes.

States may, indeed, under the Constitution, lay duties on foreign imports and exports, for the use of the Treasury of the United States, with the consent of Congress, but they do not derive the power from the general government. The power preëxisted, and it is its exercise only that is subjected to the discretion of Congress.

Congress may lay local taxes in the Territories, affecting persons and property therein, or authorize territorial legislatures to do so, but it cannot lay tariff duties on articles exported from one State to another, or from any State to the Territories, or from any State to foreign countries, or grant a power in that regard which it does not possess. But the decision now made recognizes such powers in Congress as will enable it, under the guise of taxation, to exclude the products of Porto

Rico from the States as well as the products of the States from Porto Rico; and this, notwithstanding it was held in De Lima *v.* Bidwell, 182 U. S. 1, that Porto Rico after the ratification of the treaty with Spain ceased to be foreign and became domestic territory.

My Brothers HARLAN, BREWER, and PECKHAM concur in this dissent.

We think it clear on this record that plaintiffs were entitled to recover, and that the judgment should be reversed.

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## HAWAII *v.* MANKICHI.

190 U. S. 197; 23 Sup. Ct. Rep. 787. 1903.

This was a petition by Mankichi for a writ of *habeas corpus* to obtain his release from the Oahu convict prison, where he is confined upon conviction for manslaughter, in alleged violation of the Constitution, in that he was tried upon an indictment not found by a grand jury, and convicted by the verdict of nine out of twelve jurors, the other three dissenting from the verdict.

Following the usual course of procedure in the Republic of Hawaii, prior to its incorporation as a Territory of the United States, the prisoner was tried upon an indictment much in the form of an information at common law, by the Attorney General, and indorsed "a true bill, found this 4th day of May, A. D. 1899. A. Perry, first judge of the Circuit Court," etc.

From an order of the United States District Court, discharging the prisoner, the Attorney General of the Territory appealed to this court.

MR. JUSTICE BROWN delivered the opinion of the court:

The question involved in this case is an extremely simple one. The difficulty is in fixing upon the principles applicable to its solution. By a joint resolution adopted by Congress, July 7, 1898 (30 Stat. 750), known as the Newlands resolution, and with the consent of the Republic of Hawaii, signified in the manner provided in its Constitution, the Hawaiian Islands and their dependencies were annexed "as a part of the Territory of the United States, and subject to the sovereign dominion thereof," with the following condition: "The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution *nor contrary to the Constitution of the United States*, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." The material parts of this resolution are printed in the margin.[1]

[1] Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States (30 Stat. 750).

Whereas the government of the Republic of Hawaii having, in due form signified its consent, in the manner provided by its Constitution, to cede, absolutely and without

Though the resolution was passed July 7, the formal transfer was not made until August 12, when, at noon of that day, the American flag was raised over the government house, and the islands ceded with appropriate ceremonies to a representative of the United States. Under the conditions named in this resolution, the Hawaiian Islands remained under the name of the "Republic of Hawaii" until June 14, 1900, when they were formerly incorporated by act of Congress under the name of the "Territory of Hawaii." (31 Stat. 141, chap. 339.) By this act the Constitution was formally extended to these islands (Sec. 5), and special provisions made for empaneling grand juries, and for unanimous verdicts of petty juries. (Sec. 83.)

The question is whether, in continuing the municipal legislation of the islands not contrary to the Constitution of the United States, it was intended to abolish at once the criminal procedure theretofore in force upon the islands, and to substitute immediately, and without

reserve, to the United States of America, all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining: Therefore,

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.

. . . . . .

Until Congress shall provide for the government of such islands, all the civil, judicial, and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons, and shall be exercised in such manner, as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned.

The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nation. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.

Until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands, the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged.

. . . . . .

There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands.

The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper.

new legislation, the common law proceedings by grand and petit jury, which had been held applicable to other organized Territories. Webster *v.* Reid, 11 How. 437; American Pub. Co. *v.* Fisher, 166 U. S. 464; Thompson *v.* Utah, 170 U. S. 343 [**831**], though we have also held that the States, when once admitted as such, may dispense with grand juries, Hurtado *v.* California, 110 U. S. 516 [**905**], and perhaps allow verdicts to be rendered by less than a unanimous vote. American Publishing Co. *v.* Fisher, 166 U. S. 464; Thompson *v.* Utah, 170 U. S. 343 [**831**].

In fixing upon the proper construction to be given to this resolution, it is important to bear in mind the history and condition of the islands prior to their annexation by Congress. Since 1847 they had enjoyed the blessings of a civilized government, and a system of jurisprudence modeled largely upon the common law of England and the United States. Though lying in the tropical zone, the salubrity of their climate and the fertility of their soil had attracted thither large numbers of people from Europe and America, who brought with them political ideas and traditions which, about sixty years ago, found expression in the adoption of a code of laws appropriate to their new conditions. Churches were founded, schools opened, courts of justice established, and civil and criminal laws administered upon substantially the same principles which prevailed in the two countries from which most of the immigrants had come. Taking the lead, however, in a change which has since been adopted by several of the United States, no provision was made for grand juries, and criminals were prosecuted upon indictments found by judges. By a law passed in 1847, the number of a jury was fixed at twelve, but a verdict might be rendered upon the agreement of nine jurors. The question involved in this case is whether it was intended that this practice should be instantly changed, and the criminal procedure embodied in the Fifth and Sixth Amendments to the Constitution be adopted as of August 12, 1898, when the Hawaiian flag was hauled down and the American flag hoisted in its place.

If the words of the Newlands resolution, adopting the municipal legislation of Hawaii, *not contrary to the Constitution of the United States*, be literally applied, the petitioner is entitled to his discharge, since that instrument expressly requires Amendment 5, that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury;" and, Amendment 6, that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed." But there is another question underlying this and all other rules for the interpretation of statutes, and that is, What was the intention of the legislative body? Without going back to the famous case of the drawing of blood in the streets of Bologna, the books are full of authorities to the effect that the intention of the lawmaking power

will prevail, even against the letter of the statute; or, as tersely expressed by Mr. Justice Swayne in Smythe *v.* Fiske, 23 Wall. 374, 380: "A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law." A parallel expression is found in the opinion of Mr. Chief Justice Thompson of the Supreme Court of the State of New York (subsequently Mr. Justice Thompson of this court), in People *v.* Utica Ins. Co. 15 Johns. 358, 381: "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers."

Without going farther, numerous illustrations of this maxim are found in the reports of our own court. Nowhere is the doctrine more broadly stated than in United States *v.* Kirby, 7 Wall. 482, in which an act of Congress, providing for the punishment of any person who "shall knowingly and willfully obstruct or retard the passage of the mail, or any driver or carrier," was held not to apply to a state officer who had a warrant of arrest against a carrier for murder, the court observing that no officer of the United States was placed by his position above responsibility to the legal tribunals of the country, and to the ordinary processes for his arrest and detention when accused of felony. "All laws," said the court, "should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter." A case was cited from Plowden, holding that a statute which punished a prisoner as a felon who broke prison did not extend to a prisoner who broke out when the prison was on fire, "for he is not to be hanged because he would not stay to be burned." Similar language to that in Kirby's case was used in Carlisle *v.* United States, 16 Wall. 147, 153.

In Atkins *v.* Disintegrating Co. 18 Wall. 272, it was held that a suit *in personam* in admiralty was not a "civil suit" within the eleventh section of the judiciary act, though clearly a civil suit in the general sense of that phrase, and as used in other sections of the same act. See also *In re* Louisville Underwriters, 134 U. S. 488. So in Heydenfeldt *v.* Daney Gold &c. Co. 93 U. S. 634, 638, it was said by Mr. Justice Davis: "If a little interpretation of any part of it (a statute) would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced its enactment." To the same effect are the

Church of the Holy Trinity *v.* United States, 143 U. S. 457, in which many cases are cited and reviewed, and Lau Ow Bew *v.* United States, 144 U. S. 47, 59. In this latter case it was held that a statute requiring the permission of the Chinese government, and the identification of "every Chinese person other than a laborer, who may be entitled by treaty or act of Congress to come within the United States," did not apply to "Chinese merchants already domiciled in the United States, who, having left the country for temporary purposes, *animo revertendi*, seek to reënter it on their return to their business and their homes." Said the Chief Justice: "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."

Two recent English cases are instructive in this connection: In Plumstead Board of Works *v.* Spackman, L. R. 13 Q. B. D. 878, 887, it was said by the Master of Rolls, afterwards Lord Esher: "If there are no means of avoiding such an interpretation of the statute" (as will amount to a great hardship), "a judge must come to the conclusion that the legislature by inadvertence has committed an act of legislative injustice; but, to my mind, a judge ought to struggle with all the intellect that he has, and with all the vigor of mind that he has, against such an interpretation of an act of Parliament; and, unless he is forced to come to a contrary conclusion, he ought to assume that it is impossible that the legislature could have so intended." See also Ex parte Walton, L. R. 17 Ch. D. 746.

Is there any room for construction in this case, or, are the words of the resolution so plain that construction is impossible? There are many reasons which induce us to hold that the act was not intended to interfere with the existing practice, when such interference would result in imperiling the peace and good order of the islands. The main objects of the resolution were, 1st, to accept the cession of the islands theretofore made by the Republic of Hawaii, and to annex the same "as a part of the territory of the United States, and subject to the sovereign dominion thereof;" 2d, to abolish all existing treaties with various nations, and to recognize only treaties between the United States and such foreign nations; 3d, to continue the existing laws and customs regulations, so far as they were not inconsistent with the resolution, or contrary to the Constitution, until Congress should otherwise determine. From the terms of this resolution it is evident that it was intended to be merely temporary and provisional; that no change in the government was contemplated, and that, until further legislation, the Republic of Hawaii continued in existence. Even its name was not changed until 1900, when the "Territory of Hawaii" was organized. The laws of the United States were not extended over the islands until the organic act was passed on April 30, 1900, when, so careful was Congress not to disturb the existing condition of things any further than was necessary, that it was pro-

vided, sec. 5, that only "the laws of the United States which are not locally inapplicable shall have the same force and effect within the said Territory as elsewhere in the United States." There was apparently some discretion left to the courts in this connection. Indianapolis, &c. R. R. Co. *v.* Horst, 93 U. S. 291, 299. The fact, already mentioned, that Congress, in this organic act, inserted a provision for the empaneling of grand juries and for the unanimity of verdicts, indicates an understanding that the previous practice had been pursued up to that time, and that a change in the existing law was contemplated.

Of course, under the Newlands resolution, any new legislation must conform to the Constitution of the United States; but how far the exceptions to the existing municipal legislation were intended to abolish existing laws must depend somewhat upon circumstances. Where the immediate application of the Constitution required no new legislation to take the place of that which the Constitution abolished, it may be well held to have taken immediate effect; but where the application of a procedure hitherto well known and acquiesced in left nothing to take its place, without new legislation, the result might be so disastrous that we might well say that it could not have been within the contemplation of Congress. In all probability the contingency which has actually arisen occurred to no one at the time. If it had, and its consequences were foreseen, it is incredible that Congress should not have provided against it.

If the negative words of the resolution, "nor contrary to the Constitution of the United States," be construed as imposing upon the islands every provision of a Constitution which must have been unfamiliar to a large number of their inhabitants, and for which no previous preparation had been made, the consequences in this particular connection would be that every criminal in the Hawaiian Islands convicted of an infamous offense between August 12, 1898, and June 14, 1900, when the act organizing the territorial government took effect, must be set at large; and every verdict in a civil case rendered by less than a unanimous jury held for naught. Surely, such a result could not have been within the contemplation of Congress. It is equally manifest that such could not have been the intention of the Republic of Hawaii in surrendering its autonomy. Until then it was an independent nation, exercising all the powers and prerogatives of complete sovereignty. It certainly could not have anticipated that, in dealing with another independent nation, and yielding up its sovereignty, it had denuded itself, by a negative pregnant, of all power of enforcing its criminal laws according to the methods which had been in vogue for sixty years, and was adopting a new procedure for which it had had no opportunity of making preparation. The legislature of the Republic had just adjourned, not to convene again until some time in 1900, and not actually convening until 1901. The resolution on its face bears evidence of having been intended

merely for a temporary purpose, and to give time to the Republic to adapt itself to such form of territorial government as should afterwards be adopted in its organic act.

The language of Mr. Buchanan, then Secretary of State, in holding that the military government established in California did not cease to exist with the treaty of peace, but continued as a government *de facto* until Congress should provide a territorial government, is peculiarly applicable to this case. "The great law of necessity justifies this conclusion. The cousent of the people is irresistably inferred from the fact that no civilized community could possibly desire to abrogate an existing government, when the alternative presented would be to place themselves in a state of anarchy, beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the dominion of the strongest." 16 How. 184.

It is insisted, however, that, as the common law of England had been adopted in Hawaii by the Code of 1897, it was within the power of the courts to summon a grand jury, and that such action might have been taken and criminals tried upon indictments properly found, and convicted by a unanimous verdict. The suggestion is rather fanciful than real, since section 1109 of the Code of 1897, adopting the common law of England, contained a proviso that "no person shall be subject to criminal proceedings except as provided by the Hawaiian laws." These laws provided expressly, sec. 616, Penal Laws of 1897, as follows: "The necessary bills of indictment shall be duly prepared by a legal prosecuting officer, and be duly presented to the presiding judge of the court before the arraignment of the accused, and such judge shall, after examination, certify upon each bill of indictment whether he finds the same a true bill or not." The question thus squarely presented to every judge in the Republic was, whether he was bound to summon a grand jury under the Newlands resolution, when no provision existed by law for impaneling the same, or their payment, and when, in so doing, he was obliged to ignore the plain statute of his own country.

It is not intended here to decide that the words "nor contrary to the Constitution of the United States" are meaningless. Clearly, they would be operative upon any municipal legislation thereafter adopted, and upon any proceedings thereafter had, when the application of the Constitution would not result in the destruction of existing provisions conducive to the peace and good order of the community. Therefore we should answer without hesitation in the negative the question put by counsel for the petitioner in their brief: "Would municipal statutes of Hawaii, allowing a conviction of treason on circumstantial evidence, or on the testimony of one witness, depriving a person of liberty by the will of the legislature and without process, or confiscating private property for public use without compensation, remain in force after an annexation of the territory to the United States, which was conditioned upon the extinction of

all legislation contrary to the Constitution?" We would even go farther, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well being.

Inasmuch as we are of opinion that the status of the islands and the powers of their provisional government were measured by the Newlands resolution, and the case has been argued upon that theory, we have not deemed it necessary to consider what would have been its position had the important words "nor contrary to the Constitution of the United States" been omitted, or to reconsider the questions which arose in the *Insular Tariff* cases regarding the power of Congress to annex territory without, at the same time, extending the Constitution over it. Of course, for the reasons already stated, the questions involved in this case could arise only from such as occurred between the taking effect of the joint resolution of July 7, 1898, and the act of April 30, 1900, establishing the territorial government.

*The decree of the District Court for the territory of Hawaii must be reversed, and the case remanded to that court, with instruction to dismiss the petition.*[1]

[1] MR. JUSTICE WHITE, with whom concurred MR. JUSTICE MCKENNA, agreed to the opinion of the majority on the ground "that as a consequence of the relation which the Hawaiian Islands occupied towards the United States, growing out of the resolution of annexation, the provisions of the Fifth and Sixth Amendments of the Constitution concerning grand and petit juries were not applicable to that Territory, because, whilst the effect of the resolution of annexation was to acquire the islands, and subject them to the sovereignty of the United States, neither the terms of the resolution nor the situation which arose from it served to incorporate the Hawaiian Islands into the United States and make them an integral part thereof. In other words, in my opinion, the case is controlled by the decision in Downes *v.* Bidwell, 182 U. S. 244."

MR. CHIEF JUSTICE FULLER with whom concurred MR. JUSTICE HARLAN, MR. JUSTICE BREWER and MR. JUSTICE PECKHAM, dissented, stating his conclusion as follows:

"Assuming, solely for the sake of argument, that the mere fact of annexation might not in itself have at once extended to the inhabitants of Hawaii all the rights, privileges, and immunities guaranteed by the Constitution, and that Congress had the power to impose limitations in that regard, I think not only that Congress did not do so in the particulars in question, but that, in reënacting existing legislation, Congress, by the terms of the resolution, intentionally invalidated so much thereof as in these particulars was inconsistent with the Constitution. The presumptions are all opposed to any capitulation in the matter of common-law institutions."

MR. JUSTICE HARLAN further dissented, stating his conclusions as follows:

"I am of opinion: 1. That when the annexation of Hawaii was completed, the Constitution — without any declaration to that effect by Congress, and without any

## DORR *v.* UNITED STATES.

195 U. S. 138; 24 Sup. Ct. Rep. 808. 1904.

[In error to the Supreme Court of the Philippine Islands to review a judgment which affirmed a conviction of libel in the court of first instance in the City of Manilla.]

Mr. Justice Day delivered the opinion of the court:

The case presents the question whether, in the abseuce of a statute of Congress expressly conferriug the right, trial by jury is a necessary incident of judicial procedure in the Philippine Islands, where demand for trial by that method has been made by the accused, and denied by the courts established in the islands.

The recent consideration by this court, and the full discussion had in the opinions delivered in the so-called "Insular cases," renders superfluous any attempt to reconsider the constitutional relation of the powers of the government to territory acquired by a treaty cession to the United States. De Lima *v.* Bidwell, 182 U. S. 1; Downes *v.* Bidwell, 182 U. S. 244 [**1119**]. The opinions rendered in those cases cover every phase of the question, either legal or historical, and it would be useless to undertake to add to the elaborate consideration of the subject had therein. In the still more recent case of Hawaii *v.* Mankichi, 190 U. S. 197 [**1244**], the right to a jury trial in outlying territory of the United States was under consideration. For the present purpose it is only necessary to state certain conclusions which are deemed to be established by prior adjudications, and are decisive of this case.

It may be regarded as settled that the Constitution of the United States is the only source of power authorizing action by any branch of the Federal government. "The government of the United States was born of the Constitution, and all powers which it enjoys or may exercise must be either derived expressly or by implication from that instrument." Downes *v.* Bidwell, 182 U. S. 244, 288 [**1119**], and cases cited. It is equally well settled that the United States may acquire territory in the exercise of the treaty-making power by direct cession as the resnlt of war, and in making effectual the terms of peace; and for that purpose has the powers of other sovereign nations. This principle has been recognized by this court from its

power of Congress to prevent it — became the supreme law for that country, and, therefore, it forbade the trial and conviction of the accused for murder otherwise than upon a presentment or indictment of a grand jury, and by the unanimous verdict of a petit jury. 2. That if the legality of such trial and conviction is to be tested alone by the Joint Resolution of 1898, then the law is for the accused, because Congress, by that Resolution, abrogated or forbade the enforcement of any municipal law of Hawaii so far as it authorized a trial for an infamous crime otherwise than in the mode prescribed by the Constitution of the United States; and that any other construction of the Resolution is forbidden by its clear, unambiguous words, and is to make, not to interpret, the law."

earliest decisions. The convention which framed the Constitution of the United States, in view of the territory already possessed and the possibility of acquiring more, inserted in that instrument, in article IV., section 3, a grant of express power to Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

As early as the February term, 1810, of this court, in the case of Seré and Laralde *v.* Pitot and others, 6 Cranch, 332, Chief Justice Marshall, delivering the opinion of the court, said:

"The power of governing and legislating for a territory is the inevitable consequence of the right to acquire and to hold territory. Could this position be contested, the Constitution of the United States declares that 'Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' Accordingly we find Congress possessing and exercising the absolute and undisputed power of governing and legislating for the Territory of Orleans. Congress has given them a legislative, an executive, and a judiciary, with such powers as it has been their will to assign to those departments respectively."

And later, the same eminent judge, delivering the opinion of the court in the leading case upon the subject, American Insurance Co. *v.* Canter, 1 Pet. 511, 542 [**827**], says:

"The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or by treaty. The usage of the word is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded Territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly-created power of the state.

"On the 2d of February, 1819, Spain ceded Florida to the United States. The sixth article of the treaty of cession contains the following provision: 'The inhabitants of the territories which His Catholic Majesty cedes to the United States by this treaty shall be incorporated in the Union of the United States as soon as may be consistent with

the principles of the Federal Constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States.'

"This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government till Florida shall become a State. In the meantime Florida continues to be a territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress 'to make all needful rules and regulations respecting the territory or other property belonging to the United States.' "

While these cases, and others which are cited in the late case of Downes *v.* Bidwell, *supra*, sustain the right of Congress to make laws for the government of Territories, without being subject to all the restrictions which are imposed upon that body when passing laws for the United States, considered as a political body of States in union, the exercise of the power expressly granted to govern the territories is not without limitations. Speaking of this power, Mr. Justice Curtis, in the case of Scott *v.* Sandford, 19 How. 393, 614, said:

"If, then, this clause does contain a power to legislate respecting the territory, what are the limits of that power?

"To this I answer that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that, in the exercise of the legislative power, Congress cannot pass an *ex post facto* law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution."

In every case where Congress undertakes to legislate in the exercise of the power conferred by the Constitution, the question may arise as to how far the exercise of the power is limited by the "prohibitions" of that instrument. The limitations which are to be applied in any given case involving territorial government must depend upon the relation of the particular territory to the United States, concerning which Congress is exercising the power conferred by the Constitution. That the United States may have territory which is not incorporated into the United States as a body politic, we think was recognized by the framers of the Constitution in enacting the article already considered, giving power over the territories, and is sanctioned by the opinions of the justices concurring in the judgment in Downes *v.* Bidwell, *supra*.

Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision that the territory is to be governed under the power existing in Congress to make laws for such territories, and subject to such constitu-

tional restrictions upon the powers of that body as are applicable to the situation.

For this case the practical question is, must Congress, in establishing a system for trial of crimes and offenses committed in the Philippine Islands, carry to their people by proper affirmative legislation a system of trial by jury?

If the treaty-making power could incorporate territory into the United States without congressional action, it is apparent that the treaty with Spain, ceding the Philippines to the United States carefully refrained from so doing; for it is expressly provided that (Article IX): "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." In this language it is clear that it was the intention of the framers of the treaty to reserve to Congress, so far as it could be constitutionally done, a free hand in dealing with these newly-acquired possessions.

The legislation upon the subject shows that not only has Congress hitherto refrained from incorporating the Philippines into the United States, but in the act of 1902, providing for temporary civil government, 32 Stat. 691, there is express provision that section eighteen hundred and ninety-one of the Revised Statutes of 1878 shall not apply to the Philippine Islands. This is the section giving force and effect to the Constitution and laws of the United States, not locally inapplicable, within all the organized territories, and every territory thereafter organized, as elsewhere within the United States.

The requirements of the Constitution as to a jury are found in article III, section 2:

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the States where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

And in article six of the amendments to the Constitution:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury, of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

It was said in the Mankichi case, 190 U. S. 197 [**1244**], that when the territory had not been incorporated into the United States these requirements were not limitations upon the power of Congress in providing a government for territory in execution of the powers conferred upon Congress. Opinion of Mr. Justice White, p. 220, citing Hurtado *v.* California, 110 U. S. 516 [**905**]; *In re* Ross, 140 U. S.

453, 473; Bolln *v.* Nebraska, 176 U. S. 83, and cases cited on p. 86; Maxwell *v.* Dow, 176 U. S. 581, 584 [**19**]; Downes *v.* Bidwell, 182 U. S. 244 [**1119**].

In the same case Mr. Justice Brown, in the course of his opinion, said:

"We would even go farther, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case [right to trial by jury and presentment by grand jury] are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well being."

As we have had occasion to see in the case of Kepner *v.* United States, 195 U. S. 100, the President, in his instructions to the Philippine Commission, while impressing the necessity of carrying into the new government the guaranties of the Bill of Rights securing those safe-guards to life and liberty which are deemed essential to our government, was careful to reserve the right to trial by jury, which was doubtless due to the fact that the civilized portion of the islands had a system of jurisprudence founded upon the civil law, and the uncivilized parts of the archipelago were wholly unfitted to exercise the right of trial by jury. The Spanish system, in force in the Philippines, gave the right to the accused to be tried before judges, who acted in effect as a court of inquiry, and whose judgments were not final until passed in review before the audiencia, or Supreme Court, with right of final review, and power to grant a new trial for errors of law, in the Supreme Court at Madrid. To this system the Philippine Commission, in executing the power conferred by the orders of the President, and sanctioned by act of Congress (act of July 1, 1902, 32 Stat. 691), has added a guaranty of the right of the accused to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses against him face to face, and to have compulsory process to compel the attendance of witnesses in his behalf. And, further, that no person shall be held to answer for a criminal offense without due process of law, nor be put twice in jeopardy of punishment for the same offense, nor be compelled in any criminal case to be a witness against himself. As appears in the Kepner case, *supra*, the accused is given the right of appeal from the judgment of the court of first instance to the Supreme Court, and, in capital cases, the case goes to the latter court without appeal. It cannot be successfully maintained that this system does not give an adequate and efficient method of protecting the rights of the accused as well as executing the criminal law by judicial proceedings which give full

opportunity to be heard by competent tribunals before judgment can be pronounced. Of course, it is a complete answer to this suggestion to say, if such be the fact, that the constitutional requirements as to a jury trial, either of their own force or as limitations upon the power of Congress in setting up a government, must control in all the territory, whether incorporated or not, of the United States. But is this a reasonable interpretation of the power conferred upon Congress to make rules and regulations for the territories?

The cases cited have firmly established the power of the United States, like other sovereign nations, to acquire, by the methods known to civilized people, additional territory. The framers of the Constitution, recognizing the possibility of future extension by acquiring territory outside the States, did not leave to implication alone the power to govern and control territory owned or to be acquired, but, in the article quoted, expressly conferred the needful powers to make regulations. Regulations in this sense must mean laws, for, as well as States, territories must be governed by laws. The limitations of this power were suggested by Mr. Justice Curtis in the Dred Scott case, above quoted, and Mr. Justice Bradley, in the Mormon Church case, 136 U. S. 1 [**835**], said:

"Doubtless Congress, in legislating for the Territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions."

This language was quoted with approbation by Mr. Justice Brown in Downes *v.* Bidwell, *supra*, and in the same case Mr. Justice White said: "Whilst, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the Territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government, which cannot be with impunity transcended. But this does not suggest that every express limitation of the Constitution which is applicable has not force, but only signifies that even in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution."

In treating of article 4, section 3, Judge Cooley, in his work on Constitutional Law, says:

"The peculiar wording of the provision [section 3, article 4] has led some persons to suppose that it was intended Congress should exercise, in respect to the territory, the rights only of a proprietor of property, and that the people of the territories were to be left at liberty to institute governments for themselves. It is no doubt most

consistent with the general theory of republican institutions that the people everywhere should be allowed self-government; but it has never been deemed a matter of right that a local community should be suffered to lay the foundations of institutions, and erect a structure of government thereon, without the guidance and restraint of a superior authority. Even in the older States, where society is most homogeneous and has fewest of the elements of disquiet and disorder, the State reserves to itself the right to shape municipal institutions; and towns and cities are only formed under its directions, and according to the rules and within the limits the State prescribes. With still less reason could the settlers in new territories be suffered to exercise sovereign powers. The practice of the Government, originating before the adoption of the Constitution, has been for Congress to establish governments for the territories; and whether the jurisdiction over the district has been acquired by grant from the States, or by treaty with a foreign power, Congress has unquestionably full power to govern it; and the people, except as Congress shall provide for, are not of right entitled to participate in political authority until the Territory becomes a State. Meantime they are in a condition of temporary pupilage and dependence; and while Congress will be expected to recognize the principle of self-government to such extent as may seem wise, its discretion alone can constitute the measure by which the participation of the people can be determined." Cooley, Principles of Constitutional Law, 164.

If the right to trial by jury were a fundamental right which goes wherever the jurisdiction of the United States extends, or if Congress, in framing laws for outlying territory belonging to the United States, was obliged to establish that system by affirmative legislation, it would follow that, no matter what the needs or capacities of the people, trial by jury, and in no other way, must be forthwith established, although the result may be to work injustice and provoke disturbance rather than to aid the orderly administration of justice. If the United States, impelled by its duty or advantage, shall acquire territory peopled by savages, and of which it may dispose or not hold for ultimate admission to Statehood, if this doctrine is sound, it must establish there the trial by jury. To state such a proposition demonstrates the impossibility of carrying it into practice. Again, if the United States shall acquire by treaty the cession of territory having an established system of jurisprudence, where jury trials are unknown, but a method of fair and orderly trial prevails under an acceptable and long-established code, the preference of the people must be disregarded, their established customs ignored, and they themselves coerced to accept, in advance of incorporation into the United States, a system of trial unknown to them and unsuited to their needs. We do not think it was intended, in giving power to Congress to make regulations for the territories, to hamper its exercise with this condition.

We conclude that the power to govern territory, implied in the

right to acquire it, and given to Congress in the Constitution in Article IV, § 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation, and of its own force, carry such right to terrritory so situated.

[Other assignments of error relating to the action of the lower court in sustaining the conviction are considered and as no error is found to have been committed, the judgment is affirmed.][1]

[1] MR. JUSTICE PECKHAM, with whom agree the CHIEF JUSTICE and MR. JUSTICE BREWER, specially concurred on the ground that the case is ruled by Hawaii *v.* Mankichi, 190 U. S. 197, *supra*, p. 1244, holding that a jury trial is not a constitutional necessity in Hawaii, which conclusion is applicable also to the Philippine Islands; but he does not assent to the view that Downes *v.* Bidwell, 182 U. S. 244 [1119], is to he regarded as authority for such conclusion. MR. JUSTICE HARLAN dissented on grounds stated by him in his dissent in the case of Hawaii *v.* Mankichi, *supra*, p. 1244.

In the case of RASSMUSSEN *v.* UNITED STATES, 197 U. S. 516, 25 Sup. Ct. Rep. 514 (1905), it was held that under the treaty annexing Alaska the provisions of the Sixth Amendment of the Constitution of the United States, requiring a jury trial in criminal prosecutions, render invalid the provisions of an act of Congress for trials of misdemeanors in that Territory by a jury of six.

# APPENDIX C.

## ADDITIONAL CASES AS TO DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAWS, AND THE POLICE POWER.

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### LOCKNER *v.* NEW YORK.

198 U. S. 45; 25 Sup. Ct. Rep. 539. 1905.

This is a writ of error to the County Court of Oneida County, in the State of New York (to which court the record had been remitted), to review the judgment of the Court of Appeals of that State, affirming the judgment of the Supreme Court, which itself affirmed the judgment of the County Court, convicting the defendant of a misdemeanor on an indictment under a statute of that State, known, by its short title, as the labor law. . . . The plaintiff in error demurred to the indictment on several grounds, one of which was that the facts stated did not constitute a crime. The demurrer was overruled, and, the plaintiff in error having refused to plead further, a plea of not guilty was entered by order of the court and the trial commenced, and he was convicted of misdemeanor, second offense, as indicted, and sentenced to pay a fine $50, and to stand committed until paid, not to exceed fifty days in the Oneida County jail.

[The opinion of the appellate division of the Supreme Court of New York is reported in 73 App. Div. 120, and that of the Court of Appeals of that State in 177 N. Y. 175.]

MR. JUSTICE PECKHAM, after making the foregoing statement of the facts, delivered the opinion of the court.

The indictment, it will be seen, charges that the plaintiff in error violated the one hundred and tenth section of article 8, chapter 415, of the Laws of 1897, known as the labor law of the State of New York, in that he wrongfully and unlawfully required and permitted an employee working for him to work more than sixty hours in one week. There is nothing in any of the opinions delivered in this case, either in the Supreme Court or the Court of Appeals of the State, which construes the section, in using the word "required," as referring to any physical force being used to obtain the labor of an employee. It is assumed that the word means nothing more than the requirement arising from voluntary contract for such labor in excess of the number of hours specified in the statute. There is no pretense in any of the opinions that the statute was intended to meet a case of involuntary labor in any form. All the opinions assume that there is no

real distinction, so far as this question is concerned, between the words "required" and "permitted." The mandate of the statute, that "no employee shall be required or permitted to work," is the substantial equivalent of an enactment that "no employee shall contract or agree to work," more than ten hours per day; and, as there is no provision for special emergencies, the statute is mandatory in all cases. It is not an act merely fixing the number of hours which shall constitute a legal day's work, but an absolute prohibition upon the employer permitting, under any circumstances, more than ten hours' work to be done in his establishment. The employee may desire to earn the extra money which would arise from his working more than the prescribed time, but this statute forbids the employer from permitting the employee to earn it.

The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. Allgeyer *v.* Louisiana, 165 U. S. 578 [**929**]. Under that provision no State can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere. Mugler *v.* Kansas, 123 U. S. 623 [**938**]; *In re* Kemmler, 136 U. S. 436; Crowley *v.* Christensen, 137 U. S. 86; *In re* Converse, 137 U. S. 624.

The State, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment. Contracts in violation of a statute, either of the Federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal Constitution, as coming under the liberty of person or of free contract. Therefore, when the State, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of con-

tract in regard to their means of livelihood between persons who are *sui juris* (both employer and employee), it becomes of great importance to determine which shall prevail — the right of the individual to labor for such time as he may choose, or the right of the State to prevent the individual from laboring, or from entering into any contract to labor, beyond a certain time prescribed by the State.

This court has recognized the existence and upheld the exercise of the police powers of the States in many cases which might fairly be considered as border ones, and it has, in the course of its determination of questions regarding the asserted invalidity of such statutes, on the ground of their violation of the rights secured by the Federal Constitution, been guided by rules of a very liberal nature, the application of which has resulted, in numerous instances, in upholding the validity of State statutes thus assailed. Among the later cases where the State law has been upheld by this court is that of Holden *v.* Hardy, 169 U. S. 366 [**929**]. A provision in the act of the legislature of Utah was there under consideration, the act limiting the employment of workmen in all underground mines or workings, to eight hours per day, "except in cases of emergency, where life or property is in imminent danger." It also limited the hours of labor in smelting and other institutions for the reduction or refining of ores or metals to eight hours per day, except in like cases of emergency. The act was held to be a valid exercise of the police powers of the State. A review of many of the cases on the subject, decided by this and other courts, is given in the opinion. It was held that the kind of employment, mining, smelting, etc., and the character of the employees in such kinds of labor, were such as to make it reasonable and proper for the State to interfere to prevent the employees from being constrained by the rules laid down by the proprietors in regard to labor. The following citation from the observations of the Supreme Court of Utah in that case was made by the judge writing the opinion of this court, and approved: "The law in question is confined to the protection of that class of people engaged in labor in underground mines, and in smelters and other works wherein ores are reduced and refined. This law applies only to the classes subjected by their employment to the peculiar conditions and effects attending underground mining and work in smelters, and other works for the reduction and refining of ores. Therefore it is not necessary to discuss or decide whether the legislature can fix the hours of labor in other employments."

It will be observed that, even with regard to that class of labor, the Utah statute provided for cases of emergency wherein the provisions of the statute would not apply. The statute now before this court has no emergency clause in it, and, if the statute is valid, there are no circumstances and no emergencies under which the slightest violation of the provisions of the act would be innocent. There is nothing in Holden *v.* Hardy which covers the case now before us.

Nor does Atkin *v.* Kansas, 191 U. S. 207, touch the case at bar. The Atkin case was decided upon the right of the State to control its municipal corporations, and to prescribe the conditions upon which it will permit work of a public character to be done for a municipality. Knoxville Iron Co. *v.* Harbison, 183 U. S. 13, is equally far from an authority for this legislation. The employees in that case were held to be at a disadvantage with the employer in matters of wages, they being miners and coal workers, and the act simply provided for the cashing of coal orders when presented by the miner to the employer.

The latest case decided by this court, involving the police power, is that of Jacobson *v.* Massachusetts, decided at this term and reported in 197 U. S. 11. It related to compulsory vaccination, and the law was held valid as a proper exercise of the police powers with reference to the public health. It was stated in the opinion that it was a case "of an adult who, for aught that appears, was himself in perfect health and a fit subject of vaccination, and yet, while remaining in the community, refused to obey the statute and the regulation, adopted in execution of its provisions, for the protection of the public health and the public safety, confessedly endangered by the presence of a dangerous disease." That case is also far from covering the one now before the court.

Petit *v.* Minnesota, 177 U. S. 164, was upheld as a proper exercise of the police power relating to the observance of Sunday, and the case held that the legislature had the right to declare that, as matter of law, keeping barber shops open on Sunday was not a work of necessity or charity.

It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext — become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both par-

ties to it. The one has as much right to purchase as the other to sell labor.

This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the State? and that question must be answered by the court.

The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State interfering with their independence of judgment and of action. They are in no sense wards of the State. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.

It is a question of which of two powers or rights shall prevail — the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

This case has caused much diversity of opinion in the state courts. In the Supreme Court two of the five judges composing the Appellate Division dissented from the judgment affirming the validity of the act. In the Court of Appeals three of the seven judges also dissented from the judgment upholding the statute. Although found in what is called a labor law of the State, the Court of Appeals has upheld the act as one relating to the public health — in other words, as a health law. One of the judges of the Court of Appeals, in upholding the law, stated that, in his opinion, the regulation in question could not be

sustained unless they were able to say, from common knowledge, that working in a bakery and candy factory was an unhealthy employment. The judge held that, while the evidence was not uniform, it still led him to the conclusion that the occupation of a baker or confectioner was unhealthy and tended to result in diseases of the respiratory organs. Three of the judges dissented from that view, and they thought the occupation of a baker was not to such an extent unhealthy as to warrant the interference of the legislature with the liberty of the individual.

We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employee, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go. The case differs widely, as we have already stated, from the expressions of this court in regard to laws of this nature, as stated in Holden *v.* Hardy, and Jacobson *v.* Massachusetts, *supra*.

We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the Government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's, or a physican's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this

assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family. In our large cities there are many buildings into which the sun penetrates for but a short time in each day, and these buildings are occupied by people carrying on the business of bankers, brokers, lawyers, real estate, and many other kinds of business, aided by many clerks, messengers, and other employees. Upon the assumption of the validity of this act under review, it is not possible to say that an act, prohibiting lawyers' or bank clerks, or others, for contracting to labor for their employers more than eight hours a day would be invalid. It might be said that it is unhealthy to work more than that number of hours in an apartment lighted by artificial light during the working hours of the day; that the occupation of the bank clerk, the lawyer's clerk, the real estate clerk, or the broker's clerk in such offices is therefore unhealthy, and the legislature, in its paternal wisdom, must, therefore, have the right to legislate on the subject of, and to limit the hours for such labor; and, if it exercises that power, and its validity be questioned, it is sufficient to say it has reference to the public health; it has reference to the health of the employees condemned to labor day after day in buildings where the sun never shines; it is a health law, and therefore it is valid, and cannot be questioned by the courts.

It is also urged, pursuing the same line of argument, that it is to the interest of the State that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature. Not only the hours of employees, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the State be impaired. We mention these extreme cases because the contention is extreme. We do not believe in the soundness of the views which uphold this law. On the contrary, we think that such a law as this, although passed in the assumed exercise of the police power, and as relating to the public health, or the health of the employees named, is not within that power, and is invalid. The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both

employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health, or to the health of the employees, if the hours of labor are not curtailed. If this be not clearly the case, the individuals whose rights are thus made the subject of legislative interference are under the protection of the Federal Constitution regarding their liberty of contract as well as of person; and the legislature of the State has no power to limit their right as proposed in this statute. All that it could properly do has been done by it with regard to the conduct of bakeries, as provided for in the other sections of the act, above set forth. These several sections provide for the inspection of the premises where the bakery is carried on, with regard to furnishing proper wash rooms and water-closets, apart from the bake room, also with regard to providing proper drainage, plumbing, and painting; the sections, in addition, provide for the height of the ceiling, the cementing or tiling of floors, where necessary in the opinion of the factory inspector, and for other things of that nature; alterations are also provided for, and are to be made where necessary in the opinion of the inspector, in order to comply with the provisions of the statute. These various sections may be wise and valid regulations, and they certainly go to the full extent of providing for the cleanliness and the healthiness, so far as possible, of the quarters in which bakeries are to be conducted. Adding to all these requirements a prohibition to enter into any contract of labor in a bakery for more than a certain number of hours a week is, in our judgment, so wholly beside the matter of a proper, reasonable, and fair provision as to run counter to that liberty of person and of free contract provided for in the Federal Constitution.

It was further urged on the argument that restricting the hours of labor in the case of bakers was valid because it tended to cleanliness on the part of the workers, as a man was more apt to be cleanly when not overworked, and if cleanly then his "output" was also more likely to be so. What has already been said applies with equal force to this contention. We do not admit the reasoning to be sufficient to justify the claimed right of such interference. The State in that case would assume the position of a supervisor, or *pater familias*, over every act of the individual, and its right of governmental interference with his hours of labor, his hours of exercise, the character thereof, and the extent to which it shall be carried would be rec-

ognized and upheld. In our judgment it is not possible in fact to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman. The connection, if any exist, is too shadowy and thin to build any argument for the interference of the legislature. If the man works ten hours a day, it is all right, but if ten and a half or eleven, his health is in danger and his bread may be unhealthful, and, therefore, he shall not be permitted to do it. This, we think, is unreasonable and entirely arbitrary. When assertions such as we have adverted to become necessary in order to give, if possible, a plausible foundation for the contention that the law is a "health law," it gives rise to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare.

This interference on the part of the legislatures of the several States with the ordinary trades and occupations of the people seems to be on the increase. In the Supreme Court of New York, in the case of People *v.* Beattie, Appellate Division, first department, decided in 1904, 89 N. Y. Supp. 193, a statute regulating the trade of horseshoeing, and requiring the person practicing such trade to be examined, and to obtain a certificate from a board of examiners and file the same with the clerk of the county wherein the person proposes to practice such trade, was held invalid, as an arbitrary interference with personal liberty and private property without due process of law. The attempt was made, unsuccessfully, to justify it as a health law.

The same kind of a statute was held invalid (*In re* Aubry) by the Supreme Court of Washington in December, 1904. 78 Pac. Rep. 900. The court held that the act deprived citizens of their liberty and property without due process of law, and denied to them the equal protection of the laws. It also held that the trade of a horseshoer is not a subject of regulation under the police power of the State, as a business concerning and directly affecting the health, welfare, or comfort of its inhabitants; and that, therefore, a law which provided for the examination and registration of horseshoers in certain cities was unconstitutional as an illegitimate exercise of the police power.

The Supreme Court of Illinois, in Bessette *v.* People, 193 Ill. 334, also held that a law of the same nature, providing for the regulation and licensing of horseshoers, was unconstitutional as an illegal interference with the liberty of the individual in adopting and pursuing such calling as he may choose, subject only to the restraint necessary to secure the common welfare. See also Godcharles *v.* Wigeman, 113 Pa. St. 431, 437; Low *v.* Rees Printing Co., 41 Neb. 127, 145. In these cases the courts upheld the right of free contract and the right to purchase and sell labor upon such terms as the parties may agree to.

It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the

police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. Minnesota *v.* Barber, 136 U. S. 313 [**376**]; Brimmer *v.* Rebman, 138 U. S. 78 [**373**]. The court looks beyond the mere letter of the law in such cases. Yick Wo *v.* Hopkins, 118 U. S. 356 [**917**].

It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to, and no such substantial effect upon, the health of the employee as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, *sui juris*), in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.

The judgment of the Court of Appeals of New York, as well as that of the Supreme Court and of the County Court of Oneida County, must be reversed and the case remanded to the County Court for further proceedings not inconsistent with this opinion.

*Reversed.*

MR. JUSTICE HARLAN (with whom MR. JUSTICE WHITE and MR. JUSTICE DAY concurred) dissenting.

While this court has not attempted to mark the precise boundaries of what is called the police power of the State, the existence of the power has been uniformly recognized, both by the Federal and state courts.

All the cases agree that this power extends at least to the protection of the lives, the health, and the safety of the public against the injurious exercise by any citizen of his own rights.

In Patterson *v.* Kentucky, 97 U. S. 501 [**489**], after referring to the general principle that rights given by the Constitution cannot be impaired by state legislation of any kind, this court said: "It [this court] has, nevertheless, with marked distinctness and uniformity, recognized the necessity, growing out of the fundamental conditions of civil society, of upholding state police regulations which were

enacted in good faith, and had appropriate and direct connection with that protection to life, health, and property which each State owes to her citizens." So in Barbier *v.* Connolly, 113 U. S. 27 [**925**]: "But neither the [Fourteenth] Amendment — broad and comprehensive as it is — nor any other Amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people."

Speaking generally, the State, in the exercise of its powers, may not unduly interfere with the right of the citizen to enter into contracts that may be necessary and essential in the enjoyment of the inherent rights belonging to everyone, among which rights is the right "to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation." This was declared in Allgeyer *v.* Louisiana, 165 U. S. 578, 589 [**929**]. But in the same case it was conceded that the right to contract in relation to persons and property, or to do business, within a State, may be "regulated, and sometimes prohibited, when the contracts or business conflict with the policy of the State as contained in its statutes." (p. 591.)

So, as is said in Holden *v.* Hardy, 169 U. S. 366, 391 [**929**]: "This right of contract, however, is itself subject to certain limitations which the State may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental, to the health of the employees as to demand special precautions for their well-being and protection, or the safety of adjacent property. While this court has held, notably in the cases Davidson *v.* New Orleans, 96 U. S. 97, and Yick Wo *v.* Hopkins, 118 U. S. 356 [**917**], that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances; and a large discretion 'is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests.' Lawton *v.* Steele, 152 U. S. 133, 136." Referring to the limitations placed by the State upon the hours of workmen, the court in the same case said (p. 395): "These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employees, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts."

Subsequently, in Gundling *v.* Chicago, 177 U. S. 183, 188, this court said: "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities

of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and, unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference. As stated in Crowley *v.* Christensen, 137 U. S. 86, 'the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community.'"

In St. Louis, Iron Mountain &c. Ry. *v.* Paul, 173 U. S. 404, 409, and in Knoxville Iron Co. *v.* Harbison, 183 U. S. 13, 21, 22, it was distinctly adjudged that the right of contract was not "absolute in respect to every matter, but may be subjected to the restraints demanded by the safety and welfare of the State." Those cases illustrate the extent to which the State may restrict or interfere with the exercise of the right of contracting.

The authorities on the same line are so numerous that further citations are unnecessary.

I take it to be firmly established that what is called the liberty of contract may, within certain limits, be subjected to regulations designed and calculated to promote the general welfare, or to guard the public health, the public morals, or the public safety. "The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import," this court has recently said, "an absolute right in each person to be at all times and in all circumstances wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good." Jacobson *v.* Massachusetts, 197 U. S. 11.

Granting, then, that there is a liberty of contract which cannot be violated even under the sanction of direct legislative enactment, but assuming, as according to settled law we may assume, that such liberty of contract is subject to such regulations as the State may reasonably prescribe for the common good and the well-being of society, what are the conditions under which the judiciary may declare such regulations to be in excess of legislative authority and void? Upon this point there is no room for dispute; for the rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power. In Jacobson *v.* Massachusetts, *supra*, we said that the power of the courts to review legislative action in respect of a matter affecting the general welfare exists *only* "when that which the legislature has done comes within the rule that, if a

statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law" — citing Mugler *v.* Kansas, 123 U. S. 623, 661 [**938**]; Minnesota *v.* Barber, 136 U. S. 313, 320 [**376**]; Atkin *v.* Kansas, 191 U. S. 207, 223. If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. If the end which the legislature seeks to accomplish be one to which its powers extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere. In other words, when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional. M'Culloch *v.* Maryland, 4 Wheat. 316, 421 [**1**].

Let these principles be applied to the present case. By the statute in question it is provided that "No employee shall be required, or permitted, to work in a biscuit, bread, or cake bakery, or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employee shall work."

It is plain that this statute was enacted in order to protect the physical well-being of those who work in bakery and confectionery establishments. It may be that the statute had its origin, in part, in the belief that employers and employees in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength. Be this as it may, the statute must be taken as expressing the belief of the people of New York that, as a general rule, and in the case of the average man, labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor. Whether or not this be wise legislation it is not the province of the court to inquire. Under our systems of government the courts are not concerned with the wisdom or policy of legislation. So that, in determining the question of power to interfere with liberty of contract, the court may inquire whether the means devised by the State are germane to an end which may be lawfully accomplished and have a real or substantial relation to the protection of health, as involved in the daily work of the persons, male and female, engaged in bakery and confectionery establishments. But when this inquiry is entered upon I find it impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the State and the end sought to be accomplished by its legislation. Mugler *v.* Kan-

sas, *supra*. Nor can I say that the statute has no appropriate or direct connection with that protection to health which each State owes to her citizens, Patterson *v.* Kentucky, *supra* [**489**]; or that it is not promotive of the health of the employees in question, Holden *v.* Hardy, [**929**]; Lawton *v.* Steele, *supra*; or that the regulation prescribed by the State is utterly unreasonable and extravagant or wholly arbitrary, Gundling *v.* Chicago, *supra*. Still less can I say that the statute is, beyond question, a plain, palpable invasion of rights secured by the fundamental law. Jacobson *v.* Massachusetts, *supra*. Therefore I submit that this court will transcend its functions if it assumes to annul the statute of New York. It must be remembered that this statute does not apply to all kinds of business. It applies only to work in bakery and confectionery establishments, in which, as all know, the air constantly breathed by workmen is not as pure and healthful as that to be found in some other establishments or out of doors.

Professor Hirt in his treatise on the "Diseases of the Workers" has said: "The labor of the bakers is among the hardest and most laborious imaginable, because it has to be performed under conditions injurious to the health of those engaged in it. It is hard, very hard work, not only because it requires a great deal of physical exertion in an overheated workshop and during unreasonably long hours, but more so because of the erratic demands of the public, compelling the baker to perform the greater part of his work at night, thus depriving him of an opportunity to enjoy the necessary rest and sleep, a fact which is highly injurious to his health." Another writer says: "The constant inhaling of flour dust causes inflammation of the lungs and of the bronchial tubes. The eyes also suffer through this dust, which is responsible for the many cases of running eyes among the bakers. The long hours of toil to which all bakers are subjected produce rheumatism, cramps, and swollen legs. The intense heat in the workshops induces the workers to resort to cooling drinks, which, together with their habit of exposing the greater part of their bodies to the change in the atmosphere, is another source of a number of diseases of various organs. Nearly all bakers are pale-faced and of more delicate health than the workers of other crafts, which is chiefly due to their hard work and their irregular and unnatural mode of living, whereby the power of resistance against disease is greatly diminished. The average age of a baker is below that of other workmen; they seldom live over their fiftieth year, most of them dying between the ages of forty and fifty. During periods of epidemic diseases the bakers are generally the first to succumb to the disease, and the number swept away during such periods far exceeds the number of other crafts in comparison to the men employed in the respective industries. When, in 1720, the plague visited the city of Marseilles, France, every baker in the city succumbed to the epidemic, which caused considerable excitement in the neighboring

cities and resulted in measures for the sanitary protection of the bakers."

In the Eighteenth Annual Report by the New York Bureau of Statistics of Labor it is stated that among the occupations involving exposure to conditions that interfere with nutrition is that of a baker. (p. 52.) In that Report it is also stated that, "from a social point of view, production will be increased by any change in industrial organization which diminishes the number of idlers, paupers, and criminals. Shorter hours of work, by allowing higher standards of comfort and purer family life, promise to enhance the industrial efficiency of the wage-working class — improved health, longer life, more content and greater intelligence and inventiveness." (p. 82.)

Statistics show that the average daily working time among workingmen in different countries is, in Australia, eight hours; in Great Britain, nine; in the United States, nine and three-quarters; in Denmark, nine and three-quarters; in Norway, ten; Sweden, France, and Switzerland, ten and one-half; Germany, ten and one-quarter; Belgium, Italy, and Austria, eleven; and in Russia, twelve hours.

We judicially know that the question of the number of hours during which a workman should continuously labor has been, for a long period, and is yet, a subject of serious consideration among civilized peoples, and by those having special knowledge of the laws of health. Suppose the statute prohibited labor in bakery and confectionery establishments in excess of eighteen hours each day. No one, I take it, could dispute the power of the State to enact such a statute. But the statute before us does not embrace extreme or exceptional cases. It may be said to occupy a middle ground in respect of the hours of labor. What is the true ground for the State to take between legitimate protection, by legislation, of the public health and liberty of contract is not a question easily solved, nor one in respect of which there is or can be absolute certainty. There are very few, if any, questions in political economy about which entire certainty may be predicated. One writer on relation of the State to labor has well said: "The manner, occasion, and degree in which the State may interfere with the industrial freedom of its citizens is one of the most debatable and difficult questions of social science." Jevons, 33.

We also judicially know that the number of hours that should constitute a day's labor in particular occupations involving the physical strength and safety of workmen has been the subject of enactments by Congress and by nearly all of the States. Many, if not most, of those enactments fix eight hours as the proper basis of a day's labor.

I do not stop to consider whether any particular view of this economic question presents the sounder theory. What the precise facts are it may be difficult to say. It is enough for the determination of this case, and it is enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion. There are many reasons of a weighty, substantial

character, based upon the experience of mankind, in support of the theory that, all things considered, more than ten hours' steady work each day, from week to week, in a bakery or confectionery establishment, may endanger the health and shorten the lives of the workmen, thereby diminishing their physical and mental capacity to serve the State and to provide for those dependent upon them.

If such reasons exist, that ought to be the end of this case, for the State is not amenable to the judiciary, in respect of its legislative enactments, unless such enactments are plainly, palpably, beyond all question, inconsistent with the Constitution of the United States. We are not to presume that the State of New York has acted in bad faith. Nor can we assume that its legislature acted without due deliberation, or that it did not determine this question upon the fullest attainable information and for the common good. We cannot say that the State has acted without reason, nor ought we to proceed upon the theory that its action is a mere sham. Our duty, I submit, is to sustain the statute as not being in conflict with the Federal Constitution, for the reason — and such is an all-sufficient reason — it is not shown to be plainly and palpably inconsistent with that instrument. Let the State alone in the management of its purely domestic affairs, so long as it does not appear beyond all question that it has violated the Federal Constitution. This view necessarily results from the principle that the health and safety of the people of a State are primarily for the State to guard and protect.

I take leave to say that the New York statute, in the particulars here involved, cannot be held to be in conflict with the Fourteenth Amendment without enlarging the scope of the amendment far beyond its original purpose, and without bringing under the supervision of this court matters which have been supposed to belong exclusively to the legislative departments of the several States when exerting their conceded power to guard the health and safety of their citizens by such regulations as they in their wisdom deem best. Health laws of every description constitute, said Chief Justice Marshall, a part of that 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." Gibbons *v.* Ogden, 9 Wheat. 1, 203 [**235**]. A decision that the New York statute is void under the Fourteenth Amendment will, in my opinion, involve consequences of a far-reaching and mischievous character ; for such a decision would seriously cripple the inherent power of the States to care for the lives, health, and well-being of their citizens. Those are matters which can be best controlled by the States. The preservation of the just powers of the States is quite as vital as the preservation of the powers of the General Government.

When this court had before it the question of the constitutionality of a statute of Kansas making it a criminal offense for a contractor

for public work to permit or require his employees to perform labor upon such work in excess of eight hours each day, it was contended that the statute was in derogation of the liberty both of employees and employer. It was further contended that the Kansas statute was mischievous in its tendencies. This court, while disposing of the question only as it affected public work, held that the Kansas statute was not void under the Fourteenth Amendment. But it took occasion to say what may well be here repeated: "The responsibility therefor rests upon legislators, not upon the courts. No evils arising from such legislation could be more far reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true — indeed, the public interests imperatively demand — that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably beyond all question in violation of the fundamental law of the Constitution." Atkin *v.* Kansas, 191 U. S. 207, 223.

The judgment, in my opinion, should be affirmed.

Mr. Justice Holmes dissenting:

I regret sincerely that I am unable to agree with the judgment in this case, and that I think it my duty to express my dissent.

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Postoffice, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vac-

cination law. Jacobson *v.* Massachusetts, 197 U. S. 11. United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. Northern Securities Co. *v.* United States, 193 U. S. 197 [**1081**]. Two years ago we upheld the prohibition of sales of stock on margins, or for future delivery, in the Constitution of California. Otis *v.* Parker, 187 U. S. 606. The decision sustaining an eight-hour law for miners is still recent. Holden *v.* Hardy, 169 U. S. 366 [**929**]. Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word liberty, in the Fourteenth Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.[1]

[1] In the case of MULLER *v.* OREGON, 208 U. S. 412, 28 Sup. Ct. Rep. 324 (1908), it was held that a State statute limiting the hours of employment of women was not in conflict with the provisions of the Fourteenth Amendment, although it involved a limitation on freedom of contract.

In the case of ADAIR *v.* UNITED STATES, 208 U. S. 161, 28 Sup. Ct. Rep. 277 (1908), an act of Congress making it a criminal offense for a carrier engaged in interstate commerce to discharge an employee simply because of his membership in a labor organization, was held to be in violation of the guarantee of due process of law found in the Fifth Amendment. MR. JUSTICE MCKENNA and MR. JUSTICE HOLMES dissented in separate opinions.

## COTTING *v.* KANSAS CITY STOCK-YARDS COMPANY.

183 U. S. 79; 22 Sup. Ct. Rep. 30. 1901.

[In error to the Circuit Court of the United States for the District of Kansas, which dismissed the complaint of plaintiff in error, asking that the enforcement of a State statute regulating the rates of public stock-yards be restrained on the ground that it was applicable only to one particular company and not to other companies or corporations engaged in like business in the State, and therefore was invalid as denying to that company the equal protection of the laws.]

Mr. Justice Brewer delivered the opinion of the court.

[The views stated in the opinion on the question whether the statute is unconstitutional upon the ground that by its necessary operation it would deprive the company of its property without due process of law are not concurred in by the majority of the justices, those not concurring declining to express an opinion on that question.]

The act in terms applies only to those stock-yards within the State "which for the preceding twelve months shall have had an average daily receipt of not less than one hundred head of cattle, or three hundred head of hogs, or three hundred head of sheep."

It appears affirmatively from the testimony that there are other stock-yards in the State, one at Wichita and one at Jamestown, and it is stated by counsel for appellants that there are many others scattered through the State, each doing a small business. Neither the yard at Wichita nor that at Jamestown, so far as the testimony shows, comes within the scope of this act. So it may be assumed from the record that the legislature of Kansas, having regard simply to the stock-yards at Kansas City and the volume of business done at those yards, passed this act to reduce their charges. . . . In short, we come back to the thought that the classification is one not based upon the character or value of the services rendered, but simply on the amount of the business which the party does, and upon the theory that although he makes a charge which everybody else in the same business makes, and which is perfectly reasonable so far as the value of the services rendered to the individuals seeking them is concerned, yet if by the aggregation of business he is enabled to make large profits, his charges may be cut down.

The question thus presented is of profoundest significance. Is it true in this country that one who by his attention to business, by his efforts to satisfy customers, by his sagacity in discerning the probable courses of trade, and by contributing of his means to bring trade into those lines, succeeds in building up a large and profitable business, becomes thereby a legitimate object of the legislative scalping knife?

Having created the facilities which the many enjoy, can the many turn around and say, you are making too much out of those facilities, and you must divide with us your profits? We cannot shut our eyes to well-known facts. Kansas is an agricultural State. Its expensive and fertile prairies produce each year enormous crops of corn and other grains. While portions of these crops are shipped to mills to be manufactured into meal and flour, it is found by many that there is a profit in feeding them to stock, so that the amount of stock which is raised and fattened in Kansas is large and makes one of the great industries of the State. Now, shall they whose interests are all along the line of production, having by virtue of their numerical majority the control of legislation, be permitted to say to one who acts as an intermediary between transportation and sale, that while we permit no interference with the prices which we put upon our products, nevertheless we cut down your charges for intermediate services; and this, not because any particular charge is unreasonable, but because you are making by the aggregate of those charges too large a sum, and ought therefore to divide with us. The possibility of such legislation suggests the warning words of Judge Catron, afterwards Mr. Justice Catron, of this court, when in Vanzant *v.* Waddel, 2 Yerg. 260, 270, he said:

"Every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community who made the law by another."

The Fourteenth Amendment forbids any State to "deny to any person within its jurisdiction the equal protection of the laws." The scope of this prohibition has been frequently considered by this court.

[After quoting from Barbier *v.* Connolly, 113 U. S. 27 [**925**], and Gulf, etc., R. Co. *v.* Ellis, 165 U. S. 150 [**922***n*], the opinion continues:]

But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other. There can be no pretence that a stock-yard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements, and the only difference is that one does more business than the other. But the receipt of an extra two head of cattle per day does not change the character of the business. If once the door is opened to the affirmance

of the proposition that a State may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guaranty of the equal protection of the laws is lost, and the door is opened to that inequality of legislation which Mr. Justice Catron referred to in the quotation above made. This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would. We think, therefore, that the principal of the decision of the Supreme Court of Kansas in State *v.* Haun, *supra* [61 Kan. 146], is not only sound, but is controlling in this case, and that the statute must be held unconstitutional as in conflict with the equal protection clause of the Fourteenth Amendment.

. . . . . .

Without expressing any opinion as to the jurisdiction of the court if it had been properly and seasonably challenged, we think the true solution of this matter will be found in reversing the decree upon the merits, and directing a dismissal of the suit as to the Attorney-General, without prejudice to any other suit or action.

# APPENDIX D.

## ADDITIONAL CASES RELATING TO CITIZENSHIP.

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### UNITED STATES *v.* JU TOY.

198 U. S. 253; 25 Sup. Ct. Rep. 644. 1905.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case comes here on a certificate from the Circuit Court of Appeals presenting certain questions of law. It appears that the appellee, being detained by the master of the Steamship Doric for return to China, presented a petition for *habeas corpus* to the District Court, alleging that he was a native-born citizen of the United States, returning after a temporary departure, and was denied permission to land by the collector of the port of San Francisco. It also appears from the petition that he took an appeal from the denial, and that the decision was affirmed by the Secretary of Commerce and Labor. No further grounds are stated. The writ issued, and the United States made return, and answered, showing all the proceedings before the Department, which are not denied to have been in regular form; and setting forth all of the evidence and the orders made. The answer also denied the allegations of the petition. Motions to dismiss the writ were made on the grounds that the decision of the Secretary was conclusive, and that no abuse of authority was shown. These were denied, and the District Court decided, seemingly on new evidence, subject to exceptions, that Ju Toy was a native-born citizen of the United States. An appeal was taken to the Circuit Court of Appeals, alleging errors the nature of which has been indicated. Thereupon the latter court certified the following questions:

"First. Should a District Court of the United States grant a writ of *habeas corpus* in behalf of a person of Chinese descent being held for return to China by the steamship company which brought him therefrom, who, having recently arrived at a port of the United States, made application to land as a native-born citizen thereof, and who, after examination by the duly authorized immigration officers, was found by them not to have been born in the United States, was denied admission, and ordered deported, which finding and action upon appeal was affirmed by the Secretary of Commerce and Labor, when the foregoing facts appear to the court, and the petition for the writ alleges unlawful detention on the sole ground that petitioner does not come within the restrictions of the Chinese

exclusion acts, because born in and a citizen of the United States, and does not allege or show in any other way unlawful action or abuse of their discretion or powers by the immigration officers who excluded him?

"Second. In a *habeas corpus* proceeding should a District Court of the United States dismiss the writ, or should it direct a new or further hearing upon evidence to be presented where the writ had been granted in behalf of a person of Chinese descent being held by the steamship company for return to China, from whence it brought him, who recently arrived from that country, and asked permission to land, upon the ground that he was born in and was a citizen of the United States, when the uncontradicted return and answer show that such person was granted a hearing by the proper immigration officers, who found he was not born in the United States, that his application for admission was considered and denied by such officers, and that the denial was affirmed upon appeal to the Secretary of Commerce and Labor, and where nothing more appears to show that such executive officers failed to grant a proper hearing, abused their discretion, or acted in any unlawful or improper way upon the case presented to them for determination?

"Third. In a *habeas corpus* proceeding in a District Court of the United States, instituted in behalf of a person of Chinese descent being held for return to China by the steamship company which recently brought him therefrom to a port of the United States, and who applied for admission therein upon the ground that he was a native-born citizen thereof, but who, after a hearing, the lawfully designated immigration officers found was not born therein, and to whom they denied admission, which finding and denial, upon appeal to the Secretary of Commerce and Labor, was affirmed — should the court treat the finding and action of such executive officers upon the question of citizenship and other questions of fact as having been made by a tribunal authorized to decide the same, and as final and conclusive unless it be made affirmatively to appear that such officers, in the case submitted to them, abused the discretion vested in them, or, in some other way, in hearing and determining the same, committed prejudicial error?"

We assume in what we have to say, as the questions assume, that no abuse of authority of any kind is alleged. That being out of the case, the first of them is answered by the case of United States *v.* Sing Tuck, 194 U. S. 161, 170. "A petition for *habeas corpus* ought not to be entertained unless the court is satisfied that the petitioner can make out at least a *prima facie* case." This petition should have been denied on this ground, irrespective of what more we have to say, because it alleged nothing except citizenship. It disclosed neither abuse of authority nor the existence of evidence not laid before the Secretary. It did not even set forth that evidence, or allege its effect. But, as it was entertained, and the District Court found for

the petitioner, it would be a severe measure to order the petition to be dismissed on that ground now, and we pass on to further considerations.

The broad question is presented whether or not the decision of the Secretary of Commerce and Labor is conclusive. It was held in United States *v.* Sing Tuck, 194 U. S. 161, 167, that the act of August 18, 1894, chap. 301, § 1, 28 Stat. 372, 390, purported to make it so, but whether the statute could have that effect constitutionally was left untouched, except by a reference to cases where an opinion already had been expressed. To quote the latest first, in The Japanese Immigrant Case (Yamataya *v.* Fisher), 189 U. S. 86, 97, it was said: "That Congress may exclude aliens of a particular race from the United States, prescribe the terms and conditions upon which certain classes of aliens may come to this country, establish regulations for sending out of the country such aliens as come here in violation of law, and commit the enforcement of such provisions, conditions, and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this court." See also Turner *v.* Williams, 194 U. S. 279, 290, 291; Chin Bak Kan *v.* United States, 186 U. S. 193, 200. In Fok Young Yo *v.* United States, 185 U. S. 296, 304, 305, it was held that the decision of the collector of customs on the right of transit across the territory of the United States was conclusive, and, still more to the point, in Lem Moon Sing *v.* United States, 158 U. S. 538, where the petitioner for *habeas corpus* alleged facts which, if true, gave him a right to enter and remain in the country, it was held that the decision of the collector was final as to whether or not he belonged to the privileged class.

It is true that it may be argued that these cases are not directly conclusive of the point now under decision. It may be said that the parties concerned were aliens, and that although they alleged absolute rights, and facts which it was contended went to the jurisdiction of the officer making the decision, still their rights were only treaty or statutory rights, and therefore were subject to the implied qualification imposed by the later statute, which made the decision of the collector with regard to them final. The meaning of the cases, and the language which we have quoted, is not satisfied by so narrow an interpretation, but we do not delay upon them. They can be read.

It is established, as we have said, that the act purports to make the decision of the Department final, whatever the ground on which the right to enter the country is claimed — as well when it is citizenship as when it is domicil, and the belonging to a class excepted from the exclusion acts. United States *v.* Sing Tuck, 194 U. S. 161, 167; Lem Moon Sing *v.* United States, 158 U. S. 538, 546, 547. It also is established by the former case and others which it cites, that the relevant portion of the act of August 18, 1894, chap. 301, is not void as a whole. The statute has been upheld

and enforced. But the relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again. United States *v.* Reese, 92 U. S. 214, 221; Trade-Mark Cases, 100 U. S. 82, 98, 99; Allen *v.* Louisiana, 103 U. S. 80, 84; United States *v.* Harris, 106 U. S. 629, 641, 642; Virginia Coupon Cases, 114 U. S. 269, 305 [**469***n*]; Baldwin *v.* Franks, 120 U. S. 678, 685–689; Smiley *v.* Kansas, 196 U. S. 447, 455. It necessarily follows that when such words are sustained, they are sustained to their full extent.

In view of the cases which we have cited it seems no longer open to discuss the question propounded as a new one. Therefore we do not analyze the nature of the right of a person presenting himself at the frontier for admission. *In re* Ross, 140 U. S. 453, 464. But it is not improper to add a few words. The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction, and kept there while his right to enter was under debate. If, for the purpose of argument, we assume that the Fifth Amendment applies to him, and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require judicial trial. That is the result of the cases which we have cited, and the almost necessary result of the power of Congress to pass exclusion laws. That the decision may be intrusted to an executive officer, and that his decision is due process of law, was affirmed and explained in Nishimura Ekiu *v.* United States, 142 U. S. 651, 660, and in Fong Yue Ting *v.* United States, 149 U. S. 698, 713 [**567***n*], before the authorities to which we already have referred. It is unnecessary to repeat the often-quoted remarks of Mr. Justice Curtis, speaking for the whole court in Murray's Lessee *v.* Hoboken Land & Improv. Co., 18 How. 272, 280 [**895**], to show that the requirement of a judicial trial does not prevail in every case. Lem Moon Sing *v.* United States, 158 U. S. 538, 546, 547; Japanese Immigrant Case, 189 U. S. 86, 100; Public Clearing House *v.* Coyne, 194 U. S. 497, 508, 509 [**479***n*].

We are of opinion that the first question should be answered, no; that the third question should be answered, yes, with the result that the second question should be answered that the writ should be dismissed, as it should have been dismissed in this case.

*It will be so certified.*[1]

[1] Mr. Justice Brewer, with whom Mr. Justice Peckham concurred, rendered a dissenting opinion. Mr. Justice Day also dissented.

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